WHY THE FRENCH DON'T LIKE THE *BURQA*:[1] *LAÏCITÉ*, NATIONAL IDENTITY AND RELIGIOUS FREEDOM

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Abstract This article examines the controversies over and implications of the 2010 French ban on the covering of the face. It carries out an internal critique of the new law and, in a broader European context, questions its compatibility with the European Convention on Human Rights. It argues that the ban has strayed away from the confines of laïcité (the separation of State and religion in the public sphere) by encompassing activities and people who in no way emanate from the State. Far from being a flagship of a secularism—à la française—or a French way of life, the ban—it is argued—goes against entrenched French legal traditions and unduly conflates the concept of national identity at the cost of individual liberties, thus forgetting the true goal of secularism: the conciliation of different beliefs and values. Assuming that the defence of secularism is nevertheless (for reasons we will explore) upheld by the European Court of Human Rights as a legitimate aim pursued by the law, the French ban, it is argued, is likely to fall foul of European requirements for lack of proportionality.

I. INTRODUCTION

> If the salient question of the twentieth century was race, first as manifested in European imperialism and then in international decolonization and domestic civic rights movements, the corresponding question of the twenty-first century may well be religion, particularly Islam.[2]

As the issue of the public display of religion hits the headlines again,[3] recent events seem to lend some truth to Fadel's prediction. Movements to ban the *full Islamic veil* have gained ground across Europe. Polls in Italy, Spain, Germany and Britain have indicated widespread support[4] and very recently, two Western European countries—France and Belgium—have legislated to

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[1] The title evokes John R Bowen's illuminating book, *Why the French Don't Like Headscarves, Islam, The State and Public Place* (Princeton University Press, 2008).

[2] MH Fadel, 'Public Reason as a Strategy for Principled Reconciliation: The Case for Islamic Law and International Human Rights Law' (2008) 8 ChiJIntlL 1.

[3] See <http://www.bbc.co.uk/news/world-europe-14261921>.

[4] See J-P Willaime, 'Le Voile intégral: approches européennes et réactions nord-américaines', in *La Laïcité à l'épreuve du voile intégral*, La Documentation française (2010) 53–65.

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ban the covering of the face in public spaces.[5] These recent developments have reignited old conceptual divides between multiculturalism and secularism, between the public and the private spheres, between a British and a French legal tradition.

On 11 April 2011, the French ban[6] came into force, followed closely, on 23 July 2011, by the Belgian Act.[7] Whilst The Netherlands[8] and some cities in Spain[9] have followed suit, other European countries, amongst which Britain, are resisting the trend. Shadow Chancellor and Former Schools Secretary Ed Balls for example said in January 2010 that it was 'not British' to tell people what to wear in the street after the UK Independence Party called for all face-covering Muslim veils to be banned.[10] Conversely, the 2010 ban has been defended by its supporters in France as a manifestation of a French tradition.

In this article, I will contest the allegation that the French ban embodies a secularist or French tradition. The differences between secularism and multiculturalism, often associated respectively with French and British traditions, should not be exaggerated. As Brenna Bhandar has very convincingly shown:

> if multiculturalism rests on the recognition of diversity which it then seeks to accommodate whereas secularism purports to construct a transcending common unity, both multiculturalism and secularism are deployed as techniques to govern difference that is perceived to violate dominant norms and values defined in reference to the Christian cultural heritage of the nation-state.[11]

Protecting common values is key to both secularism and multiculturalism. The differences lie in the methods used to protect these common fundamental values: whereas the secularist countries will to some extent relegate religious expression to the private sphere, multiculturalist countries will not rely upon the public/private sphere divide so strictly.[12] Focusing on the 2010 French

[5] For a comparative analysis of *burqa* bans in France, Belgium and concept legislation in The Netherlands, see G van der Schyff and A Overbeeke, 'Exercising Religious Freedom in the Public Space: a Comparative and European Convention Analysis of General *Burqa* Bans' (2011) 7 EuConst 424–52.

[6] Loi no 2010–1192 *interdisant la dissimulation du visage dans l'espace public* of 11 October 2010, JO 12 October 2010.

[7] *Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage* of 1 June 2011, JO Le Moniteur 13 July 2011.

[8] See <http://www.dnaindia.com/world/report_third-european-country-holland-soon-to-ban-burqa_1587935> accessed 27 September 2011.

[9] See <http://www.bbc.co.uk/news/10316696> accessed 13 September 2011.

[10] <http://news.bbc.co.uk/1/hi/8464124.stm> accessed 4 June 2012.

[11] B Bhandar, 'The Ties that Bind Multiculturalism and Secularism Reconsidered' (2009) 36 Journal of Law and Society 325.

[12] See J-F Gaudreault-DesBiens and N Karazivan, 'The "Public" and The "Private" in the Common Law and Civil Law Traditions. Legal Traditions as Reasoning Templates for the Regulation of Religion' (2011) Law and Religion e-Journal, available at <http://papers.ssrn.com/abstract=1905138>.

legislative ban, this article will contest the allegation that the ban on the *burqa*[13] corresponds in any way with a secularist or any other French tradition.

Undeniably, the 2010 Act is not the first instance of a prohibition of religious symbols in France. In 2004, the French ban on ostentatious religious symbols in public schools[14] was received—whether welcomed or criticized—as a French peculiarity, a symbol itself of a '*laïcité à la française*'. As this French 'tradition' was then upheld by the European Court of Human Rights (ECtHR)[15] and social tensions in French public schools subsided,[16] one could have thought that the 2004 ban was the end of the road. One would have been wrong. Six years later, with the new ban on the covering of the face, this '*laïcité à la française*' is now allegedly taken out of schools and onto the streets. If both the 2004 and 2010 laws adopt a neutral phraseology—targeting respectively 'ostentatious religious symbols' and 'the covering of the face'—it has escaped no one's attention that the first law was primarily aimed at the Islamic headscarf or *hijab* whilst the latter is to condemn the practice of the full Islamic veil, ie the wearing of the *burqa* or *niqab*, that is a form of veiling which hides the body completely except for the hands and with the latter, for a gauze panel or slit for the eyes. Both Acts could therefore be described as the legal expression of the French sensitivity to the presence of Islam in the public sphere. Despite the similarities between the two Acts, the continuity between the two pieces of legislation will be challenged in this article.

The 2010 Law which was adopted on 11 October 2010,[17] with the blessing of the French Constitutional Council, the *Conseil constitutionnel*,[18] originated in a Presidential comment. On 22 June 2009, before both Houses of Parliament in Versailles, President Nicolas Sarkozy declared that 'the *burqa* wasn't welcome in France.'[19] This feeling is not uniquely French. On this side of the Channel too, politicians and journalists have at times confessed their uneasiness towards the *burqa*. Jack Straw had publicly acknowledged his discomfort[20] and similar feelings have been found expressed by Matthew Parris in the Opinion columns in *The Times.*[21] But the French (and now

[13] The term '*burqa*' will be used throughout this article in a broad sense to include any forms of Islamic veils covering the face that is *burqa* in a strict sense as well as *niqab*.

[14] Loi no 2004–228 of 15 March 2004, JO 17 March 2004, 5190.

[15] ECHR 4 December 2008 *Kervanci v France* 31645/04 and *Dogru v France* 27058/05, RTD civ (2009) 1049–52.

[16] See Report of July 2005 by Mme Hanifa Chérifi, quoted in the Report on the full Islamic veil, infra (n 25) 91.

[17] Loi no 2010–1192, JO 12 October 2010, 18344.

[18] Conseil Constitutionnel 7 October 2010, JO 12 October 2010, 18345.

[19] Cf A Chrisafis, 'Nicolas Sarkozy says Islamic veils are not welcome in France' *The Guardian* 23 June 2009 available at <http://www.guardian.co.uk/world/2009/jun/22/islamic-veils-sarkozy-speech-france> accessed 27 September 2011.

[20] <http://news.bbc.co.uk/1/hi/uk_politics/5413470.htm>.

[21] M Parris, 'Never Mind What the Woman Thinks. Wearing the Veil is Offensive to Me' *The Times* 27 August 2005, available at <http://newsgroups.derkeiler.com/Archive/Soc/soc.culture.african.american/2005–08/msg00663.html> accessed 30 June 2012.

Belgian and possibly soon to be Dutch) specificity resides in the political determination to turn this dislike into a legal prohibition whereas in Britain social norms are seen as the best response.[22]

Since Nicolas Sarkozy's remark, committees, reports and parliamentary debates have in France searched for ways to translate this feeling of discomfort into French law. Instructed by the Prime Minister to suggest legal avenues for a ban on the *burqa*, the *Conseil d'Etat*[23] considered that a general dislike for the *burqa* could not transform into a general prohibition in all public spaces. No legal basis would allow for a prohibition of such general scope.[24] The special Committee set up to study the 'practice of the wearing of the full veil on French national territory'[25] concluded firmly that the *burqa* was incompatible with the fundamental values of the French Republic but was evasive as to the appropriate legal response. Undeterred by the special committee's uncertainty or the *Conseil d'Etat*'s warnings that a general prohibition would be likely to be incompatible with the Constitution and the European Convention on Human Rights (ECHR),[26] the government decided to open the parliamentary stage of the debates.[27] Despite its legal fuzziness, the proposal for a general ban was approved by the lower house on 8 July 2010 and by the upper house on 14 September 2010. The political support[28] behind the ban did not cure the text of its legal frailty. Implicitly acknowledging the legal weakness of the law, the Presidents of each house of the French Parliament—jointly—and so, for the first time in the legislative history of the French Fifth Republic—referred the newly voted law to the *Conseil constitutionnel*'s scrutiny. The *Conseil constitutionnel*'s brief and reverential decision[29] allowed the law to be promulgated but—I will argue—this has not strengthened the legal basis for the ban nor removed the risk of incompatibility with the ECHR.

In this article, I will contest the allegation that the 2010 ban is but a next step in the promotion of secularism and feminism. The eradication of difference that

[22] On this issue of whether resort to law is the proper response, see Tariq Ramadan, in conversation with members of the Pew Research Forum in the United States: 'The answer is not to come with law to prevent people … It's not the way forward … Speak more about education, psychology … we have to be very cautious not to translate every sensitive issue into a legal issue. We are wrong by doing this', available at <http://pewforum.org/Politics-and-elections/A-conversation-With-Tariq-Ramadan.aspx> accessed 4 June 2012, quoted in R Grillo and P Shah, 'Reasons to Ban? The Anti-*Burqa* Movement in Western Europe', Max Planck Working Papers 12-05, <http://www.mmg.mpg.de/publications/working-papers/2012/wp_12-05/> accessed 30 June 2012.

[23] *Rapport sur les solutions juridiques d'interdiction du port du voile intégral* 25 March 2010, JCP 2010, act 406, comments by A Levade.

[24] Conseil d'Etat, Report (n 23) 35.

[25] *Mission d'information sur la pratique du port du voile intégral sur le territoire national*, Report submitted to the President of the National Assembly 26 January 2010, JCP 2010, act 142, comments by A Levade.

[26] Conseil d'Etat, Report (n 23) 29.

[27] A similar proposal had already been submitted by the party UMP 5 February 2010 (proposition de loi AN no 2283).

[28] The Law was voted by an overwhelming 335/1 majority before the Lower House of the French Parliament and a 246/1 majority before the Upper House.

[29] Conseil Constitutionnel 7 October 2010, (n 18).

is sought by the new law is alien to secularism which even in its most virulent forms is designed to manage rather than deny diversity of beliefs. Nor is the new law a crusade for feminism. The ideal and abstract female image it defends does not support the dignity of veiled women but seeks to protect the comfort of the majority. This article will in turn consider and reject all of the potential justifications put forward (explicitly or implicitly) in support of the 2010 ban: *laïcité* (Part I), dignity, gender equality (Part II) and public policy (Part III). It will further argue that these aims, however legitimate, would not qualify as justifications for a general ban before the ECtHR and if they did, would fail the test of proportionality when confronted with the interferences they cause in concrete cases to individual religious freedoms protected under Article 9 ECHR (Part IV).

II. A DISTORTION OF *LAICITE*

In many ways, the 2010 ban appears like the next logical step to the 2004 prohibition. And yet, this article will show that the reasoning behind the new Act has strayed away from the concept of *laïcité* which inspired the earlier ban. The contours of *laïcité* are restricted to public services or public officials where the presence of the State requires religious neutrality. No such demands of neutrality have ever been required under the French legal system from ordinary citizens in ordinary public places. As will be demonstrated in this section, banning the *burqa* altogether in all public places is therefore not a manifestation, but rather a distortion, of *laïcité*.

French secularism or *laïcité* is usually defined as a system in which there is a separation between religion and the State.[30] But French secularism has always been thought to be compatible to some degree with state intervention in religious matters. Indeed the principle of separation between religion and State, proclaimed by the law of 1905,[31] coexists with the principle of freedom of conscience, also asserted in the 1905 Law. French secularism therefore does not convey any hostility or even indifference towards religion. On the contrary it was devised as a means to ensure the free exercise of religion by all citizens. To the extent required by the principle of freedom of conscience, the principle of separation between religion and State may be loosened. The French State will for example fund private religious schools under contract.[32] Whilst such support for religion may seem at odds with the principle of separation between religion and State, it is actually in harmony with the 1905 legislative framework as long as such intervention is deemed

[30] See J Rivero, 'La notion juridique de laïcité' (Recueil Dalloz 1949) 137.

[31] JO 11 December 1905; On the origins of the Act, see J Foyer, 'La Genèse de la loi de séparation' in *La Laïcité* (2005) *Archives de Philosophie du droit* vol 48, 75–83.

[32] Under the 1959 Debré Law. See B Poucet (ed), *La loi Debré, paradoxes de l'Etat éducateur?* (CRDP 2001).

necessary to protect freedom of conscience. Arguably, non-involvement of the State in private religious education would put religious parents at a disadvantage since only non-religious parents could benefit from the free state system of secular education while religious parents would need to pay high fees in order for their children to receive an education that reflects their religious convictions.[33] To ensure full respect for the religious convictions of parents and put an end to a conflict between secular France and Catholic France, the French State under the Debré 1959 Law now provides substantial financial assistance to private (religious) schools that have entered into a contract with the State.[34] The mere fact that the French State intervenes in matters of religion does not necessarily go against the core features of French secularism, as long as these interventions can be said to strengthen freedom of conscience. One fails to see however how the intervention of the French State to ban the *burqa* will reinforce freedom of conscience. There may be an assumption whereby the *burqa* is the manifestation of a group ideology the *Salafist* school of thought against which individuals should be protected by the State.[35] But as will be argued later on, evidence of group pressures on individuals would then need to be put forward for such a rationale to be supported.

Beyond individual freedom of conscience, the search of a 'common good', of a 'civil religion' runs through French history and also explains why at times *laïcité* may well be seen as being compatible with state intervention in matters of religion. Michel Troper traces this French tradition of a state morality back to the French Monarchy:

> To make politics autonomous required the subordination of the religious by the affirmation of a divine right of the King independent of the views of the Church. Each King was thus designated by God from which the duty of absolute obedience followed. (. . .) The royal power thus had to affirm itself independently and eventually in opposition to the Church but it was able to do so on a religious basis. The idea that the role of the sovereign State at least includes propagating essential values if not articles of faith was never completely abandoned in France even when the State became secular.[36]

If this tradition of state values has survived the shift to the Republican State, its foundation is now clearly defined by opposition to religion. It manifests itself in the positive side of *laïcité,* which carries its own teaching and its own places

[33] Naturally, the dichotomy between 'religious parents' and 'non-religious' parents is too crude. There are various degrees of religiosity and many parents with strong religious convictions choose the state school system whereas many parents with a vague religious commitment choose to send their children to Catholic schools. See B Chélini-Pont, 'The French Model: Tensions between *Laïc* and Religious Allegiances in French State and Catholic Schools', chap 7 in Myriam Hunter-Henin (ed), *Religious Freedoms and Education in Europe* (Ashgate 2012) 153–69.

[34] See n 32.

[35] See n 96.

[36] M Troper, 'French Secularism or *Laïcité*' (1999–2000) 21 Cardozo Law Review 1272–3.

of worship (town halls, official state buildings, state schools).[37] Today it is asserted in order to maintain a sphere free of the influence of the Church and is consequently restricted to the confines of the State's natural domain of public agents and public services. With its extension to the whole of the public sphere, the 2010 ban therefore does no more than seek to protect a state areligious identity as it strives to strengthen the exercise of individual religious freedom.

Whatever interpretation of the concept may be used, the 2010 ban therefore steps outside of French traditions on *laïcité*. Unsurprisingly, the special committee set up to consider the issue of the wearing of the full veil had to admit that the concept of *laïcité* was not relevant to the discussion[38] and the government's text which led to the 2010 law did not rely on the notion. By contrast, the supporters and opponents of a ban on religious symbols at school each embodied one version of *laïcité.* Whereas the contours and meaning of *laïcité* were thus at the heart of the debates surrounding the 2004 Act, *laïcité* was no more than a political slogan in 2010.

For the detractors of the 2004 ban, the prohibition of religious symbols throughout school premises, whether worn by staff or by pupils was already a step too far. These advocates of an 'open *laïcité*'[39] considered that religious neutrality could and should be required from public agents and removed from public premises but that it should not extend to users of those services. Consequently, in a school context, *laïcité* would be a reason to object to religious symbols being displayed in the classroom or worn by teachers but could not be invoked against manifestations of religious freedom by pupils. Indeed whereas the former—directly or indirectly—reflect the State's attitude towards religion, the latter mainly convey allegiance to individually held religious beliefs.

In addition to the diversity of its meanings within the French context, the principle of laïcité may also vary in its application across States. For example, despite the clear connection with the State, the presence of crucifixes in state schools is a regular occurrence in Italy where the principle of *laïcité* is construed as encompassing the Catholic heritage of the nation rather than as a way of resisting it like in France.[40] Crucifixes in Italian state schools recently survived a challenge before the ECtHR. The Grand Chamber held in the *Lautsi* case that the mere presence of crucifixes did not amount to a violation of Article 2 Protocol 1 of the Convention protecting parents' right to ensure that their children receive education and teaching that conforms with their own

[37] Cf suggesting a bank holiday dedicated to *Laïcité* on 9 December, date of the 1905 Act on the separation of Church and State, P Vitel MP from the party UMP (Var), Question to the Prime Minister no 68744, JO 19 January 2010, 443.

[38] See Report, (n 25) 95–122. See also, Report by the Conseil d'Etat, (n 23) 17.

[39] See J-P Willaime, *Le Retour du religieux dans la sphère publique. Vers une laïcité de reconnaissance et de dialogue* (Editions Olivetan 2008).

[40] See A Ferrari, 'De la politique à la technique: laïcité narrative et laïcité du droit. Pour une comparaison France/Italie' in B Basdevant-Gaudemet and F Jankowiak (eds), *Le Droit ecclésiatique en Europe et à ses marges XVIIIe–XXe siècles* (2009) 333–45.

religious and philosophical beliefs nor did it raise any separate issue in respect of Article 9 of the Convention protecting freedom of religion and conscience.[41] This conclusion is not to suggest however that the ECtHR prefers an Italian secularism to a *laïcité* 'à la française'. The Grand Chamber's decision is not about the correct meaning of *laïcité*:

> [it] is not for the court to rule on the compatibility of the presence of crucifixes in state school classrooms with the principle of secularism as enshrined in Italian Law (para 57).

Rather the Court's assessment focused on the reconciliation of crucifixes with the principle of pluralism. Having regard to the wide margin of appreciation granted to Member States in this area,[42] the Grand Chamber went on to hold that the crucifix merely constitutes a passive religious symbol[43] which, put in perspective with the openness of Italian state schools towards other religions,[44] cannot in itself amount to a violation of Convention rights.

It will be interesting to examine whether the wide margin of appreciation granted to Member States in respect of the principle of secularism and its consequences would be sufficient to secure the fate of the French 2010 ban on the *burqa* in Strasbourg.[45] Suffice to note here how different the concept of *laïcité* may be in France and Italy, to the point, in the Italian specific context, of allowing what would be construed by all in France as the exact denial of *laïcité*: an endorsement of religion (and indeed of a particular religion) by the State.

In the case of teachers, the link to the State is only indirect. If teachers as public agents are emanations of the State, as individuals, they are also holders of fundamental rights, including that of freedom of religion. Would the wearing of a headscarf by a teacher in a state school therefore necessarily contradict the idea of separation between State and religion that the notion of *laïcité* implies or should it be construed as an expression of the teacher's individual faith? This individual dimension prompted Quebec to moderate the demands of *laïcité* against public staff and allow the wearing of headscarves by civil servants as long as the headscarf did not interfere with their tasks and mission. Conceptually, the comparison with Quebec reveals once more[46] how accommodating towards religion the concept of *laïcité* may be.[47] But the comparison also highlights the strikingly different historical

[41] In the case of *Lautsi v Italy* (App no 30814/06), the Grand Chamber, overruling the first Chamber's decision of 3 November 2009, held on 18 March 2011 that the presence of crucifixes in the classrooms of Italian state schools was acceptable despite the principle of *laïcité* contained in the Italian Constitution. [42] ibid para 70. [43] ibid paras 72 and 73.
[44] ibid para 74. [45] See Part IV.
[46] See leading to the same conclusion the comparison between the French and the Italian notions of *laïcité* (n 40).
[47] On the Canadian context, see the Bouchard/Taylor Committee Report on reasonable accommodations, esp chap 7 (Bibliothèque et Archives nationales du Québec 2008) available at <http://archive.wikiwix.com/cache/?url=http://://www.accommodements.qc.ca/documentation/

and sociological approaches towards religion in Canada and France respectively. Concerned from the outset to ensure a harmonious cohabitation between different religious communities—Catholic and Protestant—Quebec has always been willing to accommodate 'reasonable' religious claims.[48] The concept of *laïcité* in this context has always been devoid of any positive content itself.

In France on the other hand, where the fight was historically against Catholic forces perceived as anti-republican and conservative, *laïcité* was not only constructed as a legal tool to manage the diversity of religious beliefs[49] but also, at least in some of its social and political narratives, as a concept conveying a positive belief in itself to be opposed to Catholic forces. Given this positive side of *laïcité*,[50] the absence of religious symbols in France is regarded in itself as an emblem of a state philosophy—to be reflected if not celebrated in certain key national events and key national institutions and respected by public agents.[51] In France therefore the divide between an 'open' and 'closed' version of the concept of *laïcité*[52] coincides with the divide between employees and users of public services. Even supporters of an 'open' version of *laïcité* will in France deny public servants the right to express their religion lest they betray the state philosophy they are bound to be seen to adhere to. Adopting an 'open' interpretation of the concept of *laïcité,* the *Conseil d'Etat* has consistently held that public servants are tied to a strict duty of neutrality[53] but simultaneously, until the 2004 ban, it considered on the other hand that as users of a public service, pupils should be allowed to wear religious symbols at school subject only to the requirements of public security and public order. The case law that ensued was criticized by some[54] for its inconsistencies. If the state of the law appeared incoherent to some, it was because divergent appreciation of the principle of *laïcité* could occur from one school to the other, from one student to the other depending on specific circumstances.[55] These local variations seemed in contradiction with the unified force of the principle of *laïcité*—which etymologically comes from the Greek term *laos*, meaning

rapports/rapport-final-integral-fr.pdf&title=Rapport%20final%20int%C3%A9gral> accessed 30 June 2012.

[48] ibid chap 6 on 'Interculturalism'.

[49] On the liberal historical origins of *laïcité,* see P Weil, 'Why French *Laïcité* is Liberal' (2009) 30 Cardozo Law Review 2699. See also note 36.

[50] See n 37.

[51] See CE avis 3 May 2000 *Mlle Marteaux*, RFDA 2001, 141, Conclusions R Schwartz.

[52] For further illustration of the divide, see the contrasting views of D Schnapper, *La Démocratie providentielle. Essai sur l'égalité contemporaine* (2000) and J-P Willaime (n 39).

[53] Cf CE 27 November 1989 Avis, RFDA 1990, 1, J Rivero; AJDA 1990, 39–42; J Bell, 'Religious Observance in Secular Schools: A French Solution' (1990) 2 Education and the Law 121–8.

[54] See for example, X Darcos' comments reported in MP Clément, Rapport n 1381, JOAN, Doc Session 2004, 9 and 10. Contra, C Durand-Pringorgne, 'Le Port des signes extérieurs de convictions religieuses à l'école : une jurisprudence affirmée…, une jurisprudence contestée' (1997) RFDA, 151–72.

[55] Cf emphasizing the need to take into account the circumstances of the case, CE 27 November 1996 (3 cases) JCP 1997 II 22 808, B Seiller.

unified people/society—and which historically, under a 'closed' conception of the notion, is associated with the centralized characteristics of the French State. Moreover heads of schools and teachers resented the powers forced upon them and the media attention that their decisions provoked. Gradually, legislative action thus appeared more and more indispensable. Based on one of the recommendations of a report drafted by a Committee known as the Stasi Committee,[56] the 2004 Act[57] was passed and the 'closed' version of *laïcité* proclaimed in all state French primary and secondary schools. Despite the generality inherent in the 'closed' version of *laïcité*, the 2004 prohibition is restricted to primary and secondary schools of the state sector—thus leaving universities and higher education institutions as well as private schools outside the scope of the Act.

This restriction of the 2004 ban to state schools lies at the heart of the justification of the 2004 legislation and ties the 2004 ban to the concept of *laïcité*. The principle of *laïcité* has indeed a particular force and meaning in the context of education and of children.[58] Since the reforms of Jules Ferry,[59] schools through free, compulsory, public education for all have become the symbol of integration for all into the Republican State. In that sense, schools are at the epicentre of *laïcité*.

> The French view school as the perfect institution to teach future citizens to exploit their faculties of reason and to help them exercise freedom of thought. (…) Freedom of thought ensures that pupils enjoy the right to independently re-examine beliefs received from family, social group and society as a whole. This way a person can freely adhere to these beliefs, adapt them or turn from them to something else.[60]

In France, the ideal of a 'common school' is thus diametrically opposite to the British model—be it at times merely an aspiration—of a microcosm of society where pupils are encouraged to be involved in their local community and exposed to the diversity and problems of the world.[61] In France, the ideal school—be it again merely an aspiration—is a haven, safe from the turmoil of the world, a place of culture where a common intellectual quest and discussion of concepts transcends everyday life and everyone's

[56] *Rapport de la Commission présidée par M. Bernard Stasi de réflexion sur l'application du principe de laïcité dans la République* submitted 11 December 2003, La Documentation française (2004).

[57] Loi no 2004–228 of 15 March 2004 (n 14).

[58] Cf JAN Condorcet, *Cinq mémoires sur l'instruction publique (1791)*, eds C Coutel and C Kintzler (Flammarion 1994).

[59] Cf HC Barnard, *Education and the French Revolution* (Cambridge University Press 1969). The presence of documentation relating to the Ferry Laws on the official site of the French Senate illustrates the importance of the Ferry laws in the French psyche: available at <http://www.senat.fr/evenement/archives/D42/index.html> accessed 18 March 2012.

[60] J Baubérot, quoted by D McGoldrick, *Human Rights and Religion. The Islamic Headscarf Debate in Europe* (Hart Publishing 2006) 76.

[61] See K Williams, 'Religious Worldviews and the Common School. The French Dilemma' (2007) 41 Journal of Philosophy of Education 675–92.

differences.[62] The prohibition of religious symbols which are perceived as signs of diversity (if not division) at school is consistent with this idea/ideal that knowledge and culture by contrast can achieve universality:

> "the subject who accedes to the truth simultaneously and immediately breaks away from any self-centeredness; he/she realises the opposition between a universal consciousness and a subjective, mysterious and obscure unconscious mind."[63]

Confined to state schools, the 2004 prohibition of ostentatious religious can therefore be construed as an application of the principle of *laïcité.* Taking the prohibitive stance outside of schools and targeting not just civil servants but any passer-by, the new restrictions on individual religious freedoms under the 2010 Act by contrast fall outside of the bounds of *laïcité*. If the 2010 ban is a manifestation of *laïcité*, its wide ambit is unjustifiable:

> If the *laïc* State is neutral, if the principle of neutrality of public services imposes absolute constraints on public agents who are not allowed to express the slightest religious conviction, it is for the sake of users' and citizens' right to believe or not to believe. In this *laïc* setting, seeking to regulate the expression of religious freedom outside of public services and independently of any threat to public order is problematic.[64]

It confuses *laïcité* (which implies the separation of State and religion) with secularisation (which describes the decreasing influence of religion in society).[65] It blurs the distinction between the normative and the descriptive and extends unduly the realm of the law. This unduly wide scope of the prohibition explains why part of the opposition abstained from voting in favour of the ban. The Socialist Party wished the ban to be limited to public services. Instead, the 2010 law extends the prohibition to all public places. As a result, *laïcité* can no more be invoked to justify the ban than the ban can be used to criticize the French model of *laïcité.* The two phenomena are totally unrelated. If *laïcité* is not at stake, what therefore could be the basis for a prohibition? The Committee reporting on the wearing of the full veil suggested that the full veil amounted to a violation of broader Republican values:[66] equality, liberty and fraternity. Of the Republican values referred to by the Committee, the government relied explicitly on the concepts of dignity and equality in the proposal which led to the law. But as we will show below, these do not offer a more secure basis for the 2010 law.

[62] R Debray, *Ce que nous voile le voile. La République et le sacré* (Gallimard, Paris, 2004) 32.
[63] G Bachelard, 'Valeur morale de la culture scientifique' in Didier Gil (ed), *Bachelard et la Culture Scientifique* (Presses Universitaires de France 1993) (author's translation).
[64] R Schwartz, Interview published in *La Laïcité à l'épreuve du voile intégral*, La Documentation française no 364 (2010) 17 (author's translation).
[65] For a comparable distinction but in respect of pluralism/plurality, see J Beckford, *Social Theory of Religion* (Cambridge University Press 2003).
[66] Report (n 25) 95–122.

III. A PATERNALISTIC VIEW OF DIGNITY AND EQUALITY

Fighting the *burqa* was described in France as a combat for equality and dignity for women. However in this section, I will argue that the ban is actually not about promoting women's dignity and equality. The enforcement of a prohibition against autonomous decisions made by adult women is a paternalistic and outdated view of women that reverses feminist achievements and that will worsen the marginalization that it is said to be combating.

During the Parliamentary debates leading to the ban, all saw the full veil as an unacceptable oppression towards women:

> All of us are against the *burqa*. All of us are fighting for women's dignity and for promoting equality between men and women. This is not where the disagreement lies. But as far as we're concerned we see it as extremely important that the law should have a strong legal basis (and therefore that the ban should have a more limited scope).[67]

However, if the *burqa* does violate women's dignity, isn't it logical and indeed desirable to extend the prohibition to the whole of France? The scope of the 2010 Act would therefore suggest that dignity rather than *laïcité* is the concept underlying the prohibition against the *burqa*. The question raised is then whether the *burqa* does indeed amount to a violation of women's dignity. The lack of empirical evidence to support Parliament's assumption that women's dignity is curtailed by the wearing of the full veil is striking.

The case for a ban for the sake of dignity was also made in 2004 to justify the prohibition of ostentatious religious symbols in French state schools. It was thus reported in the Stasi Commission[68] prior to the 2004 legislation that young girls from impoverished areas known as the '*cités*' were pressurized into wearing the headscarf by their family or by young male adults from their neighbourhood. Providing for a neutral zone at school was seen as the only way to ensure that these young girls had a space where their freedom not to wear the veil could be exercised. Even then, a general ban may have appeared disproportionate given that in the majority of cases,[69] the wearing of the *hijab* was the result of a voluntary choice. Assuming that dignity was a legitimate justification for the 2004 ban, why not—if young adult women were subjected to similar family or social pressures—protect women's dignity more fully and take the prohibition further to the streets and all public spaces?[70] However,

[67] J-P Sueur, JO Sénat CR 15 September 2010, 6755 (author's translation).

[68] Stasi Report (n 56) section 3.3.1, p 57; section 4.2.2.1, p 99 and ff.

[69] See R Liogier, *Une Laïcité légitime. La France et ses religions d'Etat* (Médicis Entrelacs 2006).

[70] Arguably, the prohibition should then even extend to the private sphere. The restriction to the public sphere however broadly construed stands in contradiction with the announced goal to protect women's dignity. This restriction suggests that the prohibition is less about protecting dignity than it is about protecting 'Republican values' under an inflated conception of public policy (see Part III).

the legislator in 2004 took the view that the presumption of vulnerability could not easily be applied to people over 18.[71] Clearly departing from this position, the 2010 ban therefore stands in opposition with the previous 2004 Act.

In 2010, the concept of dignity is clearly used to protect adult women despite and against themselves and to ban practices chosen freely. Before the 2004 ban was passed, the Commission Stasi set up to draft the preliminary report had produced examples of coerced wearing of the headscarf. By contrast, the superficial research carried out by the 'full veil Committee' on the reasons behind the wearing of the *burqa* could at most reveal an influenced choice:

> Indeed, there is some kind of pressure in wearing the *burqa* but it is not an external social pressure exercised by an Imam or by family members. It is more of a self-imposed pressure by the woman herself. (. . .) Women wearing the *burqa* see it as a sign of increased Islamic religiosity, the mark of membership to an elite, to a proper Islam susceptible to guide other fellow Muslims.[72]

In other words, the little evidence gathered revealed at most an 'influence'—mostly through reading the internet—rather than a 'coerced' decision to wear the *burqa*. If we were to discard influenced decisions as not being the exercise of genuinely free choices, how many—if any—of our decisions would still qualify as expressions of free will? More crucially, even if there were to be no room for true freedom, this moral/philosophical determinism should be no obstacle to maintaining an illusion of freedom and autonomy at the heart of our legal systems.[73] The social pressures that may limit our individual freedoms should not be an excuse for adding state interferences and pressures. The lack of substantial clear empirical evidence[74] to support the claim that decisions to wear the *burqa* are coerced choices is matched by a similarly lack of evidence to the contrary. However, the lack of evidence either way does not put the terms of the alternative between banning and allowing the *burqa* on the same standing. Unless coercion is proven to have taken place, a presumption of autonomy *must* be posed. By reversing this presumption, the 2010 Act fundamentally disturbs civil liberties and human rights protection which first and foremost safeguards individual liberties—however illusory—against

[71] But the 2004 prohibition applies to pupils over 18 who are still in secondary schools whether before or after Baccalauréat (A levels). This uniform application of the 2004 ban throughout state schools suggests that the prohibition of religious symbols is less about protecting dignity than it is about enforcing *laïcité* throughout the public school sector (see Part I).

[72] Interview of Sami Amghar before the 'Committee on the full veil' Report (n 25) 467 (author's translation).

[73] See D de Béchillon, 'Voile intégral: éloge du Conseil d'Etat en théoricien des droits fondamentaux' (2010) RFDA 467–8.

[74] See on this crucial question of empirical evidence, <http://www.ugent.be/re/publiekrecht/en/news/faceveil.htm> accessed 20 March 2012.

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illegitimate interferences from the State and its agents. It also crudely suggests that autonomy, feminism and religious beliefs can never be reconciled.[75]

To undermine the importance of the legal shift, supporters of the 2010 Act have sought to establish a connection between the 2010 prohibition and previous case law based on dignity. But I will argue that the connection is unconvincing. Whether relating to *laïcité* or dignity, the 2010 Act cannot relate to an established French legal tradition. On the contrary, on both counts, it signals a radical and worrying shift in approaches. The supporters of the 2010 ban argue that the *burqa* relegates its wearers to an inferior status incompatible with French notions of equality and women's dignity. By veiling her face completely, the veiled woman would deny her own identity and deprive herself from social contacts. Relying expressly on the work of Emmanuel Lévinas,[76] the reasoning underscores the social and philosophical value attached to communication which an uncovered face, open to dialogue, would symbolize. But the fundamental question remains: how can departing from this philosophy violate the veiled woman's dignity if the different philosophy she embraces is freely chosen? Of course, dignity has been invoked in the past to strike down consensual arrangements. In the famous case of *Commune de Morsang*,[77] the *Conseil d'Etat* held void contracts whereby dwarves had consented to being part of a 'show' involving them being thrown up in the air. These agreements despite being consensual were held to be contrary to human dignity. Save for bioethics legislation, the concept of dignity is however rarely used to oppose consensual practices. The case of *Commune de Morsang* has remained isolated and involved an *ex-post* balancing process of the indirect pressures exercised by the remuneration provided to the participating dwarves against the low public interest involved in having 'throwing of dwarves' shows available.

By contrast, the ban on the *burqa* applies in all circumstances save for the limited exceptions of private places—where it is not needed—and places of worship. Moreover, unlike in the dwarves' case, the decision to wear a *burqa* is not prompted by any promise of remuneration and covers a myriad of motivations. Reducing them all to one—the subordination of women—is necessarily too crude. It also carries a (negative) value judgment on the decision to wear the *burqa* which would arguably be better left to social conventions than the law. It is fair to say that absolute prohibitions imposed in the name of human dignity in spite of the complexities of participants' feelings and motivations have at times been pronounced in French Law. Article 16–7 of the French Civil Code for example prohibits on that ground voluntary

[75] See J-L Nancy, 'Church, State, Resistance' (2007) 34 Journal of Law and Society 7. Also on the tensions between 'piety' and 'polity', S Motha, 'Veiled Women and the *Affect* of Religion in Democracy' (2007) 34 Journal of Law and Society 139–62.

[76] E Lévinas, *Ethique et Infini* (Fayard 1982).

[77] CE Ass 27 October 1995 *Commune de Morsang-sur-Orge,* also known as '*l'affaire du lancer de nains', Grands arrêts de la jurisprudence administrative*, 17th ed, n 98. Comments by O Cayla, 'Le Coup d'Etat de droit' (1998) *Le Débat* 108.

surrogacy arrangements, whether commercial or not, whatever the circumstances. But the general prohibition of surrogacy, itself often controversial,[78] would be no justification by analogy for a general ban on the *burqa*. Indeed, whereas there is no recognized fundamental right to a child, there is an uncontested individual right to freedom of religion.[79] The *Conseil d'Etat* itself thought that the concept of dignity could not legally justify a general ban on the *burqa*.[80] Denying adults' choices in the name of dignity is problematic when autonomy is more and more regarded as an essential component of dignity.[81]

Besides, in the case of the full veil, one may suspect the French legislator of hypocrisy:

> Strangely enough what indeed seems to disturb critics the most is the voluntary veil, voluntary manifestation in public rather than the imposed veil. But as it is unassailable per se precisely because it is indeed voluntary, it will be criticized for being what it is not, 'veiling by constraint'.[82]

The wearing of the *burqa* may for many signal archaic practices which diminish the feminist achievements of the twentieth century. But fighting it with paternalistic measures may all the same go against the feminist tradition of claiming equal rights with men and rebutting the presumption that women cannot make free choices for themselves. Long-term effects of the ban may therefore worsen rather than improve women's dignity. Moreover, the situation of veiled women can only deteriorate after a ban. Penalizing women who wear the *burqa* does not liberate them. There is a concern at European level that a general ban on the *burqa* would backfire: Commissioner Thomas Hammarberg, Council of Europe Commissioner for Human Rights, thus took the view that banning women who wear the *burqa* from public institutions/places like hospitals or government buildings may result in them avoiding such places entirely.[83] Integration will not be improved by the ban. A report from the Open Society Foundation[84] already reveals that since the debate on the face veil began in France, 30 of 32 *burqa*-wearing women interviewed had experienced verbal abuse, and some had also been physically assaulted. As a direct result they preferred to limit the amount of time they spent outside the home, the NGO found. Consequently, the European Parliament adopted both a recommendation and a resolution whereby Member States are advised not to legislate against the wearing of the full veil.[85]

[78] See M Hunter-Henin, 'Surrogacy. Is There a Room for a New Liberty between the French prohibitive Position and the English Ambivalence' in M Freeman (ed), *Law and Bioethics* (OUP 2008) 329–57. [79] See Part IV. [80] Conseil d'Etat, Report (n 23) 20.

[81] See for example, CEDH 17 February 2005 *KA and AD v Belgium,* no 42758/98. For a theoretical perspective, R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 272–3.

[82] R Liogier, '*Laïcité* on the Edge in France: Between the Theory of Church-State Separation and the Praxis of State-Church Confusion' (2009) 9 Macquarie Law Journal 40.

[83] <http://www.coe.int/t/commissioner/Viewpoints/100308_en.asp> accessed 4 June 2012.

[84] <http://www.crin.org/docs/unveiling-truth-20110411.pdf> accessed 13 September 2011.

A general ban on the *burqa* does not therefore liberate veiled women but increases their stigmatization and isolation. Nor does it genuinely seek to do so. The dignity which is to be protected is in reality less that of the veiled woman than of other non-veiled citizens. Indeed the argument has been made that by shunning social contacts, veiled women are refusing to treat non-veiled citizens as equals and thereby encroaching onto their dignity. In our societies of intense communication, the woman who rejects the gaze, handshakes or services of male fellow passers-by, colleagues, doctors or teachers distances herself from modernity and offends social conventions. But is a legal prohibition the answer to such social dysfunction?[86] Are we to legislate to prohibit all practices that appear socially shocking asks David Koussens?[87] Can the right not to be offended rival a right to express one's religion? In its brief decision of October 2010, the *Conseil constitutionnel* suggested that legislation banning socially disturbing practices could be promulgated on the new ground of '*social ordre public*'. The ban on the *burqa* would be legitimate and constitutionally sound not because it seeks to protect *laïcité*, dignity or equality—which indeed are not referred to by the *Conseil constitutionnel*—but because the full veil would put the French social backbone, the French '*vivre ensemble*' into jeopardy. However, this article will argue that this new legal basis represents an inflated and unconvincing conception of public policy.

IV. AN INFLATED CONCEPTION OF PUBLIC POLICY

Public policy has always been a valid reason for limiting individual freedom. If wearing the full veil violates public policy, a legislative reaction to ban its display will be legitimate. But how could a prescription of what constitutes socially acceptable head-wear amount to legislative protection of public policy? In this section, I will argue that the 2010 ban on the *burqa* relies on an illegitimate and inflated conception of public policy. The ban is not a reaction to any threats to public order or public safety. Nor does it fit within the broader trends throughout immigration laws in EU Member States to restrict individual religious freedom for the sake of national cohesion.

Has the protection of public policy turned into the protection of the conformity of appearances? Has France, 'la *Patrie des droits de l'homme*'—the 'land of human rights'—as it likes to call itself turned into the 'land of blinkered thinking'—le 'pays de la *pensée unique*'? As explained above, the

[85] Recommendation and Resolution no 1743 both entitled 'Islam, Islamism and Islamophobia in Europe' of 23 June 2010 available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/EREC1927.htm> accessed 4 June2012 and <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1743.htm> accessed 4 June 2012.

[86] Admittedly, one does so to prohibit for example the display of nudity in public spaces but I will argue that the ban on the *burqa* goes much further. See Part III.

[87] D Koussens, 'Sous l'affaire de la *burqa*... quel visage de la laïcité française?' (2009) 41 Sociologie et Sociétés 328.

2010 Act represents an unprecedented and worrying expression of state morality. Such a move should be strongly condemned. But the risk of a slippery slope where the ban on the *burqa* could evolve for example into a ban on the 'mini-skirt' and then turn into a general positive list of acceptable clothing cannot be seriously entertained. Social norms may be more prescriptive in Paris than in London as to what amounts to 'correct' colour matching of garments but the law is no more likely to move into the territory of individual fashion in France than it is in Britain. The ban on the *burqa* only found its way through the legislative process because the wearing of the full veil was seen as a radical and extreme practice and the covering of the face was described as radically different from the covering of the body.[88] Because the intrusion of state morality appears at the margin, to condemn what is described as 'extreme'—the *complete* dissimulation of the face, the *full* veil as opposed to a more moderate veil—and to oppose what appears as a sign of religious extremism—the *salafist* school of thought[89] as opposed to a moderate acceptable Islam—the ban on the *burqa* still superficially adopts the usual mould of public policy. It does not seek to prescribe what is acceptable but erects a barrier against practices which step outside the *limits* of the tolerable.

As a reaction against the extreme, as a limit to objectionable practices, the 2010 Act superficially seems to fit in with traditional legal reasoning. Philosophically and politically, it seems to support a modern and moderate form of liberalism in line with John Rawls' thinking.[90] Politically and philosophically, the 2010 Act would not embody an aggressive form of *laïcité* but, by seeking to eradicate the most archaic forms of religious manifestations and retain liberal religious traditions, it would promote a peaceful compromise between modern ideals and (religious) traditions.[91] *Laïcité* indeed is not inherently contrary to Rawls' notion of consensus and justice. Khaled Beydoun has claimed that:

> because secularism functions as France's guiding comprehensive doctrine, to the exclusion of a panoply of other worldviews adhered to by its citizens, an overlapping consensus of just governance cannot be had.[92]

While this may be true of the most rigid accounts of *laïcité*, dominant in the narrative[93] of the concept, the presentation of *laïcité* as an exclusivist concept does not reflect the nuanced ways in which it has been implemented in law.

[88] See French MP Lionel Luca, Parliamentary debates of 19 May 2010, National Assembly.

[89] See n 96.

[90] See J Rawls' idea of an 'overlapping consensus' in *Political Liberalism* (Columbia University Press 1993) 150–4.

[91] See B-H Lévy, *Le Testament de Dieu* (Bernard Grasset 1979).

[92] KA Beydoun, '*Laïcité*, Liberalism and the Headscarf' (2008) 10 Journal of Islamic Law and Culture 191.

[93] For a distinction between *laïcité* as a narrative and *laïcité* as a legal concept, see A Ferrari (n 40). And more generally, R Cover, 'Foreword: Nomos and Narrative' (1983) 97 HarvLRev 4–5.

Nevertheless, scratching underneath the surface, one has to acknowledge that the reasoning adopted under the 2010 law brings *laïcité* as a narrative into the realm of the law. Relying purely on political strategies and slogans, the new law is in my opinion flawed both in terms of its sociological premise and of its legal basis. The new ban cannot be justified because first and foremost the premise on which the legislative prohibition relies is wrong: empirical research has suggested that in most cases, the decision to wear the *burqa* is inspired by a personal quest for meaning[94] and identity rather than by an extremist religious position.

> It is important to analyse subtly the relationship that individuals have with religion in order not to confuse religion as resource and support and religious radicalisation where religion becomes the unique source of truth and perspective on the world.[95]

The decision to wear a full veil rarely conveys the imprisonment into religion associated with religious radicalization. Fully veiled women do not necessarily see the world through the unique prism of religion. And when elements of a religious radicalization can be detected, they do not generally carry any political agenda susceptible to threaten public policy but merely seek religious transformation and authenticity.[96]

In order to capture these legally harmless but socially disturbing practices, the concept of public policy has been enlarged so as to include 'a set of fundamental common social features, of common requirements and guarantees'. To some extent, this redefinition of core common values 'around an ethic of surveillance which overcomes the ethic of autonomy' feeds into a broader modern worrying trend which is not specific to France.[97] But this idea of a '*social ordre public*' represents a distortion of *ordre public* which radically puts civil liberties in second position and public policy in first. It therefore amounts to what I see as the most fundamental flaw of the new law. Under the new legislative framework, the priority is no longer to protect individual freedoms save where a threat to security or other conflicting rights are present but rather to ensure that socially common fundamental standards are complied with.[98] Public policy thus becomes a standard in its own right and insidiously empowers the majority to sweep away human rights whenever their manifestation is offensive to the majority of citizens. The restriction of this '*social ordre public*' to fundamental social values is of little consolation given

[94] On the importance for human rights to study people's motivation in depth, see A Vakulenko, 'Islamic Headscarves and the European Convention on Human Rights: an Intersectional Perspective' (2007) 16 Social and Legal Studies 183–99.

[95] A-S Lamine, 'Les Formes actuelles du retour du religieux' in *La Laïcité à l'épreuve du voile*, La Documentation française no 364 (2010) 32.

[96] S Amghar, 'Le Salafisme en France: de la révolution islamique à la révolution conservatrice' (2008) 3 Critique internationale 95–113.

[97] See M Foessel, *Etat de vigilance. Critique de la banalité sécuritaire* (Broché 2010).

[98] See D de Béchillon (n 73) 470.

that the majority alone—through its parliamentary representatives—can decide what behaviours and practices fall within or without this fundamental core of social values. Surprisingly, the *Conseil constitutionnel*[99] nevertheless implicitly gave credit to this notion of '*social ordre public*' by referring to Article 5 of the 1789 Declaration of the Rights of Man and the Citizen which states that 'the legislator is only entitled to edict prohibitions against acts which are harmful to Society.' This article in its negative phraseology was designed to restrict state interferences. Ironically, it has now thus become a source of justification for one of the most intrusive pieces of legislation passed in France.

Admittedly, there are other instances where the State has interfered with individual freedoms for the sake of public morality: the regulation of nudism and pornography for example fall under that category. However in these cases, the chosen path was to regulate and restrict these socially disturbing practices rather than prohibit them altogether. Until the 2010 ban, a similar approach was adopted in relation to the *burqa*. Prior to the 2010 law, a set of texts was already in place to prohibit the wearing of the *burqa* in many contexts: at school, in respect of school pupils or staff under the 2004 previous ban;[100] in public services in respect of public officials;[101] in the vicinity of demonstrations,[102] to quote but a few examples.[103] Moreover, there were many other instances provided for in specific legislative texts, regulations or case law where fully veiled women were to temporarily uncover their face either for security reasons or in exchange for a public service requiring identification. It is the extension under the new legislation of all these specific restrictions and prohibitions to the whole of the public space which marks a radically new turn in the French approach. Far from embodying a French legal tradition, the 2010 ban on the *burqa* therefore runs counter to a long-standing commitment to individual liberty as expressed by Article 4 of the Declaration.[104] Methodologically and legally, the shift is colossal.

However, the promoters of the new law here again argue that this social version of public policy belongs to the French legal tradition. According to the defenders of this social public policy, other instances of a '*social ordre public*' would be noticeable in immigration law:[105] family members are thus only allowed to join a foreign migrant in France if they belong to a 'normal' family unit under French terms. In effect, polygamous marriages, however valid they may be according to private international rules, will be disregarded: only one of

[99] Conseil constitutionnel of 7 October 2010 (n 18), considérant 3. [100] See n 14.
[101] CE 3 May 2000 avis *Mlle Marteaux* (n 51). [102] Décret no 2009-724 of 19 June 2009.
[103] For a full list see the Conseil d'Etat's Report (n 23).
[104] The Conseil constitutionnel made a merely symbolic reference to art 4 which states that 'Liberty is the right to do everything that does not cause harm to others. Thus, each and every human being enjoys natural liberties that know of no other bounds but the very same rights and liberties enjoyed by other members of society. These boundaries must be determined by the legislator.' (author's translation)
[105] See A Levade, 'Le Conseil d'Etat aux prises avec le voile intégral' JCP 2010, 754.

the wives of a polygamous husband settled in France will thus be able to invoke the right to be re-united with her husband.[106] In the 1993 Act relating to Immigration[107] French values are thus imposed against minority held beliefs and the protection afforded to the foreign immigrant's family life is restricted to forms of family life which qualify as 'normal' in the host country. The 1993 Act simultaneously seeks to improve integration of immigrants into French society and to eradicate the practice of polygamy which for many in France appears to be degrading for women. The reasoning here echoes the goals of the 2010 ban on the *burqa* which indeed seeks both to eradicate a practice that the majority would find degrading for women and to impose the host country's views of normality in the hope of fostering better integration of minority groups into French society. Didn't the *Conseil d'Etat* itself prepare the way for the prohibition when it denied French nationality to a veiled woman for want of assimilation into French society?[108]

However, I contest the perceived similarities between previous legislation or case law and the new 2010 ban. Whereas the 1993 legislation and the *Conseil d'Etat* case law addresses the situation of prospective migrants or candidates to French nationality, the 2010 ban targets anyone present on the French territory, whether already a French citizen or a mere tourist. With respect to the former, a set of common values may constitute a legitimate threshold to set for those applying to a special status in the host country such as permanent residency or citizenship.[109] In the UK, pre-entry English language tests were introduced in November 2010 as a prerequisite for entry of migrants from outside the European Union. Debates about the need to promote 'integration'[110] and avoid disjointed societies were thus at the forefront in a vein reminiscent of discussions on the other side of the Channel.[111] As T Asad argues, 'the idea that a successful modern nation-state rests on a dominant culture that encodes shared values is now commonplace'.[112]

This shared conception is a tie between multiculturalism and secularism, two concepts which are often presented as conflicting with each other and which are usually associated with the British and French models of integration respectively. One should not exaggerate the differences between

[106] See Decision of the Conseil constitutionnel no 93-325 DC of 13 August 1993.

[107] Loi no 97-1027 of 24 August 1993 (*loi relative à la maîtrise de l'immigration et aux conditions d'entrée, d'accueil et de séjour des étrangers en France*) JO 29 August 1993.

[108] CE 27 June 2008 *Mme Machbour*, no 286798.

[109] Contra, S Mullally, 'Civic Integration, Migrant Women and the Veil: at the Limits of Rights' (2011) 74 MLR 27–56.

[110] See 'Citizenship Tests in a Post-National Era' (2008) 10(1) International Journal of Multicultural Societies Special Issue.

[111] Integration models of each country may thus not be so far apart as one sometimes thinks. But the emphasis on 'common values' may be more characteristic of the French Republican tradition, see Bowen (n 10) 11.

[112] T Asad, 'Trying to Understand French Secularism' in H de Vries and LE Sullivan (eds) *Political Theologies: Public Religions in a Post-Secular World* (Fordham University Press 2006) 495.

multiculturalism and secularism:[113] both strive to achieve a balance between majority (culturally Christian views) and minority beliefs. Like multiculturalism and secularism, the respective approaches to religious diversity in Britain and France are not as far apart as sometimes stated either. Indeed, neither country espouses one model fully: both countries borrow to varying degrees from both multiculturalism and secularism[114] and both countries strike the balance between national cohesion and conflicting human right requirements more or less favourably for the latter. If the 2010 French ban thus calls into question the commitment to the right to religious freedom, the extension in Britain of pre-entry language tests to spouses of UK citizens raises the question as to whether integration requirements infringe fundamental rights to family life.

Notwithstanding the resonances in immigration policies and debates on either side of the Channel and the interactions on each side of the Channel between the models of multiculturalism and secularism, the 2010 ban on the *burqa* I would argue stands out. To tighten requirements on entry into the French territory or French citizenship is one thing—which the UK is also familiar with. But to then claim to monitor the behaviour of everyone on the French territory and make sure they do not stray away from common values and do not adhere to the *burqa* is a completely different ambition, which cannot relate to British or indeed to French traditions. The set of common values is no longer one of the requirements on which the award of a particular privilege is dependent; it then becomes a permanent imperative that restrains everyone's moves and gestures in all (public) places.[115]

Curiously, however, the absolute scope of the prohibition has been defended as a sign of its legitimacy. By contrast to the balancing approach recommended by the *Conseil d'Etat* and criticized for its complexity, the clear-cut solution contained in the law was praised for its 'clarity', 'purity' and 'courage'.[116] The 2010 ban does convey a clear message: the *burqa* is not only unwelcome in France; it is now also illegal. However, there is no 'purity' but on the contrary sheer confusion and distortion of legal concepts—be it *laïcité*, dignity, equality or public policy. There is no 'courage' but astute political strategies in turning the social discomfort felt towards the *burqa* into a legislative position which is likely to drain the support of the extreme right and secure votes for the elections held in April 2012. The real courage would be to take up a politically

[113] See p 1.

[114] Often described as a true multicultural system, Britain actually also seeks at times a superseding unity: see for example debates on Britishness and British values, S Lee, 'Gordon Brown and the "British Way"' (2006) 77 The Political Quarterly 369–78.

[115] With the exception of places of worship open to the public, see Conseil Constitutionnel 7 October 2010, considérant 5, (n 18).

[116] See A Levade, praising the absolute scope of the law and criticizing by contrast the position recommended by the Conseil d'Etat for its complexity and its cautious approach,: 'Le Conseil d'Etat aux prises avec le voile intégral' (n 105); see also, A Levade, 'Epilogue d'un débat juridique: l'interdiction de la dissimulation du visage dans l'espace public validée!', JCP 2010, 1978–1981.

and socially unpopular position against the ban and in favour of civil liberties. The unqualified nature of the ban may have increased its popularity in France. It will however in my view be the cause of its downfall before the European Court of Human Rights in Strasbourg.

V. LIKELY INCOMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Whereas the *Conseil d'Etat* had given an optimistic prognosis for the fate of the 2004 ban before the ECtHR,[117] it was extremely sceptical as to the compatibility of the 2010 law with the requirements of the ECHR.[118] On the first anniversary of the coming into force of the Act, around 300 women were reported to have been fined.[119]

There is no doubt that if their fines are upheld by higher Courts, the case will be taken to the ECtHR. A French Muslim property dealer, Rachid Nekkaz, said he had created a fund to pay women's fines and legal challenges, and encouraged 'all free women who so wish to wear the veil in the street and engage in civil disobedience'.[119] Since then, a French couple who claimed to have been forced to emigrate to Britain to avoid sanctions under the French ban are reported to have filed a petition to the ECtHR.[120]

The compatibility with the ECHR could also be raised before national courts as French courts have construed Article 55 of the French Constitution as allowing international treaties direct effect before French domestic courts.[121] Despite the blessing conferred by the *Conseil constitutionnel*'s decision, the Cour de cassation could still therefore set aside the legislation on the basis that it violates Article 9 of the ECHR which protects the right to religious freedom.[122] But even if the Cour de cassation—as seems more likely—applies the 2010 Act, it is very doubtful that the legislation will survive a challenge before the ECtHR. Before Strasbourg, it is likely that the 2010 ban would be held to infringe Article 9 rights to religious freedom and that the infringement, assuming it is regarded as necessary to serve a legitimate aim, would then be held to amount to a disproportionate interference.

[117] CE 8 October 2004 *Union française pour la cohésion nationale,* no 269704.

[118] Conseil d'Etat Report (n 23) 32.

[119] <http://www.newsnet14.com/?p=100115> accessed 4 June 2012>. <http://www.france24.com/en/20110819-french-businessman-pay-all-burqa-fines-belgium-rachid-nekkaz> accessed 4 June 2012.

[120] <http://jurist.org/paperchase/2011/06/france-muslim-couple-to-challenge-burqa-ban-in-echr-spain-court-uupholds-city-ban.php> accessed 20 March 2012.

[121] See M Hunter-Henin, 'France. Horizontal Application of Human Rights in France. The Triumph of the European Convention on Human Rights' in D Oliver and J Fedtke (eds), *Human Rights and the Private Sphere – A Comparative Study* (Routledge-Cavendish 2007) 98–124.

[122] Indeed, the Cour de cassation has shown in the past that it is audacious enough to challenge new legislative moves when other supreme French national courts have behaved with greater reverence towards Parliament. See M Hunter-Henin, 'Constitutional Developments and Human Rights in France: One Step Forward, Two Steps Back' (2011) 60 *ICLQ* 1–22.

To escape censorship by the ECtHR, the 2010 French Law would first need to be proven to pursue a legitimate aim. Dignity and equality between genders have been implicitly recognized by European case-law but this may not (or no longer) be seen by the ECtHR as justification for paternalistic measures in the absence of immediate threats to public order.[123] Would the notion of a *social ordre public* save the French position in Strasbourg as it did before the *Conseil constitutionnel*? The risk of conflict has been upheld as a reason to restrict religious freedom in Turkey[124] but it is doubtful that the risk posed by the full veil will be judged sufficiently tangible in the French context.[125] A broader notion of public policy does not exist under the case law of the ECtHR but arguably, under the wide margin of appreciation granted to Member States in areas where religious/secular national identities are at stake, this idea could be encompassed under the concept of *laïcité*. In that sense, *laïcité* would probably qualify more easily than other rationales as a legitimate aim pursued by the ban. One may question, however, whether *laïcité* is at stake where regulation of religious manifestation occurs outside of public services; I have argued above that it is not. But previous ECtHR case law suggests that the European Court will not enter into a discussion of what the notion of *laïcité* itself entails but on the contrary take for granted state claims in that respect.[126] However, the Court will be far less deferential when it comes to ascertaining how bans pronounced for the sake of *laïcité* have been enforced. It will thus assess whether the infringements of individual religious freedoms are proportionate to the alleged requirements of *laïcité*. A State may exceed its margin of appreciation by taking disproportionate measures in the name of national identity.[127] France therefore will not be able to escape the test of proportionality in Strasbourg and when it does, the 2010 ban in all its absolute clarity is highly unlikely to pass the test.

It is surprising that this lack of proportionality did not incur censorship by the *Conseil constitutionnel*. Disappointingly, the *Conseil constitutionnel* carried out a very superficial examination of the law and was content that it had passed the requirements of proportionality in view of the gradual system of sanctions put in place by the law.[128] But a measured system of penalties is no guarantee that the prohibition itself is in the first place a proportionate response. One may hope that the ECtHR will apply the proportionality test more convincingly by putting into the balance the aim(s) sought by the ban on the one hand and the restriction to religious freedom it causes on the other.

[123] See ECHR 17 February 2005 *KA and AD v Belgium,* no 42758/98 (but in the context of practices carried out in private).

[124] ECHR *Sahin v Turkey,* App no 44774/98 [2004] 299 paras 97–8.

[125] See n 135.

[126] ECHR 4 December 2008 *Kervanci v France*, no 31645/04 and *Dogru v France*, no 27058/05 para 62.

[127] See E Brems, 'Human Rights: Minimum and Maximum Perspectives' (2009) 9 HRLRev 359–65.

[128] Conseil constitutionnel 7 October 2010, (n 18), considérant 5.

The most recent case against Turkey, *Ahmet Arslan*[129] supports this view. In that case, the prohibition of a peaceful religious event in the streets was held to amount to a disproportionate interference with religious freedoms. The principle of *laïcité*, even in the Turkish tense context, could not justify an absolute prohibition of religious public display, in the absence of a present proven threat to public security. Several factors, according to the ECtHR, pointed to a lack of necessity for the prohibition in *Ahmet Arslan*: the targeting of mere 'citizens' (para 48), rather than public agents[130] or teachers[131] who could be reasonably submitted to more stringent restrictions; and the extension of the prohibition to 'ordinary public places' such as public streets (para 49), rather than public buildings where the connection to the State could warrant a greater obligation of religious discretion. The Court also remarked that the plaintiffs were members of a group devoid of influence or political ambitions (para 51).

The facts of *Ahmet Arslan* would not fall under the scope of the French 2010 legislation. Under Article 2 of the French Act,[132] full covering of the face in the context of cultural or religious specific events escapes the prohibition. It is merely day-to-day wearing of the *burqa* which is forbidden under the Act. Nonetheless, the reasoning adopted by the European Court in *Ahmet Arslan* against the Turkish prohibition could easily be transposed to the French ban. Just like the Turkish prohibition, the French Act problematically affects 'ordinary citizens' in 'ordinary public places'. By analogy, the French ban on the *burqa* is therefore likely[133] to be regarded as a disproportionate reaction to a minority practice which no evidence connects to any security threats or social unrest, except for a feeling of social discomfort. If the Strasbourg Court has been more lenient towards state interferences where these were opposed to groups—such as Islamist political parties in Turkey—that threatened the political liberal order,[134] the lack of evidence linking the wearing of the full veil to a political agenda of its wearers/promoters makes it very unlikely that the Strasbourg Court will show the same leniency towards the French 2010 ban.

Moreover, the stigmatization of the Islamic faith—which the less overt title finally[135] chosen for the 2010 law cannot hide—may give rise to a violation of Article 9 combined with Article 14 of the Convention. The 2004 ban was also clearly inspired by headscarf affairs and thus clearly targeted at Islam. But the prohibition against ostentatious religious signs at school could objectively

[129] See ECHR 23 February 2010 Ahmet Arslan and Others v Turkey, 41135/98, D.2010, 682–4, J-P Marguénaud.

[130] See *ECHR* 26 September 1995 *Vogt v Germany*, 1996-IV, no 14, 21 EHRR 205; ECHR 20 May 1999 *Rekvéni v Hungary*, 25390/94.

[131] See ECHR 15 February 2001 *Dahlab v Switerland*, 42393/98; ECHR 24 January 2006 *Kurtulmuş v Turkey*, 65500/01.

[132] See (n 137).

[133] Depending of course on the circumstances of the case put forward to Strasbourg as the ECtHR does not examine Acts *in abstracto* but in relation to their application to a particular case.

[134] ECHR *Refah Partisi v Turkey*, no 41340/98, 41343/88 and 41344/98 [2003] 37 EHRR 1.

[135] On the advice of the Conseil d'Etat. See Report, (n 23) 21.

apply to symbols of other religions. Other religions on the other hand will escape the 2010 ban. As for other non-religious instances where someone may be arrested for covering his/her face in public places, it is likely that the list of exceptions provided for in Article 2[136] would then apply. In effect, the ban is not likely therefore to be applicable in any other instances but the wearing of the *burqa*. Despite its neutral language, the 2010 ban inescapably qualifies as a piece of legislation restricting a particular type of religious practice. This religious dimension was implicitly acknowledged in the *Conseil constitutionnel*'s decision which ruled that the ban was compatible with the French Constitution provided that the prohibition was not enforced in places of worships or their vicinity.[137] As such, the legislation may be regarded as discriminatory towards Islam and consequently may constitute a violation of Article 14 which provides for anti-discrimination protection in respect of convention articles (in the present case: Article 9). The argument that only extreme unacceptable forms of Islam[138] would fall under the prohibition could not prevail since the ECtHR has asserted many times that it is not up to Member States to assess the legitimacy of particular religious beliefs.[139] Indeed, religious freedom would be seriously hampered if only moderate forms of beliefs and practices acceptable to the State were covered. Similarly, the argument that the wearing of the *burqa* would not be a 'religious' manifestation since there is no clear religious requirement to cover one's face under Islam is bound to fail. Regardless of the controversies in their interpretation, the wearing of the *burqa* originates in scriptural authorities in the *Qur'an*[140] and is subjectively strongly felt by the women who wear it as carrying a religious meaning. It is therefore likely that legal challenge to the 2010 ban as violating Article 9 (and also possibly Article 14) ECHR would succeed before the ECtHR.

Nevertheless, proponents of the ban do not consider criticisms of it—and even the possibility of an adverse ruling by the ECtHR—as a reason for abandoning it.[141] Departing from a European consensus (itself possibly emerging with Belgium and possibly The Netherlands now following suit) or from national tradition is not—the argument goes—a flaw in itself. Otherwise, no legal changes could ever be implemented. But lack of grounding in

[136] Art 2.2 of the 2010 law provides that the ban will not apply to instances where the covering of the face is prescribed by other legislative or regulatory requirements; is mandated by health or professional reasons; or occurs in the context of sporting, artistic or traditional events.

[137] Conseil constitutionnel, (n 18), considérant 5.

[138] This vision inspired the French parliamentary resolution adopted on 11 May 2010 (Ass Nat XIII législature, TA no 459; JCP 2010, act 551, comments by Anne Levade) in which the full veil is described as a radical practice that is contrary to the values of the French Republic.

[139] See for example, ECHR 26 October 2000 *Hasan and Chaush v Bulgaria*, para. 78.

[140] On these Quranic origins, A Barlas, '*Believing Women' in Islam: Unreading Patriarchal Interpretations of the Qur'an* (University of Texas Press 2002) 53.

[141] A Levade (n 105) 756.

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traditional legal concepts may be less an indication of innovation than of imperfection when in the absence of this legal tradition, the very necessity of the ban cannot be justified. Indeed that is why the promoters of the ban have shown endless energy in seeking to root the new law into previous texts and concepts. Anne Levade, whilst defending the innovative approach of the new legislation and undermining the importance of respect for tradition, thus seeks to anchor the new law into the 1789 Declaration on the Rights of Man and the Citizen:

> the terms of the Declaration could support this (innovative) notion of '*social ordre public*' in so far as the authors of the Declaration were striving to establish a framework for the relationships between Man/the Citizen on the one hand and a constituted society on the other.[142]

The social dimension in place in 1789 seems to me a tenuous argument for linking the new concept of '*social ordre public*' to an established French tradition of civil liberties. But these efforts to demonstrate legal continuity are interesting; they reveal a legitimate desire to look beyond political majority for justifying the ban. Coherence within the legal system is a quality required for the 'morality of law'.[143] Political majority alone cannot legitimate infringements of minority rights.

In any case, censorship by the ECtHR, as explained above, would actually not be incurred because of the arguably illegitimate aims sought by the law but because of the way these aims are being implemented. More likely than not, it is the lack of proportionality between the infringements caused and the aims sought by the prohibition that would lead to a condemnation of France in Strasbourg. And this requirement of proportionality, despite its complexity, should in my view be embraced. It is an opportunity to balance conflicting interests and take into account a diversity of viewpoints. It is the best protection against logics of antagonism and the best vehicle for ensuring that multiculturalism/secularism models foster reconciliation rather than generate confrontation.

VI. CONCLUSION

Why then don't the French like the *burqa*?

As in 2004, the prohibition of a certain type of religious symbols was seen as the answer to force integration of minority groups. As such, the 2010 ban may tie in with current debates on multiculturalism and integration across Europe, including in the UK. But this political timeliness is not enough to ground the law in the traditions of secularism and feminism. The absolute scope of the law which covers the whole of the public space betrays both secularist and feminist

[142] ibid.
[143] See L Fuller, *The Morality of Law* (Yale University Press 1969).

tradition by leaving no scope for the expression of difference within the public sphere and by leaving no room for subjective views of dignity by veiled women. None of the arguments invoking the concepts of *laïcité,* equality, dignity or '*social ordre public*' as evidence of a unique French manifestation of secularism and feminism are convincing.

The 2010 ban falls outside of the boundaries of the notion of *laïcité.* Even the most virulent forms of *laïcité* cannot stretch beyond public services or public agents and be applied to places and people who in no way emanate from the State. If they did, *laïcité* would no longer be a mode of Church/State relationship which leaves room for the manifestation of individual beliefs but would become a vehicle for State indoctrination. Nor is the 2010 ban about protecting women's dignity and equality. Such paternalistic views of dignity cannot be enforced where no conclusive empirical evidence suggests that the full veil is in most cases worn as a result of coercion. If they were, individual autonomy and liberty in the public sphere would simply be denied. Finally, the 2010 ban cannot rely on the notion of '*social ordre public*'. While the 2010 law is indeed about promoting common values and fostering a way of 'living together', '*un vivre ensemble*', in a legal system committed to human rights, this goal cannot be enforced at the cost of civil liberties. Proportionate interferences with religious freedoms may be justifiable but the absolute negation of individual rights—be it in respect of a garment that appears so alien and extreme—cannot in law be upheld. Despite the recent approval bestowed by the French Constitutional council, it is predicted that the law will fall foul of European Convention requirements. Even if —given the wide margin of appreciation that the European Court grants to Member States in these areas—*laïcité* may well (but wrongly in my view as argued above) qualify as a legitimate goal pursued by the ban, the 2010 ban is bound to fail for want of proportionality between the aim sought and the absolute and unqualified[144] restriction on religious freedom it carries.

Secularism, *laïcité* and multiculturalism as it has been said[145] are all tools designed to manage diversity. As such, they can never endorse measures which aim at erasing differences altogether. For the sake of *laïcité* and multiculturalism as well as for human rights, it is to be hoped that the 2010 ban will not become the new model for Europe.

[144] Save for the private sphere where the *burqa* however won't be felt needed.
[145] See Part IV.

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