CASE NOTE: *The Watari Immigrants Association for Freedom and Justice v.* Lleida City (Judgment of the Supreme Court of Spain 4118/2011 of February 14, 2013)

Seiichi Aoto

1. Facts of the Case

On October 8, 2010, the Catalan City of Lleida approved a local ordinance banning the use of "integral veils" such as the burka, niqab,[1] and other full-face masks or helmets in public spaces. The ordinance that became effective on December 9 of that year provided that it would not be exceptionally applied if there was an appropriate reason for using the integral veils because of professional obligations to maintain public security or health, or due to events such as festivals, and so on. Lleida was the first Spanish city to introduce a ban on the niqab and burqa in public spaces. This ordinance was motivated by fears for public security because integral veils can generate anxiety among the public and disturb social peace since it is difficult or impossible to identify individuals wearing the veils and to visually communicate with others.

The Watani Association for Liberty and Justice (*Asociación Watani para la Libertad y La Justicia*, plaintiff/appellant) filed an administrative lawsuit in the High Court of Catalonia against Lleida City, arguing the prohibition of the full-face veil violated the protection of human rights. The High Court dismissed the plaintiff's appeal, holding that the ban was in conformity with the local autonomous entity's lawmaking right (June 7, 2011, 394/2010). The plaintiff appealed the Catalan High Court's judgment to the Supreme Court of Spain.[2]

2. Judgment

The Supreme Court quashed the original judgment and struck the part of the ordinance that banned the use of Muslim veils in public spaces. The following is a summary of the reasons for judgement:

1) Banning the use of the burqa and niqab[3] in public spaces should be stipulated by law because it constitutes a limitation of the freedom to express religious beliefs. In Spain, however, such a law does not yet exist, so that it is not acceptable that fundamental human rights are restricted by ordinances because ordinances are subordinated to laws.[4]
2) Although Lleida City argued that the use of the burqa and/or niqab can disturb public order, it has not been made concretely clear what disorders could happen. The maintenance of public order must not be understood as a prevention against any accidental risks, but it must be confirmed by the authority that there is a risk of violating public security, health, and morals. Moreover, the ordinance will impose a penalty for a violation of the regulation, so that the city needs to provide a more persuasive explanation relating to the legal benefits of the ordinance about the infringement upon the legal benefit.
3) The argument has been made that the compulsory use of the burqa and niqab discriminates against women. However, if banning the use of the burqa and niqab separates Muslim women from accessing public spaces, it can be argued that the ordinance violates the equality of both sexes and furthers the discrimination of women.

In a case concerning an amendment of Article 21 of the Rules for Passengers of the Lleida City Transportation Services, the issue involved an obligation of passengers who were entitled to a reduced rate due to age, income, or other reason to provide photo identification verification. In that case, the Supreme Court rejected appellant's claim, recognizing the appropriateness of the amendment as an unavoidable restriction of the exercise of official duties.[5]

3. Analysis

3. 1 Relationship Between State and Religion

1) Japan

The 1977 *Tsu City Groundbreaking Ceremony* case was Japan's first World War II to deal with the separation between the state and religion. Tsu City decided to construct a new public gym and invited Shinto priests to hold a groundbreaking ceremony, as was customary, before the construction began. One of the city council members filed a suit against the Mayor, claiming compensation for the expenditure of public money on the ceremony and argued the ceremony was an infringement of Articles 20 and 89 of Japan's Constitution. The Supreme Court held that, although the city's ceremony undeniably had a relation with a religion, a complete separation of state and religion was impossible despite the Constitution's provisions. According to the court, government involvement is permissible to the extent that it does not go beyond the limits considered to be appropriate regarding the purpose and effect of the involvement. The court held the purpose of the ceremony was to pray for peace, firmness of the planned construction site, and safety of the construction work and was deemed appropriate as general practice in Japanese society, and that the effect was not to support, encourage, or promote Shinto or to oppress or interfere with it. Therefore, the Court rejected the plaintiff's claim and held that the ceremony did not conflict with Clause 3 of Article 20 of the Constitution, which prohibits religious activities of the state. The so called "purpose-effect" test is evaluated as a standard that has been established by Japanese judicial precedents. However, it cannot be said that the evaluation is sufficiently solid because a result of measuring the purpose and effect can be influenced by criteria adopted for it. In Japan, the opinion requiring strict application of the purpose and effect starndard is prevailing.

2) United States of America

The courts of the United States apply a stricter standard than Japan in reviewing the constitutionality of the relationship between religion and state. The Constitution absolutely guarantees religious beliefs but it generally does not prohibit regulation of religious conduct. Therefore, the constitutionality of government interference with religious conduct has been rigorously judged. The *Sherbert* case (1963) established a constitutional precedent in this area when the court ruled that the constitutionality is reviewed by a compelling governmental interest (CGI) test. This test is used when a government restriction is imposed that can cause considerable hardship for religious conduct.

However, the laws that have been declared unconstitutional by applying the same test are only related to cases where there has been a refusal of unemployment benefits. According to the Free Exercise Clause of the First Amendment to the United States Constitution, the application of a "*neutral, generally applicable regulatory law*," such as in criminal law, is permitted because it causes only incidental hardship to a religious act. In the case of *Employment Division, Department of Human Resources v. Smith* (1990), Smith sought unemployment benefits after he was fired from his job for using peyote in a religious

ceremony. The Oregon Supreme Court ruled that Smith should be awarded unemployment compensation as his right to the free exercise of religion was violated. The Employment Division, Department of Human Resources, appealed the decision. The United States Supreme Court reversed the original judgment, holding that the Free Exercise Clause of the First Amendment did not prohibit the State of Oregon from banning the use of peyote through its general drug prohibition laws or from denying unemployment benefits to those who were dismissed from their jobs because of such religiously inspired use. The reason is that the United States Supreme Court understood that it is contrary to constitutional tradition and common sense to approve a religious exemption each time a "*neutral, generally applicable regulatory law*," is unable to meet the CGI test because it is against a religious belief. In addition, the United States Supreme Court has expressed the view that since a court is not authorized to examine religious doctrine, it is impossible to accept a religious exemption as long as conduct subject to prohibition is identified as a principal activity for the religion in question.

The *Smith* decision was severely criticized because it substantially reduced the importance of the Free Exercise Clause and left the question relating to approval or disapproval of religious exemptions to the legislative body. However, the decision remains in force as constitutional precedent in the United States.

3) Europe

The European Convention on Human Rights[6] ("the Convention") has influence on judgments made by the national constitutional courts and other judicial organs of the member-states. The freedom of religion clause is set forth in Article 9 of the Convention but there is no provision relating to the separation of state and religion. The relationship of state and religion is so diverse in Europe that some states strictly adopt the principle of separation of government and religion while other states have official religions or a state religion. It is very difficult to stipulate a relationship between state and religion that is common to all countries in Europe. For that reason, the European Court on Human Rights ("ECtHR") respects the circumstances of each member-state. Consequently, the Islamic veil regulation is varied, depending on the history and tradition of democracy in each country, and the requirements for regulations protecting the "right of the others" and the "public order" are different among the member-states.

In 2010, the Council of Europe presented *Recommendation 1927* on "Islam, Islamism and Islamophobia," and called on the member-states not to establish a general ban of full veiling or other religious or special clothing, but instead to protect Muslim women from all physical and psychological duress, to protect their free choice to wear religious or special clothing, to ensure equal opportunities for them to participate in public life, and to pursue education and professional activities. Legal restrictions on this freedom may be justified where necessary in a democratic society for security purposes or where public or professional functions of individuals require religious neutrality or where faces can be seen.[7]

In Europe, the discussion of the Muslim veils has been developed mainly where public primary, and secondary educational institutions are concerned. In the French-speaking region of Belgium it has been concluded that the use of Islamic veils is banned in the majority of public schools. After this decision was made a formal objection was filed against the ban, but the Belgian court rejected plaintiff's claim, stating that the principle of sexual equality and religious neutrality in public education were superior to the freedom of religious belief.

The French Constitution provides in Article 1 that "France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction

of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis." All individuals can control their private lives at their own discretion, generally including the right to select appropriate clothing. Therefore, the use of Islamic veils may correspond to the individual's right. However, the principle of constitutional secularism (*laïcité*), which the French won by overthrowing royal power and after a long battle against the Catholic church, is an important pillar of French republicanism. It is a substantial value to be strongly defended even if the freedom of individual religion is constrained. In accordance with this principle, on February 10, 2004, the French National Assembly voted 494 to 36 to pass legislation that would ban the wearing of the burqa and niqab or any other conspicuous religious symbol within French public schools. The law relating to religious symbols became effective March 15 of the same year. The French Constitutional Court reviewed the constitutionality of the law and found it constitutional, holding that the law satisfied the constitutional requirements of maintaining public order and the guarantee of freedom (while the State Council recognized the law's constitutional problem and a group of burqa advocates promised to file a suit in the ECtHR).

The Republic of Turkey is the first and most secular country in the Muslim world. In Turkish secularism, called *laiklik*, the state plays a more active role by excluding religious symbols from the public domain and thus confines religion to the private domain. Consequently, the use of Islamic veils in public space has been a hotly disputed issue. *Leyla Sahin v. Turkey* (2004) was a ECtHR case[8] brought against Turkey by the applicant, Leyla Sahin, a medical student at the University of Istanbul who was denied access to lectures, courses, and two written exams in oncology because she was wearing the *hijab* (Islamic headscarf). She alleged that the ban on wearing the hijab in higher-education institutions had infringed upon her right under Article 2 of Protocol No. 1 to the Convention. The ECtHR dismissed her appeal, holding that there has been no violation of Article 9 of the Convention, which guarantees the freedom of thought, conscience, and religion, primarily for the following reasons:

(1) It is necessary to have regard for the fair balance that must be struck between the various interests at stake—the rights and freedoms of others, avoiding civil unrest, the demands of public order, and pluralism;
(2) The values of pluralism, respect for the rights of others, and, in particular, equality before the law of men and women, are being taught and applied in practice; and the relevant authorities would consider that it ran counter to the furtherance of such values to accept the wearing of religious insignia;
(3) There are extremist political movements in Turkey which seek to impose, on society as a whole, their religious symbols and conception of a society founded on religious precepts;
(4) The University of Istanbul's regulations imposing restrictions on the wearing of hijabs and the measures taken to implement them were justified in principle and proportionate to the aims pursued and therefore could be regarded as "necessary in a democratic society."

In the case of *Ahmet Arslan v. Turkey*,[9] the court considered whether there should be a restriction on the use of religious clothing in public open spaces accessible to everyone. The ECtHR took a different position from decisions in other cases involving closed education institutions. Ahmet Arslan was one of 127 members of a Muslim group that gathered in Ankara in 1996 to attend a religious ceremony and walk through the city wearing their religious dress, such as turbans and tunics. They were arrested and eventually convicted under provisions of Turkish law banning the wearing of religious clothing in public other than for

the purpose of religious ceremonies. The ECtHR confirmed that wearing of religious clothing was a manifestation of religious belief and that it was a subjective decision as to whether or not clothing was of religious significance.[10] The ECtHR ruled that interfering with the right to manifest religious beliefs did not have a sufficient foundation in light of Article 9 of the Convention and that the guilty verdict in question violated the same Article. The court held that the applicant had no intention of putting undue pressure on others to propagate his religion in public spaces; and the decision was based on the "principle of proportionality." The "principle of proportionality" test requires that (1) the restriction be prescribed by law, (2) that it serve a legitimate purpose, and (3) that it is necessary in a democratic society.[11]

This precedent reveals that, although the relationship between government and religion in the member-states is taken into consideration where there is a regulation of religious clothing in public educational institutions, the imposition of the restriction, in accordance with *laïcité*, with regard to the freedom to manifest religious belief in public open spaces is no matter for the state's discretion. Therefore, the basis for justifying or applying France's burqa banning law is difficult.

In deciding the case of *The Watari Immigrants Association for Freedom and Justice, v. Lleida City* Spain's Supreme Court reviewed the ECtHR cases of *Leyla Sahin v. Turkey, Ahmet Arslan v. Turkey, and Kervanci v. France* (2008)[12] but did not adopt them as precedent for the following reasons:

(1) The rule of law in each member-state varies in its application of the Convention;
(2) The degree of restriction of human rights that is adopted in accordance with the Constitution and laws varies among the member-states; and
(3) The precedents of Turkey and France strongly focus on the predominance of secularism in the Constitution but the Spanish Constitution does not strive for secularism.

The Spanish democratic Constitution (1978) abrogated state Catholicism under Franco's dictatorship and the complete guarantee of the freedom of religion for individuals and groups was declared. The "1979 Concordat between Spain and the Vatican" established an agreement to maintain freedom of religion and the same cooperative relationship between the state and church, declaring the principle of mutual independence. The majority of Spanish people, however, belonged to the Catholic Church and its social influence could not be ignored. The lawmakers were expected to establish "cooperation relations with the Catholic Church and other confessions," considering the church's social influence. Besides, the Spanish royal family is traditionally catholic. Though the powers of the King are restricted to ceremonial roles by the Constitution, Catholicism can be said to correspond to the "religion of the monarch" because the present Constitution provides that the system of government will be a constitutional monarchy. Regarding these historical circumstances, it will be practically impossible, in Spain, to completely separate state and church.

In this way Spain, which was democratized after the Franco Government, can be said to function under the "cooperation relation between the State and Church" provided for in the Constitution. This principle of separation of state and church differs both from France where the hereditary monarchy was abrogated by the 1789 Revolution and from Turkey, which has been promoted in a strict and extreme manner, the secularism model of France. Accordingly, it is disproportionate to apply the above-mentioned precedents of the ECtHR relating to France and Turkey unconditionally to the *Lleida* case in Spain without examining, within the context of Spain's Constitution, the constitutionality of the regulation of religious clothes such as the burqa and the niqab.

3.2 Constitutional Review of the Regulation Relating to Wearing the Burqa and Niqab.

In the reasons stated for this judgment, Spain's Supreme Court referred to *Raihon Hudoyberganova v. Uzbekistan*[13], a case involving the United Nations International Covenant on Civil and Political Rights. Ms. Hudoyberganova, a student at the Tashkent State Institute appropriately dressed in accordance with the tenets of her religion, and in her second year of studies at the university started to wear a hijab. According to her, the administration of the State Institute began to seriously limit the right to freedom of belief of practicing Muslims in September 1997 and she was excluded from university because she wore a hijab for religious reasons and refused to remove it. The student claimed that she was a victim of violations of her rights under Articles 18 and 19 of the Covenant. The UN Human Rights Committee noted the student's claim that her right to freedom of thought, conscience, and religion was violated and the Committee considered that "the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion." In addition, the Committee found that "to prevent a person from wearing religious clothing in public or private may constitute a violation of Article 18, Paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion." The Committee found that "the freedom to manifest one's religious beliefs is not absolute and may be subject to limitations which are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others (Article 18, Paragraph 3, of the Covenant)," and it concluded that in the absence of any justification provided by the state regarding its necessity, there had been a violation of Article 18, Paragraph 2. For these reasons, according to the views of the UN Human Rights Committee, the regulatation concerning wearing religious clothes must be justified by a legitimate purpose and compatibile with the right of the others and the public order.

In Spain, although there is constant discussion about the regulation of the use of Islamic veils, corresponding legislation has still not been implemented. As highlighted by Spain's Supreme Court in this case, since the veils are a measure of manifesting one's religious belief as Muslims, the legislative ban of wearing the religious clothes violates the freedom of religion and the equality before the law unless it is considered necessary for the maintenance of the public order (as provided for under Section 16, Clause 1). Even if the use of religious clothing were restricted for the purpose of maintaining the public order, it would be necessary to specify, in an objective and concrete manner, violations of the public order which could occur when implementing it.

The Ministry of Justice expressed its opinions relating to the Supreme Court's judgment as follows: (1) Religion must be left to the conviction and conscience of every individual; (2) A policy banning the use of religious garments, one of the most important religious acts, constitutes a violation of the Section 16 of the Constitution; (3) It can neither be thought that the use of the burqa or niqab in public spaces has an effect to create social disorder, nor is there any objective data to indicate it; and (4) In Spain, the burqa and niqab are socially recognized, to a certain extent, as Muslim garments through the increase in the number of Muslim immigrants and the audiovisual media such as the Internet so that it is inappropriate to ban the wearing of the burqa and niqab for the purpose of maitaining the public order.

Furthermore, the Supreme Court of Spain emphasized the importance of multiculturalism. In an increasingly globalized world, the tension provoked by the cultural, religious, and ideological pluralism is intensifying with the phenomenon of immigration. An adequate conciliation of the differences in civic harmony is essential. And, it should be emphasized that such a prohibition generally does not exist in many occidental countries.

3.3 Principle of Sexual Equality

France's supposed burqa ban law provides a general prohibition on the wearing of full-face veils without referring to a specific religion, Islam. However, the Sarkozy administration made efforts for enactment of the bill to relieve Muslim women from the forced wearing of a burqa.

Certainly, there is a view that the veils used by Muslim women, whether or not by personal preference, are incompatible with the principle of sexual equality, and that as a value it is impossible to delete in democratic societies. But seeing that many modernized Islamic countries have abrogated the compulsory wearing of veils by women and that a revival of veils has recently been noted in various countries where the number of users had decreased in the past, it seems that drawing a general conclusion that the veils represents a symbol of subordinated Muslim women constitutes a lack of balance.

In addition, it must be taken into consideration that, as emphasized by the Spain's Supreme Court in its reasons for this judgment, if Muslim women who are banned from wearing veils lose opportunities to have access to public spaces and make contact with Spanish society, the ban violates the principle of sexual equality and has the risk of encouraging discrimination against women.

4. Conclusion

Although the Muslim population is approximately one million inhabitants, or 2.3% of the total national population,[14] the number of Muslim immigrants is increasing in the autonomous community of Catalonia, principally in Barcelona city. The negative emotion that Spanish people display over the burqa is relatively strong[15]. In such a social situation, a trend toward the legislation to regulate the use of burqa is growing in Spain. In June 2010, the Senate approved a motion urging Zapatero's government to ban Islamic all-body veils in public places. For that reason, this Supreme Court ruling attracted the attention of many people. Of course, this judgment invalidating Lleida City's ordinance does not have any effect to terminate the possibility of the future legislation, but there is no doubt that the views presented by the judicial authorities regarding the constitutionality of burqa ban law will have an impact on the increasing trend toward legislation.

In Spain, a law to prohibit the wearing of a burqa and niqab should not be made unless there are sufficient efforts to develop multicultural policies that actively promote public recognition of the Muslim community in accordance with the cultural and religious pluralism that has been defined by the European Convention on Human Rights. Legislation must serve the essential good of a democratic society and must concretely demonstrate that the violation of the maintenance of "public order," "public safety," and the "right of the others" must correspond to the purpose of the ban, and we must conclude that imposing restrictions on the "freedom to manifest one's religious belief" and the "cultural and religious" is unavoidable. However, the legislation should not have any effect on promoting or impeding a specific religion. Based on this precedent, it is important to be attentive to the development of this issue.

ACKNOWLEDGMENT

The author would like to thank Enago (www.enago.jp) for the English language review.

Notes

[1] The terms *burqa* and *niqab* are often incorrectly used; a niqab covers the face while a burqa covers the whole body from the top of the head to the ground.

[2] Sentencia del Tribunal Supremo de Justicia Cataluña 489/2011, de 7 de junio.

[3] In this court, fundamental human rights were examined that focused on the use of the burqa and niqab as religious garments. Other “integral veils” such as full-face masks and helmets were excluded from consideration at the trial proceedings.

[4] Section 16.1 of the Constitution of Spain provides a requirement for limiting the freedom of ideology and religions as follows: Freedom of ideology, religion, and worship is guaranteed to individuals and communities with no other restriction on their expression than may be necessary to maintain public order as protected by law.

[5] Sentencia del Tribunal Supremo, Sala de lo Contencioso, STS 693/2013.

[6] European Convention for the Protection of Human Rights, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, and 13. European Court of Human Rights, Council of Europe. F-67075 Strasbourg cedex.

[7] http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/EREC1927.htm

[8] The Case of Leyla Sahin v. Turkey, Judgment, the European Court of Human Rights (Fourth Section), Strasbourg, 29 June, 2004.

[9] L'affaire Ahmet Arslan et autres c. Turquie, Arrêt, la Cour européenne des droits de l'homme (deuxième section), Strasbourg, 23 février, 2010.

[10] Reed, Esther D. & Dumper, Michael, *Civil Liberties, National Security and Prospects for Consensus: Legal, Philosophical and Religious Perspectives*, Cambridge University Press, 2012, p.107.

[11] Affaire Ahmet Arslan et autres c. Turquie, Requête n° 41135/98.

[12] The applicant, Belgin Dogru, has been excluded from secondary school because she refused to remove her hijab during the sports lessons. The Director of Education upheld this decision and justified it on the basis of compliance with school's internal rules such as those governing safety, health, and assiduity. The Court held that the restriction on the applicant's right to manifest her religious convictions was aimed at applying the requirement of secularism in public schools.

[13] Communication No. 931/2000, United Nations International Covenant on Civil and Political Rights, Human Rights Committee, January 18, 2005.

[14] *El País*, http://elpais.com/diario/2011/01/28/sociedad/1296169203_850215.html (January 28, 2011)

[15] A public opinion poll by the *Financial Times* (March 2, 2010) shows that 65% of Spanish people are in favor of banning the use of the burqa in public spaces (cf. 70% in France, 63% in Italy, 60% in England, 55% in Germany).

（本学非常勤講師）