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# How the French State Justifies Controlling Muslim Bodies: From Harm-Based to Values-Based Reasoning

AS THE SECOND DECADE OF THE TWENTY-FIRST CENTURY BEGINS, political leaders across Western Europe have increasingly pointed to Muslims' bodily attitudes as indicative of their refusal to join the wider society, and as indicative of the failure of the society to sufficiently carry out programs of political socialization and assimilation. Among the targeted practices have been covering the hair or face (for women), wearing loose, short trousers (for men), refusing to shake hands with those of the opposite sex, and praying in the street (for men and women). Political actors have made both broader and more specific claims: that these badges of separation show that some Muslims refuse the rules of common social life, and that covering the hair or face shows that the oppression of women, either in particular cases or generally, remains part of Islamic culture. Civic "normality" is thereby portrayed against images of its opposite: people who by their bodily practices show themselves to be visibly and slavishly obedient, unmodern, and sectarian.

Although this picture applies to a number of different countries, in each case it has been produced by specific rules of justification, interweaving legal and political domains. I examine here how politically useful condemnations have been given the force of law in

France. In particular, I trace a shift in the legal justifications for French laws and decisions targeting women's dress during the first decade of the 2000s. The shift, to be found in texts of court decisions and administrative practice, consists in moving from harm-based arguments to values-based ones. Recent decisions provide a legal basis for new condemnations of Muslim practices in a period when the center-right party seeks to carve out electoral territory from the increasingly popular National Front. It also supports debates on "national identity" and secularity (*laïcité*), in which some left-leaning voters as well as rightward-leaning ones might be attracted by appeals for stricter enforcement of civic republicanism.

I begin with a decision by France's Constitutional Council, the legal body having the final say on the constitutionality of laws. In 2010, the council upheld a law against covering the face in public by ascribing objective meanings to face coverings, a novel judicial argument. I then trace a line of judicial reasoning beginning in 1989 concerning headscarves, and arrive again at 2010 by way of judgments about virginity and citizenship. I examine courts' explicit (but often short and cloudy) justifications, as well as the broader forms of argumentation reasoning that readers (including French jurists) can infer from the texts. Along the way, I consider links between political priorities and court decisions.

## **WHY THE ANTI-BURQA LAW IS CONSTITUTIONAL**

First, a word on the institutions we will consider. The Constitutional Council (Conseil Constitutionnel) considers requests to pronounce on the constitutionality of a law being considered in either chamber of Parliament. Since 2010 it may also respond to demands brought by ordinary citizens to judge the constitutionality of a law already passed ("priority questions of constitutionality"). But historically, the Constitutional Council has given an opinion concerning the constitutionality of a proposed law to the legislator at the legislator's request, a role that reflects French (and generally civil-law) theory that legislators pass laws and courts enforce them (Eolas 2010).

The State Council (Conseil d'État), on the other hand, acts as a review body for actions arising in public institutions such as schools or immigration offices. The State Council decides whether actions taken by French bodies conform to the law, in the broadest sense that includes international commitments and the French constitutions. Its writ is grander than this single role implies, however, for the State Council also issues reports on various matters and is routinely asked to inform Parliament of the state of the law on questions of the day. State councilors also act as multipurpose agenda-setters for a wide array of commissions and legal institutions. As of 2010, the State Council might be asked to render an opinion on the constitutionality of a proposed law or to forward a request to decide constitutionality on to the Constitutional Council. These two institutions thus have overlapping roles in judging the constitutionality of a law, a matter that arises in the decisions to be discussed here.

Finally, the Court of Cassation (Cour de Cassation) receives requests to overturn decisions taken by lower courts. Unlike a Supreme Court, but similar to high courts in other civil-law countries, it limits its judgments to the question of whether the law was interpreted correctly by the lower court in a particular case. It plays no role in the discussion that follows here.

Now to the law in question, passed in October 2010 and forbidding anyone “in public space, to wear clothing meant to cover his/her face” (Fillon 2011, texte 1). Public space was given a broad definition, including any space either open to general use or controlled by the state.

Prior to the law's promulgation, the National Assembly had asked the Constitutional Council to decide whether the law conformed to the constitution. The assembly did so in part because earlier the State Council had given its opinion that a general burqa ban (for such was the target, if not the language, of the law) would unduly restrict religious freedom (Conseil d'État 2010). In upholding the law, the Constitutional Council cited two principles (leaving aside a brief reference to the red herring of “public safety”). It argued, first, that covering the face “misrecognizes

the minimal requirements of living in society” and, second, that those women who decide to wear a face veil “find themselves placed in a situation of exclusion and inferiority clearly incompatible with the constitutional principles of freedom and equality” (Conseil Constitutionnel 2010). Burqa-wearing violates minimal conditions for civic life, and it objectively reduces the autonomy of the wearer, regardless of her knowledge, capacities, or intentions, argued the council.

The Constitutional Council momentarily entertained the idea that religious freedom might be endangered by the law, only to dismiss it on grounds that the legislature had succeeded in balancing the requirements of public moral order (*ordre public*) with the religious rights of citizens in a way that was not “clearly out of proportion” and so was not contrary to the constitution. But they did add a restriction to the law, stipulating that it not apply to people who are in public religious spaces, which means mosques, churches, temples, and so on. Thus a woman now may cover her face in her automobile when she drives to the mosque (a right recently upheld in court), and when she is inside the mosque, as long as she removes it between the parking space and the mosque entryway.

The council’s two justifications were new as legal arguments but old as public and political ones. The first, concerning the requirements of sociability, echoes long-standing claims about ways in which Muslim “communalism” hindered full civic participation. The second, about signs of female inferiority, makes a claim long avoided by judges and jurists: that head coverings signal Muslim patriarchy. But together these two justifications base French law on a values-based condemnation of practices that some Muslim women undertake on the basis of their religious convictions. The council argued that religious freedom considerations were outweighed by the arguments concerning sociability and gender equality.

### **2003: PREVENTING HARM**

In the past, jurists have avoided the language found in this 2010 decision for reasons that we can best appreciate by returning to the long

legal and social debates of 1989–2004 over girls wearing headscarves in public schools (Bowen 2007). Often forgotten is that during these 15 years, the State Council consistently held that pupils had the right to wear the scarves as an instance of the religious freedom they enjoy under European law and under French constitutions. The 2003 presidentially appointed Stasi Commission, which gave the more or less official justification for the subsequent law, acknowledged those rights (Stasi 2003). However, the Stasi Commission argued that religious rights were outweighed by the need to protect some girls, who did not wish to wear scarves, from the men and women who were trying to force them to do so. No such girls testified at the public hearings held by the Stasi Commission, and although frequent reference is made by supporters of the law to the commission’s closed hearings, only one such testimony appears to have been taken even in private (Baubérot 2011).

This liberal argument is the only one that former commission members continue to advance publicly, in particular when addressing non-French audiences. When in late 2010 the Stasi Commission’s *rapporteur* defended the law as part of a televised mock trial proceeding, he made “protecting these girls” his sole argument (World On Trial 2010). In this way French spokesmen moved the debate out of the realm of religion and into the realm of public moral order, saying that the state needed to protect a vulnerable class of its citizens, those non-scarf-wearing schoolgirls. This reasoning was fit for export to Anglo-American audiences, who could be persuaded to see it as the expression of negative liberty. (The exported reasoning fails to take account of the range of reasons invoked by members of the National Assembly in 2004, but that is another issue.) The commission also explicitly refused to pronounce on the meaning of scarves or the wearing of scarves, saying that this was something that they could not judge.

The commission’s argument would have been difficult to use to justify banning full face veils (called “burqa” in France) for a reason set out in July 2010 by former member of the Constitutional Council Dominique Schnapper: “How could you claim that women were being harmed by wearing the burqa if no women came forward to complain?”

(Schnapper 2010). The Parliamentary Commission formed in 2009 to debate the issue also came up short in that area. To make things worse for those favoring a law, this lack of evident harm led jurists testifying before the commission to say that they could not see how such a law could withstand scrutiny either by the Constitutional Council or by the European Court of Human Rights. There was no harm against which the loss of religious freedom could be “balanced” (Assemblée Nationale 2010).

But arguments had been displaced between 2003 and 2010 by a new justification, one that was promoted by the governments under President Nicolas Sarkozy and that subsequently was taken up by the Constitutional Council in 2010. Now values, rather than harm, become the grounds for restraining liberty. Two decisions from 2008 prefigured the council’s later argument.

### **2008: PREVENTING ARCHAIC MARRIAGE PRACTICES**

In April 2008, a court in Lille accepted a husband’s argument that his marriage should be annulled on grounds that his wife had lied concerning “an essential quality of the person,” to use the language of the Civil Code, in this case her virginity. His wife did not contest the request. It also happened that the parties were Muslims (he a convert, born in Morocco; she a French Muslim woman of Moroccan background), but this fact did not figure in the Lille court’s decision (Chemin 2008).

The husband’s argument fit with the way jurists have interpreted the relevant passage of the Civil Code, namely, that it is the parties to the marriage who define what counts as an “essential quality” of their persons. The marriage has dimensions of a contract, and one of the parties to a contract may not conceal something that the other would consider to be essential to it. The set of such qualities is a private, subjective matter, and not a matter for public policy. Only about 80 annulments are granted each year, and this case resembled others from recent years, when a husband lied to his wife about his impotence, or about his positive result on an AIDS test, or when one party married

only to obtain a financial advantage or legal residence. Most jurists supported the court's decision to annul, on grounds that such decisions rest, not on the values revealed in the case, but the "freedom of consent" that underlies a marriage (Fulchiron 2008; de Larquier 2008). Even Minister of Justice Rachida Dati initially supported the court's decision on grounds that it was legally correct, that it allowed the woman to continue with her life, and that in other cases this reasoning could protect women from unwanted marriages (Neuer 2008).

So far so good, until in June of that year the decision became more widely known, and came under lively attack. Fifty French deputies to the European Parliament signed a protest against these "fundamentalists in their archaic struggle." The leader of an association that fights violence against women said the decision was a "fatwa against women's freedom" ("Mariage annulé" 2008). One of President Sarkozy's close advisers urged ending the practice of annulment entirely—apparently forgetting that most annulments come at the request of government officials trying to eliminate fraudulent marriages. Most of these political commentators systematically misrecognized the court's logic, claiming that France was championing a virginity test for brides and thereby siding with Muslim fundamentalists. Minister Dati changed her mind and by June the decision had been suspended (Chemin and Le Bars 2008).

In November of the same year, the appellate court (at Douai) overturned the original decision. Here enters the new logic. They could have merely found that the husband had not proved that his wife had lied; that finding would have been sufficient to overturn the annulment. But they went further to argue that the couple did not have the right to base their case on their own "subjective" sense of what is essential to a marriage, because claiming that virginity is one of those qualities raises questions of the equality of women and men and public moral order (*ordre public*). Virginity is not essential to a marriage, declared the court, no matter what the couple might have thought (Bras 2011). This decision left the couple once again married; they soon took the easier route of simply divorcing.

Although the appellate court took care not to denounce Islam as such, its decision has been interpreted as “preventing taking account of communal or religious norms when consenting to marriage,” and thus reducing the contractual element of marriage. Certain values or considerations are now potentially considered essential to marriage, and other ones, such as those of virginity, are not (Bras 2011).

## **2008 BIS: KEEPING SUBORDINATE WOMEN OUT OF THE REPUBLIC**

That same June came a second decision, which pushed the courts a bit further toward the logic of values-based prohibitions of Islamic practices. The decision was taken by the State Council, which refused to grant French nationality to a woman from Morocco (Conseil d’État 2008). The council ruled that her religious practices had led her to hold values that ran counter to the equality of men and women and that caused her to suffer from insufficient assimilation to become a French citizen. She suffered from a *défaut d’assimilation*. The woman, named Faiza, had married a French convert to Islam who requested that she wear a full face-veil. They had three children. She was reported to stay at home and to have insufficient knowledge of the right to vote and the basics of laïcité.

Faiza had met the formal conditions for citizenship, having waited the required period of time after marriage before requesting naturalization. Normally the administrative tribunals, including the State Council, would have awarded her citizenship. However, since 2003 the government has the right to intervene in naturalization procedures in order to object to granting citizenship on grounds other than the formal, legal requirements. In this case, Minister Eric Besson did so, arguing that although the woman had met the requirements for citizenship there was a substantive reason to deny it to her, namely her assimilation defect. The State Council agreed and argued that her defect lay in her failure to accept the values of women’s equality. They were careful not to make the couple’s religion the explicit grounds for reject-

ing her request, as had the Stasi Commission during the debate over the headscarf. Both bodies did so in order to avoid a subsequent finding of unconstitutionality or a violation of the European Convention on Human Rights.

But religion clearly was at the base of the argument. The well-read legal blogger known as “le maître Eolas,” who sided with the State Council in its decision, nonetheless argued that, council rhetoric aside, the justification was not on grounds of burqa-wearing but on what it signified: her “radical practice” of religion, held to be incompatible with the principle of gender equality. “Even if she had given in on the burqa and substituted a simple headscarf,” he writes, “the State Council’s decision would have been the same: it is refusing to live as a being with equal human rights that, in the eyes of the State Council—as it happens with a woman presiding—is incompatible with the condition of assimilation” (Eolas 2008).

But how did one know that her practice was radical and against general equality? The government’s case was that her religious practice was radical not because of ways she interprets the Qur’an or how often (or with whom) she prays, but in her choice of clothing and the fact that she made that choice when marrying her husband. The situation appears to have been a bit more complicated. She wore Islamic dress, with headscarf, in Morocco before meeting her husband, after they married (in Morocco), and even after coming to France. In her own version of events, she explained that she felt unsure of her dress, read Islamic books on the subject, and decided for the niqab. “I don’t believe that I submit to my husband; I am the one who takes care of paperwork and the budget,” she told a reporter (Le Bars 2009).

The government also linked Faiza to what they saw as radical Islamic (that is, Salafi) movements judged incompatible with France, and emphasized her burqa as representative of the gender inequality of those movements. As another jurist, supportive of the decision, wrote, although she insisted that Republican values, particularly *laïcité*, were favorable for the practice of her religion, her husband belonged to a

Salafi movement, and she wore a burqa to the prefecture, stayed at home, and did not vote, and “in this way she is completely subservient to the men in her family and has not internalized Republican values, particularly the equality of the sexes” (Vallar 2009).

Consider the logic, for it foreshadows that of the 2010 ruling. First, the woman wears a burqa, and the burqa is the preeminent sign of women’s inequality. Therefore, we know from her dress, even if it was not forced upon her, that she has not accepted women’s equality. This conclusion is strengthened by several other bits of information: that she stays at home, that she did not know much about laïcité or the right to vote. A third jurist specified that at issue is “the wearing of the burqa and the behavior to which it leads” (Chrestia 2008).

Second, her husband is a Salafist, a radical version of Islam that must be opposed. The jurist Vallar explains that one ground for rejecting claims to citizenship is if the applicant is aggressive toward the republic. He then points out that her husband claimed allegiance to Salafism and that, quoting the government’s claims, this tendency “had reached their neighborhood after the passage of a ‘*particularly vehement*’ imam, which returns us to the jurisprudence against aggressive proselytizing (Vallar 2009; italics in original).

There appear, then, three elements in logical interrelation: burqa-wearing, rejection of French values, and radical Islam. Burqas are signs of having rejected French values and in some way also promote non-French ways of thinking. Indeed, the state has decided that certain clothing practices carry objective meanings: a 2000 interministerial circular (Circ. DPM 2000) instructs immigration agents to indicate whether someone applying for naturalization wears the “traditional headscarf in use notably in the North African countries and Turkey” or the “hijab which covers the head and neck and, following the example of the chador, is a sign of belonging to fundamentalist Islam.” In these last cases (continues the circular, ominously) “one should tell the applicants what wearing these vestimentary signs means.”

Now, if this is the logic subtending the State Council's decision—burqas signal bad ideas—the council was careful to make the applicant's insufficient appreciation of women's equality the major grounds for rejecting her request for citizenship—technically, rejecting her request to annul the government's intervention. The council had to do so in particular because in an earlier decision it had ruled that wearing a hijab, a headscarf, was not in itself a sign of an "assimilation defect" (Conseil d'État 1999). The council faced a challenge in trying to avoid attributing its decision to the clothing's religious meaning, though, because the main grounds for arguing that the burqa is the sign of women's inequality is that it is part of Salafism—and even its conclusion attributes wearing the burqa to the woman's "radical practice of her religion."

This decision had quick results. In July 2008, a housing authority in Vénissieux, a suburb of Lyon with a large Muslim population, refused to allow a family to occupy the apartment officially allotted to them because the wife wore a burqa. The letter of refusal repeated the words of the State Council's decision: "Madame wears the burqa, which characterizes a radical religious practice that is incompatible with the essential values of the French community and with the principle of the equality of the sexes" (*Le Monde* 2009).

In October of the same year, La Halde, France's public watchdog group on discrimination, ruled that denying a woman in a burqa access to the classes required for her to remain in France was not discriminatory in that "the burqa carries a meaning of the woman's submission that goes beyond its religious significance and could be considered to attack the Republican values that govern these teachings" (La Halde 2008). Other than La Halde's choice of linguistic mode ("could be considered"), the ruling follows the State Council's 2008 phrasing word for word.

The decision now has become jurisprudence, but the justifications have been brought in line with the more recent logic, reflected in the 2010 decision by the Constitutional Council, that assigns objective

values to garments, and justifies actions against their wearer on those grounds. In a case decided in late September 2010, an administrative court no longer attempted to relate burqa-wearing to radical religion, as had the State Council in 2008, but said that even if the woman seeking naturalization did *not* engage in a “practice of radical religion,” her burqa-wearing was in itself contrary to “Republican integration” because it was “contrary to the respect of the equality of the sexes” (Tribunal 2010). The government representative argued that the burqa was not a “Qur’anic requirement” but was merely part of custom, whose purpose is “to keep women under domination by men.”

This claim, accepted by the tribunal, moves us along to the point picked up weeks later by the Constitutional Council, where wearing a burqa is taken to be direct proof of an assimilation defect, not because of something about the religious beliefs or practices of the wearer (or of anyone else, for that matter), but because it is a practice that is *objectively* contrary to French principles.

What links these two 2008 decisions? In both instances, Muslim individuals had met the legal conditions to gain access to a legal good: the annulment of a marriage, French citizenship. In both cases they were denied that access because they were considered to act on the basis of unacceptable values: requiring virginity in a marriage, remaining subservient to a husband. These purportedly universal value judgments did not conceal very well a targeting of certain forms of Islam. One law professor wondered what the consequences would be of stripping all subservient French women of their citizenship (Lochak 2008).

Moreover, the decisions arguably increased harm rather than reducing it. Recall that Rachida Dati initially supported the annulment decision on the grounds that it would help women leave undesirable marriages. Another legal blogger wondered why one would seek to keep outside the French legal community a permanent resident of France who is married to a French man and has French children, rather than seek to repair her “assimilation defect.”

## BACK TO 2010: A DUAL CRITIQUE OF BODILY CITIZENSHIP

The Constitutional Council's 2010 decision continued this values-based reasoning but gave it a stronger theory about normal bodily citizenship based on two major ideas. These ideas had strong appeal for many in France.

First, the council argued that normal citizens are autonomous in private as well as in public life, and that certain religious views can undermine autonomy and thereby weaken the conditions for citizenship. The couple requesting an annulment endangered women's equality because expecting a virgin bride was part of a patriarchy package—that the wife may have agreed with the request made the danger only greater. The woman with the assimilation defect wore the wrong clothes, but they were not a violation of public secularity, because she reportedly stayed at home too much. Her clothes were a sign of a basic personal flaw, one that comes from holding the wrong religious views. This is precisely the claim carefully side-stepped by the Stasi Commission in 2003.

Second, the decision evokes the idea that normal citizens are civil; they interact in the “shared life” of civic France. As Dominique Schnapper put it in a public forum in July 2010, giving a justification for banning burqas: “France is the country where everyone says ‘*bonjour*’” (Schnapper 1998, 2010). Implicitly, one cannot really greet another from behind a veil. Here we have essentially the same claim about communication made by British Minister Jack Straw a few years earlier. But where Straw made it on personal grounds—he would not speak with someone whose face was covered—Schnapper made it on grounds of a theory of civic life.

The second argument draws on scares about “communalism” most commonly heard in the 2001–2003 period, scares that draw from the fundamental French ambivalence concerning intermediate groups. Similar concerns were evinced then about refusals to shake hands: France is the country where one says “*bonjour*” and then shakes hands.

Issues intersect here: a distaste for “communalism,” an embrace of *mixité*, which tends to mean in particular mixing of men and women, and gender equality. This set of concerns appears time and again in French public discussions. In the unusually hot summer of 2003, a debate erupted over the existence of women-only hours at some municipal swimming pools in several French cities. In southern Lille, one of the four municipal pools had offered such hours for two years when reporters finally stumbled on the practice in June 2003. The mayor, Martine Aubry, who later became the Socialist Party leader, had authorized the special hours upon request from a number of women of North African background. In other parts of France, Jewish associations had successfully petitioned to have sex-segregated hours at municipal pools, with no media attention. But in 2003, the existence of the “Arab” women-only hours shocked certain commentators. The president of the association Europe and Laïcité, Etienne Pion, considered the arguments for women-only hours—modesty, ease with babies—to be but “alibis to force the acceptance of communalist principles.”

When the story about Lille broke, Martine Aubry was quickly asked to explain herself during a municipal council meeting. The head of the opposition party in Lille (in this case, the Union for a Popular Movement, or UMP) publicly denounced sex-segregated hours for swimming pools as conflicting with “Republican practices of equality and gender-mixing” (*mixité*) and promoting a “closing-off of communities from each other” (*un repli identitaire et communautariste*). In her reply, Aubry suggested that by making “a small detour” from Republican principles “women can liberate themselves.” One suburban Lille pool admitted only Muslim women, but Aubry assured the public that in 2002 users of the women-only time slot were 70 percent Muslim and 30 percent non-Muslim. (No one appears to have found it remarkable that in a country where officially recording religion or ethnicity is forbidden, Aubry’s office would have such figures.) By December, the minister of sports strongly condemned the pool hours

for women as “a deep challenge to the value of our country and of sports” (Bowen 2007: 109–110).

A more striking instance where modesty is declared to take the back seat to *mixité* comes from the well-known 2002 book, *The Lost Territories of the Republic*. One (female) lycée teacher describes how she and others felt challenged on a deeper level by Islamic attire:

The striking fact here is that girls and boys cover themselves with a kind of violence that makes one ill at ease. It seems that prior to the religious meaning of head coverings is the notion that the head ought to be covered because the body itself presents a problem. That is what one finds again and again, in pupils’ refusal to attend swimming class, in their challenges to *mixité*, in the problems they raise on account of modesty [*pudeur*]. We even had to refuse their demand for separate toilets for girls and boys, so as to avoid an anti-Republican politics, even though the poor treatment suffered by girls justified it for their sexual protection (Brenner 2002: 194–95).

In this striking account, the field of combat is no longer the school but the girls’ attitudes toward their own bodies. A measure that might strike an outsider as normal (building separate toilets), and that in this school would have protected girls from aggressions by boys was considered to send the wrong message about Republican norms. Providing separate toilets would have meant accepting, even promoting, shame about one’s body. It is this shame that lies behind wearing a headscarf and refusing to play sports with boys. It must be fought even at the cost of the girls’ well-being. Gender mixing fights bad Islamic values and affirms both sociability and gender equality.

However, finding a legal justification for banning burqas because they inhibit mixing and civic sociability had no clear basis in French jurisprudence. To accomplish its task of finding the anti-burqa law

constitutional, the Constitutional Council had to create a new judicial instrument and also to conceal the fact of that invention. The instrument in question was a new notion of *ordre public*. In the quasi-official Dalloz-published review of administrative law (the domain into which these cases fall), the commentator on the Constitutional Council decision focused on the half-visible steps taken by the council. In his analysis, the council needed to create a new juridical base to approve the law, which otherwise (without that new base) would have been found to disproportionately infringe on religious freedom (the previous finding of the State Council).

The Constitutional Council's sphere of action was severely limited by existing jurisprudence, however. First, the European Court of Human Rights (2010) had recently ruled that simply appearing in public in a certain set of clothes could not be considered a menace to *ordre public* or a threat to anyone. Therefore, the council could not base its ruling on usual conceptions of *ordre public*, which have to do with the interests of citizens taken as a whole. These interests can take on a nonmaterial form, such as moral order and the respect of human dignity. In France, *ordre public* really concerns "public moral order," with its Durkheimian sense that the law protects socially embedded moral conceptions (Bénabent 1996). But the State Council had already ruled that public moral order could not be used to ban burqas in that these items of clothing did not present an "immoral" character in any sense of the term (Conseil d'État 2010: 25).

The State Council had offered a loophole, however, if only to quickly close it—and the Constitutional Council appears to have tried to stealthily reopen it. The State Council had said that one could conceive of *ordre public* as the basic elements of reciprocity needed to live together in society—but then they emphasized that this view could not be found in judicial texts or in judges' writings or in the jurisprudence of neighboring countries, and was thus a risky path to explore (2010: 26).

This "risky path" was, however, precisely what the Dalloz commentator saw as the only discernable basis for the decision—

and barely discernible at that, so hard did the Constitutional Council work to cover its tracks. Public moral order was implicitly extended to include the conditions for social life, conditions violated when burqa-wearers thereby close themselves off from everyday social interaction.

### **BROADENING THE VALUES-CRITIQUE**

Although English-language accounts written by French public actors of the 2004 law against Islamic headscarves in schools argued that the law was passed to prevent harm to schoolgirls, even at that time values-based critiques were prominent in the political sphere. At the time they were focused on the idea of preserving a “secular space” in public, with issues of social mixing in mind. President Jacques Chirac’s December 2003 speech made this point, as did the deputies in the National Assembly, who saw preserving this space as the best way to prevent the arrival in France of “Islamists” (Bowen 2007: 123–40). This argument, although politically and publicly prominent, could not have been used as the legal justification for the 2004 law, because it would not have pointed to a danger sufficiently clear to justify limiting religious freedom. The State Council had already made this clear. But it remained the political reason for continued efforts to restrict Muslim practices that seemed to violate the exigencies of living together.

As we have seen, within a few years things had changed, and even judges and jurists base control of women’s bodies on direct critiques of Islamic practices without pretending that direct harm could be found. By 2011 the tone had taken a new turn. A new campaign by the center-right majority party, the UMP, focused on strengthening *laïcité* and restricting Islamic practices that could be seen as preventing integration and living with others. Jean-François Copé, the party leader, called for a new regulation of Islamic Friday sermons, that they be entirely in French and no longer in Arabic (Le Bars 2011b). The minister of education, Luc Chatel, ordered that mothers with their heads covered would not be allowed to accompany their children on school outings. This rule

made official a practice carried out by some school heads beginning with the 2004 law, and gave the lie to the claim that the purpose of that law was to protect schoolgirls from male pressure. The director of a school in Bobigny, near Paris, had fought to keep a woman with a niqab out of her school, in the name of *laïcité*, but failed to see the reason for the new rule concerning mothers outside the school. In any case, because nearly all her pupils' mothers are "believers," "I don't know who I could take with me if no mothers with headscarves were allowed to accompany us. Should we also forbid fathers with beards?" (Le Bars 2011a)

In other domains as well, arguments have shifted from harm-based to values-based. Let me just mention one. In the 1990s and early 2000s, French jurists condemned Muslim marriages or divorces conducted abroad if and only if the particular judicial event in question failed to give equal rights to women, and so they were inspected case by case. But by the mid-2000s, jurists and judges decided that any *talaq* (divorce) and any polygamous marriage was unacceptable because in principle all such proceedings violated legal norms of gender equality. A woman divorced in Morocco who wished her divorce recognized was denied that request on grounds that to allow her to remarry would be to endorse Moroccan legal proceedings (Fulchiron 2006). The new justification makes explicit something that one heard frequently in the earlier 2000s: that the claims Muslim women make to exercise autonomy are false, based on their having internalized repressive norms.

Critiques of values held by immigrants and their children have provided a space of political convergence. By early 2011, and in preparation for the presidential election of 2012, the political campaigns and slogans had shifted from the previous campaign. The shift was notable across the political spectrum, but especially on the part of the National Front, whose new leader, Marine Le Pen, continued the party's long-term call to reserve French jobs for "true" French people. "However, she presents these ideas in a different manner, in the name of defending Republican values and *laïcité*, and in the name of values that are

feminist and tolerant, but that are derided by Islam” (Mayer 2011). Leaders of the center-right governing party, the UMP, attacked the presence of unassimilated or inassimilable immigrants on multiple fronts, from expelling Roma who had arrived from elsewhere in the European Union to trying (and failing) to pass legislation, and from taking French citizenship away from naturalized citizens who had committed certain crimes. The UMP judged these moves to be popular, an assessment supported both by polling results favoring Le Pen over both Nicolas Sarkozy and either of the two most likely Socialist Party candidates, and by opinion polls showing a growing unease regarding Muslim immigrants. As of January 2011, about three-fourths of rightward-leaning voters and about one-third of leftward-leaning ones agreed not only that “there are too many immigrants in France” but also that France has accorded “too many rights to Islam and to Muslims” (Mayer 2011). The UMP clearly saw adopting anti-Islam rhetoric and, where possible, policies, as a way to keep past UMP voters from defecting to the National Front. At the same time, the proposed renewed focus on and accentuation of *laïcité* proposed by Sarkozy was intended to appeal to voters who in the past had voted for the Socialists.

The new French values arguments also make it that much more difficult to do what Britain does and weigh sensibilities of Muslims and requirements of institutions. Britain allows school girls to wear Muslim dress, including headscarves, as long as that dress is in the school colors. They drew the line on the more flowing jilbabs, on the basis of opinions rendered by leading Muslim clerics (Tarlo 2010).

France cannot do that for multiple reasons. First, it does not weigh things in the same way, but starts from principles deemed integral to the republic. Even a great deal of harm to Muslim sensibilities cannot outweigh a principle—at least when it becomes politically desirable to think in that way. French resoluteness is a symbolic resource available when useful.

Secondly, France cannot “ask the women” any more than it can “ask an imam.” Doing the former would assume that Muslim

women know what they are doing, and the 2010 decision declared that assumption to be unfounded. Muslim women have an “autonomy defect” as part of their “assimilation defect” by simple virtue of wearing the wrong clothing. Doing the latter would mean that the state took mainstream religious thinking into account when deciding on a matter of principle. Muslims appointed to the French Council of the Muslim Faith, the CFCM, can decide on matters of the start of the fasting month or on a way to regulate halal food—not that they do a very good job of either—but not on any matter involving the republic. This line between what Muslims do and what France does has a nagging way of preventing thinking about Muslims as French (Bowen 2009).

## CONCLUSIONS

In France, state efforts to regulate the Muslim body find themselves with a new object: no longer foreign nationals or immigrants, but French Muslims on French territory. The legal mechanisms have shifted as well, from harm-based reasoning to a critique of putatively Islamic values. France now seems to want to “secularize its citizens, especially Muslim ones,” rather than to secularize the state, the original idea of the separation of state and churches (Le Bars 2011).

This means that even in technical legal decisions, justifications find in everyday behavior of some Muslims signs of insufficient replacement of older (Arabic, Islamic, African) values with new French ones. This shift in the target of critique may reflect a general French awareness that Muslims in France now work within a publicly secularist context. Muslim political demands are for the even-handed application of *French* laws (on schooling, religious freedom, houses of worship) and not for the development of sharia-based laws. But if Muslims appear to be accepting the explicit rules of the game, they can nonetheless be scrutinized for their embrace of French values. Even Muslims who were born in France, speak French, hold mainstream jobs (and so cannot easily be said to be “communalist”), and give typically French answers to poll takers might nonetheless be harboring radical difference in

fundamental commitments, which would then emerge through singular, revealing events. Here enters the role of court decisions and legal commentaries to explain how it is that technical decisions are justified by efforts to save the republic.

The French case suggests a slow appropriation of a set of assumptions associated with “clash of civilizations” claims, assumptions increasingly shared by public figures in a number of Western European countries. These changes form part of the rise of a new kind of “nationalist-populist” rhetoric, the new forms of National Front self-presentation, and similar developments in the Netherlands, Belgium, and Germany. These movements increasingly make Muslim bodily citizenship the problem for which a return to “shared” values is the answer. Worryingly, they are now espoused by French high judges, and not only by Marine Le Pen.

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