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Limits of Restricting Islam: The French Burqa Law of 2010

In June 2009, addressing both houses of French Parliament (*Congrès*) in a historical Versailles venue, French President Sarkozy denounced the burqa, an extreme Islamic all-body-covering garment, as "a sign of subjugation, of debasement" that is "not welcome on French territory".[1] One day later, a parliamentary commission, led by Communist deputy André Gerin, was established to give an "*etat des lieux* about the practice of wearing the burqa and the niqab by certain Muslim women…on the national territory", with the mandate to "better understand the problem and to find ways to fight against this affront to individual liberties".[2] What became known as "Burqa Commission" notably did *not* recommend a "general and absolute prohibition of the integral veil[3] in public space", even though such prohibition had been the driving motivation of its initiators (Assemblée Nationale 2010: 187). Overriding two negative recommendations by the Conseil d'Etat, France's highest administrative court, the National Assembly in July 2010 still passed a law that prohibits "the dissimulation of the face in public space". This was an unprecedented defiance of concerted legal opinion in France and beyond.

One can read this outcome in opposite ways. The most obvious response is outrage over the restriction of elementary liberties, not just to practice one's religion freely but what to wear in the street. What the *New York Times* said about the rather modest, only partial prohibitions that the Burqa Commission had earlier proposed in lieu of a total burqa ban, is valid even more for the far more drastic "general and absolute" prohibition that was passed six months later: "French politicians seem willfully blind to the violation of individual liberties", practicing a kind of reverse Talibanism.[4] A second, perhaps more apposite,

response is ridicule. One may shake one's head about the disproportionate measure of gunning down by national law an ultra-marginal phenomenon that concerns by far under 0.1 percent of France's Muslim population, and for which a number of partial restrictions already existed that made French law tougher in this respect than most other jurisdictions in Europe (see Conseil d'Etat 2010: 11-15). If one of the main instigators of the burqa campaign, André Gerin, ignoring the tiny numbers laid out to his commission by no one less than the Interior Minister himself, deemed French society in the grip of "Talibanization" and drowning in a "*marée noire*" (oil pest) of dark Muslim veils, this was a case of moral panic, better understood in psycho-pathological than politico-rational terms. Overall, when assessing the "collateral damage" done to France in the world by its anti-burqa campaign, it is an understatement to conclude that "We are not understood in the world, not even in Europe".[5]

In this chapter, I propose a third, less obvious reading of the French anti-burqa campaign: even though a restrictive law was passed, the legal-political debate surrounding this law spells out in fascinating detail the limits of restricting even the most extreme expression of Islam in the liberal state. Indeed, more apposite than being astounded or outraged by the law, is recognizing the significant legal-constitutional hurdles that had to be taken, or rather blithely ignored, and which may still prove fatal to the law if brought to bear by the European Court of Human Rights.

Institutionalization of Islam in France

One has to realize that this third round of French headscarf battles, after the dramatic opening shot in Creil, 1989, and the law against the ordinary headscarf (and all ostentatious religious symbols) in public schools in 2004 (for an overview, see Joppke 2009:ch.2), occurred against the backdrop of a thorough institutionalization, if not nationalization of Islam in France—the

transition from Islam in France to French Islam had long occurred and was, in fact, never put into question. Discussing a state-level campaign for "national identity" that was running parallel to the quest for restricting the burqa, Jonathan Laurence (2010:22) puts both into perspective: "(N)egative rhetoric and repressive measures that have put Muslim communities on the defensive,…belie a broader trend toward greater religious freedom and institutional representation".

One also has to consider that none of the Muslim representatives testifying before the Burqa Commission, from shiny media star Tariq Ramadan to the grey suits of the *Conseil Français du Culte Musulman* (CFCM), had anything positive to say about the integral veil—for Ramadan, burqa and niqab were nothing less than an "attack on the rights of women", "restriction of their liberty", and "contrary to human dignity".[6] Not unlike the President of the French Republic and the feisty apparatchiks of the Burqa Commission, the president of the *Conseil français du culte musulman* (CFCM) called the integral veil "an extreme practice that we do not wish to see gaining ground on the national territory".[7] And the rector of the influential Paris Grand Mosque, Dalil Boubakeur, traced back the niqab to its original function of sun and desert-wind protection for the nomadic Touregs in the Sahara, adding caustically that this was "evidently not the case in France".[8]

The simultaneous happenings of the restriction-bent French Burqa Commission with the Swiss successful national referendum against the construction of new minarets, in late November 2009, might lead one to conclude that both are made of the same cloth, that is, an all-European assault on Islam and Muslims. This would be misleading. Certainly, if presented with the possibility of a public vote, the French, like most other Europeans, might well decide like the Swiss did.[9] Only, nowhere in Europe outside Switzerland, France included, is there the possibility to put such sensitive issue to the public test. It is instructive to look at French President Sarkozy's carefully worded response to the Swiss vote, published a week later on

the front page of France's leading liberal newspaper, *Le Monde*.[10] While respecting the Swiss vote as a desperate scramble for "national identity" in a globalizing world, thus justifying his own parallel campaign for national identity that has been very much the background noise to the Burqa Commission, Sarkozy conversely conceded that "one does not respect people if one obliges them to practice their religion in cellars or garages (*dans les caves ou dans des hangars*)".[11]

So no problem with minarets and visible Islam in France! Indeed, when the purpose-built great mosque of Créteil opened its doors for up to 2000 believers in December 2008, 200 similar mosque projects were under construction all over France. This would add so much prayer space to the already existing 2000 mosques that some of the latter were deemed to run out of customers--considering that only an estimated minority of 20 to 30 percent of France's ca. 5 million Muslims practice their religion regularly.[12] Compare this to the alarm cry of "an insufficient number" of Islamic mosques in the 2000 *état des lieux* by the Haut Conseil à l'Intégration (2000:36). Also the days when provincial mayors were raiding mosque sites with bulldozers are past (reported in ibid, 37). On the contrary, the French state, intent on preempting the foreign (especially Saudi-Arabian) financing of mosques, is routinely circumventing the formal ban of state support for religion under the second clause of the 1905 Law on the Separation of Churches and State by funding mosque constructions through the cultural rather than religious (*cultuel*) angle, and by handing out building sites through inexpensive long-term loans (so-called "*bails emphéotiques*"). Overall, as Sarkozy underlined in his Swiss referendum response, the lode star of the French state's treatment of Islam has been to lift the latter "on a floor of equality with the other great religions", a process that he sees completed with the creation of the *Conseil français du culte musulman* (CFCM) under his first spell of Interior Minister in 2003.[13]

However, Sarkozy also admonished his "Muslim compatriots" to practice their religion in "humble discretion", because France was a country "where the Christian civilization had left profound traces, where the values of the Republic are integral part of our national identity". Not respecting or challenging "this heritage and these values" would "condemn to failure the instauration of Islam in France that is so necessary".[14] Invoking the Christian roots of France was a Sarkozian trademark provocation to the Republican establishment enamored to the clap-track of *laïcité*. But who could doubt this historical fact?

Overall, what fires this latest round of Europe's protracted Islam debate is not a questioning of its institutional accommodation, which has mostly occurred by now, and successfully at that, on the premise of formal (not always substantive, of course) equality with the historically established religions. If one considers 1,400 years of violent confrontation between the Christian and Muslim worlds, in the early phase of which both emerged as self-conscious civilizations in exact opposition to the other,[15] this is an astonishing occurrence—and one that is notably not reciprocated by an equal treatment of Christian religions in Muslim lands. Instead, this latest round of Europe's Islam debate is about an extreme and highly visible practice of this religion, symbolized by niqab and burqa, and which is perceived as provocation and mocking of the principles and values, above all that of gender equality, on which European societies are founded, at least today. The issue is a visibly uncompromising Islam that is not doing its share in the "two-way process" that has by now become the standard understanding of "integration".[16]

Interestingly, and demonstrative of the intention not to roll back but to complete the "recognition" of Islam in France, a red thread underlying the French debate over the integral veil is to expel the latter from the ambit of religion. "To reject the integral veil is to respect Islam", said, forever slick, Immigration Minister Eric Besson before the Burqa Commission.[17] Already in his Versailles statement, President Sarkozy had argued that "the problem of the

burqa is not a religious problem, it is a problem of the liberty (and) dignity of women. The burqa is not a religious symbol". [18] This was true, and reiterated by all Muslim representatives and Islam specialists testifying before the Commission, but only in the sense that the integral veil is not a religious prescription that can be found anywhere in Quran or Sunna, the religious core texts of Islam. Burqa and niqab "are not an Islamic prescription", said Tariq Ramadan coolly,[19] "the burqa is the most violent symbol of the oppression of women and has nothing to do with the Muslim religion, my religion", exclaimed Sihem Habchi, president of the feminist *banlieue* movement *Ni putes ni soumises*, not so coolly.[20]

That the integral veil is not a religious symbol was laid out before the Burqa Commission, in rather questionable detail, by anthropologist Dounia Bouzar.[21] While correctly qualifying the "Salafist discourse" of those who propagate burqa and niqab as "sectarian", this ipso facto disqualified the latter in her eyes as "religious". This is because the thrust of religion, as indicated by the Latin root word *religare*, was to "assemble" (*accueillir*) and not to "separate".[22] This was a rather idiosyncratic distinction between sect and religion, one that would disqualify the founders of America as lunatic politicos, not members of a religion. "(We should) treat these factions (*groupuscules*) as if they were not Muslim", suggested Bouzar at the Commission's first expert audition[23] and this became a kind of *ceterum censeo* throughout its further proceedings.

At a minimum, the problem with the religious excommunication of the integral veil, if conducted on part of the state, is that it would force the state to "decide what religion is", and thus draw it into the "war of Gods".[24] The liberal state must, and generally does, leave the definition of religion to those who practice religion. For altogether different reasons: solidarity with co-religionists, this was also the stance taken by the official Islam organizations. After stating that the integral veil was not a "religious prescription", the president of the CFCM would add that it was still "a religious practice founded on a minority

view (of Islam)".[25] The religious disqualification of the integral veil was inconsistent, at best a (perhaps hypocritical) strategy of immunizing Islam from getting rough with the burqa. However, the more likely, and widely resented, effect of the enterprise was "stigmatizing an entire religion".[26]

The burqa in France: chosen and ultra-marginal

But what do we know about the burqa women, their background, their motivations? The interior minister, Brice Hoertefeux, relying on French intelligence sources, qualified the donning of the integral veil as a "completely marginal practice among the Muslims of France", amounting to an estimated 1900 such cases in the entire country, 50 percent of them in the greater Paris area alone (Île-de-France).[27] The majority of veiled women are young, 90 percent of them being under 40 years of age, 50 percent under 30 years. Two thirds of them are French citizens, half of them of the 2nd or 3rd immigrant generation; no less than one-fourth are converted Muslims. Among the Islamic law traditions only the Saudi-origin Hanbali School favors the integral veil. More concretely, most of the veil's proponents are members of Salafism, which is a fundamentalist but largely pietistic, a-political sect favoring a literalist reading of Quran and Sunna, advocating to "live like the companions of the prophet" during the 7th century in Mecca and Medina. A leading French expert estimated their total followers, males included, as just between 5,000 and 10,000 persons, dominating no more than 20 to 30 of the approximately 2,000 mosques in the entire country.[28] Among the motivations for donning the integral veil, this expert cited a mixture of "symbolic protest", the quest for "social distinction", and—the dominant explanation in most accounts of this phenomenon—"hyper-individualism", achieved not within but against the ethnic origin

community (and thus exactly *not* an expression of *communautarisme* that the French political elite of all stripes attributes to and resents about it).[29]

This sociological account of burqa women creates difficulties for the two main justifications of reining in on this phenomenon. First, as it apparently is more likely to be chosen by the respective woman than imposed by her male environment, it is difficult to find in it the affront to female liberties and dignity as which it has been predominantly construed, from the womanizing French President to pious Muslim icon Tariq Ramadan. Perhaps the most famous of all French niqab women (remember: the burqa is practically non-existent in France), Faiza Silmi, who was denied French citizenship in July 2008 on account of her niqab wearing, certainly does not appear to be a victim of Muslim male chauvinism. "Don't believe for a minute that I am submissive to my husband", she tells a *Le Monde* journalist, "It is me who deals with the paperwork and the bills!"[30] Nevertheless, the Conseil d'Etat, France's highest administrative court, denied her French citizenship for "a radical practice of her religion…incompatible with the essential values of the French community and notably the principle of the equality of sexes".[31] On the opposite side, it also has to be conceded that a ready attribution of "choice" as the main motivation of donning the integral veil is skewed by selection bias: those women for whom this is *not* choice are unlikely to ever reach a microphone.

However, also the second, somewhat auxiliary justification for restricting the burqa: its alleged threat to security, clashes with its sociological reality. If, indeed, the vast majority of the tiny Salafi sect in France is "pietistic" rather than "political" or "djihadiste", as its leading French chronicler thinks it is (Amghar 2005), it is very difficult to see in the integral veil a security threat at all. Rather than pursuing the dreaded "entry-ism" in French public institutions (that the Muslim Brothers had once been infamous for, before they became domesticated within the UOIF and the CFCM), "the only project of young Salafis is, in my

view, to leave France for a Muslim country".[32] For one thing, this is the stated intention of Faiza Silmi after her denial of French citizenship in summer 2008.[33]

The marginality of the integral veil in France is impressively (should one say: eerily) demonstrated by seven mayors lined up to testify to the Burqa Commission, some from the more ill-famed banlieues. The Mayor of Evreux, in the Paris region, which sports two large "popular quarters", knew of "less than ten" integrally veiled women in his city of 85.000: "One cannot say at this point that the burqa is a problem in local life…it is not a subject of debate".[34] Even with respect to the ordinary headscarf (*hijab*), he knew of only one case of a woman insisting on working in a school canteen with a headscarf on, and that was back in 2004, and she quickly agreed to remove it—"We have not encountered any other difficulty".[35] While this mayor evidently had little to report from the local front, he still thinks: "It seems to me that legislation on the burqa question is necessary".[36] The statements by most of his colleagues are very similar. The mayor of Conflans-Sainte-Honorine, in Île-de-France, observed "in the past 2 or 3 years, at least 2 or 3 women in integral veil and with gloves, walking 3 meters behind what I believe were their husbands".[37] Even the mayor of Montfermeil, part of the urban agglomerate that includes notorious Clichy-sous-Bois, site of the 2005 banlieue unrests, had to concede that the integral veil "is a marginal question" there.[38]

For Burqa Commission president, André Gerin, the integral veil is "only the visible part of the iceberg that is fundamentalist *intégrisme*" (Assemblée nationale 2010: 13). However, it is not likely to be one that could ever rock the boat. In fact, if one considers the sociological marginality of the phenomenon, both in terms of quantity and of quality, it is difficult to follow some of the inflated rhetoric surrounding it: "The alternative is clear: it is either the Republic or the burqa."[39]

But what is it that is problematic about the burqa? It is the one communality between the present burqa and the past foulard affairs that veil and headscarf are perceived as a threat to "national cohesion" and to "Republican values" (Assemblée nationale 2010: 87). Restricting it is part of the great French, even European movement to get serious about "integrating" its immigrant and ethnic minorities. In France, it is better understood than elsewhere in Europe that this does not work without setting explicit conditions that newcomers and minorities have to fulfill and that it requires spelling out what it *is* that immigrants are to be integrated into.

However, the key difference between past and present veil affairs is that prohibiting the burqa cannot be in the name of *laïcité*, the French version of liberal state neutrality. To protect *laïcité*, to remember, had been the leitmotif in the 2004 legislation against ostentatious religious symbols in public schools. The 2009 parliamentary resolution to establish "a commission of inquiry about the practice of wearing the burqa and the niqab on the national territory", still presented the incriminated garb all as a threat to *laïcité*, the latter figuring as symbol for national unity: "If *laïcité* is threatened, French society is threatened in its unity, in its capacity of offering a common destiny" (Assemblée nationale 2009). This was but a reflex of the past that quickly receded.

Why did *laïcité* move into the background? For two reasons: first, because of the setting in which the integral veil was to be regulated—all public places, which does not, or only peripherally, involve the state; secondly, and somewhat bizarrely, because of a non-religious perception taking hold of the burqa, as political symbol that is not intrinsically related to Islam. With respect to the first, which is really the main consideration, the main purpose now is to prohibit the burqa in all public places. The state is mostly absent in this setting; instead it involves other individuals and their relationships. But *laïcité* is a principle

that obliges the state (as mandate to be neutral in religious affairs), not individuals. So it cannot be the operating principle for the relationships between individuals in public places. In the 2004 law, a public service provided by the state (education) was key, which brought in *laïcité*. And if this principle came to be, rather dubiously, extended from the providers to the users of public services, that is, school children, this is because children and adolescents in education were deemed in need of "reinforced protection" (Assemblée Nationale 2010: 91).[40] On the opposite side, "public space" and the relationships between individuals in it are subject to the "respect of fundamental liberties"[41]—the right of private life, of free movement (*droit d'aller et venir*), of free expression. This makes for a daunting degree of individual rights protection and gives a taste for the rather extraordinary, if not sinister, project of restricting something as fundamentally private as what to wear in the street.

But there is a second reason why *laïcité* cannot be invoked for restricting the burqa, one that is connected to a peculiarly non-religious perception of it that seems to have been shared by most pushing for restrictive legislation, even most experts involved (with the exception of the Islamic organizations). *Laïcité* is a principle to regulate religion. However, if the burqa is taken, however unconvincingly, as extrinsic to Islam, and not as religious expression at all, it falls outside the ambit of *laïcité*.

As *laïcité* is interestingly out of the picture, which are the "Republican values" put to the test by the burqa, and why? Let us go through the "Republican triptych", one by one.[42] Starting with "liberty", only if the integral veil is the result of external pressure, it "clearly negates the freedom of choice of women" (Assemblée nationale 2010: 95). However, considering that just one percent of integral veils is estimated to be worn by minors whom one must deem intrinsically vulnerable to such pressure (which amounts to the extraordinarily small number of under twenty in all of France!) (ibid., 99), and considering further the rather choice-prone sociological profile of fully veiled Muslim women in France, one must rather

argue the opposite: “liberty” is for not against the burqa, donning the burqa is an expression of the liberty of dress.

What about the second Republican value, “equality”? This goes to the heart of why the burqa is rejected: it denies sex equality. Remember that the Conseil d’Etat’s denial of French citizenship to Faiza Silmi was in reference to her niqab’s violation of sex equality, this “essential value” of the “French community”. As also the envisaged legislation against the burqa in public places was mostly built on this principle, I will further discuss it below.

“Fraternity” is the third Republican value, which is distinct from the other two in that, interestingly, no legal (and therefore: legislative) case has ever been attempted to be built around it. This is astonishing for the land of Durkheim, which has forever been obsessed by the “integration” of society. As a noted legal participant throughout the two-decade long French headscarf controversy put it, “fraternity has never been considered as legal principle.”[43] But if one perceives the burqa as undermining “national cohesion” and “Republican values” (which in this context signal the ties that bind), it should first and foremost be tackled as affront to solidarity. However one stands on the liberty- and equality-constraining charge made against the burqa, it is incontrovertible that it constitutes “a rupture of the social pact (*pacte social*)” (Assemblée nationale 2010: 118). In rather indirect ways, this motif would eventually evolve into the main justification of the legislation against the burqa. In enabling the veiled woman of seeing without being seen, the burqa interrupts the elementary reciprocity of seeing and being seen that undergirds everyday life. The burqa signals withdrawal and refusal to communicate, and this in permanence and in principle. This may well be taken as “symbolic violence”[44] inflicted on those exposed to the burqa. For French feminist Elisabeth Badinter, it even signifies “all-powerfulness over the other”: “The woman thus dressed arrogates to herself the right to see me but refuses to me the right to see her” (quoted in ibid. 118f). One sees the wildly oscillating pictures of burqa women on offer

here: hapless victim of archaic religion cum male power or sly and arrogant destroyer of the social contract. While the "symbolic violence" charge appears academic, the integral veil's affront to solidarity is difficult to deny. Only, no one can be forced to walk and talk with the others. If it were otherwise we would no longer live in a liberal society.

The fact of covering one's face, which is distinctive of the integral veil, also invited a reflection on the significance of the face in the Occident, which the forever philosophically minded French picked up with impressive ease. The final Burqa Commission report cited lengthy passages from the works of Emmanuel Lévinas that reflect on the face as the "mirror of the soul" and site of the "individualism" and "humanism" that is the mark of the West. Only the face in its totality, not reducible to its parts, chin, nose, or eyes, has this quality of expressing the soul. Therefore it is rarely covered, only when one's emotions win over—but then it is precisely the mark of civility for the others to look away. "The best way to encounter the other", writes Lévinas, "is to not even notice the color of the eyes! If you observe the color of the eyes, you are not in a social relationship with the other" (quoted in Assemblée Nationale 2010: 118). From this follows that covering one's face behind a veil, or leaving only a slit for the eyes to see, makes the individual lose her soul or humanity for the others, who cannot but relate to the veiled woman as "an object" (ibid.). This conclusion, which reduces rather than enhances the capacity of the veiled woman, is hard to reconcile with the opposite charge of her "all-powerfulness" in rupturing the social contract. One gets a sense for the irritations that a full-body veil evokes in the streets of Paris.

The flawed legal bases for a burqa ban

There are obviously many ways in which the integral veil is an affront to Republican, nay, Western values. The next step was to reflect on the legal viability of restricting or even

prohibiting the integral veil. These legal deliberations between lawyers and politicians open up a fascinating window into the reality of "judicialized politics", that is, a politics conducted "through the medium of legal discourse" (Shapiro and Stone Sweet 2002:187), with lawmakers trying to sort out in constant (often explicit but always internalized) dialogue with lawyers and legal experts how an essentially political project can be made compatible with the top-heavy constraints of an autonomous legal system, in this case especially of constitutional law and international human rights law. "We have to liberate ourselves from the clutches (*décisions*) of justices", exclaimed one exasperated member of the parliamentary Burqa Commission at one point.[45] This is why France, much like any other liberal-constitutional state, can only with great difficulties impose a general burqa ban that democratic representatives want to have for populist reasons.

The half-dozen lawyers cited before the Burqa Commission (only counting those appearing under their hat of legal expert) all had the same story to tell, if one brackets smallish nuances. There are three legal-normative principles on which to build a legislative case against the integral veil: "*laïcité*", "human dignity", and "public order". Each avenue, however, has been found wanting, so that in the end the commission discounted a "general and absolute" prohibition as a viable project.

Laïcité. If one considers the centrality of *laïcité* in the passing of the 2004 law prohibiting ostentatious religious signs in public schools, one is astonished how fast and categorically every single legal opinion expressed during the burqa deliberations wiped it off the table as "*inopérant*" (Assemblée Nationale 2010: 173). As the wittiest and most impressive of audited lawyers, Denys de Béchillon, a law professor at the provincial Université de Pau in the French Pyrenees, put it, representative for all, the principle of *laïcité* "weighs on the state and not on private persons."[46] If that is so obvious and uncontested, one wonders: Why did nobody

mention it in 2003/4, when the principle of *laïcité* became creatively reinterpreted as a norm that not just school teachers but also, and above all, school children were to follow and internalize?

Human dignity. Consonant with the moral rejection of the integral veil, the gist of building a law against it had to rest on the principle of "human dignity". This principle, though it cannot be found explicitly anywhere in the French Constitution, fuses all elements of the Republican triptych, especially those of liberty and equality, with different emphases—a subjective concept of dignity aligning more closely with liberty, an objective understanding more closely with equality. Kant defined dignity as the condition of being an "end in itself" and not just of "value" relative to some other purpose (such "relative value" of a thing being its "price"). Only human beings, endowed with the faculty of morality, that is, to decide between right and wrong, have "dignity", and each one of them equally.[47] This is the classic enlightenment view of the individual as free and equal. However, underneath this philosophical formulation hides a fundamental ambiguity that has become pertinent to a legal-political understanding of the term: is dignity an objective (and thus idealized) image of humanity that may be brought against the individual that violates it against herself, even if no other party is involved; or does dignity merge with freedom of choice and thus can be violated only by a third party?[48]

The ambiguity of "dignity" has implications for its utility to negate the burqa. A subjective reading of dignity, in which it becomes fused with freedom of choice, would amount to a defense of the burqa as expressive of religious liberty. Only an objective reading of dignity would allow using it for restricting the burqa. The import of this alternative becomes clear when considering the sociological reality of the burqa phenomenon. The situation would be straightforward if the burqa were simply imposed on the woman and thus against her will—who would argue that this violates her dignity? Incidentally, the headscarf

as imposed has been the main reading of reality when the 2004 headscarf law was crafted. However, now the situation was different—in all appearance, the integral veil seemed to be mostly a matter of choice. The phenomenon that the aspiring lawmakers were faced with has been succinctly described as "voluntary servitude", because one was dealing with "adult women who, on the most part, affirm to wear this dress voluntarily".[49] However, how could this ever be declared illegitimate "without questioning the capacity of self-determination that modern thinking has posited as fundament of our democratic system"?[50]

Considering the social reality of "voluntary servitude", the only possibility to restrict the burqa was on the basis of an objective reading of the concept of dignity. Dignity thus understood was surely consonant with a focus on equality, as the ideal picture of woman as equal to man could be violated by a woman who, through her own choice, put herself under and behind her husband or God or both. Such objective dignity was more difficult to reconcile with a focus on freedom, both being contradictory. This explains the focus on sex equality in the French burqa battle.

The problem is that an objective understanding of human dignity would push the state toward the questionable pursuit of an ethical project. For Eric Besson, Minister of Immigration, this is no problem: "Public authority is founded on protecting the dignity of the person, if necessary against the person herself".[51] A very French instinct for putting the collectivity first to emancipate the individual, shared by the left and right alike, popped to the surface. For UMP deputy Françoise Hostalier "society must protect its members, even if they voluntarily torture, mutilate, or impose on themselves an undignified appearance".[52] On the opposite end of the political spectrum, Pierre Forgues, member of the radical leftist SRC party, similarly holds that "freedom itself must be organized, and it is up to the legislator to protect the citizen, even against her- or himself".[53] Law professor Guy Carcassone retorted to such views that "the legislator would cease being democratic precisely if it superimposes

itself over liberty, telling the citizen under the cover of dignity what to do or not to do". A ban of the integral veil in these terms would be a "formidable signal to the virtue leagues to equally prohibit pornography, prostitution, or piercing".[54]

There is a second problem with an objective understanding of human dignity. As an objective principle it cannot be rationed between a public and private sphere, it cannot come in gradations, in terms of a "more" or "less". As law professor Anne Levade pointed out, dignity thus defined would call for a "general and absolute prohibition (of the integral veil) in all circumstances", the private sphere included.[55] Decreeing an objective meaning of dignity by way of law would be the end of France as a liberal society, as the French state would be forced to follow people into their bedrooms.

The major hurdle to an objective understanding of dignity, however, is all on the legal side, at the national and European levels alike. The main legal ammunition for an objective reading of dignity has been a noted but widely criticized decision of the Conseil d'Etat, *Commune de Morsang-sur-Orge*, of October 1995.[56] The court had argued in this case that the practice of a "dwarf" being thrown, for public amusement, as a projectile through the spectator ranks of a provincial discotheque (dubbed *lancer de nain*) constituted a violation of this (handicapped) person's human dignity, even though he had consented to it, even done it for a profit. Thus the local commune was acting lawfully to prohibit the spectacle for the sake of protecting "public morality" as an element of "public order".

Only, the Morsang-sur-Orge decision was anomalous, never affirmed or upheld even by the same court. At European level, there is, indeed, a similar judgment by the European Court of Human Rights, which is on sadomasochistic practices by a group of British homosexuals, in 1995. However, it likewise was quickly reversed. In this similar decision the ECHR had affirmed their severe punishment by a British court as "necessary in a democratic society for the protection of health", even though these sexual practices were consented and

not harmful to third parties, and thus, as the defendants argued, "part of private moraity which is not the State's business to regulate".[57] Lord Templeman's House of Lords indictment of the practices, which had been in the name of an objective concept of human dignity, was left standing: "Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilized."[58] However, in a subsequent decision, involving similar sadomasochistic practices by a heterosexual trio in Belgium, the ECHR reversed its line toward a consent-based, subjective understanding of dignity. The decision affirmed a similarly harsh punishment by a Belgian court, but this time on the argument that the "victim" had at one point withdrawn her consent to the pain inflicted on her, which was not honored by the (heavily intoxicated) defendants. As the court argued: "Although individuals could claim the right to engage in sexual practices as freely as possible, the need to respect the wishes of the 'victims' of such practices—whose own right to free choice in expressing their sexuality likewise had to be safeguarded—placed a limit to that freedom. However, no such respect had been shown in the present case."[59]

Overall, all lawyers before the Burqa Commission agreed that the legal development in France and at European level has been toward a subjective understanding of dignity, according to which dignity becomes identified with freedom of choice. This has also been the gist of the Veil Commission's recommendation for including the concept of dignity into the French constitution, which was to occur on the premise of not "moralizing" the term: "(Dignity should) rest fundamentally a matter of choice, of liberty, in a word, of autonomy" (Veil Committee 2008: XX).

The rub is that as a subjective concept, dignity could kick in only if a third party violated it; a self-inflicted harm to dignity becomes impossible. "From a legal point of view", argues matter-of-factly Bertrand Mathieu, a Sorbonne law professor, "the principle of dignity is utilized in rapports between self and others, and not in internal rapports within the self".[60]

Thus understood, dignity is "a protection of our liberty", as Guy Carcassone put it.[61] But this implies that dignity is protection for rather than challenge to the burqa: "The heart of the dignity of the woman is precisely the exercise of her free judgment, of her liberty, including the liberty to wear the burqa if she so intends".[62]

This creates the dilemma that religious liberties may be used for the destruction of liberty, which is the core paradox of the entire struggle surrounding Islam in liberal societies. A subjective concept of dignity is but one element in the unfolding of this paradox. When having the outraged lawmakers all over him, yelling that "we have to rescue ourselves from the clutches of justices", Bertrand Mathieu outed himself in favor of an "objective conception of dignity, one that can limit liberty". But he added that this view was "not shared by all" and that it was surely "not (the view) of the European Court of Human Rights". Calling himself a mere "mechanic of law," at least in his present function, this lawyer touched on the heart of the matter: "If you like it or not, today the legislator is controlled by the judge. I myself regret this disequilibrium in favor of the judge, but this is the reality".[63] Thus, in a powerful demonstration of the workings of judicialized politics, the main legal avenue for a wholesale interdiction of the integral veil, the one that resonated most closely with its moral-political motivation, turned out to be a dead-end.

Public order. The last resort for achieving a general interdiction was to construe the integral veil as a threat to "public order". This, of course, is an established concept in French public law, which includes the elements of "security", "tranquility", "public health", and—last and least, but eventually the shooting star—"public morality". Building on legal headscarf veteran Rémy Schwartz, [64] one could argue that a general anti-burqa case could only be built on the basis of "public morality". Therefore the importance of the Conseil d'Etat's 1995 *Commune de Morsang-sur-Orge* decision, which had exactly introduced human dignity as an element of

public order that the state was mandated to protect, via the "public morality" angle. A general prohibition of the burqa on the basis of public order concerns thus had to merge with one on the basis of human dignity, or rather, the former had to collapse into the latter. But then both must fail on the same ground, namely the fact that an objective concept of dignity is not the one that has come to prevail in the legal system. As one of its leading justices pointed out, the Conseil d'Etat immediately incorporated the loud critique of its 1995 decision as potentially destructive of individual liberties, and the principle of human dignity thus understood has been "rarely" ever mentioned since (Sauvé 2009: 15). In fact, legal restrictions on "public morality" grounds, which had flourished in the early 20th century, have almost disappeared.[65] It is no longer possible, for instance, for the mayors of beach resorts to require trousers and shirts on Main Street. This is in line with a general retreat of the state as ethical watchdog.

A morality-tinged notion of public order not having much traction, perhaps a security-focused understanding of order might provide a viable basis for interdicting the veil. The rub is that on these grounds at best a punctual and local but not a "general and absolute" prohibition could be built. The audacious scope of the anti-burqa undertaking is nowhere more apparent than here: public space is in the first a "space of liberty",[66] a space in which "liberty is the principle and restriction, not to mention interdiction, is the exception".[67] This makes restriction in public spaces a rather more difficult matter than restriction in public institutions, which had been the thrust of the 2004 headscarf law. A permanent burqa ban on public security grounds would have to be on the assumption that there is a "permanent threat" deriving from "a manifestation of religious liberty",[68] conveying the rather exaggerated "image of France in danger".[69] Moreover, where would be the stopping point? With respect to jilbab-style body cover, which might allow one, say, to smuggle weapons or explosives under it, one would have to equally prohibit "rucksack, handbag, *boubou* (a wide African dress), even the *soutane* (worn by catholic priests)".[70] But the real affront would be a security-based

order to always have one's face uncovered, in order to be at any moment identifiable to the state.

Among the lawyers, the first to seriously make such a proposition was law professor Guy Carcassonne: "One must not cover (*dissimuler*) one's face, in all public space, with respect to anyone".[71] However, this was not based on security grounds but justified with a heavy dose of public morality considerations. This would become the *piste* taken by the lawmakers. As it happens to be the "social code" in France and the West to "dissimulate one's face" and not to "expose one's sex", which might well be the opposite in "a thousand years", argues Carcassone, one could prohibit face coverage as much as its symmetrical opposite, nudity, *has* already been prohibited, for the sake of public morality (*bonnes mœrs*).[72] In addition, Carcassonne gives an important twist to a dignity-focused anti-burqa justification, always under the "public order" umbrella. While he sided with those who rejected the possibility of a self-inflicted dignity violation, it was still possible to see the dignity *of others* violated by the burqa's rupturing of the reciprocity of everyday life. In signifying to the other that "he is not sufficiently dignified, pure, or respectable to allow him looking at you",[73] the integral veil could be construed as "harm" according to Article 4 of the Declaration of the Rights of Man and Citizen, which states that "Freedom is the power to do anything which does not harm another". This was a rather strained interpretation of an article that was usually held to protect the freedom of expression in public spaces and thus was more pro- than anti-burqa in effect.

The first, forward-shooting law proposal by UMP deputy Jean-François Copé, which would cause the Socialist members of the Burqa Commission to noisily abstain from the final vote over the commission report, was along such lines: "In our societies, the face is part of the body which carries the identity of the individual. To dissimulate one's face from the regard of others is a negation of self, a negation of the other, and a negation of life in society". Its

proposed Article 1, in essence identical with the first article of the later burqa law, states: "It is prohibited to dissimulate one's face in all public places (*les lieux ouverts au public et sur la voie publique*) except for legitimate motifs laid down by the Conseil d'Etat".[74]

In its legal rejection of a general burqa ban, the Conseil d'Etat (2010:26) interestingly stipulated that a general prohibition would have to rest on a "new concept of public order", one in which "public order rests on a minimal foundation of reciprocity and of essential guarantees of life in society". While this would become the central meta-legal reference of the aspiring lawmakers, the Conseil d'Etat immediately dismissed the idea as insufficiently "elaborated as legal doctrine" and likely to be rejected by a Conseil Constitutionnel beholden to a "traditional conception of public order" (ibid, 28). At best, the court argued, one could express what amounts to the "fraternity" part of the Republican triptych in terms of a solemn parliamentary resolution, thus "put(ting) in value the constitutive elements of the social contract as they appear in our national representation" (ibid.).

However justified, an order to always dissimulate one's face still amounted to a Foucauldian dystopia of a totally legible society, a panopticon writ large, a society turned into "a vast zone of video surveillance".[75] As this would have to be a generalized rule, beyond the burqa, what about the motorbike rider forgetful of taking off her casket on the sidewalk, what about Father Christmas, what about masked people during Carnival (all examples that were seriously discussed by the Burqa Commission as necessary exemptions)? In June 2009, the government had passed a *décret* prohibiting the wearing of hoods (*anti-cagoule*), an icon like baggy-trousers among youthful hipsters, but this ban is effective only "in the presence of a threat", like a public demonstration, and not always and everywhere. A permanent prohibition along such lines would at a minimum require legislation, because of the fundamental liberty restriction involved. But there are daunting constitutional hurdles to this: "The actual jurisprudence of the *Conseil constitutionnel* does not indicate that citizens are obliged to

uncover their faces in permanence, to be everywhere and under all circumstances recognizable, and that any police officer may control their identity".[76] Rémy Schwartz expresses the dominant legal opinion that was loud and clear and nearly uncontested during the hearings of the Burqa Commission: "If public order requires the power to identify people, this control cannot be permanent. One cannot impose on citizens to be in a state of permanent control".[77]

Considering the legal-constitutional difficulties of achieving a general ban of the integral veil on all grounds: laicity-dignity-order, Denis de Béchillon appositely concludes: "I don't like the burqa, it disgusts me, but I don't believe that we have the tools and the political culture for prohibiting the wearing of such dress on the territory of the Republic."[78]

What is to be done?

While the Burqa Commission could not agree upon a recommendation for a "general and absolute" prohibition even along the "least risky", the public order route, no less than 15 policy recommendations were still made.[79] On top of the list was a symbolic "resolution" by parliament (a so far never used possibility after a constitutional reform in 2008) that would solemnly "reaffirm the Republican values of liberty, egality and fraternity" (notably not *laïcité*!) and that would "proclaim that all of France says no to the integral veil and demands that this practice be prohibited on the territory of the Republic" (Assemblée nationale 2010: 210). One wonders: who should be the address for this "demand", as it could logically address only parliament itself? The National Assembly unanimously passed such a resolution in May 2010.

Next to prohibiting the integral veil in public offices and public transport, the most interesting among the not-so-symbolic proposed restrictions was to circumvent through the route of immigration and nationality law some of the constitutional constraints that protect citizens and legal permanent residents. As the Commission report quite cunningly thinks aloud, one-third of integral veils are worn by non-French citizens and they may be "captured" this way (Assembleé nationale 2010: 165). A first measure would be to make the granting of family unification and long-term residence visa dependent on the immigrant's recognition of "equality between men and women and the principle of *laïcité*" (ibid). Furthermore, a permanent settlement permit (*carte dix ans*) was to be refused if a person "manifested a radical practice of his or her religion incompatible with the values of the Republic, especially the principle of equality between men and women" (ibid.). That was the precise formula used by the Conseil d'Etat in its denial of French citizenship to Faiza Silmi. These immigration law measures were logically completed by inserting the exact same condition into nationality law. All of these measures were first announced in Immigration Minister Eric Besson's testimony before the Burqa Commission. By way of administrative decree they have long become the law of the land.

The Burqa Commission concluded with the revival of a few ameliorative propositions that had already been part of the Stasi Commission Report of 2003, but which had never been seriously considered since: introduction of an Islamic holiday, to fight discrimination more effectively, a more "just representation of spiritual diversity" etc. To repeat the perhaps strangest but central premise of the anti-burqa crusade: "The integral veil is not a religious sign. However, the fact that it has often been presented as such…has contributed to present Islam as an archaic religion, incompatible with the values of the Republic, thus feeding the prejudices against the Muslims of France. It is thus important for the Commission to distance itself from such views through…reaffirming our solidarity with all Muslims who suffer from

discrimination" (Assembleé nationale 2010: 128). As the integral veil was categorically dissociated from Islam, it was no contradiction to complement the legally possible restrictions with positive integration measures. Indeed, Islam has long become French, the anti-burqa cause's peculiar dissociation of the integral veil from Islam being not the smallest proof of this.

The Conseil d'Etat's "no" to a general burqa ban

As it still insisted on the "largest and most effective possible (restriction)" of the integral veil, the French government, upon the Burqa Commission's termination, called on the Conseil d'Etat for "juridical solutions" (quoted in Conseil d'Etat 2010:43). In its "study" (*etude*) presented to the Prime Minister in March 2010, the Conseil d'Etat distinguished the "political and sociological" nature of the Burqa Commission report from the "strictly juridical" nature of its own report.[80] This is a misleading distinction, because it ignores the weight of legal-constitutional considerations that had already forced the "political" Burqa Commission to step back from its original project of a "general and absolute" burqa ban. In fact, the Conseil d'Etat *étude* comes to almost identical conclusions as the Burqa Commission. The only "very solid" basis for prohibiting the integral veil, under the more general auspices of prohibiting all dress that "dissimulates" a person's face, was on "public security" grounds, but this in turn was possible "only in particular circumstances" (ibid., 30). Negatively formulated, "public security does not justify to impose on everyone the obligation to have one's face uncovered during all times and in all places" (ibid., 32). Concretely, the court suggested exactly what already the Burqa Commission had proposed in terms of "hard" legislation: to pass an interdiction, mostly by way of "harmonizing and reinforcing" the many already existing restrictions, "in certain places open to the public where the circumstances or the nature of the

places warrant it"(ibid., 37), while leaving it to the political lawmaker to specify what these "places" and "circumstances" were to be precisely. Shortly before the Conseil d'Etat had presented its report to the Prime Minister, his boss, the President, had noisily restated that "too long already we have accepted the assault on *laïcité*, on equality between men and women, the discriminations. It's enough…The response must be interdiction of the integral veil."[81] Not much learned on his side. The Conseil d'Etat confirmed the impossibility of exactly such response. "The political will could yet another time falter before the law (*droit*)", *Le Monde* commented the outcome,[82] and this seemed the final lesson to be drawn from France's burqa struggle.

Politics against the law

However, the politicians did not give up. While the issue fell dormant after the Burqa Commission's disappointing lack of spine, it was cunningly unburied three days before the regional elections of March 2010, in an obvious "signal" to the voters of the right-wing National Front: "The integral veil is contrary to the dignity of women", thundered the president of the Republic, "The response is interdiction of the integral veil. The government will introduce a bill conformant to the general principles of our law".[83]

The rhetoric for this move, so obviously in contradiction to the negative recommendation by France's administrative high court, was given by a parallel move toward a total burqa ban in Belgium, which became the first country in Europe to pass a burqa law: this was a matter of "risk taking" and of shouldering "political responsibility". Well aware of the French Conseil d'Etat *avis* on the matter, a liberal Francophone Belgian deputy expressed his "great respect" for the court, but then declared that it was up to the political world to "take responsibility" against the legal odds.[84] This was, one should note, the last consensual matter

in a country that was heading towards the abyss, that is, dissolution into a French and Flemish-speaking part; only in the front against Islam could one still "be proud to be Belgian".[85]

"Risk taking" and "political responsibility" became the dominant rhetoric in the French move toward a burqa law as well. When he officially announced the project in late April 2010, Prime Minister François Fillon expressed himself "ready to take juridical risks".[86] Interestingly, the President conceded that "it's not this which will allow people to find work". His front man in the burqa campaign was Jean-François Copé, who heavily invested his bid for UMP leadership in this at best symbolic affair.[87] It was a matter of "political courage", and one could not afford "to let loose on it", said Copé.[88] The Conseil d'Etat *avis* was merely a legal "interpretation", and one that was "respectable but contestable".[89] Moreover, "If the Conseil d'Etat says that the juridical fundaments are contestable, this means they are not impossible".[90]

This was polite. What now occurred was political backlash against a perceived dictate of the legal system. The anger accumulated during the legal lessons before Burqa Commission erupted into the open, with a vengeance. One UMP delegate declared himself "shocked" by the "preemptive tone" of the Conseil d'Etat, advising the latter to "leave their ivory tower and face reality".[91] Another UMP delegate discovered that it was "not the first time" that the Conseil d'Etat had proved to be "seriously wrong", referring to the court's liberal headscarf *avis* of 1989 that was annulled fifteen years later by the headscarf law.[92] Calling the legal defense of religious liberties an "error" was a peculiar way of understanding the relationship between politics and law in a liberal-constitutional state. A third UMP delegate, his finger high up, declared that "Parliament is there to make law, not to follow the views of the Conseil d'Etat", and the latter was "obliged to recognize that this interdiction rests on legal fundaments".[93] The chorus of conservative court bashers was completed by a

fourth UMP delegate, who found that “the French don’t understand these legal disputes and prefer that we pass effective laws”. This was the political (or rather populist) heart of the matter: 70 percent of the French public supported a general burqa ban, so that the latter was the easiest way of pleasing them in an austere economic climate.

These rabid views were triggered by the Conseil d’Etat’s second rejection of a total interdiction of the burqa, issued in presence of the general secretary of the government. The Conseil d’Etat restated that “a total and general interdiction of the wearing of the integral veil could not find any incontestable juridical foundations”, and that it would be “exposed to strong constitutional and statutory uncertainties”.[94]

The burqa bill that was brought to parliament in July 2010 was all in the language of dignity, equality, and high-sounding Republican principles that have been found wanting from a legal-constitutional point of view: “The dissimulation of the face in public space is a symbolic violence and dehumanizing” and even if voluntary, it “violates the dignity of the person”.[95]

However, the legal case was built more narrowly on a niche that had been prepared by the Conseil d’Etat itself, in its speculation on the “non-material” dimension of public order: “Public order rests on a minimal fundament of reciprocity and of essential guarantees of life in society” (Conseil d’Etat 2010:26). Like the “fraternity” part of the Republican triptych, this dimension of public order had never been “legally theorized”. But it existed, as one could see in extant prohibitions of incest, polygamy, or nudity in public. Spelling it out, which the Conseil d’Etat abstained from doing, would mean “affirmation of a right and an equal belonging of everyone to the social body” (ibid. 27). Only in the land of Durkheim one could one fathom a law that makes everyone an organic part of society. This is what the burqa law does.

When the burqa bill was introduced to parliament in early July 2010, its main justification was the reference to "immaterial" or "social" public order, as Justice Minister Alliot-Marie put it in her opening speech. "The Republic is lived with the face uncovered", said the minister.[96] To prohibit the burqa was for the sake of "living together" (*vivre ensemble*) and to refuse separatism (*repli sur soi*).[97] Jean-Paul Garraud, chair of a parliamentary study (*rapport*) on the burqa interdiction, cleverly added that the "majority opinion" among jurists was "sensibly evolving" on the issue.[98] In fact, Sorbonne law professor Ann Lavande, who had earlier declared, like every single of her peers, that "neither laicity nor dignity nor public order could ever justify a general and absolute interdiction"[99], now ruminated that the immaterial dimension of public order was "indispensable counterweight to the excesses of the absolute primacy of individual rights".[100]

Most importantly, the invocation of immaterial public order allowed smuggling back in the dignity discourse that had to be thrown out for legal reasons. "Dignity" was openly invoked by the Justice Minister's presentation of the bill to the National Assembly: "The Republic does not accept the compromising of human dignity."[101] So it was not difficult for a Socialist opposition deputy, Jean Glavany, to call the trick. "You claim not to invoke the principle of dignity", which was apparently not quite true, "but this is finally the only principle that is written into your text", which also was not quite true.[102] But Glavany aptly grasped the essence: "Immaterial public order rests on public morality and respect of the dignity of the human person. The dignity of the human person: here we meet it again".[103] And this was at significant cost: "The fundamentalist jurists are already rubbing their hands".[104]

Of course, the Socialists happily participated in the political backlash against constitutional law. While abstaining from the final vote on the burqa law, which the National Assembly accepted on July 13, 2010 with only one vote of dissent, the Socialists took a self-declared "responsible attitude" in not submitting the law to the Conseil Constitutionnel, which

is the routine procedure in the political game between government and opposition. In fact, a leading Socialist later called the burqa ban a "victory for the Republic", and he was as satisfied as his UMP colleagues that the Conseil d'Etat "does not make law" in France.[105]

So safe felt the conservative government party (UMP) that it itself referred the fresh burqa law to the Conseil Constitutionnel for the constitutionality check. While the law was all couched as a matter of "risk taking", one must assume that the risk of failing before the Conseil Constitutionnel was calculably low. After all, this is a court not made up of professional judges but of political notables, including Jacques Chirac, Valerie Giscard d'Estaing, and Jean-Louis Debré, all conservative politicians who had taken vocal and often controversial stances on anti-Muslim and anti-immigrant campaigns, and who were unlikely to obstruct a government close to their leanings. In a typically short and apodictic decision in October 2010, the Conseil Constitutionnel declared the burqa law "conform with the constitution", apparently agreeing with the lawmakers' view of the burqa as "manifestly incompatible with the constitutional principles of liberty and equality"—which was a stretch, if not impossibility, by the predominant legal reasoning.[106]

However, the Conseil Constitutionnel included a surprising proviso: the burqa prohibition "shall not restrict the exercise of religious liberty in places of cult that are open to the public". This was not to violate Article 10, the religious liberty clause, of the 1789 Declaration of the Rights of Man and Citizen. Patrick Weil pointed out in a brilliant commentary that the religious cult exemption "unveils the real—religious—object of the law."[107] Remember that the red thread in the burqa campaign had been that this was no "religious question" but only "a problem of living together in the Republic".[108] The religious cult exemption exposed this claim as false. If, deep down, one did not suspect the restricted wear to be religious, why the religious exemption? No religious exemption, after all, exists for the prohibition of incest or public nudity, which the burqa restriction was compared with by

the lawmaker. On her way to Notre Dame cathedral (that, like all catholic churches in France, tolerates the burqa), a burqa woman "could invoke the right to religious liberty that the legislator has deliberately refused to associate with the law, but which the Conseil Constitutionnel now has associated with it", Weil concludes.[109]

Most importantly, after the Conseil's recognition of the religious possibility of the restricted burqa, the burqa law becomes even more vulnerable to an intervention by the European Court of Human Rights (ECHR). In February 2010, the Strasbourg court branded as violation of religious liberty rights, under Article 9 of the European Human Rights Convention, the Turkish government's arrest of members of an Islamic sect that had publicly paraded in their traditional garb near their temple of worship.[110] The court distinguished here between dress restriction in "public institutions", which is legitimate on public servants who are to "respect neutrality", and dress restrictions "in public places open to all like streets or places", addressed to "simple citizens", which constitutes an Article 9 violation. But this is exactly what the French government has undertaken in its burqa law. Of course instantly aware of the European court rule in the age of constitutional politics, French lawmakers deem themselves immune from its reach, retorting that no particular dress was targeted by the burqa law (but all dress that "dissimulates the face"), and that the restriction was based not on the religion-centered principle of *laïcité* but of *ordre public societal*.[111] Now that France's own Conseil Constitutionnel, called on to rubberstamp the law, has done so only by bringing back in the religious dimension, the Strasbourg court may not be convinced that the French and Turkish situations are "totally different".[112]

In his indictment of the Conseil Constitutionnel's "confused and contradictory" *d'accord* to the burqa law, Patrick Weil expounds how this submission of law to politics was possible: "Mostly composed of former political officeholders, the Conseil Constitionnel has not dared to oppose public opinion and to engage in proper legal reasoning".[113] Overall, the

limits of restricting Islam could be transgressed only by denying that the burqa is part of Islam. This has already proved not the last word on the matter.

Endnotes:

[1] *Libération*, 22 June 2009 (www.libération.fr).
[2] Assemblée nationale, *'Proposition de résolution'*, no. 1725, 19 June 2009.
[3] Being made aware by an audited anthropologist that the Afghan-origin burqa was practically non-existent in France, Commission president Gerin ordered the relabelling of his enterprise into one that studies the "integral veil" (*voile integral*). This has since become the umbrella term for niqab and burqa in French political language. In the following, I use the notions 'burqa' and 'integral veil' interchangeably.
[4] "The Talibans would applaud", *New York Times* 26 January 2010.
[5] "Les dégâts collatéraux du débat sur le port du voile integral", *Le Monde* 5 February 2010.
[6] Tariq Ramadan at the 6th meeting of the *Mission d'information sur la pratique du port du voile integral sur le territoire national*. The transcripts of all 18 meetings are available on www.assemblee-nationale.fr/13/cr-miburqa/09-10/index.asp. I refer to them in the following as *Mission*, followed by the meeting number (1-18).
[7] *Mission* meeting no 8, p.19.
[8] *Mission* meeting no 10, p.4.
[9] A French public survey done at the heels of the Swiss vote found 46 percent of respondents in favor of prohibiting minaret constructions in France ("Les Français de plus en plus hostiles à la construction de mosquées", *Le Figaro* 3 December 2009, p.11). If one considers that no poll had predicted the Swiss referendum outcome (presumably for respondents' reticence for expressing hostility to Islam and Muslims), this figure is likely to be an undercount of minaret opponents.
[10] Nicolas Sarkozy, "Respecter ceux aui arrivent, respecter ceux qui accueillent", *Le Monde* 9 December 2009, p. 1 and 20.
[11] Ibid., p.20.
[12] "La création de mosquées se banalise en France", *Le Monde* 4 December 2008, p.1 and 9.
[13] Sarkozy in *Le Monde* 9 December 2009, op.cit., p.20.
[14] Ibid.
[15] This is the topic of Pirenne (1937).
[16] See, for instance, the Council of the European Union's (2004) « common basic principles » of immigrant integration policy.
[17] *Mission* meeting no 18, p.12.
[18] *Libération*, 22 June 2009 (www.libération.fr).
[19] *Mission* meeting no 15, p.2.
[20] *Mission* meeting no 4, p.9.
[21] *Mission* meeting no 2.
[22] Ibid., p.5.
[23] Ibid., p.12.
[24] UMP Commission member Jaques Myard commenting on the Bouzar testimony, ibid. p.10.
[25] *Mission* meeting no 8, p. 3.
[26] CFCM president Mohammed Moussaoui, ibid., p.4.
[27] *Mission* meeting no 18, p.3f.
[28] Samir Amghar of the Ecole des Hautes Etudes en Sciences Sociales (ECESS), *Mission* meeting no 11, p. 3.
[29] Ibid. For the "hyper-individualism" of contemporary global, de-ethnicized Islam, see above all Roy (2004). Also Abdennour Bidar, "La burqa, symtôme d'un malaise", *Le Monde* 24/25 January 2010, p.14.
[30] Quoted in "Vivre en France avec le niqab", *Le Monde* 24 June 2009, p.3.
[31] Conseil d'Etat, 27 June 2008, *Mme Faiza M.*, req. no 286798.
[32] French salafi expert Samir Amghar testifying before the Burqa Commission, *Mission* meeting no 11, p.6.
[33] *Le Monde* 24 June 2009, p.3.
[34] Michel Champredon, Mayor of Evreux, *Mission* meeting no. 3, p.21.
[35] Ibid.
[36] Ibid., p.24.

[37] Philippe Esnol, mayor of Conflans-Sainte-Honorine, ibid., p.22.
[38] Xavier Lemoine, mayor of Montfermeil, *Mission* meeting no 6, p.8.
[39] Sihem Habchi (*Ni putes ni soumises*), *Mission* meeting no 4, p.9.
[40] The Burqa Commission report follows here the statement by law professor Anne Levade, *Mission* meeting no 13, p.10.
[41] Rémy Schwartz (*conseiller d'Etat*), *Mission* meeting no 7, p.13
[42] In doing so I only need to follow the Burqa Commission report (Assemblée nationale 2010:87-122).
[43] Rémy Schwartz, *Mission* meeting no. 7, p.16.
[44] Philosopher Abdennour Bidar, *Mission* meeting no.2, p.17.
[45] UMP delegate Jacques Myard, *Mission* meeting no.14, p.6.
[46] *Mission* meeting no 8, p.25.
[47] Immanuel Kant, *Grundlegung zur Metaphysik der Sitten* (1785). Bonn: Akademie-Ausgabe, p.434.
[48] I follow here the succinct discussion of the « multiple and uncertain » contents of the concept of dignity in the Veil Commission report (2008:92-95), which—despite conceding the ambiguity of « dignity »--recommended inserting a dignity clause into Article 1 of the French Constitution.
[49] Minister of Work, Xavier Darcos, at *Mission* meeting no. 18, p.8.
[50] Ibid., p.9.
[51] *Mission* meeting no. 18, p.13.
[52] *Mission* meeting no. 14, p.6
[53] Ibid., p.6.
[54] *Mission* meeting no. 14, p.12.
[55] *Mission* meeting no. 13, p.6.
[56] C.E., Ass., 27 octobre 1995, *Commune de Morsang-sur-Orge*.
[57] European Court of Human Rights (ECHR), *Laskey, Jaggard and Brown v. The United Kingdom*, at par.50 and 45, respectively.
[58] Ibid., at par. 20.
[59] European Court of Human Rights (ECHR), *K.A. and A.D. v. Belgium*, 17 February 2005.
[60] *Mission* meeting no. 14, p.3.
[61] *Mission* meeting no. 14, p.12.
[62] Denys de Béchillon, *Mission* meeting 8, p.28.
[63] *Mission* meeting no. 14, p. 7.
[64] *Mission* meeting no. 7, p.15f.
[65] Rémy Schwartz, ibid. p.15.
[66] Anne Levade, *Mission* meeting no. 13, p.5.
[67] Rémy Schwartz, *Mission* meeting no. 7, p.13.
[68] Anne Levade, *Mission* meeting no. 13, p.7.
[69] Denys de Béchillon, *Mission* meeting no. 8, p.25.
[70] Ibid., p.25.
[71] Guy Carcassonne, *Mission* meeting no 14, p.16.
[72] Ibid., p.13.
[73] Ibid.
[74] Copé's *proposition de loi* is reprinted in Assemblée national (2010:268-70).
[75] Law professor Danièle Lochak, quoted in *Le Monde* 13 November 2009, p.13.
[76] Denys de Béchillon, *Mission* meeting no. 8, p.26.
[77] Rémy Schwartz, *Mission* meeting no. 7, p.15.
[78] Ibid. p.29.
[79] The Socialist members of the commission even refused to vote on the final version of the commission report, in protest against the UMP law proposal launched separately by Jean-François Copé and against the parallel « national identity » campaign conducted by the Gaullist government.
[80] In an annex to Conseil d'Etat (2010), entitled "Fiche questions-reponses" (downloaded from the website of the Conseil d'Etat).
[81] President Nicolas Sarkozy, quoted in "Burqa: le chef de l'Etat reparle d'une loi", *Le Monde*, 26 March 2010, p.9.
[82] "De la difficulté de lutter contre le communautarisme par la loi", *Le Monde*, 31 March 2010, p.12.
[83] President Sarkozy, quoted in *Le Monde* 26 March 2010, p.9).
[84] *Le Monde*, 2 April 2010, p.9.
[85] A Belgian parliamentarian, quoted in *Le Figaro* 30 April 2010, p.11.
[86] "Voile integral: une loi votée avant l'été" *France2.fr*, 23 April 2010.
[87] *Le Monde*, 9 April 2010, p.18.

[88] Ibid.
[89] Copé quoted in *Le Figaro.fr*, 14 May 2010.
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] *L'Express.fr* 14 May 2010.
[95] Assemblée nationale, *Projet de loi interdisant la dissimulation du visage dans l'espace public*. No. 2520, 19 May 2010; at p.3-4.
[96] Assemblée nationale, *Compte rendu no.75, Commission des lois constitutionnelles, de la legislation et de l'administration générale de la République*, 6 July 2010, at p.2.
[97] Ibid.
[98] Ibid., p.8.
[99] *Mission* meeting no.13, p.7.
[100] Assemblée nationale, *Rapport fait au nom de la commission des lois constitutionnelles, de la legislation et de l'administration générale de laRrépublique sur le projet de loi (no.2520), interdisant la dissimulation du visage dans l'espace public, par M. Jean-Paul Garraud*, no.2648, 23 June 2010 (henceforth referred to as Garraud Rapport 2010); at p.31.
[101] Assemblée nationale, *Compte rendu no.75*, op.cit., at p.4.
[102] Glavany ibid., p.14.
[103] Glavany, ibid., p.15.
[104] Ibid.
[105] Manuel Valls (PS), in *Le Monde* 1 October 2010, p.20.
[106] Conseil constitutionnel, *Décision no. 2010-613 DC*, 7 October 2010 (Loi interdisant la dissimulation du visage dans l'espace public).
[107] Patrick Weil, "La loi sur la burqa risque l'invalidation par l'Europe" *Le Monde*, 24 November 2010, p.23.
[108] Justice Minister Alliot-Marie, when audited by the National Assembly in June 2010 (Garraud Rapport 2010, op.cit., at p.27.
[109] Weil, op. cit.
[110] European Court of Human Rights, *Affaire Ahmet Arslan et autres c. Turquie* no.41135/98, 23 February 2010.
[111] Garraud Rapport 2010, op.cit., at p.21.
[112] Ibid.
[113] Weil, op.cit.