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Of Bodies and Burkinis: Institutional Islamophobia, Islamic Dress and the Colonial Condition

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The 2016 burkini controversy and the criminalisation of visibly Muslim women in France is a violent reminder of the precarity of colonial bodies in public space. These laws demonstrate the ongoing management of colonial bodies and communities which speaks over time from historical colonisation to present, and future, neocolonial narratives. This article moves beyond the dominant logics of security and gender oppression in the Islamic dress debate which, it is argued, are invoked in a strategic manner to obfuscate the colonial condition and engender a normative, institutional Islamophobia in the public-political imaginary. The article critiques the instrumental use of law in creating political space for such agendas and analyses the whiteness of public space and institutions. The article insists that it is necessary to acknowledge the epistemic lens of the colonial condition in the Islamic dress debate and critically reflects on the alienation and reduced capacity for action of bodies wearing Islamic dress.

INTRODUCTION

On 24 August 2016 the Islamic dress debate erupted again, on a beach in Nice. A Muslim woman lying on the beach was approached by four armed police men and asked to remove items of clothing that were considered to contravene a rule enacted in the wake of the Bastille Day attack in Nice,¹ which had been claimed by Islamic State.² She was also issued with an on the spot fine.

The term ‘Muslim women’ is inherently problematic for the universalism that the term propagates,

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¹ Le Conseil d’Etat, CE decision du 26 septembre 2016, No 403578.

² H. Karimi, ‘No liberty, no equality, no fraternity: The death of French secularism’, Middle East Eye, 3 September 2016 <<http://www.middleeasteye.net/columns/no-liberty-no-equality-and-no-fraternity-death-french-secularism-1248910892>>.

denying cultural variations and specificities.³ For the purposes of this article, the term should not be understood as essentialising Muslim women as a homogenous group. The term Muslim women is therefore employed in a strategic manner,⁴ and is understood in its situated and materialist context as disclosing many divergent realities.

The controversies surrounding Islamic dress depend on the situated context in which they take place. Context notwithstanding, the persistence and unresolved nature of these controversies unifies varying discourses on Islamic dress. The term Islamic dress is understood as constituted through difference to include the *hijab*, a veil or headscarf, *jilbab*, full black dress head to toe, *burqa*, a cloak covering the whole body including the face, *niqab*, the face veil. The *burkini* can now be added to this list.⁵ The administrative rule in question on the beach in Nice refers to modes of dress that do not cover the face and follows the criminalisation of visibly Muslim women through the enactment of French law 2010-1192⁶ which prohibits wearing full-face coverings in French public space. The oft-witnessed conflation of forms of Islamic dress⁷ points to the fact that these acts of censure are strategic and instrumental in pursuing wider political aims. In the context of French restrictions on Islamic dress, the strategic political aim is the assimilation of colonial bodies in pursuit of neocolonial aspirations.

³ N. J. Hirschmann, 'Western Feminism, Eastern Veiling, and the Question of Free Agency' (1998) 5:3 *Constellations*, 346.

⁴ G. C. Spivak, *The Post-colonial Critic: Interviews, Strategies, Dialogues*, (1990) 11.

⁵ The burkini can be likened to a wetsuit with a hood. The term burkini is derived from bikini. The term bikini was coined in 1946 by Louis Réard in Paris to describe the bathing suit. Réard named the bathing suit after the Bikini Atoll in the Marshall Islands to convey its explosive effect, Réard website <<https://www.reard.com/en-uk/history>>. The Oxford English Dictionary cites the etymology of bikini: *Bikini*, the name of an atoll in the Marshall Islands where an atomic bomb test was carried out in July, 1946 and attributes two meanings to the word bikini: 1. A large explosion. 2. [*< French, apparently < sense 1.*] A scanty two-piece beach garment worn by women...[1947 *Le Monde Illustré* Août 929/1 *Bikini*, ce mot cinglant comme l'explosion même..correspondait au niveau du vêtement de plage à un anéantissement de la surface vêtue; à une minimisation extrême de la pudeur.]

<<http://www.oed.com.ezproxy.sussex.ac.uk/view/Entry/18925?redirectedFrom=bikini#eid>>. The French text links the bikini garment with the Bikini explosion. The colonial origins of the term bikini are therefore acknowledged. The Bikini Atoll hosted the most destructive U.S. atomic bomb tests to date, displacing native populations and imperial actions persist today. The imperial inception of bikini as a garment signifies the appropriation by white women of the sexual allure attributed to native women in the enduring imperial imagination; 'The "bikini" rehearses the central paradox of sexual modernity as some form of going native', N. Hoad, 'World Piece: What the Miss World Pageant Can Teach about Globalization' (2004) 58 *Cultural Critique*, 56, at 62, 61-63.

⁶ Access <<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022911670&categorieLien=id>>.

⁷ J. W. Scott, 'Symptomatic Politics: The Banning of Islamic Head Scarves in French Public Schools' (2005) 23:3 *French Politics, Culture and Society* 106, at 115.

This article examines recent French laws, legal judgments, and political debates, in relation to Islamic dress. A distinctive critique of the current legal approach is developed, which draws upon a broad range of postcolonial, feminist and phenomenological literatures as well as analysis of relevant European Court of Human Rights (ECtHR) judgments. The argument is that shifting legal justifications of gender oppression and national security simultaneously obfuscate and enact a strategy of cultural and colonial assimilation that controls and regulates Islamic bodies in public space. This article takes a different approach to existing literature on gender, race and law by introducing the colonial lens. In so doing it challenges the current state of ECtHR and French jurisprudence and analyses a rarely told aspect of contemporary French society.

To begin, the article relocates the beach incident in Nice to its colonial context. This exposes the narrative that assimilates colonial subjects through social cohesion and civic integration policies⁸ and maintains this issue as a matter of French domestic policy without sufficient external human rights law review. To support this argument the concepts of colonialism, Islamophobia, the French nation, and secularism are explored.

The following sections offer important insights into how the logics of gender oppression and security act as modes of thinking about Islamic dress to divert attention away from the colonial substratum that is fundamental to, yet absent from, Islamic dress in French legal and public-political discourse. The logic of gender oppression and the logic of national security are explored and then the way that these logics interact and displace a failed logic of secularism is analysed. The article demonstrates that the colonial and racial dimensions are constitutive of the complexity of the Islamic dress debate but are purposely obscured from public consciousness. The critique is not of gender oppression and national security per se, but rather of the instrumental, strategic, use of these narratives as logics to eclipse the colonial and racial dimensions.

The article analyses French case law on Islamic dress and critiques the introduction of the concept of 'living together' by the ECtHR in *SAS v France*⁹ as a justification for upholding the criminalization of forms of Islamic dress. Such endorsement speaks to the instrumental role of law

⁸ S. Mullally, 'Civic Integration, Gender Equality and the Veil: at the limit of Rights?' (2011) 74:1 *Modern Law Rev.*, 27.

⁹ *S.A.S v France* (2015) 60 E.H.R.R. 11.

and human rights in lending legitimacy to domestic, neocolonial,¹⁰ political agendas resulting in structural discrimination against Muslim communities.

The analysis turns to the phenomenological theory of Frantz Fanon¹¹ and Sara Ahmed¹² to explore how the legal-normative foundations of institutional Islamophobia as manifested in the censure of Islamic dress entrench a whiteness of public space and institutions that acts to disorient visibly Muslim bodies. The conclusion is that law creates the political space for such agendas and that the regulation of the bodies of visibly Muslim women cannot be thought apart from colonialism as an epistemic form through which knowledge is produced.

COLONIAL: PAST, PRESENT, FUTURE AND THE FRENCH NATION

As decolonial scholars explain, colonial matters are not resigned to history but rather they structure the temporality of the past, present, and future. The colonial narrative is therefore the condition of modernity, which in its socio-epistemic form permeates knowledge production and modes of being in the world.¹³ This colonial condition is the context in which debates and restrictions on Islamic dress arise. Knowledge of Islamic dress is thus produced through the epistemic lens of the colonial condition and resurfaces under the contemporary label of Islamophobia. Islamophobia has been defined as ‘unfounded hostility towards Islam’¹⁴ including the way in which this hostility impacts on the lives of Muslim communities and individuals, resulting in social and political exclusion. Itaoui has mapped how Islamophobia constitutes a form of racism.¹⁵ For Edwards, Islamophobia is ‘latent Orientalism...condoned and justified by the threat of terrorism’.¹⁶ De Sousa Santos has identified an abyssal line between metropolitan and colonial societies that produces radical

¹⁰ B. De Sousa Santos, *If God Were a Human Rights Activist* (2015), 2, 4, 13.

¹¹ F. Fanon, *Black Skin, White Masks* (1986).

¹² S. Ahmed, *Queer Phenomenology: Orientations, Objects, Others* (2006).

¹³ S. Posocco, ‘(De)Colonizing the Ear of the Other: Subjectivity, Ethics and Politics in Question’ in *Decolonizing Sexualities: Transnational Perspectives Critical Interventions* eds. S Bakshi, S. Jivraj, S. Posocco (2016) 250.

¹⁴ The Runnymede Trust Commission on British Muslims and Islamophobia, *Islamophobia a challenge for us all* (1997) 4.

¹⁵ R. Itaoui, ‘The Geography of Islamophobia in Sydney: mapping the spatial imaginaries of young Muslims’ (2016) 47:3 *Australian Geographer*, 261, at 262.

¹⁶ S. Edwards, ‘Defacing Muslim Women: Dialectical Meanings of Dress in the Body Politic’, in *Rights in Context: Law and Justice in Late Modern Society* ed R. Banakar (2010) 137.

exclusions.¹⁷ Far from being eliminated with the end of historical colonialism, these exclusions persist as part of the configuration of the present through neocolonial assimilation, racism, xenophobia and the permanent state of exception established regarding terrorists, undocumented migrant workers and asylum seekers.¹⁸ Restrictions on Islamic dress and Islamophobia sit alongside these categories as both the tool and effect of colonialism.

The radical exclusions of colonialism structure the way in which law and society function and thus how knowledge is produced. These exclusions, concomitant restrictions and criminalisation are the cause of psychopathologies and alienation for colonial bodies targeted by such measures. As Posocco has explained ‘coloniality has to do with wounded body politics in the present; and the figurations of past, present, and future that emerge from them’.¹⁹ The Nice incident was particularly noteworthy as a potent reminder of the precarity of colonial bodies in public space. The action of this woman being required to remove clothing by armed police men demonstrated in a startling manner the diffuse power of the French state at its most violent in suppressing and subsuming colonial narratives through eliminating colonial subjects from public space. The erasure of the colonial markers of this woman was performed on the beach in Nice for all to see and institutionalised by catachrestic legal definitions.²⁰ The absence of colonial memory weighed heavily on the woman who was made an example of as either an agent of terror or a victim of gender oppression. The lack of colonial context belied a nuanced understanding of Islamic dress and instead the image resonated as a demonstration of state authority protecting the French citizenry from the threat to *ordre public* that this woman has come to (re)present. The dehistoricisation of this incident located the threat of terrorism in the body of this Muslim woman and appropriated her body as a symbol of terror, such that she became synonymous not with ongoing struggles of colonial subjects, but rather with a terrorist threat to the existence of the liberal, secular state. Her body was thereby used by the French state to control communities and public space in pursuit of strategic political agendas.

¹⁷ B. De Sousa Santos, ‘Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledge’ (2007) 30:1 *Rev. Fernand Braudel Center*, 45.

¹⁸ De Sousa Santos, *op. cit.*, n. 11, p. 2.

¹⁹ Posocco, *op. cit.*, n. 13, p. 250.

²⁰ J. Butler, *Excitable Speech: A Politics of the Performative* (1997) 72.

The language of the French republic was manifest in the administrative law, which required respect for accepted customs and secularism. The specific role of secularism in this debate has been considered elsewhere²¹ and is not therefore addressed here. It is however important to note the instrumental function of secularism as a means to facilitate and justify the political agenda of the French state. As Altglas has observed, ‘laïcité is what laïcité does’.²² Secularism is a self-perpetuating term the meaning of which shifts with use to meet the strategic demands of a particular political situation. The legal instantiation of public space as secular²³ has enabled the French state to retain tight legal control over public space, criminalising bodies that deviate from the republican, secular norm.²⁴ Legal support is thus given to the political appetite of the day. Political preferences also find support in a narrative secularism; a specifically French exceptionalism characterised by the restriction of religious visibility in the public sphere, which although not legally authoritative, entails a certain normative power.²⁵ The French approach represents the ‘enlightenment secularists’ of Europe who oppose a multicultural approach in an ongoing *Kulturkampf* on the best way to organise European society.²⁶ Secularism thus creates the political space for the French state to suppress colonial narratives and pursue an assimilationist agenda through law.

As postcolonial activists in France have emphasised, whilst the category of colonial native or *indigènes*²⁷ no longer exists as a legal category, ‘the regime of the *indigénat* still haunts institutions, practices and ideologies in France’.²⁸ The colonising need to categorise in order to

²¹ See: T. Asad, ‘French Secularism and the “Islamic Veil Affair”’, (2006) *SS The Hedgehog Review*; K. Brayson, *Law and Islamic Dress: a critique of human rights in Europe*, (forthcoming).

²² V. Altglas, ‘Laïcité is what laïcité does: Rethinking the French Cult Controversy’, (2010) 58:3 *Current Sociology*, 489.

²³ 1905 Law on the separation of Church and State; Article 1 French Constitution 1958.

²⁴ Asad, *op. cit.*, n. 21, p. 95.

²⁵ V. Amiraux & D. Koussens, ‘From principle to narratives: Unveiling French secularism’, in, *Religions in the public sphere: Accommodating religious diversity in the post-secular era* eds G. D’ Amato & F. Colom RECODE working papers no. 19, 4.

²⁶ French *laïcité* is but one form of secularism. See: T. Asad, *Formations of the Secular: Christianity, Islam, Modernity* (2003). On the *Kulturkampf* between multiculturalists and enlightenment secularists in which this article intervenes see: J Habermas, ‘Notes on Post-Secular Society’, (2008) 25:4 *New Perspectives Q.*, 24.

²⁷ *Indigènes* is the French word used to describe ‘native’ subjects of the colonies, in particular those colonial subjects from the North African countries of Algeria, Morocco and sub-Saharan Africa. The related and opposite category of *évolués* is used to describe assimilated ‘natives’ in French colonial practice.

²⁸ T. Martin ‘Anti-racism, Republicanism and the Sarkozy Years: SOS Racisme and the Mouvement des Indigènes de la République’ in *France’s Colonial Legacies: Memory, Identity, Narrative*, ed F Barclay (2013) 198 citing Sadri Khiari, *Pour une politique de la racaille* (2006) 17.

manage immediately reduces the complexity of experience and relationality.²⁹ Law and the process of juridification³⁰ also functions with this insistence to reduce complex subjectivities through categorisation leaving both the colonial condition and its main ally, the law, woefully inadequate to articulate the multiplicities that cohere around Islamic dress and the complex, situated subjectivities of those wearing it. The erasure of colonial markers from the colonial body, and in turn the colonial body itself, is characteristic of the '(dis-)identificatory dynamics'³¹ of colonialism. This erasure of the colonial body mirrors the absence of the colonial condition from contemporary debates on Islamophobia and Islamic dress and endorses the exclusions, restrictions and prohibitions of the colonial lens. The epistemic consequences of how knowledge is produced through this colonial condition are thus overlooked, enabling neocolonial assimilation agendas to be carried out almost unquestioned.

Fanon described how the French colonial project in Algeria was signified through the systematic unveiling of Algerian women.³² Consequently, the veil came to represent Algerian national resistance to French colonisation.³³ In response, the familiar language of liberating Algerian women by unveiling them was employed by the French state.³⁴ Such language echoes contemporary justifications offered by the French state in the public-political process preceding the adoption of the 2004 French law banning conspicuous religious symbols in the classroom.³⁵ The Stasi Commission, which debated the law, refused on principle to hear evidence of 'veiled girls'³⁶ but did consider the evidence of secular Muslim women who supported the law.³⁷ The Commission considered the veil to stand for the alienation of women³⁸ and that *laïcité*, could not

²⁹ Posocco, op. cit., n. 13, p. 250.

³⁰ J. Habermas, *The Theory of Communicative Action, Volume II, Lifeworld and System: A Critique of Functionalist Reason* (1987 trans Thomas McCarthy) 356.

³¹ Posocco, op. cit., n. 13, p. 250.

³² F. Fanon, 'Algeria Unveiled', in F. Fanon, *A Dying Colonialism*, (1965) 62-63.

³³ M. Hélie-Lucas, 'Women, Nationalism and Religion in the Algerian Liberation Struggle', in *Rethinking Fanon* ed N.C. Gibson (1999), 275-276.

³⁴ Fanon, op. cit., n. 33, p. 62.

³⁵ B. Stasi, *Laïcité et République: Rapport de la Commission de Réflexion sur l'application du principe de laïcité dans la République remis au Président de la République le 11 décembre 2003* (2004) and Jean-Louis Debré, *La Laïcité à l'école un principe républicain à réaffirmer*. Rapport No. 1275, 2 vols. (2003).

³⁶ C. Delphy, *Separate and Dominate: Feminism and Racism after the War on Terror* (2015 Trans. D Broder). 142.

³⁷ M. Fernando, 'Exceptional citizens: Secular Muslim women and the politics of difference in France', (2009) 17:4 *Social Anthropology/Anthropologie sociale*, 379, at 380.

³⁸ B. Stasi, cited in E Terray, 'L'Hystérie politique', in *Le Foulard islamique en questions*, ed Nordmann (2004) 113.

be conceived of apart from gender equality. Such reasoning was again instrumental in justifying the 2010 prohibition on full-face coverings in French public space, thus reflecting the colonial impulses of the past in contemporary domestic legislation.

The stipulation in the 2010 law that full-face coverings are prohibited in public space not only defines public space very broadly,³⁹ but also intrinsically binds the 2010 law to the French concept of the nation.⁴⁰ Public space in France has been described as an idiosyncratic ‘third space’ where belonging to the French national political community and national citizenship are realised.⁴¹ This third space facilitates liberal secularism in France, enjoys priority over individual liberties and is based on the reduction of religious belief to a private choice. The French state thus stipulates a very specific kind of religious freedom as opposed to a generic one.⁴² This is a religious freedom that discloses an inherent Islamophobia.

For McCrea legislative prohibitions such as French law 2010-1192 represent legal rules stepping in to replace the dissolution of cultural consensus on religious dress in ever-diversifying societies.⁴³ Prohibiting Islamic dress is therefore supported by many who are sincere in their egalitarianism and support for tolerance and liberalism.⁴⁴ On this understanding, legal prohibitions are integral to the successful functioning of the French republic to ensure the open interaction of citizens on a liberal basis.⁴⁵ Prohibitions on Islamic dress are thus considered to embody the three central republican ideals of individual autonomy, whereby women are emancipated from oppressive religious belief; secular equality, which considers a religion-free public sphere the best way to respect all citizens; and national cohesion, which considers religious signs as “ostentatious” symbols of divisiveness and evidence of insufficient integration of minorities into French national

³⁹ C. Laborde, ‘State Paternalism and religious dress code’, (2012) 10:2 *International J. of Constitutional Law*, 398, p. 406.

⁴⁰ Amiraux & Koussens, op. cit., n. 25, p. 5.

⁴¹ id., 9.

⁴² Laborde, op. cit., n. 40, p. 400.

⁴³ R. McCrea, ‘The Ban on the Veil and European Law’, (2013) 13:1 *Human Rights Law Rev.*, 57, at 58.

⁴⁴ id., p. 58.

⁴⁵ P. Weil, ‘Why the French laïcité is liberal’, (2009) 30:6 *Cardozo Law Rev.*, 2714.

community.⁴⁶ Prohibitions on Islamic dress are thus a method to realise the political republican model of France and its foundation in social cohesion as assimilation.⁴⁷

The defensiveness demonstrated by the French state through criminalising Islamic dress evidences the attachment of the colonial past to the present and future; it is a manifestation of the failure of the historical project of French colonialism. French colonialism was a project of cultural and educational transformation of *indigènes* into French citizen subjects. The French colonial project in Algeria was fundamentally entwined with the 1848 French revolution. At the birth of the second French republic in 1848, Algeria was made an integral part of France and subjected to administrative reform that extended French power across Algeria.⁴⁸ Assimilation, far from being a contemporary critique of French policy in relation to minority, migrant, Muslim communities, was the self-confessed colonial method of the French state in the nineteenth century, whereby natives had to endure a cultural civilisation, ‘France’s *mission civilisatrice*’, before being considered for French naturalisation.⁴⁹ This colonising agenda therefore constitutes part of the self-image of the French republican model and cuts to the heart of the French concept of the nation. Islamic dress and the presence of colonial subjects in French public space on their own terms are not only an affront to the fundamental pillars of the republic but also a symbol of the failure of the French colonial project and the assimilationist project of the French nation. Colonial subjects are being punished for their failure to assimilate precisely because this evidences the failure of the French republic to assert its power and colonise the culture, education and epistemologies of the *indigènes*.

THE LOGIC OF GENDER OPPRESSION

In the context of the French Islamic dress debate, the unresolvable, inconsistent and repetitive use of gender oppression as a representational logic⁵⁰ in justifying prohibitions on Islamic dress needs

⁴⁶ Laborde, op. cit., n. 40, p. 398.

⁴⁷ Mullally, op. cit., n. 8, p. 36.

⁴⁸ E. Bleich, ‘The legacies of history? Colonization and immigrant integration in Britain and France’ (2005) *Theory and Society*, 34, 171 at 174.

⁴⁹ P. Lorcin, *Imperial Identities: Stereotyping, Prejudice and Race in Colonial Algeria* (1995) 7.

⁵⁰ A. Al-Saji, ‘The racialization of Muslim veils: A philosophical analysis’ (2010) *Philosophy and Social Criticism* 36(8) 875, at 876.

to be contested. This does not set aside substantiated concerns relating to gender oppression but rather challenges the manner in which gender oppression is employed as a diversion in the discourse around prohibitions on Islamic dress and is thus made complicit in French neocolonial agendas. The logic of gender oppression is fundamental to state strategies in legislating on Islamic dress by creating public-political and legal debates that obfuscate wider political and economic aims including the ongoing management of colonial bodies.

Fernando has identified secular Muslim women who support prohibitions on full-face coverings as ‘exceptional subjects’ in French public space. These women have translated their presence in French public space into political positions, notably the lobby group *ni putes ni soumises*.⁵¹ They consider they have cast off the chains of patriarchal Islam and speak on behalf of their sisters who have been silenced by Islamic fundamentalists.⁵² In so doing they embrace the secular, universal values of liberty, equality and tolerance so fundamental to the French republic, arguing that veiling signifies the gender oppression of Muslim women through Islam and denouncing the way in which Islam treats women.⁵³ These feminists call for veiled women to quit their backward religion and oppression and to wake up to western values and rationalism.⁵⁴ Some suggest that there is a causal link between veiling and rape.⁵⁵ For Leila Ahmed feminism in this incarnation has been co-opted as ‘an instrument of colonial domination’.⁵⁶ Similarly, Mohanty has analysed how western feminisms in this form appropriate and colonise the experience of ‘third world women’. In these forms of feminism power is exercised through the discursive homogenisation of the experience of Muslim women.⁵⁷ Mernissi has argued persuasively that the current restrictions imposed on

⁵¹ Fernando, op. cit., n. 38, p. 381.

⁵² id., p. 380.

⁵³ Organisations such as *ni putes ni soumises*, Translated as: Neither Whores Nor Submissive <<http://www.npns.fr/>>; Élisabeth Badinter and Sihem Habchi president of *ni putes ni soumises*, ‘Interdire le voile intégral au nom de la dignité de la personne’, *Liberation*, 9 September 2009 <www.liberation.fr/societe/0101589842-interdire-le-voile-integral-au-nom-de-la-dignite-de-lapersonne> ; the *Collectif nationale des droits des femmes* adopt a pro-ban position refusing veiled women access to meetings and stopping them participating in International Women’s Day marches in 2004/2005.; <<https://www.theguardian.com/lifeandstyle/womens-blog/2015/jul/20/france-feminism-hijab-ban-muslim-women>>

⁵⁴ S. Silvestri, *Europe’s Muslim Women: potential aspirations and challenges: Research Report*, City University London and Cambridge University (2008) 26.

⁵⁵ L. Kandel, ‘Un foulard qui provoque d’étranges cécités’, *Le Monde*, 8 July 2003, cited in Delphy, op. cit., n. 37, p. 143.

⁵⁶ L. Ahmed, *Women and Gender in Islam* (1992) 237.

⁵⁷ C. Mohanty, ‘Feminist Scholarship and Colonial Discourses’, (1988) 30 *Feminist Rev.*, 61, at 63.

Muslim women, including Islamic dress, unduly hinder Muslim women in pursuing a full life.⁵⁸ Mernissi does not attribute this oppression to Islam, but rather to the instrumental, political appropriation of the sacred text of Islam, the Quran, by a tradition of misogyny that appropriates Islamic dress and the hijab as a curtain and tool of oppression.⁵⁹ Others argue that Islamic dress is an autonomous choice that must be protected through human rights law.⁶⁰ More specifically in the French context, others stress the contrary meanings of Islamic dress and in particular its use as a protest in the face of growing racism.⁶¹

Some scholars have argued that gender oppression as a justification for restricting Islamic dress is not specific to the French context.⁶² Undoubtedly, the gender oppression justification for unveiling transcends spatial and temporal boundaries and is invoked in many different geo-political contexts. However, the way in which this argument holds as a universal truth that Islamic dress is an unequivocal symbol of gender oppression through Islam, is very specifically employed in the French context as inimical to the values of the French republic. As early as 1989, French intellectuals intervened stating that if French society tolerated the Islamic headscarf as ‘a symbol of women’s submission... free rein [is given] to their fathers and brothers... the harshest patriarchy on the planet’.⁶³ The appropriation of women’s rights and a discourse of feminism in support of restrictions on Islamic dress has been very successful in France. Delphy has described how these pro-ban feminist arguments are in fact politicians’ arguments.⁶⁴ Indeed, French feminist Élisabeth Badinter started a petition amongst French intellectuals to ban the full-face veil through law.⁶⁵ Delphy has explained that the gender oppression justification for restricting Islamic dress became all the more integral due to the weak nature of the secularist argument in justifying these

⁵⁸ F. Mernissi, *Women and Islam: An Historical and Theological Enquiry* (1991 trans Mary Jo Lakeland).

⁵⁹ *id.*, p. 85.

⁶⁰ J. Marshall ‘Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate’ (2008) 30 *Human Rights Q.*, 631.

⁶¹ F. Gaspard and F. Khorokhavar, *Le Foulard et la République*, (1995) cited in Delphy, *op. cit.*, n. 37, p. 136.

⁶² Al-Saji, *op. cit.*, n. 51, p. 876.

⁶³ Élisabeth Badinter, Régis Debray, Alain Finkielkraut, Élisabeth de Fontenay and Katarine Kintzler identified by Delphy; ‘Profs, ne capitulons pas!’, *Le Nouvel Observateur*, 1304, 2-8 November 1999, cited in Delphy, *op. cit.*, n. 37, p. 139.

⁶⁴ Delphy, *op. cit.*, n. 37, p. 139.

⁶⁵ Interview with Badinter: ‘Banaliser l’image de la femme voilée, c’est l’ériger en norme’, *Le Monde*, 28 March 2013.

restrictions.⁶⁶ She highlighted how suddenly, in 2003, gender equality became *the* defining pillar of the French republic. The equality of women was thereby transformed into a foundational pillar of the French republic which transcended political divides. This narrative dominated public-political discourse preceding the criminalisation of the full-face veil. French justice minister, Michèle Alliot-Marie stated that the vote to ban full-face coverings in public was a success for the republic, working towards the values of gender equality and against those who push for inequality and injustice.⁶⁷ Bérengère Poletti, of Sarkozy's centre-right UMP party similarly claimed that women in full veils wore 'a sign of alienation on their faces' and had to be 'liberated'.⁶⁸ André Gerin of the Communist opposition compared the veil to 'a walking coffin, a muzzle'.⁶⁹

The strategic use of the gender oppression argument in contemporary France speaks over time to reveal an enduring and specifically French colonial, political agenda; indeed France was the first country to criminalise visibly Muslim women.⁷⁰ Legally, the dignity and equality of women form the foundations of most arguments in favour of prohibiting Islamic dress.⁷¹ Fanon described how during the Algerian Revolution of 1958, the French army publicly and forcefully unveiled Muslim women, exclaiming "*Vive l'Algerie française!*".⁷² Such action speaks through the years to the incident witnessed on the beach in Nice and other incidents experienced by Muslim women in contemporary France, where French citizens have felt empowered to tear Islamic dress from women in the street. This enforced physical unveiling or 'burka rage'⁷³ has been diagnosed in the United Kingdom as a hate crime,⁷⁴ disclosing a heavily gendered dimension in targeting Muslim women only.⁷⁵ As was the case during the French colonisation of Algeria, the act of unveiling these

⁶⁶ Delphy, op. cit., n. 37, p. 137.

⁶⁷ Editorial, 'French niqab ban: beneath the veil', *The Guardian*, 15 July 2010.

⁶⁸ 'French MPs vote to ban Islamic full veil in public', *BBC*, 13 July 2010 <<http://www.bbc.co.uk/news/10611398>>

⁶⁹ id.

⁷⁰ Subsequently joined by Belgium and Denmark.

⁷¹ V. Amiraux, 'The illegal covering saga: what's next?', (2013) 19:6 *Sociological perspectives, Social identities: J. for the study of Race, Nation and Culture*, 794, at 799.

⁷² Fanon, op. cit., n. 33, p. 62.

⁷³ P. Allen, 'France has first 'burka rage' incident', *The Telegraph*, 18 May 2010

<<http://www.telegraph.co.uk/news/worldnews/europe/france/7735607/France-has-first-burka-rage-incident.html>>

⁷⁴ N. Chakraborti and I. Zempi, 'The veil under attack: Gendered dimensions of Islamophobic victimization' (2012) 18:3 *International Rev. of Victimology*, 269, at 272-273.

⁷⁵ id., p. 270.

women to control populations and exert power remains the strategy in contemporary France resulting in a neocolonialism that was clear to see on the beach in Nice.

The Islamic dress as gender oppression narrative has been heavily critiqued by postcolonial feminists as embodying the notion of white man saves brown woman from brown men.⁷⁶ This narrative paints women as victims without agency and implies a barbarism on the part of wider Muslim communities and Muslim men. It suggests that Islam subjects women to gender oppression in worse ways than other religions and cultures with recurring narratives of arranged marriages, honour killings and Islamic dress.⁷⁷ Islam is thus painted as ‘a barbaric source of women’s inequality’,⁷⁸ whereby Islamic dress is the tool of this inequality. This narrative imposes a meaning on Islamic dress that disregards the complexity and nuance of the practice and the meaning given to it by those women who wear it. Moreover, this narrative obfuscates and perpetuates a French neocolonialism.

THE LOGIC OF SECURITY

Gender oppression does not act alone in obfuscating the colonial narrative. Arguably more powerful and effective in this role is the logic of security manifested in a terrorism narrative and the threat to public safety that Islamic dress has come to signify. In the French context, the Charlie Hebdo shootings,⁷⁹ the Bataclan theatre attack,⁸⁰ the Nice attack and the Trèbes shootings⁸¹ have fuelled this narrative of a state at war with Islamic terror elements that threaten national security.⁸² The logic of security thus steps in to the Islamic dress debate as a diversion to obscure neocolonial agendas that are implemented without question or critique.

⁷⁶ L. Abu-Lughad, ‘Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism’ (2005) 104:3 *American Anthropologist*, 784.

⁷⁷ The Runnymede Trust, op. cit., n. 15, p. 28.

⁷⁸ Hirschmann, op. cit., n. 3, p. 345.

⁷⁹ Editorial, ‘Charlie Hebdo attack: Three days of terror’, *BBC*, 14 January 2015

⁸⁰ Editorial, ‘Paris attacks: Bataclan and other assaults leave many dead’, *BBC*, 14 November 2015

⁸¹ ‘France gun attack: Trèbes held memorial mass for victims’, *BBC*, 25 March 2018 at.

⁸² For a critique of security as justification for action see: M. Neocleous, *Critique of Security* (2008) 122, 134.

National security justifications are symptomatic of the diversification of society whereby misgivings about Islam in French society are accentuated by the emergence of ‘communities...who do not feel bound by the compromises laboriously developed over the last century between cathos and laïcques’.⁸³ Brown has explored how this feeling of being threatened leads to a phenomenon characterised by building physical and metaphorical walls around states in times of waning sovereignty.⁸⁴ Fernando has applied this general impulse to the French context by describing the control of the sexuality of Muslim women through prohibitions on clothing as a reassertion of the French republic in neoliberal times of declining sovereignty.⁸⁵

The focus on Islamic dress as the symbol of a terrorist threat represents the politicisation of Islamic dress and the bodies of those who wear it. Marine Le Pen relied on this narrative to build her platform for the French presidential election, proposing the eradication of fundamentalist Islam. The method proposed to combat this terrorist threat was a blanket ban on the full-face Islamic veil as contrary to the principle of gender equality.⁸⁶ This seamless conflation of terrorism and gender equality betrays a reasoned, robust account of Islamic dress as a signifier of either of these logics but is successful at entrenching a powerful terror/security/public order narrative as determinative of the public-political discourse around Islamic dress. This narrative interacts in a gendered manner with the perception of Muslim women in everyday encounters affecting access to the workplace, healthcare and education thus structurally entrenching discrimination.

Islamic dress and the regulation of the bodies of Muslim women thereby become the tools of revived imperial and neocolonial agendas that seek to produce a ‘derogatory stereotype, of other, alien, subordinated societies’.⁸⁷ As Said explained in *Orientalism*⁸⁸, Islam is often talked about in

⁸³ O. Roy, *Secularism Confronts Islam* (2007, trans Holoch) 6. In the French context the *cathos* are those in support of a Catholic agenda for society and the *laïcques* are those in support of a secular agenda for society.

⁸⁴ See: W. Brown, *Walled States, Waning Sovereignty* (2014).

⁸⁵ M Fernando ‘Save the Muslim Woman, Save the Republic: Ni Putes Ni Soumises and the Ruse of Neoliberal Sovereignty’, (2013) 21:2 *Modern & Contemporary France*, 147, at 148.

⁸⁶ J. Henley, ‘Marine LePen promises liberation from the EU with France-first policies’, *The Guardian*, 5 February 2017 at <https://www.theguardian.com/world/2017/feb/05/marine-le-pen-promises-liberation-from-the-eu-with-france-first-policies>

⁸⁷ Cannadine, *Ornamentalism: How the British Saw Their Empire* (2001) xvi, cited in Edwards, op. cit., n. 17, p. 137.

⁸⁸ E. Said, *Orientalism* (1978).

essentialist clichés that are based upon a seventeenth century ideal of Islam.⁸⁹ Stereotypes are generated of Muslims as retrogressive and immune to change. This paranoia manifests in increased criminalisation of Islamic dress and the proliferation of terrorism laws such as the French state of emergency laws put in place in 2015 following the Bataclan attack. The 2015 French state of emergency laws are fundamentally attached to French colonialism as they replicate the use of emergency laws that transferred power to the military to overcome and combat resistance to French colonial power during the Algerian war of independence of 1955.⁹⁰ The colonial impulse and genesis of French state of emergency powers is thus reiterated in contemporary France through heightened terror laws and the criminalisation of Islamic dress. For Neocleous the state of emergency is the status quo. State emergency powers constitute ‘an ongoing aspect of normal political rule’.⁹¹ Emergency powers emerge from within the rule of law and are as important to the political management of the modern state as the rule of law itself; they are what is used when the rule of law needs to be overcome.⁹² The French state of emergency laws have been widely acknowledged to disregard the law, unduly restricting and eroding the liberties of certain targeted individuals and groups through regulations such as prohibitions on burkinis. These laws are justified in the name of national security. National security is the logic of the state of emergency.⁹³ In this context Islamic dress is considered as a signifier of terrorism, a threat, resistance to French colonial power and an ‘anti-West posture’.⁹⁴ For Edwards, Islamic dress ‘has become the site of contemporary political struggle’.⁹⁵ The body of the Muslim woman wearing Islamic dress has become territorialised as the site of political disputes over church and state relations, identity and secularism.⁹⁶ National security territorialises the body of the Muslim woman in an attempt to reinforce the waning sovereignty of the French state. National security thus acts in a gendered manner to specifically target Muslim women the result of which is the colonisation of the body of the Muslim woman by French administrative power.

⁸⁹ *id.*, pp. 31-49.

⁹⁰ S. Morton, *States of Emergency: Colonialism, Literature and Law* (2013).

⁹¹ M. Neocleous, ‘The Problem with Normality: Taking Exception to “Permanent Emergency”’, (2006) 31 *Alternatives: Global, Local, Political*, 191, at 207.

⁹² *id.*, p. 207.

⁹³ *id.*, p. 205.

⁹⁴ Edwards, *op. cit.*, n. 17, p. 137.

⁹⁵ *id.*, p. 117.

⁹⁶ S. Motha, ‘Veiled women and the “affect” of religion in democracy’, *Journal of Law and Society*, (2007) 34:1 138, at 150.

The logics of security and gender oppression divert attention away from the neocolonial substratum of the debate around Islamic dress and are transposed on to the body that wears Islamic dress. These two constructions of Muslim women act as ‘avatars’⁹⁷ in the public-political imaginary as the body of the Muslim woman becomes responsabilised for perpetuating gender oppression and a threat to national security. The result of this responsabilisation is that she is targeted by the state through criminalisation and by civic society through ever more prevalent hate crime.⁹⁸ Blame for civic tensions within French society and an increased threat to national security is directed individually at the visibly Muslim woman, obfuscating the structural, (neo)colonial source of tensions and alleviating the French state and the history of colonialism of any blame. The logics of security and gender oppression perform the political role of redirecting blame from the state and colonialism to the Muslim woman. These logics are tightly woven together such that each can be used to justify the other in a self-perpetuating method that reinforces this imaginary.

THE INSTRUMENTAL ROLE OF LAW: FRANCE

French domestic and ECHR law have been instrumentalised to facilitate a French political agenda of assimilation and management of colonial bodies. For Delphy the French law criminalising Islamic dress is a rejection of French descendants of colonial subjects in response to increased demands for full legal citizenship and recognition by the state.⁹⁹ De Sousa Santos has argued that international law and mainstream human rights doctrines guarantee the continuity of the radical exclusions of colonialism.¹⁰⁰ Political and legal debates on Islamic dress are therefore intrinsically entwined one with another such that law is instrumentally employed as the tool of political posturing.

⁹⁷ S. Moyn, ‘From Communist to Muslim: European Human Rights, the Cold War, and Religious Liberty’, (2014) 113:1 *South Atlantic Q.*, 63.

⁹⁸ Chakraborti and Zempi, op. cit., n. 75, p. 270.

⁹⁹ Delphy, op. cit., n. 37, p. 108.

¹⁰⁰ De Sousa Santos, op. cit., n. 11, p. 2.

The ongoing Islamic dress controversy in France began in 1989 when three girls were expelled from school for wearing headscarves. This was followed in 1994 by a decree from the French Minister of Education, François Bayrou that ostentatious signs of religious affiliation were to be prohibited in schools. Islamic dress was considered ostentatious and in itself proselytising. Consequently 69 girls were expelled from schools for wearing “veils”.¹⁰¹ Controversy continued in the 1990s and 2000s, evidenced by French law 2004-228, which was enacted banning ‘conspicuous religious symbols’ in schools. This law was widely acknowledged to be aimed at Muslim girls wearing headscarves. Scott has exposed how these three episodes of ‘*l’affaire du foulard*’ coincided with government initiatives to increase integration within French society.¹⁰²

The controlling of women wearing full-face coverings can be traced back to 2008 when the French *Conseil d’Etat* refused citizenship to a 32-year-old Moroccan resident because her full-face veil constituted a lack of assimilation.¹⁰³ Her ‘radical practice’ of Islam was considered incompatible with French values, community and gender equality. In response right-wing politicians called for a ban on the full-face veil. The debate escalated in 2009 when Communist party mayor, André Gérin, claimed that the full-face veil represented an anti-French, anti-white struggle that threatened *laïcité* and thus legislation was required.¹⁰⁴ The result was French law 2010-1192, criminalising full-face coverings in French public space. As the long list of exceptions carved out by the *Conseil d’Etat* highlights,¹⁰⁵ this law was and is specifically aimed at Muslim women. In 2014, the French *Cour de Cassation* held in the *Baby Loup* case that a nursery had acted lawfully in requiring an employee to remove her *jilbab*, which does not cover the face, at work.¹⁰⁶

The restriction on the beach in Nice focused on ‘correct dress, respectful of accepted customs and secularism, as well as rules of hygiene and of safety in public bathing areas’.¹⁰⁷ A similar ban in

¹⁰¹ Scott, op. cit., n8, pp. 107-108.

¹⁰² id., 111.

¹⁰³ Conseil d’État, 2ème et 7ème sous-sections réunies, du 27 juin 06 2008 no 286798.

¹⁰⁴ See: Réveil Communiste: <<http://reveilcommuniste.over-blog.fr/article-30144822-6.html>>.

¹⁰⁵ Conseil d’État, décision du 7 October 2010 no 2010613: <<http://www.conseilconstitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2010/2010-613-dc/decision-n-2010-613-dc-du-07-octobre-2010.49711.html>>

¹⁰⁶ Cass Ass Plén 25 June 2014, (2014) Rec D 1386. For a full analysis of this case see: M. Hunter-Henin, ‘Religion, Children and Employment: the *Baby Loup* case’, (2015) ICLQ vol 64, pp 717-731.

¹⁰⁷ Le Conseil d’État, op. cit., n1.

Cannes was first challenged at the local level, where the court upheld the prohibition arguing that the burkini could create a risk to public order. The ban was ultimately suspended in a test case decided on Friday 26 August 2016 by the French *Conseil d'Etat*,¹⁰⁸ the highest administrative court in France. The *Conseil d'Etat* stated that the restriction of fundamental rights manifested in the prohibition on the burkini had to be justified by an actual risk to public order, rather than by recourse to other considerations.¹⁰⁹ The court stated that no actual risk to public order was present.¹¹⁰ In the wake of this decision, the Collective against Islamophobia in France called on the mayors of 30 other French cities to remove similar bans. Despite these calls and the decision of the *Conseil d'Etat*, the mayors of various municipalities defiantly maintained the bans. The League of Human Rights in France vowed to challenge these bans one by one. The French Prime Minister, Manuel Valls, suggested that naked breasts better represent the French republic than do headscarves. At the time of writing, a rule prohibiting the burkini on the French island of Corsica had been upheld by a local court,¹¹¹ citing the nebulous concept of the risk to 'public order' as justifying the ban.

In a further ruling of 26 September 2016, the *Conseil d'Etat* considered the Nice prohibition. The French League of Human Rights and the Collective against Islamophobia in France argued that the mayor of Cagnes-sur-Mer had exceeded his powers by prohibiting burkinis or ostensibly religious dress on the beach. The court considered the prohibition was in breach of the fundamental liberties of freedom of movement, freedom of conscience and personal freedom. The *Conseil d'Etat* suspended the prohibition and struck down the judgment of the administrative tribunal of Nice, which had upheld the ban at first instance.¹¹² The justification given by the Nice tribunal was that the measure was put in place to prevent disturbances to public order. The *Conseil d'Etat* stated that even given the recent terror attacks and ongoing state of emergency in Nice, the risk to public order was not great enough to warrant a legal order. As such, the mayor had exceeded his powers.¹¹³ On

¹⁰⁸ Le Conseil d'Etat, CE ordonnance du 26 août 2016, Nos 402742, 402777 <<http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-ordonnance-du-26-aout-2016-Ligue-des-droits-de-l-homme-et-autres-association-de-defense-des-droits-de-l-homme-collectif-contre-l-islamophobie-en-France>>.

¹⁰⁹ *id.*, para 5.

¹¹⁰ *id.*, para 6.

¹¹¹ 'Burkini ban issued on French island of Corsica upheld by court', *The Guardian*, 6 September 2016 <<https://www.theguardian.com/world/2016/sep/06/burkini-ban-corsica-upheld-by-french-court>>.

¹¹² Le Conseil d'Etat, *op. cit.*, n. 1.

¹¹³ *id.*, para 6.

8 June 2017, the mayor of Lorette (Loire) established an administrative rule explicitly prohibiting monokinis, burkinis and veils on the beach.¹¹⁴ At first instance the administrative tribunal of Lyon struck down the rule and ordered the municipality of Lorette to pay each petitioning human rights organisation compensation.¹¹⁵ The municipality of Lorette challenged this decision at the *Conseil d'Etat*, which rejected the appeal and upheld the decision of the administrative tribunal.¹¹⁶

The gender oppression justification for prohibiting Islamic dress is largely absent from the text of the French judgments quashing municipal orders. This enabled the courts to avoid making normative statements about the link between Islamic dress and gender equality. Consequently, the *Conseil d'Etat* was able to quash the municipal bans on Islamic dress and overrule the lower French courts without going against dominant public discourse in France, which considers Islamic dress to be symbolic of the gender oppression of Islam. Instead, the court picked up the logic of national security as public order and quashed the municipal bans on the basis that, even if a prohibition would be justified in pursuit of public order, the disturbance or risk posed by burkinis was not proven in these instances. In these rulings the *Conseil d'Etat* sent a clear political message to the French administration and civil society by quashing the burkini bans and overruling first instance judgments, that rules with such discriminatory intent and effect were unacceptable. Despite the lack of substantive, explicit analysis of discrimination in the judgments of the *Conseil d'Etat*, the action of the court to remove the bans was more powerful than the words of the judgments in these cases.

THE INSTRUMENTAL ROLE OF RIGHTS: THE ECtHR

A parallel and intertwining narrative to the national French jurisprudence was in the meantime unfolding at the ECtHR, which until 2005 had declared all applications on the issue of Islamic dress inadmissible.¹¹⁷ It is important to stress that the ECtHR narrative was not merely parallel to the French case law but facilitated the French pursuit of colonial and neocolonial assimilationist policies through law. In its early admissibility decisions, the ECtHR established a necessary

¹¹⁴ Le Conseil d'Etat, CE decision du 26 juillet 2017, No 412636.

¹¹⁵ *id.*, ordonnances n° 1704800, 1704801, 1704805.

¹¹⁶ *id.*

¹¹⁷ *Karaduman v Turkey* (16278/90) Unreported 3 May 1993 (EurComm HR). See also: *Lamiye Bulut v Turkey* (18783/91); *Dahlab v Switzerland* (42393/98) Unreported, 15 Feb 2001 (ECHR).

connection between Islamic dress and gender oppression, stating that the hijab was grounded in a principle in the Quran that was ‘hard to square with the principle of gender equality’.¹¹⁸ It was on this basis that the jurisprudence developed. In *Sahin v Turkey* veiling was considered a practice ‘synonymous with the alienation of women’.¹¹⁹ However, as Judge Tulkens asked: ‘what, in fact, is the connection between the ban and sexual equality? The judgment does not say.’¹²⁰ For Dembour, the ECtHR’s statements about the relationship between gender equality, the veil and religious fundamentalism were ‘gratuitous’ and not reasoned adequately.¹²¹ The ECtHR invoked the narrative of “saving” these women who are thus ‘paraded as the objects of the conduct of uncivilised states justifying at least in part, punitive action by the civilised’.¹²² The victim discourse around these applicants was not borne out in reality. These were independent working, or studying, women who had pursued their claims to wear Islamic dress to the highest level. Despite this factual context, the necessary link between Islam and gender oppression identified by the court became reified as fact in subsequent jurisprudence and was therefore not questioned or investigated from a critical perspective but rather used to justify future decisions.

The *Sahin* judgment developed the notion of the risk to public order and security as justifying headscarf bans, despite that risk being largely unfounded,¹²³ and insisted on the necessary connection between secularism and democracy. The ECtHR upheld the Article 9 violation in *Sahin* as justified since the right to manifest religion or belief may be restricted to ensure that everyone's beliefs are respected. In the 2008 case of *El Morsli v France*¹²⁴ the ECtHR declared the application inadmissible on the basis that ‘security reasons’ outweighed the applicant’s right to refuse to remove her *foulard islamique* on religious grounds.¹²⁵ This decision demonstrated a logic that posits Islam against the West embodying secularism as a fear of Islam.¹²⁶ Two further ECtHR

¹¹⁸ *Dahlab*, id., para 13.

¹¹⁹ *Sahin v Turkey* [2005] ECHR 819, Tulkens dissenting, para 11. See also the earlier cases of *Karaduman* and *Dahlab*.

¹²⁰ id., Tulkens dissenting, para 11.

¹²¹ M-B. Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (2006) 212.

¹²² C. Chinkin, S. Wright & H. Charlesworth, ‘Feminist Approaches to International Law Reflections from Another Century’ in *International Law Modern Feminist Approaches* eds D. Buss and A. Manji (2005) 33.

¹²³ *Sahin*, op. cit., n. 120, Tulkens dissenting, para 140.

¹²⁴ *El Morsli v France* (15585/06) Unreported 4 March 2008 (ECHR).

¹²⁵ The Court cited *Phull v France* (35753/03) Unreported 11 January 2005. This case concerned a Sikh applicant made to remove his turban for airport security.

¹²⁶ H. Gülağ, ‘Secularism and the European Court of Human Rights’ (2010)16:3 *European Public Law*, 455, at 464.

cases concerning France were decided in 2008 prior to the criminalisation of the full-face veil.¹²⁷ Both judgments followed a *Şahin* interpretation whereby the infringements of the applicants' Article 9 rights were justified by the aim of pursuing secularism, public order, and the rights and freedoms of others.

In the 2014 case of *SAS v France* the applicant challenged French law 2010-1192 on the basis of articles 3, 8, 9, 10, 11 and 14 of the European Convention on Human Rights (ECHR). In this judgment the ECtHR dismissed the claims under articles 3, 10 and 11 and concentrated on articles 8, 9 and 14 and most specifically on article 9, the right to freedom of religion. The gender oppression argument so fundamental to the ECtHR's early decision making¹²⁸ in this area was ostensibly rejected along with security justifications.¹²⁹ The ECtHR was not prepared to consider that the French law banning full-face coverings in public space pursued these points as legitimate interests. Instead, justification for the criminalisation of visibly Muslim women shifted from the familiar, specific arguments of gender oppression and security to the more general discourse of the 'far-fetched and vague' concept of 'living together'.¹³⁰ Living together is not a concept formerly recognised by the interpretive method of the ECtHR, nor is it found in the text of the ECHR. It does not appear as part of limitation clauses in articles 8(2) or 9(2) however the ECtHR employed a descriptive sleight of hand and found that living together constituted part of 'the protection of rights and freedoms of others', a phrase found in the text of articles 8 and 9, and thus held that the applicant's right could be limited on this basis.¹³¹ Contrary to the impression created by the ECtHR's reasoning, the catch-all term 'living together' did not jettison the gender oppression and security justifications so integral to the French government's argument and dominant public-political discourse in France. Rather, the notion of 'living together' perpetuated these dominant narratives as forming part of a French way of life. This judgment made normative a French way of living and a French citizen subject that was untouched by the persuasive critiques put forward to challenge the fidelity of the logics of gender oppression and security in justifying restrictions on Islamic dress. The French government was called to account for prohibiting Islamic dress and

¹²⁷ *Dogru v France* (2009) 49 E.H.R.R.8. *Kervanci v France* (31645/04) Unreported 4 December 2008 (ECHR).

¹²⁸ See: *Dahlab and Karaduman*, op. cit., n. 118.

¹²⁹ *SAS*, op. cit., n. 10, paras 119-120.

¹³⁰ *id.*, dissenting judgment, para 5.

¹³¹ *id.*, para 117.

the process of human rights review was performed, justice was seen to be done. Despite this illusion of justice, the ECtHR enabled the French government to maintain issues of postcolonial assimilation as a domestic matter. The ECtHR's adoption of the notion of 'living together' implicitly endorsed an assimilationist agenda that requires Muslim communities to assimilate according to the values of the French republic.

The French government argued that a violation of the applicant's right to manifest her religion was justified because of public safety and 'respect for the minimum set of values of an open and democratic society'.¹³² This minimum set of values included gender equality, human dignity and living together. These three elements identified in the submissions of the French government are the three central republican ideals of individual autonomy, secular equality and national cohesion translated into the language of the ECtHR and represented the strategic misappropriation of the foundational pillars of the French republic to justify restrictions on Islamic dress.¹³³ Whilst national security does not appear explicitly in these values, it is the concomitant of living together and national cohesion and is thus present in the judgment. National security is what protects the cohesive national political community from those who threaten its unity.

The French government expressed surprise at the 'highly positive representation' of Islamic dress presented by the applicant and third-party interveners.¹³⁴ According to the French government Islamic dress effaced women from public space, pushed them into a 'private family space or to an exclusively female space' and thus could not be considered consonant with human dignity as it excluded Muslim women from the social contract.¹³⁵ The French government's arguments represented what Brown has described as human rights as a tactic of governance and domination.¹³⁶ It is the French law that erased these women from public discourse by not allowing them to participate in society on their own terms and decide their future. If one among many interpretations of Islamic dress is that it is a curtain to society, prohibiting Islamic dress acts as a double discrimination in eliminating Muslim women from the public sphere altogether.

¹³² *id.*, para 154.

¹³³ C. Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (2008).

¹³⁴ *SAS v France*, *op. cit.*, n. 10, para 82.

¹³⁵ *id.*, paras 77, 82.

¹³⁶ W. Brown, "'The Most We Can Hope For...': Human Rights and the Politics of Fatalism", (2004) 103:2/3 *South Atlantic Q.*, 451, at 459.

The human rights law of the ECtHR was thereby invoked instrumentally to achieve the political ends of the French republic and engender a strategic narrative in the public psyche that is hostile to colonial subjects. Legislative restrictions on Islamic dress were debated in public-political arenas, which meant that the political imperatives of the French republic and the various (mis)interpretations of its foundational pillars became enshrined in statute. Law became instrumentalised as the vehicle for the highly specific political aim of assimilating migrant communities and maintaining a status quo in the management of colonial bodies within France.¹³⁷ The genesis of ‘living together’ is inherently rooted in a French concept of the nation that promotes national cohesion at the cost of cultural and religious diversity and considers religious dress a divisive sign of lack of integration of minority communities. Through law, communities are forced to conform to a univocal concept of citizenship, which is paternalistically imposed by the state. Through law, markers of diversification from the republican norm are efficiently erased. Politics and law are inextricably linked in the Islamic dress debate. The enduring French colonial political agenda drives a public-political discourse premised on a politics of fear and characterised by the logics of gender oppression and security, obfuscating the colonial impulse at the heart of restrictions on Islamic dress. This creates a climate of Islamophobia and the requisite public-political consensus to pass laws banning Islamic dress through legitimate democratic processes.

The intertwined nature of national political debates and the role of law in the Islamic dress debate was reiterated in *SAS* by the wide margin of appreciation afforded to France.¹³⁸ The margin of appreciation is the ‘room for manoeuvre’¹³⁹ afforded to states in the implementation of ECHR rights. The margin represents the political and legal compromise that is the genesis of the ECHR system.¹⁴⁰ The margin enables the court to avoid confrontation with national governments in politically sensitive cases by deferring to domestic policies and can thus be understood as a

¹³⁷ On the instrumentalisation of law see: Habermas, *op. cit.*, n. 31, *Vols I and II*.

¹³⁸ *SAS*, *op. cit.*, n. 9, para 155.

¹³⁹ D. Spielmann, ‘Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?’ (2012) *Centre for European Legal Studies Working Paper Series University of Cambridge* (February) 2.

¹⁴⁰ K. Brayson, ‘Securing the Future of the European Court of Human Rights in the Face of UK Opposition: Political Compromise and Restricted Rights’ (2017) 6:1 *International Human Rights Law Rev.*, 53.

political tool or a mode of governance.¹⁴¹ The margin of appreciation is a necessary compromise to ensure the ongoing political legitimacy of the ECHR system, which at its inception was a political-diplomatic union between states. When political compromise must be made to ensure the continued legitimacy of the ECHR system, it is the individual legal rights of the most vulnerable that are restricted.¹⁴² At the time of *SAS*, the ECHR system was and continues to be experiencing a political age of subsidiarity,¹⁴³ where human rights as a diplomatic arrangement overrides human rights as individual rights. Saul has demonstrated how the *SAS* judgment in particular, depicts a deepening of the ECtHR's concept of subsidiarity and the extent to which national parliamentary processes feature in the ECtHR's jurisprudence via the margin of appreciation.¹⁴⁴

The wide margin afforded to France was justified by the democratic process that preceded adoption of the law.¹⁴⁵ However, as Berry has identified, reliance on democratic process does not *per se* justify restrictions on minority rights,¹⁴⁶ a point established by the ECtHR in *Young, James and Webster v United Kingdom*.¹⁴⁷ The wide margin afforded to France was inconsistent with the ECtHR's recognition that the flexibility inherent in the notion of living together could have resulted in the risk of abuse and this must be mitigated by 'a careful examination of the impugned limitation'.¹⁴⁸ The ECtHR expressed concerns acknowledging that Islamophobic remarks had littered the debate leading up to the adoption of the law banning full-face coverings.¹⁴⁹ On notice of a pervasive Islamophobia in the French political debate, the ECtHR should have carried out an examination of the utmost care. Had the court done so it would have uncovered a democratic process characterised by the above-analysed debates of gender oppression and national security, two logics that the court explained in *SAS* it was not prepared to recognise as legitimate interests. As the dissenting opinion emphasised, whilst 'the "values of the French Revolution"' were

¹⁴¹ S. Paul, 'Governing from the Margins: The European Court of Human Rights' Margin of Appreciation Doctrine as a Tool of Global Governance', (2016) 12 *Croatian Yearbook of European Law and Policy*, 81.

¹⁴² Brayson, *op. cit.*, n. 141, pp. 81-83.

¹⁴³ Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 *Human Rights Law Rev.* 487 p. 491.

¹⁴⁴ M. Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments', (2015) 15:4 *Human Rights Law Rev.*, 745.

¹⁴⁵ *SAS*, *op. cit.*, n. 9, para 154.

¹⁴⁶ S. Berry, '*SAS v France: does anything remain of the right to manifest religion.*' (2014) EJIL: Talk!.

¹⁴⁷ (1981) 4 EHRR 38.

¹⁴⁸ *SAS*, *op. cit.*, n. 9, para 122.

¹⁴⁹ *id.*, para 159.

relevant to the ECtHR's decision, especially given the 'overwhelming political consensus' preceding adoption of the law',¹⁵⁰ it remained the court's role to 'protect small minorities against disproportionate interferences'.¹⁵¹

The French interior ministry stated that the law in question would affect 2000 of France's 64 million population.¹⁵² To withstand human rights scrutiny at the ECtHR, a measure must be proportionate. This is tested by identifying a legitimate aim; in the above cases this aim has been interchangeably, security, gender oppression, secularism, and now living together. The second part of the test assesses whether such a measure is proportionate to the aim pursued. Taking the above figures into consideration, the criminalisation of full-face coverings is, from a legal perspective, disproportionate. The ECtHR itself noted the small number of Muslim women that this law would be relevant to. The French government maintained that this law was neutral.¹⁵³ However the fact that punishment for contravention include taking a citizenship test belies the discriminatory intent of the law and exposes law 2010-1192 as deeply rooted in an assimilationist agenda.

Throughout the judgment the ECtHR emphasised pluralism, tolerance and broadmindedness as the markers of a democratic society.¹⁵⁴ Following this reasoning, one might have expected the court to find that a blanket ban limiting the rights of a small minority group to wear Islamic dress would be considered intolerant, narrow-minded and homogenising. The court nevertheless found that there had been no violation of the applicant's article 9 right to manifest her religion thereby legitimising the criminalisation of full-face coverings in France. As the dissenting opinion argued, the blanket ban on full-face coverings could be considered a 'sign of selective pluralism and restricted tolerance' by eliminating the cause of tension between the majority in France and the small minority.¹⁵⁵ This is a criticism that has historically been raised in the court's jurisprudence on Islamic dress. It was observed in *Sahin* that the headscarf ban in question sought to 'eliminate the cause of tension by doing away with pluralism'.¹⁵⁶ The repetitive nature of this criticism would

¹⁵⁰ *id.*, dissenting, para 20.

¹⁵¹ *id.*

¹⁵² Editorial, *The Guardian*, *op. cit.*, n. 68.

¹⁵³ *SAS*, *op. cit.*, n. 9, para 151.

¹⁵⁴ *id.*, paras 128, 153.

¹⁵⁵ *id.*, dissenting, para 14.

¹⁵⁶ *Sahin*, *op. cit.*, n. 120, para 88.

suggest that *SAS* presented an opportunity for the ECtHR to address this issue. The fact that the ECtHR chose not to indicates that this is political decision making.

In a political climate of subsidiarity that challenges the legitimacy of the ECtHR from the perspective of national sovereignty, it is doubtful that the ECtHR could have done anything other than accommodate the French prohibition on full-face coverings. This places political compromise and the legitimacy of the ECHR system before the rights of those who wear Islamic dress. The ECtHR therefore finds itself stuck between a political rock and a legal hard place. Had the ECtHR annulled the French ban, the political support afforded to the ECHR system by the French government would have been compromised. However, in securing the legitimacy of the ECHR system via a wide margin of appreciation, the ECHR fails to protect the most vulnerable in society, thus revealing an inherent flaw in the ECHR system. At the time of writing, the UN Human Rights Committee had published two decisions contradicting and condemning the ECtHR approach in *SAS*.¹⁵⁷ The Committee stated that French law 2010-1192 does in fact infringe the rights of Muslim women.

The above examination exposes an assimilationist project through law and the instrumental appropriation of law to achieve strategic political goals. This is not a novel contemporary moment, but rather an ongoing colonial project. Rancière has contested the narrative that September 11 marked a symbolic rupture in the political order and has explained how attributing a new world of terror post September 11 eliminates political reflection on the practices of Western states, reinforcing civilisation's continuous war with terror.¹⁵⁸ That much is evident in the ECtHR's deference to French national political agendas in *SAS*. Characteristic of this symbolisation of lack of politics is the eclipse of an identity that is inclusive of alterity. The erasure of colonial markers effected by the French law prohibiting face coverings manufactures this eclipse in identity. Pertinent to the analysis of legal measures around Islamic dress is Rancière's identification of a growing indetermination of the juridical, where facts are identified through consensus or justified through arguments relating to terrorism, most obviously national security and public order.

¹⁵⁷ UN Human Rights Committee, CCPR/C/123/DR/2807/2016 and CCPR/C/123/D/2747/2016, 22 October 2018.

¹⁵⁸ J. Rancière, 'September 11 and Afterwards: A Rupture in the Symbolic Order?', in J. Rancière, *Dissensus: On Politics and Aesthetics* (2013) 104.

These methods are present in the Islamic dress jurisprudence, where ‘European consensus’ is the mode of decision making. Consensus features significantly in *SAS* in the majority’s justification for granting a wide margin of appreciation on account of the overwhelming political consensus that underpinned the democratic process preceding adoption of the legal ban. The fact that this consensus was characterised by Islamophobia and grounded in neocolonial agendas was not addressed by the majority and, although hinted at, the ECtHR avoided a substantive examination of the issue of Islamophobia and its neocolonial implications.

INSTITUTIONAL ISLAMOPHOBIA AND THE WHITENESS OF FRENCH PUBLIC SPACE

As the analysis thus far has established the instrumental use of the law of the ECHR creates the political space for French domestic laws that target, regulate and criminalise the bodies of Muslim women. This legal-normative institutionalisation of Islamophobia is manifested in the censure of Islamic dress, which entrenches a whiteness of public space and institutions and represents the material use of the bodies of Muslim women to control wider communities through law. The instrumental use of law in this way governs not just bodies but also governs public space in pursuit of colonial agendas. Applying Keenan’s analysis to this context, law produces spaces where some subjects belong, and others do not by assuming that French public space is always already white and non-Muslim.¹⁵⁹ The geo-political effect of the French law criminalising full-face dress in public spaces is to entrench French public space as white. This stops not-white bodies from flourishing and hinders the mobility of these bodies. With material and ideological foundations in French colonial past, present, and futures Islamophobia acts as a form of racism in targeting those who do not conform to the French univocal, assimilationist concept of citizenship.¹⁶⁰ Together, the logics of gender oppression and security enable the French state to establish institutional Islamophobia and whiteness as the normative qualities of French public space. The bodies of Muslim women who do not correspond to such normative qualities are unwelcome in that space, unable to function and attract hostile attention. Institutional Islamophobia in France can thus be

¹⁵⁹ S. Keenan, *Subversive Property: Law and the production of spaces of belonging* (2015) 28.

¹⁶⁰ This analysis is applicable to white French convert women as non-normative and does not undermine the use of phenomenological literatures on race and whiteness in the analysis of Islamophobia and Islamic dress.

considered as a neocolonial extension and effect of the property, economy and power imperatives of the French colonial project in Algeria, which, like law, consider space to be blank and ripe for the imposition of a particular socio-legal regime.¹⁶¹

Fanon has described his own experience as the object of the hostile white gaze whereby ‘the corporeal schema crumbled, its place taken by the racial epidermal schema’.¹⁶² For Fanon, following Jaspers, this experience is contingent on existing concrete ‘legends, stories, history and above all *historicity*’.¹⁶³ To be an object of the white gaze is for Fanon a specific moment where body is displaced by colour. To extrapolate Fanon’s observation and apply it to the experience of Muslim women in contemporary France, this same moment is present. Upon entering French public space Muslim women experience Islamophobia as the body is displaced by Islam. In this moment, Islamophobia acts as a form of racism. As Ahmed has explained, the effect of this moment is that the body in question is ‘stopped’ in its tracks or negated.¹⁶⁴ In contemporary France, the unveiling of Muslim women through legislation acts in the same way to interrupt or disorient the corporeal schema of the Muslim woman wearing Islamic dress.

For Fanon, bodies are shaped by histories of colonialism. Colonialism makes the world white and this is a world that accepts certain kinds of bodies and puts certain objects within their reach. The ‘body-at-home’ in this world is the white body. As Ahmed has explained, racism stops black bodies from inhabiting space by spreading itself through objects and others as the familiarity of the implicit white world. This situation “disorients” black bodies and reduces them to things among things. The result of the disorientation effected by racism is that it reduces capacities for action. Ahmed has built on Fanon’s insights to explore racism as an ‘unfinished history, which orientates bodies in specific directions, affecting how they “take up” space’.¹⁶⁵ Ahmed’s insight is to explore how such orientations are crucial to how bodies inhabit space and to the racialisation of bodily, as well as social, space; specifically, how whiteness is produced in domestic and public spaces.¹⁶⁶ The requirement through law that French public space should be free from full-face coverings,

¹⁶¹ Keenan, op. cit., n. 160, p. 25.

¹⁶² Fanon, op. cit., n. 12, p. 112 quoted in Ahmed, op. cit., n. 13, p. 110.

¹⁶³ id., 110.

¹⁶⁴ Ahmed, op. cit., n. 13, p. 110.

¹⁶⁵ id., 111.

¹⁶⁶ id., 112.

produces this whiteness of public space both metaphorically and literally by making public space inhospitable to Muslim women, their families and communities.

Institutions are exposed as white by highlighting how ‘institutional spaces are shaped by the proximity of some bodies and not others: white bodies gather and cohere to form the edges of such spaces’.¹⁶⁷ The institution of law brings this point into sharp focus in the context of Islamic dress in France by regulating public space to criminalise bodies for wearing Islamic dress. White bodies cohere around political institutions, debate, and democratic process to form the overwhelming consensus that led to the adoption of French law 2010-1192. This direction of time, energy and resources in regulating, criminalising, and policing the bodies of those wearing Islamic dress in French public space is a measure of how the West chooses to exercise power over the Orient.¹⁶⁸ Such administrative and legislative measures enshrine whiteness in French public space, simultaneously hindering the action of those bodies that are perceived to invade¹⁶⁹ that white, non-Muslim public space and legitimising the burka rage of those who fit that public space.

This legal-normative institutionalisation of Islamophobia makes public space inaccessible to women wearing Islamic dress. Itaoui has shown through empirical research that Islamophobia as a form of racism experienced by young Muslims affects mobility and the use of public space by creating mental maps of exclusion.¹⁷⁰ Laws criminalising Islamic dress or banning burkinis create legislative maps of exclusion and represent Islamophobia as racism in its institutional extreme. The effect of these laws is to stop the physical mobility of bodies, blocking the ability of not-white bodies to flourish through a form of segregation. Analytically, colonial bodies are pushed into the private sphere. Politically, colonial bodies are denied a voice as the objects of colonial management.

Law acts instrumentally to perpetuate the whiteness of public space and entrench institutional Islamophobia. Bouamama has described this move through law as making racism respectable.¹⁷¹

¹⁶⁷ Ahmed, op. cit., n. 13, p. 132.

¹⁶⁸ id., 117.

¹⁶⁹ N. Puwar, *Space Invaders: Race, Gender and Bodies Out of Place*, (2004).

¹⁷⁰ Itaoui, op. cit., n. 16, p. 264.

¹⁷¹ S. Bouamama, *L’Affaire du foulard islamique: la production d’un racisme respectable* (2004) cited in Delphy, op. cit., n. 37, p. 136.

The colonial condition echoes through French institutions. Past incursions on colonial bodies speak to the present to hinder the potential of those bodies now and into the future. The old legal category of colonial *indigènes* resurfaces in its contemporary form of institutional Islamophobia to criminalise Islamic dress in public spaces. This affects not just the ability of certain bodies to flourish but has geo-political consequences in terms of the use of space and decreased mobility of Muslim communities in public spaces, including the correlative lack of political mobilisation. Less considered is the psycho-sociological affect of this legal-normative Islamophobia for visibly Muslim women and Muslim communities, which results in alienation and reduced capacity for action.

Onlookers on the beach in Nice reportedly applauded the armed police men for their efforts and shouted at the woman to go home. This discourse of ‘stranger danger’ is employed as a response to outsiders of a community, those who are not ‘at home’ and whose presence raises suspicion.¹⁷² Muslim communities and visibly Muslim women have been subject to this discourse and alienated through their vilification in the press and society. Under such circumstances these communities and individuals protect their identities by recourse to defensive strategies. The alienation or singling out of the body that ‘could be Muslim’ results in the adoption of a ‘defensive posture as we “wait” for the line of racism to take our rights of passage away’.¹⁷³

CONCLUSION

This article has demonstrated how law legitimises the logics of gender oppression and national security as diversions in the legal-political debate on Islamic dress in France. Strategic recourse to the shifting logics of gender oppression and national security obfuscates and enacts the colonial substratum upon which this discourse is founded and suppresses the colonial condition from public consciousness. Despite this subterfuge, knowledge continues to be produced through the epistemic lens of the colonial condition and resurfaces under the contemporary label of Islamophobia.

¹⁷² Ahmed, op. cit., n. 13, p. 142.

¹⁷³ Ahmed, op. cit., n. 13, p. 142.

Islamophobia manifests in its institutional form through French laws prohibiting Islamic dress and permeates French institutional arrangements.

The analysis of French and ECHR jurisprudence has revealed the instrumental role of law in facilitating political agendas. Human rights law plays an integral role in the French Islamic dress debate but far from offering a principled protection of vulnerable subjects, the ECtHR legitimises and perpetuates the French pursuit of neocolonial, assimilationist agendas through laws restricting Islamic dress. This decision making has been achieved via the margin of appreciation and is exposed as political and lacking critical reflection on state practices in relation to Islamic dress. The colonial context is absent from these decisions, reinforcing the avatars of Muslim women as gender oppressed or a terrorist threat in the public-political imaginary.

Legal decisions and laws restricting Islamic dress send a normative message to civil society that is openly hostile to Islamic dress and the visibly Muslim body, as evidenced in Nice. Prohibitions on Islamic dress represent an endemic lack of solidarity in society and the correlative alienation of visibly Muslim women who are prevented from possible action by the law. Institutional Islamophobia understood as racism hinders physical mobility and echoes through French institutions. These bodies are not 'at home' in a normatively white French public space and experience a form of colonial paralysis. Paradoxically the one thing absent from this discourse is the colonial subtext.

Despite the ostensible emphasis on gender oppression and national security in the French Islamic dress debate, this article has shown that the regulation of the bodies of visibly Muslim women cannot and should not be thought apart from the epistemic lens of colonialism.