

France's Islamist Challenge

Burqas, Niqabs, and “Living Together”

by **Eelco van Riel**

Addressing both houses of the French parliament on June 22, 2009—the first such speech by the head of state in one hundred and fifty years—President Nicolas Sarkozy stated that the *burqa*—an Islamic garment that conceals the face with the exception of the eyes—was “not welcome on the territory of the French Republic.” He explained to the gathered delegates,

The burqa problem is not a religious problem; it is a problem pertaining to freedom, to the dignity of women ... It is not a religious sign; it is a sign of enslavement; it is a sign of debasement.¹



Gare de Lyon train station, Paris, April 11, 2011. In June 2009, then-president Nicolas Sarkozy stated that the burqa was “not welcome on the territory of the French Republic.” In April 2011, the French law “prohibiting the concealment of the face in public space” went into effect.

The next day, the National Assembly, the parliament’s lower house, approved the creation of a fact-finding commission to study the practice of “wearing the full veil.” In January 2010, the commission submitted its report, recommending a ban on face-concealing garments so as to sustain a public space where all French citizens can

¹ *Libération* (Paris), [June 22, 2009](#); France 24 TV (Paris), [June 22, 2009](#); see, also, Erica Howard, “Banning Islamic veils: Is gender equality a valid argument?” *International Journal of Discrimination and the Law*, Sept. 2012, pp. 160-1; Jonathan Laurence and Gabriel Goodliffe, “The French Debate on National Identity and the Sarkozy Presidency: A Retrospective,” *The International Spectator: Italian Journal of International Affairs*, Mar. 2013, p. 40.

agreeably “live together” (*vivre ensemble*). On July 13, the National Assembly passed a bill on face-concealing garments with the Senate following suit two months later. On October 7, after lingering doubts, the Constitutional Council, France’s highest constitutional authority, acquiesced, and four days later, the law “prohibiting the concealment of the face in public space” came into effect.²

The European Court of Human Rights upheld the French law on the principle of “protection of the rights and freedoms of others.”

This was not the first time that the contentious issue of religion’s appropriate place in society, notably the extent to which public display of religious symbols ought to be tolerated, came to the forefront of French politics. Six years earlier, another ban had roiled French society, leading to a public uproar and sparking a string of debates on questions pertaining to Islam, religious accommodation, religious identity, citizenship, Republicanism, and, most notably, *laïcité* (secularism).³ The March 2004 law, passed by the French National Assembly with an overwhelming majority, stipulated that “in public schools, the wearing of symbols or

clothing by which students conspicuously manifest a religious appearance is forbidden.”⁴

Though the European Court of Human Rights (ECHR) upheld the 2010 law and its predication on the *vivre ensemble* principle for “the protection of the rights and freedoms of others,”⁵ a host of thought-provoking questions continues to divide French society: What exactly does the *vivre ensemble* principle encompass, and why is it accorded such weight? And should the French government accommodate the public display of cultural and religious expression or, in keeping with the celebrated principle of *laïcité*, persevere in circumscribing the public sphere?

In Search of *Laïcité*

No notion in French society has been addressed as frequently, as fervently, and as dramatically as the principle of *laïcité*. This singular concept, which has engrossed the French for some two centuries, still appears to elicit intense disputes and vehement debates about its actual meaning and application. The most common English translation in scholarly

² “Loi du 11 Octobre 2010 Interdisant la Dissimulation du Visage dans l’Espace Public (1), n° 2010-1192,” *Journal Officiel de la République Française*, NOR: JUSX1011390L; Paul Cliteur and Machteld Zee, “[The Burqa Challenge to Europe](#),” *Middle East Quarterly*, Spring 2016; Jennifer Fredette, “Becoming a Threat: The Burqa and the Contestation over Public Morality Law in France,” *Law & Social Inquiry*, June 2015, pp. 587-9.

³ Pascal Bruckner, “Unveiled: A Case for France’s Burqa Ban,” *World Affairs*, Nov.-Dec. 2010, p. 61; Elaine R. Thomas, “Keeping identity at a distance: Explaining France’s new legal restrictions on the Islamic headscarf,” *Ethnic and Racial Studies*, 2 (2006), pp. 239-42.

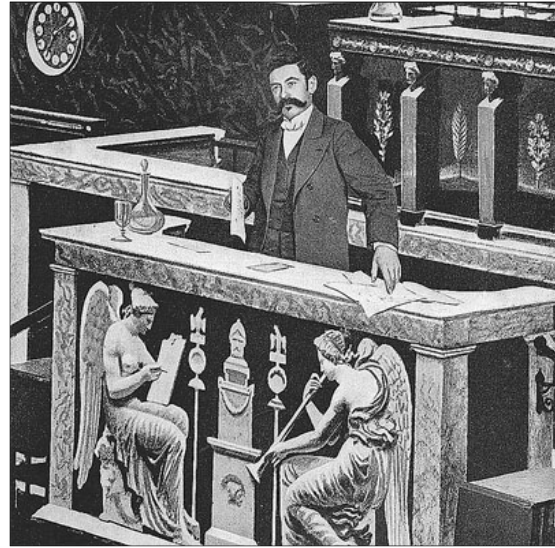
⁴ Elisa T. Beller, “The Headscarf Affair: The Council d’Etat on the Role of Religion and Culture in French Society,” *Texas International Law Journal*, 4 (2004), pp. 581-2; Benjamin Ismail, “[Ban the Burqa? France votes yes](#),” *Middle East Quarterly*, Fall 2010, pp. 47-55.

⁵ *S.A.S. v. France*, app. no. 43835/11, European Court of Human Rights (ECHR), July 1, 2014, paras. 54, 121; see, also, art. 8, “Right to respect for private and family life,” art. 9, “Right to freedom of thought, conscience and religion,” Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR, 1950.

literature is “secularism,” or the separation of church and state.⁶ This translation is but a rough approximation for *laïcité* has a distinct flavor: it is deeply embedded in the French “national spirit” and amounts to a true political philosophy. But to understand this requires going back to the French Revolution (1789-1801).

After centuries of public grievances against the throne and Catholic Church, the revolution abolished all the privileges held by these institutions, which had dominated the French social and political landscape: the holdings of the church were nationalized; the tithes dispensed with, and the clergy were forced to relinquish their elevated status.⁷ In short, *laïcité* was born of the changes wrought by the revolution.

The revolutionary turmoil shook France to the core. It demolished the very foundation upon which society had been built. A novel breed of revolutionaries, the Republicans, enthused and galvanized by enlightenment ideas, argued that the state ought to shoulder the burden of coalescing society.⁸ Religion, since time immemorial the chain that bound and unified society, was subsumed by the



Aristide Briand, rapporteur of the 1905 bill on the separation of church and state, French National Assembly, Paris. With this law, the display of religious symbols in France was abolished.

state. The “general will” reigned supreme. The individual, no longer subject to the dictates of religion, was obliged to abide by the laws of the state. The specter of Jean-Jacques Rousseau’s political philosophy haunted the revolution. The Republicans, roused by the political potential of Rousseau’s “social contract,” which promised the liberation of the individual, clung to his dictum that “it is only by the force of the state that the liberty of its members can be secured.”⁹ According to the French enlightenment philosopher, individual liberty means complete capitulation to the state, which embodies the general will and hence commands the absolute allegiance of

⁶ Cécile Laborde, “Toleration and *laïcité*,” in Catriona McKinnon and Dario Castiglione, eds., *The Culture of Toleration in Diverse Societies: Reasonable Tolerance*, (Manchester: Manchester University Press, 2003), p. 162; Michel Troper, “French Secularism, or *Laïcité*,” *Cardozo Law Review*, 4 (2000), p. 1267.

⁷ Efe Peker, “Bringing the State Back in Secularization: The Development of *Laïcité* in the French Third Republic (1875–1905),” *Journal for the Scientific Study of Religion*, Nov. 2019, p. 818; Steven Englund, “Church and State in France since the Revolution,” *Journal of Church and State*, Spring 1992, p. 329.

⁸ J. C. Soper et al., “France: Separation from the Public Square,” in *The Challenge of Pluralism Church and State in Six Democracies* (Lanham: Rowman and Littlefield, 2017; 3rd ed.), p. 58.

⁹ Jean-Jacques Rousseau, “Book 2, Chapter 12,” *The Social Contract* (Ware, Hertfordshire: Wordsworth Editions Limited, 1998), p. 89.

all individuals in the body politic.¹⁰ This notion left an indelible mark on the development of French society, with the formerly sacrosanct synthesis of church and nobility dissolved into an inviolable state.

***Laïcité* dictates that, in public, the individual thrusts aside religious predispositions and ascribes to the values of the republic.**

The second substantial step in the process of French secularization was made during the Third Republic (1870-1940), when *laïcité* became the official doctrine of the state. The final blow against the Catholic Church was struck in 1905 with the promulgation of the Law on the Separation of Church and State. The church, with its power already on the wane, lost its mandate to exert influence on the public sphere: public funding of faith-based schools ceased; ownership of religious buildings was transferred to the state, and the display of religious symbols was abolished.¹¹ Philosopher Charles Taylor neatly captures the thinking of the Republicans of the Third Republic: “the state should be founded on a *morale indépendante*, that is, one free from and a rival to religious morality.”¹²

The principle of *laïcité*, after a long and turbulent history, has become a permanent and enduring feature of French society: “*laïcité*, arguably defines the collective, public identity of the French people, the cornerstone of a national personality, defining what it means to ‘be French.’”¹³ This demonstrates that *laïcité*

cannot be dispensed with as either a militant or hostile separation of church and state.¹⁴ Rather, it is an animating concept, grounded in history, deeply layered and multi-faceted, which is constantly subject to revision and reappraisal.

Laïcité is an intricate body of moral commitments that articulates the neutrality of the state on religious matters while simultaneously demarcating the boundary between the private and public spheres.¹⁵ The public sphere, suffused with the spirit of *laïcité* that could arguably be considered a fundamental manifestation of French national identity, dictates that in the public sphere, the individual momentarily thrusts aside his or her religious predispositions and personal histories and ascribes to the values of the republic that steers the “collective citizenry from pluralism to unity through consent.”¹⁶ This means, in other words, to meet, mingle, and live together as French individuals.

The *Vivre Ensemble* Principle in Europe’s Court

In 2014, the ECHR adjudicated a claim submitted to the court by a Pakistan-born French citizen who argued that the October

¹⁰ Robert A. Nisbet, “Rousseau and totalitarianism,” *The Journal of Politics*, May 1943, pp. 99-102.

¹¹ Soper et al, “France: Separation from the Public Square,” pp. 60-1.

¹² Charles Taylor, “The polysemy of the secular,” *Social Research*, Winter 2009, p. 1147.

¹³ Britton D. Davis, “Lifting the Veil: France’s New Crusade,” *Boston College International and Comparative Law Review*, 1 (2011), p. 122.

¹⁴ Benjamin Neuberger, “Cooperation between Church and State in Liberal Democracies,” in J. Fox, ed., *Religion, Politics, Society and the State* (Boulder: Paradigm Publishers, 2011), p. 12; Craig Calhoun, “Rethinking Secularism,” *Hedgehog Review*, Fall 2010, p. 42.

¹⁵ Peter G. Danchin, “Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law,” *Yale Journal of International Law*, Winter 2008, p. 21.

¹⁶ Davis, “Lifting the Veil,” p. 122.

2010 law prohibiting the wearing of face-concealing garments in public violated several articles of the European Convention of Human Rights. The court decided to consider the case only under articles 8 and 9.¹⁷ The plaintiff maintained that the law “prevented her from manifesting her faith, from living by it and from observing it in public.”¹⁸ The French government acknowledged that the ban could arguably be seen as a “limitation” on the “freedom to manifest one’s religion or beliefs” set forth in Article 9 § 2, but contended that the ban pursued three “legitimate aims” to justify restricting this freedom: “ensuring public safety”¹⁹; “protection of the rights and freedoms of others” by guaranteeing “respect for the minimum set of values of an open and democratic society,” and safeguarding “the equality between men and women.”²⁰ The court found by a majority of 15-2 that no violation of articles 8 and 9 had occurred, positing that “under certain conditions the ‘respect for the minimum requirements of life in society’ referred to by the Government—or of ‘living together [vivre ensemble],” can be linked to the legitimate aim of the “protection of the rights and freedoms of others,” as stated in both articles 9 § 2 and 8 § 2.²¹

Does the above ruling explain the exact legal understanding of the *vivre ensemble* principle? Hardly. Yet it infers that this principle provides a qualification to establish a society composed of individuals who can and may exercise their rights, under the proviso that the rights of others are not



In 2014, the European Court of Human Rights ruled that France’s ban on veiling did not violate the pertinent articles of the European Convention of Human Rights.

infringed. This implies a public sphere subject to reasonable limits to ensure the welfare of every citizen. And, should the need arise, affords the state a legal instrument to intercede on behalf of the republic to safeguard its values and uphold a readily accessible public sphere.

Accommodation or the Republic?

A vast literature, scholarly and otherwise, exists, and much brainpower has been expended on the subject; nonetheless, impartiality in the assessment of issues pertaining to religious manifestation in the public sphere is unfortunately not always a given. Understandably, the ban on the face veil, which regrettably has acquired the moniker “burqa ban” despite the fact that the law is formulated in exclusively neutral terms, stirs tempers. However, emotions or political leanings must not cloud judgement or intrude on impartial evaluation.

¹⁷ S.A.S. v. France, paras. 69-74.

¹⁸ Ibid., para. 76.

¹⁹ For a discussion on the concealment of the face and its relation to public safety, see Daniel Pipes, “Niqabs and Burqas as Security Threats,” Lion’s Den blog, [Mar. 19, 2022](https://www.lionsden.org/2022/03/19/niqabs-and-burqas-as-security-threats/).

²⁰ S.A.S. v. France, paras. 81-2.

²¹ Ibid., para. 121.

Sarkozy's passionate opposition to the burqa derides this covering as a symbol of enslavement that encroaches upon the freedom of women and corrupts their dignity. But he was equally quick to point out that the "burqa problem is not a religious problem."²² Echoes of Sarkozy's impassioned plea resound in the thinking of Pascal Bruckner, a French philosopher, who argued that the burqa "is a direct challenge to the ideal of laicization since it dramatically violates the principle of equality between men and women."²³ Tellingly, both Sarkozy and Bruckner are right for the wrong reasons. The burqa is not a violation of the principle of equality between men and women. The argument, while often discussed by politicians and aired by feminists under the banner of emancipation, originates in the claim that women are intimidated into wearing face-concealing attire by men.²⁴ In fact, the opposite appears to be true: many Muslim women allegedly consider donning the burqa or niqab a reinforcement of their Islamic identity.²⁵

Many legal scholars chastise the ECHR for not admonishing the French government for restricting the right to religious manifestation.

Hence, the ECHR's rejection of the idea that "the equality between men and women" is a purported aim of the law of October 2010 is entirely justified.²⁶

But given the impression that the act of wearing the burqa is indeed a "genuine" attempt at religious manifestation, why did the ECHR not appeal to the "religious manifestation" clause of the European human rights convention's article 9 to pressure the French government to repeal the law? A legitimate question, and one that has vexed many legal scholars who deem the ECHR ruling flawed and chastise the court for not admonishing the French government for restricting the right to religious manifestation.²⁷ And rightly so, were it not, as stressed by Sarkozy in his June 2009 address, that the "burqa problem" is not a religious problem at all. Those opposed to the ECHR ruling based their case on the premise that the issue at hand was of a manifestly religious nature, but the French government had never couched the issue thus. Does this mean that *laïcité* has not been encroached upon? Or that Bruckner was mistaken to broach the subject of *laïcité* in the first place? Absolutely not, but it does depend on the professed understanding of *laïcité*. Under a narrow assessment of this principle as a

²² Reuters, June 22, 2009; *Le Figaro* (Paris), [June 23, 2009](#).

²³ Bruckner, "Unveiled," p. 61.

²⁴ Thomas Hammarberg, *Human rights in Europe: no grounds for complacency. Viewpoints by Thomas Hammarberg Council of Europe Commissioner for Human Rights* (Strasbourg: Council of Europe Publishing, 2011), p. 40; Howard, "Banning Islamic veils," pp. 148-60; see, also, Ulrike Spohn, "Sisters in disagreement: The dispute among French feminists about the burqa ban and the causes of their disunity," *Journal of Human Rights*, Apr. 2013, p. 148.

²⁵ Irene Zempi, "'It's a part of me, I feel naked without it': choice, agency and identity for Muslim women who wear the niqab," *Ethnic and Racial Studies*, Mar. 2016, pp. 1750-1.

²⁶ *S.A.S. v. France*, para. 118.

²⁷ Ann Power-Forde, "Freedom of Religion and 'Reasonable Accommodation' in the Case Law of the European Court of Human Rights," *Oxford Journal of Law and Religion*, 3 (2016), pp. 599-600; Javier Martínez-Torrón, "Manifestations of Religion or Belief in the Case Law of the European Court of Human Rights," *Religion and Human Rights*, 2-3 (2017), pp. 116-20.

straightforward separation of church and state, and, if the French government is correct that the “burqa problem” is not of a religious nature, it cannot be said that the principle of *laïcité* has been violated. However, if one agrees with the broadly conceived understanding of *laïcité* as comprising the fundamental requirements of “living together,” the principle, irrespective of the nature of the “burqa problem,” has, indeed, been challenged.

Many critics have lampooned and disparaged the ECHR for upholding the French law of October 2010, which in their view is unmistakably discriminatory, hampers the integration of Muslim minorities, and constitutes legal repression. It has even been suggested that the law exploits *laïcité* by making it “a French excuse for increasing Islamophobia.”²⁸

One critic has accused the European court of “pandering to dangerous political leanings” and failing to stem the tide of “an increasingly illiberal and siege attitude toward minorities.” This critic has even compared the French government’s enactment of the law to China’s practice of forced assimilation.²⁹



*Anti-burqa poster defaced by vandals. It has been suggested that the French law exploits *laïcité* by making it “a French excuse for increasing Islamophobia.”*

Strong words indeed, yet the critics fail to appreciate two distinctive features of French society: the distinct constitutional arrangement of France and the Republican-flavored exclusive neutrality espoused by the French state. Additionally, and rather alarmingly, they appear to deem it excessive to consider the reason why the ECHR upheld the *vivre ensemble* principle as a legitimate aim, namely,

to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society.³⁰

²⁸ Jennifer Heider, “Unveiling the Truth behind the French Burqa Ban: The Unwarranted Restriction of the Right to Freedom of Religion and the European Court of Human Rights,” *Indiana International & Comparative Law Review*, 1 (2012), p. 115; Nilay Saiya and Stuti Manchanda, “Do burqa bans make us safer? Veil prohibitions and terrorism in Europe,” *Journal of European Public Policy*, Nov. 2019, pp. 13-4; Shaira Nanwani, “The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction?” *Emory International Law Review*, 3 (2011), pp. 1445-6.

²⁹ Hakeem Yusuf, “S.A.S. v. France: Supporting Living Together or Forced Assimilation,” *International Human Rights Law Review*, 2 (2014), pp. 300-2.

³⁰ Mark Hill and Katherine Barnes, “Limitations on Freedom of Religion and Belief in the Jurisprudence of the European Court of Human Rights in the Quarter Century since its Judgment in *Kokkinakis v. Greece*,” *Religion and Human Rights*, 2-3 (2017), p. 196.

And with what intent? Precisely to address and resolve the objections raised.

The French National Assembly condemned the wearing of the full-face veil as “rejection of the values of the Republic.”

“*vivre ensemble*” in French society.³²

Conclusion

The Carolingian scholar Rabanus Maurus (7th/8th centuries) contended that the face permits *agnitio* (perception/recognition of nature) of the person encountered. The celebrated philosopher Ludwig Wittgenstein asserted that the face appears as the visible manifestation of the self.³¹ Deeply ingrained, yet seldom accentuated, this notion is a key feature of the social and historical disposition of Europe. This explains why the French National Assembly accorded so much weight to the *vivre ensemble* principle and, in an explanatory memorandum to the 2010 bill, was willing to condemn explicitly the wearing of the full-face veil as

the rejection of the values of the Republic. Negating the fact of belonging to society for the persons concerned, the concealment of the face in public spaces brings with it a symbolic and dehumanizing violence, at odds with the social fabric. ... The voluntary and systematic concealment of the face is problematic because it is quite simply incompatible with the fundamental requirements of

That European societies are becoming more pluralistic, multi-religious, and multicultural is a given that cannot be circumvented or dodged by politicians, officials, and legislators. But it does raise questions: How to fashion a society that allows disparate groups of people to flourish and exercise their rights without significantly altering the cultural landscape of a country? In France’s case, should the government ease restrictions on cultural and religious expressions in the public sphere or persist in advocating measures that safeguard *laïcité*? France has apparently chosen to endorse a moderate or weakened *laïcité*. But it would be preposterous to conceive of the current French government’s understanding of *laïcité* as “hostile.” Next to the fact that this is legally impossible (France is after all a member of the ECHR), a glance at the French public space should suffice. Public spaces brim with symbols that ostensibly appear to contravene *laïcité*. It is all there, from kippahs to hijabs, from churches to synagogues to mosques. These are reasonable symbols expressive of particular identities that befit a pluralistic, democratic, and open society.³³ But, according to a majority of Europe’s foremost court on human rights and the French national assembly, face-concealing garments are not. Quite the opposite, they compromise the values of the republic. Tolerance and reciprocity sanction *vivre ensemble*, but this

³¹ M. E. Moore, “Meditations on the Face in the Middle Ages (with Levinas and Picard),” *Literature and Theology*, Feb. 2010, p. 22; Ludwig Wittgenstein, *Culture and Value* (Chicago: Chicago University Press, 1980), p. 23.

³² S.A.S. v. France, para. 25.

³³ John Rawls, “The Idea of Public Reason Revisited,” *The University of Chicago Law Review*, Summer 1997, p. 801.

requires that one countenance others, which, as the Belgian Constitutional Court in their appraisal of a similar law phrased in 2011, “is inconceivable, without his or her face, a fundamental element thereof, being visible.”³⁴ Instead of thoughtlessly denouncing the French for indulging in the promulgation of discriminatory legislation, their approach should be considered and taken seriously throughout the European realm.

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³⁴ S.A.S. v. France, para. 42.