

BANNING BURQAS: THE PERSPECTIVE OF POSTSECULAR COMPARATIVE LAW

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I. INTRODUCTION	214
II. THE PHENOMENON OF EUROPEAN FACE-VEIL BANS	216
A. Face-Veil Bans as a New Development	216
B. Face-Veil Bans in Legislation – An Overview.....	218
C. Face-Veil Bans in the Courts	222
D. Assessment.....	223
III. THE CONSTRUCTION OF ISLAMIC LAW.....	225
A. The Refusal to View the Face Veil as Religious	225
B. Culture and Politics vs. Religion.....	227
C. Religion vs. Choice?	228
IV. THE CONSTRUCTION OF THE STATE.....	230
A. Living Together – A Puzzle	230
B. Living Together and the Nation	233
C. The Role of Religion.....	234
D. Living Together and the Ban of Face Veils.....	237
E. Living Together in Other Countries	239
V. CONCLUSION.....	242
A. The Misconstruction of Islamic Law as a State.....	242
B. The Misconstruction of the State as a Religion.....	243
C. Toward Postsecularism?.....	244

“Occident, lift your burqa!”¹

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1. Title of a book by ERNEST MOUTOUSSAMY, OCCIDENT, ENLÈVE TA BURQA! (2010).

I. INTRODUCTION

It is an extraordinary, and undoubtedly undeserved, honor for me to give this year's Herbert Bernstein Memorial lecture. Strange as it may seem, I never met Herbert Bernstein. But I did meet his spirit at Duke. I am in many ways his replacement at Duke. After he died unexpectedly, I came here to teach one of his courses, Comparative Law. Herbert's friends on the faculty became my first friends here; his wife is a good friend. Like Herbert, I am German; indeed, we both originate from the same city, Hamburg. And Herbert Bernstein's childhood story, retold by Paul Haagen in the memorial issue of the *Journal of Comparative and International Law*,² reminds me closely of that of my own father, born six years after Herbert. Both grew up in Hamburg, with fathers affected by the Nuremberg Laws, and critical of the Nazi regime. Both Herbert and my father were sent away from Hamburg in order to escape Allied bombing. Both retained, from this experience, a keen interest in Germany's dark times of anti-Semitism and fascism.

Those dark times are frequently invoked today, and often with regard to Muslims, though with curious differences: for some, Muslims are the new Nazis, brutal racist killers, a threat to the world. For others, Muslims are the new Jews, victims of persecution and ostracization.

My topic today concerns one aspect of the ambivalent role of Muslims as a perceived threat to, and as perceived victims of, Western law today: bans of face veils, often (and inexactly) called burqa bans. Such bans may appear strange to an American audience; as problematic as we may find burqas in view of women's rights, the idea that the state should ban them generally strikes us as odd. Our neighbor Canada has long debated whether face veils should be banned during the citizenship oath.³ Quebec very recently passed legislation banning face veils for anyone giving or receiving a public service;⁴ after protests, the government suggested the law should apply only

2. Paul H. Haagen, *A Hamburg Childhood: The Early Life of Herbert Bernstein*, 13 *DUKE J. COMP. & INT'L L.* 7, 7 (2003).

3. Face veils at citizenship ceremonies were banned in 2011. See Laura Payton, *Face Veils Banned for Citizenship Oaths*, CBC NEWS, Dec. 12, 2011, <http://www.cbc.ca/news/politics/face-veils-banned-for-citizenship-oaths-1.1048750>. A federal appeals court held the ban unlawful in 2015: *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 194, <http://decisions.fca-caf.gc.ca/fca-caf/decisions/en/120099/1/document.do>. For discussion, see, e.g., Augustine S.J. Park, *Racial Nationalism and Representations of Citizenship: The Recalcitrant Alien, the Citizen of Convenience, and the Fraudulent Citizen*, 38 *CAN. J. SOC.* 579, 586–89 (2013); Jasmine Thomas, *Only if She Shows Her Face: Canadian Media Portrayals of the Niqab Ban during Citizenship Ceremonies*, 47 *CANADIAN ETHNIC STUD.* 187 (2015); Lara Mazurski, *Exclusion in the Canadian context: Full-face veils as a barrier to citizenship*, 9 *J. ARAB & MUSLIM MEDIA RES.* 1, (2016).

4. Angelica Montgomery, *What You Need to Know About Quebec's Religious Neutrality Legislation*, CBC NEWS, Oct. 18, 2017, <http://www.cbc.ca/news/canada/>

for moments of identification.⁵ The ban is currently under judicial review and may well be struck down; a court has already suspended it.⁶ Here in the United States, the closest we have come to such a ban was a bill submitted in the legislature of Georgia, which was withdrawn after one day.⁷

In Europe, by contrast, face-veil bans have been adopted in several countries and discussed in even more. These bans have generated a number of critical analyses and doubtlessly will generate many more. Many such analyses have taken the road that courts take. They have focused specifically on aspects of human rights, in particular the right to religious freedom and the right to gender equality. My analysis here will of course touch on these questions, but my interest is a different one. It asks not so much whether the bans are legal, and more what they symbolize.

Burqa wearers in Europe are exceedingly rare, and yet states spend a disproportionate effort on regulating them. This discrepancy between practical relevance and legislative effort is of high interest to the comparative lawyer. Obviously, what is being regulated here is not an actual social problem. Instead, legislation against face veils is symbolic, expressive. Burqa bans are means by which the state can express something about its understanding of the other and of itself. Burqa bans, I suggest, must be seen as exercises in national identity-building. And such identity-building takes place through differentiation and identification: in banning the burqa, the state defines what it is not and what it is.⁸ The Western state “is not burqa,” as indeed the German interior minister stated, with questionable grammar, in

montreal/burqa-niqab-national-assembly-quebec-liberal-government-stephanie-vallee-1.4357463.

5. Ashifa Kassam, *Quebec Softens Face-Covering Ban Amid Criticism it Targets Muslims*, THE GUARDIAN, Oct. 24, 2017, 4:39 PM, <https://www.theguardian.com/world/2017/oct/24/quebec-softens-face-cover-ban-muslim-women-niqab-burqa>.

6. Paul Cherry, *Quebec's New Face-Covering Law Fails First Legal Challenge*, MONTREAL GAZETTE, Dec. 1, 2017, <http://montrealgazette.com/news/quebecs-new-face-covering-law-fails-first-legal-challenge>.

7. House Bill 3 was pre-filed on November 15th, 2016 and withdrawn on November 16th. See *Rep. Jason Spencer Comments on Pre-filed Legislation, House Bill 3*, GA. H.R. BLOG, Nov. 17, 2016, <http://www.house-press.com/?p=6058>; *Rep. Jason Spencer to Withdraw House Bill 3*, GA. H.R. BLOG, Nov. 17, 2016, <http://www.house-press.com/?p=6060>. See Lindsey Bever, *After Outcry, Georgia Lawmaker Abandons Bill That Would Have Banned Muslims from Wearing Veils*, WASH. POST, Nov. 18, 2016, <https://www.washingtonpost.com/news/acts-of-faith/wp/2016/11/18/after-outcry-georgia-lawmaker-abandons-bill-that-would-have-banned-muslims-from-wearing-veils>.

8. Ernst-Wolfgang Böckenförde, *The Future of Political Autonomy—Democracy and Statehood in a Time of Globalization, Europeanization, and Individualization [1998]*, in ERNST-WOLFGANG BÖCKENFÖRDE, CONSTITUTIONAL AND POLITICAL THEORY—SELECTED WRITINGS 325, 330–32 (Mirjam Künkler & Tine Stein eds., 2017).

an attempt to define a German culture.⁹ The question remains: Then what is it? I will take these questions in turn: what Islam does the Western state have in mind when it bans face veils? And what, in turn, do such bans tell us about the Western state?

In looking at these questions, I use an approach to comparative law that I call postsecular comparative law and that I explain in more detail elsewhere.¹⁰ Postsecular comparative law is a proposal for an expanded comparative law that creates space for religious laws as objects of comparison. In this focus on religious laws, postsecular comparative law can help bring to the fore essential differences between state law and religious law, but it can also demonstrate underappreciated similarities. It can show how much religious law operates like state law, but also ways in which state law ultimately operates as religious law. In this, postsecular comparative law focuses not just on religious law; it also allows new and hopefully richer understandings of the modern state.

It is with this perspective that I look at the clash between state law and religious law that is reflected in face-veil bans.

II. THE PHENOMENON OF EUROPEAN FACE-VEIL BANS

A. Face-Veil Bans as a New Development

For a long time, the fight against headscarves and other Islamic garb was a concern mainly in Muslim-majority countries that hoped to modernize. Turkey is perhaps the most famous example of a country in which a

9. Thomas de Maizière, “*Wir sind nicht Burka*”, BILD AM SONNTAG, Apr. 29, 2017, <http://www.bild.de/bild-plus/politik/inland/thomas-de-maiziere/leitkultur-fuer-deutschland-51509022>.

The grammar is incorrect. It may reference a famous headline in Bild when German Cardinal Ratzinger was elected Pope, reading “Wir sind Papst” (“we are pope”). And it expresses a forceful, and deeply problematic, system of inclusion and exclusion, of identification and non-identification. “We” is not, here, a contingent and internally plural community; it is a device to exclude. The article was republished on the government’s website, with a different title, also in English: Thomas de Maizière, *A Leitkultur for Germany – What Exactly Does it Mean?*, FED. MINISTRY OF THE INTERIOR, May 1, 2017, <http://www.bmi.bund.de/SharedDocs/Interviews/EN/2017/namensartikel-bild.html>. The reference to the burqa is not the only implicit rejection of certain habits typically connected with Islam. De Maizière, *id.*, also emphasizes that “[t]o us there is no linkage between the concept of honour and violence,” demanded that immigrants “must show respect in the way they interact with others and accept the precedence of law over religion,” and alluded to the primacy of Christianity: “Religious holidays are part of our calendar. Church spires are part of our landscapes. Our country is based on Christian tradition.”

10. Ralf Michaels, *Religiöse Rechte und Postsäkulare Rechtsvergleichung*, in ZUKUNFTSPERSPEKTIVEN DER RECHTSVERGLEICHUNG 39–102 (Reinhard Zimmermann ed., Mohr Siebeck 2016).

headscarf ban was central to a specific project of modernization,¹¹ but similar developments occurred in many other areas of the world. Western countries, by contrast, while concerned with headscarves in their colonies, remained largely unconcerned with the regulation of Islamic garb in their home countries, not least because it was rare.

This has changed; the West is now keenly interested. In 2009, President Obama, in his now famous Cairo speech, suggested that “it is important for Western countries to avoid impeding Muslim citizens from practicing religion as they see fit—for instance, by dictating what clothes a Muslim woman should wear.”¹² He spoke not just to Egyptians but also to inhabitants of Western countries. Islamic dress codes had indeed become an issue in the West, especially in Europe. In the late 1980s, attention was directed to headscarves, which were banned in specific contexts. Thus, students in France and England were banned from schools for wearing headscarves.¹³ In England, these decisions remained within the regulatory power of the schools. In France, by contrast, the “affaire du foulard” led to a ban on headscarves in schools that was later approved by the courts, including the European Court of Human Rights.¹⁴ Other countries followed France’s lead, although with varying levels of intensity and degree. In 2007, France expanded its ban to include those delivering a public service.¹⁵ That ban too was later upheld by the European Court of Human Rights.¹⁶

More recently, attention has turned away from headscarves to face veils—veils that cover the entire face. One type of face veil is the niqab, a veil originating in the Arab world that covers the whole face except for the eyes. The other is the burqa, a whole body veil originating from Central Asia, which covers the eyes with a grid. The niqab has long been an object of orientalist fascination for European eyes.¹⁷ The burqa, by contrast, gained

11. ANNA C. KORTEWEG & GÖKÇE YURDAKUL, *THE HEADSCARF DEBATES—CONFLICTS OF NATIONAL BELONGING* 57–95 (2014).

12. Barack Obama, *Text: Obama’s Speech in Cairo*, N.Y. TIMES, June 4, 2009, <http://www.nytimes.com/2009/06/04/us/politics/04obama.text.html>.

13. See CHRISTIAN JOPPKE, *VEIL—MIRROR OF IDENTITY* 27, 94–95 (2009).

14. See generally, JOHN R. BOWEN, *WHY THE FRENCH DON’T LIKE HEADSCARVES—ISLAM, THE STATE, AND PUBLIC SPACE* (2007); KORTEWEG & YURDAKUL, *supra* note 11, at 15–56.

15. LE PREMIER MINISTRE, *Circulaire no. 5209/SG*, Apr. 13, 2007, <http://www.legirel.cnrs.fr/IMG/pdf/070413.pdf>.

16. *Ebrahimian v. France*, (no. 64846/11, Eur. Ct. H.R. 2015), <http://hudoc.echr.coe.int/eng?i=001-159070>.

17. See JUDY MABRO, *VEILED HALF-TRUTHS: WESTERN TRAVELLERS’ PERCEPTION OF MIDDLE EASTERN WOMEN* (1991); see also Frantz Fanon, *Algeria Unveiled*, in *DECOLONIZATION: PERSPECTIVES FROM NOW AND THEN* 42 (Prasenjit Duara ed., 2004) (originally in FRANTZ FANON, *A DYING COLONIALISM* 35–49, 58–64 (1960)).

attention in Europe as an unattractive and off-putting piece of clothing due to its association with the Taliban reign in Afghanistan. When people speak of “burqa” bans, rather than “niqab” or “face veil” bans, this is symptomatic of an underlying presumption: what is being rejected here is an Islam that is considered dangerous, close to terrorism. The term “burqa ban” is therefore a loaded one; if I use it here, then I do so with this very deliberately in mind.¹⁸

Face-veil bans are different from headscarf bans in important ways.¹⁹ First, the face veil, unlike the headscarf, conceals the face and thus has more than a mere symbolic-expressive function: it prevents full reciprocal visibility. Second, the face veil, unlike the headscarf, is largely absent from more recent European history; whereas Christians, not only nuns, wore a headscarf until relatively recently, non-Muslim face veils have always been rare.²⁰ Third, unlike headscarf bans, face-veil bans affect a miniscule minority of Muslim women.

Face veils and headscarves are also regulated differently. Where headscarves are banned, such bans are always partial, limited to certain specific situations (e.g., for students in school) or to specific offices (e.g., for judges). By contrast, face veils are banned, at least in some countries, fully. Women are thus banned from wearing face veils in general and comprehensively. Whereas headscarf bans attempt to expel headscarves from contexts that involve the state by preventing certain people, such as government employees, from wearing them, face-veil bans expel face veils from public life altogether: private individuals are forbidden from wearing the regulated veil outside the home.

B. Face-Veil Bans in Legislation – An Overview

France was the first European country to ban the face-veil nationally.²¹ The French ban saw its origins in the 2008 affair of Madame M. Madame M

18. See, e.g., David Koussens, *Sous l'affaire de la burqa . . . quel visage de la laïcité française?*, 41 *SOCIOLOGIE ET SOCIÉTÉS* 327, 329.

19. See Patrick Weil, *Headscarf versus Burqa—Two French Bans with Different Meanings*, in *CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL* 195, 211 (Susanna Mancini & Michel Rosenfeld eds., 2014). Weil was one of the promoters of the headscarf ban.

20. Nedad Memić, *Gesichtsschleier in Europa: Zwischen Pflicht und Tradition*, *DER STANDARD*, Sep. 17, 2016, <http://derstandard.at/2000044447166/Gesichtsschleier-in-Europa-Zwischen-Pflicht-und-Tradition>; Bianca M. du Mortier, *In Search Of The Origins Of The Huik: Did The Spanish Play A Part In Its Introduction?*, in *ARTE NUEVO* 64, 66–67 (Andrian J. Saez, ed., 2014), http://doc.rero.ch/record/233043/files/Arte_nuevo_1_2014.pdf; LLOYD LLEWELLYN-JONES, *APHRODITE'S TORTOISE: THE VEILED WOMAN OF ANCIENT GREECE* (2003).

21. For the history, I draw especially on: Anne Fornerod, *The Burqa Affair in France*, in *THE BURQA AFFAIR ACROSS EUROPE—BETWEEN PUBLIC AND PRIVATE SPACE* 59, (Alessandro Ferrari & Sabrina Pastorelli eds. 2013).

was a Moroccan woman living in France whose application for French citizenship was denied by the authorities, at least in part because she wore a face veil and thus demonstrated, in the government's view, insufficient assimilation to warrant citizenship. The Conseil d'Etat, France's highest court in administrative matters, upheld the refusal. The court agreed that Madame M had adopted a radical practice of religion incompatible with "essential values of French society."²² The following year, the government set up the Gérin commission, a fact-finding commission that held a vast number of interviews with experts, including—this is France—a number of philosophers. The commission suggested that face veils infringe on the freedom and dignity of women, on gender equality and a mixed society, and on social life and the common desire to live together, but stopped short of recommending a legislative ban.²³ Other institutions, notably the National Advisory Commission on Human Rights and the Conseil d'Etat, expressed doubts that a ban could be legally justified.²⁴ Nonetheless, in 2010 the French legislature passed an act banning face veils in public spaces.²⁵ The law imposed modest criminal penalties for women who wear them, and higher fines for those who force them to do so.

Although it may have looked like a French eccentricity at the time, other countries were already on the way to introducing their own bans. In Belgium,²⁶ some municipalities had banned face veils since 2004. In 2011,

22. CE, June 27, 2008, Rec. Lebon 286798; for discussion in English, see Anastasia Vakulenko, *Gender Equality as an Essential French Value: The Case of Mme M*, 9 OXFORD HUMAN RIGHTS L. REV. 143, 143–54 (2009); Per-Erik Nilsson, *Who is Madame M? Staking Out the Borders of Secular France*, in RELIGION AS A CATEGORY OF GOVERNANCE AND SOVEREIGNTY 21, 25–33 (Trevor Stack, Naomi R. Goldenberg & Timothy Fitzgerald eds., 2015).

23. ASSEMBLÉE NATIONALE, RAPPORT D'INFORMATION AU NOM DE LA MISSION D'INFORMATION SUR LA PRATIQUE DU PORT DU VOILE INTÉGRAL SUR LE TERRITOIRE NATIONAL, Jan. 26, 2010, <http://www.assemblee-nationale.fr/13/pdf/rap-info/i2262.pdf>; for a summary in English, see <https://www.loc.gov/law/help/france-veil.php>.

24. National Advisory Commission on Human Rights, Opinion on Secularism, Official Gazette no. 0235 of Oct. 9 2013; Conseil d'Etat [CE] [highest administrative court] Report adopted by the General Assembly of the Conseil d'Etat on Dec. 19, 2013 (Fr.).

25. Loi 2010-1192 du 11 Octobre 2010 interdisant la dissimulation du visage dans l'espace public, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], Oct. 12 2010, p. 18344.

26. Jogcum Vrieling, Saïka Ouad Chaib & Eva Brems, *The Belgian 'Burqa Ban': Legal Aspects of Local and General Prohibitions on Covering and Concealing One's Face in Belgium*, in THE BURQA AFFAIR ACROSS EUROPE 143 (2013); see also Eva Brems et al., *The Belgian 'Burqa Ban' Confronted With Insider Realities*, in THE EXPERIENCE OF FACE VEIL WEARERS IN EUROPE AND THE LAW 77, (Eva Brems ed., 2014). Compare Eva Brems, *Equality Problems in Multicultural Human Rights Claims: the Example of the Belgian 'Burqa Ban'*, 38 SIM SPECIAL: EQUALITY AND HUMAN RIGHTS: NOTHING BUT TROUBLE? 67, 74–78 (2015), available at http://sim.rebo.uu.nl/wp-content/uploads/2015/04/Brems_Equality-problems-in-multicultural-human-rights-claims.pdf, with Rob Widdershoven, *Troubles concerning the 'burqa ban': reflections from an outsider*, 38 SIM SPECIAL: EQUALITY AND HUMAN

the Belgian national legislature passed its own face-veil ban.²⁷ The discussion leading up to Belgium's ban referred repeatedly to the one in France, and included several of the same arguments the French had applied: safety, the requirements of "living together," and women's rights.²⁸ Somewhat surprisingly, unlike the French ban, the Belgian law criminalizes only the wearing of the veil; it does not address those who might force a woman to wear one.

Finally, in 2017, Austria followed the French and Belgian models to pass a ban on face veils in public spaces and public buildings.²⁹ Here, also, punishment is directed only against those wearing the veil. The ban is formulated in such general fashion that it was enforced, in its first weeks, against a man wearing a shark mask, another man dressed up as a Lego Ninja figure, and a woman wearing a scarf on a bicycle.³⁰

In other countries, proposals for general national face-veil bans have so far not been successful, though they still may be. Attempts for federal legislation in Switzerland have not passed; a bill that passed the lower chamber of Parliament in 2016 was rejected by the upper chamber.³¹ Proponents of a ban are now hoping for a referendum.³² A bill in Estonia that was directed specifically against burqas and niqabs has been withdrawn.³³

RIGHTS: NOTHING BUT TROUBLE? 87, 90–91 (2015) *available at* <http://sim.rebo.uu.nl/wp-content/uploads/2015/04/Widdershoven-Troubles-concerning-the-burqa-ban.pdf>.

27. Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage du Juin 1, 2011, MONITEUR BELGE [M.B.], July 13, 2011.

28. See Vrielink et al., *supra* note 26, at 151–55.

29. ANTI-GESICHTSVERHÜLLUNGSGESETZ 2017 BUNDESGESETZBLATT I [BGBl I] No. 68/2017, https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2017_I_68/BGBLA_2017_I_68.pdf (Austria); cf. Lizzie Dearden, *Austrian parliament passes burqa ban seeing Muslim women face £130 fines for wearing full-face veils*, INDEPENDENT, May 18, 2017, <http://www.independent.co.uk/news/world/europe/austria-burqa-ban-parliament-fines-150-full-face-veils-muslim-islam-niqabs-public-transport-a7742981.html>; see also BUNDESMINISTERIUM FÜR INNERES, VERBOT DER GESICHTSVERHÜLLUNG TRAT AM 1. OKTOBER 2017 IN ÖSTERREICH IN KRAFT (2017), www.bmi.gv.at/verhuellungsverbot. For critique, see Flora Alvarado-Dupuy, *Anti-Gesichtsverhüllungsgesetz: Zwangzur Entschleierung*, 2017 *Juridikum—Zeitschrift Für Kritik, Recht, Gesellschaft* 152 (2017).

30. Chase Winter, *Austria 'burqa ban': Police raid toy store over a Lego Ninja*, USA TODAY, Oct. 21, 2017, <https://www.usatoday.com/story/news/world/2017/10/21/austria-burqa-ban-police-raid-toy-store-over-lego-ninja/787167001/>.

31. *Swiss Senate refuses nationwide burqa ban*, LOCAL, Mar. 9, 2017, <https://www.thelocal.ch/20170309/swiss-senate-refuses-nationwide-burqa-ban>.

32. Simon Hehli, *Die Schweiz wird über das Burkaverbot abstimmen*, NEUE ZÜRCHER ZEITUNG, Sep. 13, 2017, <https://www.nzz.ch/schweiz/die-schweiz-wird-ueber-das-burkaverbot-abstimmen-ld.1315989>. The proposed text is available as Eidgenössische Volksinitiative 'Ja zum Verhüllungsverbot,' <https://www.bk.admin.ch/ch/d/pore/vi/vis465t.html>.

33. *EKRE withdraws bill calling for face veil ban*, ERR, Feb. 7, 2017, <http://news.err.ee/120601/ekre-withdraws-bill-calling-for-face-veil-ban>.

Similarly, attempts in Spain to ban face veils both nationally and in one province (Catalonia) were unsuccessful.³⁴ The Dutch government once planned to introduce a general face veil-ban but did not.³⁵ The Danish government, by contrast, currently has plans for a ban.³⁶

What does exist, in some countries, are regional bans. In Switzerland, a referendum in the canton of Ticino led to a constitutional amendment banning face veils in public places or buildings; implementing legislation went into force in 2016.³⁷ In Spain, several municipalities (most of them in Catalonia) adopted bans,³⁸ before the Spanish Supreme Court held them to be unconstitutional.³⁹ Regional bans exist also in Italy.⁴⁰

Further, other European countries have banned face veils in certain situations. Bulgaria recently legislated that face veils may not be worn in Bulgaria's central and local administrative institutions, schools, cultural institutions, and places of public recreation, sports, and communications.⁴¹ Similarly, the lower house of the Dutch parliament voted in 2016 for a ban on face veils in certain public places, including schools, hospitals, government buildings, and public transport; the ban has not yet become

34. Robert Gould, *Moors and Christians: Fear of Islam in Spanish Political Debates*, in *FEAR OF MUSLIMS? INTERNATIONAL PERSPECTIVES ON ISLAMOPHOBIA* 191, 195–203, 206–08 (Douglas Pratt & Rachel Woodlock eds., 2016).

35. Adriaan Overbeeke, *Introducing a General Burqa Ban in the Netherlands*, in *THE BURQA AFFAIR ACROSS EUROPE*, *supra* note 21 at 101.

36. *Denmark Poised to Ban Islamic Full-Face Veils*, *INDEPENDENT*, Feb 10, 2018, <http://www.independent.co.uk/news/world/europe/denmark-ban-islamic-fullface-veils-france-belgium-burqa-niqab-hijab-a8197931.html>.

37. Women reacted by replacing the face veil with a medicinal mouth protection, which the law allows. Aug. 15, 2017, <https://www.aargauerzeitung.ch/schweiz/so-umgehen-musliminnen-im-tessin-das-burkaverbot-131612423>.

38. See Augustin Motilla, *The Burqa Affair in Spain: Legal Perspectives*, in *THE BURQA AFFAIR ACROSS EUROPE*, *supra* note 21 at 127.

39. *See infra* note 50.

40. Catherine Edwards, *Italian Region Bans Women in Face Veils from Entering Hospitals*, *THE LOCAL IT*, Mar. 8, 2017, <https://www.thelocal.it/20170308/italian-region-bans-veiled-women-from-entering-hospitals>.

41. Siobhan Fenton, *Bulgaria Imposes Burqa Ban—and Will Cut Benefits of Women Who Defy It*, *INDEPENDENT*, Oct. 1, 2016, <http://www.independent.co.uk/news/world/europe/bulgaria-burka-ban-benefits-cut-burkini-niqab-a7340601.html>. For background, *see* Maya Kosseva & Iva Kyrukchieva, *Religious Dress Codes: The Bulgarian Case*, in *RELIGION IN PUBLIC SPACES* 255 (Silvio Ferrari & Sabrina Pastorelli eds. 2012).

law.⁴² Norway plans a similar ban.⁴³ And in Germany, to many people's surprise, Chancellor Merkel declared in December of 2016 that she wanted to ban burqas insofar as is compatible with existing law.⁴⁴ In consequence, the federal legislator passed a law banning face veils for public servants and for identification purposes.⁴⁵ Bavaria passed a law that goes further, expanding the prohibition on veils to public servants and allowing local municipalities to pass event-specific bans.⁴⁶

Europe's approach to face veils is thus not unanimous and will not likely be so in the near future. Recently, the European Peoples' Party, the biggest party in the European Parliament, proposed an EU-wide ban for face veils.⁴⁷ Given the significantly different attitudes espoused by different member states, it is unlikely to succeed, at least for now.

C. Face-Veil Bans in the Courts

Not surprisingly, face-veil bans have been attacked in courts, both national and supranational, as both conflicting with religious freedom and as constituting religious discrimination. The success of such attacks has been mixed. The constitutional courts in France (in 2010) and Belgium (in 2012) both upheld their respective national bans,⁴⁸ both courts required an

42. Harriet Agerholm, *Dutch parliament approves partial burqa ban in public places*, INDEPENDENT, Nov. 29, 2016, <http://www.independent.co.uk/news/world/europe/dutch-burqa-veil-ban-holland-votes-for-partial-restrictions-some-public-places-a7445656.html>; for background, Adriaan Overbeeke, *Introducing a General Burqa Ban in the Netherlands*, in THE BURQA AFFAIR ACROSS EUROPE, *supra* note 21 at 101.

43. *Norway Plans to Ban Face Veils in Schools and Universities*, NEW YORK TIMES, June 12, 2017, <https://www.nytimes.com/2017/06/12/world/europe/norway-veil-burqa-schools.html>.

44. Philip Oltermann, *Angela Merkel endorses party's call for partial ban on burqa and niqab*, THE GUARDIAN, Dec. 6, 2016, <https://www.theguardian.com/world/2016/dec/06/angela-merkel-cdu-partial-ban-burqa-niqab-german>.

45. Janina Lückhoff, *Das Burkaverbot läuft ins Leere*, TAGESSCHAU, Apr. 28, 2017, <https://www.tagesschau.de/inland/burkaverbot-bundestag-103.html>.

46. Gesetz über Verbote der Gesichtsverhüllung in Bayern, June 17, 2017, BAYERISCHES GESETZ-UND VERORDNUNGSBLATT [BAY GVBL] 362 (Bavaria) (Ger.), <https://www.verkuendung-bayern.de/gvbl/jahrgang:2017/heftnummer:12/seite:362>.

47. Jon Stone, *European Parliament's biggest political group calls for EU-wide ban on Islamic face veils*, INDEPENDENT, Apr. 7, 2017, <http://www.independent.co.uk/news/uk/politics/islamic-veil-burka-ban-face-european-peoples-party-manfred-weber-a7672606.html>.

48. France: Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010–613 DC (Loi interdisant la dissimulation du visage dans l'espace public), Oct. 7, 2010, <http://www.conseil-constitutionnel.fr/decision/2010/2010-613-dc/decision-n-2010-613-dc-du-07-octobre-2010.49711.html> (Fr.); English translation available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2010613DCen2010_613dc.pdf; for analysis see, e.g., Noemi Gal-Or, *Is the Law Empowering or Patronizing Women? The Dilemma in the French Burqa Decision as the Tip of the Secular Law Iceberg*, 6 RELIG. & HUMAN RIGHTS 315 (2011). Belgium: Cour constitutionnelle [CC]

exception for veils within houses of worship.⁴⁹ By contrast, the Spanish Constitutional Tribunal, when striking down a municipal ban in 2011, upheld principles of pluralism and emphasized that certain differences had to be tolerated within society.⁵⁰

Both the French and Belgian bans have been upheld by the European Court of Human Rights. In 2014, the Grand Chamber of the European Court of Human Rights addressed the French ban. Its decision provided a comprehensive overview of developments in France and other European countries. The Court expressed severe doubts about the ban but nonetheless upheld it as lying within the member states' "wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one's religion or beliefs is 'necessary.'"⁵¹ Two Judges gave a partly dissenting opinion, suggesting that the legislation had no legitimate aim and was not proportional. When the Court reviewed the Belgian ban three years later, it held itself bound by its earlier decision and upheld the Belgian ban in two separate decisions.⁵² In the Belgian cases, the Court voiced its concerns even more strongly than it had in reference to the French one, and one concurring vote emphasized the narrowness of the holding. But the Court did not substantively change its approach. Whether the Austrian law will be challenged remains to be seen.

D. Assessment

It is striking to see how much energy is spent on a question that appears to be of so little practical relevance (except for those affected). Headscarf bans at least deal with a widespread phenomenon—since the Islamic revival, the number of Muslim women wearing headscarves has grown considerably.⁵³ Niqabs, by contrast, are exceedingly rare in Europe, and

[Constitutional Court] decision no 145/2012, Dec 6, 2012, <http://www.const-court.be/public/f/2012/2012-145f.pdf> (Belg.).

49. Conseil constitutionnel (Fr.), *supra* note 48, at no. 5. Cour constitutionnelle (Belg.), *supra* note 48, at no. B.30.

50. Tribunal Supremo, Sala de lo Contencioso-Administrativo Appeal no 4118/2011, Jdgmt of 14 Feb 2013, <http://www.poderjudicial.es/stfls/SALA%20DE%20PRENSA/NOVEDADES/Sentencia-Uso%20burka-Lleida.pdf>; English summary in 2 OX. J. L. & RELIG. 476, 476 (2013). Cf. Gould, *supra* note 34, at 203–06 Agustín García Ureta, *Signos Religiosos, Autonomía Municipal Y Derechos Fundamentales: Comentarios Sobre La STS De 14 De Febrero De 2013 (Prohibicion De Uso Del Velo Integral)*, 191 REVISTA DE ADMINISTRACIÓN PÚBLICA 201 (2013).

51. S.A.S v. France, 2014-III Eur. Ct. H.R. 291, 291129.

52. Belcemi and Oussar v. Belgium (application No. 37798/13), July 11, 2017; Dakir v. Belgium (application No. 4619/12), July 11, 2017.

53. See generally SABA MAHMOOD, POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT (2005).

burqas, which are the implied main target of most legislation, are almost nonexistent.⁵⁴ Indeed, few legislators outside France appear to have based their legislation on reliable numbers, undoubtedly because such numbers would hardly have justified legal measures.⁵⁵ Assessments regarding the number of those affected thus vary greatly, but one can confidently say that the number of face-veil wearers in Europe is minuscule. England has perhaps the largest number (though exact numbers appear unavailable) but no ban. In France, an early report cited only 367 face-veil wearers in the country.⁵⁶ In view of the low number, the French government commissioned a second report, which tallied 1900 face-veil wearers, including 270 in France's non-European territories.⁵⁷ A Danish study estimates there are about 150 niqab wearers in Denmark.⁵⁸ In Belgium, either 200 women wear a face veil or, according to some, only 30.⁵⁹ In Latvia the number is three.⁶⁰ In Austria, many assume that the country is home to 150 face veil wearers, but the number is not confirmed and very doubtful.⁶¹ Germany is allegedly home to 300 women who wear a burqa, but the empirical basis for that number is unclear.⁶² A journalist, trying to find actual cases, found only one—and that

54. See Nilufar Ahmed, *So few Muslim women wear the burqa in Europe that banning it is a waste of time*, THE CONVERSATION, Aug. 30, 2017, <https://theconversation.com/so-few-muslim-women-wear-the-burqa-in-europe-that-banning-it-is-a-waste-of-time-82957>.

55. For broader critique of the untested empirical assumptions underlying the Belgian ban, see Eva Brems et al., *The Belgian 'Burqa Ban' Confronted with Insider Realities*, in THE EXPERIENCES OF FACE VEIL WEARERS IN EUROPE AND THE LAW 77 (Eva Brems ed., 2014) [hereinafter: EXPERIENCES].

56. *La loi et la burqa*, LE MONDE, July 29, 2009, http://www.lemonde.fr/idees/article/2009/07/29/la-loi-et-la-burqa_1223753_3232.html.

57. *Rapport d'Information No. 2262*, Assemblée Nationale (2010) at 28f [hereinafter *Gérin Report*].

58. Kate Østergaard, Margit Warburg & Brigitte Schepelern Johansen, *Niqabis in Denmark: when politicians ask for a qualitative and quantitative profile of a very small and elusive subculture*, in EXPERIENCES, *supra* note 55, at 42–76.

59. *Belgian law makers pass burka ban*, BBC, <http://news.bbc.co.uk/2/hi/8652861.stm>, Apr. 30, 2010. See also *Loi contre le port de la burqa, 5 ans après: où en est-on?*, ATLANTICO, Oct. 26, 2015, <http://www.atlantico.fr/decryptage/loi-contre-port-burqa-5-ans-apres-ou-en-est-on-denis-jacob-2380275.html>.

60. Richard Martyn-Hemphill, *Latvia Wants to Ban Face Veils, for All 3 Women Who Wear Them*, N.Y. TIMES, Apr. 16, 2016, https://www.nytimes.com/2016/04/20/world/europe/latvia-face-veils-muslims-immigration.html?_r=0.

61. Jan Michael Marchart & Werner Reisinger, *Die ominösen 150 Burkas*, WIENER ZEITUNG, Mar. 2, 2017, http://www.wienerzeitung.at/nachrichten/oesterreich/politik/871996_Die-ominoesen-150.html.

62. Adam Taylor, *Germany's potential burqa ban has a problem: Where are the burqas?*, WASH. POST, Dec. 6, 2016, <https://www.washingtonpost.com/news/worldviews/wp/2016/08/19/germanys-potential-burqa-ban-has-a-problem-where-are-the-burqas>.

was a reporter who wore a burqa to go undercover.⁶³ Among the public servants within the scope of the recent German law, not a single one appears to wear a face veil.

Legislators justify the ban with the argument that measures must be taken before the phenomenon takes hold. Be that as it may, for now, this is largely symbolic legislation—except, of course, for those women to whom it does apply. And with regard to them, the legislation seems to have had fairly little deterrent effect. The French law has been enforced, it appears, with some frequency, including thirty-three times against the same woman.⁶⁴ But the number of face-veil wearers has not gone down significantly.⁶⁵

The legislation must thus be understood as symbolic. And this makes it more, not less, fascinating to look at the justification given for it.

III. THE CONSTRUCTION OF ISLAMIC LAW

A. The Refusal to View the Face Veil as Religious

Is the face veil about Islam? Even those in favor of a ban do not agree, and for good reason. If the face veil is viewed as Islamic, a ban triggers concerns about fundamental rights, in particular freedom of religion and freedom from religious discrimination. If, on the other hand, the face veil is not viewed as representing Islam, it is not entirely clear why it should be banned, when so many other forms of discrimination against women are not.

Some European legislators' preferred rationale is that face veils are not religious and therefore face-veil bans do not interfere with religious freedom. The French ban is said to concern "the social or intangible public order, rather than the principle of *laïcité*."⁶⁶ The Austrian ban is directed against any veiling, regardless of whether it is religiously motivated.

Indeed, some argue that the face veil *could* not possibly be required by Islam, because if they were, hundreds of millions of Muslim women

63. Fabien Köhler, *Ich habe versucht, Burka-Trägerinnen in Deutschland zu finden*, BENTO, Nov. 8, 2016, <http://www.bento.de/politik/burka-in-deutschland-wie-viele-vollverschleierte-frauen-gibt-es-in-deutschland-773270/>.

64. Guillaume Stoll, *La loi anti-burqa a 5 ans. Pour quel bilan?*, L'OBS, Oct. 9, 2015, <http://tempsreel.nouvelobs.com/societe/20151009.OBS7366/la-loi-anti-burqa-a-5-ans-pour-quel-bilan.html>.

65. *Loi contre le port de la burqa, 5 ans après: où en est-on?*, ATLANTICO, Oct. 26, 2015, <http://www.atlantico.fr/decryptage/loi-contre-port-burqa-5-ans-apres-ou-en-est-on-denis-jacob-2380275.html>.

66. For example, the sponsor of the French bill emphasized "Jean-Paul Garraud, Report No. 2648 on the Bill No. 2520, prohibiting the concealing of the face in public," French National Assembly, June 23, 2010.

worldwide are in breach of their religious duties.⁶⁷ These European legislators reference Islamic theologians for their assessments that Islam does not require a face veil.⁶⁸

Those who claim the face veil is not religious posit two alternative explanations for it that are sometimes used together. The first is that the face veil is not religious but *cultural*. The Gérin report emphasized that face veils predate Islam, and that French Muslims have only recently adopted them as an import from the Middle East.⁶⁹ As cultural dress, face veils should be permissible to ban. We find here, in the law, the old debate about the perceived conflict between feminism and multiculturalism: should the West protect women from their indigenous culture, or should it tolerate cultures that treat women differently than it does?⁷⁰

Another explanation of the face veil is that it is not religious but *political*. According to this view, the face veil is indeed representative of Islam, but only of radical Islam. Radical Islam, in this reading, is not a religious but a political movement aimed at toppling secular regimes. Viewed as such, the face veil deserves as little protection as the swastika, with which it is indeed sometimes compared.⁷¹ Political Islam can be viewed as a threat to the Republic not because it is religious but because it is extreme. Indeed, the argument that the face veil stands for political Islam is used as a reason for its ban in a number of Muslim-majority countries. In Egypt, it is even argued that the face veil is actually not Islamic but Jewish.⁷² And so, if even these Muslim-majority countries ban it, so the argument goes, all the more so can the Western state. It is typically overlooked in such arguments that the role of political Islam in Muslim-majority countries is significantly different than it is in Western ones.

67. Tomas Avenarius, *Die Burka gehört verboten*, SÜDDEUTSCHE ZEITUNG, Aug. 12, 2016, <http://www.sueddeutsche.de/politik/streit-um-symbole-die-burka-gehört-verboten-1.3118828>.

68. *Gérin Report*, *supra* note 57, at 36ff.

69. *Id.* at 25ff.

70. See Karen Knop, Ralf Michaels & Annelise Riles, *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 64 STAN. L. REV. 589, 596–609 (2012).

71. See Paul Cliteur & Machteld Zee, *The Burqa Challenge to Europe*, 23 MIDDLE E. Q. 2, 6 (March 2016), available at <http://www.meforum.org/meq/pdfs/5878.pdf>. See also *Islam Critic Ayaan Hirsi Ali Says Burka 'Like Wearing a Very Big Swastika'*, YAHOO, Apr. 4, 2017, <https://au.news.yahoo.com/a/34907487/islam-critic-ayaan-hirsi-ali-says-burka-like-wearing-a-very-big-swastika/#page1>.

72. Hend El-Behary, *Parliament to Draft Law Banning Niqab in Government Institutions, Public Places*, EGYPT INDEPENDENT, Mar. 7, 2016, 4:47 PM, <http://www.egyptindependent.com/news/parliament-draft-law-banning-niqab-government-institutions-public-places>; Siobhan Fenton, *Egypt Drafts Bill to Ban Burqa and Islamic Veils in Public Places*, THE INDEPENDENT, Mar. 9, 2016, <http://www.independent.co.uk/news/world/africa/egypt-drafts-bill-to-ban-niqab-veil-in-public-places-a6920701.html>.

Regardless of whether the face veil is cultural or political or both, classifying it as nonreligious has an advantage: if the face veil is not religious, then the woman who wears it cannot invoke freedom of religion to do so. If she has been forced to wear it by family members, then the ban provides her with protection. If she has freely chosen to wear it—as research suggests many do⁷³—then this choice is inherently suspicious, because it shows that the woman is either against gender equality, or in favor of a politically suspicious movement.

In drawing these distinctions, proponents of face-veil bans make two important presuppositions that are questionable and shall be discussed in turn. The first: religion on the one hand, and culture or politics on the other, stand on opposite ends; the face veil can be only one or the other but not both. The second: the face veil is either a religious requirement, or a matter of personal choice, but not both. Both presuppositions are erroneous.

B. Culture and Politics vs. Religion

First, it is critical to examine the assumption that face veils are either cultural and political, on the one hand, or religious, on the other. That presupposes that we can neatly distinguish religion from culture and from politics. Such a distinction is perhaps possible for Christianity, which can indeed to some extent be viewed as distinct from both politics and culture. When in the New Testament Jesus asks the faithful to give to Caesar what is Caesar's and to God what is God's, the Bible lays the foundation for a potential coexistence between a religion that deals with heavenly matters and politics that deals with earthly ones. This distinction is radicalized later in Protestantism, which turns religion into a private matter of faith, leaving not only the realm of governance (politics) but also the realm of action (culture) to other parts of society. Such a purely faith-based religion can indeed be viewed as separate from both politics and culture.

But this distinction is peculiar to one religion—Christianity—and, in a mirror image, to one specific state—the Western secular state. The distinction has never been as easy for Islam, which did not undergo the same separation between politics and religion that Christianity did in the West.⁷⁴ In Islam, the face veil can be both, political and religious.

73. On the importance for human rights of studying people's motivation in depth, *see generally* Anastasia Vakulenko, 'Islamic Headscarves' and the European Convention on Human Rights: an Intersectional Perspective, 16 SOC. AND LEGAL STUD. 183, (2007). For in-depth studies, *see generally*, THE EXPERIENCES OF FACE VEIL WEARERS IN EUROPE AND THE LAW (Eva Brems ed., 2014).

74. *See generally* WAEL B. HALLAQ, AUTHORITY, CONTINUITY AND CHANGE IN ISLAMIC LAW (2001); NOAH FELDMAN, THE FALL AND RISE OF THE ISLAMIC STATE (2008).

The veil is certainly political, at least for many. The face veil as such has come to serve, widely, as a symbol of a certain strand of political Islam. This is, indeed, why it is banned in some Muslim-majority countries like Egypt: it symbolizes a threat to the more moderate Islam that serves as the foundation of the state. But this does not make the face veil non-religious. Islam is traditionally, and remains in principle, a religion that claims to order all of life, including the political and the cultural. It is not a religion based on faith alone but instead one in which action is of crucial importance. Certain actions are therefore not merely accidental to Islam; they are indispensable elements. As a consequence, the distinction between religion on the one hand, and politics on the other, cannot be made as easily. The fact that the face veil is political does not imply that it is not religious: it is both of these things.

That is not to say that every Muslim carries her religion into the political realm. Islam has detailed rules for how believers should defer to secular rule in states in which they are a minority. Nor is it to say that what is now often called “political Islam” (and what is really a modern movement) represents in any way an official Islamic position on politics. The point here is more limited: the way we think about the distinction between religion and politics is determined by the distinction between Christianity and the Western state; it does not necessarily apply in the same way for Islam.

C. Religion vs. Choice?

Yet more problematic is the suggestion that Islam does not require women to wear the veil and that it is therefore a matter not of religious command but of individual choice. Of course, as a matter of human rights the issue is irrelevant. Religious freedom is not confined to actions that are required by some official religion. The law also protects religious convictions when they are individually held, as long as they are sincere. Resting on this point, the German Constitutional Court has required that a woman’s decision to wear a headscarf be tolerated when it plausibly rests on her perception that the religious requirement is binding.⁷⁵ In October 2016, this was upheld for teachers in preschools.⁷⁶

75. Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court), 1 BvR 471/10, 1 BvR 1181/10, Jan. 27, 2015, 138 BVerfGE 296, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html.

76. BVerfG, 1 BvR 354/11, 18 Oct 2016, 2007 Neue Juristische Wochenschrift 381, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/10/rk20161018_1bvr035411.html.

Even still, the claim that Islam does not require a face veil is troubling because it is misleading. Although most Islamic scholars do not consider a face veil to be required by Islam, a consensus does not exist.⁷⁷ Indeed, Muslim women in different parts of the world wear different types of veils, including different types of face veils, depending on different interpretations of the requirement. Such ambiguity is characteristic of religious laws in general, and of Islam in particular. Most religions, unlike states, have no processes for final decision. Nor is the content of Islam a matter of majority decision. While great deference is given to the most respected experts of Islamic law, at the end of the day, ambiguity remains. And Islam favors the plurality of views. “Every mujtahid is correct,” the Prophet is reported to have said.⁷⁸

How then can the individual know what is required of her? One way, perhaps the preferred one, is *taqlid*, or following: she should follow the advice, or judgment, of a respected legal scholar. But this begs the question what one should do when scholarly opinions differ. Complicating matters further, Islamic law has a populist strand;⁷⁹ *taqlid* is not the only way to discover what is right. From this perspective, Islam requires each believer to make an honest attempt to get to the right result through struggle—*ijtihad*. Faced with unclear sources and different interpretations, every woman must decide for herself whether she feels compelled to cover her face. Of course, she may need to contend with external pressures—from her father, her brothers, and the community—meaning that the choice is not always fully free, whatever exactly that would mean. But in the end, the answer she gives is her own.

Notably, her answer is not one of pure discretion. Islamic law is not understood, in the liberal sense of law, as setting outer boundaries within which a decision can be taken on extralegal criteria. Rather, Islamic law requires the faithful to answer any questions on the basis of, in the spirit of, and therefore ultimately as a continuation of, Islamic law. This is a crucial point. The distinction that Western law draws between command and choice becomes a largely meaningless distinction. Islam commands the woman to choose for herself, meaning, to struggle to find the right response. And what the woman chooses is not what she personally would like to do, but rather

77. See, e.g., Roberta Aluffi Beck-Peccoz, *Burqa and Islam*, in THE BURQA AFFAIR ACROSS EUROPE, supra note 21, at 15. An easily accessible collection of the main Quranic passages is at *The Quran*, REORIENTING THE VEIL, <http://veil.unc.edu/religions/islam/quran/>.

78. See, e.g., Intisar Rabb, *Ijtihād*, OXFORD ISLAMIC STUD. ONLINE, www.oxfordislamicstudies.com/article/opr/t236/e0354; Anver M. Emon, *Ijtihad*, in THE OXFORD HANDBOOK OF ISLAMIC LAW (Anver M. Emon & Rumea Ahmed eds., 2018).

79. On this, see Wael B. Hallaq, *What is Shari'a?*, 12 Y.B. ISLAMIC & MIDDLE EASTERN L. 151 (2005).

what she thinks to be the best and most adequate interpretation of the requirements of Islam.

IV. THE CONSTRUCTION OF THE STATE

In response to Islam, the state not only constructs the object it tries to regulate, namely religion. The state also constructs itself. What the state is, what it aims to be, can be viewed through the justifications it gives for a regulation like a face-veil ban. Essentially, there are three types of justifications for face-veil bans, and they reflect the three views of the face veil described earlier: the veil is viewed as a risk for security, a violation of female dignity and equality, and an impediment to the way in which people live together.

For my purposes, this third justification is the most interesting one. The European Convention of Human Rights allows restrictions on religious freedom with regard to the requirements of democracy and society. The claim is that a face veil stands in the way of “living together” and thereby, indirectly, impedes the kind of society that the liberal Western state requires and protects.⁸⁰ Living together, it is said, requires society members’ ability to see each another’s faces, to communicate not just orally but also visually.

This is an interesting argument. Living together is not, formally, a legal term, and yet it is used for specific legal purposes. This is so especially after the European Court of Human Rights approved the justification as a legitimate reason to ban face veils in 2014.⁸¹ Since the European Court of Human Rights approved of “living together” as a justification for a ban on face veils, much confusion has ensued as to what the term was meant to mean and how it can be defined in a meaningful way—a confusion that has made its way even into dissenting votes in the ECHR itself.⁸² This confusion justifies a somewhat more extended analysis into the origins and meaning of the concept. Here, a perspective from postsecular comparative law is useful.

A. Living Together – A Puzzle

As concerns bans on veils, the idea of “living together” emerged first in France. In 2004, President Chirac referred to the “desire to live together” to justify a ban of veils in public schools.⁸³ Later, the 2010 Gérin Report

80. Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2010-613DC, Oct. 7, 2010, Rec. 276 (Fr.).

81. *S.A.S v. France*, 2014-III Eur. Ct. H.R. 291, 343.

82. *See id.* at 385 (*S.A.S v. France* dissent No. 9).

83. *See* BOWEN, *supra* note 14, at 158; Circulaire du 18 mai 2004 relative à la mise en oeuvre de la loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou

repeatedly used the term.⁸⁴ And during hearings on the national ban, France's minister of justice explicitly invoked the idea of living together:

The will to live together depends, as we all know, on our capacity to assemble around common values and a common destiny. This 'living together' necessarily entails a refusal to withdraw to oneself, a refusal to reject the other, which sustains communitarianism. Living together supposes acceptance of the gaze of the other.⁸⁵

Does the face veil prevent living together? Taken literally, this makes no sense. Of course people can live together without seeing one another's faces. We conceal our faces when we ski, when we motorcycle, and when we celebrate Carnival or Halloween.⁸⁶ Banning all these activities seems bizarre, as reports from Austria make clear.⁸⁷

More importantly, if the veil is a necessary prerequisite for living together with women who feel obliged to wear it in public, banning the face veil, in fact, actually undermines living together. The Spanish Supreme Court made this point forcefully:

In academic studies on the justification of this kind of prohibition, what frequently stands out is the risk of a perverse effect that could follow: the enclosing of the woman in her immediate familiar environment, if she decides to prioritize her religious convictions over other considerations. This could eventually lead to a result contrary to the objective of integration in different social spaces, and in sum, instead of serving elimination of discriminations, could contribute to their increase, if those spaces are closed to the woman in question.⁸⁸

Does the face veil at least stand in the way of a particular aspect of living together, namely proper communication? This is the understanding of which

de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 22, 2004, p. 9033.

84. Gérin Report, *supra* note 57, at 119–122, 492, 512.

85. *Déclaration de Mme Michèle Alliot-Marie, ministre de la justice et des libertés, sur les motifs du projet de loi visant à interdire la dissimulation du visage dans l'espace public, à Paris le 15 Septembre 2010*, VIE PUBLIQUE, <http://discours.vie-publique.fr/notices/103002026.html> (translated by RM). The original text is: La volonté de vivre ensemble dépend de notre capacité à nous rassembler autour des valeurs communes et d'un destin partagé. Vivre ensemble entraîne le refus du repli sur soi et du rejet de l'autre qu'exprime le communautarisme. Vivre ensemble suppose l'acceptation du regard de l'autre.

86. See S.A.S Judgment, *supra* note 51, at 385 (S.A.S dissent No. 9).

87. See *supra* note 35 and accompanying text.

88. S.T.S., Feb. 14, 2013 (J.T.S., No. 4118/2011, p. 21) (Spain), *supra* note 50 (translated by RM). The original text is: "en los estudios doctrinales sobre la justificación de una prohibición de tal tipo no es infrecuente resaltar el riesgo del efecto perverso que pueda derivarse de la misma: el enclaustramiento de la mujer en su entorno familiar inmediato, si decide anteponer a otras consideraciones sus convicciones religiosas; lo que a la postre resultaría contrario al objetivo de integración en los diferentes espacios sociales, y en suma, en vez de servir a la eliminación de discriminaciones, pudiera contribuir a incrementarlas, si a la mujer concernida se le cierran esos espacios." See also EUR. PARL. ASS., *Resolution 1743—Islam, Islamism and Islamophobia in Europe*, no. 17 (2010).

the European Court of Human Rights approved. But this seems equally unconvincing. We communicate quite often without seeing our counterpart's face, for example on the telephone.⁸⁹ Women with a niqab have communicated for centuries; it is not clear why this should be impossible. Moreover, it is not clear why how we communicate should matter at all. As the dissenting vote in the European Court of Human Rights makes clear, there is also a right *not* to communicate.⁹⁰ We have no duty to take off our headphones in public, or to raise our eyes from our smartphones.

There is a third understanding of living together, and it is linked to a philosophical justification: a reference to the philosopher Emmanuel Levinas and his emphasis on face-to-face encounters.⁹¹ Levinas suggests, essentially, that the Other comes to us not as an abstraction but as a concrete person with a concrete face, and that this encounter immediately creates ethical obligations for us. Defenders of face-veil bans deduce from this an obligation for the other to show her face. They even cite Levinas in their favor:

You turn yourself toward the Other as toward an object when you see a nose, eyes, a forehead, a chin, and you can describe them. The best way of encountering the Other is not even to notice the color of his eyes! When one observes the color of the eyes one is not in social relationship with the Other. The relation with the face can surely be dominated by perception, but what is specifically the face is what cannot be reduced to that.⁹²

The Gérin Report suggests that this means that the face, animated by its expressions, is a whole that cannot be reduced to one of its elements, so that a niqab, which shows only the woman's eyes, must be banned. But this use of Levinas is a perversion of his argument. In reality, it appears clear that Levinas meant the precise opposite: that the face cannot be reduced to its physicality, and that it should therefore not be confined to those elements that describe it. In speaking about the face, Levinas really meant that the Other approaches us as a concrete and vulnerable person, not an abstract entity. It is the vulnerability of the other person that makes an ethical demand

89. See also *S.A.S. v. France*, App. No. 43835/11 (2014) (joint partly dissent par. 9).

90. *Id.* at par. 8. See also Bijan Fateh-Moghadam, *Ganzkörperverschleierung verbieten?*, 7 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 214, (2016).

91. Gérin Report, *supra* note 57, at 116–18. See also MICHAEL L. MORGAN, *THE CAMBRIDGE INTRODUCTION TO EMMANUEL LEVINAS* 59ff. (2011) (featuring a helpful introduction Levinas' ethical theory of the face).

92. EMMANUEL LÉVINAS, *ETHICS AND INFINITY*, 85–86 (1985) (cited in Gérin Report, *supra* note 57, at 118 and in Stéphane Mechoulan, *France Bans the Veil: What French Republicanism Has to Say about It*, 35 B.U. INT'L L.J. 223, 263 (2017)). See also Michel Erman, *La burqa ou l'impossible compromise*, LE MONDE, July 11, 2009, http://www.lemonde.fr/idees/article/2009/07/11/la-burqa-ou-l-impossible-compromis_1217883_3232.html.

on us. This suggests that the veiled woman, if indeed she is oppressed (as ban supporters tend to argue), deserves our support, not our regulation.⁹³

B. Living Together and the Nation

In order to properly understand what “living together” means, the concept must be put in its historical context. When the French minister of justice stated that “the will to live together depends . . . on our capacity to assemble around common values and a common destiny,”⁹⁴ she made a clear implicit reference. This “desire to live together” is nothing less than Ernest Renan’s answer, given more than 100 years prior, to the question, “what is a nation?”⁹⁵ In his words,

A nation is a soul, a spiritual principle. Two things that, in truth, are only one, make up this soul, this spiritual principle. One of these lies in the past, the other in the present. One is the possession in common of a rich legacy of memories; the other is the present consent, the desire to live together, the will to validate the heritage that has been jointly received.⁹⁶

The desire to live together is, thus, what makes the nation. Renan rejected, forcefully, the contemporaneous German conception of a nation, which was one of essence—a community of fate, a race. This could not work for France, which based its nation on the Revolution and the regime that the people themselves had created. As Renan said, “Ours is the politics of the right of nations; yours is the politics of race. The division of humanity into races . . . can only lead to wars of extermination, to ‘zoological’ wars.”⁹⁷

In defining the nation as a “spiritual principle,” Renan focused on mentality rather than biology, and in particular on a common tradition. As he explained:

To have common glories in the past, and a common will in the present; to

93. See Sharon Todd, *The “Veiling” Question: On the Demand for Visibility in Communicative Encounters in Education*, 2010 *PHILOSOPHY OF EDUCATION* 349, 355–56; Chloe Patton, *Defacing Levinas: Vision, Veiling and the Ethics of Republican Citizenship in France*, 20 *SOCIAL IDENTITIES* 186, 197 (2014); Maryam Borghée, *VOILE INTÉGRAL EN FRANCE. SOCIOLOGIE D’UN PARADOXE* 212–17 (2012); see also Gina Gustavsson, *Romantic Reading of the French Burqa Ban: Liberty as Self-Expression and the Symbolism of Uncovered Faces in the French Debate on Full Veils*, 2 *CONFLUENCE* 88, 100–03 (2015).

94. *Déclaration de Mme Michèle Alliot-Marie*, *supra* note 85.

95. Ernest Renan, *Address at the Sorbonne: What is a Nation?*, Mar. 11, 1882. The influence of Renan on the concept of ‘living together’ is occasionally recognized but rarely analyzed further. See, e.g., Carla M. Zoethout, *Secularism Stated, Rejected, and Reaffirmed: France, Italy, and Canada and the Dilemmas of Multi-Religious Societies*, 17 *J. REL. & SOC.* 1, 6 n.9 (2015); Bowen, *supra* note 14, at 158.

96. Renan, *What is a Nation?*, in *ON THE NATION AND THE ‘JEWISH PEOPLE’* 37, 63 (Shlomo Sand ed. 2010).

97. Robert D. Priest, *Renan’s Race Problem*, 58 *HIST. J.* 309, 313, n.21 (2015) (citing Ernest Renan, *Lettre à David Strauss (1871)*, *LETTRES FRANÇAISES* 2, 25–36 (1941)).

have done great things together, and to seek to do so again, those are the essential conditions for being a people. One loves in proportion to the sacrifices to which one has consented, the evils that one has suffered.⁹⁸

Renan's alternative to a racial concept of nationhood was then one of consent—a “daily plebiscite,” as he wrote elsewhere in the same text.⁹⁹ But in what way does the woman in a face veil not share this desire to live together, not consent to the French nation? Madame M, for example, the woman who was denied citizenship because of her face veil, expressed her whole support for the French nation and yet was unable to convince the state that it should give her citizenship.

C. The Role of Religion

In order to understand the full argument, it is necessary to look at Renan's definition in its broader context. Renan's text on the nation did not deal with religion, at least not explicitly—but much of his other writing did. Having been brought up religiously, Renan later rejected belief in the transcendental in favor of a keen interest in science. He rose to fame with a book on the life of Jesus that was, unsurprisingly, controversial, as it presented Jesus as a historical figure, not a theological object of study.¹⁰⁰ His approach to religions other than his own was similarly scientific. In an address concerning Judaism, he suggested that it was a religion and not a race, and therefore rejected racial antisemitism: “men should be judged not by the blood flowing in their veins but rather by their moral and intellectual value.”¹⁰¹

Renan was harsher on Islam, calling it, in a lecture entitled “Islam and Science,” “the heaviest chain that humankind has ever borne” and deploring “the inevitably narrow-mindedness of a true believer, of that kind of iron ring around his head, making it absolutely closed to science, incapable of learning anything or of opening itself up to any new idea.”¹⁰² In words that could be written by opponents of Islam today, he wrote, emphatically, “Liberals who defend Islam do not know it.”¹⁰³ This is clearly islamophobic, and for that

98. Renan, *supra* note 96, at 64.

99. *Id.* at 64.

100. See generally ERNEST RENAN, *LA VIE DE JÉSUS* (1863). See also ROBERT D. PRIEST, *THE GOSPEL ACCORDING TO RENAN: READING, WRITING AND RELIGION IN 19TH CENTURY FRANCE* 4–5 (2015).

101. Renan, *supra* note 96, at 69, 100.

102. Ernest Renan, *Address at the Sorbonne: L'Islamisme et la science*, Mar. 29, 1883, transcript available at <https://archive.org/details/lislamismeetlas00renagoog>. Quotations are from the English translation by S.P. Ragep at https://www.mcgill.ca/islamicstudies/files/islamicstudies/renan_islamism_cversion.pdf.

103. *Id.* at 17.

reason it is not surprising that Edward Said, in his book on orientalism, made Renan one of his main foes.¹⁰⁴ But Renan's main foe here was not Islam specifically, but religion in general:

Western theology has not been less of a persecutor than that of Islam. Only, it did not succeed, it did not crush the modern spirit, as Islam crushed the spirit of the countries that it conquered.¹⁰⁵

The advantage of Christianity over Islam, according to Renan, was thus not its strength but its weakness: it was unable to prevent the rise of rationalism and science. These, for Renan, represented the future. Indeed, Renan ended his essay on Islam and science with an enthusiastic (and not at all pacifistic) praise for science tout court:

Science is the soul of a society, because science is reason. It creates military superiority and industrial superiority. It will one day create social superiority. I mean a state of society where the amount of justice that is compatible with the essence of the universe will be procured.¹⁰⁶

To Renan, then, the promise of modernity is not religious freedom but freedom from religion altogether. A contemporary defendant of the face-veil ban mirrors this thought when he argues that “an individual's most fundamental right is to free himself or herself from his or her origins.”¹⁰⁷

And how does modern man overcome religion? Through the nation. A famous passage in Renan's lecture on the nation deals with the need of forgetting, a collective amnesia:

The essence of a nation, however, is that all individuals have many things in common, including that they have equally forgotten many things. No French citizen knows whether he is Burgundian, Alan, Taifal or Visigoth; every French citizen has to have forgotten St. Bartholomew's night, or the

104. EDWARD SAID, *ORIENTALISM* 130ff. (2014). Said's depiction of Renan has been criticized. See DANIEL MARTIN VARISCO, *READING ORIENTALISM: SAID AND THE UNSAID* 111–15, 117–18 (2017). For a different critique of Renan's theory of Islam, see HICHEM DJAIT, *EUROPE AND ISLAM—CULTURES AND MODERNITY* 42ff. (1985). Renan's critique had drawn immediate response in his own time. See CEMIL AYDIN, *THE POLITICS OF ANTI-WESTERNISM IN ASIA: VISIONS OF WORLD ORDER IN PAN* 47ff. (2007); Nelly Lahoud, *Islamic responses to Europe at the Dawn of Colonialism*, in *WESTERN POLITICAL THOUGHT IN DIALOGUE WITH ASIA* 163, 170–78 (Takashi Shogimen & Cary J. Nederman eds., 2009); York A. Norman, *Disputing the “Iron Circle”: Renan, Afghani and Kemal on Islam, Science, and Modernity*, 22 *J. WORLD HIST.* 693, 694 (2011); Michelangelo Guida, *Al-Afghāni and Namik Kemal's Replies to Ernest Renan: Two Anti-Westernist Works in the Formative Stage of Islamist Thought*, 2 *TURKISH J. POL.* 57, 59–62 (2011). One important response to Renan is translated here: Sayyid Jamal al-Din al-Afghani, *Lecture on Teaching and Learning and Answer to Renan* (transcript available at <http://www.oxfordislamicstudies.com/article/book/islam-9780195154672/islam-9780195154672-chapter-11>).

105. Renan, *supra* note 102, at 18.

106. *Id.* at 23.

107. Pascal Bruckner, *Unveiled—A Case for France's Burqa Ban*, 173 *WORLD AFF.* 61, 62 (2010).

thirteenth-century massacres in the Midi.¹⁰⁸

The odd formulation (“has to have forgotten”) points to a peculiarity that Benedict Anderson emphasizes in an appendix to his book, *Imagined Communities*.¹⁰⁹ these events are not really forgotten; they are actually remembered, recalled, in order to be forgotten. Forgetting these events rather means leaving them behind, overcoming them. Importantly, these events that every French citizen has to have forgotten have a peculiar nature. St. Bartholomew’s night was a massacre committed by a Catholic mob against Huguenots.¹¹⁰ The massacres in the Midi followed from the campaign by Pope Innocent III against Catharism in Languedoc, a Christian sect.¹¹¹ We should suspect that Renan chose them for a reason. These events stand for interreligious brutality; this is why they were, and are, remembered. Voltaire, for example, referenced both events in his argument against religion.¹¹² There can be little doubt that Renan was aware of this when he picked them as examples.

This context helps explain what Renan had in mind when he talked about these events as something every Frenchman “has to have forgotten.” Anderson suggests that Renan mistakenly refers to the actors in the massacres as fellow Frenchmen, when in reality their identity was grounded more in their religion than in their common nationality.¹¹³ I think he gets the argument exactly backwards. Presumably for Renan, it was precisely the lack of a common national identity that served as root for interreligious clashes. Religious groups fought each other to the death precisely because they were *not* French. They viewed each other as different, as enemies, because they belonged to different religions. It was only by *becoming* French—secular, post-religious French that is—that they could leave these times of brutality behind. This describes, then, in more precision, what the French “have to have forgotten” in order to maintain internal peace: they must have forgotten that they once defined their identity through their

108. Renan, *supra* note 96, at 47.

109. BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 199–201 (rev. ed. 2006); *see also id.* at xiv.

110. BARBARA DIEFENDORF, *THE ST. BARTHOLOMEW’S DAY MASSACRE: A BRIEF HISTORY WITH DOCUMENTS* (2008).

111. M.D. COSTEN, *THE CATHARS AND THE ALBIGENSIAN Crusade* (1997); JONATHAN SUMPTION, *THE ALBIGENSIAN CRUSADE* (2000).

112. *See* VOLTAIRE, *THE HENRIADE* (1723; English 1797); *see also* VOLTAIRE, *DE LA CROISADE CONTRE LES LANGUEDOCIENS* (1756), English translation at http://www.midi-france.info/articles/t_voltairecathars.htm. *Cf.* O. R. Taylor, *Voltaire et la Saint-Barthélemy*, 73 *REVUE D’HISTOIRE LITTÉRAIRE DE LA FRANCE* 829 (1973).

113. Anderson, *supra* note 109, at 200–01.

religious differences rather than through their national unity. They have to have forgotten their once not being French.

Living together, in Renan's view, is thus not just an empty formal concept that could be filled by any way in which people live together. Rather, living together is made possible by overcoming religion and its potential for strife. The nation that is created through daily plebiscite is a nation that rejects religion as the prime locus of identity.¹¹⁴ This idea of the nation makes demands, first and foremost, from the state. The state that overcomes strife and creates identity must be based on a nation that has overcome religion as its identification. The state must be strongly secular, which the French idea of *laïcité* indeed expresses. But this idea of the nation makes demands also from religion. As Renan points out in his famous definition of *laïcité*, the secular state he has in mind is “the State that is neutral among the religions, tolerant toward all worship, and that forces the Church to obey it on this capital point.”¹¹⁵ The church, in other words, has to be subjected to the state; it is not an equal of the state but its subordinate. This reference to “the Church” concerns, first and foremost, the Catholic Church, but it really explains the role of all religions, including Islam.

D. Living Together and the Ban of Face Veils

Understanding this background and context allows us to finally draw the connection between living together and the ban on the face veil. Renan's “desire to live together” does not come without conditions. Rather, it requires “present-day consent,” and this consent, in turn, is consent to the common “rich legacy of memories;” “to have suffered, enjoyed, and hoped together.”¹¹⁶ Entering a nation, being part of a nation, requires saying yes to this common legacy. The Jews, Renan suggests, “assimilated to different nations, in harmony with diverse national units.”¹¹⁷ In other words, they gave the required consent. In exchange for forfeiting the primacy of religion,¹¹⁸ they were welcomed in the French nation to “make an eminent contribution

114. See Michel Troper, *Sovereignty and Laïcité*, 30 *CARDOZO L. REV.* 2561, 2561–64 (2009).

115. ERNEST RENAN, RÉPONSE AU DISCOURS DE RÉCEPTION DE LOUIS PASTEUR À L'ACADÉMIE FRANÇAISE, 27 Avril 1882, <http://www.academie-francaise.fr/reponse-au-discours-de-reception-de-louis-pasteur>. (“l'État neutre entre les religions, tolérant pour tous les cultes et forçant l'Église à lui obéir sur ce point capital”).

116. Renan, *supra* note 96, at 63–64.

117. *Id.* at 100.

118. Not, obviously, without any problems. The acceptance of Jews into French nationality came, precisely, at the cost of giving up their separateness. See Jay R. Berkowitz, *The Napoleonic Sanhedrin—Halakhic Foundations and Rabbinical Legacy*, 54 *CCAR JOURNAL: A REFORM JEWISH QUARTERLY* 1, 11–34 (2007).

to the social progress of humanity.”¹¹⁹ In theory, Muslims could do the same. But they would have to consent to forgetting St. Bartholomew; they would have to leave behind the primacy of their religious identity. The Muslim woman who wears a niqab or burqa, from this perspective, refuses this particular consent. She refuses to leave her religious identity behind to participate in the public. It is this act that excludes her from the French nation.

Living together is therefore not merely a way of life or a social fact. Living together is far more. Its *function* is to constitute the nation state that can no longer be built on the grounds of race. Its *mode* is that of consent, a communicative act. Its *content* is the agreement to share in the nation’s past and future. And its *substance* is the very rationalism that has left religious particularity behind. The Jew, the Christian, the moderate Muslim can agree to that. The Muslim in a face veil cannot. Her wearing a face veil is interpreted as a refusal to take part in the daily plebiscite.

Or so at least the French statute implies. After all, living together emerges today no longer merely in the form of a statement of political philosophy. Living together has become a legal category, one recognized even by the European Court of Human Rights. This is a significant step: the rejection of the face veil becomes definitional not merely of culture but of the state and its laws. Of course, the Western state has always been established through legal regulation. Sovereignty is in many regards a legal concept. So is *laïcité*, the particular French version of the separation between church and state, which is named as a principle in Art. 1 of the 1958 Constitution and whose content is laid down in a law from 1905.¹²⁰ But that legal definition of *laïcité* is formal and largely negative: it defines from what the state and the church must, respectively, refrain. “Living together” is something entirely different: a positive requirement from each individual, a demand to actively consent to the state. This is the opposite of a human right; it is a civil duty. The French citizen, it appears, owes the state more than just compliance with its laws. She owes her daily consent. By requiring the Muslim woman to take off her face veil, the state creates a positive duty for her to express her belonging to the state.

It is quite remarkable, therefore, that the European Court of Human Rights accepted the requirements of “living together” as a permissible exception to religious freedom as guaranteed under the Convention of Human Rights. The duty to consent to the state goes beyond the traditional

119. Renan, *supra* note 96, at 100.

120. For a quasi-official report on the state of *laïcité* in France one hundred years after this law, see RÉFLEXIONS SUR LA LAÏCITÉ (2004), http://pmsimonin.fr/lexique/2008/laicite/laicite_conseil%20d'etat.pdf.

duties of the liberal state (complying with the law, paying taxes, perhaps serving in the army). As the Court put it, the “[s]tate is seeking 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.”¹²¹ It is hard to overlook the irony in this for the Muslim woman: tolerance and broadmindedness are demanded from her, not afforded to her. She is the one who is required to be tolerant and broadminded toward a form of secularism that is not her own, and which presents itself as liberal and tolerant while demonstrating its own limits. And her refusal to take off the niqab or burqa is interpreted, whether she wants it to be or not, as the withholding of her consent to the social contract.

E. Living Together in Other Countries

Renan’s living together should be an idea that could not travel, despite attempts to copy it in various other countries.¹²² The French face-veil ban, like its underlying concept of “living together,” is quintessentially French. It rests not on generalizable ideas about the liberal state, or freedom of religion, or even of the separation of church and state. Instead, it rests on a specific French idea that expresses a very specific French history.

And indeed, to some limited extent the idea does not travel. In Spain, the concept of living together—*convivencia*—has a specific Spanish background as well: it describes the centuries of more or less peaceful living together between Muslims and Christians in the Middle Ages.¹²³ That idea of peaceful coexistence may not match reality; it has long been romanticized, and if current relations between the state and the Muslim minority are rife with tensions, this is not a new thing. Nonetheless, what the concept of *convivencia* invokes is tolerance between Islam and Christianity (and, by extension, the secular state), not the restriction of religion. This may explain why, in Spain, a similar argument of “living together” to support a face-veil ban has not been successful, at least up until now. During discussions about a national ban, one representative complained about the plagiarism implicit in simple attempts to copy a solution from France.¹²⁴ And while Spanish

121. See S.A.S Judgment, *supra* note 51, at no. 153.

122. MARIAN BURCHARDT ET. AL., THE JUDICIAL POLITICS OF ‘BURQA BANS’ IN BELGIUM AND SPAIN – SOCIO-LEGAL FIELD DYNAMICS AND THE STANDARDIZATION OF JUSTIFICATORY REPERTOIRES 12–25 (2017).

123. See Kenneth Baxter Wolf, *Convivencia in Medieval Spain: A Brief History of an Idea*, 3 RELIGION COMPASS 72 (2009).

124. *Presidencia del Excmo. Sr. D. Francisco Javier Rojo Garcia*, IX Legislatura 4548 (2010) (statement of Sen. Baigi Torras), translated in Gould, *supra* note 34, at 198.

municipalities justified their bans with the needs of civility and living together (*civismo y convivencia*),¹²⁵ they were unsuccessful before the courts. The Spanish Supreme Court suggested that “[t]he argument that the burqa disturbs our Western culture lacks a convincing demonstration.”¹²⁶ More importantly, the Court noted that even if the burqa did create friction, it would be the task of the state to “reconcile the interests of the diverse groups and guarantee the respect to all faiths.”¹²⁷ Religious plurality is thus a part of the Spanish public order, not its enemy.¹²⁸ Or, put differently, the idea of living together places the burden of tolerance on the majority.

In Germany, remarkably, an idea parallel to France’s “living together” has had some success. After the catastrophe of the Nazi regime, post-war Germany attempted new definitions of the nation state that were closer to the French ideal, without copying it. Germany’s version of a secular state gives religion a stronger role in creating the conditions of “living together.” Ernst Wolfgang Böckenförde, Germany’s most important constitutional scholar after World War II, asked a question similar to Renan’s: “From where does the liberal secularized state achieve, now and in the future, the level of prelegal community and fundamental ethos that is indispensable for a beneficial living together in a liberal order?”¹²⁹ Renan’s answer, as discussed earlier, was a common past and a common project for the future. Jürgen Habermas’ answer, in turn, was constitutional patriotism, a secular idea borrowed from the United States. Böckenförde’s own famous answer is more ambivalent:

The liberal, secularized state draws its life from preconditions it cannot itself guarantee. This is the great venture it has made for the sake of liberty. On the one hand, as a liberal state it can only survive if the freedom it grants to its citizens is regulated from within, out of the moral substance of the individual and the homogeneity of society. On the other hand, it cannot seek to guarantee these inner regulatory forces by its own efforts—that is to say, with the instruments of legal coercion and authoritative command—without abandoning its liberalness, and relapsing, on a

125. S.T.S., Feb. 6, 2013 (R.J. No. 4118/2011)(Spain), *supra* note 88.

126. *Id.* (“La realidad de esa perturbación de la tranquilidad en nuestra cultura occidental, a que alude la sentencia, carece de una demostración convincente en cuanto simple constatación sociológica, con lo que la base esencial sobre la que la sentencia se sustenta se desvanece.”).

127. *Id.* (citing *Şahin v. Turkey*, 44 Eur. Ct. H.R. 5, 14 para. 106 (2004)).

128. In the European Court of Human Rights, a similar argument garnered only two dissenting votes: “there is no right not to be shocked or provoked by different models of cultural or religious identity, even those that are very distant from the traditional French and European lifestyle.”

129. Ernst Wolfgang Böckenförde, *The Rise of the State as a Process of Secularization*, in *RELIGION, LAW AND DEMOCRACY* (Mirjam Künkler and Tine Stein eds., forthcoming 2018). The original German text is *Die Entstehung des Staates als Vorgang der Säkularisierung*, in Böckenförde, *Der säkularisierte Staat* (2007) 43 (originally 1964).

secularized level, into the very totalitarian claim it had lead away from during the confessional civil wars.¹³⁰

Böckenförde's dictum, sometimes called a paradox, creates an ambiguous role for religion. On one hand, the state must be secular: it cannot, as a liberal state, be a religious state. On the other hand, because the state has no ethical foundations of its own, it must find them somewhere in society. Böckenförde has rejected suggestions that this foundation necessarily has to be Christianity, though this is how the dictum is often applied. Even so, Böckenförde does not confine religious freedom to Christianity: he was an early and forceful opponent of headscarf bans. What this would mean for face veils is less clear. At the same time, the "great wager" that the state undertook, expresses, for him, a wager that is worth undergoing vis-à-vis Christianity but not Islam: Böckenförde has rejected an EU membership for Turkey, and emphasized that Muslims must remain a minority in Germany.¹³¹

Finally, the concept of "living together" as a basis for a face-veil ban was adopted in Belgium. The Belgian legislator rested its own ban "not solely on considerations of public order, but more fundamentally on social considerations that are, in the view of the authors of the ban, indispensable for 'living together' in a society that is both emancipatory and protective of the rights of all and of everyone."¹³² This idea was obviously borrowed from the French discourse, as were many of the other arguments put forth by the Belgian legislator, down to the reference to Levinas.¹³³ In many ways, the Belgian legislative process mimicked the French one. This is quite problematic. In a general sense, some idea of "living together" is of course foundational to any nation, and not specific to any one country. By contrast, the affirmative requirements of the French conception of "living together" certainly are. The "heritage of shared glory and regrets,"¹³⁴ the sacrifices to which one has consented¹³⁵ and that constitute the nation, are necessarily different for different countries. In France they led to a particular kind of

130. *Id. at 71* Emphasis in the original. Differently from the cited translation, I translate *Wagnis* as venture.

131. See Ralf Michaels, *Böckenförde Theorem and Burqa Bans*, GERMAN L.J. (forthcoming 2018).

132. Thus the formulation of the Belgian Constitutional Court, *supra* note 48, under B.4.2.

133. See Chambre de Representates de Belgique [House of Representatives of Belgium], Proposition de loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage, Dec 1, 2009, <http://www.lachambre.be/FLWB/PDF/52/2289/52K2289001.pdf>, p. 6: (Au-delà de cet aspect purement sécuritaire, les vêtements cachant totalement ou de manière principale le visage, nous interpellent également au niveau de leur principe. Fondamentalement, tout comme Levinas, nous estimons que c'est par le visage que se manifeste notre humanité.).

134. Renan, *supra* note 95, at 64.

135. *Id. at 64.*

secularism that defines itself in explicit opposition to religion in a way that is coherent, even if it is objectionable. By contrast, Belgian history did not create the same kind of secularism, nor the same kind of national unity. Under Article 181 of the Belgian Constitution, wages and pensions of those supplying religious services are paid by the state. The Belgian state is deeply intermingled with Catholicism.¹³⁶ And unlike France, the Belgian nation is a recent foundation, and certainly not one in which internal strife, especially between Flemish and Wallons, can be said to have been overcome in favor of a common national identity. It is therefore less than convincing to base a Belgian ban on face veils on the French conception of “living together.” The European Court of Human Rights, in its decision upholding the Belgian ban, felt bound by its earlier decision regarding the French ban.¹³⁷ Given the specific nature of the French concept of “living together” and the significant differences between the two countries, this seems rather questionable.

V. CONCLUSION

Face-veil bans stand in tension with the Western secular and liberal state. Of course, neither religious freedom, nor general freedom, are granted without limits—in Europe or in the United States. The state cannot tolerate every act merely because it is religious, and the state feels justified to restrict liberty where its own preservation is at stake. But the ban on face veils appears implausible because it is so purely symbolic, so clearly ineffective at fending off a real danger. Even if political Islam is viewed as a real risk for the Western state, that danger lies with terrorists with bombs and preachers with hate speech, not with women who wear a veil.

I have suggested that something else is going on: a self-identification of the state, which identifies itself in opposition to the visible religion of Islam. Face-veil bans reflect a Western state in perceived need of asserting its own conception in defense against the other. In regulating clothes by banning the face veil, the Western state demonstrates a remarkable lack of confidence. It is therefore fruitful to consider how the state defines religion, and itself, and what that demonstrates.

A. The Misconstruction of Islamic Law as a State

In banning the face veil, the state bans what it knows to be a religious symbol. However, in its justification of the face-veil ban, the state misconstrues Islam in two ways. First, it construes it as necessarily separate

136. See Stathis N. Kalyvas, *Democracy and Religious Politics—Evidence from Belgium*, 31 COMP. POL. 292, 300 (1998).

137. Cf. Talal Asad, *supra* note 52.

from both culture and politics: if it is cultural or political, it cannot be religious. Second, it construes it as either requiring certain actions or considering those actions a matter of individual choice, but not both.

I said earlier that these differentiations—between religion and culture/politics, and between necessity and choice—are applicable only to Christianity. But they are also characteristic not only of a religion but of the state itself. It is state law that is, in the liberal state, separate from morality. It is state law that is, under the rule of law, separate from politics. It is state law that is, with an emphasis on legal positivism, separate from culture. And of course it is state law—more precisely, liberal state law—that differentiates between commands and individual choice. On the one hand, the state governs the individual through commands. On the other hand, in the absence of such commands, the state leaves the individual free to choose how to live her life, within the limits set by the law. In a strange move, therefore, the state re-conceptualizes Islam as though it were, or ought to be, like the state itself. First, it turns Islam against its nature and into a state. Then, precisely because Islam does not fit this model, it finds it wanting.

This misconception of Islam is not an accident. Rather, it is a consequence of the process of secularization. By secularizing, the state identified itself in opposition to the religion (especially Christianity) that it sought to overcome. It has defined religion as that which happens in the private sphere, and has assumed the monopoly of the public sphere. As a consequence, when Islam enters the public sphere, the Western state can no longer conceptualize it as religion. Instead, it conceptualizes it as something aspiring to be a state. And as such it threatens the state's sovereignty.

B. The Misconstruction of the State as a Religion

Remarkably, a similar misconception takes place on the other side of the equation, too. The state, in banning the face veil, defines itself in a certain way—as a liberal and secular state. But is it? At first sight, it seems so. The state protects women from discrimination, while religion discriminates against them. The state is liberal, while religion is oppressive. The state is based on reason and argument, while religion is based on faith and subjection.

A closer look demonstrates the fragility of this difference. In regulating the face veil, the state reconstructs itself as though it were a religion. This concerns, first, the question of liberalism. The claim is that Islam is restrictive, whereas the Western state is liberal. But in the regulation of the face veil, the opposite is the case. In order to protect women from a religious dress code, the Western state imposes on them a secular dress code. Conservative Islam orders women to wear a veil; the secular state orders

them to take it off. Between the Islamic duty to dress and the Western duty to undress, this looks like a struggle between two restrictive normative systems, and the idea that what is being protected is women's freedom becomes hard to maintain. Banning a piece of clothing, freely worn, merely to establish a certain way of living together, is the opposite of liberal.

Moreover, the state, in rejecting the face veil, ultimately invokes faith and subjection just like the religion it seeks to regulate. Renan's "daily plebiscite" may look secular at first. But in reality, it is at heart a religious act, comparable to the Christian profession of faith (or indeed the Islamic submission to Allah). In the end, it appears, the state requires a quasi-religious commitment from its citizens—and excommunicates those who do not, in word and deed, express their willingness to follow. And it is the wearer of the face veil who is made to bear the consequences.

C. Toward Postsecularism?

How can these misconceptions be overcome? This is not the place to resolve this question. But some insights can be drawn.

On the one hand, the Western state ought to recognize Islam as a valid actor in the public sphere, entitled to take part in political debate, and also capable thereof. This is now done under the title of postsecular society.¹³⁸ With Christianity, that is fairly easy, given that the Western state and the Christian church have always coexisted and have arranged themselves with a view to each other. Islam poses greater challenges to the state, and the face veil is a symbol of these challenges. It is therefore not surprising that Islam is often viewed only as a threat. But at the same time, it presents an opportunity for a richer, more inclusive political dialogue within a pluralist society.

On the other hand, the state must recognize the contingency of its own position. The Western state is not neutral—both its secular and its liberal character are fruits of its history.¹³⁹ That does not make its law and ideals indefensible—far from it. All that it means is that supporters of the Western state have to actively make the case for their particular conception of statehood. And they have to be willing to listen to alternative conceptions. This is so because the state cannot automatically assert superiority of its own position over those of other participants in political discourse without betraying the very liberalism it espouses.¹⁴⁰

138. See generally, Jürgen Habermas, *Notes on Post-Secular Society*, 25 *NEW PERSP. Q.* 17 (2008).

139. Cf. Michaels, *supra* note 10.

140. Cf. Böckenförde, *supra* note 129; Michaels, *supra* note 131.

If these two steps are possible, we may achieve a true pluralism in which positions are negotiated rather than asserted, and in which dialogue replaces command and resistance. Instead of the fear and mistrust that is expressed in face-veil bans, the West might lift the burqa over its own eyes to look Islam in the eye. This would enable true communication, the true living together that is expressed so frequently. That is, of course, a utopian idea. But utopia is inherent both in religion and in the liberal concept of democracy. Perhaps this similarity can serve as a stepping stone.