

Head Coverings in the Courtroom: A Question of Respect for the Judge or of Judicial Tolerance?

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*English-language summary*¹

The Human Rights Centre at Ghent University (the HRC) first initiated the present research while preparing an *amicus curiae* brief in the *Lachiri v. Belgium* case² before the European Court of Human Rights (ECtHR). The applicant in *Lachiri*, who was a civil party in legal proceedings concerning the murder of her brother, was denied access to a Brussels courtroom after refusing to remove her Islamic headscarf.³ Ms. Lachiri's admission was refused in reliance on Article 759 of the Belgian Judicial Code (*Gerechtigd Wetboek / Code Judiciaire*), which provides that “[t]he audience will attend the sessions with their heads uncovered, respectfully and silently; whatever the judge commands for the maintenance of order will be punctually and immediately executed.”⁴ In its third-party intervention, the HRC sought to supply the ECtHR with additional information concerning three points: the debate on the wearing of Islamic headscarves in Belgium, the history, object and purpose of Article 759 of the Belgian Judicial Code, and the scope of the State margin of appreciation in prohibiting religious items of clothing.

¹ This document provides an English-language summary of the original, Dutch-language research report. For more information, particularly as concerns the methodology employed and the detailed results of the survey, please consult the Dutch-language version of the report.

² *Lachiri v. Belgium*, no. 3413/09, communicated on 9 October 2015.

³ For the full-text version of the HRC's *amicus* brief, compare <<http://www.hrc.ugent.be/wp-content/uploads/2016/02/Amicus-Brief-Lachiri-HRC.pdf>>.

⁴ According to the authors' own translation. The original text of the provision reads, in the Dutch-language version, “[d]e toehoorders wonen de zittingen bij met ongedekten hoofde, eerbiedig en stilzwijgend; alles wat de rechter tot handhaving van de orde beveelt, wordt stipt en terstond uitgevoerd.” The French-language version reads “[c]elui qui assiste aux audiences se tient découvert, dans le respect et le silence; tout ce que le juge ordonne pour le maintien de l'ordre est exécuté ponctuellement et à l'instant.”

Both during and after the preparation of its *amicus* brief in *Lachiri*, the HRC explored how judges apply Article 759 to both religious and non-religious head coverings in practice. The research was conducted by means of an anonymous online survey which garnered responses by 255 Dutch-speaking and 263 French-speaking Belgian judges on various levels of jurisdiction. The judges were asked a series of questions and provided with the opportunity to explain their answers. While some preliminary results – particularly the general trends identified below in section II. – were used for the *amicus* brief, the survey was continued to include as many judges as possible, with responses accepted until March 2016. The judges were asked about their application of Article 759 to both religious and non-religious head coverings that leave the face free, thereby excluding those that preempt the identification of the wearer. The resulting report, as summarized below, sheds light on the behavior of judges in both language regions. On the basis of these findings, the HRC formulated a number of recommendations addressed to the domestic government, legislature and the High Council of Justice. These recommendations respond in particular to the explanatory statements provided by a small minority of judges, who singled out Islam and the Islamic headscarf and indicated that they were “angered” by this head covering or that its tolerance meant “giving in to the invasion”.⁵

I. On Article 759 of the Belgian Judicial Code

The report begins by shedding some light on the object and purpose of the domestic legal provision at issue in *Lachiri*, Article 759 of the Belgian Judicial Code. The HRC’s research has shown that the *ratio legis* of Article 759 is not the removal of head coverings *per se*, but the maintenance of order in the courtroom.⁶ The report therefore argues that judges who apply the provision to require the removal of a head covering should have regard for the behavior of the persons concerned and the impact of that behavior on order in the courtroom. Faced with an individual who is threatening that order, judges may take a number of measures, including requiring the removal of the head covering. However, the provision does not provide a legitimate basis for requiring the removal of a religious head covering as *per se* disrespectful to the court. The decision to wear a religious head covering, such as an Islamic headscarf, represents an expression of religious faith, and cannot be construed as a sign of disrespect to the court. The spirit and history of the provision further show that other principles, such as the separation of Church and State, cannot be invoked to justify requiring the removal of a religious head covering: the secularity principle applies to State actors, and not to private persons attending a court hearing.

⁵ According to the authors’ own translation. The original text of these statements, in French and Dutch, is available in the Dutch-language report.

⁶ Compare, *inter alia*, Koen Lemmens, ‘Chapeau voor de Antwerpse correctionele rechtbank’, 2 *Nederlands Tijdschrift voor Rechtsfilosofie en Rechtstheorie* (2007), 53-54. See the full version of the report for further references.

The report also highlights the differences between religious head coverings, which are worn on the basis of spiritual conviction, and non-religious ones. Requiring the removal of religious head coverings conflicts with the fundamental right to religious freedom, as enshrined *inter alia* in Article 9 § 1 of the European Convention on Human Rights (ECHR). In addition, given the differences between them, treating both religious and non-religious head coverings in an identical fashion absent a legitimate aim gives rise to a discrimination issue *inter alia* under Article 14 ECHR, the prohibition of discrimination.

II. Four General Trends

Against this background, the HRC's report details the information gathered by means of a judicial survey conducted in the early months of 2016. The results of the survey allowed for the identification of four general trends concerning the manner in which Belgian judges understand and apply Article 759 of the Belgian Judicial Code.

- a) First, it became apparent that many judges are aware of the *ratio legis* of Article 759, and invoke the provision or its spirit in order to require persons who behave disruptively during the proceedings to remove their head coverings. Many judges explicitly stated that they have relied on the provision to require the removal of head coverings, particularly caps, worn by disruptive attendees.
- b) Secondly, many judges are aware of the distinction to be made between religious and non-religious head coverings in this context: 41% of Dutch-speaking and 55,5% of French-speaking judges would require the removal of the latter but not of the former. A significant number of judges, however, indicated a belief that both types of head coverings should be treated equally, be it because they see them as analogous, because they do not wish to distinguish religious head coverings from non-religious ones or because of their belief that this is necessary in order to ensure the separation of Church and State. As a result, 18% of Dutch-speaking and 9,5% of French-speaking judges never require the removal of any type of head covering, while 10% of Dutch-speaking and 25% of French-speaking judges have the opposite reaction and – at least hypothetically – require the removal of both religious and non-religious head coverings. In their explanatory comments, some of these judges expressed a belief that treating religious and non-religious head coverings differently constitutes unequal treatment, with tolerance of the Islamic headscarf, in particular, being singled out as discriminatory.⁷
- c) Thirdly, it became apparent that some of the judges who do or would require the removal of a religious head covering make a distinction according to the type of covering concerned, to the detriment of Islamic headscarves. Thus, for

⁷ The original text of two such statements, in French and Dutch, is available in the Dutch-language report.

example, while 10,2% of the Dutch-speaking and 15,2% of the French-speaking judges would require the removal of an Islamic headscarf, only 7,8% of the Dutch-speaking and 12,9% of the French-speaking judges would require a Catholic nun to remove her head covering.

A small minority – 1 % of Dutch-speaking and 1,5% of French-speaking judges – indicated that they would require the removal only of the Islamic headscarf, but not of any other religious head covering. The explanatory comments provided by the judges provide insight into the reasoning behind this position. These statements target Islam as a religion, arguing for example that “Muslims do not have a multi-religious mind-set” or that “[w]hat we require of men wearing a cap (removing it out of respect), we dare not ask a Muslim: one yields gradually to the invasion...”⁸

- d) Fourthly, the explanatory responses provided by many judges indicated that a number of respondents desire clear guidance on Article 759 in order to eliminate inconsistencies and remove the need for judges to decide in the individual case whether a head covering is to be considered religious or not.

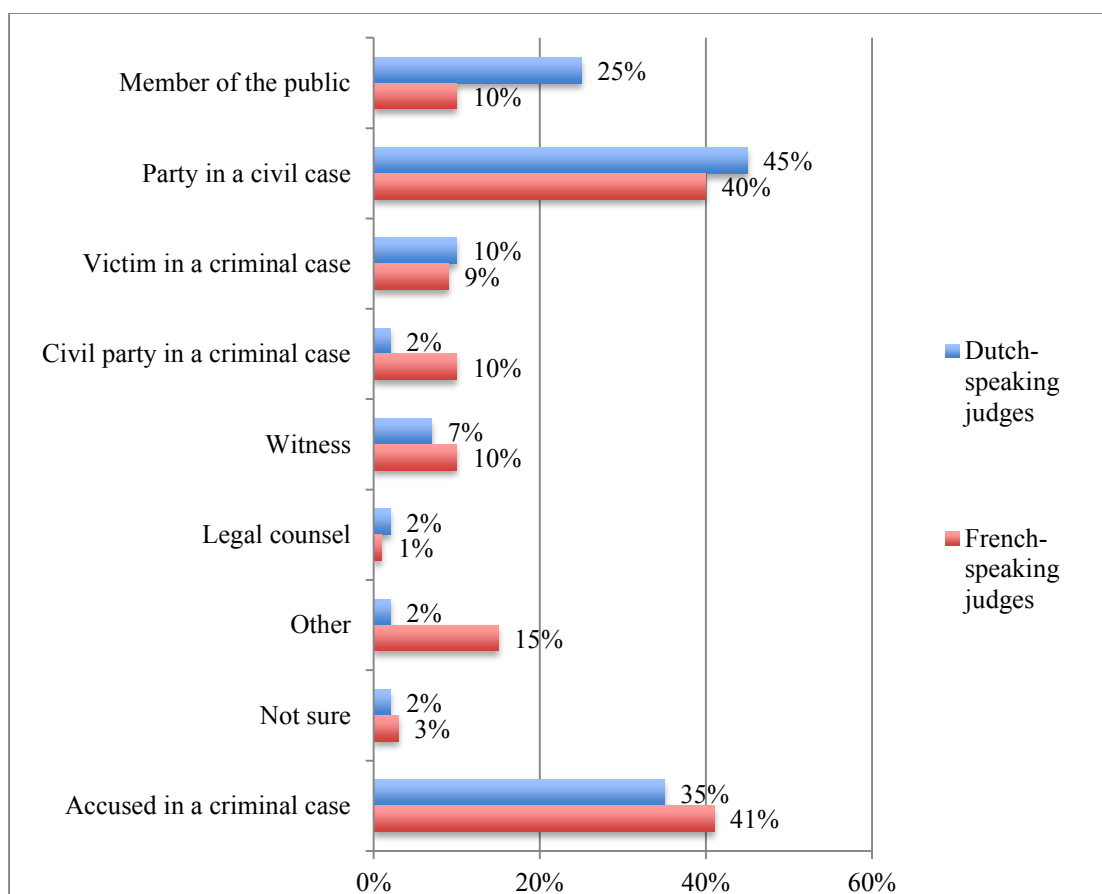
III. Statistics Regarding the Results of the Survey

The report goes on to provide statistical information regarding the results obtained in response to each survey question. These results, which represent the anonymous answers obtained from 255 Dutch-speaking and 263 French-speaking Belgian judges on various levels of jurisdiction, will be summarized below and separated according to language region. Responses to the first survey question, which concerns the function in which the judges surveyed are active, will not be part of the present summary.

Question 2, which determined what further questions the respondents would be asked during the course of the survey, was *whether the judges had ever applied Article 759 of the Belgian Judicial Code to require the removal of a head covering*. In response to this question, 23.5% of the Dutch-speaking and 38% of the French-speaking judges answered in the affirmative. This means that, for reasons to be explored below, an absolute majority of respondent judges had not yet applied Article 759.

Those judges who answered question 2 in the affirmative were then asked, in question 3, to indicate *in what function the person concerned was present in the courtroom*. Many of the judges indicated that they had required parties in civil cases or the accused persons in criminal cases, in particular, to remove their head coverings. The graph on the following page displays the results obtained in more detail.

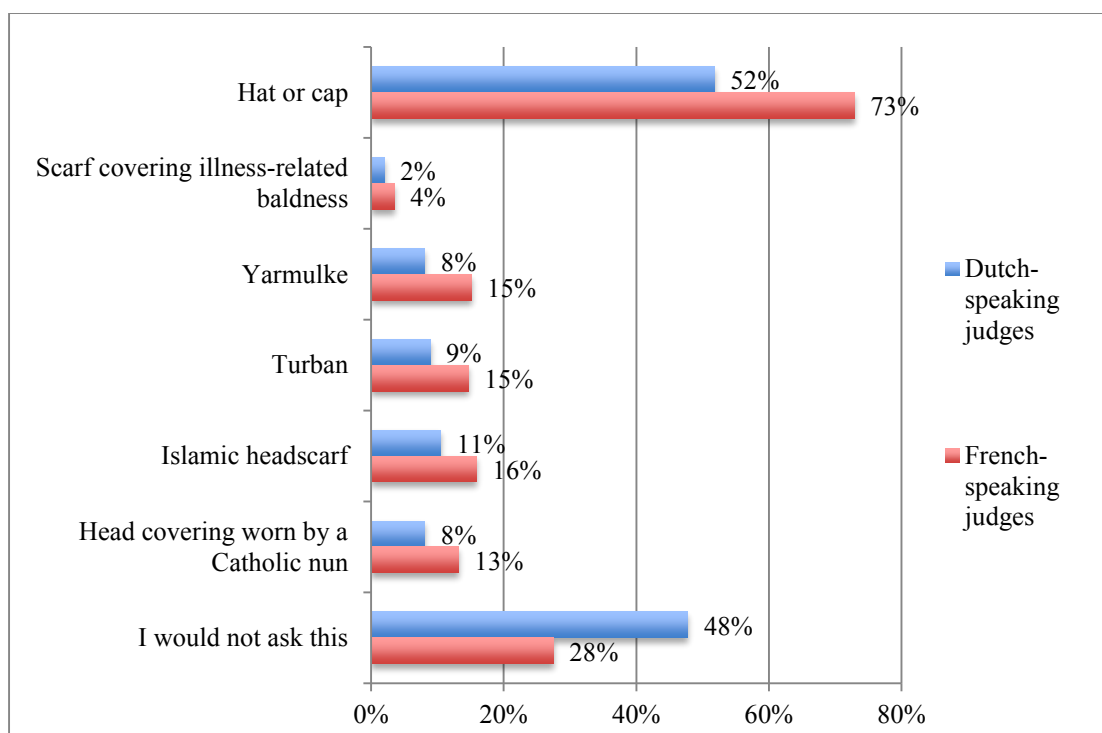
⁸ According to the authors' own translation. The original text of these statements, in French and Dutch, is available in the Dutch-language report.



Question 4 was also reserved for those judges who had answered question 2 in the affirmative and had thus already applied Article 759 to require the removal of a head covering. The question asked the judges to shed light on the *type of head covering to which they had applied Article 759*. 80% of Dutch-speaking and 79% of French-speaking judges responded that they have only applied the provision to non-religious head coverings. By contrast, a small minority – 3% of Dutch-speaking and 7% of French-speaking judges – stated that they have only required the removal of religious head coverings. 16% of Dutch-speaking and 14% of French-speaking judges answered that they have required the removal of both types of head coverings.

Question 5 was reserved for those judges who had not yet applied Article 759 of the Belgian Judicial Code to require the removal of a head covering – in other words, those who answered question 2 negatively. Question 5 *inter alia* asked them to indicate *why they had never applied Article 759 to a religious head covering*. Of the respondents, 54% of Dutch-speaking judges and 31% of French-speaking judges stated that they consciously chose not to apply the provision. 37% of Dutch-speaking judges and 59% of French-speaking judges stated that they had not yet been confronted with this issue to date.

Question 6 was asked of all judges, regardless of their response to question 2, and asked them to indicate *whether they would require the removal of a variety of specific head coverings* in the hypothetical event that they would be confronted with them in the courtroom. The graph on the following page displays the results obtained.



IV. Recommendations

Given the results of the survey and the findings made regarding the object and purpose of Article 759 of the Belgian Judicial Code as well as regarding the provision’s compatibility with religious freedom and the prohibition of discrimination, the HRC made a number of recommendations. One essential finding was that individuals who do not disturb the order of the courtroom should be allowed to keep their head coverings on as long as these do not interfere with the identification of the person concerned. If the individual at issue disturbs the proceedings, the presiding judge may take measures in order to maintain order. However, in light of the fundamental right to freedom of religion, a judge may not require persons present in his or her courtroom to remove a religious head covering.

As concerns the government and legislature, the HRC recommended that Article 759 of the Belgian Judicial Code be amended to remove the clause requiring that persons enter a courtroom with their “heads uncovered”.

Regarding the High Council of Justice, the HRC recommended that, pending such amendment of Article 759, a directive be issued to shed light on the object and purpose of the provision and explain why particular restraint is required vis-à-vis religious head coverings. The HRC also recommended that the High Council of Justice take measures, such as organizing seminars and training opportunities, to make judges aware of any prejudice against Islam and to tackle Islamophobia and discrimination.