

Virginity and Burqa: Unreasonable Accommodations?

Considerations on the Stasi and Bouchard-Taylor Reports

By Cécile LABORDE

Setting side by side the Stasi Report on secularism and the recent Bouchard-Taylor Report published in Quebec in 2008, Cécile Laborde brings out the inconsistencies in the French position and its “catho-laïque¹” particularism.

Two cases² have recently contributed to the reinforcement and stabilisation of the “republican consensus” reached, after 15 years of *hijab* controversy, with the 2004 law banning religious symbols in schools. This consensus sets narrow limits to the acceptance of religious and cultural particularisms in the republic. In what follows, I aim to show that this consensus has been established on flawed bases. It does not deepen, but on the contrary contradicts the republican ideal of *laïcité*, as a comparative analysis of the “reasonable accommodations” doctrine in the Stasi Report (France 2003) and the recent Bouchard-Taylor Report (Quebec, 2008) shows.

¹ Neologism, originally used by historian Emile Poulat, to refer to the way that the French understanding of religious neutrality - or *laïcité* - was unwittingly yet profoundly influenced by the Catholic heritage of the country.

² Annulment of a marriage in Lille in April 2008 on grounds of non-virginity; rejection of a citizenship application in June for observance of a radical version of Islam

Whereas the 2004 law was only concerned with schools, the public spaces *par excellence* of the republic, we now see the private observance of a faith, Islam, called into question. In the so-called Lille case, a judge pronounced the annulment of a marriage on the grounds that the bride had lied about her virginity, considered as one of her “essential qualities” (Lille TGI³, judgment of 1 April 2008). In the Burqa case, a young woman was denied French citizenship on the grounds of her “observance of a radical form of her faith, incompatible with values essential to the French community, to wit, the principle of sex equality” (*Conseil d’État*, judgment of 27 July 2008, No 286798). Almost unanimously, political parties, intellectuals and journalists condemned the first decision and praised the second. This republican consensus was built around three guiding principles, which must be rigorously spelt out in order to discuss their scope and their limitations.

1/ the same secular law for all. This principle derives from the republican ideal of equality and asserts that the law of the republic applies to all and must take precedence over religious rules. In the Lille case, there was outrage at the thought that a judge of the Republic had applied rules apparently drawn from *Sharia* law and deemed a woman’s virginity a legitimate motive of annulment for a marriage in ordinary law. In the *burqa* case, allegiance to the radical Islamist prescriptions of Salafism seemed hardly compatible with endorsement of the law of the republic.

2/ non submission to another’s will. This principle derives from the republican ideal of freedom and autonomy and informs the criticism of some Muslim practices. Thus in the Burqa case, the young woman admitted to wearing the garment that covers her whole body and face at the request of her husband and to living in strict observance of fundamentalist religious principles. In the same spirit, the Lille case was interpreted as allowing the repudiation by men of women found impure according to an archaic and misogynist conception of sexual morality.

3/ duty of assimilation. This principle derives from the republican ideal of fraternity and establishes the moral, cultural and political foundation of the community of French citizens. In the *burqa* case, it was accordingly thought that wearing an “exotic” garment, rejecting the principle of sex equality, and endorsing a

³ Tribunal de Grande Instance

radical practice of her faith contravened values essential to French society. Likewise, in the Lille case, the wish to apply a “foreign” law seemed to point to a refusal to integrate, on the part of the persons concerned.

These three principles – which make up the conceptual framework behind the republican notion of *laïcité* (secularism) – have underpinned and reinvigorated the republican criticism of the so-called Anglo-Saxon approach to multiculturalism and its “reasonable accommodations” of minorities’ cultural and religious practices. Such accommodations, according to the prevailing French republican consensus, are in fact unreasonable if they enable each community to enforce its own law and to live according to its own values, in disregard of the principles of liberty, equality, fraternity on which the Republic rests.

I propose to show here that, while it is true that secularism is incompatible with such multicultural communitarianism, it may nonetheless tolerate, and indeed require, some reasonable accommodations of minority religious practices. Let us look in turn at the three pillars of the republican doctrine, with a view to show how it leads to the dangerous radicalisation of republicanism into a communitarian and conservative doctrine. However the conclusions drawn in the Lille and *burqa* cases are judged – and the republican consensus can justifiably be thought to have got them right –, there remains cause for concern about the arguments on the basis of which they were reached.

1/ the same secular law for all versus respect of privacy. The secular law is indeed the same for all. However, it stops short of a person’s private life and conscience. The Lille verdict rested on the fact that marriage is not (or no longer) a public institution but a private contract founded in mutual consent. According to marriage law, a marriage can be annulled if one of the parties has lied about one of his/her “essential qualities”. Thus it has been found admissible that being divorced, or sexually impotent can be a legitimate cause for the annulment of a marriage, in the case when the groom had deliberately kept it from his bride, knowing it to be grounds for her refusal. Likewise, the Lille judge, restricted himself to noting that the woman’s virginity was considered by both parties as essential to their union, that the bride had lied about her status, and that both demanded the annulment on the grounds of vitiated

consent. Far from substituting a religious rule (never mentioned) to secular law, the judgment merely drew the logical conclusions of the contractualisation of marriage in French law (Terré 2008). The real debate – completely obscured in the French controversy – should have focused on the question of who is in a position to judge the “essential qualities” of the spouses to be (Maurie 2008). Should – as contractualisation allows – the spouses alone be left to fix the parameters of their union, or should the prevailing way of life in French society at large be taken into account? Paradoxically, a more secular stance more favourable to the separation between private and public morals, would have pointed towards the acceptance, in the private sphere, of moral positions at odds with society as a whole (such as the importance of virginity). All in all, the Lille case has strictly nothing to do with acknowledging the authority of religious tenets in French law. It contents itself with drawing the consequences of the contractualisation of social relationships resulting from the long process of secularisation of marriage.

2/ non subjection to others’ will versus paternalism. While the idea of non-submission (or non-domination) is at the heart of progressive republicanism, it does not follow that the interpretation the republican consensus gives to it is coherent. It falls foul of what could be called the paternalist dilemma, which analyses the conditions under which individuals can be forced to be free. In both the Lille and the burqa cases, claim was laid to free Muslim women from their religious husband’s impositions, with little regard for the question of their consent. Thus the young bride was to be protected from repudiation by a traditionalist husband, largely ignoring the fact that she herself demanded the annulment of her marriage. Likewise the Burqa-wearing woman was denied French nationality on the grounds of her submission to her husband and to a misogynist religious doctrine. Having “chosen” to be “subjected”(sic), she failed to display adequate attachment to the Republic (Devers 2008). Paradoxically, the two women found themselves *punished* (forced to stay in a undesired marriage or denied French nationality) on the grounds of their *victim* status – a paradox inherent to a republican paternalism hell bent on liberating minority women through coercion, instead of considering the political, social and cultural conditions required for non-domination.

3/ “duty of assimilation” versus cultural conformism. Let us assume that republicans are right to request a measure of assimilation to the host country as a condition for obtaining French citizenship (residency, family attachments, fluency in the language). Let us further grant that applicants should demonstrate a minimal attachment to French societal values – whereupon self-confessed members of violent and extremist movements could legitimately be turned down. The ambiguity of the burqa ruling remains its assumption that radical religious practice *as such* is evidence of a “lack of assimilation”: the risk here, akin to that of the confusion between public and private sphere alluded to earlier, is that behaviours deemed “not conform to the laws of the Republic” amount in fact to no more than culturally and religiously “foreign and strange” behaviours even though they infringe no law. And so there is a risk of conflation between public morality (republican values) and French society’s cultural prejudices.

Now there may be good cause to think that the “essential quality” of a spouse in a civil marriage should not be decided by the spouses themselves, and that commitment to the Salafist or fundamentalist doctrine is *per se* incompatible with commitment to the republic. Yet, however we judge the way both cases were concluded, it is clear that the republican consensus has relied on a number of ambiguous and sometimes flawed arguments. They point to a dangerous culturalisation of republican values – whereby ideals of liberty, equality and fraternity are achieved not through respect for the law of the Republic but through allegiance to a specific culture, the French “*catho-laïque*” culture, which dictates both public and private behaviours. The ambiguities of the republican consensus (cultural conformism, confusion between public and private spheres, coercive paternalism) can also be found in the Stasi Report on *laïcité* which in December 2003 recommended – among other things – the adoption of a law on wearing religious symbols in state schools. Although the report claims objectively to question the compatibility of religious expression with the secular neutrality of public services, it relies on culturalist and stereotypical opinions about the meaning of Muslim religious symbols. For instance, the headscarf or *hijab* is described as an “aggressive” symbol of “separation”, “communitarianism” or “proselytism”. These judgments are made with no reference whatsoever to either the weighty serious documentation available about the practice of Islam among second (and third) generation immigrants in Europe nor

to the opinion of the women concerned (the Commission stating that it feels “little moved” by the arguments of women allegedly irrational, submissive and oppressed). The only basis for the Stasi Commission’s judgment on the meaning of the headscarf, of its own admission, was the statements of the headmasters, teachers, medics and other public employees who felt “intimidated” or “threatened” in the performance of their duties by demands for religious accommodation. There is little doubt that public services, not least education, are in serious crisis. But when the feelings of staff affected by this crisis, of which the Islamic headscarf is a symbol in their eye, become the sole justification for a coercive law, the (cultural) “tyranny of the majority” is nigh. As John Stuart Mill forcefully pointed out, mere “dislike”⁴ for a minority practice should never suffice for it not to be tolerated: It should be banned only if it causes serious harm, break the law, or infringe essential values.

A more plausible justification invoked by the Stasi Report refers to the *inherent* incompatibility between religious expression and the secular neutrality of the state. But yet again the rigidity that meets Muslim religious expression (“worrying” requests, public services “denied in their principles and obstructed in their operation”) contrasts with the accommodating leniency shown to traditional infringements of secularism (private school⁵ funding, adaptation of working time to accommodate religious festivals, public recognition of religions in Alsace-Lorraine): secularism is presented in these instances as “pragmatically applied”. Thus the Stasi Report approves of the “reasonable accommodations”⁶ that the secular state has granted to its Christian and Jewish citizens. Muslims, for their part, are required to assent to “what is known in Quebec as ‘reasonable accommodations’, by setting boundaries to the expression of their public identity”. Thus double standards are applied; which is troubling, to say the least, in a report extolling the secular State’s neutrality as guarantor of equality between the faiths. What the Stasi Report in the end suggests is that the French status quo is eminently “reasonable”, and that “reasonable” Muslims must accept it as such.

⁴ In English in the original (tr)

⁵ Mostly ran by Catholic clergy in France (tr)

⁶ As the following quote shows, the term reasonable accommodation is specific to Quebec and does not belong to the terminology in the Stasi report, which explicitly acknowledges its loan.

The argument flounders on what might be called “status quo neutrality”, which fails to provide a critical analysis of the existing relations between state and religious groups, confuses facts and values (whether they be ideal or merely ‘reasonable’) and conflates the universal values of neutrality, freedom, equality and fraternity with their – particularist and incomplete – realization through the historical compromises of French society. In other words, the French republican consensus is insufficiently *critical* (Laborde 2008). A more critical republicanism would more carefully distinguish between French cultural practices and the ideal of neutrality, and would thereby accept the idea that it is because the public sphere is not culturally and religiously neutral that some “reasonable accommodations” in favour of minorities can be justified. These accommodations, in so far (and only insofar) as they restore equality are not in breach of the republican ideal, but on the contrary deepen it. This is possible only if it is conceded that republican integration takes place through the common law and public institutions, not through assimilation and cultural conformism.

Interestingly, a doctrine very similar to this “critical republicanism” underpins the recent report drafted for the Quebec government by historian Gérard Bouchard and philosopher Charles Taylor (Bouchard-Taylor 2008). This dense and thorough report outlines the principles that would enable the people of Quebec to settle the “accommodations crisis” which has seen Quebec society fight back requests for religious accommodations in public institutions – Sabbath exemptions, demands for hospital female medics, wearing of religious symbols by public employees, to name but a few examples. From the outset, the Bouchard-Taylor Report, unlike the Stasi Report, notes that the accommodation crisis was not just a reflection of the “unreasonable” attitude of minorities in the face of a secular state, but also a sign of “protest from an ethno-cultural majority (the French-speaking Canadians) that is evidently unsure of itself” and struggles to come to terms with cultural and religious pluralism. To be sure, according to the authors, this pluralism should not lead, in the Quebec context, to accepting “Canadian-style multiculturalism”. In Quebec, respect for diversity must be subordinated to the promotion of a French speaking culture and of common institutions as spaces for participation. Thus the report takes as read the cardinal, and easily recognizable, principles of republican integration: the State’s secular neutrality, equal rights, immigrant integration, promotion of French as

common language, participation by all in public institutions. These principles set clear limits to all demands of accommodation: no adjustment is legitimate that would call into question essential constitutional principles such as equality between men and women. It would therefore be inaccurate to present the Bouchard-Taylor Report as a document representative of “Anglo-Saxon multiculturalism” (assuming the latter could be easily defined). Much more pertinent is an analysis which shows how the Quebec report defends reasonable accommodations *on the basis of republican principles*.

Some accommodations are necessary because all the laws and norms in force in Quebec society do not pertain to “neutral and universal “ principles (such as, for instance, equality between men and women) but on the contrary “reproduce worldviews, values, and implicit norms that are those of the majority culture.” For example, the calendar of holidays, while officially secular, favours Christian religious practice. In this context, the permission granted to members of minority faiths to take some time off for religious practice during weekdays does not represent an unjustifiable privilege, but rather a restoration of equality. Accommodations arise when cultural neutrality is impossible and mutual adjustments are necessary to rectify the most glaring injustices. By contrast, whenever cultural and religious neutrality is possible and desirable, the authors of the report do not shrink from sanctioning public institutions for breach of secularism. For instance, they demand that crucifixes be removed from the National Assembly and prayers abolished at municipal councils. Compare this with the Stasi Report’s magnanimous tolerance of the Alsace-Moselle Concordat⁷, which it justifies on the grounds that “the populace is attached to it”....

Bouchard and Taylor also reflect on the obligation of religious restraint on the part of state employees. They recommend that the wearing of signs and symbols be forbidden only to officials holding representative or coercive positions (ministers, judges, policemen). Public service users and schoolchildren may wear religious symbols, except when the latter are not compatible with the activities undertaken: the report refuses to interpret the meaning of the *hijab* beyond that of a symbol of faith. And, in line with the republican principle according to which public institutions must

⁷ Whereby the Catholic, Protestant and Jewish religions are established as a result of Napoleon’s 1801 Concordat with the Pope, which still prevails in this region because it was part of Germany when this disposition was rescinded in France.(tr)

be secular in order to be inclusive of all citizens regardless of their origin or belief, Bouchard and Taylor reject the Stasi commission's restrictive conclusions. In their view, religious restraint is required in the action of the State rather than in the appearance of workers and users. As to the requests for exemptions and accommodations in the fields of health and professional activities, their position is less clear-cut and more nuanced, partly because they (rightly) leave it to consultative and deliberative processes to decide which accommodations are reasonable or otherwise in particular contexts. It is to be regretted, however, that the report gives but few indications on the actual implications of the constitutional principle of equality between men and women, a principle both essential and vague, which is often directly challenged by requests for the accommodation of orthodox religious practices.

Be that as it may, this brief survey of the Bouchard-Taylor Report should suffice to bring out its affinity with the critical republicanism approach. Unlike the Stasi Report, it does not postulate that existing institutions implement perfectly (or reasonably) the ideals of secularism, neutrality and equality, and that minority citizens simply have to conform to them. On the contrary, the Quebec report insists on the fact that the "reasonable accommodations" necessary for integration are *mutual* accommodations: they are required from the minorities and from the majority. The Stasi Report, for its part, labours under the impression, dear to the French republican consensus, that universal democratic liberal values and French ethno-cultural norms are one and the same, and that minority practices can be judged by criteria which do not adequately discriminate between both registers. Instead of a *critical* republicanism, it champions a *conservative* republicanism inclined to judge the majority by its (stated) ideals, and minorities by their (construed) practices. This rather conservative republicanism has provided the conceptual framework for the Lille and the burqa cases. In both cases, it relied on a culturalist rejection of practices deemed "un-French" – the significance of a bride's virginity and the wearing of restrictive clothing by women.

In sum, the conclusions reached by the republican consensus can legitimately be upheld, provided the right questions are being asked. So, in the Lille case, the real question was not whether a judge of the republic is entitled to apply religious law in civil matters: he is not. But there is a debate to be had about who should be the judge

of the future spouses' "essential qualities", and about the limits to set to the contractualisation of marriage. In the burqa case, the refusal of French citizenship was supported through appeal to *ad hoc* and *ad hominem* considerations: adoption of a restrictive garment, submission to a husband and radical understanding of the faith. Taken separately, these three traits could in no way justify the denial of French citizenship. Taken together, they undoubtedly draw the contours of the "radical Islam" which marks the imaginary boundary of French citizenship. What remains to be ascertained is which specific beliefs or practices fall on the wrong side of the boundary, as incompatible with French citizenship and, among these declared incompatibilities, which fall foul of 'Franco-French' culture in the broad sense, and which of *political* values necessary for integration. (Bizarrely, the fact that the woman concerned showed little knowledge of secularism or political rights was hardly evoked in the discussion of the case). To ensure that principles of law, and not ethno-cultural norms, inform our judgments on minority practices, it would be useful to apply more frequently what could be called "the fundamentalist Catholic test". It should not be possible to deny citizenship to a woman wearing the burqa unless it was also refused, on the same grounds, to a fundamentalist Catholic nun. It should only be possible to oppose the annulment of a marriage on grounds of non-virginity of the bride for Muslim spouses if the same request, coming from a traditionalist Christian couple, was met with the same sternness. In other words, both cases, while pointing to the reasonable limits of minority practice accommodations, also bring to light the "*catho-laique*" particularism that besets French republicanism. A parallel reading of the – less ideological and more rigorous - Bouchard-Taylor report is enlightening in this respect.

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