The European Case Against the Face-Veil

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Abstract

In 2010, France banned the wearing of face-veils in public. Anglo-liberal scholars criticized the move vehemently. France succeeded in confusing the European Court of Human Rights into accepting the proposition that the visibility of the face is key to the so-called “vivre ensemble.” However, such arguments distract our attention onto the material implication of the practice of veiling while obscuring the genuine driver behind the prohibition, i.e., the metaphysical harm caused by publicly displaying an ideology supporting a competing vision of the good. This is corroborated by those attempts to ban the burkini in the summer of 2016 in some French municipalities. The surge of face-veil bans and condemnations of the practice of face-veiling across Europe underscores the existence of a common sensitive nerve: the face-veil appears to defy the minimal amount of cohesiveness necessary for the preservation of collective identity within European culture. In turn, this article provides a legal articulation for the ban that does not need the tenets of French republicanism as support. Drawing from anthropology, sociology, and political philosophy, I elucidate how, in this haphazard concept of vivre ensemble, one must read in a legitimate injunction to abide by the tacit, unbending rules of membership inherent to a national community.
I. Introduction

In June of 2009, five years after the prohibition of all religious symbols in French public schools, then-president Nicolas Sarkozy decided to proscribe the *burqa.* The French legal community, while supportive of the project’s aim, was generally reserved regarding the constitutional validity of its translation into law. However, the legislative proposal prohibiting concealment of one’s face in public received overwhelming support in Parliament, and then passed France’s *Conseil Constitutionnel*’s muster. Meanwhile, the criminalization of face-covering was swiftly criticized by the U.S. State Department, prominent Non-Governmental Organizations and most Anglo-liberal thinkers who viewed the law as an unjustifiable violation of freedom of religion and expression.

Since the enactment of the ban, several developments have reignited the debate. First, in 2014, the European Court of Human Rights (ECHR) held that France could be justified in outlawing the face-veil. Second, countries and subnational jurisdictions across Europe have subsequently adopted full or partial face-veil bans – and condemnations of the practice have poured in. Third, France is again at the forefront of unsettling polemics over the permissibility of religious expression. Several coastal municipalities outlawed the burkini beachwear in the summer of 2016. More recently, the *Front National* party

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2 “We cannot accept (…) women imprisoned behind a mesh, cut off from society, deprived of all identity. That is not the French Republic’s idea of women’s dignity.”

[http://news.bbc.co.uk/2/hi/europe/8113778.stm](http://news.bbc.co.uk/2/hi/europe/8113778.stm)
leader\textsuperscript{3} publicly reiterated her intention to prohibit the wearing of \textit{all} “ostentatious” religious signs in the public space if elected – this being a seemingly neutral way to get rid of hijabs.\textsuperscript{4} Amid this frenzied context, a poised reassessment of the compatibility of foreign cultural and religious practices within early 21\textsuperscript{st} century Western society becomes a pressing matter.

This paper meets that challenge in several respects. It explores the liberal arguments that have been advanced to assail the face-veil prohibition, and also exposes the far-reaching and unique societal project that coheres with this critique. At the same time, it presents the original French republican arguments against the ban, which most of the Anglo-liberal literature seems to have misapprehended. It further accounts for the discrepancy between the conceivable justification proposed by the \textit{Conseil d’État}, i.e., a renewed definition of public order (which it did not endorse), and the argument France chose to submit before the ECHR to defend its position – that is, the necessity to show one’s face for the sake of life in society, the so-called \textit{vivre ensemble} (living together) principle.

France succeeded in confusing the majority into accepting this hazy notion as controlling the case. However, this inquiry shows that the visibility of the face is almost secondary to the issue at hand. It distracts our attention onto the material implication of the practice of veiling, problematic as it may be. In

\footnotesize{\textsuperscript{3} Claiming over a quarter of the popular vote in the 2017 presidential campaign polls.}\textsuperscript{4} \url{http://www.thetimes.co.uk/article/le-pen-would-ban-religious-dress-in-public-jfvtmknx3}

Relatedly, in March of this year, the European Court of Justice issued a joint judgment in the cases of two women, one of them from France, who were dismissed for refusing to remove their headscarf.
so doing, it obscures the genuine metaphysical harm caused by publicly displaying the ideology underlying the face-veil, which arguably constitutes the real driver behind the prohibition.

This harm is exacerbated in a country where the civic virtues hailed by the French Revolution, the memory of bloody sectarian conflicts, together with the strong state secularism that has spilled over to the entire society,⁵ have blurred the line between cultural identity and political identity. Because the face-veil manifests not just a religious practice but spearheads a competing political project, it is easier to understand why, in French society, more vividly than elsewhere, the face-veil represents a public nuisance – and why, on balance, this may justify infringing on a fundamental right. This general climate of suspicion accounts for those more recent rash stances that extend the logic behind the prohibition without due consideration for the public liberties at stake.

Be that as it may, the face-veil is now being outlawed or condemned in countries which do not share the French republican tradition. Hence, the anxiety the face-veil provokes points to a common sensitive nerve: the face-veil appears to defy the minimal amount of cohesiveness necessary for the preservation of collective identity within European culture. The threshold may vary across countries, but it exists nonetheless. In turn, this article provides an argument for the ban that does not need the tenets of French republicanism as support. Drawing from anthropology, sociology, and political philosophy, I elucidate

⁵ One telling example: Air France female flight attendants were the only ones in the world to petition for an exemption to wear the headscarf in Iran.
how, in this haphazard concept of *vivre ensemble*, despite being worded like the title of a condo regulation, one must read in a legitimate injunction to abide by the tacit, unbending rules of membership inherent to a national community.

II. **Background**

II. 1. The 2010 French Ban

Development of the proposal to ban the face-veil began in 2009 with the establishment of a nonpartisan commission of inquiry on the wearing of the face-veil. Diverse views were heard, from legal scholars, public officials, social critics, academics, community representatives, as well as women wearing a face-veil. The 658 page Gérin report⁶ reflected a deep-seated rejection of the practice from all segments of civil society.

To evaluate the conformity of a blanket prohibition with French and European law the executive branch asked the *Conseil d’État*, the highest Court for administrative matters, for a nonbinding opinion. Accordingly, the *Conseil d’État* issued a detailed report which concluded that a complete ban could not be supported within the French legal order and would also contravene European constitutional jurisprudence. Nevertheless, the French government decided to proceed.

The government insisted that the ban hinged on the nebulous notion of *vivre-
ensemble. During the legislative process, an impact-assessment document acknowledged the need for a democratic society to accommodate symbols expressing pluralism, yet adding that such accommodation should not undermine the foundations of the social contract that makes social cohesion possible. The bill elaborates upon the latter point in more articulate fashion. It asserts that face-veils constitute a form of symbolic and dehumanizing violence that offends society as a whole. Subsequently, a report was prepared for the National Assembly, elaborating further on the rationale for a strict prohibition and using this time an expanded interpretation of the notion of public order as the core argument, emphasizing its validity under both French and European constitutional law.

In Parliament, the proposal received overwhelming support among the majority. The opposition abstained. The law was worded in neutral terms to avoid being struck down by the Conseil Constitutionnel, France’s Supreme Court for constitutional matters. Therefore, although the government had made it clear that the purpose was the ban of burqas and niqabs, those are not mentioned in the final text. Exceptions were provided to avoid situations where those socially accepted circumstances for concealing one’s face would have contravened the new law.

7 http://www.assemblee-nationale.fr/13/propositions/pion2272.asp
8 http://www.assemblee-nationale.fr/13/projets/pl2520-ei.asp
9 http://www.assemblee-nationale.fr/13/projets/pl2520.asp
10 http://www.assemblee-nationale.fr/13/rapports/r2648.asp
11 Future PM Manuel Valls being a notable exception.
The Conseil Constitutionnel found no basis to declare the law unconstitutional. It only added to the list of exceptions that face-covering attire should be lawful inside places of worship. It invoked broadly defined principles in support of the law, acknowledging that France’s republican identity served as its primary motivation. Reminiscent of U.S. Supreme Court Justice Robert Jackson’s advancing (in dissent) that the Constitutional Bill of Rights is not a “suicide pact”\textsuperscript{12} the Court noted the limitation on freedom of religion yet upheld the law after implementing a succinct proportionality test.\textsuperscript{13} The ban was enacted shortly after.

II. 2. Developments outside France

The Council of Europe criticized the ban as flouting European values.\textsuperscript{14} A disparate choir of critiques joined in: the U.S. State Department, NGOs, and many Anglo-liberal academics reproved the ban, holding it contrary to international human rights law, including the Universal Declaration of Human Rights (UDHR).\textsuperscript{15} Adopted in the wake of WWII, the UDHR champions a

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\textsuperscript{12} Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949). The phrase expresses the view that constitutional restrictions on governmental power must be balanced against the need for survival of the state and of its people.

\textsuperscript{13} www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/en2010_613dc.pdf


\textsuperscript{15} See, for example, https://www.article19.org/data/files/pdfs/publications/bans-on-the-full-face-
global consensus on fundamental rights, shielded from the bearings of cultural particularisms. However, as early as 1947, the American Anthropological Association warned that the Declaration would be anything but universal, instead reflecting Western values, and noting that “what is held to be a human right in one society may be regarded as anti-social by another people”.16

The European Convention for the Protection of Human Rights and Fundamental Freedoms’ (henceforth “the Convention”) philosophical inspiration derives from the UDHR. However, out of pragmatism, the ECHR has interpreted the Convention’s provisions with deference to Council of Europe member states. This stance is embodied in the “margin of appreciation” doctrine guiding ECHR jurisprudence.17 Succinctly, where there is strong consensus on the correct interpretation and application of a provision, the ECHR will show little deference to states accused of infringing certain Convention-protected rights.18

It is against this background that a petition to the ECHR over the French face-veil ban was filed on November 2013. S.A.S. (the initials of the woman

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bringing the challenge) was supported by NGOs such as Article 19.\textsuperscript{19} To summarize, S.A.S. argued that the prohibition is disproportionate, discriminatory, and in contravention of her rights to freedom of religion, expression, and private life. France replied, \textit{inter alia}, that the scope of the ban falls within the margin of appreciation doctrine. Along with arguments based on public safety, gender equality, and dignity, France advanced that the ban is proportionate to the goal of preserving the \textit{vivre ensemble}. Yet, France’s submission on this point was laconic given its centrality to the case:

\begin{quote}
[T]he face plays a significant role in human interaction: more so than any other part of the body, the face expresses the existence of the individual as a unique person, and reflects one’s shared humanity with the interlocutor, at the same time as one’s otherness. The effect of concealing one’s face in public places is to break the social tie and to manifest a refusal of the principle of “living together” (le “\textit{vivre ensemble}”).\textsuperscript{20}
\end{quote}

The case hinged on whether the ban would come under the exception provided in Article 9(2) which establishes that the freedom to manifest one’s religious beliefs may be subject to limitations that are “prescribed by law and are

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\item \textsuperscript{20} S.A.S. \textit{supra} at 37-38.
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necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”21 Importantly, France did not attempt to promote an expansive definition of public order as possible justification, choosing instead to invoke the protection of the rights and freedoms of others.22

The ECHR ruled in favor of France on July 2014 by a majority of 15 to 2. The Court undertook a four-part test to determine whether the ban constitutes an infringement of the appellant’s rights. The Court found those arguments alleging infringement of Article 8 (right to respect for private life) and Article 9 (right to manifest one’s beliefs) to be admissible.

The Court then considered whether France had a legitimate aim in enacting the ban. Of all the arguments advanced by France, the Court only accepted the submission that the law aims to ensure the respect for the minimum set of values of an open and democratic society, and specifically, the respect for the minimum requirements of life in society, holding that this value corresponds with the legitimate aim of protecting the rights and freedoms of others.23

After finding that the ban is premised on a legitimate state objective, the Court undertook a proportionality test. In finding that the ban is proportionate to


22 Supra note 18 at 37.

23 S.A.S., supra note 18 at 49 (“The Court is… able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialization which makes living together easier.”).
the goal of promoting *vivre ensemble*, the Court drew attention to the fact that the ban is not specifically targeted towards Muslims, but rather towards the practice of concealing the face. The entire case, therefore, was premised on the idea that facial visibility is necessary for proper socialization.

The majority referred to the ban as a “choice of society,” acknowledged the rift in human rights values, and accepted that France offered valid justifications that do not warrant overturning the ban. The judgment, however, does not elaborate on the key matter at hand, which was not lost on the dissenting opinion: what is the basis for a right to live in a so-called “space of socialization”?

Since the rendering of the judgment, the face-veil debate has crossed national boundaries and legal traditions, thus proving that it is not specific to the circumstances of French Republicanism. Aside from Belgium, which adopted a full ban around the same time France did, several other European states have since implemented either full bans, partial bans in public institutions, or are in the process of implementing one of these options. The Swiss canton of Ticino adopted a full ban in 2015.24 Bulgaria followed suit in 2016.25 A partial ban is currently going through the legislative process in the Netherlands and in Austria. In the UK, hotbed of the liberal tradition, a 2016 poll found that a 2-1 majority are in favor of banning the face-veil in public.26 And in Germany, Chancellor

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Merkel recently called for a face-veil ban wherever legally possible to prevent the development of parallel societies.\textsuperscript{27} If the threat of social fragmentation and national disintegration were the real drivers behind the French face-veil ban, it may well be that the argument that the \textit{vivre ensemble} requires the visibility of the face is, at best, incomplete.

II. 3. Back to France: what the uproar around the burkini reveals on the face-veil issue

Another indication that the doctrine behind the prohibition remains incompletely chartered is provided by the case of the burkini ban, first enacted by the French Riviera municipality of Cannes and followed by several others in August of 2016.\textsuperscript{28} Arguably, the nationwide face-veil ban and the municipal burkini bans were motivated by the same discomfort. Similar arguments were proffered in both cases. Nicolas Sarkozy himself made the burkini ban part of his platform in the mainstream right wing party 2016 primaries, thus betraying a lack of engagement with the subtleties of the law he himself fathered.\textsuperscript{29} The socialist government decided against introducing a legislative proposal against the burkini; however, then prime minister Manuel Valls called the burkini a provocation of radical Islam, incompatible with the French values of the

\textsuperscript{27} \url{http://www.express.co.uk/news/world/652842/Burka-Niqab-Islamic-Face-veil-Ban-UK-Fine-France-Belgium-Netherlands-Europe-Muslim-dress}

\textsuperscript{28} \url{http://www.bbc.com/news/world-europe-37056742}

\textsuperscript{29} \url{https://www.theguardian.com/world/2016/aug/26/burkini-row-nicolas-sarkozy-calls-for-nationwide-ban}
Republic, and personally supported the municipal bans: “The burkini is not a new range of swimwear, a fashion. It is the expression of a political project, a counter-society, based notably on the enslavement of women.”

Clearly, understanding why France refrained from banning the burkini, even with the recent backing of the ECHR, is instructive toward a better understanding of the motivations, justifications, and contours of the face-veil prohibition.

In all cases but one, the burkini bans were grounded implicitly, but exclusively, on the notion of sociability, despite the alleged security concerns. While the face-veil was said to undermine the *vivre-ensemble*, the burkini must have spoiled the *nager-ensemble*, or the *bronzer-ensemble* among fellow beach goers. Here, the visibility of the face was not at stake; rather, it was the perception of a symbolic assault on shared customs. At issue was the invasion of the common space by religious, prescriptive norms (that is, this is how I should appear; therefore, this is how you should appear as well if you are a fellow Muslim woman); the violation of a time honored etiquette that calls for religious signs to be discreet in public; the swaggering of apartness; and the diffuse reminiscence that the ideology underlying the burkini is associated, elsewhere, with less frivolous attempts to regulate gender relations and the presentation of the female body in public. Succinctly, the burkini was perceived as a beacon of subversion.

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31 The ban originating from the municipality of Sisco was explicitly based on considerations of material public order following a brawl between Muslims and non-Muslims on the beach.
On judicial review, the *Conseil d’État* stuck to the broad principle that individual public liberties must be defended absent material breach of the public order.\(^{32}\) The bans were therefore quashed. Yet, the *Conseil d’État* declined to tackle the root of the problem (or, alternatively, to compare burkinis and burqas). It would be simplistic to view the reasons that distinguish the face-veil ban from the burkini bans as deriving solely from the visibility of the face as the locus of the *vivre ensemble*. The offences that each garment conveys belong to the same category of symbolic harm.\(^{33}\)

A legitimate question is therefore the following: is it simply that the mischief emanating from the two garments differ in their degree that a ban is an appropriate response for one and not for the other? Alternatively, if the idea of a burkini ban can be easily dismissed, does that not threaten the justification for the face-veil ban?

### III. Critiques of the face-veil ban and a partial solution

#### III.1 The Liberal Critique

For liberals, the concept of right is originally associated with the notion of a

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perimeter of individual freedom defined against the state.\textsuperscript{34} Government, writes Dworkin, “must not constrain liberty on the ground that one citizens’ conception of the good life … is nobler or superior to another’s.”\textsuperscript{35} Liberals thus express a preference for a level playing field on which individuals can live according to their preferred ethical code. Achieving equilibrium among competing rights-holders requires a state that is philosophically neutral. Its objective is to apply laws that guarantee the compatibility of individual freedoms. In their attack of the face-veil ban, liberals have not simply proclaimed their attachment to this credo, but have also tried to delegitimize the competing arguments in favor of the ban.

The \textit{S.A.S} case provides an instructive starting point to explore such views. For the dissent, if, as the majority contends, the impugned law protects the French right to “liv[e] together” – requiring, as it does, the communal observance of “minimum requirements of life in society” – then this right must be clearly protected. However, by defining this concept as amorphous, the dissent precludes any possible finding of such a right within the Convention. Given such a debased conceptualization of “living together,” the subsequent discussion of proportionality is a self-consciously empty gesture: since the ban does infringe the rights of those who wish to wear a face-veil, there can be no meaningful balancing exercise when the law is not directed at a legitimate aim.

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\textsuperscript{34} Michael Ignatieff, \textit{Human Rights as Politics and Idolatry} (Princeton Univ. Press, 2001) at 63-77.
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Therefore, it is wrong to allow abstract principles, dismissed as “far-fetched and vague,” to trump concrete rights. To buttress the argument that there is no justifiable claim to be free from face-veils, the dissent relies on a large body of jurisprudence thus summarized: “[T]here is no right not to be shocked or provoked by different models of cultural or religious identity.” In short, pluralism requires the protection of potentially offensive imagery and unconventional opinions.

This line of reasoning is reminiscent of so-called reformation liberalism which openly welcomes the collision of earnestly held ideals and opinions about the nature and basis of the good life. In this perspective, “moral distress” is a “positive and healthy sign that the process of ethical confrontation that Mill called for is actually taking place.” Thus, one reason for protecting illiberal ideas is that they are bound to induce such distress.

However, beyond asking for people to bear the harm that the ban seeks to prevent for the sake of tolerance and pluralism (and the feasibility of such a demand may then be questioned), the two judges embark on a discussion aimed at playing it down. While the dissent correctly submits that the hiding of the face is not the true source of the “uneasiness” at play, it immediately qualifies that the perception of harm is based on the face-veil’s “presumed” philosophical

36 SAS, supra note 18 at 61.
37 Id, at 62.
underpinnings. After characterizing the face-veil as physically neutral (albeit potentially ideologically loaded), it is presented as the subject of competing symbolic interpretations (and therefore, possibly, misinterpretations). In passing, the dissent explicitly conjectures that the French rejection of the face-veil may be motivated by fear.40

Similarly, the idea that fear is behind the face-veil ban is a running theme in Martha Nussbaum’s book The New Religious Intolerance.41 However, since fear can be rational, the argument goes further by asserting that policies restricting religious freedom should be understood as the product of ignorance about the meaning and purpose of foreign cultural and religious practices. Going further, Nussbaum equates the repudiation of the veil with colonial preference for dominant uniformity. The opposition between us and them gains traction, she suggests, based on the populist usage of fear and suspicion; societies are vulnerable to this form of distrust, which is exploited by those in power or those who wants to seize it.

The attempt to delegitimize the repulsion that the face-veil provokes by taking it away from the realm of reason, and then frame the issue as one of domination and oppression, is reminiscent of Joan Scott’s critique of the earlier prohibition of religious symbols in public schools.42 Lumping the French republic ideals and the notion of French national community into the mixture of

40 S.A.S. supra note 18 at 62.
myths and fantasies, French social norms become folkways at best, and the French, trapped in their obsolete parochial ideology, just need to mature up. Scott mocks the “alleged superiority of French gender relations, [and the way of] associating them with higher forms of civilization.” The French model of integration, for Scott, depends on the sublimation of cultural identity into the homogenous French archetype – which Robert Goodin once called “a particularly vicious form of closed communitarianism, a collective attitude of “We’re all right, [Jean-]Jacques.”

The liberal critique of the face-veil ban continues to sound from various sources, but generally conforms to a simplistic rendering of “living together” and views the assertion of national values as a dominating impulse. The notion that some cultures may indeed be incompatible, or the existence of a clash of civilizations, are brushed off. For liberals, the insistence on assimilation embodies a xenophobic concern toward privileging a singular Western perspective. This covert objective requires discrediting, if not silencing alternative points of view.

The solution, according to Scott, is to acknowledge differences in ways that call into question the certainty and superiority of our own views, and instead of assimilation, to think about the negotiation of differences. In the same vein, for Nussbaum, it consists in respect for human equality and a “curious and sympathetic imagination.” Similarly, Charles Taylor’s recommends that

43 Id. at 16.

“contemporary democracies, as they progressively diversify... undergo redefinitions of their historical identities, which may be far-reaching and painful.”45

The end outcome of this introspective, questioning, and negotiating process, in the context of those human interactions in which the face-veil ban is situated, is perhaps most clearly announced by Judith Butler, who submits that the public space belongs to – and is, in fact, solely constituted – by each discrete individual. In *Bodies in Alliance and the Politics of the Street*, for instance, she suggests that “bodies in their plurality lay claim to the public, find and produce the public through seizing and reconfiguring the matter of material environments.”46 Given this formulation of the public sphere, it is difficult to imagine how any version of collective identity could arise amidst the subjects that create and continuously reshape, rather than cohere around, a fragmented public community.

III.2 The Republican Critique

Many republican thinkers were equally critical of the ban. Republicanism, like liberalism, is a doctrine that protects fundamental rights. This is evident from the 1789 Declaration. However, contrary to liberalism, republicanism is concerned with a community’s ethical context.47

Based on the idea of self-realization through participation in public affairs,


46 http://www.eipcp.net/transversal/1011/butler/en

republicans must commit to civic virtue\textsuperscript{48} and embrace the obligation for reasonable, good-faith interaction resulting in eventual consensus. Republican rights are not mere individual entitlements but also mechanisms enabling citizens to deliberate and achieve the realization of the common good.\textsuperscript{49} In particular, because the republican framework emphasizes the public dimension of autonomy and self-government, it supports a more demanding ideal of participatory democracy than what the liberal architecture calls for.

In turn, in the republican model, the state is entrusted with the responsibility of guaranteeing not only negative but also positive liberty. However, such positive liberty can only flourish within a given socio-cultural environment. Conceptually, then, the republican state is better justified than the liberal state in interfering with private conducts to protect the distinct set of values deemed essential to the success of free political institutions. Paradoxically, the republican agenda was well summarized by liberal former Chief Justice of Canada Brian Dickson: “It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.”\textsuperscript{50}

Applying these principles to the case of the face-veil, it appears that it runs

\textsuperscript{48} That is by definition the cultivation of habits that are commonly understood to be important for the success of the community as well as the dedication of citizens to the common welfare even at the cost of their individual interests.

\textsuperscript{49} Blandine Kriegel, \textit{Philosophie de la République} (Plon, 1998).

against the principles of reciprocity, civility, and trust – republican virtues that go beyond mere courtesy. Hiding one’s face is, at least in Western societies, inconsistent with the notion of trust in interpersonal relations, a necessary condition for the civic dialogue that republican ethics foster. A minimum level of openness is a precondition for the type of integration necessary to support a republican political community. By contrast, the practice of veiling makes it virtually impossible for those women to engage with anyone outside their group. In promoting insularity, it creates a kind of secular profanation. Put differently, one may say that republicanism’s aversion to the veil stems from its stifling effect on the capacity for individuals to participate meaningfully in public life.

However, the French commitment to republicanism does not extend to invading individuals’ private lives to ensure citizens fulfil those duties contemplated by the republican ideal. For example, French law does not mandate, let alone enforce voting – unlike some countries, among which several liberal democracies. Civility, trust, reciprocity do not constitute legally defined interests. In fact, most of the legal scholars who testified before the Gérin commission went further and expressed skepticism as to the possibility of infringing freedom of religion in the name of core republican principles, i.e., laïcité, fraternity, gender equality, human dignity, or public order. The following explores those distinctly republican arguments in sequence.


One suggested justification for the ban is that the face-veil is alien to the value of fraternity, that spirit of fellowship that enjoins citizens of all backgrounds to rally around a common purpose. Former Supreme Court of Canada Justice Gonthier wrote: “In my view, fraternity is simply (...) the glue that binds liberty and equality to a civil society.”\textsuperscript{53} Such is the importance of the bond connecting citizens in the French republican psyche that the revolutionaries hailed fraternity as one of the nascent Republic’s signature traits. It has been adopted as part of the country’s motto since the time of the Third Republic at the end of the 19\textsuperscript{th} century (now Article 2 of the 1958 Constitution). France mentioned fraternity in its submissions before the ECHR. The various legislative documents that prefaced the ban refer to it multiple times as well.

French philosopher Elizabeth Badinter declared, insisting on the alleged “perversity” of the face-veil, that the latter is injurious to the principle of fraternity.\textsuperscript{54} Similarly, philosopher Pierre Manent recognized that the removal of the face-veil must be, together with the rejection of polygamy, the qui pro quo that would allow the integration of French Muslims in French society as it is contrary to the spirit of civic friendship defining French culture.\textsuperscript{55} Unnoticed by


\textsuperscript{54}Elizabeth Badinter’s presentation for the Gérin report, \textit{supra} note 5.

all commentators thus far, even article I of UDHR\(^{56}\) does contains an explicit duty of brotherhood. Yet, the values of fraternity and civic friendship are wishful and invocatory in nature. Since they lack formal constitutional traction, they cannot form a legal basis for the prohibition.

The other notions of *laïcité*, gender equality, dignity, and public order, being more firmly grounded in the legal landscape, were analyzed by *Conseil d’État*.\(^{57}\) Its report provides a comprehensive perspective into the tension between the role of cultural norms and the defense of individual rights, as interpreted by the French Republican canon at that point.

*Laïcité* is the French doctrine of obdurate state neutrality with respect to religion.\(^{58}\) It is a foundational value of the French Republic and was formalized by the often cited 1905 Law entrenching the separation of Church and State. Notably, the first article of the 1958 Constitution mentions that France is a *République laïque*. Although *laïcité* has grown out of the four corners of its legal definition and permeated society with the idea that the public expression of one’s religion should be discreet, the *Conseil d’État* reiterated that *laïcité* only characterizes the strict secular nature of the state. As further evidence that the doctrine is not meant to regulate private conduct, it is worth remembering that the idea of banning Catholic priests’ outfits in the public space floated during the

\(^{56}\) “All human beings… should act towards one another in a spirit of brotherhood.”


\(^{58}\) Régis Debray and Didier Leschi *La Laïcité au Quotidien: Guide Pratique* (Folio, 2016).
Revolutionary period, and later during the 1905 parliamentary debates, but never prevailed.\textsuperscript{59} Succinctly, “in French public law, secularism is inseparable from freedom of conscience and religion, and … from the universal freedom to proclaim one’s religion or convictions.”\textsuperscript{60}

With respect to equality, the French republican project calls for a subtle and ambitious, substantive notion of political equality which should lead to the operative capacity of every citizen to weigh on the political decisions that bind them.\textsuperscript{61} At a minimum, the face-veil questions the status of women as being ontologically, and therefore politically, equal. Yet, the Conseil d’État briefly reiterated that the equality principle is not intended to be applicable to the person’s exercise of personal freedom, even if that exercise leads to the adoption of a form of behavior that could be interpreted as sanctioning an inferior status. The Court declined to expand on its prior ruling upholding the denial of a citizenship application of a woman wearing the \textit{burqa} because of its “incompatibility with the essential values of the French community, notably with the principle of gender equality.”\textsuperscript{62}

\textsuperscript{59} François Saint-Bonnet (2012) \textit{La citoyenneté, fondement démocratique pour la loi anti-burqa}, Jus Politicum 7.

\textsuperscript{60} Conseil d’État, supra note 55 at 20.

\textsuperscript{61} Contrast with the more formal liberal conception of equality (of opportunities, in the labor market especially). See Samantha Besson and José Luis Martí, \textit{Legal Republicanism: National and International Perspectives} (Oxford Univ. Press, 2009) at 19-20.

\textsuperscript{62} Arrêt Mme Faiza M., (2008), req. n° 286798.
As for dignity, a principle of constitutional value, the Conseil d’État retreated from the conclusions of its decision banning dwarf-throwing competitions because these violate the dignity of the human person. Indeed, this ruling had been regarded as a puzzling outlier by constitutional scholars. The Conseil d’État recognized that the principle of human dignity implies respect for autonomy. However, it acknowledged the tension between the moral requirement to protect dignity (which can only be assessed by reference to community standards) and the ECHR position affirming the primacy of self-determination over any paternalistic conception of dignity. Accordingly, the Conseil d’État concluded that dignity is too subjective a concept to compete with freedom of self-determination.

Finally, the Conseil d’État recognized that the concept of public order contained an immaterial dimension encompassing public decency and respect for the dignity of the person. It acknowledged that such a route would be the best possible justification for a ban, but only if public order were reinterpreted as the minimal set of reciprocal requirements and essential guarantees for life in society. The Conseil d’État found no precedent for such an expansive

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64 Arrêt Commune de Morsang-sur-Orge (1995) req. n° 136727.
65 Gérin report, supra note 5.
66 KA & AD v. Belgium 42758/98 and 45558/99 [2005] (recognizing the right for someone to consent to being tortured).
67 The English version of the decision translates l’ordre public immatériel (literally, immaterial public order) as non-substantive public policy.
interpretation in either French or European law and therefore found the risk of constitutional censure too high.

III.3 An Incomplete Solution

If the most satisfactory way to anchor the law on a solid basis was an extended conception of public order, it is surprising that France did not submit it to the ECHR. Recall that France’s argument hinged instead on the protection of the rights and freedoms of others through an ad hoc description of what the so-called vivre ensemble entails. Paradoxically, or perhaps strategically, the ambiguities of the term served the French position.

Before the Gérin Commission, constitutional scholar Guy Carcassonne made a noteworthy effort to explain how the face-veil should be perceived as an attack on public order by reference to an implicit social code:

Why talk about public order? Social codes are such that there are elements of our body that we hide, and others that we show. Perhaps in a thousand years we shall expose our sex while concealing our face. Yet, for the moment, it is the opposite that is unanimously accepted. We are entitled to consider that what harms others, under Article 4 of the [1789 Declaration], is the fact that someone hides her own face, thus telling them that they are not

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68 “Liberty consists of doing anything which does not harm others (…).”

worthy enough, pure and respectable to be able to see her.⁶⁹

While this proposition accounts for the metaphysical harm conveyed by the face-veil, it does not sufficiently explain how it adversely impacts the rights and freedoms of others.

Yet, it is a version of that reasoning that the French government adopted by insisting on the fundamental importance of the visibility of the face in human contacts, and construed it as axiomatic without much elaboration that such visibility constitutes a necessary condition for the existence of a social contract (which, if broken by one party, would thus affect others). Beyond the troubling episode of the burkini, a couple of simple thought experiments should convince us, however, that it is not the concealing of the face per se that makes the face-veil unbearable, but the hostility emanating from it through the diffusion of a competing conception of the good, and the threat such a conception represents for society.⁷⁰

First, let us think about the common practice of wearing surgical masks in public in Asian countries. Specifically, among many young Japanese, masks have evolved into social firewalls; healthy teenagers and young adults now wear

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⁶⁹ Gérin report, supra note 5.

⁷⁰ “…for most people a conception of the good is a necessary starting point for the building of a true society, and the knowledge that they live among people with different conceptions of the good is disturbing, alienating, and in the last analysis destructive.” (Roger Scruton, The West and the Rest: Globalization and the Terrorist Threat. (Bloomsbury Publishing, 2003) at 13-14.)
them to signal a lack of desire to communicate with those around them. Moreover, in Japanese culture, a person’s true feelings and desires and the behaviour and opinions one displays in public must be kept separate. By wearing a mask, these emotions can remain hidden. Finally, surgical masks have become so common that, apparently, they have become fashion statements.

This example, I posit, is more persuasive than those provided by the dissent in S.A.S., which relied on the socially acceptable instances where concealing one’s face facilitates the performance of specific activities, and then disingenuously conflated such instances with functional modalities of socialization. However puzzling and foreign to Western culture, the routine wearing of a surgical mask in ordinary life cannot be perceived as militant display of any ideology. A surgical mask could not be interpreted as vector of a larger cultural project. The practice is not connected to any political, societal, or anthropological order. Arguably, the French government would not have acted

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74 “...the face plays an important role in human interaction. But this idea cannot … lead to the conclusion that human interaction is impossible if the full face is not shown. This is evidenced by examples that are perfectly rooted in European culture, such as the activities of skiing and motorcycling with full-face helmets and the wearing of costumes in carnivals (…) People can socialise without necessarily looking into each other’s eyes.” (S.A.S at 63)
against the fringe practice of wearing a surgical mask in public, despite it covering the face.

Conversely, let us speculate about a hypothetical religious prescription mandating women to walk behind their husband on a leash, or any other similar custom one would normally find degrading per Western standards of human dignity, but without any issue of face covering. Imagine that some women would voluntarily follow such a custom in the streets of any European city. It is also intuitive that whatever government in charge would be pressured to take action and prohibit such a practice; and if the legal argument based on dignity must, technically, yield to that of autonomy, one may conjecture that some variation around the principle of *vivre ensemble* would be advanced.\(^\text{75}\)

Hence, several arguments converge toward the proposition that it is not the visibility of the face, nor the specific French republican legal architecture, that motivated the prohibition of the face-veil in the public space. As shown below, the idea that the face-veil undermines the social contract and adversely impacts the rights and freedoms of others is indeed defendable. However, it demands a more candid analysis than what the French government decided to submit or what the ECHR adopted as reasoning. Specifically, it must face the liberal critique head-on, repudiate both universalist aspirations and axiological neutrality, and resolve itself to recognize the necessity of upholding the notions

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\(^\text{75}\) However, if a few women behaved like this without any reference to a common religious or cultural prescription, a prohibition would be less clear. Independent, disconnected individuals do not make up a competing notion of the good.
of civilization, community membership, and national identity unapologetically. To that end, one must construe such notions as a part of a collective right to historical continuity, and ultimately, as a manifestation of the arch purpose of law, i.e., ensuring the endurance of the society that it governs.

IV. The face-veil as blasphemy against the Western state’s political community

IV.1. The face-veil as marker of a different civilizational structure

Anglo-liberal critics of the face-veil ban treat the practice of veiling as the genuine manifestation of some faith – in the sense of a system of beliefs and worshipping precepts. For example, Martha Nussbaum’s approach is clearly grounded in the early history of the U.S. with respect to freedom of religion – accordingly, her reference point is that of theological divergences within the Christian world in the late eighteenth century U.S., and the contextual solution of toleration adopted to address that situation. However, the religious dimension of the face-veil must not conceal its political and civilizational significance. Islam is both religion and political system (dîn-wa-dwala), and within Islam, the face-veil remains an unequivocal civilizational marker. Although trite in European social commentary, such a remark still appears iconoclastic in North America, as

evidenced by, e.g., the reactions to Shadi Hamid’s *Islamic Exceptionalism*.\(^7\)

First, though most Sunni clerics argue there is no canonical justification for it, the face-veil must nevertheless be unambiguously associated with the most rigorous interpretation of the civil and criminal code, Sharia law, that some women sincerely believe command it being worn. This begs the question of the compatibility of a democratic, pluralist legal order with Sharia law, to which the ECHR gave a resounding answer:

> [the Court] has a role to play in identifying the constituent elements of democracy and in reminding everyone of the minimum essential requirements of a political system if human rights within the meaning of the Convention are to be protected... In [Refah Partisi (The Welfare Party) and Others v. Turkey [41340-4/98] (2003)], it (…..) found that a Sharia-based regime was incompatible with the Convention, in particular, as regards (…) the place given to women in the legal order and its interference in all spheres of private and public life in accordance with religious precepts.

It is therefore difficult to see, conceptually, how someone could bind themselves to Sharia law privately while abiding by the laws of the secular state without coming into a conflict – at the very least, embracing the values underlying both systems seems impossible. Which further begs the classic question of how much

a pluralist and democratic state can tolerate conducts that express not just fringe or radical opinions, but openly defy some of its core principles.  

More importantly, the aversion to the face-veil that transcends European societies reflects an often unarticulated, but nonetheless correct intuition. People understand that garb as a symbol of allegiance to a set of anthropological values that contradict their common ethos. It proposes an alternative rule of coexistence between genders, unknown in the Western world: strict separation. According to the Islamic legal traditions that have theorized its justifications, the face-veil prohibits the female body from the sight of men because the woman’s body is intrinsically indecent (awra):

…” the body of women, according to tradition and Islamic texts, is considered completely taboo since it carries within it the seeds of seduction and sedition for the whole city. Women are reported lacking in religion and reason, they are the henchmen of the devil, according to some hadith.

In turn, the face-veil cannot be isolated from the issue of women’s condition in those traditional societies where it is worn. For example, anthropologist

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79 See Constantin Languille, La Possibilité du Cosmopolitisme, Gallimard (2015) for a pertinent parallel with the ECHR treatment of homophobic speech.

80 Claude Habib, Galanterie Française (Gallimard, 2006) at 411 and 413.


82 Fehti Benslama, Entretien avec Fehti Benslama, 10 Outre Terre, 57-59 (2005).
Germaine Tillion explained how the hiding of the woman’s body in traditional North African societies shapes a dysfunctional class of young, vain, and irresponsible men.\textsuperscript{83} This practice has a profound implication on the social structure: when the seclusion of women is the norm, cousins marry each other since men cannot freely meet other women. Tillion opposes the so-called tribal “republic of cousins” to the exogamous “republic of citizens” (the western model) which, she argues, enables individuals to acquire a conception of the common good.

Given these irreconcilable approaches, one must remember that the rebuff of radically inconsistent customs and practices constitutes a first-order collective necessity. In his UNESCO address \textit{Race and Culture}, French anthropologist Claude Lévi-Strauss explains why a society cannot survive when its members express fundamentally separate modes of existence. The solution, for Lévi-Strauss, is that any culture must, for the sake of self-preservation, shield itself from certain traits of foreign cultures, without necessarily passing judgment on the superiority of any.\textsuperscript{84}

Being the product of a certain civilization, and regardless of its liberal or republican inclination, the law of a European state is not made to adjudicate conflicts between civilizations. The challenge is to translate those


\textsuperscript{84} Claude Lévi-Strauss, \textit{Race et Culture} (1971) available on

<http://www.unesco.org/bpi/pdf/courier042008_levy_strauss_race_culture.pdf>
anthropological insights while privileging a commitment to pluralism. To that end, the law must not seek guidance from the arrangement it has produced, but instead from the underlying structure that produced it.

IV.2 As the law derives from membership, so must the law protect membership
Legality does not arise spontaneously. It takes effect from within a necessarily political structure. To appreciate how the face-veil may corrupt one such arrangement, we must go to the origins of what binds people within a polity, so that we can better understand what could unbind them.

Human societies are not comprised of all people everywhere: figuratively, when a group of people gather to decide on their common future, they have already recognized a certain togetherness around some notion of the good life. 85 The society thus constituted is by construction exclusive, granting privileges and benefits to members only. The resulting experience of membership “enables me to regard the interests and needs of strangers as my concern [and] recognize the authority of decisions and laws that I must obey, even though they are not directly in my interest; that gives me a criterion to distinguish those who are entitled to the benefit of the sacrifices that my membership calls from me, from those who are interloping.” 86 This sense of belonging is “one of the most vivid elements of human experience.” 87 On the other hand, those privileges and

85 Scruton, supra, note 69 at 11.
86 Id. at 13.
87 Elizabeth de Fontenay, Actes de Naissance, Le Seuil (2011) at 103. It is precisely the threat of
benefits cannot be conferred to outsiders without sacrificing the element of trust that guarantees the sustainability of any social structure.\textsuperscript{88} This applies in particular to people who affirm a different conception of the good.

According to French sociologist Gabriel Tarde, this social bond defining membership is driven by a process of imitation.\textsuperscript{89} Without assimilation and transmission through imitation and sharing of existing norms and customs, no polity may be established. It follows that a social contract can only emerge from members of a preexisting community united by a manifold relation of commonality and interacting within a circumscribed behavioral framework.

In modern Europe, specifically, this distinctive normative character of social life was elucidated through what Norbert Elias called “self-legitimization”. As he explains in \textit{The Civilizing Process}, the structuring and restraining of human behavior depended on the culmination of observed mores.\textsuperscript{90} Post-medieval vitiating that experience which accounts for the virulence of the objections made against the face-veil. Philosopher Alain Finkielkraut’s snap is emblematic: “To be inclusive, [those against the ban] ask France to be nothing more substantial than a mall or an airport. But is this really how people live?” (interview, \textit{Journal du Dimanche}, May 8\textsuperscript{th} 2010)


\textsuperscript{89} Gabriel Tarde, \textit{Les Lois de l’Imitation} (Félix Alcan, 1890)

\textsuperscript{90} It is culturally revealing that \textit{mœurs} makes immediate sense in French as the tacit social code defining what is acceptable to the community. Conversely, the early twentieth century English
European standards regarding e.g., violence, sexual behavior, bodily functions, table manners and forms of speech, were gradually transformed by increasing thresholds of shame and repugnance derived from precepts originally found in court etiquette. Over time, ideas about proper conduct became internalized as second nature, in the Pascalian sense of overwriting the initial one, for all members of society. Ever since that crystallization, deviation from the dominant form of manners and customs has become jarring and threatening to the sociability thus formed.

What, then, is the relation between mores and the law? Montesquieu’s work on the subject informs any meaningful discussion of this key conceptual link. For Montesquieu, mores express collective opinions and passions. They describe not only a society’s needs, but also the nature of its pleasures and aversions. Mores, in turn, determine acceptable behavior within a social group. Between the institutional structure of a regime and the principles which drive equivalent mores was coined by American sociologist William Sumner, and still represents a sophisticated academic construct in the English language.

91 For historical reasons, which can be gleaned from Samuel Huntington’s *Who Are We? The Challenges to America's National Identity* (Simon & Schuster, 2004), this civilizing process was arguably less prescriptive in America. American culture was uniquely inspired by Anglo-Protestant settlers whose preoccupation was detached from, if not opposed to concerns of etiquette, and fostered instead an alternative culture – the “American Creed” – based, in short, on individualism, the quasi-sanctification of negative rights, and faith in the market as the best form of social regulation. Huntington feared that Hispanic immigration could transform America into a bicultural society, and doubted that a nation could survive on the sole basis of an abstract political contract among individuals lacking commonality.
men’s actions within it, the relationship is dialectic: abiding by the law supposes certain mores, which must themselves be formed and maintained by politics and law.\textsuperscript{92} It is of direct interest to the present discussion that Montesquieu linked the social norms guiding male-female interpersonal relations with certain institutions; in particular, he observed a strict separation between genders characterizes despotic regimes.\textsuperscript{93}

In democracies, on other hand, the preservation of a hierarchy of obedience is the condition of the state’s survival, and “there is much to be gained, with respect to mores, by keeping old customs.”\textsuperscript{94} Montesquieu’s wisdom is encapsulated in the conclusion that lawmakers must ensure that laws are appropriate to the mores and characters of the people whose behaviors they are meant to regulate. It is the accord of jurisprudence and mores which is the ultimate criterion of rationality within a legal system.

The importance of customs is explicitly opposed to legislative entrepreneurship: the law cannot fashion the people to suit its ends, even for the sake of providing a present or future political good. Mores are linked to a people’s beliefs, thinking habits, and feelings, which the legislator cannot frustrate without being guilty of a “tyranny of opinion.”\textsuperscript{95} Montesquieu writes

\begin{itemize}
  \item \textsuperscript{92} Céline Spector, Dictionnaire Montesquieu [moeurs] on \url{http://dictionnaire-montesquieu.ens-lyon.fr/fr/article/1376474087/en/}
  \item \textsuperscript{93} Montesquieu, \textit{L’Esprit des Lois}, VII, 9; XVI, 8. Available on \url{http://www.pourlhistoire.com/docu/esprit%20des%20lois.pdf}
  \item \textsuperscript{94} Id., V, 7.
  \item \textsuperscript{95} Id., XIX, 3
\end{itemize}
from the perspective of a lawmaker who would be tempted to act against the prevailing mores,\textsuperscript{96} but the same logic applies to enacting laws that preserve the existing ones.

We therefore reach the proposition that commonality of values, shaped through history into mores, forms an unavoidable backdrop for theorizing rights within Western Europe. This conclusion is exacerbated in the French context because of the way Rousseau’s legacy informs the canon of modern French republicanism. Like Montesquieu, Rousseau was aware of the link between a society’s mores and its legal architecture. However, the socialization process introduces, for Rousseau, a moral dimension: humanity undergoes a “remarkable change”\textsuperscript{97} as instincts are replaced by justice, duty, and a concern for the greater good. The social contract brought about by the experience of membership, ultimately seeks to perform the good through a unified sense of purpose. Yet, the process culminating in the attainment of what Rousseau calls civil liberty, where the moral superiority of the general will over individual freedom is achieved, must always draw from the expression of some intersubjective sensitivity. Specifically, the political formation of a people into a republic demands, as precondition, a common language, common mores, and common customs.

This is explicit from the \textit{Social Contract}, where Rousseau defines four types of laws: political, civil, criminal, and mores-inspired, and that last type

\textsuperscript{96} “…laws that would constrain our sociability would not be proper for us.” (\textit{id.}, XIX, 5-6).

guarantees the possibility of existence of the three others.98 Elsewhere, he writes “Let us not flatter ourselves that we shall preserve our liberty while renouncing the mores by which we acquired it.”99 Ultimately, nothing can substitute to mores for the upkeep of government. All states, Rousseau recognizes, are anchored in historical context, and will die if those roots are arbitrarily cut.100

Given the foregoing, one begins to understand the challenge posed by the face-veil to the experience of membership defined, in Europe, by the sharing of a set of mores, and to the legal structure that is best consistent with it – in particular, that of a republic. Community members, when delineating between rights-holders and positive duties owed, must be conscious of the unifying thread that holds the community together. They cannot reasonably assent to that which frustrates the fulfillment of those members’ aspiration for collective self-realization. When the “community of character”101 becomes nation, that experience of membership is called national identity, and the threat embodies a new, political dimension.

98 Rousseau, supra, II, 12.


100 Jean-Jacques Rousseau, Discours sur l'Economie Politique, Projet de Constitution pour la Corse, Considérations sur le Gouvernement de Pologne (Flammarion, 2012).

101 Defined by Michael Walzer as ‘historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.’ (Spheres of Justice, A Defense of Pluralism and Equality, 1983, 39). Community norms must therefore be distinguished from majority norms.
IV.3 The preservation of National Identity: between legitimate political concern and legally recognizable interest, in France and beyond

A forthright justification for the ban should underscore the existential consequences of leaving unchecked behaviors that threaten national identity; which is first understood, in a material sense, as jurisdictional unity. The empirical reality that people, wherever possible, choose to associate with their cultural kin, undermines the original liberal ideal of pluralism being upheld by a constant clash of values. Hence, from a long-term perspective, the ban is meant to hinder the spread of a divisive ideology that makes individuals splinter into self-segregated religious (and also, typically, ethnic and linguistic) enclaves, leading to cultural apartheid¹⁰² and claims for group rights¹⁰³.

Public display of communal particularism is met with more acute reluctance in the French context because France has been experiencing, over the last three decades, disturbing patterns of population substitution effects in suburbs turned into ghettos.¹⁰⁴ Those people attached to the secular nature of French society have gradually deserted certain neighborhoods perceived as inhospitable.¹⁰⁵

¹⁰² Similar communities exist in the U.S., but the negligible magnitude of the phenomenon can give the illusion that it does not pose a problem in principle.


¹⁰⁵ Christophe Guilluy *Fractures Françaises* (François Bourin, 2010). Incidentally, the Danish Parliament passed a resolution in February 2017 stating that nowhere in the country should Danes become minorities – the resolution explicitly addresses the presence of immigrants from non-
They had lost, and sought elsewhere “a kind of mute sense of belonging – an inarticulate experience of neighborliness – founded in the recognition that this place where we live is ours.”

The historical record further explains French society’s exacerbated concern for the possibility of territorial fragmentation. The fact that France suffered episodes of religious civil wars has impressed on the French collective conscience a legitimate reservation concerning the capacity of society for tolerance among groups motivated by parochial concerns. Conspicuously, the first article of the Constitution mentions that France is “indivisible.” Given this background, public intervention to guarantee societal cohesion is politically justified. Hence, the republican state, endowed with more symbolic power than in Anglo-liberal democracies, stands for a “homogeneous, autonomous public domain,” in order to preempt sectarian conflicts. This historical fixture accounts for Dominique Schapper’s conclusion that in France communities “must not form a political identity recognized as such within the public space.”

Western origin. This is the first time a Western democracy officially endorses the feeling of alienation felt by native citizens when they become a minority in their own original communities:


106 Scruton, supra note 69 at 48.


Carcassonne was right in drawing from the 1789 Constitution, but instead of Article 4 which defines freedom as doing whatever is not harmful to others (i.e., other *individuals*), he should have chosen Article 5 which defines the role of the law in defending against actions harmful to *Society*.

Generally, from a political philosophy standpoint, concerns over territorial fragmentation relate to the notion of territorial jurisdiction as a necessary condition for the emergence of a distinct kind of pre-political loyalty, i.e., that of citizens toward a nation – the “imagined community of strangers who are prepared to sacrifice themselves for the independent political community to which they belong.”¹⁰⁹ Specifically, it is through the nation construct that one should understand the secular allegiance built in the contractarian view of citizenship. In contrast, exclusion, militancy, and displays of apartness that invade the public space in the name of sectarian beliefs – all of which characterize the face-veil – represent threats to the experience of membership underlying the idea of national identity in Western Europe; and, in turn, to the foundation of the social contract whereby each citizen agrees to the principles of government.¹¹⁰

¹⁰⁹ Linklater and Waller, supra note 87 at 6.

¹¹⁰ Scruton, supra note 69 at 47-51. Given that the welfare state, one of the pillars of the post WWII social consensus in Europe, is the formal organization of solidarity at the national level, a weakening of the nation-based experience of membership is an indirect attack on the socioeconomic structure itself – all the more damaging since that welfare state, picking up on the damage caused by economic liberalism on the social glue, has substituted itself to the ancient interpersonal solidarities and thus become the last insurance mechanism for the people. See
Going back to the French context, the French Revolution harnessed Rousseau’s version of the social contract by establishing the concept of nation as twofold: a free association of citizens united rationally, contractually, and constitutionally by the rights, duties and privileges that citizenship guaranteed and at the same time a community of the people. The loyalties to the republican political ideal (and first within it, political equality), and to the nation-state thus coalesced.111 Accordingly, modern French national identity is not a biological but both a political and cultural fact: one is French through the practice of a language, through the learning of a culture, through abiding by mores, and through participation in the republican community.112 French identity is thus only partly encapsulated in republicanism. If the law must remain that of a specific political community organized around the nation construct – and not simply its current republican arrangement, it must adhere to this organic principle and recognize that some degree of cultural parochialism is essential to its very existence.113

To that effect, the prohibition of the face-veil based on the defense of national identity could have grown from those constitutional sources affirming the principle of the Nation. First, Article 3 of the 1789 Declaration stating that the principle of sovereignty lies essentially in the Nation. Throughout the document, the drafters made a clear distinction between individuals, the People,


111 Linklater and Waller, supra note 87 at 3.


Society, and the Nation. Second, the preamble of the 1946 French Constitution, which, since 1971, has regained constitutional authority, stating that the Nation is entrusted to enable the individual’s development potential (Article 10). Strikingly, it is not the State but the Nation that is called upon. While delineating what is hostile to the Nation may be difficult, the result is that if a practice can be construed as such, be it religious or not, it deserves less protection.\footnote{Harouel casts the net large, since for him Islam viewed not as religion but as a civilization and political project is a threat to the French Nation when its visibility in the public space crosses symbolic thresholds. He refers to the Swiss referendum against minarets (2009) as an illustration of his thesis. Supra note 76 at 129.} A jurisprudential overhaul is obviously necessary to put those general sections on the same operational footing as those defending specific individual rights in order to allow for a proper constitutional balancing exercise, but this analytical framework appears to be the most persuasive to justify the prohibition. In comparison, the invocation of the wobbly vivre ensemble principle sounds like beating around the bush.

An analogy could be drawn with the issue of flag desecration in the U.S. In a famous 1940 Supreme Court case,\footnote{Minersville School District v. Board of Education 310 U.S. 586 (1940).} a Jehovah’s witness belief was held to be an insufficient ground to override a school district’s requirement that all students must salute the flag and recite the Pledge of Allegiance. The Court balanced the secular aim of the policy – the public development of civic-mindedness among school children – with the First Amendment right to the free exercise of religion. In affirming that the interest in creating national unity was enough to allow to
require students to salute the flag, the Court held that the state’s interest in “national cohesion” was “inferior to none in the hierarchy of legal values.”

The *ratio decidendi* is well captured by Supreme Court Justice Felix Frankfurter’s controversial statement that “the ultimate foundation of a free society is the binding tie of cohesive sentiment.”

More recent examples of the tension between individual freedom, held in defense of patently antisocial behaviours, and national interest can be found in *United States v Eichman* and *Texas v. Johnson*. While the Supreme Court held the First Amendment right to flag burning as being within the limits of freedom of expression, the narrow 5-4 margin in both cases reveals the existence of two defendable views in a country where freedom of expression is arguably better protected than anywhere else. Writing for the dissent in *Eichman*, Justice Stevens held that the government has a legitimate interest in curbing a fundamental freedom in such circumstances, noting that the flag serves as a reminder of America's collective commitment to freedom and equality. For different reasons, the mores sustaining the visibility of the face, in France, and to a large extent across European nations, operate as a similar reminder.

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116 Id. at 596.

117 The Court’s reasoning illustrates what has been referred to as enlightenment liberalism, whereby democracy itself is the political expression the good. See William Galston, *Two Concepts of Liberalism*, 105 Ethics 516 (1995).


119 *Eichman*. at § 320.
V. Conclusion

The face-veil defiles the world in which most Europeans find meaning. Its prohibition, therefore, constitutes an exemplary case. It pits individual rights against the tacit aspiration of a community to live according to its culture. The French ban attempted to give those aspirations a formal legal configuration. Unfortunately, the debate was framed narrowly by focusing on the visibility of the face as a condition for life in common in society – arguably, because it would have been ill-advised to advance broader, national identity-based arguments in a country haunted by its Vichy past, and even more so, later on, before a supra-national court.

This article shows that the hiding of the face is tangential to the true harm created by the face-veil, and that the real issue – the meaning and purpose of life in common – was never plainly articulated. The spread of face-veil prohibitions and condemnations across Europe further evidences that the decision to ban the face-veil is not specific to French republicanism. Rather, it evinces a common experience of membership that transcends Western states.

Within this perspective, one puzzle that this paper allows to elucidate is that of the burkini. The burkini, unlike the face-veil, is essentially ambivalent. Here, the display of a religious symbol, unwelcome as it is in the public space, is mitigated by familiarity as the image of the full-body bathing suits from the 19th century remain in the collective memory, thus more aligned with an outdated prudery than as a mark of religious ostentation. In fact, the burkini\textsuperscript{120} is the

\textsuperscript{120} A play on word already relating to the Western punning tradition of the oxymoron. The face-
recent creation of fashion designers, and thus keeps a flavor of transgressive modernity – besides, it fits right in with the liberal market-based logic: although the term has become generic, burkini is still a registered trademark.121

Importantly, burkini clad women engage in a common activity (swimming) whereas the face veil excludes women from routine interaction with the rest of society. Further, since burkinis are forbidden in some places where the strictest interpretation of Sharia law rules, like Saudi Arabia, it is problematic to associate the burkini with the representation of female oppression commonly associated with traditional Muslim cultures in the West. To some extent, it can even be viewed as a form of emancipation and therefore encouraged as a first step towards assimilation and embracing a western compatible lifestyle.

Finally, recall that republicanism is associated with an idea of citizenship defined in terms of positive belonging to and participation in the affairs of the state. This signature conception of politics requires a civic space in which virtuous citizens, believing in the possibilities of deliberative dialogue, move beyond initial substantive disagreements to a communal understanding of the good.122 Whereas the face-veil sabotages this metaphysical framework, one could not submit with a straight face that showing skin while frolicking in the water is imperative for the sake of civic praxis.

Thus, the burkini may be considered an acceptable fringe practice; it does not

veil invites no play.


raise to the level of transgression associated with the face-veil. Two thirds of the French opposed the burkiní\textsuperscript{123} – a far cry from the nearly unanimous repulsion that the face-veil inspires.

Ultimately, what the face-veil debate invites us to determine is the possibility of cosmopolitanism.\textsuperscript{124} Framing the issue this way allows us to go beyond the superficially appealing rhetoric of rights and consider the feasibility and desirability of a multicultural, post-national democratic society pacified by dialogue, compromise, and tolerance under a human rights-based legal order. A comprehensive response to this proposition must discuss its positive and normative dimensions.

Empirically, it is clear enough that ordinary people massively reject the consequences of the cosmopolitan ideology. To illustrate with the British experiment, in 2004, the chairman of the Commission for Racial Equality cautioned that Britain was “sleepwalking into segregation” due to multiculturalism’s toleration of separateness.\textsuperscript{125} In February 2011, PM David Cameron asserted that multiculturalism had failed Britain, fostering cultural schism and radicalism.\textsuperscript{126} And British columnist Leo McKinstry said of multiculturalism that it is dragging his country “into a new dark age where, in

\begin{footnotes}
\item[123] \url{http://www.ifop.com/?option=com_publication&type=poll&id=3460}
\item[124] Languille, supra note 77.
\item[125] \url{http://news.bbc.co.uk/2/hi/technology/4270010.stm}
\item[126] \url{http://www.bbc.com/news/uk-politics-12371994}
\end{footnotes}

At about the same time, the Dutch government joined German Chancellor Angela Merkel and French President Nicolas Sarkozy in repudiating multiculturalism.
many cities, social solidarity is being replaced by divisive tribalism, democracy by identity politics."127 In sum, instead of a secular, inclusive, and pluralist society bound by rational consensus enabling the pursuit of happiness for all, we see ethnic and religious groups form parallel societies, “removed from accountability, public scrutiny, and a common space to live together in disagreement.”128

On the normative side, to counter the argument that detrimental social outcomes are insufficient to trample fundamental rights, one must go to the root of the human rights venture and of the liberal paradigm that now heralds it. Human rights were, originally, not law. What the 1789 Constitution guaranteed was public liberties. The incorporation of human rights into law over the last quarter of the 20th century, at the French and European levels, instilled into the law what used to be the stuff of individual morality. Because morality knows no fixed boundaries, unlike the law, the hybrid framework deriving from the human rights agenda progressively shifted focus to become a machinery against all forms of discriminations.129 Human rights law subtly morphed into a state condoned, secular religion of humanity.130

127 http://www.express.co.uk/comment/columnists/leo-mckinstry/443677/A-multicultural-hell-hole-that-we-never-voted-for


129 Harouel, supra note76 at 77-80. Generally, Harouel demonstrates how the human rights movement belongs to the millenarist and gnostic traditions.

130 Id. at 41.
Reformation liberalism, comprising most of contemporary liberal thinking, identifies with this framework wholeheartedly because it knows only two entities: the individual, and mankind. That doctrine eludes the question of the structuring of life in common, which is distinct from mere coexistence. It is oblivious to the fact that people first live in political communities before being organized in juridical orders. Its key characteristic is the removal of any conception of the good which might differentiate one group of citizens from their neighbors. The implication of such an axiologically neutral society is to posit, against all evidence to the contrary, that individuals who do not share values can live together as a group when equipped with abstract rights and procedural rules. Yet, a political society can only build on what is common to its members: its mores, history, culture, and references.

Ironically, the current liberals’ position aligns with British conservative philosopher Edmund Burke’s criticism of the French Revolution most radical ambitions. That demiurgic project – reshaping society from scratch, starting from abstract rights and reason alone – was headed to disaster because it was divorced from France’s normative and cultural heritage. Generally, by suppressing the virtues that guarantee social cohesion – solidarity, selflessness, sacrifice, “common decency” to borrow George Orwell’s concept – this stance of liberalism jeopardizes the operation of its own underlying construction, thus

134 Huntington, supra note 89.
risking the resurgence of that war of all against all which it had purposely been devised to forestall.\textsuperscript{135}

The societal model that (some) liberal thinkers call for strips the public space of any value-driven dimension, organizing society according to the objective dynamics of the market, hailing tolerance as a substitute for mores, and regulating conflicts through a neutral legal system concerned with the equitable treatment of rights-bearing individuals. This atomistic framework, based on individual autonomy, is by construction unresponsive to arguments based on externalities such as social capital or peer pressure.

In the present context, the face-veil, perceived quasi unanimously as abhorrent, negates the foundations of society’s long-established principles governing gender relations. Behaviors that are injurious to the natives’ way of life alienate those, drive them to despair, and as last resort, lures them into adopting extremist or demagogical political platforms, which glib social critics then demonize as populist, smug, and xenophobic.\textsuperscript{136} It is a source of concern for the citizen but also for the jurist: this process of cultural disenfranchisement erodes the implicit pact that binds people under the rule of law. Without a basic willingness to live together, the pre-political loyalties necessary for any secular architecture of rights crumble. In that perspective, the face-veil ban upholds a set of supra-constitutional values.

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