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A THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS  
FOR THE DEGREE OF DOCTOR OF PHILOSOPHY IN LAW  
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# VEILED THREATS?

Islam, Headscarves and Religious Freedom  
in America & France

by Herman Salton

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## ❧ Abstract ❧

For a variety of historical, cultural and political reasons, the Islamic headscarf has become an increasingly controversial matter in Europe. This is particularly the case in France, where the Parliament passed, in March 2004, a piece of legislation that prohibits students from wearing the Muslim veil—together with any other ‘conspicuous’ religious sign—in the classroom.

Although Statute 228/2004 proved highly controversial and attracted unprecedented media attention, it was overwhelmingly supported by French MPs as a response to popular opposition towards religious insignia at school and was heralded as a ‘liberating’ piece of legislation that faithfully reasserted the beloved French principle of *laïcité*. Overseas, the new law was less favourably perceived and was often accused of being discriminatory and of violating the students’ freedom of religious expression.

This thesis compares the French and American attitudes towards religious symbolism in general and the Islamic veil in particular. As in other matters, at first sight these two countries seem to adopt a very different—if not opposite—approach to religion and the Muslim veil, and so much so that their positions are often described as ‘irreconcilable’.

This thesis will argue that this is hardly the case. Indeed, it will show that, at least before the passage of Statute 228-2004, the French and American legal systems adopted a substantially similar approach that appeared respectful of a veiled student’s right to wear religious insignia. This, the work will also suggest, is not surprising, for contrary to popular belief, the American conception of secularism is in many respects stricter than the French idea of *laïcité*, with the result that French ‘exceptionalism’ on matters of religion is hardly a convincing ground for justifying the new piece of legislation.

The fundamental value of a Franco-American comparison, this work will suggest, ultimately lies with the fact that such a comparison demolishes a good portion of the popular myths surrounding the *affaire des foulards*: that the French legal system is fiercely secular; that the American one is strongly ‘religious’; and that France was, in 2004, confronted with a veritable ‘veil emergency’ that rendered the passage of the new statute all but inevitable.

**to Juni**

**with love and gratitude  
for the best three years of my life**

“And say to the believing women...that they should draw their veils over their bosoms and not display their beauty except to their fathers, their husband’s fathers, their sons, their husband’s sons, their brothers or their brothers’ sons, or their sisters’ sons, or their women, or the slaves their right hands possess, or male servants free of physical needs, or small children who have no sense of the shame of sex. And that they should not strike their feet in order to draw attention to their hidden ornaments.”

THE HOLY QUR’AN, Surah 24:31  
New York: Tahrike Tarsile, 2002, 230.

“The chief of the woman is the man. If the woman does not wear the headscarf, she should be punished. As for the man, he must not wear headscarves: he is the image and glory of God, while the woman is the image and glory of the man. The man has not been created for the woman; it is the woman who has been created for the man. This is why she must wear on her head the symbol of her dependence to him.”

THE HOLY BIBLE, 1<sup>st</sup> Epistle of Paul to the Corinthians  
Nashville: Thomas Nelson Publishing, 1982, 604.

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Introduction

**France, America & The Muslim Veil**

## Introduction

# France, America & the Muslim Veil

INDIVIDUAL CONSCIENCE v THE STATE,  
YESTERDAY AND TODAY

In 442 b.C. the Greek dramatist Sophocles wrote *Antigone*, one of the most popular tragedies of the ancient world. Antigone, daughter of Œdipus, was a woman caught between her civic duty to follow the Theban king Creon's edict prohibiting the burial of her dead brother Polyneices and the divine law which required her to give proper funeral honours to her brethren.<sup>1</sup> The king had no authority to overrule a higher norm, Antigone concluded, and she thus disobeyed the edict, buried the body and was brought before a furious Creon, with whom she argued unflinchingly, in the play's most famous exchange, about the importance of human decrees vis-à-vis those of divine law.<sup>2</sup>

"But you tell me", the king asked, "did you know of the proclamation forbidding this [burial]?"

"I knew. How could I not? It was public knowledge".

"And yet you dared to break this law?"

"Yes", she replied, "for it was not Zeus who made this proclamation to me; nor did Justice, who dwells with the gods below, lay down these laws for mankind. Nor did I think that your human proclamations [νομοί] had sufficient power to override the unwritten, unassailable laws of the gods [αγραπτα θεων]. They live not just yesterday and today, but forever, and no-one knows when they first came to light. I was not going to incur punishment from the gods, not in fear of the will of any man".<sup>3</sup>

Outraged that someone (a woman, at that)<sup>4</sup> disobeyed his orders, Creon condemns Antigone to death—yet the people of Thebes pity the brave girl who is merely following her conscience and the king's prophet warns that a sorrowful fate awaits him because of his decision. Frightened, Creon reverses the death sentence but it is too late: the woman has already killed herself and so has Creon's own son (who was Antigone's fiancé), as well as Creon's wife. The law and order that Creon valued so highly is maintained and he remains King of Thebes, but he has overstepped his authority and is punished for this through the loss of his spouse and offspring. "No irreverence must be shown to the gods",<sup>5</sup> Sophocles concludes.

What makes this play immortal is the fact that Antigone invokes divine law [αγραπτα θεων]<sup>6</sup> as a defence for her actions, yet implicit in her position is faith in the discerning powers of her individual conscience.<sup>7</sup> By choosing to sacrifice her life out of devotion to principles which she regards as higher

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<sup>1</sup> Respect for one's family was particularly emphasised in Sparta but was very important throughout Ancient Greece. In Athens, for example, anyone who neglected this duty was liable to a fine and to partial deprivation of citizen rights. However, the most stringent obligations were those concerning burial: close relatives had to bury their family members according to a prescribed ritual and the closest relatives were responsible for laying out the body of the deceased for the funeral. See S M Burnstein (et al) *Ancient Greece: A Political, Social, and Cultural History* (Oxford University Press, New York, 1999) 53. Interesting observations are also offered by D Felton, *Haunted Greece and Rome: Ghost Stories from Classical Antiquity* (University of Austin Press, Austin, 1999). With a few exceptions mainly related to the French materials, the footnote referencing used in this thesis is based on P Myburgh, *Legal Research & Writing Guide* (Auckland University Law School, Auckland, 2003).

<sup>2</sup> On the point, see P C Rivoltella, *Antigone, Tra Senso del Tragico e Tragedia. Un'Analisi di Struttura*, in A Ghiglione & P C Rivoltella (eds), *Altrimenti il Silenzio: Appunti sulla Scena Femminile* (Euresis Edizioni, Milan, 1998) 29.

<sup>3</sup> Sophocles, *Antigone*, transl. by D Franklin & J Harrison (Cambridge University Press, Cambridge, 2003) 33-5.

<sup>4</sup> "...a woman will never rule me while I am alive!". Sophocles, above at note 3, 41 (lines 488-9).

<sup>5</sup> Sophocles, above at note 3, 103 (lines 1322-3).

<sup>6</sup> As one author underlined, *αγραπτα θεων* [agraptá theon] are opposed to *νομοί* [nomoi] or *ψηφισματα* [psēphismata] or *κηρυγματα* [kerugmata], which are normally written down and always subject to cancellation. Sophocles, *Antigone*, edited by M Griffiths (Cambridge University Press, Cambridge, 1999) 201. See also E Hall (ed) *Antigone, Oedipus the King and Electra* (Oxford University Press, New York, 1994); and E Hamilton, *Mythology* (New American Library, New York, 1969).

<sup>7</sup> See also Sophocles, *Antigone*, Griffiths (ed), above at note 6, 200. On the point see also D Grene, *Introduction to Sophocles I: Three Tragedies* (University of Chicago Press, Chicago, 1991) 145.

than human law [νομου], Antigone represents a threat to the status quo of Thebes, but she also conveys Sophocles' potent admonition to those kings who believe they are almighty only because their decrees are backed by the strength of their armies.<sup>8</sup> Although Sophocles is not unsympathetic towards Creon, who is trying to avoid anarchy and establish his newly-acquired position in the wake of war,<sup>9</sup> Sophocles seems to suggest that the monarch has been rightly chastised because his order invaded an area over which royal decrees have no authority: human conscience.<sup>10</sup>

Two thousand five hundred years after Antigone, the conflict between the individual and the state—and between one's own conscience and the law—is as topical as in Sophocles' Greece. Times have changed, of course, kings have been substituted by democratic governments and the latter are increasingly detached from religion. Yet it is debatable whether such developments have reduced the potential for conflict between the rules of the state and the conscience of the individual, especially if one considers the escalating scale of public intervention over private matters. The veil issue is, *mutatis mutandis*,<sup>11</sup> a good example of this: do states have a right to deal with it, perhaps on the basis of women's rights, as France did in 2004? Or are they interfering, like a modern-day Creon, into a private area over which they have no authority? By the same token: should citizens object to their government's intervention into matters of faith, like Antigone did so fearlessly? And what are the legal instruments at their disposal, should they decide to do so?

This thesis looks at the conflict between national laws and religious conscience in 21<sup>st</sup>-century France and America. By considering how these two countries deal with the symbolic and highly sensitive matter of the Muslim headscarf, it analyzes the way these two modern and mature democracies with an illustrious past and a common penchant for regarding themselves as the land of human rights<sup>12</sup> are managing the ever-present conflict between the rules of the land and those of the spirit—between, in other words, Antigone's conscience and Creon's laws.

It might be asked why focus on the Muslim veil, and why concentrate on the school environment. For a variety of historical, political and legal reasons that will soon become apparent, looking at the contemporary treatment of this religious sign at school is a good way to ascertain how a polity deals with questions of conscience in general and religious belief in particular.<sup>13</sup> It is also, as we shall see at

<sup>8</sup> "Antigone", one author wrote, "represents here the emblem of the divine, unwritten law...while Creon...represents rationality and human law". A Stroppa, *Sofocle: La Genesi del Mito, L'Ineluttabilità del Nòmos*. In Ghiglione & Rivoltella, above at note 2, 49.

<sup>9</sup> As one author observed, "neither Creon nor Antigone is a villain, neither a saint". Sophocles, *Antigone*, Griffiths (ed), above at note 6, 34.

<sup>10</sup> For a more extensive analysis of the point see J P Vernant, *Mythe et Pensée chez les Grecs: Études de Psychologie Historique* (Librairie François Maspero, Paris, 1966) 44.

<sup>11</sup> Religion in Ancient Greece obviously differed in important respects from religion in 21<sup>st</sup> century France and America. Also, conscience and religion do not of course necessarily coincide, as this thesis will make clear in subsequent sections.

<sup>12</sup> On 18 May 2001 US President George W. Bush declared that "[o]ppressed peoples around the world should be assured that the United States will always be the world's human rights champion". On 17 December 2003, French President Jacques Chirac declared that "[e]verywhere in the world, France is known as the human rights country". B Chélini-Pont & T J Gunn, *Dieu en France et Aux États-Unis* (Berg International, Paris, 2005) 14-15.

<sup>13</sup> The breadth and depth of the existing literature on the veil issue is the best possible indicator of its complexity and interdisciplinary nature. Interesting comments on this from an Islamic perspective are offered by A Abu-Rabia, "The Veil and Muslim Women in France: Religious and Political Aspects", (2006) 1 *Anthropology of the Middle East*, n.2, 89-107; F Mernissi, *Beyond the Veil: Male-Female Dynamics in Modern Muslim Society* (Indiana University Press, Bloomington, 1987); F Mernissi, *Women in Islam: A Historical and Theological Enquiry* (Basil Blackwell, Oxford, 1991) (especially 85-101); A Najimabadi, "Veiled Discourse, Unveiled Bodies", (1993) 19 *Feminist Studies*, n.3, 487-518; F Shirazi, *The Veil Unveiled* (Florida University Press, Orlando, 2001); F E Guindi, *Veil: Modesty, Privacy and Resistance* (Berg, Oxford, 1999) (esp.152ff); N Ahmad (ed), *Women in Islam* (APH Publishing, New Delhi, 2003) vol.I (especially 23-45 & 197-212); L Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (Yale University Press, New Haven, 1992) (especially 144-168); F Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam* (Addison-Wesley, Reading, 1991); and M Sunder, "Piercing the Veil", (2003) 112 *Yale Law Journal* 1399 (especially 1436-8). For a Western perspective, see G Jasser, *Le Voile en Deux Maux*, in (2005) *Nouvelles Questions Féministes*, 16/4, 31-45, translated into English as "The Twin Evils of the Veil", (1999) 5 *Social Identities*, n.1, 41-45; P Mule & D Barthel, "The Return of the Veil: Individual Autonomy v Social Esteem", in (1992) 7 *Sociological Forum*, 2, 323-32; N Keddie & B Baron, *Women in Middle Eastern History: Shifting Boundaries in Sex and Gender* (Yale University Press, New Haven, 1991); C Nordmann, *Le Foulard Islamique en Questions* (Éditions Amsterdam, Paris, 2004); R Roded, *Women in Islam and in the Middle East*, (Tauris Publishers, London & New York, 1999); B F Stowasser, *The Hijab: How a Curtain Became an Institution and a Cultural Symbol*, in A Afsaaddin & M Zahniser (eds), *Humanism, Culture and Language in the Near East* (Eisenbrauns, Wina Lake, IN, 1997); G M

length in this thesis, an excellent means of measuring the impact of religious history upon a given country's legal system, as well as a reliable thermometer of its approach to larger issues of migration, multiculturalism and diversity.

Irrespective of the theological disquisitions over the compulsory character of the Islamic headscarf,<sup>14</sup> the act of wearing this piece of cloth can be regarded as a highly visible and symbolic test of a secular system's flexibility in dealing with matters of individual conscience—and of the conundrum highlighted by Sophocles two thousand five hundred years ago. "I was not going to incur punishment from the gods, not in fear of the will of any man", Antigone said in front of Creon. While a number of French people and politicians would disagree with this standpoint, this is the reason why a majority of Muslim students wears the headscarf—because they regard it (or have been taught to regard it) as a form of divine law [αγραπτα θεων] that is higher and morally superior to human law [νομοι]. In the same way as Antigone represented a threat to the status quo of Thebes, these veiled students today are challenging—albeit silently and, it must be said, in most cases unwillingly so—the secular state in a variety of different ways, and analysing the position of national governments on this issue means studying the extent to which these systems and their laws are willing to accommodate individual conscience and religious beliefs into public life.

Yet why choose France and America as comparators? Because the debate on the Muslim veil can be regarded as a discussion on multiculturalism that touches a series of raw nerves including national identity, liberalism and religious fundamentalism—and since France and America seem to have diametrically opposed ways of approaching these issues—it is posited here that this odd couple represents an interesting laboratory when it comes to understanding the mechanics through which modern democracies adapt (or fail to adapt) their secular laws to individual conscience in general and religious belief in particular. In this respect, it is my conviction that the two (apparently)<sup>15</sup> opposed approaches adopted by France and America on the Islamic veil are interesting departure points to comprehend this process of adaptation and that they will serve us well when it comes to understanding how mankind has evolved in its centuries-long quest to reconcile spiritual needs—including what Sophocles called 'the unwritten, unassailable laws of the gods'—and secular laws.

With these broad objectives in mind, I shall now briefly introduce the nature of the differences between the French and American approaches, before outlining the three main hypotheses that will form the basis of this work and, finally, dealing with practical issues of methodology, structure and contents.

#### FRANCE LEGISLATES: THE MUSLIM VEIL AS A POLITICAL SYMBOL

"It is in the name of the principle of *laïcité*,<sup>16</sup> cornerstone of the Republic, common ground of our shared values of respect, tolerance and dialogue, that I urge all Frenchwomen and Frenchmen to unite.

Vogelsang Eastwood, *For Modesty's Sake?* (Syntax, Rotterdam, 1996); A Kayani & M Zein, *Sólo Las Diosas Pasean Por El Infierno: Retrato de la Mujer en Los Países Musulmanes* (Flor del Viento Ediciones, Barcelona, 2002); J Bowker & J Holm (eds) *Women in Religion* (Pinter, London, 2004); A S Roald, *Women in Islam: The Western Experience* (Routledge, London, 2001) (especially 254-294); J Mabro (ed) *Veiled Half-Truths: Western Travellers' Perceptions of Middle Eastern Women* (Tauris Publishers, London, 1991) (especially 1-97); N Awde (ed) *Women in Islam: An Anthology from the Qur'an and Hadiths* (Curzon, Richmond, 2000) (especially 46-50 & 86-159); and E R Wolfson (ed) *Rending the Veil* (Seven Bridges Press, New York, 1998) (especially 1-116). Also interesting are the proceedings of the conference *Islam, Women, the Veil and the West* organized by the University of Montana on April 28-30, 2005.

<sup>14</sup> As the two quotations mentioned at the beginning of this thesis suggest, not only do both the Bible and Koran mention the veil—the former seems to do so more uncompromisingly than the latter.

<sup>15</sup> As we shall see below, one of the hypotheses of this book will be that the differences in the Franco-American approaches to the veil are not, legally speaking, as strong as the two countries' religious histories and political philosophies would suggest. For further comments, see below in this introduction.

<sup>16</sup> Although partly conveying an idea of 'secularism', for a variety of reasons that will become apparent in Part 2 (and especially 2.1.), *laïcité* is a particularly difficult word to translate and so I leave it in French throughout the book. This has also been the wise position of a majority of authors. For the most recent examples, see T J Gunn, "Religious Freedom and *Laïcité*: A Comparison of the United States and France" (2004) *Brigham Young Law Review* 419 (esp. 428ff); B Chélini-Pont & T J Gunn, *Dieu en France et Aux États-Unis: Quand Les Mythes Font la Loi* (Berg International, Paris, 2005) 11; E Tawil, *Norme Religieuse et*

I proclaim it very solemnly: the Republic will oppose anything that divides, anything that segregates, anything that excludes”.<sup>17</sup>

It is with these words, pronounced at the Elysée Palace on 17 December 2003, that French President Jacques Chirac banned, after months of fierce debates, the Muslim headscarf from French public schools. Mr Chirac’s speech was greeted with an extended and enthusiastic applause by the more than four hundred guests invited to attend his televised address on laïcité and was, in several respects, a remarkable performance. After urging his countrymen and women to make a “sursaut laïque”,<sup>18</sup> the President announced that, following wide consultation and thorough analysis of the Rapport sur la Laïcité produced by a commission chaired by Mr Bernard Stasi, he too was in favour of a new law forbidding all ‘clothes or symbols that conspicuously manifest a religious allegiance’ (‘tenues ou signes qui manifestent ostensiblement l’appartenance religieuse’)<sup>19</sup> in French public schools. These signs, he said, included the Jewish kippa, the Muslim headscarf and large Christian crosses, whereas the use of discreet symbols (‘signes discrets’)<sup>20</sup> such as small crosses, the David star and small Korans “remains of course possible”.<sup>21</sup> Mr Chirac justified the unprecedented move by emphasizing that “laïcité is the neutrality of the public space which allows a harmonious coexistence among different religions”<sup>22</sup> and added that he was not, with this measure, targeting any specific religion: laïcité is a historical legacy belonging to all Frenchmen and women no matter which faith they embraced, he concluded. “That is why it is non-negotiable”.<sup>23</sup>

The announcement of the French President puzzled the world but came as no a surprise in France itself, where it was widely expected and widely applauded. Well before this speech, a survey had shown that more than 70% of French people<sup>24</sup> were in favour of a law banning headscarves at school and clearly the French President was encouraged by this groundswell of public opinion.<sup>25</sup> Indeed, it was partly because of popular hostility towards the Muslim veil that, in the midst of the controversy caused by the expulsion of two veiled schoolgirls, Mr Chirac had appointed the Stasi Commission—a body of twenty eminent intellectuals who were given the task of analyzing the laïcité matter, interviewing the public and coming up with recommendations.<sup>26</sup> After taking into account, in the Commission’s words, “[t]he largest number of opinions expressed on this issue”,<sup>27</sup> the Stasi Commission concluded that “laïcité is not a simple rule of the institutional framework, it is the fundamental value of the republican pact that makes possible the coexistence of common rules, pluralism and diversity”<sup>28</sup> and recommended the enactment of a statute prohibiting “conspicuous [political and] religious clothes and symbols such as big crosses, headscarves and kippas”.<sup>29</sup>

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Droit Français, (PUAM, Aix-Marseille, 2005) (especially 29-52); J R Bowen, *Why The French Don't Like Headscarves: Islam, the State and the Public Square* (Princeton University Press, Princeton, 2006) 2; D McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing, Oxford, 2006) 34.

<sup>17</sup> J Chirac, *Discours Prononcé par Monsieur Jacques Chirac, Président de la République, Relatif au Respect du Principe de Laïcité*, 17 December 2003, in *Journaux Officiels, Application du Principe de la Laïcité dans les Écoles, les Collèges et les Lycées Publics* (Éditions des Journaux Officiels, Paris, 2005) 2. See also *Le Monde*, *Le Discours de Jacques Chirac sur la Laïcité*, 18 December 2003. Unless otherwise stated, all translations from French, Spanish, Italian, Ancient Greek and Latin into English are mine—and so are the mistakes.

<sup>18</sup> “Secular jump” or “secular burst of energy”. In Chirac, above at note 17, 1-2.

<sup>19</sup> *Id.* 7.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.* See also *Le Monde*, *M. Chirac Prône le ‘Sursaut Républicain’ et Interdit le Voile à l’école*, 19 December 2004.

<sup>22</sup> *Id.* 5.

<sup>23</sup> *Ibid.*

<sup>24</sup> Quoted in *The Economist*, *The War on the Headscarves*, 5 February 2004. For further statistics on French people’s aversion to the Muslim headscarf, see Section 2.3.

<sup>25</sup> “The national will cannot be ignored”, his Education Minister declared to the weekly *Le Point*. See *Le Monde*, *M. Chirac Prône le ‘Sursaut Républicain’ et Interdit le Voile à l’école*, 19 December 2004.

<sup>26</sup> Between July and December 2003, the Commission conducted one hundred public hearings and forty private hearings, and audited politicians, religious leaders, trade unionists, businessmen, academics as well as heads of hospitals, clinics and prisons. See Chapter 2.3. for details.

<sup>27</sup> B Stasi et al, *Rapport de la Commission de Réflexion sur l’Application du Principe de Laïcité dans la République* (Documentation Française, Paris, 2004) 9. See also *Le Monde*, *Le Rapport de la Commission Stasi sur la Laïcité*, 12 December 2003.

<sup>28</sup> *Ibid.* See also ‘Conclusion’ (145ff).

<sup>29</sup> Stasi, above at note 27, 129.



On 17 March 2004, only three months after these recommendations were submitted to the President, the French Parliament (partly)<sup>30</sup> complied: “In elementary, intermediate and high schools”, Statute 228 reads, “the wearing of clothes or symbols through which pupils conspicuously manifest a religious affiliation is prohibited”.<sup>31</sup> To give a sense of the overwhelming support for this measure, the statute—which entered into force at the commencement of the 2004/2005 school year—was approved by a majority of 494 to 36 in the *Assemblée Nationale* and 276 to 20 in the *Sénat*, and was supported not only by Mr Chirac’s centre-right party (the UMP, ‘*Union pour un Mouvement Populaire*’) but also by the opposition.<sup>32</sup> It “meets the expectations and worries of the Socialists”,<sup>33</sup> one prominent left-wing politician commented.

As we shall see at length later in this thesis, Mr Chirac’s (partial) endorsement of the Stasi Commission’s core recommendation—and the French Parliament’s decision to give the go-ahead to the religious side of the proposed ban—is only the latest act in an ongoing civic debate in France that at times has turned into a national drama. “Few things seem to scare the French as much as the sight of Muslim schoolgirls wearing headscarves”,<sup>34</sup> one author observed. As for the official arguments given in favour of the ban, they were common to the Stasi Report, Mr Chirac’s speech and the commentary accompanying the new legislation, and invariably revolved around two issues: the defence of the ideal of *laïcité* and the protection of women’s rights.

As far as the first point is concerned, France’s momentous decision to ban headscarves in public schools must be understood in the light of the country’s political history. In France, the principle of *laïcité* is venerated at least as much as that of religious freedom in the United States—and the curious parallels between the two form the basis of this thesis. From the Renaissance to the Enlightenment, from the Lutheran Reform to the Nantes Edict, French history is strewn with examples of the constant struggle between a religious (read Catholic) vision of the state and public affairs and a secular, rationalist movement upholding the principle of separation between spiritual and worldly matters.<sup>35</sup> Needless to say, France was not alone in facing this problem as virtually every polity had sooner or later to deal with the distinction between the spiritual and the secular (it was, after all, Christ himself who, in the Bible, is reported as saying “Render to Caesar the things that are Caesar’s, and to God the things that are God’s”)<sup>36</sup>. France’s history and political culture, however, combined with the presence on her territory of a strong and historically powerful Catholic Church, ensured the peculiarity of the country’s response to the dilemma, which the 1905 Law on Separation of Church and State tried to resolve. Part 2 and 3 of this thesis will cover these issues in detail.

The necessity to protect women from discriminatory pressures resulting from certain religious practices is, as we shall see, the other official justification given for the new French legislation—and one that resonates in virtually every page of both the Stasi Report and President Chirac’s speech. As for the former document, after having warned of “a resurgence of sexism that translates into pressures and verbal, psychological and physical violence”,<sup>37</sup> it made a direct reference to the Muslim headscarf and overtly denounced the ‘compulsory’ character of such a veil—which, according to the Stasi members, can all too easily turn into a veritable object of violence: “Young people force girls to wear oppressive and asexual clothes and lower their gaze when they see a man—and, if they do not obey,

<sup>30</sup> While the Stasi Commission recommended a ban against all conspicuous symbols, religious and political, Mr Chirac concentrated only on the former and the French Parliament followed suit. See Section 2.3. for details.

<sup>31</sup> *Journal Officiel*, Loi 2004-228 du 15 Mars 2004 Encadrant, en Application du Principe de Laïcité, le Port de Signes ou de Tenues Manifestant une Appartenance Religieuse Dans les Écoles, Collèges et Lycées Publics, *Journal Officiel* n. 65 du 17 Mars 2004, 5190.

<sup>32</sup> See *Analyse du Scrutin*, in *Assemblée Nationale*, *Laïcité: Le Débat à l’Assemblée Nationale*, *Séances Publiques du 3 Au 10 Fevrier 2004 (Première Lecture)* (Documentation Française, Paris, 2004) 325-6.

<sup>33</sup> *Le Monde*, M. Chirac Prône le ‘Sursaut Républicain’ et Interdit le Voile à l’école, 19 December 2004.

<sup>34</sup> N Alsayyad & M Castells (eds), *Muslim Europe or Euro-Islam? Politics, Culture and Citizenship in the Age of Globalization* (Lexington, Oxford, 2002) 9.

<sup>35</sup> These matters will be dealt with in chapters 2.1. and 3.1. Good introductory overviews of the issue are offered by J L Ormières, *Politique et Religion en France* (Editions Complexe, Bruxelles, 2002) (esp. 11-23); M Agulhon, « Républicain à la Française », (1992) 13 *Revue de Tocqueville*, n.1, 107-118 (esp. 107-112); et H Pena-Ruiz, *Dieu et Marianne: Philosophie de la Laïcité* (PUF, Paris, 2005) (esp. 17-111).

<sup>36</sup> “*Reddite quae sunt Caesaris Caesari, et quae sunt Dei Deo*”. The New Testament, The Gospel According to Matthew, 22:21.

<sup>37</sup> In Stasi, above at note 27, 101. See also *Le Monde*, *Le Rapport de la Commission Stasi*, above at note 27, § 3.3.2.1.

are stigmatized as whores”, Mr Stasi wrote. “The Republic cannot ignore their distress call”.<sup>38</sup> Interestingly, these words are very similar to those that, a few days later, resounded within the lavishly-decorated salons of the Elysée: “We cannot accept”, President Chirac warned, “that some people, taking as an excuse a biased interpretation of the secularist principle, try to imperil these long-won values of our Republic that are the equality of sexes and the dignity of women”.<sup>39</sup> For this reason, he concluded, a new piece of legislation banning from French schools conspicuous religious symbols in general—and the Muslim veil in particular—was “obviously necessary”.<sup>40</sup>

AMERICA DISAGREES:  
THE MUSLIM VEIL AS A RELIGIOUS SYMBOL

On 30 March 2004, thirteen days after the French Parliament passed Statute 228, the US Department of Justice (DoJ) issued an urgent press release announcing its intervention in a lawsuit brought by a Muslim student who had been suspended from a public school for wearing an Islamic headscarf.<sup>41</sup> The Oklahoma School District had twice excluded the pupil on the ground that her veil infringed the Benjamin Franklin Science Academy’s dress code prohibiting headgear inside the Muskogee, Oklahoma, institution.<sup>42</sup> “Once you move the [hijab] into school”, the superintendent was reported to say, “it would bring religion into the school”.<sup>43</sup>

The US government emphatically disagreed. “As a matter of equal protection, free exercise of religion and free speech, the school district cannot do so”,<sup>44</sup> it wrote in defence of the girl, while at the same time emphasizing that the dress code had to give way to the student’s right to visibly express her faith. “Nashala’s claim involves free exercise rights coupled with expressive rights”, the DoJ submitted, “and therefore heightened scrutiny is warranted...”.<sup>45</sup> Moreover, it observed, “[t]he hijab is a pure symbol, such as the cross, the Star of David, the crescent, the swastika...or the black armband in Tinker [and] any individualized activity with regard to it...is bound to convey a message of fealty or revulsion and is ‘closely akin to pure speech’”.<sup>46</sup> Contrary to France, where it is precisely the religious nature of students insignia—and, it should be noted, nothing else—that is currently singled out for prohibition, in America such spiritual connotation contributes to strongly ensuring the highest possible legal protection, as well as its stringent enforcement by the federal government.<sup>47</sup>

As mentioned, the Oklahoma School District at first rejected the girl’s claims, but after the matter gained national and international prominence it changed its stance, accommodated the veil and added a religious exception to its dress code—a development that, as we shall see in Chapter 1.3., is typical of the few veil incidents that have arisen in the United States.<sup>48</sup> “Head coverings of any sort whatsoever will not be worn by students to class or within school buildings”, the revised policy reads, “unless...previously approved by the School Board upon written application for bona fide religious reason...”.<sup>49</sup> Following a Department of Justice suggestion, the District also agreed to implement a training programme on the amended dress code for its entire teaching and administrative staff,<sup>50</sup> implying that the school had learned its lesson and that a very different stance was going to be adopted in the future by school authorities.

<sup>38</sup> Stasi, above at note 27, 101.

<sup>39</sup> Chirac, above at note 17, 6.

<sup>40</sup> Ibid.

<sup>41</sup> US Justice Department, Justice Department Files Complaint against Oklahoma School District Seeking to Protect Student’s Right to Wear Headscarf to Public School, Washington: US Justice Department Press Release, 30 March 2004.

<sup>42</sup> “Students shall not wear...hats, caps, bandannas, plastic caps or hoods on jackets inside the [school] buildings”, the regulation read. See Hearn and USA v Muskogee Public School, Defence Briefings, Ex A, 4.

<sup>43</sup> Id. § 2.

<sup>44</sup> Id. § 1.

<sup>45</sup> Id. (“Argument”).

<sup>46</sup> Id. Part III (quoting Chalifoux and Coughatta Tribes).

<sup>47</sup> For a detailed analysis of the point, see Chapter 1.2.

<sup>48</sup> For details on the matter, see Chapter 1.3. See also Associated Press, Case Settled Over Headscarves in the Classroom in Oklahoma, 19 May 2004; and Dallas Morning News, Muslim Girl in Oklahoma Public School OK’d to Wear Headscarf, 12 November 2004.

<sup>49</sup> Hearn and USA v Muskogee Public School District, Consent Order, 3 (emphasis added).

<sup>50</sup> Id. 4.

As for the government's intervention, it was unusually vigorous and left little doubt as to the importance attached by federal authorities to individual conscience and religious freedom. The Department declared the Oklahoma lawsuit one of "general public importance"<sup>51</sup> because it concerned the crucial issue of "whether a school district can bar a Muslim student from wearing a religious scarf, known as a hijab, under the district's dress code".<sup>52</sup> "[It] cannot do so", the memo confidently stated, in what sounded like an oblique condemnation of the new French legislation, because "[n]o student should be forced to choose between following her faith and enjoying the benefits of a public education. We certainly respect local school system's authority to set dress standards and otherwise regulate their students", the American government concluded, "but such rules cannot come at the cost of constitutional liberties. Religious discrimination has no place in American schools".<sup>53</sup>

What France had prohibited as a sign promoting 'division', 'segregation' and 'exclusion',<sup>54</sup> American authorities seemed to vigorously protect with the full strength of the law—and it should be noted that this had also been the position of past US administrations, which on the matter (like their French counterparts) do not appear to split along political lines.<sup>55</sup>

FIRST HYPOTHESIS:  
RELIGIOUS HISTORY AS FIRST REASON BEHIND THE FRANCO-AMERICAN DIVIDE

As this concise synopsis suggests, the French and American approaches to the Islamic headscarf graphically highlight one of the most daunting problems facing rulers and political leaders ever since the times of Sophocles and Creon: the need to balance belief and non-belief—or, otherwise put, the need for a democratic state to make accommodations so that the rights of believers can effectively be squared with the laws of a secular state. Yet France and America also seem to have different—if not contrasting—attitudes on how to achieve that goal, for there is no doubt that Mr Chirac's speech on la laïcité would have been met with incredulous faces had it been delivered in front of an American audience, while a good portion of French people would regard the US government's commitment to religion as one more example (if not result) of that country's defective separation between Church and State.<sup>56</sup>

This brings us straight to the core questions addressed in this thesis: what are the reasons behind this difference? Why is the same religious sign interpreted and treated in such strikingly different ways? And, moreover, how can this happen in two countries that regard themselves as secular democracies<sup>57</sup> and claim the moral high ground when it comes to individual rights and civil liberties? France and the United States share the honour of having created two of the world's oldest human rights instruments—La Déclaration des Droits de l'Homme et du Citoyen (1789) and the Bill of Rights (1791)—both of which date back to the end of the eighteenth century and are universally perceived as

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<sup>51</sup> US Justice Department, *Complaint-in-Intervention in Hearn v Muskogee Public School District*, Ca N CIV 03 598-S, 30 March 2004, 3; *Motion to Intervene as Plaintiff-Intervenor in Hearn v Muskogee Public School District*, 30 March 2004, 2.

<sup>52</sup> US Justice Department, *Memorandum of Law in Support of Its Cross-Motion for Summary Judgment in Hearn v Muskogee Public School District*, 6 May 2004, 1.

<sup>53</sup> *Ibid.* As an indirect confirmation that this was a matter of principle as well as a point of law, the authorities made sure that their 'pro-veil' message was spread far and wide, insofar turning the divide between Washington and Paris into a matter of national pride. See e.g. US Justice Department, *Letter to State Governors on Religious Symbols at School*, Washington: Justice Department, 20 August 2004, 2.

<sup>54</sup> Chirac, above at note 17, 2.

<sup>55</sup> For details on the matter, see Chapters 1.3. & 2.3.

<sup>56</sup> This was for instance conveyed in graphic terms during the parliamentary debates on Statute 228/2004: "It is paradoxical that our current debate is criticized by some Western leaders like those of...the USA, where a number of decisions of the Bush administration are taken in the name of God and where certain politicians with educational responsibilities recommend, for school programs, the suppression of Darwin's theory because it rejects the truth of the Genesis. These practices are worthy of a theocracy..." See H Nayrou (PS, in favour). In *Assemblée Nationale, Laïcité: Le Débat à l'Assemblée Nationale. Séances Publiques du 3 au 10 Février 2004* (Documentation Française, Paris, 2004) 107. "France is a laïque nation", another MP, this time belonging to the centre-right ruling party, agreed. "Here, the President does not swear on the bible. Here, everyone is submitted to the laws of the Republic, not to those of God". B Bourg-Broc (UMP, abstention), In *Débats*, above at note 56, 86.

<sup>57</sup> Secular democracies in the sense that their founding constitutions (the US Bill of Rights and the French Human Rights Declaration and Constitutions) are regarded by them and by the world as the archetypes of a secular state. See Chapters 1.2 & 2.2. for details.

luminous models of freedom and liberalism.<sup>58</sup> So, one cannot help wondering, why such different perspectives?

While answering this question is no easy task, this thesis suggests that the answer lies partly in the two countries' religious past. As we shall see, history teaches that European nation-states in general—and the French one in particular—have often seen religion as an obstacle (sometimes even a threat) to their own authority. The very ideas of civic polity and social contract of the European Enlightenment did not require much commitment to a transcendental belief—and, on the contrary, somewhat feared it,<sup>59</sup> while European nation-states also very much disliked the significant temporal power still held by the Church, which in turn often condemned those states' unprecedented concentration of power and wealth. The maxim *Homo Proponit, Sed Deus Disponit*<sup>60</sup> (“Man proposes, but it is God who decides”) may have been a popular dictum within clerical circles of the time, but it hardly sat well with newborn European nation-states trying to increase their authority in a fragmented and conflict-torn world. As Thomas of Kempis pointed out, “religions are inherently revolutionary [because] they are capable of providing the ideological resources for an alternative view of public order”<sup>61</sup>—and history shows that European nation-states frequently grew uncomfortable with such an ability.

Because of a number of historical circumstances that will be considered at length in this thesis, the United States largely ignores the highly confrontational paradigm that has historically characterized Church-State relationships in Europe in general and France in particular. Whereas the French revolutionaries thought that only when religion was out of the public realm (and school) could the State flourish,<sup>62</sup> the American Founding Fathers were convinced—and, as we shall see, made it quite clear—that the exact opposite was the case and thought that religion was among the most powerful means of developing the self-governing morality required to maintain a free nation. In stark opposition to France, religious feelings have been in the past and are still today so strong in the new world that they have become embedded in the nation's identity, while in France, courtesy of the endless religious wars between the Catholic Church and the secular State, there was (and partly still is) the widespread belief that *l'égalité* can only be achieved through *laïcité*. “No law, no [religious] practice is superior to that of the République, nor can or should become an obstacle to it”,<sup>63</sup> France's Interior Minister (and currently President) Nicolas Sarkozy pointed out, in a sentence that sounded like a warning to religions. As we shall see, nothing could be further from the truth in the United States' history, practice and law.<sup>64</sup>

Nowadays the situation is of course different. This is because the balance of power between religion(s) and states has changed considerably, as have the challenges faced by modern European polities in regulating their balance. As the veil issue suggests, today's multi-cultural and multi-religious societies in both Europe and America face the challenge of having to accommodate, within one territory, the sometimes extremely varied expectations of people belonging to different faiths, while at the same time guaranteeing the respect for negative rights of non-belief such as those of atheists and agnostics. Yet there is one thing which has not changed—and this, from the point of view of European governments, is both the importance as well as the problematic character of religion. As one scholar observed, even today “[r]eligion remains one of the problems that every

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<sup>58</sup> It is interesting to note that the two reasons given by French authorities for the adoption of Statute 228/2004—secularism and women's rights—are also widely shared principles of the American legal system and political establishment. For details, see Chapters 3.2. & 3.3.

<sup>59</sup> See e.g. C Tilly, *Reflections on the History of European State-Making*, in C Tilly (ed) *The Formation of National Western States in Western Europe* (Princeton University Press, Princeton, 1975) 42.

<sup>60</sup> Originally in Thomas of Kempis, *Imitatio Christi*, I, 19, 2. Quoted in P Mastellarò, *Il Libro delle Citazioni Latine e Greche* (Mondadori, Milan, 1994) 96.

<sup>61</sup> *Id.* at xii.

<sup>62</sup> See e.g. E Burke, *Reflections on the Revolution in France* (Regnery, Chicago, 1955) 33.

<sup>63</sup> *Le Monde*, *Vers une Nouvelle Citoyenneté Française*, 2 May 2003.

<sup>64</sup> “The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual”, the US Supreme Court wrote for example in 1946. “The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State”. See *Girouard v USA*, 328 US 61, 64 (1946).

[European] nation-state ha[s] to face, [for] it is not so easy to deal with people, whether citizens or not, who think that religion is the ultimate and absolute source of morality, more ultimate and more absolute than even the state".<sup>65</sup>

This thesis will argue that French history is a prime example of the controlling tendency of European nation-states over religion—and that this is precisely what distinguishes it from the United States, where religion is an inherently 'private' matter. "There is no country in the world where...religion retains a greater influence over the souls of men than in America", Alexis de Tocqueville wrote in 1831, "and there can be no greater proof of its utility and of its conformity to human nature than that its influence is powerfully felt over the most enlightened and free nation of the earth".<sup>66</sup> This historically different (public versus private) role of religion in the two contexts, I will further suggest, is one of the reasons behind the passage of Statute 228/2004 and also partly explains the startling differences between the anaemic numbers of contemporary religious allegiance in Europe<sup>67</sup> (and particularly in France)<sup>68</sup> vis-à-vis the buoyant ones in the United States.<sup>69</sup>

The legacy of the two countries' religious histories should not be underestimated, therefore, and the first hypothesis of this book is that such inheritance plays an important role when it comes to the Franco-American divide over the veil. Yet one point should be made here as an extension of my first hypothesis: France's recent ban and strong, almost obsessive emphasis on *laïcité* should not be taken as a symbol of the almighty power of the secular state over religion but rather as the product of centuries of frustration and fierce battles between the two. Religion is—and always has been—central not only to French culture but also to French national history, and far more fiercely and dramatically than in America. This is why, I will argue, the French Establishment feels the need to rally behind the principle of *laïcité*—and this is also why, in my opinion, a comparison with the United States is so illuminating. Although for opposite reasons, in both countries religion is essential and, *pace* Mr Chirac, firmly cast in their genetic heritage—yet this leads one system to ban religious expression in public schools and fear its influence on civic life, and the other one to acknowledge its importance and protect it at all levels. The obvious and irresistible question that this thesis will try to address is: why?

#### SECOND HYPOTHESIS: ISLAMOPHOBIA AS SECOND REASON BEHIND THE FRANCO-AMERICAN DIVIDE

As if religion alone were not daunting enough, its relationship with Islamophobia risks being another, more subtle but equally demanding, source of problems—particularly for France. For if it is true, as Creon discovered more than two thousand years ago, that accommodating the spiritual and secular components of a society is one of the main challenges facing nation-states, it seems accurate to say that this is especially the case when the religion in question is Islam. There are at least two reasons for this. The first is Western (and particularly European) countries' historical uneasiness

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<sup>65</sup> G Baumann, *The Multicultural Riddle* (Routledge, London, 1999) 52.

<sup>66</sup> A de Tocqueville, *De La Démocratie en Amérique* (Gallimard, Paris, 1986) Vol. I, 431 ("L'Amérique est pourtant encore le lieu du monde où la religion...a conservé le plus véritables pouvoirs sur les âmes; et rien ne montre mieux combien elle est utile et naturelle à l'homme, puisque le pays où elle exerce de nos jours le plus d'empire est en même temps le plus éclairé et le plus libre"). Translating Tocqueville's intelligence is no easy task and I have long hesitated on whether to do so or simply reproduce the French original. For the sake of readability, I have translated, but I have left the original in the footnotes because much of his message's beauty and refinement is lost in translation.

<sup>67</sup> According to one source, the United States possesses a 'religiosity index' of almost 70%, while France has little more than 30% and other EU nations score somewhere in between. See S Huntington, *Who Are We? America's Great Debate* (Free Press, London, 2005) 91. Interesting comments are also offered by G Gallup & J Castelli, *The People's Religion: American Faith in the 90s* (MacMillan, London, 1989) 18 & 91; A Greeley, *Religious Change in America* (Harvard University Press, Cambridge, MA, 1989) 115-6.

<sup>68</sup> *Ibid.*

<sup>69</sup> "Overwhelming majorities of Americans affirm religious beliefs. When asked in 1999 whether they believed in God or a universal spirit, or neither, 86 percent of those polled said they believed in God, 8 percent in a universal spirit, and 5 percent in neither. When asked simply whether they believed in God or not, 92 percent said yes". *Id.* 86. Together with other figures of religious allegiance in the world, this leads the author to conclude that "[a]n almost global resurgence of religion [is] under way, manifest in almost every part of the world—except in Western Europe". See Huntington, above at note 67, 360.

about this faith, while the second is that, in spite of France and America being multi-cultural and multi-religious in composition, they remain preeminently Christian at heart.

No one should be in any doubt about the historical persistence of Western Islamophobia—and as we shall see shortly, the French parliamentary debates on Statute 228/2004 are an eloquent reminder of this.<sup>70</sup> As early as 1110 the renowned French epic *Chanson de Roland* described Arabs as “[t]he authors of all evil, hating God and actively seeking Satan. They eat their prisoners, betray their oaths, buy and sell their own womenfolk”.<sup>71</sup> The poet Petrarch, writing some time later, did not have a significantly better opinion when he portrayed them as “a naked, cowardly and lazy people who never grasp the steel but entrust all their blows in the wind”.<sup>72</sup> Nor, for that matter, had Ludovico Ariosto, who, in his *Orlando Furioso*, defined Muhammad as “falso e fallace”.<sup>73</sup> As time passed by and Europeans plummeted from invading power (in the Middle East) to ‘invaded’ people (in their own Europe),<sup>74</sup> contempt turned into fear—and soon became panic, nowhere better depicted than in the title of a pamphlet published in London in 1916. “Mohammed or Christ”, it reads, “An account of the rapid spread of Islam in all parts of the globe, the methods employed to obtain proselytes, its immense press, its strongholds, and suggested means to be adopted to counteract the evil”.<sup>75</sup>

This hostility is perhaps less surprising when one considers that Europe itself was made through the encounter with—and fight against—religions, particularly Islam. “It was largely in response to the Muslim threat”, one author underlined, “that Europe drew together. For centuries, the only European enterprises were joint actions against Muslims, from the Crusades of the Middle Ages to the defence of the Habsburg Empire against the Turks in the late seventeenth century”.<sup>76</sup> Despite the undeniable cultural and religious roots shared by medieval Islam and Christianity, therefore, the relationship between Islam and the West remains tense—and recent events in France and the United States bear witness to this tension. Yet in this respect, too, there seems to be a divide between France and America—a divide that, as we shall see, is important when it comes to explaining the difference over the veil issue.

In France, critics of the new legislation wondered whether the ban on conspicuous religious symbols at school is really for all religions.<sup>77</sup> “Secularism asks all religions to make an effort of adaptation”,<sup>78</sup> Mr Stasi wrote in his Report. Yet how many schoolchildren turn up to class wearing crucifixes or David stars of a “manifestly excessive dimension”?<sup>79</sup> Lila and Alma—the two girls expelled from school in 2003 because of their clothing—were Muslim, and before the new statute came into effect in 2004 no Christian or Jewish schoolboy or schoolgirl had ever been expelled for similar reasons by a French school. As the official documents accompanying the new legislation explicitly recognize (and as we shall see at length later in this thesis), the problem is therefore the Islamic headscarf, not religious symbols in general. “The important thing is to protect young girls who are obliged to wear the [Muslim] headscarf”,<sup>80</sup> one MP declared in the *Travaux Préparatoires*.<sup>81</sup>

<sup>70</sup> See Chapter 2.3. for details.

<sup>71</sup> M Frassetto & D Blanks (eds), *Western Views of Islam in Medieval and Early Modern Europe: Perception of Other* (St Martin, New York, 1999) 57-8.

<sup>72</sup> “Turchi, Arabi e Caldei/Popolo Ignudo, Paventoso e Lento/Che Ferro Mai Non Strigne/Ma Tutt’i Colpi Suoi Commette al Vento”. R M Durling (ed) *Petrarch’s Lyric Poems* (Cambridge University Press, Cambridge, 1976) 76-7.

<sup>73</sup> ‘False and fallacious’. L Ariosto, *L’Orlando Furioso* (Garzanti, Milan, 1992) 12.

<sup>74</sup> In the 16<sup>th</sup> century, at the height of its power, the Ottoman Empire spanned three continents (including Southeastern Europe) and was widely perceived by Europeans as a significant threat to their civilization. See e.g. J F Guilmartin, “Ideology and Conflict: The Wars of the Ottoman Empire, 1453–1606”, (1988) 18 *Journal of Interdisciplinary History* 4, 721–747.

<sup>75</sup> Frassetto & Blanks, above at note 71, 16.

<sup>76</sup> Alsayyad & Castells, above at note 34, 55.

<sup>77</sup> As we shall see in Chapter 2.3., not all veils are the same. The Catholic veil, for instance, does not seem to worry the French people and their politicians, and it was often accommodated in the public sphere and at school—at least before the 2004 statute on religious symbols somewhat changed the climate.

<sup>78</sup> Stasi, above at note 27, 36.

<sup>79</sup> See Chirac, *Discours*, above at note 17, 2.

<sup>80</sup> In *Analyse des Discussions Législatives et des Scrutins Publics de la Loi Encadrant, en Application du Principe de Laïcité, le Porte des Signes ou de Tenues Manifestant une Appartenance Religieuse dans les Écoles, Collèges et Lycées Publics*, available at [http://www.senat.fr/dossierleg/tc/ana\\_pjl03-209.html](http://www.senat.fr/dossierleg/tc/ana_pjl03-209.html) (at 17 May 2006).

Similarly, the Circulaire explaining the new law justified the ban with the fact that “[t]he school’s mission is to transmit the Republic’s values, among which is the equality between men and women”<sup>82</sup> (something obviously seen as irreconcilable with the Muslim veil). Finally, the Stasi Report made it crystal clear that the purpose of the ban was to redress “a number of fundamental rights of women which in our country are infringed on a daily basis”<sup>83</sup> by the Muslim headscarf, which the document explicitly defined as the expression of a “communalist’ withdrawal [repli communautaire] that is forced upon women rather than chosen”.<sup>84</sup>

Many people of Islamic faith remain sceptical about the French ban, therefore, and while they recognize that Mr Stasi spared no effort in condemning all forms of discrimination against Muslims, they are also concerned that he exclusively criticized Islam.<sup>85</sup> In addition, they point out that while the French President lectured Muslims on the importance of women’s rights<sup>86</sup> and Mr Stasi did the same in his Report,<sup>87</sup> the new law—explicitly passed in order to secure women’s equality in French society—was voted by a devastating majority of men<sup>88</sup>, none of whom was Muslim.<sup>89</sup> When it comes to understanding the veil issue in France, therefore, religion alone does not tell the whole story and it is the second hypothesis of my work that Islamophobia played a considerable role in the adoption of Statute 228/2004 and hence partly contributes to the Franco-American divide on the veil.

Needless to say, France is not alone in establishing a connection between racism and Islam, for such association has recently proved to be even more visible in America. To quote only the most noticeable example of this, in a country where racial profiling was, until 9/11, unanimously regarded as abhorrent, within weeks of the 2001 events people of Arab origins became the object of officially enforced religious and racial screening at national airports;<sup>90</sup> racial attacks against them increased threefold;<sup>91</sup> the issuing of visas to them collapsed by almost 60%;<sup>92</sup> 1,200 immigrants of either Arab extraction or Muslim faith were detained by the Justice Department for anti-terror investigations;<sup>93</sup> 5,000 young men with Middle Eastern traits were questioned in connection with the September 11 events (and were subsequently released because no such connection existed);<sup>94</sup> and, more generally, Muslims were accused of being terrorists, fanatics and extremists, while the Koran was often condemned as a dangerous book preaching intolerance.<sup>95</sup>

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<sup>81</sup> The parliamentary debates on Statute 228/2004 confirm this impression. Indeed, one very clear point of convergence among MPs was that although the new law officially dealt with religious symbols at school, the real problem concerned the Muslim headscarf. See Part 2 for details.

<sup>82</sup> Journal Officiel, Circulaire Relative à la Mise en Oeuvre de la Loi n.2004-228 du 15 Mars 2004 Encadrant, en Application du Principe de Laïcité, le Port des Signes ou de Tenues Manifestant une Appartenance Religieuse dans les Écoles, Collèges et Lycées Publiques, in *Journaux Officiels, Application du Principe de Laïcité*, above at note 17, 324-5.

<sup>83</sup> Stasi, above at note 27, 101.

<sup>84</sup> Ibid, Title of § 3.3.1. “Today, secularism is indivisible from the principle of equality of sexes”, the Report insisted. Ibid.

<sup>85</sup> See e.g.: “In certain communities, particularly the Turkish, African and Pakistani ones, marriages are imposed” (Id. 101); “Young girls are also victims of other forms of violence such as sexual mutilations, polygamy, repudiation” (Id. 101).

<sup>86</sup> “...these long-won values of our Republic which are the equality of sexes and the dignity of women...” See Chirac, above at note 17, 8.

<sup>87</sup> “The French Republic cannot accept attempts to undermine the equality of sexes”. See Stasi, above at note 27, 128 (§4.1.2.2).

<sup>88</sup> Women make up only 13% of the total number of French MPs, and when it comes to sexual equality in parliament, France ranks 21<sup>st</sup> out of the 25 EU countries—and 84<sup>th</sup> in the world, behind Niger. See *L’Express, Femmes Politiques de Tous Pays*, 28 November 2006. Also, it should be recalled that, in France, until 1960 married women could not issue cheques without their husband’s assent. See J Baubérot, *Voile, École, Femmes, Laïcité*, in J Baubérot, D Bouzat, J Costa-Lascoux & A Hounziaux, *Le Voile, Que Cache-t-il?* (Éditions de l’Atelier, Paris, 2004) 59.

<sup>89</sup> Out of an Islamic population of five million (or 10%) and a 800-strong legislature, the French parliament has only two Muslim MPs, both of whom were elected in 2004. See S Giry, “France and Its Muslims”, in (2006) *Foreign Affairs*, September-October Issue, 97.

<sup>90</sup> See *The Guardian*, *Arabs and Muslims to be Fingerprinted at US Airports*, 2 October 2002.

<sup>91</sup> F Ajami, *America and the Arabs, in 9/11 and After*, (2002) *Foreign Affairs*, November/December Issue, 22.

<sup>92</sup> *The Economist*, *Beware Students*, 23 August 2003.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> W J Perry, *Preparing the Next Attack*, (2002) *Foreign Affairs*, November/December Issue. For a detailed analysis of post-9/11 anti-Islamic attacks in America, see Council on American-Islamic Relations (CAIR), *Unequal Protection: Executive Summary* (CAIR, New York, 2005); Arab-American Institute, *Healing the Nation: The Arab American Experience After September 11* (AAI, Washington, 2005); Arab-American Institute, *Profiling and Pride: Arab American Attitudes and Behaviours Since September 11*, (AAI, Washington, 2002). Interesting academic insights are in D A Ramirez, J Hoopes & T L Lai Quinlan, “Defining Racial Profiling

Despite all this, as I will endeavour to show in Part 1 of this thesis, it is noteworthy that the events of 9/11 appear to have had little or no negative impact in America on the question of the Muslim veil. Contrary to France, where the 2001 events seem to have accentuated—but by no means initiated<sup>96</sup>—various forms of anti-Muslim tensions that, critics argue, together with domestic events consciously or unconsciously contributed to the 2004 law,<sup>97</sup> in America the Muslim headscarf has been—even during the legal chaos that followed 9/11—the object of a forceful and committed protection by US law and policy.<sup>98</sup> This, it will be argued, is directly related to America’s unwavering attachment to religious freedom.<sup>99</sup>

THIRD HYPOTHESIS:  
LEGAL v HISTORICO-POLITICAL DIVIDE ON VEIL ISSUE

As the previous pages suggest, France and America seem to offer different—if not opposite—approaches to the issue of the Muslim veil and it is precisely such divergence that makes the comparison intriguing. Not only does this apparent asymmetry—prohibition of the veil in French schools versus protection in American ones—allow us to understand the way two modern democracies deal with individual conscience, it also suggests that different outcomes are indeed possible and that conciliation between human and divine law could well depend on the side of the planet one lives on. Historically, politically and legally, therefore, America and France seem to be ideally positioned to highlight this potential contrast—yet caution must be exercised at all times, because it is the very nature of comparisons (as well as their most important asset) to generate unexpected results and unearth similarities where differences had at first been apparent.<sup>100</sup>

This thesis is in many respects an example of the potentially surprising effects of comparisons—and of what Professors Zweigert and Kötz called “the basic rule of comparative law”: the *praesumptio similitudinis* according to which “different legal systems give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure and style of operation”.<sup>101</sup> Although this may sound surprising given that the Muslim headscarf is currently prohibited in French schools but allowed in the US, the veil issue is, I will argue, a startling example of this rule. Despite the fundamental historical and political differences between the two countries—differences that, as we shall see, invest the very role of religion as well as the ways France and America deal with ‘diversity’—their legal attitudes towards the veil have much in common, particularly in the period preceding the passage of French Statute 228 on religious symbols

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in a Post-September 11 World”, (2003) 40 *American Criminal Law Review* 1195; D A Harris, “An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001”, (2004) *Utah Law Review* 913; L Braber, “Korematsu’s Ghost: A Post-September 11<sup>th</sup> Analysis of Race and National Security”, (2002) 47 *Villanova Law Review* 451; K R Johnson, “Racial Profiling After September 11: The Department of Justice Guidelines”, (2004) 50 *Loyola Law Review* 67; L Cainkar, “Special Regulation: A Fervour for Muslims”, (2003) 7 *Journal of Islamic Law and Culture* 73; M Wolfe, “As the Smoke Began to Clear: Reflections on Islam in America after September 11<sup>th</sup>”, (2002) 7 *Journal of Islamic Law & Culture* 165.

<sup>96</sup> By saying that 9/11 has had a different impact on the Muslim veil issue in America and France I do not mean to say that Statute 228/2004 would not have passed without the September 2001 events—my impression is that it would have done. The point I will make is that 9/11 contributed to France’s veillophobia (and inflated this country’s scepticism towards religion) but did not affect America’s commitment to religious freedom.

<sup>97</sup> For details, see Chapter 2.3.

<sup>98</sup> As we shall see in Chapter 1.3., one of the few exceptions seems to have been the much-criticized *Freeman v Florida*, Case 2002-CA-2828 (2003), 13, where a Florida judge forbade a woman to appear in a burqa on a driving licence picture on the ground that “[t]oday is a different world than it was 20-25 years ago” and “[i]t would be foolish not to recognise that there are new threats to public safety, including both foreign and domestic terrorism, and increased potential for ‘widespread abuse’”. On the case, see P T Currier, “Freeman v State of Florida: Compelling State Interests and the Free Exercise of Religion in Post September 11<sup>th</sup> Courts”, (2004) 53 *Catholic University Law Review* 913; K A Sukinik, “Civil Liberties in the Face of 9/11: The Case of Sultaana Freeman”, unpubl.paper (2004). This case was confirmed in 2005 by the Fifth District of the Florida Court of Appeal. See *Sultaana Lakiana Mike Freeman v Department of Highway, Safety & Motor Vehicles*, Case n. 5D03-2296, July Term 2005 (unreported).

<sup>99</sup> See, in particular, Part 1 and Conclusion.

<sup>100</sup> As has been observed, “[c]omparative law procures the gradual approximation of viewpoints, the abandonment of deadly complacency and the relaxation of fixed dogma. [I]t permits us to catch sight, through the differences in detail, of the grand similarities and so to deepen our belief in the existence of a unitary sense of justice”. K Zweigert & H Kötz, *An Introduction to Comparative Law* (Clarendon Press, Oxford, 1995) 3.

<sup>101</sup> *Id.* 36.



at school—a piece of legislation that, I will maintain, is responsible for a good portion of the French and American split on the issue. While the two countries' historical heritage and political outlooks are remarkably dissimilar, this thesis will argue that their laws are not as far apart as Statute 228 would suggest, and display, at least in the pre-2004 era, a number of interesting similarities.

Be that as it may, several words of caution are necessary. Comparing the French and American approaches to religion and the veil is no easy task, because the French seem to take pleasure in distancing themselves from the Americans—and vice versa. In particular, the French politicians refer to the 2004 legislation as an *exception française* and have happily used popular opposition against the veil to achieve a change in law that according to a number of observers goes against settled legal principles to the point of being constitutionally doubtful.<sup>102</sup> The headscarf issue possesses, in other words, such a strong political significance—and, as I have suggested, is so intimately connected with the different religious histories in France and America<sup>103</sup>—that the comparativist must take into account a wide variety of non-legal factors, particularly history and politics. So, in addition to the well-known and 'traditional' risks of comparative law—language barriers,<sup>104</sup> errors in law, civil versus common law divide,<sup>105</sup> different institutional and legal practices and different degrees of litigiousness—one should also add the peril of being superficial, for one cannot possibly deal with all the issues involved in the matter of the Muslim veil in an exhaustive manner. This is particularly the case since comparative law has itself been accused of vagueness. When, in 1993, Professor Alan Watson published his controversial book on comparative methodology, for example, he included a chapter on the "Perils of Comparative Law"<sup>106</sup> and prominently listed among them the fact that "a comparative lawyer is bound to be superficial".<sup>107</sup>

In a certain sense, therefore, I find myself in the unenviable position of being obliged to take into account a plethora of different perspectives (because it is impossible to understand the veil matter without considering a number of non-legal factors) while at the same time being acutely aware that, given the interdisciplinary character of the subject, the time constraints,<sup>108</sup> the limited financial resources,<sup>109</sup> the geographical restrictions<sup>110</sup> and the tight word-limit assigned to it, this work will not and cannot be a comprehensive treatment of the veil issue in France and America but rather an introduction to it.<sup>111</sup>

<sup>102</sup> See Chapter 3.1. (and especially Sections 3.3.6. & 3.3.7.)

<sup>103</sup> "History clarifies the legal rules", one author observed. See B S Markesinis, *The Comparatist (or a Plea for a Broader Legal Education)*, in B S Markesinis, *Foreign Law and Comparative Methodology: A Subject and a Thesis* (Hart Publishing, Oxford, 1997) 27.

<sup>104</sup> The art of translation is always a dangerous one, but this is particularly the case when an author, whose mother tongue is neither English nor French, is carrying out a difficult comparison between a common law and a civil law country concerning a statute, the language of which is highly ambiguous even in the French original. While extra care has been taken, therefore, mistakes are perhaps unavoidable. I have tried to keep them to a minimum by using as much French as I could.

<sup>105</sup> I was educated in a civil law system at the undergraduate level and in common law countries in my postgraduate studies. This, of course, by no means solves the 'comparative riddle'—it just means that I am acutely aware of it.

<sup>106</sup> A Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, Athens, 1993) 10.

<sup>107</sup> F H Lawson, *The Field of Comparative Law*, in Watson, above at note 106, 10. Professor Watson also added the likelihood of errors in law and emphasized that "at times it is as if a comparative anatomist were to say that lions and ants are similar and are at a comparable level of development since both are warm-blooded, have six legs and are always winged". Watson, above at note 106, 12. To this, one could respond with the words of another famous (and more enthusiastic) comparativist (couple): "Watch out, be brave and keep alert". Zweigert & Kötz, above at note 100, 33.

<sup>108</sup> Thirty six months.

<sup>109</sup> I have greatly benefited from a University of Auckland International Doctoral Scholarship covering tuition fees and living expenses. I was also lucky enough to be provided with a travelling grant from the University of Auckland Faculty of Law which covered travelling and living expenses during my stay at the Institut d'Etudes Politiques in Paris. Because of time, financial and other limits—and because most US materials are, unlike the French ones, readily available in New Zealand—I did not conduct primary research in America. This, together with the fact that it is France which is the 'odd-one-out' when it comes to Muslim headscarves, partly explains this thesis's emphasis on the French over the American context.

<sup>110</sup> Although every effort has been made to locate materials anywhere they could be found, and with the exception of my research trip to Paris, this thesis was carried out on the basis of the materials available in New Zealand during the years 2004-2007. It is updated to March 2007.

<sup>111</sup> As a consequence of the time and space constraints (mentioned in the previous footnote) and of the fact that this is largely a legal endeavour, the thesis will regrettably ignore highly interesting issues such as the religious and political significance and meanings of the veil and other practices of veiling in Islam and Christianity; the relevance of the Muslim headscarf in political Islam (especially in Afghanistan and Turkey); the theological discussions on whether the Muslim veil is religiously mandated by the Koran vis-à-vis the Bible; and the question of whether veiling is an inherent symbol of sexual inferiority and is irreconcilable with women's rights.

While this is certainly a drawback, the answer to the multidisciplinary issue may lie in acknowledging that legal developments do not happen *in vitro*—and that, as it has been observed, “the craft of law is not practiced, and should not be studied, in a vacuum”.<sup>112</sup> Moreover, an interdisciplinary approach is nowhere more necessary than in the issue of the Islamic headscarf, an area where history, law and politics converge in a complex but fascinating manner. Consequently, I make no apology for taking into account the historical and political components of the matter alongside the legal ones, for, as we shall see, it is precisely the relationship between these three that make the whole comparison worthwhile.

## THE VOYAGE

The issues highlighted in this introduction lie at the heart of my work. As the reader will appreciate, they present formidable difficulties. Formidable, firstly, because religion can easily sound absolute and has the potential to make everyone an outsider, to make everyone a target. Formidable, secondly, because religion is not based on ‘reason’ but on ‘revelation’, so the law cannot but have problems in dealing with the dilemmas of the spirit, as Sophocles presciently cautioned more than two thousand years ago. And formidable, lastly, because religion is often the first victim of politicization—and, historically, has been used to achieve goals that had very little to do with the delights of the spirit and the message of the holy books (the Crusades, the Inquisition and 9/11 are cases in point). The Muslim veil, this thesis will argue, is a further example of such politicization and this is precisely what makes it so complex but at the same time so interesting.

The structure of the book will reflect both this complexity as well as the inter-disciplinary nature of the headscarf issue. After this “Introduction”, “Part One”—dedicated to the American experience—will begin with a historical overview of the salience and substance of religion in the formation of the United States as a nation-state (1.1.). As we shall see, this historical perspective is indispensable in order to understand and put into context the various problems of religious freedom that so often arise in American law as well as to appreciate the extent to which US religious law reflects such historical developments (1.2.). After carrying out this analysis, attention will be drawn to the treatment of the Muslim headscarf within the US legal system and to the politico-legal issues connected to it (1.3.).

“Part Two” deals with the French experience and follows the same pattern: an opening historical part (2.1.) followed by a discussion of the place of religion in French law (2.2.) and a systematic treatment of the veil issue (2.3.). The third and last part will be devoted to a comparison between the American and French systems (3.1.) and, in particular, to an analysis of their similarities and differences before (3.2.) and after (3.3.) the passage of the 2004 French statute on religious symbols at school. The “Conclusion” contains a general assessment of the differences and similarities between these two countries’ treatment of the veil. It will argue that it is at the level of the law (as opposed to religious history and political philosophy) that the two nations’ attitudes are the most alike. That a veritable French Revolution intervened in 2004—and that the two legal systems have since taken an opposite path to the veil matter—does not make their pre-2004 points of convergence less momentous and indeed renders the comparison even more intriguing.

Before commencing, a word on ‘personal viewpoint’ should be mentioned—both as a disclaimer and out of intellectual honesty. Although I was originally brought up as a Catholic, I regard myself as neither a ‘religious’ nor an ‘irreligious’ person—agnostic is the (admittedly artificial) category that perhaps best describes my approach to spirituality. As a consequence, my interests in the issues raised in this thesis do not stem from personal circumstances or religious commitment but from a ‘holistic’ approach to human rights that regards spirituality in general and religion in particular as two of mankind’s most fundamental freedoms, while at the same time acknowledging that the Church-State separation offers the best—if regrettably imperfect—way to guarantee such freedoms. Furthermore, as a cosmopolitan who has studied and lived in several countries in Europe, America and Asia and who has conducted this research on France and America while based in New Zealand, I

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<sup>112</sup> B S Markesinis, *Foreign Law and Comparative Methodology: A Subject and a Thesis*, above at note 103, 7.

cannot help seeing the question of the Muslim headscarf through the prism of multiculturalism and national identity, and this work will partly reflect such an outlook.

Approaching religion as an ‘outsider’ may have its advantages, but it also has a number of drawbacks—the most obvious of which being perhaps that a ‘religious’ person is likely to disagree with certain parts of this work or even perceive—despite all efforts to the contrary—a certain lack of understanding of (or even ‘sensitivity’ toward) religious feelings. This may or may not be inevitable (i.e. it may or may not be my fault) but the reader should rest assured that, whatever its shortcomings, this thesis has been carried out in good faith and with as open an outlook as my abilities allow.

As we begin to consider and put side by side the American and French approaches to religion and the Muslim veil, it is suggested that the reader starts this journey by keeping in mind Antigone’s last words in front of Creon: “If I now seem to you to have acted foolishly, perhaps I am convicted of folly by a fool”.<sup>113</sup> It will figuratively be the purpose of this thesis to see whether it is Antigone’s (religious) conscience or Creon’s (worldly) edict that two secular and liberal democracies like the United States and France regard as foolish—and the first place to look for answers is history.




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<sup>113</sup> Sophocles, above at note 3, 35 (lines 431-2).

Part 1

# United States of America

## Chapter 1.1.

# The Place of Religion in American History

### 1.1.1. AMERICA'S 'SPECIAL RELATIONSHIP' WITH RELIGION

America's connection with religion has historically been close and complex—and is still today the source of fierce debates. The polarization on the issue is multifaceted but usually involves clashes between those who depict the historical foundations of the country as eminently religious (read Christian) and its population as particularly devout,<sup>1</sup> and those who claim that America is and has always been a secular state with secular institutions—and that this is exactly what makes it special.<sup>2</sup> “Our civilization and our institutions are emphatically Christian”, an American judge—proponent of the first school of thought—wrote in 1892. “From the discovery of this continent to the present hour”, another wrote, “there is a single voice making the affirmation...that this is a Christian nation”.<sup>3</sup> “It is not true that the Founders designed a Christian Commonwealth”,<sup>4</sup> representatives of the second current respond. “The US Constitution... is a godless document. Its utter neglect of religion was no oversight; it was apparent to all”.<sup>5</sup> The highly political character of this issue—and the current identification of these two approaches with the two major parties in American politics—is not conducive to a composed debate, but, on the contrary, heightens sensibilities and considerably complicates the situation to the impartial observer.<sup>6</sup>

Both these perspectives contain elements of truth but, like most generalizations, fail to acknowledge that the reality is not as clear-cut as it appears—and they equally neglect that a distinction should be made between the American nation (or community of people) and the American state (or political institution).

When Alexis de Tocqueville, a French jurist-turned-politician, sailed to the United States in 1831 to study the democratic institutions of the newborn country, he was surprised by the role played by religious conviction in those distant lands—and even more so by its intimate connection with democracy. “In the United States”, he wrote in *De La Démocratie en Amérique*, “religion does not only inform people's habits, it even extends its empire on their way of thinking”.<sup>7</sup> This was noteworthy not because Europe or France lacked sufficient attachment to

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<sup>1</sup> See e.g. C M Andrews, *The Colonial Period of American History: The Settlement* (Yale University Press, New Haven, 1934), vol.I; H Mumford Jones, *America and French Culture*, (University of North Carolina Press, Chapel Hill, 1927); S L Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Devotion* (Anchor Books, New York, 1994).

<sup>2</sup> See I Kramnick & L Moore, *The Godless Constitution: The Case Against Religious Correctness* (Norton, New York, 1996); C Berkin, *The Brilliant Solution: Inventing the American Constitution* (Harcourt, New York, 2002); S Rapp, *God's Country: A Case Against Theocracy*, (Haworth Press, New York, 1991).

<sup>3</sup> In W Safran, *The Secular and the Sacred: Nation, Religion and Politics* (Frank Cass, London, 2003) 13.

<sup>4</sup> Kramnick & Moore, above at note 2, 143.

<sup>5</sup> *Id.* 27.

<sup>6</sup> On religion's politicization in America, see especially D Chidester, *Patterns of Power: Religion and Politics in American Culture* (Prentice Hall, Englewood Cliffs, NJ, 1988); D Easton, *A System Analysis of Political Life* (Wiley, New York, 1965); A J Reichley, *Religion in American Public Life* (Brookings Institution, Washington, 1985); R F Thiemann, *Religion in Public Life: A Dilemma for Democracy* (Georgetown University Press, Washington, 1996); K D Wald, *Religion and Politics in the United States* (St Martin's Press, New York, 1987); C Strout, *The New Havens and the New Earth: Political Religion in America* (Harper & Row, New York, 1974); G Wills, *Under God: Religion in American Politics* (Simon & Schuster, New York, 1990); G C Layman, *The Great Divide: Religious and Cultural Differences in American Party Politics* (Columbia University Press, New York, 2001); and K Phillips, *The Cousins' Wars: Religion, Politics and the Triumph of Anglo-America* (Basic Books, New York, 1999).

<sup>7</sup> «Aux États-Unis, la religion ne règle pas seulement les mœurs, elle étend son empire jusque sur l'intelligence». A de Tocqueville, *De La Démocratie en Amérique* (Gallimard, Paris, 1986) Vol. I, 434.

religion—quite the contrary, since most of Europe’s wars had historically been religious wars. In Tocqueville’s eyes the problem was that, whereas religion in the United States meant freedom and democracy, in Europe it meant tyranny and despotism. “In France, I had seen the spirit of religion and the spirit of freedom marching almost invariably in opposite directions”, he wrote. “Here [in America], I have found them intimately linked to each other: they both reign on the same soil”.<sup>8</sup> The reason for this, the Frenchman concluded, was the remarkable separation of Church and State in America, in contrast to their close and at times neurotic relationship in Europe.<sup>9</sup> “Everyone [in America] attributes their country’s quiet empire of religion mainly to the complete separation of Church and State”, he wrote. “I am not afraid to say that, during my stay in America, I have not met one person, religious or secular, who does not agree with this point.”<sup>10</sup>

Tocqueville wrote only forty years after the French and American Revolutions and at a time of considerable political and religious turmoil in France,<sup>11</sup> yet his analysis is still valid to the extent that it graphically depicts one of America’s biggest contradictions. What is arguably the most religious democratic society in the world<sup>12</sup> is also the one that has historically done most in order to keep its institutions apart from its spiritual beliefs—and that has consequently gone farthest in terms of protecting religious freedom.<sup>13</sup> When, in 1829—barely two years before Tocqueville’s visit—the US Senate emphasized America’s uniqueness, for example, it did so precisely on the ground of the country’s relationship with religion: the rest of the world was in “religious bondage”,<sup>14</sup> the Senate reported, and Europe’s “scenes of persecution”<sup>15</sup> and “cries of burning victims”<sup>16</sup> were a painful reminder of precisely what path America should not take when it comes to religion. “Religious zeal”, the Report concluded, “enlisting the strongest prejudices of the human mind..., excites the worst passions of our nature under the delusive pretext of doing God’s service”.<sup>17</sup> Look at Europe, the document seemed to say, and you will understand why America is special.

Things have not always been that way, however, and freedom of religion has not always been an American characteristic. As the following section will suggest, it certainly was not inborn.

## 1.1.2. RELIGION, THE PURITAN FATHERS & THE ORIGINS OF THE AMERICAN NATION

### 1.1.2.1. From England to the New World

The connection between religion and the founding of America as a nation—or community of people—is intimate, and some historians go as far as to say that the United States was born out of religious dissent.<sup>18</sup>

<sup>8</sup> «J’avais vu parmi nous l’esprit de religion et l’esprit de liberté marcher presque toujours en sens contraire. Ici, je les retrouvais intimement unis l’un à l’autre: ils régnaient ensemble sur le même sol». Id. 437.

<sup>9</sup> In this respect, see Tocqueville, above at note 7, vol. I, 434-440; vol. II, 204.

<sup>10</sup> «Tous attribuaient principalement à la complète séparation de l’Église et de l’État l’empire paisible que la religion exerce en leur pays. Je ne crains pas d’affirmer que, pendant mon séjour en Amérique, je n’ai pas rencontré un seul homme, prêtre ou laïque, qui ne soit tombé d’accord sur ce point». Tocqueville, above at note 7, 437.

<sup>11</sup> For Tocqueville’s views on his times, see also his *De l’Ancient Régime et la Révolution* (Gallimard, Paris, 1967). An interesting analysis of the French thinker’s complexities is H Brogan, *Alexis De Tocqueville: Prophet of Democracy in the Age of Revolution* (Profile, London, 2006). A thoughtful review of this book is C Kidd, “A Matter of Caste” (2007) 29 *London Review of Books*, n. 6.

<sup>12</sup> This is for example the conclusion reached by J Perry, *Human Values and Beliefs: A Cross Cultural Sourcebook—Political, Religious, Sexual and Economic Norms in 43 Societies, Findings from the 1990-1993 World Values Survey* (University of Michigan Press, Ann Arbor, 1998). This survey is mentioned, among others, in S P Huntington, *Who Are We? America’s Great Debate* (Free Press, London, 2005) 91.

<sup>13</sup> On the point, see Safran, above at note 3, 13.

<sup>14</sup> Kramnick & Moore, above at note 2, 139-40.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> S E Ahlstrom, *A Religious History of the American People* (Yale University Press, New Haven, 1972) 37; N Cousins, *In God We Trust: The Religious Beliefs and Ideas of the American Founding Fathers* (Harper, New York, 1958) 44; D J Boorstin, *The Americans: The Colonial Experience* (Random House, New York, 1958) 3ff; O P Chitwood, *A History of Colonial America* (Harper, New York, 1961) 32ff.

When, in 1558, Queen Elizabeth I ascended to the throne of England, she saw it as her very first priority to avoid the religious wars that were plaguing neighbouring France and threatening her own kingdom. In order to ensure stability and circumvent the ferocious and at times bloody religious confrontations that had characterized the reign of the two previous Tudor monarchs, she re-established the Church of England as the official faith of the Empire and, in 1571, she pushed through parliament an Act of Uniformity that called for “one uniform order of common service and prayer, and of the administration of sacraments, rites and ceremonies in the Church of England”.<sup>19</sup> She successfully avoided open religious confrontation, but a number of Protestant dissidents found it increasingly hard to live with what came to be known as the ‘Elizabethan settlement’—supporting the Church of England in public worship in exchange for liberty of conscience in private beliefs. A number of them, as a consequence, decided to flee England and its perceived religious oppression and sail to the newly discovered territories across the Atlantic, in quest of a virgin land where they could implant their own religious communities. They were quickly followed by merchants, adventurers and other escapees who varied in spiritual allegiances and other respects, but a substantial number of whom had in common religious enthusiasm and the desire to establish new communities that reflected it.<sup>20</sup>

The English Crown soon came to realize the economic and political significance of such an influx of people, and before long it began encouraging emigration and making use of joint stock companies, entrepreneurs and individual proprietors as colonizers of the new land. Groups of departing settlers were constantly reminded that their mission was not only based on God’s will but also on the monarch’s wishes—and that their enterprise was thus supported both by the Church and the State. “[King James I]”, Anglican Minister William Symonds told a group of departing settlers, “in whom is the spirit of his great ancestor Constantine, the pacifier of the world and planter of the Gospel in places most remote, desireth to present this land a pure virgin to Christ”. The gain for the English monarchs went far beyond financial profit, however, for colonization proved an extremely effective way to counter Catholic Spain’s parallel migration to the newly discovered continent.<sup>21</sup> As one author sums it up, “[r]eligion in Tudor England was more than personal piety; it was power politics. And planting the Protestant faith in America was motivated by more than evangelical zeal; it was an instrument for checking Spain’s expanding power”.<sup>22</sup>

Between 1607 and 1732, thirty-two colonies were established in this way by English settlers in the new lands. Apart from its geopolitical significance, the arrival of English escapees on the American shores was a highly symbolic event—and also an eminently religious and emotionally-charged one. “They went to the new world as emissaries of Christ and subjects of their king”,<sup>23</sup> one author observed. Leaving the known for the unknown, and taking upon them severe risks because of the long and perilous trip, these people were convinced of their divine mission—spreading the word of God to the new world and building a novel political and religious entity founded on His words and example. While “[i]n 1492 Columbus had purported to represent the one and holy Catholic Church and thus claimed America for the Christian faith”, one author commented, “English settlers vowed to make their settlements strongholds of the ‘true’ church, Protestant Christianity”.<sup>24</sup>

Before leaving England, a group of travellers explicitly spelt out the reasons for their journey and defined the contours of what they believed to be nothing less than a Covenant with the Almighty: “God hath taken us to be His after a most strickt and peculiar manner”, they solemnly declared; “wee are entered into Covenant with Him for this worke, wee have taken out a Commission...Now if the Lord shall please to heare us, and bring us in peace to the place wee desire, then hath hee ratified this Covenant and sealed our Commission, [and] will expect a strickt performance of the Articles

<sup>19</sup> F Lambert, *The Founding Fathers and the Place of Religion in America* (Princeton University Press, Princeton, 2003) 40. On the point, see also K Phillips, *The Cousins’ War: Religion, Politics and Triumph of Anglo-America* (Basic Books, New York, 1999).

<sup>20</sup> “One main end of all these undertakings”, one investor in the new enterprise commented, “was to plant the gospel in these dark regions of America”. Lambert, above at note 19, 73.

<sup>21</sup> Chitwood, above at note 18, 32ff; P Miller, *Did the Puritans Start It All? Errand Into Wilderness*, in J Butler & H S Stout, *Religion in American History: A Reader* (Oxford University Press, Oxford, 1998) 27.

<sup>22</sup> Lambert, above at note 19, 39.

<sup>23</sup> *Ibid.* On the point see also K Fischer & E Hinderaker, *Colonial American History* (Blackwell, Oxford, 2002) 5ff & 29ff.

<sup>24</sup> *Ibid.*

contained in it".<sup>25</sup> The length and severity of the journey meant that a great portion of them never made it to the New World, yet this added to the survivors' feeling that it was truly a biblical mission that they had undertaken—something akin to the Exodus of the Holy Books. Like the Jews who fled Egypt in search for the God-promised land of Israel, therefore, the Puritan Fathers fled England with the conviction that they were chosen by God for a new mission. The Almighty having taken them safely to the new world, they believed, they were bound by the Covenant to establish a society governed by divine laws.

### 1.1.2.2. Early-American Colonies and Marriage of Church and State

This is exactly what happened in the majority of the newly-established colonies, where religion and politics manifestly overlapped. The 'Covenant with God'—so the colonists believed—bound not only the settlers to the Almighty but also every single member of the community to each other. This meant that, to avoid God's ire against the whole congregation, the enforcement of that legal and moral pact had to be strict and uncompromising.<sup>26</sup> "The Lord has given us leave to draw our own articles", John Winthrop, the leader of the Massachusetts puritans, had unequivocally stated before leaving England—"[but] we have promised to base our actions on these ends...If we neglect to observe these articles...the Lord will surely break out in wrath against us and be revenged of such a perjured people, and He will make us know the price of the breach of such a covenant".<sup>27</sup>

The result was, with few exceptions and at least at the outset, religious intolerance.<sup>28</sup> The puritans had a divine mission to accomplish and they made sure that people either conformed to the rules or left. Moreover, these rules were strict: "...[E]veryone had to attend church", one author wrote, "people had to live in a family setting rather than singly, everyone had to learn to read in order to read the Bible, their personal behaviour and dress were carefully regulated, and they were expected to monitor each other's moral behaviour".<sup>29</sup> The 'City-Upon-A-Hill' had to be a sparkling and uncontaminated model of Christian faith and moral rectitude—in other words, a symbol of what a people can achieve under the guidance of God. It is therefore unsurprising that its inhabitants were not particularly open-minded towards other religions. As has been aptly observed, "[t]he puritans did not come to the new world to practice religious toleration; they came to practice their own religious views. [And they] did not believe in religious tolerance...They believed that only the truth should be heard and that it was dangerous and immoral to allow false religious ideas to be expressed".<sup>30</sup>

Although each colony's experience varied according to the people who settled it, the rigorous and messianic approach of the 'City-Upon-A-Hill' soon translated into religiously-biased policies. Virginia was the first case in point.<sup>31</sup> Founded in 1607 and chartered by King James as a Christian mission in order to propagate the "Christian religion to such people as yet live in darkness and miserable ignorance of the true knowledge and worship of God",<sup>32</sup> Virginia's colonization is an example of the fact that religious tolerance has not always been an American characteristic—and that it was certainly not innate. When the new Governor, Lord De La Warr, arrived in Virginia in 1610, he immediately issued an order making it clear that correct religious practice was not a private and voluntary matter of conscience—it was a civic duty. "I do strictly commaund and charge all Captaines and Officers", he wrote, "to have a care that the Almightye God be duly and daily served...and that such, who shall often and willfully absent themselves, be duly punished according to the martial law

<sup>25</sup> Kramnick & Moore, above at note 2, 139-40.

<sup>26</sup> On the point, see D F Hawke, *Everyday Life in Early America* (Harper & Row, New York, 1988) 101ff. See also below in the text.

<sup>27</sup> Lambert, above at note 19, 78.

<sup>28</sup> See Fischer & Hinderaker, above at note 23, 39ff.

<sup>29</sup> D Chidester, *Patterns of Power: Religion and Politics in American Culture* (Prentice-Hall, Eaglewood Cliffs, NJ, 1988) 34.

<sup>30</sup> M Corbett & J M Corbett, *Politics and Religion in the United States* (Garland, New York, 1999) 35. See also on the point Boorstin, above at note 18, 3; and N O Hatch, *The Democratization of American Christianity* (Yale University Press, New Haven, 1989); and W McLoughlin (ed) *The American Evangelicals, 1800-1900: An Anthology* (Harper & Row, New York, 1968).

<sup>31</sup> See J P Greene, *Negotiating Authorities: Essays in Colonial Political and Constitutional History* (University of Virginia Press, Charlottesville, 1994) 238ff. But see also A Porterfield (ed) *American Religious History* (Oxford University Press, Oxford, 2002) 193.

<sup>32</sup> Lambert, above at note 19, 46.



in that case provided”.<sup>33</sup> Things did not change with the advent of a legislative assembly, and in 1632 the General Legislature of Virginia passed a law—religious order is perhaps a more appropriate term—providing that “there be a uniformitie throughout this colony both in substance and circumstance to the cannons & constitutions of the Church of England as neere as may bee and that every person yield readie obedience unto them uppon penaltie of the paynes and forfeitures in that case appointed”.<sup>34</sup>

Virginia was no means an isolated case, and Massachusetts and Connecticut are other examples of the overwhelming role played by religion in the organization of the new colonies. Founded in 1629 in order to establish a Christian Commonwealth, Massachusetts was the land of John Winthrop—the very man who coined the idea of the ‘City-Upon-A-Hill’ and who spelled out the contents of the ‘Covenant with God’.<sup>35</sup> Like the Virginians, the Massachusetts Puritans emphasized from the very beginning that their holy experiment was not for everyone and that strict rules applied as to religious observance—all in the name of the divine pact. As a consequence, Catholics and other dissenters like Anglicans and Quakers were explicitly banned from the colony and practices such as witch trials, fines against Anabaptists, exile of Antinomians and physical punishment of heretics—including amputation of ears and boring holes in tongues with hot irons—were by no means uncommon.<sup>36</sup> “To Puritans”, one author observed, “intolerance in the name of Christian purity was not only defensible but mandatory for a covenanted people”,<sup>37</sup> because “[r]eligious freedom was defined as freedom from error”.<sup>38</sup>

A similar approach inspired the New England Puritans who, in 1636, drafted the Fundamental Orders of Connecticut, the colony’s new constitution.<sup>39</sup> The text made it crystal clear that the Almighty was the sole source of all government’s authority and that it was imperative for the new administration to pursue godly purposes. “The word of God”, the text read, “requires that to mayntayne the peace and vnion of such people there should be an orderly and decent Government established according to God, to order and dispose of the affayres of the people”.<sup>40</sup> As a matter of fact, the aim of the new government was “to mayntayne and preseeure the liberty and purity of the gospel of our Lord which we now professe, as also the disciplyne of the Churches, which according to the truth of the said gossell is now practiced amongs vs”.<sup>41</sup>

One great irony of this early-America historical period, therefore, consisted in the fact that the very same people who had rejected Europe’s religious intolerance and fled the Old Continent in the name of religious freedom were to establish a system that, when it came to religious dissent, was anything but tolerant.

### 1.1.3. RELIGION, THE FOUNDING FATHERS & THE ORIGINS OF THE AMERICAN STATE

If the role and importance of religion in the founding of the first American colonies is relatively undisputed, the same cannot be said for that crucial time in American history—the eighteenth century—when the institutional basis of the new federal state was laid down. Much uncertainty, in fact, exists as to the function played by religion in the establishment of America as a sovereign state—and considering the Founding Fathers’ own ambiguity on the subject, this is hardly surprising. Before turning to that dilemma, however, we need to mention some important events that were to

<sup>33</sup> Id. 51.

<sup>34</sup> Id. 67. See also Boorstin, above at note 18, 97ss.

<sup>35</sup> On the Massachusetts experience, see in particular Boorstin, above at note 18, 3ff.; Greene, above at note 31, 25ff.; Chitwood, above at note 18, 102ff.; Hawke, above at note 26, 1ff & 16ff.

<sup>36</sup> Corbett & Corbett, above at note 30, 36.

<sup>37</sup> Lambert, above at note 19, 75.

<sup>38</sup> Ibid. See also, for interesting insights, S Bercovitch, *The Puritan Origins of the American Self* (Yale University Press, New Haven, 1975).

<sup>39</sup> Greene, above at note 31, 25ss & 131ss.

<sup>40</sup> Lambert, above at note 19, 1. See also Phillips, above at note 19, 3. Berkin, above at note 2, 169ff.

<sup>41</sup> Ibid.

unquestionably affect the Framers' actions and convictions—as well as their opinions on the Church-State relationship.

### 1.1.3.1. From Religious Intolerance to a Marketplace of Religions

From the beginning until the middle of the eighteenth century, something extraordinarily important happened on the American continent—and once again it had to do with religion. Under the influx of a series of unpredicted and mostly unpredictable events, the received ideas of spiritual compliance and religious orthodoxy that had informed the majority of the English settlers during the seventeenth century started to crack.<sup>42</sup> This was a defining moment for the future of America, and also one that distinguishes it most strikingly from the experience of religion in the Old World. The causes of this transformation are multifarious, yet it is possible to briefly identify at least four of them: migration; the role of itinerant preachers and the First Great Awakening; unrest among the black population; and the effects of the Enlightenment.<sup>43</sup>

#### (i) Migration

The eighteenth century witnessed a massive increase in migration from the Old World to the new one, and this meant that America soon became restless.<sup>44</sup> Migrants were leaving Northern Europe in ever-bigger numbers (so much so, in fact, that from 1700 the population in the colonies had doubled and redoubled); goods were imported with increasing frequency; and people in the colonies themselves became more mobile, reacting to the population growth by settling down in places that were previously unpopulated. The result was soon visible: “Religious establishments and parish boundaries”, Professor Frank Lambert explains, “which had served reasonably well to preserve orthodoxy, now failed to contain new arrivals and their dissenting notions”.<sup>45</sup> The course of action that took place—and that distinguishes the American experience from the European one—is that more people came, more goods were imported, more ideas circulated, and more religious freedom was demanded.<sup>46</sup> To put it differently, a migratory marketplace soon translated into a marketplace of goods, which in turn meant a marketplace of ideas, which finally turned into a marketplace of religions. The transformation, of course, was not immediate, but it was rapid enough to cause concern within a puritan generation unprepared for change.<sup>47</sup>

#### (ii) Itinerant Preachers & the Great Awakening

This process of migration, initially reserved to ordinary people, soon extended also to priests and ministries of different faiths—and these itinerants turned out to be the second, essential element of change that led to religious liberalization.<sup>48</sup> By travelling to different parishes and by preaching originally both in terms of contents and style, these nomadic pastors quite literally brought religious competition to the doorsteps of established churches.<sup>49</sup> They were at first fiercely ostracized by the other preachers, yet these latter found it increasingly difficult—and very soon simply impossible—to snub the challenge. People liked competition—after years of religious orthodoxy, they liked the idea of disagreeing—and this had the effect of making itinerants popular, breaking parish boundaries, and,

<sup>42</sup> H F May, *The Enlightenment in America* (Oxford University Press, New York, 1976) 42; F Shuffelton, *The American Enlightenment* (University of Rochester Press, New York) 1993, 205ff.

<sup>43</sup> See on the point Fischer & Hinderaker, above at note 23, 235ff.

<sup>44</sup> See e.g. J P Green & J R Pole, *Colonial British America: Essays in the New History of the Early-Modern Era* (John Hopkins University Press, Baltimore, 1984) 205.

<sup>45</sup> Lambert, above at note 19, 123. For an interesting perspective see T Hall, *Contested Boundaries: Itinerancy and the Reshaping of the Colonial American Religious World* (Duke University Press, Durham, 1994) 83.

<sup>46</sup> See e.g. R Finke & R Stark, *The Churching of America, 1776-1990: Winners and Losers in Our Religious Economy* (Rutgers University Press, New Brunswick, 1992).

<sup>47</sup> On the point, see also May, above at note 42, 105ff; Shuffelton, above at note 42, 205ff.

<sup>48</sup> See e.g. P Johnson, *A History of the American People* (HarperCollins, New York, 1997) 283; and A Heimert, *Religion and the American Mind: From the Great Awakening to the Revolution* (Harvard University Press, Cambridge, MA, 1966).

<sup>49</sup> A good overview of the point is offered by M A Jones, *American Immigration* (University of Chicago Press, Chicago, 1992).

ultimately, destabilizing the received thinking of conventional churches.<sup>50</sup> This phenomenon, which is intimately connected to the First Great Awakening,<sup>51</sup> began to sweep across the American colonies in the 1730s and 1740s and left a permanent mark on what was to become the new nation.<sup>52</sup> Breaking with the previous tradition of rituals and ceremonies, the Great Awakening turned religion into an intensely personal matter by fomenting a sense of profound spiritual redemption. People became passionately and emotionally involved in their faith and were invited to actively participate in it, rather than inertly and passively listening to intellectual discourses—and this proved crucial because this religious upheaval laid the basis for the political upheaval that followed.<sup>53</sup>

### (iii) Slavery & Religion

Growing unrest among the black population—and the relationship between religion and slavery—was the third critical element of change.<sup>54</sup> Slave-ownership had been common practice in most colonies and indeed the majority of established churches “defended slavery on religious, Christian grounds”.<sup>55</sup> “Rather than preaching the good news of emancipation and redemption”, one author wrote, “ministers admonished slaves to be subservient and obedient, and to accept their lot in this life while hoping for a better life to come”.<sup>56</sup> When the above-mentioned marketplace of ideas and religions gained momentum, however, this situation became potentially dangerous for these churches. Black slaves were of course still far from benefiting from this mood for dissent, yet slave-owners became increasingly worried that a growing number among their subjects embraced what were regarded as ‘alternative’ religious views.

These fears proved well-founded, for it soon became clear that espousing the marketplace of religions, for slaves, was only one step away from espousing the marketplace of ideas—and therefore freedom. Since slaveholding had been systematically encouraged by most of the traditional churches, this would have hardly been a welcome development for the slave owners—so the mantra that slaveholding was perfectly acceptable for a good Christian became even more insistent. “The right of holding slaves is clearly established in the Holy Scriptures, both by precept and example”,<sup>57</sup> a Baptist spokesperson declared in the 1770s; and, as late as in 1864, southern Presbyterians were still arguing that “[i]t is the peculiar mission of the southern Church to conserve the institution of slavery”.<sup>58</sup> Perhaps slaveholders were most of all worried that, echoing the thoughts of Thomas Jefferson (who, ironically, himself owned slaves and had children by them), black people would begin to realize that

<sup>50</sup> See e.g. May, above at note 42, 105ff; Shuffelton, above at note 42, 205ff. An interesting, if dated, insight into these themes is also offered by W W Sweet, *Revivalism in America: Its Origin, Growth and Decline* (Scribners, New York, 1944).

<sup>51</sup> The Great Awakening was a revitalization of religious piety that ran through America from the 1730s until the 1770s. As one author observed, it consisted in the emergence of “a new Age of Faith to counter the currents of the Age of Enlightenment, to reaffirm the view that being truly religious meant trusting the heart rather than the head, prizing feeling more than thinking, and relying on biblical revelation rather than human reason”. See C L Heyrman, *The First Great Awakening* (University of Delaware Press, Delaware, 2000). See also J Edwards, *The Great Awakening: A Faithful Narrative* (Yale University Press, New Haven, 1972).

<sup>52</sup> See A Heimert & P Miller (eds) *The Great Awakening: Documents Illustrating the Crisis and Its Consequences* (Bobbs-Merrill, New York, 1967); P Lambert, *Pedlar in Divinity: George Whitefield and the Transatlantic Revivals* (Princeton University Press, Princeton, 1994); J Tracy, *The Great Awakening: A History of the Revival of Religion in the Time of Edwards and Whitefield* (Banner of Truth, Washington, 1997); H Stout, *The Divine Dramatist: George Whitefield and the Rise of Modern Evangelicalism* (William B Eerdmans, Grand Rapids, 1991); J Edwards (edited by C Goen), *The Great-Awakening: A Faithful Narrative* (Yale University Press, New Haven, 1972).

<sup>53</sup> As an author underlined, “[t]he evangelical impulse was the avatar and instrument of a fervent American nationalism. In the evangelical churches of pre-Revolutionary America was forged that union of tribunes and people that was to characterize the early American Democracy”. Alan Heimert quoted by Huntington, above at note 12, 76. See also J Butler, “Enthusiasm Described and Decried: The Great Awakening as Interpretative Fiction”, (1982) 69 *Journal of American History* 305-25; C A Brekus, *Strangers & Pilgrims: Female Preaching in America, 1740-1845* (University of North Carolina Press, North Carolina, 1998); R W Fogel, *The Fourth Great Awakening & the Future of Egalitarianism* (Chicago University Press, Chicago, 2000).

<sup>54</sup> See T Bacon, *Document: Christianity Shapes American Slavery: A Sermon to Maryland Slaves*, in Stout, above at note 52, 73; P Dubois, *Slaves and Other Objects* (University of Chicago Press, Chicago, 2003); Various Authors, *Slave Narratives* (Library of America, New York, 2000).

<sup>55</sup> Safran, above at note 3, 18.

<sup>56</sup> Lambert, above at note 19, 72.

<sup>57</sup> Corbett & Corbett, above at note 30, 95.

<sup>58</sup> Safran, above at note 3, 18.

“religion—religion of any kind—in the hands of power can be the worst kind of tyranny”.<sup>59</sup> One of the greatest paradoxes of this time, however, was that they were realizing this due to the liberatory effect of a mounting marketplace of religions!<sup>60</sup>

#### (iv) The Enlightenment

The role played by the Enlightenment in developing a free marketplace of ideas in America—the fourth crucial ingredient of change—can hardly be overestimated, and this was particularly the case regarding the influence of John Locke.<sup>61</sup> His vision of the human mind as a tabula rasa that takes in information, processes it and comes to its own conclusions was as straightforward as it was revolutionary. Simply put, it meant that men were in charge of their own knowledge and destiny—that they were autonomous and independent individuals capable of determining their own future. Not a small thing, in an era dominated by superstition and revelation. “The business of law is not to provide for the truth of opinion”, Locke wrote, “but for the safety and security of the commonwealth and of every particular man’s goods and persons. The truth is not taught by law, nor has she any need of force to procure her entrance into the minds of men”.<sup>62</sup> The consequence was, for Locke, as simple as it was revolutionary: Church and State had to be separate. “All the power of civil government relates only to men’s civil interests”, and, the philosopher concluded, “is confined to the care of the things of this world, and hath nothing to do with the world to come”.<sup>63</sup>

Radical as they were, Locke’s ideas need to be related to those of Francis Bacon and Isaac Newton, the Enlightenment’s other two pillars.<sup>64</sup> Like Locke, these theorists challenged the received thinking that had informed centuries of political thought—the first with his idea, in *Novum Organum*, of knowledge as a big experiment,<sup>65</sup> and the second with his theory of the universe as a completely rational (and thus knowable) entity.<sup>66</sup> As it was aptly observed, “[t]his [was] a critical turning point in Western culture as liberal ideology, very much influenced by Protestant conviction, pushe[d] morality and religion outside the public political realm to a private realm of individual preference. The entire definition of what is public and what is private [was] being changed”.<sup>67</sup> Yet one point is noteworthy: this new vision did not mean that religion had to be rejected—quite the opposite. It just meant that God and reason were on two different levels. “A religious man, Newton did not see his new science as supplanting God”, one author wrote. “Rather, he concluded that behind such a ‘clockwise universe’ there had to be an ‘intelligent and powerful Being’”.<sup>68</sup> Religion, in other words, was seen as an instrument of freedom rather than oppression—as part of the solution, rather than the problem—and it was precisely this mindset that the Founding Fathers enthusiastically embraced.

#### 1.1.3.2. The American Founding Fathers, Religion and the First Amendment

As mentioned, the position of the Founding Fathers on religion remains one of the most controversial areas of American history. The Framers have been depicted as everything and its direct opposite: modernizers and traditionalists;<sup>69</sup> brilliant and inconsistent;<sup>70</sup> principled and pragmatic;<sup>71</sup> and

<sup>59</sup> B Bailyn, *To Begin The World Anew: The Genius and Ambiguities of the American Founders* (Knopf, New York, 2003) 5.

<sup>60</sup> It is precisely this marketplace of religions that a number of authors regard as the peculiar characteristics which make America different from Europe. See e.g. P Schaff, *America: A Sketch of Its Political, Social and Religious Character* (Harvard University Press, Cambridge, MA, 1961); J Ward Smith & A L Jamison, *Religious Perspectives in American Culture* (Princeton University Press, Princeton, 1961). But see also Huntington, above at note 12, 69 (“The American Creed, in short, is Protestantism without God, the secular credo of the ‘nation with the soul of a church’”).

<sup>61</sup> On the point, see J Locke, *The Second Treatise of the State of Nature and a Letter Concerning Toleration* (Dover Publications, New York, 2002) 93. See also M R Ishay, *The Human Rights Reader* (Routledge, London, 1997) 5ff; May, above at note 42, 42ff; and Shuffelton, above at note 42, 205ff.

<sup>62</sup> Kramnick & Moore, above at note 2, 77-8.

<sup>63</sup> Lambert, above at note 19, 184.

<sup>64</sup> See e.g. G P Gooch, *English Democratic Ideas in the Seventeenth Century* (Harper, New York, 1959) 71.

<sup>65</sup> F Bacon, *Novum Organum*, in B Montague (ed & transl), *The Works* (Parry & MacMillan, Philadelphia, 1854) 3: 343-71. See also Corbett & Corbett, above at note 30, 33.

<sup>66</sup> Lambert, above at note 19, 161-2.

<sup>67</sup> Kramnick & Moore, above at note 2, 75.

<sup>68</sup> Lambert, above at note 19, 166.

<sup>69</sup> D H Botham, *George Washington: Uniting a Nation* (Rowman & Littlefield, New York, 2002) 131ff. & 137.

atheists and fervent believers.<sup>72</sup> Because they manufactured the foundation of the American edifice we know today—and because this institutional masterpiece had scores of admirers and imitators in Old Europe and around the world,<sup>73</sup> it is vital to understand their views on religion as well as its relationship with the state.

### (i) Religion's Role

The Framers did not speak with one single voice—indeed, they represented a multifarious and heterogeneous mixture of people from a variety of backgrounds and cultural environments. Yet one thing seems certain: they all attached importance to the spiritual dimension. Given that they were to build the foundations of one of the first and most secular governments ever established, this may sound surprising. But the contradiction is only apparent, for one thing is the role of religion, quite another its place. The Framers agreed on the role of religion in America. They believed that religion was important for the American people—indeed, for the American nation.<sup>74</sup> “A common religion and virtue”, John Adams wrote for example, “are the only foundation not only of republicanism and of all free government, but of social felicity under all governments and in all the combinations of human society. Without religion”, he dryly concluded, “this world would be something not fit to be mentioned in polite company—I mean hell”.<sup>75</sup>

Adams's views were not out of step. Benjamin Franklin considered himself a person with “religious principles”.<sup>76</sup> Washington, as one author aptly reminds us, did “not call religion ‘optional’. The word he uses is ‘indispensable’”.<sup>77</sup> As for Thomas Jefferson, who was considered the most ‘deist’ among the Founders, he openly acknowledged that religion and morality were important not only for a person but also for the state. “Can the liberties of a nation”, he asked, “be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?”<sup>78</sup> He himself gave the answer when he uttered the following words to an acquaintance who was doubting his beliefs: “No nation has ever yet existed or been governed without religion”, he said. “Nor can be. The Christian religion is the best religion that has ever been given to man and I, as Chief Magistrate of this nation, am bound to give it the sanction of my example”.<sup>79</sup>

### (ii) Religion's Place

The majority of the Founding Fathers were thus well aware of the importance of religion for a democratic society—and they would have certainly subscribed to Tocqueville's famous warning, according to which “[i]t is despotism that may be able to exist without faith, not freedom”.<sup>80</sup> But what about religion's place? Because this was the real matter: if it was true—and, as we have seen, the Framers believed it was—that religion in general and the Christian religion in particular were a source of freedom, democracy and justice, should not then Christianity be officially enforced as a matter of state policy? This is exactly the point where the originality of the Founding Fathers rested: the answer was a resounding ‘no’—for several reasons.

<sup>70</sup> Bailyn, above at note 59, 33.

<sup>71</sup> Corbett & Corbett, above at note 30, 62ff & 83.

<sup>72</sup> S L Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Devotion* (Anchor Books, New York, 1994).

<sup>73</sup> See e.g. M Lipset, *The First New Nation: The United States in Comparative Perspective* (Norton, New York, 1973).

<sup>74</sup> See e.g. S E Mead, *The Nation with the Soul of a Church* (Harper & Row, New York, 1975).

<sup>75</sup> J Witte, *A Most Mild and Equitable Establishment of Religion: John Adams and the Massachusetts Experiment*, in J H Hutson, *Religion and the New Republic: Faith in the Founding of America* (Rowman & Littlefield, Oxford, 2002) 1.

<sup>76</sup> Id 176. On the point, see also Cousins, above at note 18, 16.

<sup>77</sup> Hutson, above at note 75, 176. See also *The American Revolution: Writings From the War of Independence* (Library of America, New York, 2001) 41, 31 & 234; Botham, above at note 69, 131-137.; and Cousins, above at note 18, 44.

<sup>78</sup> Hutson, above at note 75, 164.

<sup>79</sup> Id. 159. See also Cousins, above at note 18, 114; F Donovan, *The Thomas Jefferson Papers* (Dodd Mead & Co, New York, 1963), 198; W W Abbott, *The Papers of George Washington* (University of Virginia Press, Charlottesville, 1983); and Shuffelton, above at note 42, 281-295.

<sup>80</sup> “C'est le despotisme que peut se passer de la fois, mais non la liberté”. Tocqueville, above at note 7, 436.

Firstly, the majority of the Founders viewed religion in a special light—more in terms of religious rationalism or secular humanism than orthodox Christianity.<sup>81</sup> They were deeply sceptical about religious institutions, and they strongly believed that the state should refrain from interfering in people’s spiritual beliefs—no matter how good and salutary. “I have ever thought religion to be a concern purely between our God and our consciences, for which we are accountable to Him, and not to the priests”,<sup>82</sup> Jefferson wrote. That is why there should be, in his own words, “an entire abstinence of the government from interference in any way whatever”.<sup>83</sup> Jefferson was also a vocal critic of a number of Christianity’s central beliefs: the true message of Jesus, he thought, had been corrupted by religious institutions, and the Bible itself had to be read with caution, since it contained a mixture of valuable moral teachings and pure superstition.<sup>84</sup> More significantly, Jefferson’s idea of religion was extremely broad, since for him, as one author observed, “...good behaviour was more important than right belief. To him, morality was paramount to doctrine, and he thought that a moral society need not be a Christian one”.<sup>85</sup> It was more or less what James Madison meant when he referred to “virtue”<sup>86</sup> and “wisdom”<sup>87</sup>—as well as what another Founder, John Adams, indicated when he stressed that more than faith, what distinguished a good man from a bad one was his everyday conduct towards his fellow humans. “Adams believed that all good men (whatever their religious beliefs) were Christians”, one author observed, which “is different from saying that a man had to be a Christian in order to be good”.<sup>88</sup>

Secondly, the Founding Fathers lived during a crucial moment in American history. They were born after the Enlightenment. They were therefore deeply influenced by the writings of Locke, Bacon, Newton and other Illuminists. They believed that, although God had created the universe, the individual—not the Almighty—was at the centre of it, and was thus capable of determining his own destiny. They were, in short, born in an age of reason, not theology. Yet their works, thoughts and actions were inevitably conditioned by the fact that America was a Christian country—not surprising since little more than a generation separated them from the time of the Puritan fathers. As late as in 1720 most colonies still had established churches and the Virginia Statute for Religious Freedom—declaring religion to be free and voluntary—was only passed in 1785.<sup>89</sup> To put it differently, the Framers lived through an extraordinary time because they were torn between tradition and innovation—and because they were the first ones to deal with America’s greatest dilemma: how to reconcile a Christian nation with religious freedom?

### (iii) The Founders’ Solution: Separation and Religious Freedom

Their genius far outlived them precisely because of the answer they gave to that question: a godless government—which by no means implied a godless America. Not the role of religion, therefore, but its place in government, was contested by the Framers. Their brilliance, in other words, rests exactly with the fact that they dared to do something that few other statesmen had done before in so radical a way: reject the traditional principles of political thought and ask why things were the way they were. In their times, it was by no means an easy approach to take, and as Professor Bernard Bailyn reminds us, “[a]gain and again they were warned of the folly of defying the received traditions, the sheer unlikelihood that they, obscure people on the outer borderlands of European civilization, knew better

<sup>81</sup> On the difference see J R Pennock & J W Chapman, *Religion, Morality and the Law* (New York University Press, New York, 1988). According to one author, the Establishment Clause was the work of evangelicals. See D Laycock, *Religious Liberty as Liberty*, 9 J Contemp Legal Issues 313, 343-47 (1996).

<sup>82</sup> Kramnick & Moore, above at note 2, 101.

<sup>83</sup> *Id.* 106.

<sup>84</sup> Perhaps the most radical among the Framers when it came to scepticism of religious institutions was Thomas Paine, whose views were as lapidary as they were abrasive: “I do not believe in the creed professed by the Jewish church”, he famously wrote, “by the Roman Church, by the Greek Church, by the Turkish Church, by the Protestant Church, nor by any Church that I know of. My own mind is my own Church”. Lambert, above at note 19, 175.

<sup>85</sup> Lambert, above at note 19, 174.

<sup>86</sup> Bailyn, above at note 59, 34.

<sup>87</sup> *Ibid.* See also R S Alley, *James Madison on Religious Liberty* (Prometheus Books, Buffalo, NY, 1985).

<sup>88</sup> Corbett & Corbett, above at note 30, 68. See also Cousins, above at note 18, 74; *The American Revolution: Writings from the World of Independence*, above at note 77, 32; 43; 124.

<sup>89</sup> See T Jefferson, *Act for Establishing Religious Freedom*, in Porterfield, above at note 31, 15.

than the established authorities that ruled them; that they could successfully create something freer, ultimately more enduring than what was then known in the centres of metropolitan life”.<sup>90</sup> Yet they were undeterred in their intellectual curiosity, because for them, as for the Connecticut jurist Oliver Ellsworth, it was not enough to say that something must be so—“[o]ne needs to know why. One needs ‘some reason’”.<sup>91</sup>

Once they asked ‘why’, the Framers decided that it was not true that sovereignty was by nature absolute and exclusive—so they did something unprecedented, and split that sovereignty between one federation and several states. They also decided that, while God was the ultimate source of everything, men were in charge of their own actions and destiny—so they again did something unprecedented, and separated the sovereignty of God (a matter for individuals and their churches) and that of institutions (an issue for the civil government). The state, Jefferson wrote, should simply refrain “from intermeddling...with religious institutions, their doctrines, discipline, or exercises...and from the power of effecting any uniformity of time or manner among them”.<sup>92</sup>

The result of this pioneering thinking was a pioneering Constitution that guaranteed freedom of religion but deliberately ignored religion itself. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”, famously recites the first ‘freedom’ of the First Amendment of the American Constitution;<sup>93</sup> building what Jefferson controversially defined as “a wall of separation between Church and State”.<sup>94</sup> God was hardly mentioned at the time<sup>95</sup> and we are left to believe that, had his introduction been proposed, it would have received the same fate of the suggested reference to Christ in the Virginian Constitution: “The insertion was rejected by a great majority”, Jefferson observed, “in proof that they meant to comprehend within the mantle of its protection the Jew and the Gentile, the Christian and the Mahometan, the Hindoo and infidel of every denomination”.<sup>96</sup> This compromise on neutrality was reached partly because the Founders were aware of the considerable religious pluralism that existed in the different states; partly because they had seen the results of religious establishment in Europe and in their own land (as well as the way established churches treated dissidents); and partly because they thought, like Tocqueville did, that secularism was the best way to preserve and promote religion itself.<sup>97</sup>

But the underlying reason was that the Founding Fathers believed in—and were genuinely committed to—freedom. “The founders thought that people should be free to seek religious truth guided only by reason and the dictates of their consciences”, one author observed, “and they determined that a secular state, supporting no religion but protecting all, best served that end”.<sup>98</sup> In that marketplace of religions that the America of the Founders had become, in other words, the only way to ensure freedom for all was to guarantee the religious neutrality of the government—because, Madison observed, “[t]he same authority which can establish Christianity in exclusion of all other religions may establish with the same ease any particular sect of Christians”.<sup>99</sup>

<sup>90</sup> Bailyn, above at note 59, 4. On the point, see also Botham, above at note 69, 137; Berkin, above at note 2, 277; May, above at note 42, 153; Shuffelton, above at note 42, 205.

<sup>91</sup> Bailyn, above at note 59, 149.

<sup>92</sup> Hutson, above at note 75, 2.

<sup>93</sup> See W L Miller, *The First Liberty: Religion and the American Republic* (Knopf, New York, 1986).

<sup>94</sup> Hutson, above at note 75, 67.

<sup>95</sup> Although this is certainly not uncontroversial, see the following: “The framers erected a secular constitutional structure, which was then undermined as God entered first the US currency in 1863, then the federal mail service in 1912 and finally the Pledge of Allegiance in 1954”. Kramnick & Moore, above at note 2, 143.

<sup>96</sup> Lambert, above at note 19, 238. See also Berkin, above at note 2, 169.

<sup>97</sup> Tocqueville, above at note 7, vol.I: 437; vol.II: 45; 204.

<sup>98</sup> Lambert, above at note 19, 167. See also on the point A L Greil & D G Bromley (eds) *Defining Religion: Investigating the Boundaries between the Sacred and the Secular* (Elsevier Science, Oxford, 2003); Cousins, above at note 18, 44ss; above at note 2, 277; Greene, above at note 31, 131; Bailyn, above at note 59, 37; Kramnick & Moore, above at note 2, 22 & 143.

<sup>99</sup> J Madison, *Writings* (Harper, New York, 1939) 30-31. In Lambert, above at note 19, 232.

#### 1.1.4. WHAT PLACE FOR RELIGION IN AMERICAN HISTORY?

That religion was seen by the Founding Fathers and the American people as an instrument of freedom rather than oppression—and as part of the solution, rather than the problem—is the greatest lesson of US religious history.<sup>100</sup>

Unlike in Europe and in the early-English colonies, religion in the United States was from the beginning associated with liberty and greatly contributed to the American Revolution—and therefore to the very origins of the American polity.<sup>101</sup> Religious feelings and the Great Awakening were “the beginning of America’s identity as a nation as well as the starting point of the Revolution”,<sup>102</sup> one author underlined, because the therapeutic importance of the latter had been strongly encouraged—not, like in France, consistently hampered—by religion. This was most famously expressed by John Adams when, in 1818, he wrote that “[t]he Revolution was effected before the war commenced. [It] was in the minds and hearts of the people, a change in their religious sentiments of their duties and obligations”.<sup>103</sup>

As we shall see at length in the next chapter, in America the ‘religious question’ is still far from resolved, yet the world had a sign of the seriousness of the Founding Fathers with reference to the secularity of their newly established masterpiece as early as 1797, six years after the adoption of the First Amendment, when an official document—the Treaty of Peace and Friendship between the USA and Libya—eloquently stated in its Article 11 that “...[t]he government of the United States of America is not in any sense founded on the Christian Religion...”.<sup>104</sup>

The fact that they managed to build a thoroughly secular edifice while at the same time putting religious freedom at the very top of the Bill of Rights is the Founders’ most enduring legacy—and it is to this pivotal constitutional balance and its impact on American religious law that I now turn. For as we shall see, the role of religion as a vector of individual liberty, free expression and pluralism in America—and the country’s understanding of Church-State separation as a means of protecting religion from the state rather than the reverse<sup>105</sup>—is nowhere better mirrored than in American First Amendment law.



<sup>100</sup> See A Heimert, *Religion and the American Mind: From the Great Awakening to the Revolution* (Harvard University Press, Cambridge, MA, 1966).

<sup>101</sup> The point is well made in N O Hatch, *The Democratization of American Christianity* (Yale University Press, New Haven, 1991).

<sup>102</sup> William McLoughlin quoted by Huntington, above at note 12, 77; and P U Bonomi, *Under the Cope of Heaven: Religion, Society, and Politics in Colonial America* (Oxford University Press, Oxford, 1988).

<sup>103</sup> J Adams in K A Niles & W Peden (eds) *The Selected Writings of John Quincy Adams* (Knopf, New York, 1946) 203 (emphasis added).

<sup>104</sup> Lambert, above at note 19, 29.

<sup>105</sup> This was well expressed by Thomas Jefferson when he wrote that “[o]ur rulers can have authority over such natural rights only as we have submitted to them. The right of conscience we never submitted, we could not submit”. T Jefferson, *Note on Virginia* (1975) quoted in A Lipscomb & A Bergh (eds) *The Writings of Thomas Jefferson* (Washington, DC, 1903-1904), 12:388, 20 volumes.



## The Place of Religion in American Law

The complexity of America's relationship with religion is nowhere more apparent than in its legal system. As mentioned in Chapter 1.1., the Founding Fathers agreed on the importance of religion for the American nation but, at the same time, were fully aware of the dangers that a connection between secular and spiritual authorities posed to the existence of their highly pluralistic nation. The tough question they faced, therefore, was how to reconcile a Christian (but multi-denominational) country with religious freedom for all, and the answer they gave was as genial as it was ambiguous: exactly because religion was so important but also divisive, it was not the business of the federal government to deal with it. It was, however, the business of enlightened constitutional framers to guarantee both the separation of the civil from the sacred as well as the importance of religious freedom in general. The carefully-drafted compromise was reached in 1791 and resulted in the apparently uncomplicated formula of the First Amendment of the American Constitution: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of people peaceably to assemble and to petition the Government for redress of grievances".<sup>1</sup>

The First Amendment is a uniquely American product, the direct result of the country's historical legacy (and earlier lessons). It is an amalgam of the five most important freedoms to be found in any democratic polity—religion, expression, press, assembly and petition—and, as such, it is the pivot around which the entire American constellation of rights turns. It is also, as we shall see in Chapter 1.3., the basis upon which the US veil law is founded. Exactly because it fulfils so many functions at once, however, it is by no means a simple passage to comprehend, and in fact rarely has the interpretative history of a constitutional provision raised more problems. "People who disagree about nearly everything else in the law agree that the Establishment Clause doctrine is seriously, perhaps distinctively, defective",<sup>2</sup> one author observed recently. Yet it is the construction of the whole First Amendment to be problematic, and given its broad wording and crucial role in American law, this is hardly surprising. From the very beginning the courts were faced with the daunting task of clarifying in precise terms what even the Founding Fathers could only summarily sketch: a definition of freedom in America. That the Framers managed to build such a construction in forty-five words is thus not only a testimony to their prescient genius but also, to some extent, to the complexity of their chosen formula, a complexity that the judiciary subsequently reflected.

While the previous chapter dealt with historical genius, therefore, this one is dedicated to judicial intricacy. It will be noted in Chapter 1.3. that such intricacy only marginally affects the issue of the Muslim veil, for American judges have generally taken a liberal position on the matter. Yet this, I argue, is precisely what renders the whole issue fascinating: despite the complexity of First Amendment problems, the Muslim veil has benefited from a relatively steady degree of tolerance from American judges. Before we deal with this tolerance, however, we need to outline the legal foundations upon which it is based, for only then will we be able to fully appreciate the position of the Muslim headscarf in US law.

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<sup>1</sup> United States Constitution, 1<sup>st</sup> Amendment.

<sup>2</sup> F M Gedicks, *The Rhetoric of Church and State: A Critical Analysis of Religion Clause Jurisprudence* (Duke University Press, Durham, 1995) 1.

1.2.1. THE 'MARKETPLACE OF IDEAS'<sup>3</sup>  
& THE IMPORTANCE OF FREEDOM OF EXPRESSION IN AMERICAN LAW

As mentioned in Chapter 1.1., during the eighteenth century an unprecedented number of events—increased population, migration, the Great Awakening, unrest among the black population and the Enlightenment—turned America from a place that punished dissent into one where heterodoxy and criticism were the norm—a 'marketplace of ideas',<sup>4</sup> as it has been called. There is, historically speaking, much speculation on whether this marketplace was the cause or the consequence of the religious fervour that inflamed America in those pivotal years. Yet the fact remains that, whatever the historical truth, the First Amendment unmistakably treats religion as a form of expression (although a particularly important one). Before we turn specifically to the religion clauses of the First Amendment (1.2.2.), therefore, we need to consider the degree of protection given by American law to free expression in general (1.2.1.) for two reasons. First, the former considerably benefits from—and significantly expands upon—the guarantees given to the latter. Secondly, the legal shelter offered by US law to the Muslim headscarf is based, as we shall see, both on grounds of free expression and free exercise of religion, with the consequence that the two need to be considered in parallel.

1.2.1.1. The 'Marketplace of Ideas' & the US Supreme Court—More Antigone Than Creon

The 'marketplace of ideas' theory was first spelled out by John Stuart Mill in 1859 in his *Liberty of Thought and Discussion*, an essay where the author argued that an erroneous idea is as valuable as a truthful one because, without the former, the latter would lose part of its strength. Banning wrong opinions, Mill thought, is damaging because it deprives humanity of "the clearer perception and livelier impression of truth, produced by its collision with error".<sup>5</sup> Although this idea of free expression as the best antidote against error was at the time rejected by the British, it was enthusiastically embraced by the Americans and became, particularly from the mid-20<sup>th</sup> century on, almost an ingrained part of the country's psyche.<sup>6</sup> It constitutes the theoretical underpinning upon which the judiciary wrote a good portion of First Amendment jurisprudence and helps explain the central role given by American law to free expression—as well as the contention that, in America, everything in the end becomes a First Amendment question. It is also, as we shall see in Chapter 3.1., one of the reasons why US law protects the Muslim veil and other religious symbols. "[T]he ultimate good desired is better reached by free trade in ideas", Justice Holmes wrote in *Abrams v United States* (1919),<sup>7</sup> the first judicial endorsement of the marketplace model. "[T]he best test of truth is the power of the thought to get accepted in the competition of the market, [because] [t]ruth is the only ground upon which [people's] wishes safely can be carried out".<sup>8</sup>

The Supreme Court has explicitly adopted this model<sup>9</sup> but, as we shall see, has not always acted consistently with it, and it is significant that Justice Holmes wrote in dissent. Yet the marketplace model conveys one central principle underlying First Amendment jurisprudence—a principle that we

<sup>3</sup> As a matter of public policy, this idea was best conveyed by President Kennedy in the following 1962 passage: "We are not afraid to entrust the American people with unpleasant facts, foreign ideas, alien philosophies and competitive values. For a nation that is afraid to let its people judge the truth and falsehood in an open market, is a nation afraid of its people". See S R Goldzwig & G N Dionisopoulos (eds), *In a Perilous Hour: The Public Address of John F. Kennedy* (Greenwood, Washington, 1995) 155.

<sup>4</sup> Legally speaking, and as we shall see below, the concept was first articulated in the dissenting opinion of Justice Oliver Wendell Holmes, Jr. (joined by Justice Louis Brandeis) in *Abrams v. United States*, 250 U.S. 616 (1919) and was subsequently confirmed in a number of other judicial cases mentioned in this chapter. "Persecution for the expression of opinions seems to me perfectly logical", Justice Brandeis originally wrote. "If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition...But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution".

<sup>5</sup> J S Mill, *Liberty of Thought and Discussion* (Longman, London, 1999).

<sup>6</sup> See F Lambert, *The Founding Fathers and the Place of Religion in America* (Princeton University Press, Princeton, 2002) 203.

<sup>7</sup> 250 US 616.

<sup>8</sup> *Id.* 630.

<sup>9</sup> For details, see the following pages.

need to consider if we are to understand the position of US law on the veil: the extraordinary protection accorded by American law to free expression vis-à-vis the minimal governmental interference allowed on the matter. Because the marketplace of ideas is only one step away from the marketplace of religions, it is important for us to briefly analyze—in chronological order—the most significant passages of the Supreme Court’s conceptual journey in establishing such a model and in giving it the protection of the law.

#### a) Flag Salute, Libel Actions & Student Symbolism

An early application of the ‘marketplace of ideas’ was in *West Virginia Board of Education v Barnette* (1943),<sup>10</sup> a case concerning compulsory flag salute and recitation of the pledge of allegiance at school. Here the Supreme Court, by a 6-3 majority, held unconstitutional a measure that obliged public school students, without exceptions or opt-out provisions, to daily salute the flag and recite the pledge of allegiance. The case is significant for the Muslim veil issue because it recognized that the purpose of the First Amendment is to ensure that individuals have a private sphere of freedom of thought and belief that even the government or its agencies (like schools) cannot invade. “If there is any fixed star in our constitutional constellation”, Justice Jackson famously wrote in a Sophoclean passage, “it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein”.<sup>11</sup> When Justice Frankfurter, in dissent, objected that the flag salute and pledge recitation could legitimately be imposed by the government since they are not religious acts but merely practices “promoting good citizenship and national allegiance”,<sup>12</sup> the majority answered that this was irrelevant because government officials cannot compel individuals to espouse beliefs at odds with their conscience, no matter whether they are religious or otherwise. “Authority here is to be controlled by public opinion”, the Court concluded, “not public opinion by authority”.<sup>13</sup>

The most interesting period for the marketplace model in American law is undoubtedly that of the 1960s and 1970s, a time when national tumult and social unrest percolated to the Supreme Court. In a series of decisions, the Justices emphasized the central—indeed, sacred—importance given to First Amendment freedoms. The best known of these cases is *New York Times v Sullivan* (1964).<sup>14</sup> There a newspaper had published an advertisement soliciting funds to cover the legal expenses of jailed students protesting against racial segregation, but contained a number of factual mistakes (such as allegations of police attacks on demonstrators). A police commissioner sued for libel and was awarded \$500,000, but the Supreme Court reversed, upholding the newspaper’s right to criticize government officials. Justice Brennan, writing for the court, justified the decision by reference to “the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials”.<sup>15</sup> Instead of censorship, the best way forward for society was rebuttal of factual inaccuracies through counter-speech.<sup>16</sup>

A few years later, the Supreme Court again had the opportunity to balance free expression and state interests in a case particularly important for the heated political situation of the time—and crucial, as we shall see in Chapter 1.3., for the veil issue in US law. In *Tinker v Des Moines School District* (1969)<sup>17</sup> the question was whether a public school regulation prohibiting students from wearing armbands against the Vietnam War was constitutional. By a 7-2 majority, the Court decided that it was not. “It can hardly be argued that either students or teachers shed their constitutional rights to

<sup>10</sup> 319 US 624.

<sup>11</sup> *Id.* 642.

<sup>12</sup> *Id.* 654.

<sup>13</sup> *Id.* 641.

<sup>14</sup> 376 US 254.

<sup>15</sup> *Id.* 270. Because of the prominent position of governments, the Court argued, they are often the first violators of civil rights and it is therefore paramount that their action be subject to the widest possible public debate, without fear of retaliation.

<sup>16</sup> “This nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials”, Justice Black wrote in a concurring opinion. “But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials”. *Id.* 297.

<sup>17</sup> 393 US 503.

freedom of speech or expression at the schoolhouse gates”,<sup>18</sup> Justice Fortas wrote for the majority. “In our system, state-operated schools may not be enclaves for totalitarianism [and] students may not be regarded as close-circuit recipients of only that which the State chooses to communicate”.<sup>19</sup> School officials, the Court concluded, cannot censor student speech only because of an “undifferentiated fear or apprehension”<sup>20</sup> but “must reasonably forecast that the student speech will cause a substantial disruption or invade the rights of others”.<sup>21</sup>

Justice Hugo Black strongly disagreed with this stance and in a forceful dissent accused the court of ushering in nothing short of “a new revolutionary era of permissiveness in this country fostered by the judiciary”.<sup>22</sup> Yet the case is significant exactly because of the majority’s answer to Justice Black’s objection: “Any departure from absolute regimentation may cause trouble”, the Tinker court wrote. “Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the view of another person may start an argument or cause a disturbance. But our Constitution says that we must take this risk...and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength...”.<sup>23</sup> And the ‘national strength’ was exactly the ‘marketplace of ideas’ embodied by the First Amendment.<sup>24</sup>

#### b) Hate Speech, Vulgar Speech & School Censorship

America’s attachment to freedom of expression is perhaps most noteworthy (and at times surprising) in relation to anti-discrimination laws, and *Brandenburg v Ohio* (1969)<sup>25</sup> is one of the most contentious decisions on the matter. The case involved a video showing Ku-Klux-Klan supporters—some hooded and carrying firearms—gathering around a large burning cross and making racist remarks such as “This is what we are going to do to the niggers”, “A dirty nigger”, “Send the Jews back to Israel”, “Bury the niggers” and “Save America”.<sup>26</sup> The appellant was a KKK leader and was shown in the video making a speech in which he said: “We’re not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revenge taken”.<sup>27</sup> Mr Brandenburg was convicted under an Ohio statute that prohibited advocating criminal syndicalism, but the Supreme Court found that his speech was mere encouragement and not actual incitement to violence and consequently reversed the conviction. The First Amendment, the Court said, protected Mr Brandenburg’s speech because “[t]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”.<sup>28</sup> The concurring opinion of Justice Black left little doubt as to the importance of free speech in American law: “[G]overnment has no power to invade that sanctuary of belief and conscience”,<sup>29</sup> even if that meant advocating such a heinous notion as racial superiority.

Justice Black’s “sanctuary” of free expression was again under attack two years later—and once more America’s highest Court respectfully declined to invade it out of devotion to the ‘marketplace of ideas’. In *Cohen v California* (1971),<sup>30</sup> a man was convicted for expressing his views against the

<sup>18</sup> Id. 506.

<sup>19</sup> Id. 511.

<sup>20</sup> Id. 508.

<sup>21</sup> Id. 514.

<sup>22</sup> Id. 518.

<sup>23</sup> Id. 508-9.

<sup>24</sup> As we shall see, *Tinker* was later limited by *Hazelwood v Kuhlmeier* and *Bethel School District v Fraser*—as well as, more recently (and after this thesis was completed) by *Morse v Frederick*, 127 S Ct 2618 (2007), holding that schools can punish the advocacy of illegal drugs, however ineffectual the advocacy. Yet *Tinker* has been strongly reaffirmed as regards political speech and the Court has forcefully protected religious speech. See below for details.

<sup>25</sup> 395 US 444.

<sup>26</sup> Id. 445-6.

<sup>27</sup> Id. 446.

<sup>28</sup> Id. 447.

<sup>29</sup> Id. 457.

<sup>30</sup> 403 US 15.

compulsory Vietnam conscription by painting the words “Fuck the Draft” on his jacket and wearing it in a courthouse. The Supreme Court nonetheless reversed the decision because it violated the man’s freedom of expression: “[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process”, Justice Harlan wrote for the majority. “Indeed, governments may soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views”.<sup>31</sup> The Justices recognized the “distasteful”<sup>32</sup> character of Mr Cohen’s expression but held that “surely the state has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us”.<sup>33</sup> The best remedy, the Court convened, was and remained America’s free marketplace of ideas.<sup>34</sup>

Several other cases in the 1980s and 1990s reaffirmed this determined belief in free expression and the marketplace of ideas. *Board of Education v Pico* (1982)<sup>35</sup> is one important example. The lawsuit involved a school decision to withdraw some books—including civil rights pieces on racial discrimination—from the library because they were considered inappropriate for young people. The Supreme Court, however, decided that school officials had violated the First Amendment because academic forums should encourage the free exchange of ideas, not reduce it: “Local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to ‘prescribe what is orthodox in politics, nationalism, religion or other matters of public opinion’”,<sup>36</sup> the Court ruled. The free flow of information, in other words, had to prevail and was all the more important in a case involving a school, which the Court defined as “the principal locus of [academic] freedom”.<sup>37</sup>

#### c) American Flag, Racial Speech & Public Parade

This liberal stance was reaffirmed a few years later in *Texas v Johnson* (1989),<sup>38</sup> one of the most controversial examples of the ‘free marketplace of ideas’ model. During a political demonstration, Mr Johnson publicly burned the American flag and chanted: “America, the red, white and blue, we spit on you”.<sup>39</sup> He was convicted under a Texas law that prohibited the “desecration of a venerated object”<sup>40</sup> but the Supreme Court ruled in his favour and struck down the Texas statute on the ground that it illegitimately restricted his freedom of expression. “If there is a bedrock principle underlying the First Amendment”, Justice Brennan wrote for the majority in a passage that is particularly interesting with reference to the matter of the Muslim veil in France, “it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”.<sup>41</sup> Chief Justice Rehnquist, however, joined by other two justices, strongly dissented on the ground that the national flag had a unique place in America “that justifies a governmental prohibition against flag burning...”.<sup>42</sup> Nevertheless, the majority was undeterred and noted that its ruling simply reflected the importance given to dissent by the First Amendment.<sup>43</sup> The decision in *Johnson* provoked a political firestorm and Congress subsequently passed a federal law against flag-burning,<sup>44</sup> yet the Supreme Court once again struck down the legislation on the basis of the free market of ideas.<sup>45</sup> As Justice

<sup>31</sup> Id. 29.

<sup>32</sup> Id. 21.

<sup>33</sup> Id. 25.

<sup>34</sup> “The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours”, Justice Harlan concluded. “That the air seems at times filled with verbal cacophony is in this sense not a sign of weakness but of strength”. *Ibid.*

<sup>35</sup> 457 US 853.

<sup>36</sup> Id. 872.

<sup>37</sup> Id. 868-9.

<sup>38</sup> 491 US 397.

<sup>39</sup> Id. 399.

<sup>40</sup> Texas Penal Code Ann. § 42.09 (a) (3) (1989).

<sup>41</sup> 491 US 397, 414.

<sup>42</sup> Id. 422.

<sup>43</sup> “The way to preserve the flag’s special role”, the court wrote in a sentence that graphically expressed the primacy of the free marketplace model, “is not to punish those who feel differently about these matters. It is to persuade them that they are wrong... We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents”. *Id.* 420.

<sup>44</sup> See Flag Protection Act 1990, 18 USC Sec. 700.

<sup>45</sup> *United States v. Eichman*, 496 US 310 (1990).

Kennedy noted in *Johnson*, “[i]t is poignant but fundamental that the flag protects those who hold it in contempt”.<sup>46</sup> Far from being a weakness, the freedom to express controversial (and even despicable) opinions is, according to the Supreme Court, America’s greatest asset.

More than twenty years after *Brandenburg* the Supreme Justices decided *RAV v City of St.Paul* (1992),<sup>47</sup> another case that, as counsel for petitioner argued at the hearing, “once again will demonstrate whether or not there is room for the freedom for the thought that we hate [and] for the eternal vigilance necessary for the opinions that we loathe”.<sup>48</sup> It is a case where freedom of expression was brought to new heights. Two teenagers had placed and burned a cross in the backyard of a black couple living in a white neighbourhood. They were convicted under a St Paul’s hate crime ordinance which prohibited the placing on any property of a symbol that might arouse “anger, alarm, or resentment in others on the basis of race, colour, creed and gender”.<sup>49</sup> The Supreme Court, however, unanimously reversed the conviction and held that the statute constituted a violation of the boys’ freedom of expression—but was divided on the reasons. The majority found that the St Paul ordinance prohibited only a certain kind of hate speech and was thus an unconstitutional and under-inclusive content-based limitation of expression.<sup>50</sup> The four concurring justices, on the other hand, argued that the ordinance was too broad because “the mere fact that expressive activity causes hurt feeling, offence or resentment does not render the expression unprotected”.<sup>51</sup> Both ways, the boys’ freedom of expression had been violated—and the future of hate-speech legislation in America put in serious doubt.<sup>52</sup>

Last but not least, an important case where freedom of expression prevailed over anti-discrimination measures is *Hurley v Irish-American GLB Group of Boston* (1995).<sup>53</sup> In 1992 the Irish-American Gay, Lesbian and Bisexual Group of Boston applied to join the St Patrick’s parade. They were turned down, but a judge held that this was an unconstitutional exclusion based on their sexual orientation and made an order allowing them to march. One year later the Massachusetts Supreme Court confirmed this stance, but in 1995 the US Supreme Court reversed. In a rare unanimous decision, it held that the free expression of the parade’s organizers had been violated because the state was “requiring petitioners to alter the expressive content of their parade”.<sup>54</sup> “Our tradition of free speech”, the Court ruled, “commands that a speaker who takes the street corner to express his views in this way should be free from interference by the State based on the content of what he says”.<sup>55</sup> Participation of gay, lesbian and bisexual people in the parade was a right, the Court emphasized, but expression of their message within the St Patrick parade was not, because “[d]isapproval of a private speaker’s statement does not legitimize use of the Commonwealth’s power to compel the speaker to alter the message by including one more acceptable to others”.<sup>56</sup>

### 1.2.1.2. Limits to the ‘Marketplace of Ideas’: State Regulation of Private Expression

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<sup>46</sup> 491 US 397, 414.

<sup>47</sup> 505 US 377.

<sup>48</sup> P Irons (ed), *May It Please the Court: The First Amendment* (New Press, New York, 1997) 201.

<sup>49</sup> 505 US 377, 379.

<sup>50</sup> “The First Amendment does not permit St Paul to impose special prohibitions on those speakers who express views on disfavoured subjects”, Justice Scalia wrote for the majority. *Id.* 391.

<sup>51</sup> *Id.* 414.

<sup>52</sup> See also, on the matter, *Virginia v Black*, 538 U.S. 343 (2003) 262 Va. 764, 553 S. E. 2d 738,

<sup>53</sup> 515 US.

<sup>54</sup> *Id.* 15.

<sup>55</sup> *Id.* 21-2.

<sup>56</sup> *Id.* 23-4. The ‘marketplace of ideas’ featured prominently also in *Reno v ACLU* (1997), a case involving pornography and children’s rights. With the aim of protecting minors from harmful on-line materials, in 1996 the US Congress passed the Communications Decency Act (CDA), which prohibited the display of ‘indecent’ or ‘patently offensive’ materials on the Internet. A year later, however, the Supreme Court—by a 7-2 majority—found this statute unconstitutional because it infringed upon the free-expression of adults. “In order to deny minors access to potentially harmful speech”, the Court ruled, “the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another” (521 US 844). The free market of ideas, therefore, was once again made to prevail over governmental regulations because, in spite of the laudable aims of the statute, the result would have been too costly for the freedom of expression of adults.

As this brief discussion of the leading cases suggests, it is difficult to overrate the importance of freedom of expression in American law. “If there is any principle of the Constitution that more imperatively calls for attachment than any other”, Justice Holmes evocatively put it, “it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate”.<sup>57</sup> This considerable liberty to allow the expression of views which are not only controversial but at times even dangerously flirting with illegality is one of the most significant characteristics of American law, as well as one of the grounds that most visibly distinguishes it from other legal systems. It is also, as we shall see in Chapter 1.3., one of the reasons why the Muslim headscarf is protected by US law.<sup>58</sup>

Yet important as it certainly is, such a remarkably robust ‘marketplace of ideas’ is not entirely unregulated—nor could it possibly be, since any government permitting this would come perilously close to chaos. Reputations can be ruined, people’s rights can be affected and a nation’s existence can, in extreme circumstances, be jeopardized by unconditional freedom, with the consequence that states may have a (residual) interest not only in following the development of the ‘market of ideas’ but also in intervening when certain boundaries are crossed. Yet the difficult question then becomes: where does the border lie? When is regulation of free expression justified? When does, in other words, freedom become abuse?

Considering free expression’s almost saintly importance in American law, one would expect regulation to take place only when narrowly-defined and extremely important values are at stake. Yet although this is true in theory, it has not always been the case in practice. The following examples of judicial intervention are instructive not only of the constant tension between individual expression and state regulation but also—and perhaps inevitably—of judicial intricacy. As mentioned above and as we shall see in Chapter 1.3., this intricacy only rarely affects the issue of the Islamic veil but it does need to be briefly outlined here, for doing so allows us to better appreciate the extent of the protection offered by American law to free expression in general and the Muslim headscarf in particular—and, later, to compare these with the French experience. If we want to know what kind of expression the US legal system permits, we must also have a quick look at what it prohibits.

#### a) Subversive Activities and ‘Clear & Present Danger’

Self-preservation being the ultimate concern of governments as well as individuals, one of the earliest limitations to free expression in American law occurred in the field of advocacy of illegal acts against the state. In 1919 the Supreme Court drew a distinction between protected and unprotected advocacy in *Schenck v United States* (1919),<sup>59</sup> a case involving the constitutionality of the Federal Espionage Act (1917). “The question in every case”, the Supreme Court wrote, “is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree”.<sup>60</sup>

Despite its importance for First Amendment jurisprudence, the ‘clear and present danger’ test was broad and worryingly prone to abuses, particularly in times of war and national emergency, when the Supreme Court already had (and was going to further develop) a reputation for bowing to governmental interests. Time proved critics right when, only a few years after *Schenck*, the Justices gave a remarkably deferential interpretation of what constituted illegal advocacy in *Gitlow v New York* (1925):<sup>61</sup> “[I]f the expression’s natural tendency and probable effect [is] to bring about the substantive evil which the legislative body might prevent”,<sup>62</sup> the *Gitlow* majority wrote, then such expression is not protected by the First Amendment. Congress, in other words, could legitimately choose to

<sup>57</sup> *US v Schwimmer*, 279 US 644, 655 (1929).

<sup>58</sup> See Sections 1.3.1. & 1.3.2.

<sup>59</sup> 247 US 47.

<sup>60</sup> *Id.* 52.

<sup>61</sup> 268 US 652.

<sup>62</sup> *Id.* 671.

“suppress the threatened danger in its incipiency”<sup>63</sup> by merely showing the expression’s “bad tendency”.<sup>64</sup>

The Court later realized the potential risk of this decision and corrected its posture by adhering to Justice Brandeis’s statement according to which “only emergency can justify repression”<sup>65</sup>. The danger, the Court ruled, had to be “clear”, “imminent”, and “substantial”.<sup>66</sup> Yet the following period proved that the confusion was not entirely dissipated and that the doctrine of ‘clear and present danger’ was also used to curtail legitimate political dissent.<sup>67</sup> The matter has since been clarified by *Brandenburg*—a case that, as we have seen above, forbids only advocacy directed to “inciting or producing imminent lawless action and is likely to incite or produce such action”.<sup>68</sup> Yet it should be noted that the Supreme Court still fluctuates between libertarian and deferential approaches, with these latter particularly frequent—9/11 docet<sup>69</sup>—in times of national emergency.

#### b) ‘Low Value’ Speech and ‘Fighting Words’

Another important example of limitation to free expression is provided by the so-called ‘low-value speech’.<sup>70</sup> The idea was first introduced by *Chaplinsky v New Hampshire* (1942),<sup>71</sup> a case involving public utterance of offensive words. Mr Chaplinsky publicly inveighed against a City Marshal and called him “a God damned racketeer”<sup>72</sup> and “a damned fascist”.<sup>73</sup> He was sentenced under a state law that prohibited “offensive words”<sup>74</sup> but appealed, arguing that the law was an unconstitutional violation of his freedom of expression. The Supreme Court disagreed. After noting that “the right of free speech is not absolute at all times and under all circumstances”,<sup>75</sup> the justices observed that “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem”. “These”, the Court continued, “include the lewd and obscene, the profane, the libellous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”.<sup>76</sup> The reason for the exclusion of these expressions was that, because of their meagre social value, they did not deserve entry into the free market of ideas.<sup>77</sup> If the Court’s definition of ‘fighting words’ was a memorable one, however, its mention of approximate ideas like ‘obscenity’, ‘immorality’ and ‘profanity’ was not—and critics argued that these expressions were ‘well-defined’ and ‘narrowly-limited’ only in the justices’ minds.<sup>78</sup>

<sup>63</sup> Id. 669.

<sup>64</sup> Id. 671.

<sup>65</sup> *Whitney v California*, 274 US 357, 377 (1927).

<sup>66</sup> Id. 379.

<sup>67</sup> The most notable example was the McCarthy era, when the Supreme Court, falling well below its own standards, justified limitations to freedom of expression of Communist Party members by arguing that, given the “inflammable nature of world conditions” (341 US 498, 511.), a “highly organized conspiracy with rigidly disciplined members” (Id. 587) was enough to justify state intervention.

<sup>68</sup> *Brandenburg v Ohio*, 395 U.S. 444, 447 (1969).

<sup>69</sup> See e.g. CNN, *Supreme Court Rejects Appeal Over Secret 9/11 Detentions*, 12 January 2004. An extensive collection of Supreme Court decisions relating to the so-called ‘War on Terror’ is available at <http://news.findlaw.com/legalnews/us/terrorism/cases/index.html> (at 7 March 2006).

<sup>70</sup> 315 US 568, 572.

<sup>71</sup> 315 US 568.

<sup>72</sup> Id. 569.

<sup>73</sup> Id.

<sup>74</sup> *New Hampshire Pub. Laws* ch. 378 § 2.

<sup>75</sup> 315 US 568, 571.

<sup>76</sup> Id. 571-2

<sup>77</sup> In the words of the Court, they were merely “utterances [which] are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”. Id. 572.

<sup>78</sup> Although, it needs to be said, ‘fighting words’ is an exception to 1<sup>st</sup> Amendment law that has not been extended much beyond *Chaplinsky*.



c) 'Obscenity' & 'Immorality'

When the Court attempted to define 'obscenity', it became apparent that not even the Supreme Justices were in agreement on these definitions. As Justice Brennan wrote in *Roth v United States* (1957),<sup>79</sup> "obscenity is not within the area of constitutionally protected speech or press"<sup>80</sup> because "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance".<sup>81</sup> Yet when they tried to define the concept, the justices stumbled into major difficulties. The question to be posed, the Roth court tentatively wrote, was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest".<sup>82</sup> This explanation betrayed the vagueness that unavoidably accompanies attempts at defining obscenity—a vagueness that was graphically expressed by Justice Stewart when he wrote a sentence that he later came to regret: "I know it when I see it".<sup>83</sup> Justice Brennan himself, after having categorically stated in Roth that obscenity was unprotected speech, had in the end to recognise—in dissent—that 'obscenity' was impossible to define.<sup>84</sup>

Yet the majority was unconvinced, and in *Miller v California* (1973)<sup>85</sup> revised the Roth test and defined 'obscenity' as those "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value".<sup>86</sup> Although this definition was less controversial, the Miller Court was bitterly divided because, Justice Douglas wrote in dissent, the justices were dealing with tastes and literature, not law. "Obscenity—which even we cannot define with precision—is a hodge-podge", he wrote. "To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process".<sup>87</sup> Other interesting cases decided in 1991<sup>88</sup> and 1992<sup>89</sup> suggest that the Supreme Court's intermittent fascination—and difficulty—with ideas of 'immorality' and 'social acceptability' is not confined to a bygone age but is very much contemporary.

d) Conclusion on the Importance of the 'Marketplace of Ideas' for the Muslim Veil

What does this short excursus on US free speech law tell us about freedom of expression in America, and why is the 'marketplace of ideas' important for the issue of the Muslim veil?

Freedom of speech has consistently been regarded as a most (if not the most) fundamental component of American law,<sup>90</sup> as well as the single most significant political freedom within the

<sup>79</sup> 354 US 476.

<sup>80</sup> Id. 485.

<sup>81</sup> Id. 484.

<sup>82</sup> Id. 489.

<sup>83</sup> 378 US 184, 197

<sup>84</sup> "After 15 years of experimentation and debate", he wrote, "I am reluctantly forced to the conclusion that none of the available formulas...can reduce the vagueness to a tolerable level...". *Paris Adult Theatre I v Slaton*, 413 US 49, 84 (1973).

<sup>85</sup> 413 US 15 (1973).

<sup>86</sup> Id. 24.

<sup>87</sup> Id. 43-4.

<sup>88</sup> In *Barnes v Glen Theater* (501 US 560, 1991), two women working in a strip-tease club claimed that an Indiana law prohibiting nude dancing among consensual adults violated their First Amendment right to express an erotic message. In a controversial decision, however, a divided Supreme Court ruled that "public indecency statutes...reflect moral disapproval of people appearing in the nude among strangers in public places" (501 US 560, 568). "Our society prohibits", Justice Scalia wrote in an oft-quoted passage, "and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, *contra bonos mores*, ie, immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution and sodomy" (Id. 575). According to the Court, therefore, plain and simple 'immorality' is enough to justify a limitation to freedom of expression. What that term meant exactly, however, the justices unsurprisingly declined to say.

<sup>89</sup> Perhaps because of the unanimous abhorrence it arouses, child pornography jurisprudence had a safer outcome. See e.g. *New York v Ferber* (458 US 747, 1992) (holding that, due to the severe harm that child pornography causes to minors and the consequent need to secure state authority over the matter, this represented another category of unprotected speech).

<sup>90</sup> See e.g. Z. Chafee, *Freedom of Speech in the United States* (Harvard University Press, Cambridge, MA, 1941) 10; and C. Isler & K. Fontanetta, *The Right to Free Speech: Individual Rights and Civil Responsibility* (The Rosen Group, New York, 2001). For a more recent

American constellation of rights.<sup>91</sup> As we have seen, the First Amendment prohibits the federal government from “abridging the freedom of speech” and, since the 1920s, its protection has been extended against state as well as federal actions. Crucially for the headscarf issue and as we shall see in Chapter 1.3., the definition of what is ‘speech’ has moreover been broadened by the US judiciary to include symbolic speech consisting of those actions that express an opinion—and this covers as protected expression not only the burning of flags as a sign of protest but also the display of a Muslim headscarf on a girl’s head, no matter whether in the classroom or elsewhere.

To be sure, free speech is not absolute and can be limited if it is regarded as sedition, libel, ‘fighting words’ or obscenity—all of which are narrowly defined. Yet none of these will negatively impact on the right of a Muslim girl to wear her headscarf, I can anticipate, because such an action is regarded as a symbolic form of speech that is protected by—and within the scope of—First Amendment shelter. Indeed, given the central place reserved for free speech by US law, it is possible to argue that the American ‘marketplace of ideas’ has historically been constructed in such a way as to protect the individual display of signs like the Muslim headscarf almost per se, as an inherent symbol of free expression, and that limiting it on any ground except serious public order issues would be incompatible with the rights established by the First Amendment. Since it is not easy to disturb the public order by simply wearing a headscarf, moreover, the assumption is that such a display is usually admitted—and this even before one takes into account the religious component of the message, a matter that, as we shall see immediately below, provides further protection of the expressive conduct.

### 1.2.2. THE ‘MARKETPLACE OF RELIGIONS’ & THE IMPORTANCE OF RELIGIOUS FREEDOM IN AMERICAN LAW

Under US law, freedom of religion—and, we will see in Chapter 1.3., freedom to veil—is a form of protected expression that benefits from the conceptual and legal safeguards mentioned above. Because of the historical developments explained in Chapter 1.1., however, religion (and religious symbolism) also possesses a unique place in America’s legal system, and the wording of the First Amendment leaves little doubt about this. “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...”<sup>92</sup> recites the first freedom of the first amendment of America’s Bill of Rights. A product of the country’s short but intense religious past, this passage was meant to recognise both that America’s unusually diverse marketplace of religions was incompatible with the establishment of one over another; and that religious liberty was among the nation’s most cherished achievements. The two aspects were at the time and are still today intimately connected because, as Madison observed, America’s crowded bazaar of faiths is the most important guarantee of religious freedom.<sup>93</sup>

In order to deal with—and preserve—this market of religions, the Founding Fathers drafted a system of careful balancing between the civil and the religious, one embodied by the Establishment Clause of the First Amendment. It soon became apparent, however, that a complete and hermetical separation was impossible to achieve because the secular and the spiritual, far from being unconnected, tend to naturally overlap—especially in the eyes of religious people, for whom, as for Antigone, universal sovereignty precedes the civil one. “Before any man can be considered as a member of Civil Society”, Madison himself admitted, “he must be considered as a subject of the Governor of

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account see also N SNOW, *Information War: American Propaganda, Free Speech and Opinion Control Since 9/11* (Seven Stories Press, New York, 2003).

<sup>91</sup> “[I]t has been for centuries the pride of this country”, John Stuart Mill wrote in 1867, “and one of its most valued distinctions from the despotically-governed countries of the continent, that a man has a right to speak his mind, on politics or on any other subject, to those who would listen to him, when and where he will”. See J S Mill, *Public and Parliamentary Speeches* (P.F. Collier & Son, Cambridge, MA, 1909) Harvard Classics Volume 25. Mill was writing about England, of course, yet his words inspired—and, indeed, best portrayed—the ‘marketplace of ideas’ approach adopted by the US Supreme Court.

<sup>92</sup> US Constitution, 1<sup>st</sup> Amendment.

<sup>93</sup> “This freedom arises from that multiplicity of sects which pervades America and which is the best and only security for religious liberty in any society”, he wrote. “For where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest”. See C C Haynes, *A Muslim in the House Advances Religious Freedom* (First Amendment Center, Washington, 2007) 16.

the Universe”.<sup>94</sup> The difficult question that the Founding Fathers left intentionally open and that the Supreme Court had to answer in interpreting the subtle words of the First Amendment, therefore, was: a sovereign government and a limited God—or the reverse?

That such a question involved very practical problems became clear from the early life of the Supreme Court and is best exemplified by the following Sophoclean dilemma: when a law prescribes a behaviour which is at odds with the tenets of a specific religion, are exemptions for people practising that religion allowed? Can religious beliefs, in other words, be accepted as a justification for an act that the law forbids? Although the Supreme Court’s position on the matter has been far from linear, it is indicative of the complexity and importance given by US law to religious expression. Torn between their reluctance to carve out religious exceptions in general terms and their acknowledgement of spirituality’s central place in America, the Justices’ legal pendulum seems to be—and very often is—moving erratically. Yet it is stable enough to confirm religion’s complex but unique role in American law—a uniqueness that has in the past thoughtfully protected religious expression, sometimes even against generally applicable laws.

As we shall see in Chapter 1.3, neither the matter of general laws nor that of the Establishment Clause will negatively impact on the Muslim veil issue and it is indeed indicative of the importance attached to religion that religious freedom is not, in American law, delineated in the positive (i.e. in terms of what religions can do) but in the negative (i.e. in terms of exceptions to such a freedom) and is thus to be regarded as the rule. Yet the fact remains that generally applicable laws and the Establishment Clause are the two most important limits to religious freedom in America, with the consequence that they need to be briefly outlined here.<sup>95</sup>

### 1.2.2.1. First Limit to Religious Freedom in America: Generally Applicable Laws

#### (a) Polygamy & Conscientious Objection

The dilemma of ‘religious immunity’ was initially given a negative answer in *Reynolds v United States* (1878),<sup>96</sup> an early but crucial case involving polygamy. Mr Reynolds, a Mormon, married a second wife and was thus convicted of bigamy. He appealed against the decision and argued that the anti-bigamy statute violated his religious freedom because Mormonism required him to marry more than once.<sup>97</sup> The Supreme Court, however, rejected his argument and set an important precedent: a man could not excuse his unlawful practices because of his religion, the justices ruled, since “[t]o permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself”.<sup>98</sup> The Court recognised that Mr Reynolds’s beliefs were sincere but ruled that, while he was free to believe in bigamy, he was not free to practise it.<sup>99</sup>

Although Reynolds fixed an important principle in American law, it was hardly a difficult judgment to decide since it involved a clearly illegal practice that was abhorred by virtually everyone but the Mormons. The following years offered more subtle (and successful) challenges based on religious exceptions to general laws—and conscientious objection was one of them.

The early cases were invariably answered in the negative. In *United States v Schwimmer* (1925),<sup>100</sup> for example, the Supreme Court turned down an applicant for US citizenship because she refused to take

<sup>94</sup> J Madison, Memorial and Remonstrance Against Religious Assessments, in G Grunt (ed), *The Writings of James Madison* (Free Press, New York, 2001) 185.

<sup>95</sup> They will also provide fertile grounds for a comparison with French law, as Chapter 2.2. and Part 3 will make clear.

<sup>96</sup> 98 US 145.

<sup>97</sup> At the time the Mormon Church was in effect maintaining that bigamy constituted—circumstances permitting—a “duty” required by God and “enjoined by...the Holy Bible” (ibid), and that “penalty for such failure and refusal would be damnation in the life to come” (Ibid 161).

<sup>98</sup> Id. 166-7.

<sup>99</sup> “Laws are made for the government of actions”, the justices concluded, “and while they cannot interfere with mere religious beliefs and opinions, they may with practices”. Id 166.

<sup>100</sup> 279 US 644.

up arms in defence of the country due to her belief that “all human beings are the children of God”.<sup>101</sup> “[I]f all or a large number of citizens oppose such defence”, the justices concluded, “the ‘good order and happiness’ of the United States cannot long endure”.<sup>102</sup> As a consequence, the state had an interest in fostering nationalism and in “safeguard[ing] against admission of those who are unworthy”.<sup>103</sup> Only a few years later, the Court confirmed this stance in *United States v Macintosh* (1931),<sup>104</sup> a similar case where another conscientious objector declared himself willing to give allegiance to the United States but unwilling to put that ahead of God. This was not enough either, the Court wrote, because “unqualified allegiance to the nation and submission and obedience to the laws of the land...are not inconsistent with the will of God”.<sup>105</sup>

After a series of analogous arguments, the turning point came a short time later when the Supreme Court, heavily relying on religious tolerance, dramatically reversed its position (by now considered “fallacious”<sup>106</sup> and even “abhorrent”)<sup>107</sup> and allowed a Seventh-Day Adventist to serve in the army as a conscientious objector. “The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual”, the justices acknowledged. “The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State”.<sup>108</sup> Only a few years later, in *United States v Seeger* (1965),<sup>109</sup> believers in non-traditional but ‘theistic’ variances of monotheism were also offered the possibility to object—and, in 1970, the right was finally extended to those with “moral” and “ethical”<sup>110</sup> beliefs as well. After initial resistance, therefore, an important general freedom was carved out of a religious exception.<sup>111</sup>

#### (b) Child Labour & Compulsory School System

As a means to ensuring the transmission of knowledge to younger generations, education has always been crucial for religions as well as governments—and the row over the Muslim veil in France leaves little doubt about this. Since both actors claim a strong interest in the child’s intellectual development—the first via the parents’ right to enforce a religious upbringing, the second via the duty to ensure that an adequate education takes place—there is an obvious potential for conflict, particularly when religious practices diverge from the mainstream. This is exactly what happened in *Prince v Massachusetts* (1944),<sup>112</sup> a case involving child labour. Mrs Prince, a Jehovah’s Witness, was convicted for permitting her offspring to sell religious magazines in the street, contrary to a Massachusetts statute that prohibited child labour. She maintained that this infringed her religious tenets as well as her right to bring up her child, but a divided Supreme Court upheld the statute. The State has a broad power to oversee the acts of children, the majority ruled, and parental authority may be restricted when doing so is in the interests of a child’s welfare.

Given Prince’s uncompromising stance in what appeared to many as a case involving relatively minor events, one would have expected the Supreme Court to reject claims of religious exceptions levied against nothing less than the compulsory school system. Yet the justices, in *Wisconsin v Yoder* (1972),<sup>113</sup> carved out just such an exception. The case involved the withdrawal from school of children

<sup>101</sup> Id. 648.

<sup>102</sup> Id. 651.

<sup>103</sup> Id. 649.

<sup>104</sup> 283 US 605.

<sup>105</sup> Id. 625.

<sup>106</sup> *Girouard v USA*, 328 US 61, 64 (1946).

<sup>107</sup> *Ibid.*

<sup>108</sup> Id. 68.

<sup>109</sup> 380 US 163.

<sup>110</sup> But not, it should be noted, to those who object only to specific wars: see *Gillette v United States* 401 US 437 (1971).

<sup>111</sup> Other successful exceptions to general laws for religious reasons were decided in the area of distribution of sacred literature. See e.g. *Cantwell v Connecticut*, 310 US 296 (1940); *Jones v City of Opelika II*, 319 US 103 (1943) and *Murdock v Pennsylvania*, 319 US 105 (1943).

<sup>112</sup> 321 US 158.

<sup>113</sup> 406 US 205 (1972). It should also be noted that, in *Pierce v Society of Sisters* 268 US 510 (1925), the Court referred to a ‘liberty interest’ in controlling a child’s education. *Pierce* invalidated a law that required all children to attend public schools, with the purpose of closing private schools, especially Catholic ones. The Court ruled that the state can insist on minimum standards,

belonging to the Old Order Amish religion upon request of their parents, who believed that education over the eighth grade (from fourteen years of age) was “too worldly”.<sup>114</sup> “When the children get to that age”, one Amishman stated at the hearings in a sentence that, as we shall see in Part 2, would most likely shock any average French *républicain* or *républicaine*, “you got to get that religion in them. Just like when you plant a tree—you got to plant it straight or it will always be crooked”.<sup>115</sup> After noting that “the values of parental direction of religious upbringing and education of their children in their early and formative years have a high place in our society”,<sup>116</sup> the Court ruled that the state’s interest in educating children should succumb to Amish parents’ religious freedom. “Long before there was general acknowledgement of the need for universal formal education”, the Court concluded, “the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs”.<sup>117</sup> The Wisconsin statute compelled Amish parents to perform acts which were at odds with a fundamental tenet of their religion, and since the state’s interest was not as substantial as the parents’, Wisconsin had to carve out an exception to the compulsory educational system specifically for Amish children.<sup>118</sup>

(c) ‘Right to Discriminate’ & Religious Exemptions in the Workplace

Just how important religion is to American law was made clear again by the Supreme Court in *Corporation of the Presiding Bishop v Amos* (1987),<sup>119</sup> a case involving the constitutionality of exemptions to anti-discrimination statutes. After being fired by his employer (a corporation affiliated to the Church of Jesus Christ) because he was not a member of that Church, a building engineer sued, claiming that he was discriminated against on religious grounds. The Supreme Court recognised that this was the case but unanimously found that the dismissal was justified because religious organizations were exempt from religious discrimination law. “[I]t is a permissible legislative purpose”, the Court wrote, “to alleviate significant government interference with the ability of religious organizations to define and carry out their religious missions”.<sup>120</sup> Since government had an interest in guarding against interference in religion, religious organizations could be constitutionally exempted from certain laws that apply to others.

Religious exceptions within the working environment had a more tortuous outcome. In 1963 the Supreme Court, in *Sherbert v Verner* (1963),<sup>121</sup> ruled that a member of the Adventist Church who had been fired because of her refusal to work on Saturdays (her faith’s Sabbath) had a right to unemployment benefits. Deciding differently would, the Court wrote, “force her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand”.<sup>122</sup> This, Justice Douglas wrote in a concurring opinion, would amount to interference “as plain as it is in Soviet Russia”.<sup>123</sup> According to the majority, states had to recognize the unique requirements of various religious traditions, because “to condition the availability of benefits upon the applicant’s willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties”.<sup>124</sup> This was not tantamount to giving special privileges to religious people, the justices concluded, but on the contrary simply guaranteed equality.

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but could not control the education of the child. “The fundamental theory of liberty upon which all governments in the Union repose”, the Court wrote, “excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations”.

<sup>114</sup> F P Shawn, *The Yoder Case: Religious Freedom, Education and Parental Rights* (Kansas University Press, Kansas, 2003) 28.

<sup>115</sup> *Id.* 94.

<sup>116</sup> 406 US 205, 213-4.

<sup>117</sup> *Id.* 214.

<sup>118</sup> The matter will be considered in detail in Chapter 1.3. as well as in the comparative portion of this thesis.

<sup>119</sup> 483 US 327.

<sup>120</sup> *Id.* 335.

<sup>121</sup> 374 US 398.

<sup>122</sup> *Id.* 404.

<sup>123</sup> *Id.* 412.

<sup>124</sup> *Id.* 406.

Although *Sherbert* has long been considered the reference case for religious exceptions in the workplace, in 1990 the Supreme Court took a different path in *Employment Division v Smith* (1990),<sup>125</sup> a case where the justices held that neutral, generally applicable laws can be applied to religious practices even when they are not supported by a “compelling governmental interest”,<sup>126</sup> as decided in *Verner*. Interestingly, however, the justification given was not founded on secular arguments but on the fact that ruling otherwise would have endangered the very existence of America’s marketplace of religions: “Any society adopting [religious exceptions to general laws] would be courting anarchy”, the majority wrote, “but the danger increases in direct proportion to the society’s diversity of religious beliefs.... Precisely because ‘we are a cosmopolitan nation made up of people of almost every conceivable religious preference’, we cannot afford the luxury of deeming presumptively invalid ... every regulation of conduct that does not protect an interest of the highest order”.<sup>127</sup> As we shall see in Chapter 1.3, this decision was the object of much criticism in America and several states passed local statutes that confirmed *Sherbert*, circumventing the Supreme Court’s strictness in the matter.<sup>128</sup> Yet this controversy remains emblematic of the Sophoclean dilemma in balancing individual conscience and state rules, a dilemma of which American law seems acutely aware.

### 1.2.2.2. Second (Possible) Limit to Religious Freedom in America: The Establishment Clause

Although the market of ideas and that of religions are intimately connected, they differ in three fundamental and problematic respects. The first is that, contrary to opinions, religious beliefs involve practices as well as thoughts—and this is exactly why the First Amendment protects the exercise of religion and not merely its belief. The second is that religion is only apparently a private matter: being concerned with human conduct, religious movements take by definition a holistic approach to life that cannot but be reflected on public issues as well. And the third, finally, is a question of priority: although civil and religious authorities stand on different levels, for a religious person—like for *Antigone*—there is usually little doubt which one prevails in case of conflict.<sup>129</sup> Although this duality is not necessarily negative—as Lord Acton wrote, it is “[t]o that conflict of four-hundred years [that] we owe the rise of civil liberty”<sup>130</sup>—it represents a potentially significant problem for governments, particularly in a country where religious denominations number in the hundreds.

The Founding Fathers were deeply aware of these peculiarities of religion and responded by creating a unique constitutional mechanism where religious freedom is balanced against the words of the Establishment Clause, which states that “Congress shall make no law respecting an establishment of religion”.<sup>131</sup> This provision has two important implications for our discussion. The first is that, contrary to what happens in the bazaar of ideas and, as we have seen, in the matter of religious exceptions to generally applicable laws, America’s marketplace of religions is not only a source of religious freedom but also—and paradoxically—an important limit to it, because the larger the number of religious groups, the more imperative it becomes for a government to prevent anarchy and maintain a state of neutrality.<sup>132</sup> The second implication has to do with the interpretation of the religious clauses: the difficulty of finding a constitutional balance between free exercise and anti-establishment produces a situation of internal inconsistency that at times blatantly favours religion and at others seems openly hostile to it. That the first situation is regarded by secularists as a judicial deformation of a godless constitution while the second is considered by religious groups as a wrong interpretation of a spiritually-oriented system is one more example of the controversial—but crucial—place occupied by religion in American law.

<sup>125</sup> 494 US 872.

<sup>126</sup> *Id.* 873.

<sup>127</sup> *Id.* 888.

<sup>128</sup> For details, see Chapter 1.3. and especially Section 1.3.1.2.

<sup>129</sup> “The reason why the servants of God are represented as troublesome is because they will not and dare not comply with the sinful commandments of men”, Madison observed. “As they have a Master in heaven, no earthly power can constrain them to deny his name or desert his cause”. Quoted in M W McConnell, “The Origins and Historical Understanding of Free Exercise of Religion”, (1990) 103 *Harvard Law Review* 1409, 1446.

<sup>130</sup> *Id.* 1513.

<sup>131</sup> US Constitution, 1<sup>st</sup> Amendment.

<sup>132</sup> French history is, as we will see in Chapter 2.1, an example of what happens when this is not the case.

This section briefly analyzes such complexity in the Establishment Clause jurisprudence with reference to three classical and highly sensitive areas of education: public contributions, curriculum and religious symbolism. Although, as we shall see in Chapter 1.3., the main topic of this thesis—the student veil—remains largely unaffected by Establishment Clause jurisprudence, the legal regime surrounding the latter does need to be briefly outlined here for it not only directly affects the matter of teachers’ wearing of the veil (Chapter 1.3.) but it will also be crucial when it comes to assessing the difference between French and American laws on the matter (Chapters 3.1. & 3.2.). This is so because one of the justifications given for the passage of Statute 228/2004 was precisely the necessity to protect the ‘neutrality’ of French public schools (and thus of the French State).

#### a) Public Contributions

The matter of public contributions to religious education provides a good example of Establishment Clause complexity—and is illustrated by *Everson v Board of Education* (1947),<sup>133</sup> a case most renowned for the justices’ comprehensive—indeed, all inclusive—definition of ‘establishment’.<sup>134</sup>

The ‘establishment of religion’ clause of the First Amendment means at least this. Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another... No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Since this passage seemingly outlawed public funds for all religious purposes whatsoever—and considering that *Everson* involved a law authorizing public schools to reimburse parents for the money spent on the transportation of children to religious schools—one would have expected the Supreme Court to strike down the legislation as unconstitutional. Yet that did not happen. The Justices held that the statute was valid because the money was given to parents, not to schools—and thereby narrowed the broad definition of establishment that they had just spelled out.<sup>135</sup>

*Everson* is all the more peculiar when compared with the Supreme Court’s approach in the other leading case on financial contributions to religious education, *Lemon v Kurtzman* (1971).<sup>136</sup> At issue here were two statutes that financially aided teachers of secular subjects in church-related schools. Entirely distancing itself from the *Everson* test and outcome, the Court concluded that both pieces of legislation were unconstitutional. In order to determine whether a statute violated the Establishment Clause, the justices argued, a new three-pronged test was necessary: “First, the statute must have a secular legislative purpose. Second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘excessive entanglement with religion’”.<sup>137</sup> The legislation at issue did not pass the third test and was thus held unconstitutional. As for the *Lemon* test, it still is today—as we shall see in Chapter 1.3. with reference to the teachers’ veil—the main lens

<sup>133</sup> 330 US 1. See D Layock, “The Underlying Unity of Separation and Neutrality”, 46 *Emory LJ* (1997); and, by the same author, “Theology Scholarships and the Pledge of Allegiance”, 118 *Harvard L Rev* 155 (2004).

<sup>134</sup> “In the words of Jefferson”, Justice Black concluded, “the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State’”. *Id.* 15-6.

<sup>135</sup> Public facilities and educational programmes are other examples of this uncertainty. Indeed, they represent historical battlegrounds between secularists and religious groups, and the Supreme Court jurisprudence on the matter mirrors this combat. See e.g. *McCollum v Board of Education*, 333 US 203 (1948) (holding that the practice of allowing outside religious instructors into the classroom during the school day violated the Establishment Clause, even with an opt-out provision and even if teachers were paid by private parties). See also *Zorach v Clauson*, 343 US 306 (1952) (holding that a New York programme allowing students to be released during the school-day to outside religious centres was constitutional because, contrary to *McCollum*, it did not involve the use of public facilities). On the matter, see also F M Gedicks, *The Rhetoric of Church and State: A Critical Analysis of Religion Clause Jurisprudence* (Duke University Press, Durham, 1995) 33.

<sup>136</sup> 403 US 602.

<sup>137</sup> *Id.* 612-3.

through which the Supreme Court assesses Establishment Clause queries, but its broad wording has only reduced—certainly not dissipated—the doubts created by *Everson*.<sup>138</sup>

#### b) School Prayers, Bible Reading & Ten Commandments

The complexity of the Supreme Court’s approach on Establishment Clause issues is also visible in the issue of religious symbolism. Although the justices have been fairly consistent in their rejection of public religious symbols at school, this directly collides with their position on symbolism in other areas of public life.

In the leading case on the matter, for instance, the justices decided that state-enforced school prayers were unconstitutional even if voluntarily recited. “[T]he constitutional prohibition against laws respecting an establishment of religion”, the Court wrote in *Engel v Vitale* (1962),<sup>139</sup> “must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious programme carried on by government”.<sup>140</sup> This position was confirmed one year later in *Abington v Schempp* (1963),<sup>141</sup> where the Court decided that official and daily school readings of Bible passages were unconstitutional because they amounted to “religious exercises required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion”.<sup>142</sup> Although, like in *Engels*, the *Abington* Court conceded that “today, as in the beginning, our national life reflects a religious people”,<sup>143</sup> it countered that “religious freedom is...likewise as strongly embedded in our public and private life”<sup>144</sup> and warned that “the breach of neutrality that is today a trickling stream may all too soon become a raging torrent”.<sup>145</sup>

In 1980, it was the turn of the Ten Commandments to fall under the scrutiny of the Supreme Court. A Kentucky law had required the posting of the Commandments in every public school, but the Supreme Court decided that this was unconstitutional. “The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths”, the Court wrote in *Stone v Graham* (1980),<sup>146</sup> “and no legislative recitation of a supposed secular purpose can blind us to that fact”.<sup>147</sup> Being sacred, the Commandments cannot but encourage a religious education on pupils: they will “induce schoolchildren to read, meditate upon, perhaps venerate and obey, the Commandments”, the Court wrote. “However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause”.<sup>148</sup>

Finally, a few years later the Supreme Court further extended its jurisprudence of neutrality on public school symbolism when it decided, in *Wallace v Jaffree* (1985),<sup>149</sup> that an Alabama law authorizing a period of silence in public schools for the purpose of “meditation or voluntary prayer”<sup>150</sup> also violated the Establishment Clause. “The addition of ‘or voluntary prayer’ indicates that the State intended to characterize prayer as a favored practice”, the Court concluded. “Such an endorsement is

<sup>138</sup> See, for example, *Widmar v Vincent*, 454 U.S. 263 (1981) and *Lamb’s Chapel v Center Moriches Union*, 508 U.S. 384 (1993), where the use of public facilities by religious groups was allowed. See also *Rosenberg v Rector of the University of Virginia*, 515 U.S. 819 (1995), where contributions to a Christian-oriented magazine were also allowed.

<sup>139</sup> 370 US 421.

<sup>140</sup> *Id.* 425. The Court acknowledged that “the history of man is inseparable from the history of religion” (*Id.* 434), but argued that intrinsic in America’s religious past was the need to separate state and religion: a union between the two, the majority agreed, “tends to destroy government and to degrade religion” (*Id.* 431).

<sup>141</sup> 374 US 203.

<sup>142</sup> *Id.* 225.

<sup>143</sup> *Id.* 213.

<sup>144</sup> *Id.* 214.

<sup>145</sup> *Id.* 225.

<sup>146</sup> 449 US 39.

<sup>147</sup> *Id.* 41.

<sup>148</sup> *Id.* 42.

<sup>149</sup> 472 US 38.

<sup>150</sup> *Id.* 40.



not consistent with the establishment principle that the government must pursue a course of complete neutrality toward religion”.<sup>151</sup>

### c) Non-School Public Display of Religion

If the Supreme Court jurisprudence has been historically constant in its opposition to public religious symbolism at school, however, the same cannot be said in the matter of religious symbols outside the classroom. For not only have the Justices explicitly recognized the constitutionality of religious holidays displays and Sunday closing laws—in 1983 they found that the Nebraska practice of beginning the legislative session with a prayer given by a publicly-funded chaplain was constitutional on the ground that “[t]he use of prayer is embedded in the nation’s history and tradition”<sup>152</sup> and that “religion has become part of the fabric of society”.<sup>153</sup> This hardly squares well with the justices’ interpretation of religious symbolism mentioned above—and even less does the fact that, like Congress, the Supreme Court itself regularly opens its sessions with an official prayer.<sup>154</sup>

## 1.3. CONCLUSION: WHAT PLACE FOR RELIGION IN US LAW?

What is the position occupied by religion in US law? As the chapter suggests, religion plays a controversial but crucial role within the American legal system—and, given the position of the Founding Fathers on the matter, this is hardly surprising. On the one hand they were convinced that religious feelings were vital for the well-being of individuals as well as nations, while, on the other, they agreed that precisely because of this, states had no right to intrude into the private conscience of its citizens and that religion should consequently be left out of government. “Our rulers can have authority over such natural rights only as we have submitted to them”, Jefferson famously wrote. “The right of conscience we never submitted, we could not submit”.<sup>155</sup>

The basic lesson of America’s First Amendment law, therefore, consists in the acknowledgement that the US system is on the one hand remarkably liberal when it comes to guaranteeing freedom of expression and religion at the individual level, and on the other hand remarkably strict (with the marginal exception of certain public practices regarded as possessing a historic, symbolic and non-sectarian character)<sup>156</sup> when it comes to the separation of Church and State. Indeed, it is possible to argue that the non-establishment rules developed by the US Supreme Court are even stricter than those provided by the supposedly impermeable French system of *laïcité*, a matter upon which I shall return in the French as well as comparative portions of this thesis.<sup>157</sup>

This Sophoclean balance between individual conscience and the law—and between private religious beliefs and Church-State separation—is precisely where the brilliance of the Founding Fathers lies. The same can be said of their agreement concerning the critical (although highly controversial) place of religion in American law as well as the corollary acknowledgement that it is

<sup>151</sup> *Id.* 60.

<sup>152</sup> *Marsh v Chambers* (1983) 463 US 783, 786.

<sup>153</sup> *Id.* 783.

<sup>154</sup> See also the recent cases on the constitutionality of religious holiday’s displays and Sunday closing laws. In particular, see *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) (holding that displaying the Ten Commandments in public bespeaks a religious object unless they are integrated with a secular message. In this case, the court saw no integration because of a lack of a demonstrated analytical or historical connection between the Commandments and the other documents and the displays were thus in violation of the Establishment Clause of the First Amendment). But see also *Van Orden v Perry*, 545 U.S. 677 (2005) (holding that a Ten Commandments monument erected on the grounds of the Texas State Capitol did not violate the Establishment Clause because the monument, when considered in context, conveyed a historic and social meaning rather than an intrusive religious endorsement).

<sup>155</sup> T Jefferson, Note on Virginia (1975) quoted in A Lipscomb & A Bergh (eds) *The Writings of Thomas Jefferson* (Library of Congress, Washington, 1903) 12:388, 20 volumes.

<sup>156</sup> This is what Professor Conkle calls ‘implicit exceptions’ to establishment rules. See D O Conkle, *Expression et Symbolisme Religieux Dans la Tradition Constitutionnelle Américaine: Neutralité de l’État, Mais Pas Indifférence*, in E Zoller (ed) *La Conception Américaine de la Laïcité* (Daloz, Paris, 2005) 170.

<sup>157</sup> See in particular Chapters 2.3. & 3.3.

precisely this controversy over conscience and spirituality—over the existence of an entity, be it religious or otherwise, that is higher and morally superior to the state—that characterizes American law and that gives sense to its entire constellation of rights.

In this perpetual debate, in the constant tension between the secular and the spiritual, lies America's freedom—a freedom that, as we shall see in the forthcoming chapter, extends to the Muslim veil as well. It is therefore to this matter that I shall now turn, for the time has come to see how the complex but crucial place occupied by religion in US law affects the legal treatment of the Islamic headscarf. The time has come, in other words, to pass from theory to practice.



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## The Place of the Muslim Veil in American Law & Policy

“These practices are inconsistent with federal law and should not be tolerated”.<sup>1</sup> So wrote the US Department of Justice, in 2004, in its resolute condemnation of any limitation imposed by American school authorities on the right of Muslim girls to veil. As mentioned in the Introduction to this thesis, the Department was writing in response to the headscarf incident involving an Oklahoma schoolgirl, a case<sup>2</sup> that we shall consider in detail below because it is illustrative of the relationship between the two major institutional players in the headscarf affair—namely, the judicial system and the political one. As far as the latter is concerned, there is no doubt that, for the American Establishment, the student headscarf represents a fundamental religious right that should be allowed in public schools—a diametrically different position from the one taken in France, where it is seen as a dangerous political symbol. Yet what about the law, one may wonder? The Oklahoma court had little contribution to make since the lawsuit was solved through mediation.<sup>3</sup> But do American judges share the US politicians’ defense of the Muslim veil and other religious symbols in US schools?

The short answer to this question is ‘yes’, although the trouble with assessing American judges’ positions on the veil lies with the paucity of judicial decisions on the matter—a paucity that, as we shall see in Chapter 2.3., sharply contrasts with the overabundance of veil litigation in France. Not only has the US Supreme Court never decided a case on headscarves at school—it has so far been silent also on the more general (but intimately connected) issue of uniforms and other student dress codes. Although the lack of constitutional precedents has resulted in a situation of partial uncertainty, this silence of the Supreme Justices is far from unusual in relation to First Amendment issues and does not, of itself, explain the small number of veil cases considered by lower courts. Moreover, as we have seen in Chapter 1.2., the Supreme Court has decided a number of cases that touch upon students’ rights to expression in general and religious expression in particular, and these provide lower judges with clues on how to decide both dress codes and religious clothing cases.

The reason for the scarcity of veil litigation in American law is therefore to be found elsewhere, and usually comes down either to the acknowledgement that the headscarf is considered uncontroversial by the majority of school authorities (and therefore no legal action is taken at all)<sup>4</sup> or, alternatively, to the use of extra-judicial instruments (such as mediation, arbitration and negotiation) during the legal process, as in the Muskogee events.<sup>5</sup> In both cases, the legal system in general—and the judiciary in particular—remain relatively dormant on the veil matter, a situation that strikingly contrasts, as we shall see, with the abundance of non-religious dress code litigation brought before American lower courts.

This chapter deals with these issues and is divided into five parts. First, it will adapt the Supreme Court’s case-law on freedom of expression and religion, as outlined in Chapter 1.2., to the more specific question of students’ rights regarding clothing in general and religious clothing in particular (1.3.1.). Secondly, it will consider the lower courts’ decisions on school dress codes and religious insignia (1.3.2.). Thirdly, it will explore the contentious but separate topic of teachers’ veils (1.3.3.). Fourthly, it will briefly deal with a number of significant non-school cases (1.3.4.) and, fifthly and lastly, it will assess the relationship between American law and policy on the veil (1.3.5.). With the

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<sup>1</sup> US Department of Justice, Letter to State Governors on Religious Symbols at School (Justice Department, Washington, 2004) 2.

<sup>2</sup> US Department of Justice, Complaint-in-Intervention in *Hearn v Muskogee Public School District* (Ca N CIV 03 598-S, 30 March 2004) 3; Motion to Intervene as Plaintiff-Intervenor in *Hearn v Muskogee Public School District*, 30 March 2004, 2; US Department of Justice, Memorandum of Law in Support of Its Cross-Motion for Summary Judgment in *Hearn v Muskogee School District*, 6 May 2004, 1.

<sup>3</sup> *Hearn v Muskogee Public School District*, Consent Order, Ca N CIV 03 598-S, May 2004.

<sup>4</sup> See Section 1.3.2.2. (b)

<sup>5</sup> See Section 1.3.2.2. (a)

aim of highlighting the dynamic character of the issue and placing the events in their historical dimension, a chronological approach will be adopted.

Throughout this chapter, the reader should expect four things: (i) limited veil litigation and an abundance of dress code and uniform cases; (ii) general—if not unanimous—upholding of private religious symbols at school; (iii) a difference in treatment between students' rights to express a religious message and the expression of a non-religious one; and (iv) the interplay between free expression and free exercise claims on the matter of student clothing. In order to emphasize these two components and their close but problematic relationship, I will consider expression and religion separately and I will show that, when it comes to students' expressive conduct, they sometimes offer two different standards of protection.

### 1.3.1. THE UNITED STATES SUPREME COURT ON THE STUDENT VEIL

As mentioned, the Supreme Court has never directly intervened in—and has in fact repeatedly declined to hear—controversies involving school dress codes.<sup>6</sup> This does not mean, however, that the justices left the matter entirely unresolved: a number of both free expression and free exercise cases indirectly deal with school clothing and have been interpreted by lower courts as providing a constitutional answer—indeed, a plurality of answers—to the veil question. This section analyzes the most relevant Supreme Court standards on the matter of student clothing, first with reference to free expression in general (dress codes) and then with regard to free exercise of religion (the veil). While the two freedoms are intimately connected, the separate treatment is appropriate, I will argue, because when it comes to student clothing, the two do not always coincide.

One point needs to be mentioned here. Under US law, the Muslim veil could be regarded as displaying a religious message (covered by the Free Speech Clause of the First Amendment) or as religious conduct (covered by the Free Exercise Clause of the First Amendment). As we shall see below, the former benefits from a higher protection than the latter.<sup>7</sup> As a result, if the veil is not regarded as speech but conduct (and some judges may see it that way), the question is whether it is still protected under US law—and this depends on whether the rule that prohibits the veil is neutral and generally applicable, or whether other exceptions to the dress code have been permitted. While keeping in mind both scenarios, this thesis will suggest that the Muslim veil conveys a (prominent) religious message that fits very well the *Tinker* standard. It is certainly true, as we shall see below, that the protection accorded to speech by *Tinker* is not foolproof and has been somewhat narrowed, yet I believe it is still strong enough to cover as highly protected expression (on a par with political speech) the very clear and immediately recognizable message coming from a Muslim veil.

Furthermore, even if the veil were accorded the lesser protection reserved for conduct rather than speech, I suggest that this would not undermine my central argument that the French legislation on religious symbols at schools would be unconstitutional under American law. For in the second case (veil as speech), the Free Speech Clause would regard the singling out of a religious message as content-based discrimination that is unconstitutional; in the first case (veil as conduct), the Free Exercise Clause would consider the singling out of religious behaviour for prohibition that does not apply to analogous secular behaviour as burdening religion pursuant to a law that is not neutral and generally applicable (*ex Smith*) and thus unconstitutional. In both cases, therefore, the result would likely be the same: the invalidation of the restriction.

#### 1.3.1.1. Student Dress as 'Symbolic Speech': Supreme Court Free Expression Standards on Student Clothing

<sup>6</sup> See e.g. *Ferrell v Dallas Independent School District* 393 US 856 (1968); *Karr v Schmidt*, 401 US 930 (1971); and *Cooper v Eugene School District n.41*, 480 US 942 (1987).

<sup>7</sup> Important cases for the protection of religious speech are the *Jehovah's witnesses* cases quoted in Section 1.2.2.1. Examples of more recent cases are *Capitol Square Review Board v Pinette*, 515 US 753 (1995); *Rosenberg v University of Virginia*, 515 US 819 (1995); and *Good News Club v Milford Central School*, 533 US 98 (2001). For details, see D Laycock, "A Survey of Religious Liberty in the US", 47 *Ohio State L J* 409, 419-20 (1986).

The first Supreme Court standard applied by American courts in determining whether dress constitutes symbolic speech is the Spence test.<sup>8</sup> Mr Spence, a college student, was convicted for affixing a peace symbol protesting against the Vietnam War on his American flag in violation of a flag misuse statute. The Supreme Court reversed, holding that his conduct constituted ‘symbolic speech’ protected by the First Amendment. Although the case did not directly concern student clothing, a number of lower courts take Spence to signify that student dress is a constitutionally protected form of symbolic speech if it meets the following two tests: (i) the student must wear the cloth with the “intent to convey a particularized message”; and (ii) “the likelihood [must be great] that the message would be understood by those who viewed it”.<sup>9</sup> In Spence’s case, the justices held, “[i]t would have been difficult for the great majority of citizens to miss the drift of the appellant’s point at the time he made it”.<sup>10</sup> If these two conditions are met—and such would easily seem to be the case with the Muslim veil—then the student clothing is considered ‘symbolic speech’ and, generally speaking, has First Amendment protection.<sup>11</sup>

As the Supreme Court point out in Spence, however, this may not automatically be the case—and symbolic speech may not, in some instances, receive full First Amendment shelter. In the same year that Spence was decided, the Supreme Court adopted another and more restrictive legal analysis in *US v O’Brien* (1968), which is used by some courts to assess student dress challenges and expressive conduct. In this case the justices held that, when speech and non-speech elements are combined in the same course of conduct, an “important interest”<sup>12</sup> could justify “incidental limitations”<sup>13</sup> to First Amendment freedom. As mentioned in Chapter 1.2., the case involved the burning of a military draft card on the steps of a federal courthouse by a protester, in violation of a statute that provided criminal penalties for such an act. To determine whether the government regulation—in *O’Brien*, the criminal statute; in our case, a school dress code—is sufficiently justified, the Supreme Court imposed a new four-pronged test. Firstly, the policy must be “within the power of the government”;<sup>14</sup> secondly, it must “further an important governmental interest”;<sup>15</sup> thirdly, it must be “unrelated to the suppression of freedom of expression”;<sup>16</sup> and, fourthly, the “incidental restriction must be no more than necessary to further a governmental interest”.<sup>17</sup> As we shall see in section 1.3.2.1., the *O’Brien* test has sometimes been used by lower courts to uphold school uniforms and student dress codes—and thus limit students’ expression.

If the *O’Brien* test is considered restrictive, the Supreme Court decision the following year in *Tinker v Des Moines Independent School District* (1969) is regarded as a milestone for freedom of expression in schools. In *Tinker*, the Supreme Court decided that wearing black armbands as a form of political protest against the Vietnam War—and in violation of a school regulation to the contrary—was a form of constitutionally protected speech under the First Amendment on the students’ part. Not only did the justices emphasize that such conduct meets the two-pronged test of the Spence standard; the importance of the *Tinker* holding consists in the fact that it prohibits school officials from silencing student expression just because they dislike it. Since *Tinker*, therefore, if a school is to proscribe student expression, it must reasonably forecast—based on evidence and not on an “undifferentiated fear or apprehension of disturbance”<sup>18</sup>—that such expression would lead either to “(a) a substantial disruption of the school environment or (b) an invasion of the rights of others”.<sup>19</sup> While *Tinker*’s potential significance for the issue of school grooming rules and the Muslim veil is obvious, the

<sup>8</sup> *Spence v Washington*, 418 US 405 (1974).

<sup>9</sup> *Id.* 410-11.

<sup>10</sup> *Id.* 410.

<sup>11</sup> Spence was confirmed in 1989 by *Texas v Johnson* 491 US 397 (1989). See Chapter 1.2.1.1.

<sup>12</sup> *Id.* 376.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Id.* 377.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Tinker v Des Moines Independent School District*, 393 US 503 (1969), 508.

<sup>19</sup> *Id.* 514.

Supreme Court cooled the enthusiasms of dress code opponents by explicitly stating that “the problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style or deportment”.<sup>20</sup> Yet the case unmistakably and significantly extends students’ rights to expressive conduct, and the result is that, at the lower courts level, advocates and enemies of school uniforms and grooming policies quote different parts of *Tinker* to justify their respective positions.<sup>21</sup>

It was in line with its balancing role between freedom and restraint that the Supreme Court introduced, in 1976, the *Johnson* standard.<sup>22</sup> Perhaps in reply to criticism of having fostered permissiveness,<sup>23</sup> the justices tempered *Tinker* by emphasizing that some matters of personal appearance do not amount to First Amendment speech but rather involve liberty issues under the Fourteenth Amendment.<sup>24</sup> The judgment upheld a rule governing hair grooming for male members of a county police force. Yet as applied to the school environment, *Johnson* has been interpreted by some courts to signify that while students may have a liberty interest in clothing and grooming, public schools can adopt regulations that limit such liberty if these have “a rational relationship to a legitimate educational interest”.<sup>25</sup> Although the burden is on schools to prove both the relationship and the interest, a number of courts have applied *Johnson* not only to limit other students’ rights but also to promote much broader (and more controversial) ideas such as ‘decency’, ‘civility’ and ‘respect for authority’, as well as to prohibit ‘vulgar’ or ‘profane’ speech.<sup>26</sup>

With its idea of “socially appropriate behavior”<sup>27</sup> and its prohibition of all “vulgar and offensive terms”<sup>28</sup> regardless of their specific content, the *Fraser* standard, introduced by the Supreme Court in 1986, is considered by critics as a further dilution of *Tinker*’s liberalism. Mr *Fraser* was a high-school student who, during a nominating speech, uttered expressions that school officials considered lewd and offensive. A legal battle ensued, with *Fraser* arguing that his message was fully protected under the *Tinker* standard. The Supreme Court disagreed: “The constitutional rights of students in public school settings are not automatically coextensive with the rights of adults in other settings”,<sup>29</sup> the justices wrote. “The freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society’s countervailing interest in teaching students the boundaries of socially appropriate behavior”.<sup>30</sup> As a consequence, the Court concluded, “[i]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse”.<sup>31</sup> While this case has no significant implications for the veil issue, it does have, as we shall see, major consequences for dress codes cases, because school authorities (and judges) have used *Fraser* to prohibit certain ‘alternative’ clothing styles as well as, in one circumstance, an anti-drug message on a t-shirt.<sup>32</sup>

Last but not least, another significant test on the limits of students’ expression, *Hazelwood*,<sup>33</sup> was decided in 1988. In this case the Supreme Court held that a school principal did not violate the First Amendment rights of students when he censored two articles on the controversial topics of pregnancy and divorce that were scheduled to appear in a student newspaper. “Educators do not

<sup>20</sup> Id. 507-8. On the Supreme Court position that speech may not be banned solely because of fear or disturbance, see also *Cohen v California*, 403 US 15 (1971), 23.

<sup>21</sup> See Section 1.3.2.1.

<sup>22</sup> *Kelley v Johnson*, 425 US 238 (1976).

<sup>23</sup> In a forceful dissent, Justice Black accused his colleagues of ushering in “a new revolutionary era of permissiveness in this country fostered by the judiciary”. *Tinker v Des Moines School District*, 393 US 509, 518 (1969).

<sup>24</sup> “No state shall deprive any person of life, liberty, or property without due process of law”. US Const, 14<sup>th</sup> Amend.

<sup>25</sup> *Kelley v Johnson*, above at note 21, 238.

<sup>26</sup> See Section 1.3.2.1.

<sup>27</sup> *Bethel School District v Fraser*, 478 US 675 (1986), at 681.

<sup>28</sup> Id. 683.

<sup>29</sup> *Ibid.*

<sup>30</sup> Id. 681.

<sup>31</sup> Id. 683.

<sup>32</sup> See *Broussard v School Board of the City of Norfolk*, 801 F Supp 1526 (E D Virg 1992) (‘Drugs suck’ t-shirt prohibited because vulgar).

<sup>33</sup> *Hazelwood School District v Kuhlmeier* 484 US 260 (1988).

offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns”,<sup>34</sup> the Court held. The case involved school-sponsored publications and did not directly deal with ‘pure’ student speech such as a flag or the Muslim veil, yet it is still noteworthy for the students’ clothing issue because, as we shall see, some lower courts have employed it to allow principals to censor student expression across a broader field than school journals; such as in the context of school band songs, school assignments and, in one case, even student campaign speeches.<sup>35</sup>

What does this short excursus tell us about the Supreme Court standards for students’ expressive conduct? Although the Supreme Court Justices have sent a variety of signals and left considerable ambiguity on the matter, the First Amendment is generally considered as protecting not only students’ freedom of speech but also other forms of expressive conduct, including what clothes can be worn. To constitute ‘symbolic speech’, however, courts normally require the contentious piece of clothing to meet the two-pronged Spence test (i.e., conveyance of a particularized message and likelihood that the message would be understood as such), after which it is eligible for First Amendment protection. However, that protection may be lost—and the school regulation upheld—if the four part O’Brien standard is satisfied. Although this standard has never been interpreted as limiting the student veil, it leaves considerable freedom to lower courts when it comes to upholding schools’ dress codes, uniforms and grooming policies, as the heterogeneity of decisions on the point demonstrates.<sup>36</sup> In compliance with *Tinker*, for example, some courts maintain that schools are not supposed to merely rely on “discomfort or unpleasantness”<sup>37</sup> to impose a certain dress code but must show that a “substantial disruption”<sup>38</sup> of the learning environment is likely to be caused by the contentious garb. Since *Tinker* deals with ‘pure’ student speech but does not apply to dress codes, however, some courts give preference to the *Johnson* and *Hazelwood* standards and argue that “a reasonable relationship”<sup>39</sup> to a legitimate educational interest is more than enough to limit students’ expressive conduct through their clothing.

### 1.3.1.2. Student Veil as ‘Religious Speech’: Supreme Court Free Exercise Standards on the Veil

What happens when, as in the case of the Muslim headscarf, the piece of student clothing has religious significance? In the absence of direct Supreme Court precedents on the matter, the attention inevitably turns to the Court’s leading cases on free exercise of religion. Furthermore, since in America school dress codes are generally-applicable laws that potentially infringe the religious requirements of the Muslim dress, the Supreme Court cases most relevant for us are those dealing with the question of whether religious exceptions can be allowed to circumvent a general, secular law that impinges on a person’s religious rights. Applied to our enquiry, in other words, the whole issue translates into the following question: does the US Constitution permit veils to be exempted from general rules on dress codes?

As we have seen in Chapter 1.2., when it comes to exceptions to generally applicable laws the US legal world is divided into a pre- and a post-Smith era. Prior to *Smith* (1990), the leading standard on religious exceptions was *Sherbert* (1963).<sup>40</sup> A secular law, the justices ruled, can burden the free exercise of religion only if it meets two essential conditions (also known as the ‘strict scrutiny’ standard): it must further a “compelling state interest”<sup>41</sup> and it must be the “least restrictive means”<sup>42</sup> of achieving that interest. Although the employment benefit law reviewed in *Sherbert* was a general

<sup>34</sup> See also, *ibid*: “A school must also retain authority to refuse to sponsor...conduct otherwise inconsistent with ‘the shared values of a civilized social order’”.

<sup>35</sup> See e.g. *Henery v City of St Charles School District*, 200 F 3d 1128 (8th Cir 1999).

<sup>36</sup> See Section 1.3.2.1.

<sup>37</sup> *Tinker*, above at note 17, 509.

<sup>38</sup> *Id.* 514.

<sup>39</sup> *Hazelwood*, above at note 32, 267.

<sup>40</sup> *Sherbert v Verner*, 374 US 398 (1963). See Chapter 1.2. and, in particular, Section 1.2.2.1.

<sup>41</sup> *Id.* 403.

<sup>42</sup> *Ibid.*

one and did not intentionally target religion, the plaintiff's religious conduct still prevailed because the only alternative was for the state to oblige her to "violate a cardinal principle of her religious faith that effectively penalizes the free exercise of her constitutional liberties".<sup>43</sup> The momentous conclusion reached by *Sherbert*, in other words, was that, when religion is at stake, only a state interest of the highest order could justify a restriction on religious freedom—and a school dress code that prohibited the Muslim headscarf would be unlikely to meet this standard.

Nine years after *Sherbert*, the Supreme Court seemed to reaffirm its point in *Yoder*, which, as we have seen, is a case involving the refusal of Amish parents to send their children to school after a certain age. These parents' religious rights must prevail over educational laws, the justices held, because state legislation requiring children to go to school "affirmatively compels [Amish parents], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs".<sup>44</sup> This, according to the Court, was unacceptable, because "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"<sup>45</sup>—and, controversially, compulsory education was not considered among them.<sup>46</sup> As we shall see in the following section, therefore, *Yoder* is often quoted in support of the right to wear religious symbols at school.

Although the *Yoder* Court seemed even more self-confident than *Sherbert's* in defending religious exceptions to general laws, it should be noted that this may have been only partly the case. The justices went to great lengths to emphasize that the Amish presented a special instance, and explicitly hinted that other religious or philosophical groups might not benefit from the same treatment.<sup>47</sup> Moreover, Amishmen themselves did not manage to obtain a permanent exemption from general laws when it came to the social security system,<sup>48</sup> reinforcing the impression that constitutional protection depends entirely on the justices' assessment of the expression "interest of the highest order".<sup>49</sup> In carving out an exception just for the Amish, therefore, the Supreme Court—instead of reinforcing the general, pro-religion exemptions in the *Sherbert* standard—might well have started the process of weakening it, as appeared to materialize in following years.

Goldman (1986) is interpreted by some observers as a part of this 'weakening' process—and as a clue to the Supreme Court's forthcoming change of direction in *Smith*. The case was brought by an Orthodox Jew and involved an Air-Force uniform rule prohibiting hats and other headgear in the Army while indoors. This, Mr Goldman maintained, was a typical example of a generally applicable rule that unfairly violated his religious rights as per *Sherbert*. Even conceding that the uniform policy met the stringent 'compelling state interest' standard of *Sherbert*, he argued, to refuse to allow a Jewish yarmulke was not 'the least restrictive means' of achieving the state interest of uniformity because the Air Force did not even try to accommodate his religious hat. The Supreme Court, however, disagreed. "The military must insist upon a respect for duty and a discipline without counterpart in civilian life",<sup>50</sup> the justices wrote. "The essence of the military service is the subordination of the desires and interests of the individual to the needs of the service",<sup>51</sup> because "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is

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<sup>43</sup> Id. 406. In so ruling, the *Sherbert* Court significantly extended the protection of the Free Exercise Clause to question any general law that had the effect of discriminating against religious interests, irrespectively of whether this burden on religion was intentional or merely fortuitous.

<sup>44</sup> *Wisconsin v Yoder*, 406 US 205 (1972), 218.

<sup>45</sup> Id. 215.

<sup>46</sup> "The conclusion is inescapable", the Court wrote to the contrary, "that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values in conflict with beliefs, and by substantially interfering with the integration of the Amish child into the way of life of the Amish faith community at the crucial adolescent state of development, contravenes the basic religious tenets and practice of the Amish faith". *Ibid*.

<sup>47</sup> "It cannot be overemphasized that we are not dealing with a way of life or mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life". Id. 235.

<sup>48</sup> See *United States v Lee*, 455 US 252 (1982).

<sup>49</sup> *Yoder*, above at note 43, 215.

<sup>50</sup> *Goldman v Weinberg*, 475 US 503 (1986), 507.

<sup>51</sup> Id. 484.



required of the civilian state by the First Amendment”.<sup>52</sup> While this case is clear in its rejection of religious symbols in the army, its emphasis on the specificity of the military setting is not seen as a threat to the constitutionality of religious exceptions (and the Muslim veil at school).<sup>53</sup>

And then, in 1990, came the Smith decision, which seriously imperiled the viability of religious exceptions, holding that “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the grounds that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)”.<sup>54</sup> The two sympathizers of the Native American Church in Smith, the majority of the Court held, could legitimately use drugs for religious reasons without committing an offence, because an explicit religious exception was provided to that effect by Oregon criminal law; they could not claim unemployment benefits once fired, however, because the statute prohibiting this did not contemplate a similar religiously-based exception. “Our conclusion”, Justice Scalia wrote for the majority, “[is] that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling government interest”.<sup>55</sup>

Since Smith, therefore, the protection of free exercise of religion is supposedly limited to those laws considered purposefully discriminatory and burdensome to religious practices<sup>56</sup>—a considerably more relaxed standard than Sherbert (1963) but, as we shall see in Chapter 2.3., one that French Statute 228/2004 may very well meet. Once again, however, it should be observed that Congress did not like this lower threshold and, as we shall see in Section 1.3.5.1. (b), a battle ensued between the judicial and legislative branches of government: Smith was first over-ridden in 1993 by the Sherbert-based Religious Freedom Restoration Act (RFRA), which was in turn struck down by the Supreme Court as unconstitutional in *Boerne v Flores*,<sup>57</sup> which was then itself circumvented through a plethora of state legislation (called in many cases RFRAs) that reintroduced the Sherbert standard into the legal landscape of many American states.<sup>58</sup> What had been thrown out of the federal door by the judiciary, therefore, came back through the states’ windows via the legislative power.

Recent developments are once again changing the legal landscape of US religious freedom, and represent further proof of the complex and controversial place occupied by religion in American law. In response to the Smith (1990) and *Boerne* (1997) decisions, in 2000 the US Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA),<sup>59</sup> which, among other things, provides that “no government shall impose a substantial burden on the religious exercise of a person residing in or confined in an institution, unless the burden furthers a compelling governmental interest and does so by the least restrictive means”.<sup>60</sup> Although limited to ‘institutionalized persons’ (such as inmates and patients of mental hospitals), the Act effectively reintroduced the ‘strict scrutiny’ regime of Sherbert (1963) at the federal level. Not surprisingly, this law was held unconstitutional by an appellate court,<sup>61</sup> but on further appeal, the Supreme Court reversed this decision and declared the Act

<sup>52</sup> Ibid. In this context, the Supreme Court concluded, “[u]niforms encourage a sense of hierarchical unity by tending to eliminate outward distinctions except for those of rank” (Id. 508) and are therefore legitimate even though they stifle religious freedom. As is often the case in free exercise cases, however, both the executive and legislative branches of government did not side with the Supreme Court and decided to directly intervene in the matter: shortly after *Goldman*, the Pentagon issued an order that admitted religious symbols, while Congress passed a piece of legislation prescribing that “a member of the armed forces may wear an item of religious apparel while wearing the uniform’, unless ‘the wearing of the item would interfere with the performance [of] military duties [or] the item of apparel is not neat and conservative”. See 10 USC § 774 (a)-(b) in *Cutter v Wilkinson*, (unpubl) (2005), II (A) (now available as *Cutter v Wilkinson*, 544 U.S. 709 (2005)).

<sup>53</sup> See Sections 1.3.4. and 1.3.5.1.

<sup>54</sup> *Employment Division v Smith*, 494 US 872 (1990), 879.

<sup>55</sup> Id. 886 (emphasis added).

<sup>56</sup> Although, it should be noted, what Smith exactly means is contested, with some authors arguing for instance that it does not require purposeful discrimination but only bad motive.

<sup>57</sup> *City of Boerne v Flores*, 521 US 509 (1997). See for details Section 1.3.5.1.

<sup>58</sup> To date, thirteen states have implemented the RFRA at the state level. See Section 1.3.5.1.

<sup>59</sup> 42 USC §2000 cc-1(a) (1)-(2).

<sup>60</sup> Id. at s. 3.

<sup>61</sup> See *Cutter*, above at note 51, II (A).

constitutional.<sup>62</sup> RLUIPA, the Supreme Court held in *Cutter* (2005), is “a law respecting religion, but not one respecting an establishment of religion”,<sup>63</sup> because the case involved institutions where people “are unable freely to attend their religious needs and are therefore dependent on the government’s permission and accommodation for exercise of their religion”.<sup>64</sup> As for the Lower Court’s argument that RLUIPA “impermissibly advances religion by giving greater protection to religious rights than to other constitutionally protected rights”,<sup>65</sup> the justices simply dismissed it<sup>66</sup> by noting that “religious accommodations ‘need not come packaged with benefits to secular entities’”.<sup>67</sup>

As the reader can easily appreciate, considerable confusion surrounds the Supreme Court position on religious exceptions to general laws—and thus the Free Exercise guarantees available to the Muslim veil in US schools.<sup>68</sup> If one were to follow the *Sherbert* standard there is, of course, little doubt that wearing a headscarf (as well as any other religious insignia) is a constitutionally protected right, because, apart from the question of whether dress codes further a ‘governmental interest of the highest order’, the strict scrutiny test is unlikely to be met by a hypothetical regulation that required Muslim schoolgirls to unveil but then made exceptions—as most dress codes indeed do—for medical or other reasons. In spite of its limited applicability, *Yoder* seems to support this position—and so does *Goldman* where it recognized that the military is special. In the context of the armed forces, free expression and free exercise claims must be tempered, the Court suggested, by the acknowledgement that in such an environment the importance of fostering critical thinking is minimal: in contrast to schools, where *Tinker* held that it is instead vital. Nevertheless, *Smith* remains a limit to religious exceptions and potentially unsettles the treatment of the veil.

As we turn to the lower courts’ stance on the constitutional position of the Muslim headscarf, it is clear that the law, at the Supreme Court level, is somewhat more convoluted than the self-confident political statement quoted at the beginning of this chapter suggests.

### 1.3.2. LOWER COURTS ON STUDENT VEIL

Given that the highest court has refused to grant leave to hear student clothing matters<sup>69</sup> and that its jurisprudence conveys a variety of messages, it is not surprising that the rest of the judiciary has not pronounced definitely on the issue of student dress. Yet the contribution of lower courts remains essential because, considering the Supreme Court’s silence, it has been up to the lower benches to carry out the hard work of answering the central question at issue in this chapter: is clothing in general—and the Muslim veil in particular—a right for students under American law? The answer to that question is far from definite, but it is clear enough to indicate that the two components (general clothing and religious clothing) should be considered separately, and that what amounted to a potential quarrel between them at the Supreme Court level may well turn into a veritable split in the lower courts.

#### 1.3.2.1. ‘Not Quite Expressive’: The Illusion of Student Clothing & Grooming as Protected Expression

<sup>62</sup> *Ibid.* The case was originally brought by inmates members of ‘non-mainstream’ religions (Satanist, Wicca, Asatru) who complained that prisons’ regulations failed to accommodate their religious beliefs by “forbidding them to adhere to the dress and appearance mandates of their religions”. See *Cutter*, above at note 51, Brief for United States at 5.

<sup>63</sup> *Cutter v Wilkinson*, 544 U.S. 709 (2005).

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> “While the Act adopts a ‘compelling interest’ standard”, Justice Ginsburg wrote for the majority, “context matters in the application of that standard”. *Ibid.*

<sup>67</sup> *Ibid.* See also 483 US 329 at 338. This seemed also the message delivered by the Supreme Court in 2006 in *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418 (2006). Here, the Justices held that a church was properly granted an injunction under the Religious Freedom Restoration Act (RFRA) against criminal prosecution for its sacramental use of a hallucinogenic substance, because the federal government had failed to show a compelling interest in forbidding that use under the Controlled Substances Act (CSA).

<sup>68</sup> An analysis from a freedom of speech perspective rather than from a Free Exercise one leads, of course, to more definite conclusions. See Chapter 1.2. and *infra* for details.

<sup>69</sup> See *Ferrell v Dallas Independent School District*, 393 US 856 (1968).

(a) 'Beatle-Style' Hair, Beards & Moustaches

The reluctance of the judiciary to recognize student clothing and grooming as forms of protected speech is evident in a number of early cases, among which *Ferrell* (1966)<sup>70</sup> is one of the most significant. During the late 1960s three male students were denied enrolment in a high school because they had 'Beatle' style hair, while the institution's policy prohibited this (and long hair in general) on the ground that it caused "commotion, trouble, distraction and a disturbance in the school".<sup>71</sup> The young men, however, were part of a music group and refused to change their haircut. A lengthy legal battle ensued, which came to an end in 1968 when the Court of Appeals for the Fifth Circuit ruled that the school interest in maintaining a proper appearance for students outweighed the students' right to express themselves through their hairstyle.<sup>72</sup> "The interest of the state in maintaining an effective and efficient school system is of paramount importance",<sup>73</sup> the court held, because "the Constitution does not establish an absolute to free expression of ideas [and] [t]he constitutional right to free exercise of speech, press, assembly and religion may be infringed by the state if there are compelling reasons to do so".<sup>74</sup> Using a severe—but, it should be noted, pre-*Tinker*—tone, the appellate judges concluded that "[t]hat which so interferes or hinders the state in providing the best education possible for its people, must be eliminated or circumscribed as needed. This is true even when that which is condemned is the exercise of a constitutionally protected right".<sup>75</sup>

Considering the uncompromising tenor of *Ferrell*, it comes as no surprise that the constitutionality of school dress codes was confirmed in a series of subsequent cases. In *Davis* (1969)<sup>76</sup> for example, the Court of Appeals for the Fifth Circuit held that "the predominant interest of a school is to educate its students. If a particular type of conduct has the effect of disrupting the learning atmosphere, it should be subject to regulation".<sup>77</sup> The *Davis* court, however, did not seem particularly concerned that constitutional liberties may be trampled on in the process—and neither was the Court in *Woods* (1970), a case where a dress code "designed to insure appropriateness of student dress for school"<sup>78</sup> and prohibiting "beards, mustaches and other expressive male styles"<sup>79</sup> was held constitutional on the ground that "the grooming regulations are reasonably necessary to insure the effective operation of the school and promote the discipline and decorum of its students".<sup>80</sup> "Extreme hairstyle", the court concluded, "may, and probably would, be a disrupting influence on a student body which does not wear them"<sup>81</sup> and can therefore be constitutionally forbidden.<sup>82</sup>

While the early cases almost exclusively dealt with whether school dress and grooming policies were appropriate per se, as the influence of *Tinker* started sweeping across US courtrooms the matter of their breadth was also raised. In 1970, for example, a court upheld a school policy that generically required "decency in the dress of all students",<sup>83</sup> making it clear that "respectable appearance was

<sup>70</sup> *Ferrell v Dallas Independent School District*, 261 F Supp 545 (1966); 392 F.2d 697 (1968).

<sup>71</sup> *Id.* 699.

<sup>72</sup> The Supreme Court declined to hear the case in 393 US 856 (1968).

<sup>73</sup> *Ferrell*, above at note 68, 703.

<sup>74</sup> *Id.* 702-3.

<sup>75</sup> *Id.* 703.

<sup>76</sup> *David v Firment*, 408 F 2d 1085 (1969), 269 F Supp 524 (1967).

<sup>77</sup> *Ibid.*

<sup>78</sup> *Woods v Alamo Heights Independent School District* (1970), 308 F Supp 551, at 552.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> Despite the speculative character of this judgment (no disruption was either proved or required), a case on substantially the same line was *Stevenson*: "Courts should uphold [school grooming regulations]", the judge wrote, "where there is any rational basis for the questioned rule. All that is necessary is a reasonable connection of the rule with the proper operation of the schools" because, the judge concluded, "among the things a student is supposed to learn at school (at least such is my idea) is a sense of discipline". See *Stevenson v Wheeler County Board of Education*, 306 F Supp 97 (1969). See also *Crews v Clonics* (303 F Supp 1370, 1375), where a judge held that "conduct which has the effect of bringing about disruption, whether intending that effect or not, may constitutionally be proscribed within reason". In a similar tone see *Jackson v Dorrier*, 424 F 2d 213 (1970) and *Schwartz v Galveston Independent School District*, 309 F Supp 1034 (1970).

<sup>83</sup> *Carter v Hodges*, 317 F Supp 89 (1970), 90.

demanded<sup>84</sup> and emphasized that “hair of ... bizarre style”<sup>85</sup> were not acceptable, insofar leaving total discretion to the principal as to what constituted permitted hairstyle. Yet the judiciary was not homogeneous in its position, and certain dress codes were struck down as overbroad. In *Crossen v Fatsy* (1970),<sup>86</sup> for example, it was decided that while schools were entitled to impose a dress code, the latter could not be “unduly vague, uncertain and ambiguous”<sup>87</sup> nor left “to the arbitrary whim of the principal”.<sup>88</sup> As a consequence, the court invalidated a policy stating that “students are to be neatly dressed and groomed, maintaining standards of modesty and good taste conducive to an educational atmosphere”.<sup>89</sup> In subsequent years, several other cases confirmed this tendency, particularly with reference to over-broad anti-gang school dress codes.<sup>90</sup>

Apart from the issue of over broadness, the *Tinker* influence seemed also to instill some doubt in the judiciary as to whether a haircut could really be as disruptive as it was claimed. Moreover, the central question as to whether students have a constitutional right to choose their hairstyle and personal appearance was raised with increased frequency—and translated into a number of decisions against dress codes.<sup>91</sup> Idaho and Alaska’s highest courts were among the first to side with the students: “[W]e hold the right to wear one’s hair in a manner of his choice to be a protected right of personal taste not to be interfered with by the state”, the Idaho judges wrote, “unless the state can meet...‘substantial burden’ criteria...”.<sup>92</sup> As for the ‘disturbances’ routinely thought to justify school grooming policies, the judges wrote that long hair by no means automatically equated with disruption: “The question is...raised as to who actually [is] to blame for these hair-related ‘disturbances’”,<sup>93</sup> they emphasized. The Alaska Supreme Court went even further: “The spectre of governmental control over the physical appearance of private citizens, young and old, is antithetical to a free society, contrary to our notions of a government of limited powers, and repugnant to the concept of personal liberty”.<sup>94</sup> Only a “compelling interest”<sup>95</sup> of the highest order on the part of the state could impinge on that liberty—and an unspecified ‘sense of discipline’ was not regarded as fulfilling that requirement.

Progressive as it certainly was, this stance was nevertheless far from representing the constitutional standard required across America. Given the US Supreme Court remark that “[t]he problem posed by [*Tinker*] does not relate to regulation of the length of skirts or the type of clothing, to hair style or deportment”,<sup>96</sup> a good portion of the judiciary took this dictum to signify that these areas of personal appearance were not only excluded from the *Tinker* protection but also from shelter under First Amendment—and said so in a number of instances.<sup>97</sup>

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Crossen v Fatsy*, 309 F Supp 114 (1970), 115.

<sup>87</sup> *Ibid.* In this sense see also *Video Software Dealers Association v Webster*, 968 F.2d 684 (1992), 690.

<sup>88</sup> *Id.* 114.

<sup>89</sup> *Crossen*, above at note 84, 115.

<sup>90</sup> See *Holsapple v Woods*, 500 F 2d 49 (1974); *McIntire v Bethel Indep Sch Dist n 32*, 804 F Supp 1415 (1992); *Stephenson v Davenport Sch Distr*, 110 F 3d 1303 (1997).

<sup>91</sup> Generally speaking, the First, Fourth, Seventh and Eighth Circuits seem more receptive to the idea that a student may have a constitutional right to select a particular hair style or hair length, although without agreement as to the source of such right. The various opinions have been based upon the First Amendment freedom of speech clause, the Ninth Amendment rights retained by the people, the equal protection clause of the Fourteenth Amendment, and the due process guarantees of the Fifth and Fourteenth Amendments. See, e.g., *Richards v Thurston* (C. A. 1, 1970), 424 F. 2d 1281; *Dwen v Barry*, 483 F 2d 1126 (2<sup>nd</sup> Circ 1973); *Massie v Henry* (C. A. 4, 1972), 455 F. 2d 779; *Long v Zopp* (C. A. 4, 1973), 476 F. 2d 180; *Mick v Sullivan* (C. A. 4, 1973), 476 F. 2d 973; *Holsapple v Woods* (C. A. 7, 1974), 500 F. 2d 49, certiorari denied, 419 U.S. 901; *Arnold v Carpenter* (C. A. 7, 1972), 459 F. 2d 939; *Crews v Cloncs* (C. A. 7, 1970), 432 F. 2d 1259; *Breen v Kahl* (C. A. 7, 1969), 419 F. 2d 1034, certiorari denied, 398 U.S. 937; *Torvik v Decorah Community Schools* (C. A. 8, 1972), 453 F. 2d 779; *Bishop v Colaw* (C. A. 8, 1971), 450 F. 2d 1069.

<sup>92</sup> *Murphy v Pocatello School District*, 94 Idaho 32 (1971), 38. “For example”, the Court continued, “if it is established that the exercise of personal taste as manifested by personal appearance has substantially impaired some societal interest, then the state may intervene”.

<sup>93</sup> *Id.* 34.

<sup>94</sup> *Breese v Smith*, 501 P 2d 159 (1972), 169.

<sup>95</sup> *Id.* 172.

<sup>96</sup> *Tinker*, above at note 17, 507-8.

<sup>97</sup> See e.g., *Zeller v Donegal School Dist. Bd. of Educ.*, 517 F. 2d 600 (1975); *Murray v West Baton Rouge Parish School Bd.*, 472 F. 2d 438 (1973); *Karr v Schmidt*, 460 F. 2d 609 (1972), certiorari denied, 409 U.S. 989; *Gfell v Rickelman*, 441 F. 2d 444 (1971); *Jackson v*

Hair length is not speech, the Court of Appeals for the Ninth Circuit wrote in *King v Saddleback* (1971),<sup>98</sup> simply because “the students were not purporting to say anything”.<sup>99</sup> “The activity involved is akin to conduct and the attachment of the label ‘symbolic speech’ does not make it symbolic speech in the absence of circumstances showing it to have been so intended. Therefore, we do not believe that *Tinker* controls [this case]”.<sup>100</sup> Even more significantly, the Court emphasized that school districts need not prove a disturbance in order to justify their dress codes, because long-haired (male) children were deemed presumptively disruptive: “Disruption [caused by hairy male students], of course, if related, would be significant”, the ruling read. “Its absence, however, does not establish that long-haired males cannot be a distracting influence which would interfere with the educative process the same as any extreme appearance, dress or deportment”.<sup>101</sup> This position was endorsed by the California Court of Appeals in *Montalvo v Madera* (1971).<sup>102</sup> Although the judges did recognize that the presence of long-haired students caused “no disruption”<sup>103</sup> or “incidents”,<sup>104</sup> in this case it was decided that such students still did not have a First Amendment right to hairstyle. “Hairstyle, without more, is not per se an expression of speech, symbolic or pure, within the protection of the First Amendment”, the California judges wrote. “At most, hair style is an indefinite and vague expression of personality, individuality or of an idiosyncrasy much like the color or style of clothes or deportment”.<sup>105</sup>

The point was later confirmed in *Karr v Schmidt* (1972),<sup>106</sup> an important case involving hair style for both personal and ‘ideological’ reasons. Mr Karr, a high school student, “believed his hair identified him as a supporter of the ‘peace or hippie movement’”,<sup>107</sup> refused to comply with a Texas school grooming regulation and kept his hair slightly below the collar. The school refused to admit him to class and he sued.<sup>108</sup> Although the District Court found in favor of Karr on the ground that “the rule attacked teaches only conformity and unreasoning submission to authority”,<sup>109</sup> in an important decision the Fifth Circuit sided with school officials and ruled that a student does not have a constitutional right to wear his hairstyle however he sees fit. “For some, no doubt, the wearing of long hair is intended to convey a discrete message to the world”, Judge Morgan wrote, “[b]ut, for many, the wearing of long hair is simply a matter of personal taste or the result of peer group influence”.<sup>110</sup> As a consequence, the appellate court held, “[w]e hold that no such right [to wear long hair] is to be found within the plain meaning of the Constitution”.<sup>111</sup> Yet the Karr court went further than that: reacting to the ever-increasing litigation on student expression, it held that those hair grooming regulations which were “rationally related to a permissible state objective”<sup>112</sup> were per se legal—and explicitly instructed district courts to simply grant a motion to dismiss future litigation on the subject. “We think it proper to announce a per se rule that such regulations are presumptively valid”,<sup>113</sup> the appellate judges concluded.

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Dorrier, 424 F. 2d 213 (1970), certiorari denied, 400 U.S. 850; *King v Saddleback Jr. College Dist.*, 445 F. 2d 932 (1971), certiorari denied, 404 U.S. 979, *Ollif v East Side Union High School Dist.*, 404 U.S. 1042 (1972); *Hatch v Goerke*, 502 F. 2d 1189 (1974); *Freeman v Flake*, 448 F. 2d 258 (1971), certiorari denied, 405 U.S. 1032 (1972).

<sup>98</sup> *King v Saddleback Junior College District*, 445 F 2d 932 (1971), 937.

<sup>99</sup> *Id.* 937.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Id.* 940.

<sup>102</sup> *Montalvo v Madera*, 21 Cal App 3d 323 (1971).

<sup>103</sup> *Id.* 336.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Id.* 334.

<sup>106</sup> *Karr v Schmidt*, 460 F.2d 609 (5th Cir. 1972).

<sup>107</sup> G Graham, “Flaunting the Freak Flag: *Karr v Schmidt* and the Great Hair Debate in American High Schools 1965-1975”, (2004) 3 *Journal of American History*, 522.

<sup>108</sup> “They didn’t like young high school kids trying to buck the system”, he said years later in an interview. “They saw [opposition to the rules] as part of the protest era of the late 1960s. It threatened their authority”. *Id.* 529.

<sup>109</sup> *Id.* 534.

<sup>110</sup> *Karr*, above at note 104, 1023.

<sup>111</sup> Graham, above at note 105, 539.

<sup>112</sup> *Trent v Perritt*, 391 F Supp 171, 172.

<sup>113</sup> *Karr*, above at note 104, 1023.

(b) Male Earrings, Body Piercing & Unconventional Grooming

As the confrontational mood of the 1970s began to fade and the more conventional era of white collars and economic boomer was ushered in, student-hair length cases progressively diminished—but attacks on school grooming regulations did not, and simply shifted to other expressions of students' personality more in line with the times, such as hair colour, piercing and aversion to school uniforms. Yet the change in fashion did not seem to translate into a substantial variation of constitutional protection, for a considerable number of courts continued to view student expression through clothing unfavourably. "The dress code is a part of the learning process in that it teaches the students grooming, etiquette, discipline and the need to live by the rules and regulations of society",<sup>114</sup> an Ohio Court of Appeals ruled. In 1984, the Eleventh Circuit agreed with this posture, confirmed the validity of *Karr*, and held that "grooming regulations are a reasonable means of furthering the school board's undeniable interest in teaching hygiene, instilling discipline, asserting authority and compelling uniformity".<sup>115</sup> Although nearly two decades had passed since *Ferrell*, the tone was remarkably similar.

The combination of this restrictive attitude with Supreme Court decisions such as *Fraser* (1986) and *Hazelwood* (1988) soon translated into a series of judgments that, critics say, had the effect of further limiting students' expression. In 1987, for example, the *Oleson* Court held that the wearing of body piercing in general—and male earrings in particular—by a male student was not a form of constitutionally protected speech because "individuality" was not a particularized message with specific significance, and was thus not worthy of constitutional shield.<sup>116</sup> In the same year, the *Gano* Court ruled that the expressive message of a T-shirt portraying school officials in a drunken state was indistinct and thus not eligible for protection.<sup>117</sup> Relying mainly on *Fraser*, one author observed, "[t]he *Gano* court explained that, even had they believed the T-shirt to be expressive, the representation of administrators as drunk was unworthy of First Amendment protection".<sup>118</sup> Finally, also in 1987, a Ohio district court held that students did not have a right to dress as members of the opposite sex at the end-of-year promotion ball: "[T]he school board's dress regulations are reasonably related to the valid educational purposes of teaching community values and maintaining school discipline",<sup>119</sup> the court decided. "The dress code requires all students to dress in conformity with the accepted standards of the community".<sup>120</sup> The fact that the incident took place out of school premises as well as school hours did not seem to trouble this judge.

More recent judgments seem to confirm the restrictive approach of the judiciary when it comes to student apparel. In 1995, for example, the Texas Supreme Court issued a decision on male earrings that is regarded by some observers as even more old-fashioned than the early cases quoted above. The judges of the highest court in Texas upheld a school district's dress code that prohibited boys—but not girls—from "wea[ing] earrings of any kind"<sup>121</sup> and forbade pupils to wear "caps and hats...not part of women's formal attire".<sup>122</sup> The school rules went on to prescribe: "Sudden, unbecoming fashions, or anything designed to attract undue attention to the individual or activities, are not acceptable".<sup>123</sup> The Texas justices found this regulation constitutional on the ground that "the state has more control over the conduct of minors than it does over adults".<sup>124</sup> As for the complaint that this policy unfavorably discriminated on the basis of sex, they also dismissed it entirely: "We refuse to use the

<sup>114</sup> *Mann v Hubbard School District*, 1976 Ohio App LEXIS 6777, 4.

<sup>115</sup> *Davenport v Randolph County Board of Education*, 730 F 2d 1395, 1379.

<sup>116</sup> *Oleson v Board of Education of School District n. 229*, 676 F Supp 820 (1987).

<sup>117</sup> *Gano v School District*, 674 F Supp 796 (1987), 798.

<sup>118</sup> D M Sarke, "Coed Naked Constitutional Law: The Benefits and Harms of Uniform Dress Requirements in American Public Schools", (1998) 78 *Boston University Law Review* 153, 162.

<sup>119</sup> *Harper v Edgewood Board of Education*, 655 F Supp 1353, 1355.

<sup>120</sup> *Id.* 1356. But in *Doe v Yunits* (2000 WL 33162199 at 1, Mass Super. Oct.11, 2000) a court found that a transvestite male student had a right to dress in female clothes and that such conduct was expressive speech protected by the First Amendment. See also Grantmore, below at note 142, 925.

<sup>121</sup> *Id.* 448.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> *Id.* 451.

Texas Constitution to micro-manage Texas high schools”,<sup>125</sup> they declared. The decision was a divided one, however, and Justice Spector expressed the hope in her dissent that “the school boards of Texas will show greater respect for individuals’ rights...than this Court has shown today”.<sup>126</sup> A year later, a Texan Court of Appeals found that grooming policies tailored exclusively for male students (such as the above) were impermissible since they “discriminate[d]...on the basis of gender”,<sup>127</sup> but the ruling was short-lived, and Texas’s highest court reversed on the ground that “constitutional challenges to hair-length policies adopted by elementary and secondary schools do not manifest such an affront to [a student’s] constitutional rights as to merit our intervention”.<sup>128</sup>

### (c) Uniforms

Uniforms are the latest frontier in the struggle between supporters and opponents of dress codes—and, in this area as with student clothing, a considerable number of courts seem to be siding with school districts.<sup>129</sup> In 1997, for example, an Arizona appellate court declared uniforms to be constitutional, not implicating First Amendment rights nor violating students’ expression.<sup>130</sup> In 2001, the Ninth Circuit Court of Appeals confirmed the constitutionality of uniforms but took a more complex approach when it held that student clothing is indeed a right, but it can be limited whenever school districts prove the uniform rule as necessary and in compliance with the O’Brien test set by the Supreme Court. “Thus”, the judges wrote, “the School Board’s uniform policy will pass constitutional scrutiny if it furthers an important or substantial government interest; if the interest is unrelated to the suppression of student expression; and if the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest”.<sup>131</sup>

This position was confirmed almost verbatim in 2001 by Littlefield,<sup>132</sup> a case where the Fifth Circuit held that uniforms need only be “rationally related to the state’s interest”<sup>133</sup> (as per O’Brien). “The restrictions pertain only to student attire during school hours and do not affect other means of communicating”,<sup>134</sup> the court emphasized, in an attempt to downplay the ruling’s side effects on student expression. Yet the most interesting aspect of the case perhaps is the court’s quick disposal of parental rights claims: according to the Littlefield parents, it was the legal guardian—not the state—who was entitled to legitimately choose the kids’ clothes.<sup>135</sup> This approach, however, was rejected by the Court: “While parents may have a fundamental right in the upbringing and education of their children”, the judges wrote, “this right does not cover the parents’ objection to a public school Uniform Policy”,<sup>136</sup> because “[i]t has long been recognized that parental rights are not absolute in the public school context and can be subject to reasonable limitation”.<sup>137</sup> The conclusion seems therefore inevitable that, for a number of American courts, even parental rights succumb to the seemingly invulnerable interest of student discipline—an approach that, as we shall see in a moment, conflicts head on with the judiciary’s almost absolute deference to parents when religion is involved.

### (d) Assessment of the Protection Given to Students’ Non-Religious Expression

<sup>125</sup> Id. 447.

<sup>126</sup> Id. 456.

<sup>127</sup> *Bastrop v Toungate*, 922 S W 2d 650 (1996), 655.

<sup>128</sup> *Bastrop v Toungate*, 958 S W 2d 365 (1997), 368.

<sup>129</sup> Several states currently have either voluntary or mandatory school uniform policies. See Department of Education, *Manual on School Uniforms* (Education Department, Washington, 1996).

<sup>130</sup> P A Zirkel, *A Uniform Policy: Assessment of School Uniform Policies* (Pi Delta Kappa, New York, 1998) 550.

<sup>131</sup> *Canady v Bossier Parish Sch Board*, Unpubl.Version, n.99-31318 (23 January 2001), § 2 C.

<sup>132</sup> *Littlefield v Forney Indep Sch Distr*, 268 F 3d 275 (2001).

<sup>133</sup> *Ibid.*

<sup>134</sup> Id. 287.

<sup>135</sup> Id. 288.

<sup>136</sup> Id. 291.

<sup>137</sup> *Ibid.* It should also be noted that, at the political level, there is broad support for uniforms. They “represent one positive and creative way to reduce discipline problems and increase school safety”, a 1996 Department of Education on school safety read. US Department of Education, *School Uniform Manual 3-6*, from www.ed.gov (at 10 May 2006). See also S M Stanley, “School Uniforms and Safety”, (1996) 28 *Education & Urban Society* 424.

“The Founding Fathers wrote an amendment for speech and assembly; even they did not deem it necessary to write an amendment for personal appearance”,<sup>138</sup> a judge wrote in 1970. As this section suggests, given the divided position of American courts on the matter of student clothing, they should perhaps have done so. Generally speaking, judges do recognize that a student’s choice of clothes or hairstyle can convey a message—but they disagree on whether it is protected by the First Amendment or by the much lower standard of the Fourteenth Amendment.<sup>139</sup> Although this has translated into a variety of positions,<sup>140</sup> it has often resulted in a fairly restrictive posture whereby seemingly unthreatening conduct (such as ‘Beatle-style’ hair, male earrings and other accessories) has been censored.<sup>141</sup> Moreover, if ‘disruption’ was often quoted as the underlying reason for these prohibitions, in many instances no disturbance was required at all, because such conduct was considered *per se* disruptive (precisely the approach taken in France towards the Muslim veil). While it is clear that children’s behaviour needs to be subject to a different standard of review than adults’,<sup>142</sup> some of the above-mentioned outcomes sound surprising in a nation that has put freedom of expression at the very base of its institutional foundation—and that takes pride in its minimal governmental interference with individual liberty.<sup>143</sup> This is especially the case since other areas of US law do not stand out as particularly compassionate toward minors: as one author observed, in America “[i]t is perfectly constitutional to execute someone who still needs the state’s protection from risqué language used during a high school assembly”.<sup>144</sup> And, one could add, who is considered immature enough to still require the state—but not the parents—to tell him what to dress and how to groom.

### 1.3.2.2. Muslim Veil & Religious Clothing at School: Religious Exceptions to Dress Codes and Uniform Policies

The aforementioned passage of the Littlefield court on the absence of a parental right to choose children’s clothing at school highlights one crucial aspect of the topic at issue, namely, the centrality of children in the relationship between state and family—and between state and religious communities.<sup>145</sup> Children, who are generally regarded as belonging to the private sphere of the family, need to be educated—and this is mainly a public task performed by the state. The conundrum is obvious: at least when they are at school, children are central to both parents and the state, and

<sup>138</sup> *Richard v Thurston*, 424 F 2d 1281 (1970), 1285.

<sup>139</sup> “No state shall deprive any person of life, liberty, or property without due process of law”. US Const, 14<sup>th</sup> Amend.

<sup>140</sup> In 1999, for example, a high-school student from Virginia who had been suspended by school authorities because his blue hair violated the dress code was reinstated. See American Civil Liberties Union, *Federal Court Reinstates High School Student Suspended for Blue Hair*, 4 June 1999; and American Civil Liberties Union, *VA Middle School Student with Blue Hair Allowed to Return to Class After ACLU Intervention*, 29 April 2002. In both cases, legal action was not necessary and an ACLU letter to the school was enough to resolve the matter.

<sup>141</sup> See on the point C Weisenberg, “Constitution or Conformity: When the Shirt Hits the Fan in Public Schools”, (2000) 29 *Journal of Law and Education* 51, 58; T A DeMitchell, F Fossey & C Cobb, “Dress Codes in the Public Schools: Principals, Policies and Precepts”, (2000) *Journal of Law and Education* 31; W Mahlin, “Secondhand Cases: An Analysis of the Constitutionality of Dress Codes in Public Schools”, (1996) 80 *Minnesota Law Review* 715. See also P D Murphy, “Restricting Gang Clothing in Public Schools: Does a Dress Code Violate a Student’s Right of Free Expression?”, (1991) 64 *USC Law Review* 1321.

<sup>142</sup> For a position in favour of uniforms, see e.g. T Y Nelson, “If Clothes Make a Person, Do Uniforms Make a Student?”, (1997) 118 *Education Law Review* 1. For one against, see the interesting A Ray, “A Nation of Robots? The Unconstitutionality of Public School Uniform Codes”, (1995) 28 *J Marshall Law Review* 645.

<sup>143</sup> As one author observed, “[t]he Achilles’ Heel of dress codes is the difficulty of defining what is proper attire in the classroom without violating the basic constitutional rights of students”. R Killen, “The Achille’s Heel of Dress Codes: The Definition of Proper Attire in Public Schools”, (2000) 36 *Tulsa Law Journal* 459, 460. For another interesting perspective see A G Myhra, “No Shoes, No Shirt, No Education: Dress Codes and Freedom of Expression Behind the Postmodern Schoolhouse Gate”, (1999) 9 *Seton Hall Constitutional Law Journal* 337.

<sup>144</sup> G Grantmore, “Lex and the City”, (2003) 91 *Georgetown Law Journal* 913, 921. Compare *Fraser*, 478 U.S. at 681 (upholding the suspension of Fraser for giving a sexually suggestive nominating speech during a high school assembly because of the effect it may have had on students in the audience), with *Stanford v Kentucky*, 492 U.S. 361, 379 (1989) (upholding as constitutional the execution of sixteen-year-old children). However, by a vote of 5-4 the U.S. Supreme Court on March 1, 2005 held that the Eighth and Fourteenth Amendments forbid the execution of offenders who were under the age of 18 when their crimes were committed. See *Roper v Simmons*, 543 U.S. 551 (2005).

<sup>145</sup> On the point, see e.g. S Van Praagh, “The Education of Religious Children: Families, Communities and Constitutions”, (1999) 47 *Buffalo Law Review* 1343, 1345.



embody a veritable middle ground between private and public spheres.<sup>146</sup> Even more importantly, because of the significance of the learning process for their intellectual and social development, schoolchildren automatically become a medium for expressing the values and objectives that both family and state find important. The question is: what happens when the two are not in agreement?

When it comes to student clothing, American courts seem consistent in suggesting that, if the divergence with the school policy has religious connotations, then the religious tenet prevails and an exception to the dress code needs to be made, while if the unorthodox clothing is due to a non-religious choice, then it is often not protected.<sup>147</sup> This results not only from the case law (a) but also—and possibly even more so—by the fact that religious clothing cases at school, if they are brought before a court at all, are usually settled by conciliation and only rarely involve a judicial decision (b). This section gives examples of both situations.

a) Court-Decided Cases: (i) Long Hair for American-Indians

The matter of religious exceptions to school grooming regulations was most prominently decided in *Big Sandy School District* (1993),<sup>148</sup> a case involving hair span for Native American (NA) students. Here, a school dress code restricted male hair length but clashed with the belief of some NAs according to whom hair had religious significance and could only be cut as a sign of mourning. Although not all NA students followed this tenet and some did not object to the rule, the court sided with the claimants and allowed them to keep their long hair. “Unlike the plaintiff in *Karr* [*Karr v Schmidt* (1972)]”, the judge wrote, “plaintiffs in the present action have alleged that the Board’s hair regulation infringes upon several fundamental rights, including the free exercise of religion, and undermines the right of parents and the Tribe to direct the religious upbringing of their children”.<sup>149</sup> Since this was not only a free expression case but a hybrid one involving religion as well, the judgment made it clear that strict scrutiny applied—and that, under both expression and religion claims, the dress code had to be changed: “Like the armbands”, the judge wrote on the free expression component of the case, “the wearing of long hair by Native American students is a protected expressive activity, which does not unduly disrupt the educational process or interfere with the rights of other students. As such, the regulation, as applied to these students, violates the First Amendment free speech clause”.<sup>150</sup> As for the case’s religious dimension, the decision held that the plaintiffs needed to meet one condition only: “To establish that a state regulation violates the First Amendment free exercise clause”, the argument went, “the claimants must show that they have a sincerely held religious belief which conflicts with and is burdened by the religious regulation”.<sup>151</sup> The fact that the ‘long-hair belief’ was not shared by other NA students was irrelevant, the judge wrote, because “the court must consider the sincerity of the plaintiffs’ own religious belief, not anyone else’s”.<sup>152</sup> “Even if the wearing of long hair is not a fundamental tenet of Native American religious orthodoxy, proof that the practice is deeply rooted in religious belief is sufficient”<sup>153</sup> because, the Court concluded, “[r]eligious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection”.<sup>154</sup>

<sup>146</sup> On the importance of the educational process for the State, see e.g.: “[Education] is the very foundation of good citizenship” (*Brown v Board of Education*, 347 US 483 (1954) at 493); “Providing public schools ranks at the very apex of the function of a State”. (*Wisconsin v Yoder*, 406 US 205 (1972) at 213).

<sup>147</sup> See e.g. *Menora v Illinois High School Ass’n*, 683 F 2d 1030 (1982); *Hatch v Goerke*, 502 F 2d 1189 (1974); *Teterud v Burns*, 522 F 2d 357, 360 (1975); *Braxton v Board of Public Instruction of Duval Co*, 303 F Supp 958 (1969), 959. Other courts implicitly indicate that religious exceptions for dress codes are legal and should be made. See e.g. *Canady v Littlefield* at 7 (“Appellants have not established that the uniform policy has interfered with their right to free exercise of religion”) and *Rogers v Brockette*, 588 F 2d 1057 (1979) (“The uniform policy includes an ‘opt-out’ provision whereby parents and students with ‘bona fide’ religious or philosophical objections to the wearing of a uniform can apply for an exemption to the Policy”).

<sup>148</sup> *Alabama and Coushatta Tribes of Texas v Big Sandy Independent School District*, 817 F Supp 1319 (1993), 1334.

<sup>149</sup> *Id.* 1334.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Id.* 1328.

<sup>152</sup> *Id.* 1330.

<sup>153</sup> *Id.* 1329.

<sup>154</sup> *Id.* 1328. See *Thomas v Review Board*, 450 US 707, 714 (1981).

(ii) Baggy Pants

Subsequent judicial developments, however, suggested that non-religious principles and practices do need to meet these requirements. In *Bivens* (1995),<sup>155</sup> for example, a court ruled that baggy pants worn for ‘cultural’ reasons did not amount to protected speech as per the First Amendment. The student, a black teenager, claimed that his clothing was meant to identify him with black identity and culture. After applying the Spence test, the court concluded that the message conveyed was not expressive conduct, because while the student did meet the first test—he clearly intended to transmit a particularized meaning—he did not fulfill the second and did not prove that others would understand his point. “Not every defiant act by a high school student is constitutionally protected speech”,<sup>156</sup> the judge concluded.

(iii) African-American Hat

Substantially similar issues were raised in *Isaacs* (1999)<sup>157</sup>—except that the cultural connection was stronger and, consequently, the contrast with religious exceptions starker. Like her mother and grandmother, Shermia Isaacs, an African American high-school student, used to wear a head wrap to “celebrate her African American...cultural heritage”.<sup>158</sup> This, however, violated school regulations prohibiting students from wearing hats in class. It should be noted that, although the dress code explicitly made “exceptions for religious headgear such as yarmulkes and Muslim hijab, including headscarves”,<sup>159</sup> the school board refused to accommodate the girl’s hat. She then sued, claiming that her free expression rights had been infringed, but the *Isaacs* court held that the school’s ‘no hats’ policy did not violate her free speech rights.

Although it was conceded that the girl was expressing a message, the verdict applied a mere ‘rationality’ parameter rather than a ‘strict scrutiny’ one, because the matter was cultural and not religious—it was not “fundamental”<sup>160</sup> enough, in the words of the court: “[W]here a Fourteenth Amendment liberty interest is combined with First Amendment free exercise concerns”, the judgment read, “the rights are fundamental and merit strict scrutiny, while infringements on the Fourteenth Amendment interest alone are subject only to rational basis scrutiny”.<sup>161</sup> As a consequence of this approach—and although no proof of disruption was actually given—the right of the girl to wear her cultural hat was deemed inferior to the school’s interest in providing “a safe, respectful and focused educational environment”.<sup>162</sup> “The right to self-expression is one that we cherish”, the judgment concluded. “However, it is not absolute and here must yield to the legitimate interests and concerns that have led to the adoption of the school’s ‘no hats’ rule”.<sup>163</sup> And besides—Judge Motz suggested, in a sentence hardly respectful of the girl’s cultural practice—“there are alternative ways for Shermia to express her message within the schools’ dress code, including wearing traditional African dress or jewelry to class”.<sup>164</sup>

(iv) Gang Symbols

The importance of religion in American law is equally apparent in the legal treatment of religious insignia as compared to that of ‘gang related’ symbols. Generally speaking, US law is not indulgent of

<sup>155</sup> *Bivens v Albuquerque Pub Sch*, 899 F Supp 556, 560-1 (D NM 1995).

<sup>156</sup> *Ibid.*

<sup>157</sup> *Isaacs v Board of Education of Howard County*, 40 F Supp 2d 335, 336 (1999).

<sup>158</sup> *Ibid.*

<sup>159</sup> *Id.* 336.

<sup>160</sup> *Id.* 338.

<sup>161</sup> *Ibid.* “Therefore”, Chief Judge Motz expanded, “if the wearing of headgear constitutes speech and also represents an exercise of religion, a student would have ‘hybrid’ constitutional protection arising out of both the free speech and free exercise. This fact alone would provide ample basis for the school system’s decision to exempt religious headgear from its ‘no hats’ policy”. *Ibid.*

<sup>162</sup> *Id.* 339. See also: “Proper deference to educators’ judgment reflects an appreciation of the difficult task performed by teachers and administrators in public schools”. *Id.* 339.

<sup>163</sup> *Id.* 336.

<sup>164</sup> *Id.* 338.

gang insignia—even at the cost of trampling on freedom of expression. In 1993, for example, a court ruled that, given America’s violence-prone schools, when a school district bans certain clothing associated with gangs, school officials need to be granted great deference once they showed the existence of some gang violence.<sup>165</sup> Furthermore, some time later another court agreed with this stance and concluded that suspending a student for wearing a jacket similar to the Confederate Battle flag was not a violation of the pupil’s First Amendment rights because such a symbol might have caused gang-related violence.<sup>166</sup>

Yet the situation seems to dramatically change if the gang icon has some form of religious significance; here, although the sign is considered ‘gang-related’ and thus forbidden by administrative or criminal legislation, its display is not only permitted but protected as ‘pure speech’. In *Harvard* (1996), for instance, a gang-member wearing a six-pointed star was allowed to do so—and the anti-gang ordinance prohibiting it was held invalid—because, together with gang signs, the ban also had the effect of restricting constitutionally protected religious speech such as the one expressed by the Jewish Star of David. The “six-pointed star...is protected by the rights of free speech and free exercise of religion under the First Amendment”,<sup>167</sup> the court noted. Since the anti-gang prohibition prevented students from engaging in constitutionally sheltered religious expression, it was overbroad and had to be invalidated.

*Chalifoux* (1997)<sup>168</sup> dealt with similar matters and reached an identical conclusion—but the facts were inverted.<sup>169</sup> Two high-school Catholic students wore rosaries for religious reasons, but were told that they could not continue to do so as the insignia constituted ‘gang-related’ apparel forbidden by school regulations. At the end of a legal battle, an appellate court found that the case presented hybrid free exercise/free speech claims and the regulations were thus subject to a rigorous standard of review. Because “the symbolic speech at issue in this case is a form of religious expression protected under the First Amendment”,<sup>170</sup> the judge held, under a *Tinker* standard the school must show that wearing the rosaries “caused substantial disruption or material interference with school activities”<sup>171</sup>—and not merely that it was reasonably related to a legitimate pedagogical concern. Yet the school could not credibly do so, the judge concluded, because the plaintiffs had worn the religious symbols for some time before being singled out. As a matter of fact, and even though wearing the rosaries was neither required by the Catholic faith nor common among practising Catholics, the school regulations were considered to unjustifiably infringe upon the students’ religiously motivated speech and were invalidated.<sup>172</sup>

#### (v) Atheism & Uniforms

The constitutionality of religious exceptions to school uniforms and grooming policies seems to have been recently confirmed by the Court of Appeals for the Third Circuit. In 2005 *Sherrie Wilkins*, a mother of two New Jersey students, brought action against a school district challenging its compulsory uniform policy. In its original version the latter provided exemptions to uniforms on “moral”<sup>173</sup> grounds, but was subsequently narrowed to cover only reasons of “sincerely held religious

<sup>165</sup> *Jeglin v San Jacinto School District*, 827 F Supp 1459 (1993). Four years later, however, the Eighth Circuit held that anti-gang dress codes must not be overbroad and must define the terms ‘gang’, colour, etc. See *Stephenson v Davenport Community School District*, 110 F 3d 1303 (1997).

<sup>166</sup> *Phillips v Anderson County Sch Dist Five*, 987 F Supp 488 (1997).

<sup>167</sup> *Harvard v Gaut*, 660 N E 2d 259, 263 (1996).

<sup>168</sup> *Chalifoux v New Caney Ind Sch Dist*, 976 F Supp 664 (1997).

<sup>169</sup> For a detailed examination of this case, see R R Holmes, “First Amendment Rights: May a School Ban Religious Symbols That Are Arguably Gang Related?”, (1998) 27 *Journal of Law and Education* 511.

<sup>170</sup> *Chalifoux v New Caney Ind Sch Dist*, 976 F Supp 664 (1997).

<sup>171</sup> *Id.* 666.

<sup>172</sup> Similar issues were involved in another case where a Mississippi student was prevented from wearing his Star of David on the ground that it was a gang symbol forbidden by school policies. Despite the fact that the student was a Jew, wore the religious symbol for personal reasons and had nothing to do with gangs, the School Board at first backed the regulation—but, after legal action was taken, changed its posture and exempted religious emblems from the list of prohibited items in the dress code. “We realized that [the regulation] infringed on freedom of religious expression, and that freedom supersedes the safety issue”, a Board member declared to the press. *Times Union*, *Star of David Ban Lifted by Board*, 28 August 1999.

<sup>173</sup> *Wilkins v Penns Grove-Carneys Point Regional Sch Dist*, 123 Fed Appx 493 (2005) at §1.

belief”.<sup>174</sup> It did, however, envisage exemptions on the basis of “financial hardship”,<sup>175</sup> “nationally recognized youth organizations”<sup>176</sup> and “certain approved school clubs”.<sup>177</sup> Ms Wilkins, an atheist, objected to the “militarism conveyed by uniforms”<sup>178</sup> and twice sought an exemption for her children, both before and after the change of policy—yet she was twice rejected. She then sued, alleging violations of the Equal Protection Clause of the Fourteenth Amendment on the ground that religious beliefs were favored over non-religious ones, but both at district court and appellate levels she failed. “The religious exemption is rationally related to further the legitimate interest in accommodating students’ free exercise of religion without undermining the pedagogical goals of the school uniform policy”,<sup>179</sup> the Court of Appeals for the Third Circuit wrote.<sup>180</sup>

#### b) Out-of-Court Settlements<sup>181</sup>

Well before Wilkins’s judicial endorsement of religious exceptions to school dress codes, a number of interesting incidents involving sacred clothing and symbolism in class had been raised before the courts—and had been settled without the need for a judicial outcome. In these cases like in many others, religious symbols were almost invariably accommodated. The following are examples of out-of-court settlements and of school dress codes amended in order to welcome religious insignia.

##### (i) Christian Necklaces & Wicca Pendulums

In American schools, a considerable number of religiously-based incidents seem to involve the display of symbols such as necklaces, rosaries and pendulums in violation of school dress codes. In 1999, for example, an Alabama student wore a necklace to express her Christian faith—but was told by school authorities that she could not do so openly because the dress code prohibited the wearing of all visible jewelry. According to the attorney for the school board, the policy was “a way to combat income-based jealousy and competitiveness among students”.<sup>182</sup> When the girl requested an exemption to the rule for religious reasons, this was denied and she was advised to simply wear the symbol inside her clothes. After the student filed suit, however, the school relinquished and an exception on religious grounds was inserted in the dress code, without need to pursue the litigation.<sup>183</sup>

Also in 1999, a Michigan lawsuit was settled in a similar way. A high-school student was prevented from openly wearing her pentagram necklace representing her faith in Wicca, an earth-based religion,<sup>184</sup> on the ground that the school policy prohibited the item as a potential advertisement for gangs and illegal activities. The school did provide exceptions for religious reasons, but explicitly “banned groups such as KKK, Skin Heads, Wiggins, Pagans, Satanists, Cults/Occults, Street Gangs, Straight Edge, Gothic, Vampire [and] Witches”.<sup>185</sup> It also prohibited “black nail polish, dog collars and ‘death-style make-up’”.<sup>186</sup> The school regarded the student’s item as “witchcraft” and

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid.

<sup>179</sup> Id at §2.

<sup>180</sup> “Our conclusion on the rationality of the exemption and its application to this case is buttressed by the deference we accord to school officials in crafting and implementing school policy”. Id at FN1.

<sup>181</sup> In the examples that follow, one is reliant on newspapers and other reports and accounts. Given the limits of data collection, therefore, these should be regarded as the tip of an iceberg rather than as a finite listing of school symbolism issues in American schools.

<sup>182</sup> Washington Times, Alabama Girl Fights School Ban on Displaying Cross Necklace, 15 October 1999.

<sup>183</sup> Ibid.

<sup>184</sup> Wicca is a neo-pagan religion first popularized in 1954 by a British civil servant named Gerald Gardner. It is a form of witchcraft founded on both religious and magical concepts, and its initiates worship a god, observe the festivals of the eight Sabbats of the year and the full-moon Esbats, use distinctive ritual forms and attempt to live by a code of ethics. Its symbol is a pentagram the five points of which symbolize, among other things, the four elements with spirit presiding at the top. See D Valiente, *An ABC of Witchcraft Past and Present* (Phoenix Publishing, Washington, 1973) 264.

<sup>185</sup> J Hyde, *Pentagram Ban Debated in Court*, Grand Rapid Press, 3 March 1999.

<sup>186</sup> Killen, above at note 141, note 242.

consequently forbade it. After the girl sued, however, it agreed to change the dress code in order to recognize the Wicca pentagram as a religious symbol, and the lawsuit was dropped.<sup>187</sup>

(ii) Uniforms & Rastafarian Dreadlocks

One year after the Michigan events, a 9-year-old Jewish boy was suspended from school in North Carolina for repeatedly failing to wear the institution's compulsory uniform. His great-grandmother (and legal guardian) objected to the uniform on the ground that "complying with the dress code would violate the family's belief that uniforms teach students to obey authority mindlessly, making them vulnerable to the Antichrist".<sup>188</sup> In December that year, an appellate court ruled that both free exercise of religion as well as parental rights were at stake in the case, rejected the school board's request for summary judgment and ordered a trial. Immediately afterward, the school agreed to excuse the pupil from the uniform requirement, paid for the cost of his tuition during the suspension and amended the dress code to allow religious exemptions.<sup>189</sup>

Several additional episodes settled by mediation concerned other visible religious signs such as dreadlocks and religious hats. In 2000, for example, eight Rastafarian children were denied enrolment to a Louisiana school on the ground that their hats and dreadlocks did not comply with the school district's dress code. Under this religious belief, the children's relatives argued, the pupils were expected to wear head coverings and keep their dreadlocks in compliance with Old Testament indications—but this clashed with the school's grooming policy. Following an intervention by the American Civil Liberties Union, the family brought suit and shortly afterward the school board made an exception to its dress code and agreed to enroll the children. As a result, the litigation was abandoned.

(iii) The Muslim Headscarf

Partly because of well-known international events, the Muslim headscarf is currently the latest religious item to be at the centre of controversy in schools and other public places—yet here, too, mediation and arbitration, rather than defended hearings, seem to be the most common outcome of litigation. The Oklahoma (or Muskogee) veil case mentioned in the introduction is, in this respect, instructive both in terms of results and legal arguments. Because this was a lawsuit involving freedom of expression and freedom of religion, the Department of Justice emphasized in its judicial intervention in support of the veiled pupil that strict scrutiny applied—and that the school dress code had to bow to the girl's rights to visibly express her faith.<sup>190</sup> Moreover, it observed, "Nashala's practice of wearing a hijab is akin to pure speech and therefore is entitled to the highest protection. The hijab is a pure symbol, such as the cross, the Star of David, the crescent, the swastika...or the black armband in *Tinker* [and] any individualized activity with regard to it...is bound to convey a message of fealty or revulsion and is 'closely akin to pure speech'".<sup>191</sup> The school district was under such pressure that it eventually decided to give in, included a religiously-based exception to its dress code and even

<sup>187</sup> In 2001 another significant case involving a Wicca pendulum arose in Texas. Fifteen year-old Rebecca Moreno was suspended from high school for willingly infringing the institution's dress code and refusing to remove her five-pointed Wicca pendulum. "When we disrupt the educational progress of other students", a school official said, "by wearing disruptive clothing, disruptive jewelry, disruptive hairstyle, whatever is disruptive, we are not hurting one student, we are hurting all". Interestingly, the school emphasized that it highly valued students' right to wear religious apparel and "...had not banned the pentacle on religious grounds, but [only] because Christians associated the Wiccan symbol with animal sacrifice and Satan worship". Yet the item had religious significance for the girl's family: "To us, this is what a cross is to a Christian, what a Star of David is to an individual who is Jewish", the girl's mother stated. In the end, the school board agreed to allow the student to wear her pendulum in full view and the matter was solved by settlement. "While the Wiccan faith may not be the majority religion in our community", the School Superintendent acknowledged in an apologetic letter to the girl's family, "our board policies protect all faiths". *Ibid.*

<sup>188</sup> C Haynes, *School Officials Ease Up on Uniform Enforcement* (First Amendment Center, Washington, 2000).

<sup>189</sup> As one author observed, "[f]aced with having to argue that the dress code trumps not one but two fundamental rights, school officials decided to avoid a trial by reaching a settlement through mediation". *Ibid.*

<sup>190</sup> "Nashala's claim involves free exercise rights coupled with expressive rights", the DoJ wrote, "and therefore heightened scrutiny is warranted...". *Id.* ("Argument").

<sup>191</sup> *Id.* at Part III (quoting Chalifoux and Coughatta Tribes).

agreed to implement a training programme on the amended clothing regulations for all its teaching and administrative staff.<sup>192</sup>

As recent events seem to confirm, the authoritative intervention of the US government in the Oklahoma case and the settlement reached—a clear victory for the Muslim veil at school<sup>193</sup>—boosted the already substantial number of out-of-court agreements on the matter of the Islamic headscarf and translated into considerable pressure on educational institutions to amend their dress codes and permit religious symbols. In 2005, for example, a Muslim student was allowed to wear her headscarf in a Tennessee school as an exception to dress code rules—“[t]here is a tradition in [this] county of allowing individuals to express their religious beliefs”,<sup>194</sup> an attorney for the school was reported to say. In another case, a 12-year old Muslim girl was first told that she could not wear her headscarf while playing in a basketball tournament on the basis of “rules prohibiting head coverings”.<sup>195</sup> After a Muslim organization complained, she was allowed to do so and a specific exception was made for religious reasons. A similar outcome was reached in another recent episode where a woman was allowed to wear a Muslim headscarf at a beauty school as an exception to the institution’s dress code, which was specifically “amended to allow religious exceptions”.<sup>196</sup> And when a 19-year old Muslim student was ordered by a California instructor to remove her hijab, the head of the institution sided with the girl and told the teacher that he “clearly had acted inappropriately”.<sup>197</sup> The instructor resigned and the incident never reached the courts.

### c) Assessment of Protection for Student Religious Clothing

There appears to be a considerable difference in the protection accorded by American courts to the expression of a student’s personality as compared to the expression of his or her religious beliefs—and this disparity produces a number of fascinating results. While for some judges the choice of a student’s hairstyle is merely “a matter of personal taste”,<sup>198</sup> “the result of peer group influence”,<sup>199</sup> something that is “not purporting to say anything”<sup>200</sup> or even an “idiosyncrasy”,<sup>201</sup> if the grooming has religious implications, then it “is protected expressive activity”<sup>202</sup> and regulating it “violates the First Amendment Free Speech clause”.<sup>203</sup> Similarly, while for some courts parents are not entitled to choose their children’s clothes or grooming style because their parental right “does not cover their objection to a public school uniform”,<sup>204</sup> if the practice is religiously-based, then it is protected because the uniform “undermines the rights of parents...to the religious upbringing of their children”.<sup>205</sup> By the same token, long-haired students are often considered disruptive—“they may, and probably would, be a disrupting influence”<sup>206</sup>—yet long-haired American Indians are not, and their hairstyle is “a protected expressive activity which does not unduly disrupt the educational process”.<sup>207</sup> Last but not least, compulsory uniform policies are generally considered legitimate because “students...remain free

<sup>192</sup> *Id.* 4.

<sup>193</sup> Unsurprisingly, the Government intervention in favour of the Muslim veil was praised by the Sikh and Jewish communities as well. See e.g. Sikh Mediawatch & Resource Task Force, *Sikhs Commend Settlement of Headscarf Case in OK*, 21 May 2004; American Jewish Congress, *Jewish Organization Commends Headscarf Verdict in OK*, 19 May 2004.

<sup>194</sup> Associated Press, *School Changes Dress Code After Muslim Student Complains*, 21 January 2005. Chattanooga, Board Backs Administration on Allowing Girl to Wear Head Scarf, 20 January 2005.

<sup>195</sup> Associated Press, *Muslim Girl Allowed to Wear Headscarf in Basketball Tournament*, 2 April 2005. See also Tampa Tribune, *Basketball Tournament Relents, Allows Hijab*, 3 April 2005; St. Petersburg Times, *Muslim Head Scarf Debated*, 5 April 2005.

<sup>196</sup> Council on American-Islamic Relations, *News Brief: MD Muslim Allowed to Wear Hijab*, 20 August 2004.

<sup>197</sup> David, above at note 74, § D.

<sup>198</sup> *Karr v Schmidt* 451 F.2d 1023 (1971).

<sup>199</sup> *Ibid.*

<sup>200</sup> *King v Saddleback Junior College District*, 445 F 2d 932 (1971), 937.

<sup>201</sup> *Montalvo v Madera*, 21 Cal App 3d 323 (1971), 334.

<sup>202</sup> Alabama, above at note 146, 1334.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Littlefield v Forney Indep Sch Distr*, 268 F 3d 275 (2001), 291.

<sup>205</sup> Alabama, above at note 146, 1334.

<sup>206</sup> *Wood v Alamo Heights Indep Sch Distr*, 308 F. Supp.551 (1970), 552.

<sup>207</sup> Alabama, above at note 146, 1334.

to wear what they want after school hours”,<sup>208</sup> but if a religious message is involved, then it cannot be delayed until after school and an exception needs to be made in order to “accommodat[e] students’ free exercise of religion...”<sup>209</sup>

While the contrast is stark, this discrepancy is necessary, one may argue, because there is a considerable difference between the expression of generic student personality and the expression of political, religious and other forms of ‘pure speech’—a difference that American law aptly recognizes by subjecting the former to a far less stringent standard of legal protection than the latter (for which strict scrutiny applies).

As this section suggests, however, this may well be the problem rather than the solution to the matter. For one thing, some infancy and behavioral psychologists would challenge this downplaying of the ‘personality’ factor and would argue that the expression of a child’s individuality through clothing and grooming, far from being a minor feature, is one of the most important and basic forms of expression—especially at the formative age of adolescence, when hairstyle and clothing are their only means of controlling their appearance as well as their bodies.<sup>210</sup> Secondly, the argument that ‘personality as such’ is not protected by US law because of its ‘generic and indistinguishable’ character does not seem to be entirely dispositive either. ‘Beatle-style’ hair in the 1970s, one could argue, was hardly indistinguishable and on the contrary conveyed a clear ‘anti-establishment’ message—and, debatably, so do male earrings, piercing and certain hairstyles nowadays.

Indeed, it is possible to suggest that it is precisely because the ‘anti-establishmentarian’ character of such conduct was so apparent, that they were met with hostility by school authorities and by many judges. It is in other words possible to argue that these activities were banned precisely because they were perceived as embodying the same kind of threat to American establishment during the Vietnam era that the veil is to today’s France—a point to which I shall return in Chapter 3.3. Are US courts so supportive of religious expression, the provocative question may be asked, because compared to other forms of anti-establishmentarianism, religion is little threat to social stability—and on the contrary is widely shared among the American population—whereas the hair and dress practices of the Vietnam-era were a much greater danger?

While this is certainly debatable, perhaps the biggest problem with the ‘pure speech v personality’ approach may be the fact that, even at the highest level of ‘pure’ expression, a difference seems to exist between the treatment of religious and non-religious messages. Just to take one example among those considered above, even the ‘cultural’ hat of an African-American girl had to succumb to the school uniform policy—and her ‘cultural’ message was told to wait until after school-hours—since “there [were] alternative ways [for her] to express her message within the schools’ dress code, including wearing traditional African dress or jewelry to class”.<sup>211</sup> Yet it would simply be unthinkable, in America, to apply this mindset to a religious belief and require, for example, a Muslim schoolgirl to surrender her veil and postpone the expression of her religious message until after school on the ground that she could keep a Koran on her desk instead.<sup>212</sup> Why such a difference? The reason was perhaps given by the Supreme Court itself when it wrote, in 1981, that “[r]eligious beliefs need not be

<sup>208</sup> Littlefield, above at note 202, 287. Interestingly, in France the new anti-veil legislation has been based on reasons, among others, like those in Littlefield.

<sup>209</sup> Wilkins, above at note 51, § 2.

<sup>210</sup> See e.g. on the point: D Dinkmeyer & R Dreikurs, *Encouraging Children to Learn* (Taylor & Francis, London, 2000); P K Smith, *Understanding Children’s Development* (Basic Psychology, Oxford, 2003) (esp p.59); F B Steuer, *The Psychological Development of Children* (Brooks Cole Publishing, London, 1994) 707; J Piaget, *The Child’s Conception of the World: A 20th-Century Classic of Child Psychology* (Littlefield Adams, London, 2000); M Donaldson, *Children’s Mind* (Norton, London, 1979); W Damon (ed). “Social Emotional and Personal Development”, in *Handbook of Child Psychology* (Wiley, London, 2000).

<sup>211</sup> Isaacs, above at note 155, 338.

<sup>212</sup> When, in 2005, a Muslim nursing student was ordered to remove her hijab in New Jersey, the Attorney-General charged the institution as follows: “We are one nation that is indivisible by race or religion. Each of us is obliged to respect the beliefs, the dignity and the customary practices of all religions. It is not only the right thing to do, it is the law”. Herald News, *Muslim Student’s Rights Violated*, 17 June 2005.

acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection”.<sup>213</sup>

Yet, as we have seen, non-religious conduct such as hairstyle and clothing does need to be acceptable, logical and consistent—and even cultural and political messages at least must be comprehended as such by judges in order to deserve the First Amendment shield, highlighting the stark contrast with religious messages, which on the contrary need only to be ‘sincerely held’ in order to be sheltered as ‘pure speech’.<sup>214</sup> While this protection for religious symbols is, in the author’s opinion, admirable as well as entirely warranted, one cannot help observing that it is hardly consistent with the position of the judiciary on students’ clothing and grooming as an expression of personality or culture—and, I suggest, it symbolizes an incongruity that can only be explained by America’s traditional high regard for religious liberty.<sup>215</sup> As we shall see immediately, this affection is not limited to students’ clothing but also invests, although less unreservedly, the issue of teachers’ religious signs.

### 1.3.3. THE TEACHERS’ VEIL

Unlike student expression, the central question involved in the issue of teachers’ religious symbols is whether these signs represent private (i.e. individual) or public (i.e. school-sponsored) speech—and the difference is crucial, as we shall see in this section, because in the former case they are protected by US law while in the latter they are not. If the solution to the matter may appear straightforward—like any other garment, a religious veil worn by a public instructor is usually the result of a personal choice and can hardly be said to reflect the school’s position<sup>216</sup>—the matter is far more sensitive than it looks, because in American law those religious signs that are perceived to convey endorsement by a school can present difficulties in terms of the Establishment Clause.<sup>217</sup> Teachers’ influence and importance for the intellectual development of young and malleable minors are well-known. This is exactly the reason why the subject involves different issues from those implicated in students’ religious apparel—and why American law is more cautious with instructors’ insignia than with students’. This section looks into these issues, first with reference to the Supreme Court jurisprudence and then in relation to the rest of the judiciary. Because of the peculiarity of the matter as well as for reasons of space, expression and religious expression will be here considered jointly.

#### 1.3.3.1. Supreme Court and Teachers’ Veils

As we have seen in Chapter 1.2., the Establishment Clause of the First Amendment precludes government from taking sides on religious matters and imposes a position of strict neutrality where religion is concerned.<sup>218</sup> In particular, it forbids government from acting with the purpose or effect of advancing or inhibiting religion, becoming excessively entangled with religion, endorsing religion, or coercing individuals to participate in a religious practice.<sup>219</sup> When it comes to religious signs for teachers, therefore, the matter translates into the following two questions: (i) Are public school teachers regarded as a part of government and thus subject to these neutrality requirements as well? (ii) If so, does their religious clothing violate the Establishment Clause, or is it symbolic expression protected by the Free Exercise of religion?

<sup>213</sup> *Thomas v Review Board*, 450 US 707, 714 (1981).

<sup>214</sup> “Once the plaintiffs have proven the sincerity of their religious belief, the burden then shifts to the state or governmental agency to show that the regulation advances an unusually important governmental goal...” In Alabama, above at note 146, 1330.

<sup>215</sup> As we shall see in Chapter 2.3., the exact opposite seems to happen in France, where, after the passage of Statute 228/2004, religious symbols are explicitly singled out for prohibition, while non-religious insignia are admitted in the classroom. America’s love affair with religion—and France’s phobia with it—will become apparent in the comparative part of this thesis (Part 3).

<sup>216</sup> An interesting discussion on the point is H L Schachter, “Public School Teachers and Religiously Distinctive Dress: A Diversity-Centred Approach”, (1993) 22 *Journal of Law and Education* 61, where it is argued that school laws and policies prohibiting teachers’ religious dress are “not actually neutral but rather enforce majority hegemony and stifle the expression of religious diversity”. *Id.* 61. For a counterpoint, see T J Gunn, “Neutrality, Expression and Oppression: A Response to Professor Schachter”, (1994) 23 *Journal of Law and Education* 391.

<sup>217</sup> On the point see Gunn, above at note 214, 394 & 396.

<sup>218</sup> The Establishment Clause of the First Amendment reads: “Congress shall make no law respecting an establishment of religion...”

<sup>219</sup> See *Lee v Weisman*, 505 US 577 (1992); *Lynch v Donnelly*, 465 US 668 (1984); *Lemon v Kurtzmann*, 403 US 602 (1971).



As with student insignia, the Supreme Court has never directly decided a case involving teachers' religious symbols<sup>220</sup>—but it has sent a number of indirect messages, and *Tinker* contains one of them. Although this case is, as we have seen, a fundamental one for students' free expression, it deals tangentially with teachers' expressive rights. "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students",<sup>221</sup> the justices wrote, because "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate".<sup>222</sup> As repositories to ideas and critical thinking par excellence, students and teachers are both fundamental players that ensure the vitality of the marketplace of ideas and should thus be allowed to express themselves unless a "substantial disruption"<sup>223</sup> is proved. Similarly to what happens for student symbolism, therefore, *Tinker* is used by some lower courts to uphold the constitutionality of teachers' religious signs.<sup>224</sup> However, given that the Establishment Clause does not apply to pupils, that the events of *Tinker* were student-related and that they only made an indirect reference to teaching staff, *Tinker* does suffer from a number of limitations—and, unsurprisingly, these limits are raised by those courts that are most critical of the constitutionality of religious symbols for public instructors.<sup>225</sup>

Two years after *Tinker*, the Supreme Court decided *Lemon v Kurtzmann* (1971),<sup>226</sup> another leading case on the limitations of the Establishment Clause. In *Lemon*, the Justices held that a statute must meet the following three tests in order to pass constitutional scrutiny under the Establishment Clause: (i) it must "have a secular legislative purpose";<sup>227</sup> (ii) "its principal or primary effect must be one that neither advances nor inhibits religion";<sup>228</sup> and (iii) it must not "foster excessive entanglement with religion".<sup>229</sup> While *Lemon* expressly dealt with statutes potentially in breach of the Establishment Clause, the case is regarded as providing a general legal standard also for other public activities related to religion—and, as we shall see, has been applied by some lower courts to rule on whether teachers have a right to wear religious insignia.<sup>230</sup> Given some judges' contention that the latter automatically advance religion and create an excessive entanglement with it, the last two tests of *Lemon* are especially significant.

In the matter of teachers' veils, as in that of students', *Hazelwood* (1988)<sup>231</sup> is often considered as a powerful limit on *Tinker*—but if for youths the importance of the case revolved around censorship of a student message, for instructors it entails the definition of school-sponsored expression. The latter, in the Supreme Court's view, is not limited to student publications or theatrical products as the facts in *Hazelwood* may suggest, but also encompasses a wide variety of situations such as those "expressive activities that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school...whether or not they occur in a traditional classroom setting".<sup>232</sup> Given the justices' remarkably generic definition of school-sponsored actions, therefore, *Hazelwood* potentially weighs against teachers' rights to wear religious insignia. While a message conveyed by a student's clothing is usually regarded as expression that "happens to occur on the school premises"<sup>233</sup> and merely constitutes "school-tolerated speech",<sup>234</sup> a teachers' veil could in some cases be considered

<sup>220</sup> On the point see H M Bastian, "Case Comment: Religious Garb Statutes and Title VII: An Uneasy Coexistence", (1991) 80 *Georgetown Law Journal* 211, 226.

<sup>221</sup> *Tinker*, above at note 17, 506.

<sup>222</sup> *Ibid.*

<sup>223</sup> *Id.* 514.

<sup>224</sup> See e.g. *Conard v Goolsby*, 350 F Supp 713, 1 (1972); *James v Board of Education of Addison*, 461 F.2d 566 (1972), 572.

<sup>225</sup> See e.g. *East Hartford Ed Association v Board of Education*, 562 F 2d 838 (1977), 861; *McGlothlin v Jackson Municipal Separate Sch Dist*, 829 F Supp 853 (1992), 855.

<sup>226</sup> *Lemon v Kurtzmann*, 403 US 602 (1971).

<sup>227</sup> *Id.* 612-3.

<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid.*

<sup>230</sup> *Ibid.*

<sup>231</sup> *Hazelwood School District et al v Kuhlmeier et al.*, 484 U.S. 260 (1988).

<sup>232</sup> *Id.* 271 (emphasis added).

<sup>233</sup> *Ibid.*

<sup>234</sup> *Ibid.*

“school-sponsored”<sup>235</sup> activity, because some young and impressionable students may well think it is conveyed through state servants or through an action that indirectly bears the “imprimatur of the school.”<sup>236</sup> For this reason, Hazelwood-wary courts have held that teachers’ religious messages can—and indeed should—be subject to far more stringent limitations than students’ expression.<sup>237</sup>

In 1990, the Supreme Court again dealt with the fundamental distinction between state speech and private speech in a case involving the constitutionality of religious clubs at school. “There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect”,<sup>238</sup> the justices wrote in *Mergens* (1990). The case upheld a statute that provided, on the basis of equality, that schools permitting secular clubs must also allow religious clubs and decided that this did not amount to Establishment of religion but to mere fairness. With words that are significant for the matter of teachers’ religious symbols, Justice O’Connor emphasized that public authorities have indeed an avowed secular purpose to prevent discrimination against faith-related speech and concluded that allowing religious clubs did not violate *Lemon’s* primary religious effect test. “[S]econdary school students”, she wrote, “are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a non-discriminatory basis”.<sup>239</sup> As we shall see, and despite its reference to student expression, *Mergens* has implications also for the matter of teachers’ rights to religious symbols.

### 1.3.3.2. Lower Courts and Teachers’ Veils

#### (a) Anti-Garb Statutes

The early cases decided by the lower judiciary on the matter of teachers’ religious insignia were mostly answered in the positive—but, it should be noted, only if specific anti-garb statutes were not in existence. In *Hysong* (1894),<sup>240</sup> for example, the Pennsylvania Supreme Court held that in the absence of a specific state policy to the contrary, a teacher was free to wear religious attire as long as this only indicated adherence to a faith and did not proselytize.<sup>241</sup> The case involved a lawsuit brought by the parents of Protestant students in a heavily Catholic school district. The School Board had appointed eight teachers, all of them Catholics and six of whom were nuns wearing religious garb—and this, the Protestant parents claimed, was a violation of the Establishment Clause. The Pennsylvania justices, however, disagreed, and concluded that “the people of Gallitzin were within their rights to elect a Catholic school board, and that the [veiled] Catholic teachers were qualified to teach”.<sup>242</sup> Although *Hysong* was confirmed in a series of subsequent cases that upheld nuns’ rights to wear religious garments in class,<sup>243</sup> its stance did not sit well with the anti-Catholic mood of the time and a number of state legislatures, preoccupied that the judgment might have a negative impact on Protestantism, hastened to pass anti-garb legislation.<sup>244</sup> As we shall see, some of these statutes are

<sup>235</sup> *Ibid.*

<sup>236</sup> *Id.* 271.

<sup>237</sup> See Section 1.3.3.2.

<sup>238</sup> *Board of Education of Westside Community Schools v Mergens*, 496 US 226 (1990).

<sup>239</sup> *Id.* 228.

<sup>240</sup> *Hysong v Gallitzin Borough District School*, 164 Pa 629 (1894), 657. For interesting comments see Gunn, above at note 214, 394 ff.

<sup>241</sup> See however Justice Williams’s dissenting opinion: “The common schools cannot be used to exalt any given church or sect, or to belittle or override it; but they should be, like our political institutions, free from ecclesiastical control and from sectarian tendencies”. *Hysong v School District of Gallitzin Borough*, 30 A 483 (1894), 484-5. See also: “In jurisdictions where no religious garb statute or regulation exists”, one author observed, “courts have cited *Hysong* with approval and held that the wearing of religious garb by public school teachers does not constitute sectarian teaching”. Bastian, above at note 218, 214.

<sup>242</sup> See Gunn, above at note 214, 395.

<sup>243</sup> *Gerhardt v Heid*, 66 ND 444 (1936); *State ex rel Johnson v Boyd*, 217 Ind 348 (1940); *Rawlings v Butler*, 290 SW 2d 801 (1956), 804.

<sup>244</sup> According to Leo Pfeffer, thirty-six anti-garb statutes for teachers were enacted between 1865 and 1946. L Pfeffer, “Church, State and Freedom”, 413 (1953), in Schachter, above at note 214, 61. See also the discussion on this point in *United States v Board of Education for the Sch Dist of Philadelphia*, 1989 US Dist LEXIS 5437, 25.

still in existence today and represent the most significant obstacle to teachers' religious symbolism in class.<sup>245</sup>

New York State is an example of how the existence of such anti-garb statutes can change the outcome. In 1905, New York's intermediate appellate court held in *O'Connor*,<sup>246</sup> that a Catholic nun could not teach at the local school while wearing religious clothing on the ground that the state Constitution prohibited religious dress in public schools, and concluded that this prohibition was perfectly constitutional. "The policy of excluding religious teaching from the common schools of the State", the Court wrote, "is not only embodied in the Constitution and the laws of the State, but is the only safe and reasonable policy to be adopted, [because] religion and religious teaching must be excluded from the common schools".<sup>247</sup> "Young children", the judges concluded, "especially girls, are very susceptible to the influence of their teachers and of the kind of object lessons continually before them in schools..."<sup>248</sup> The case is also interesting from a historical perspective, because the Court's rationale suggests that the anti-garb measure was indeed aimed at Catholics: "An effect is almost sure to be produced upon more or less Protestant children by these things [Catholic garbs]",<sup>249</sup> New York's intermediate appellate court wrote, in an oblique reminder that religious tolerance was far from inborn in America.

(b) Teachers' Goatees, Armbands & Neckties

Since, as mentioned, *Tinker* named not only students but also teachers as recipients of its free expression largesse at school, the influence of this Supreme Court decision did not stop at pupils but also extended to public instructors—at least for a while. In *Braxton* (1969),<sup>250</sup> for example, a court held that where a goatee is worn by an African American teacher as an expression of his heritage, culture and racial pride, the teacher enjoys the protection of the First and Fourteenth amendments.<sup>251</sup> Similarly, three years later, in *Conard* (1972),<sup>252</sup> a court held invalid a school's grooming regulation for teachers since the judge recognized that "black males...as a matter of custom, tradition and racial identity, are more prone to wear moustaches, beards and longer sideburns than are whites"<sup>253</sup> and should thus be allowed to do so. For one thing, the court emphasized, "the restrictions amount to racial classifications inherently suspect which burden blacks more heavily than whites and do not serve a compelling state interest".<sup>254</sup> For another, the school policy would be unconstitutional even without the racial factor, because "[i]n the absence of a showing of 'unusual conditions', a high school grooming regulation which limits the length and style of an adult teacher's hair, including his moustache, goatee or beard, is irrelevant to any legitimate state interest".<sup>255</sup>

The *James* case,<sup>256</sup> also decided in 1972, shares the post-*Tinker* mood, and fully subscribes to the Supreme Court observation according to which "[t]he vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools".<sup>257</sup> In *James*, the Court of Appeals for the Second Circuit held that a school board could not discharge an eleventh-grade Quaker teacher from his duties on the ground that he wore a black armband in protest at the Vietnam War. The teacher, a pacifist, wore the symbol "as an expression of his religious aversion to war in any form and

<sup>245</sup> According to Gunn, above at note 214, 392, "...there are only four states that still have religious-garb statutes remaining on the books...": Pennsylvania (24 Pa. Const. Stat. § 11-1112, 1993), Nebraska (Neb. Rev. Stat. § 79-1274, 1992), North Dakota (ND Cent. Code §§ 15-47-29 to 30, 1993) and Oregon (Or. Rev. Stat. § 342.650, 1993).

<sup>246</sup> *O'Connor v Hendrick*, 109 AD 361 (1905), 368.

<sup>247</sup> *Ibid.*

<sup>248</sup> *Id.* 372-3.

<sup>249</sup> *Ibid.*

<sup>250</sup> *Braxton v Board of Public Instruction of Duval Co*, 303 F Supp 958 (1969).

<sup>251</sup> *Id.* 959.

<sup>252</sup> *Conard v Goolsby*, 350 F Supp 713 (1972).

<sup>253</sup> *Id.* 1.

<sup>254</sup> *Id.* 8.

<sup>255</sup> *Id.* 13.

<sup>256</sup> *James v Board of Education of Addison*, 461 F.2d 566 (1972).

<sup>257</sup> *Tinker*, above at note 17, 512.

as a sign of his regret over the loss of life in Vietnam”,<sup>258</sup> but was ordered to remove it because of the fear that “wearing the armband would tend to be disruptive and would possibly encourage pupils to engage in disruptive demonstrations”.<sup>259</sup> Like in *Tinker*, the James court held that the teacher’s armband was an acceptable form of symbolic expression that did not disrupt order nor attempt to proselytize students.<sup>260</sup> Since the instructor did not “arbitrarily inculcate doctrinaire views in the minds of students”,<sup>261</sup> the court concluded, his expression deserved First Amendment protection.

However important James is for the matter of teachers’ freedom of expression, the point was soon made by the judiciary that public instructors are differently positioned in comparison to other adults both in terms of rights as well as responsibilities—and this soon translated into a more restraining standard of behaviour when it came to their freedom of expression. An example of this approach emerged in 1977, when the Court of Appeals for the Second Circuit ruled in *East Hartford (1977)*<sup>262</sup> that a teacher in a Connecticut high school did not have a First Amendment right to refuse, as a matter of principle, to wear a necktie imposed by the school. The teacher argued that his rejection dissociated him with ‘establishment conformity’ as well as with many of the values related to the older generation—and that this amounted to constitutionally protected expressive activity. The appellate court, however, disagreed: “If Mr Brimley has any protected interest in his neckwear, it does not weigh very heavily on the constitutional scales”.<sup>263</sup>

### (c) Sikh Teacher’s Turban

Partly influenced by the *Lemon* standard on state-religion entanglement as well as, later, by the *Hazelwood* one on school-sponsored speech, subsequent decisions seem to confirm that, when it comes to teachers’ insignia, the presence of state legislation may well make all the difference. In 1987, the Supreme Court of Oregon heard the case of a Sikh instructor who was prevented from wearing his turban in class by the state’s anti-garb statute.<sup>264</sup> According to the instructor, this piece of legislation violated his First Amendment rights and had to be repealed—yet Oregon’s highest court disagreed and in *Cooper* found the statute constitutional on the ground that it guaranteed religious impartiality. “The aim of maintaining the religious neutrality of the public schools”, the justices held, “furthers a constitutional obligation beyond an ordinary policy preference for the legislature”.<sup>265</sup> Because the turban impinged on the school’s impartiality and might have been interpreted by some students as expressing the institution’s endorsement of Sikhism, therefore, the piece of legislation was appropriate and the instructor’s right had to succumb.<sup>266</sup> It should be noted, however, that the justices did not find the turban in conflict with the Establishment Clause, but rather held that state assemblies could legitimately legislate against teachers’ religious signs in class if they so wished—thereby suggesting that, in the absence of such statutes, instructors are indeed free to wear the emblems.<sup>267</sup> As for the Sikh teacher, he appealed to the US Supreme Court but the justices summarily disposed of his case and refused to overturn the *Cooper* decision.<sup>268</sup>

<sup>258</sup> James, above at note 254, 572.

<sup>259</sup> *Ibid.*

<sup>260</sup> “Any limitation of the exercise of constitutional rights”, the court ruled, “can be justified only by a conclusion, based upon reasonable inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially jeopardized, whether the danger stems initially from the conduct of students or teachers”. *Ibid.*

<sup>261</sup> James, above at note 254, 573.

<sup>262</sup> *East Hartford Ed Association v Board of Education*, 562 F 2d 838 (1977).

<sup>263</sup> *Id.* 861. “The very notion of public education” the judge continued, “implies substantial public control. Educational decisions must be made by someone [and] there is no reason to create a constitutional preference for the views of individual teachers over those of their employers”. *Id.* 858.

<sup>264</sup> “No teacher in any [Oregon] public school shall wear any religious dress while engaged in the performance of duties as a teacher”, the statute read. See Or. Rev. Stat. § 342.650 (1993), in *Cooper v Eugene School District n.41*, 301 Ore 358 (1986).

<sup>265</sup> *Id.* 375.

<sup>266</sup> “[T]he teacher’s appearance in religious garb”, the court wrote, “may leave a conscious or unconscious impression among young people and their parents that the school endorses the particular religious commitment of the person whom it has assigned the public role of teacher”. *Id.* 313.

<sup>267</sup> “A rule against a religious dress is permissible to avoid the appearance of sectarian influence, favouritism or official approval in the public school”, the Oregon justices concluded. “The policy choice must be made in the first instance by those with lawmaking or delegated authority to make rules for the schools”. *Id.* 308.

<sup>268</sup> *Cooper v Eugene School District n.41*, 480 US 942 (1987).

(d) Muslim Teacher's Headscarf

Three years after *Cooper*, similar events were discussed in *USA v Board of Education* (1989),<sup>269</sup> a crucial case on headscarves in class. A public school teacher wore a Muslim headscarf as a sign of her faith but was told by school authorities that doing so violated school regulations as well as an 1895 Pennsylvania Garb Statute.<sup>270</sup> After being initially referred to the Equal Employment Opportunities Commission, the teacher's complaint was taken up by the US Department of Justice (DoJ), which filed a lawsuit on her behalf<sup>271</sup> and alleged a situation of employment discrimination in violation of Title VII of the United States Civil Code.<sup>272</sup> According to the Justice Department, anti-garb statutes are unconstitutional and public school instructors do have a right to wear their religious apparel, because they must be allowed "the full enjoyment...of their right to equal employment opportunities without discrimination based on religion"<sup>273</sup>—and, the Department insisted, this certainly included accommodating the headscarf.

Once again, however, lawyers proved more cautious than politicians. In 1989, a first decision at the district court level found in favour of the Muslim woman on the ground that "the action of the Board in permitting Ms Reardon to wear her religiously-required attire does not involve the endorsement of a particular substantive religious message or viewpoint".<sup>274</sup> "I have not found...evidence", the judge concluded, "that permitting a public school teacher to wear a scarf required by her religious faith would be likely or probable to create a perception among students that the school...endorsed the religion of the teacher".<sup>275</sup> On appeal, this position was reversed by the Third Circuit—on two grounds. First, the appellate judges argued, given that *Cooper* was "factually indistinguishable from [the present case]";<sup>276</sup> that, as the Oregon Supreme Court had upheld the anti-garb legislation of that case and the US Supreme Court had refused to overturn it, therefore the Oregon statute was constitutional—and, consequently, so was the Pennsylvania one.<sup>277</sup> Secondly, the appellate judges emphasized that the school had acted appropriately since "accommodating Ms Reardon's desire to express her religious commitment through her attire would have imposed undue hardship on the School Board",<sup>278</sup> would have created a "significant threat to the maintenance of religious neutrality in the public school system"<sup>279</sup> and would have exposed it to the consequences of "criminal prosecution".<sup>280</sup> Therefore, the justices concluded, the Garb Statute was constitutional and the Muslim teacher had been lawfully prevented from wearing her veil in class. As in *Cooper*, however, this judgment did not translate into a prohibition of teachers' religious symbols in the absence of specific statutes to the contrary: "We are not currently presented with an Establishment Clause case", the judges emphasized, "and for the present purposes we need only note that *Cooper* does not mean, and we need not conclude, that tolerating religious garb would violate the Establishment Clause".<sup>281</sup>

<sup>269</sup> *United States v Board of Education for the Sch Dist of Philadelphia*, 1989 US Dist LEXIS 5437 (1989).

<sup>270</sup> Id. 25. The Pennsylvania Garb Statute, similar to the Oregon one, provided that "[n]o teacher in any [Pennsylvania] public school shall wear in said school—or while engaged in the performance of his duty as such teacher—any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination". See 24 Pa. Const. Stat. § 11-1112 (1993), Id. 3.

<sup>271</sup> *United States v Board of Education for the Sch Dist of Philadelphia*, 911 F.2d 882 (1990), 885.

<sup>272</sup> Title VII makes it unlawful for employers "to fail or refuse to hire or to discharge any individual...because of such individual's...religion", except when the employer proves "undue hardship".<sup>272</sup> See Id. 886. "The term 'religion'", the statute reads, "includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business".

<sup>273</sup> Id. 885.

<sup>274</sup> *United States* (1989), above at note 267, 45.

<sup>275</sup> Id. 38.

<sup>276</sup> *United States* (1990), above at note 269, 887.

<sup>277</sup> "The United States Supreme Court could not have decided to dismiss for want of a substantial federal question without concluding that *Cooper's* free exercise claim was without merit", the court ruled. Id 889.

<sup>278</sup> Id. 891.

<sup>279</sup> Id. 894.

<sup>280</sup> *Ibid.*

<sup>281</sup> Id. 889.

(e) Cultural & Religious Beret for Teacher

Two years later, this last point—together with the general admissibility of teachers’ religious garb—was implicitly confirmed in *McGlothlin* (1992).<sup>282</sup> Here, a Mississippi court decided that a teacher’s aide had been rightly fired for wearing what she perceived as a cultural and religious beret, yet it so held not on the ground of hostility to religious signs but because the woman had not properly conveyed to school officials the religious dimension of her African-American hat. “Because the court finds that plaintiff failed to communicate to defendant that there was a religious basis for her conduct, the court concludes that she cannot sustain either the Title VII or the First Amendment claim”.<sup>283</sup> The interesting feature of this decision, therefore, lies with the different standards of protection accorded to religious vis-à-vis cultural headgear—a circumstance that should not come as a surprise to the reader of this chapter. “The district is required, under the First Amendment and Title VII, to make some accommodation for the practice of religious beliefs when it pursues an end which incidentally burdens religious practices”,<sup>284</sup> the judge highlighted. Yet although the woman did possess a “sincerely held”<sup>285</sup> belief in the religious dimension of her African-American hat, she only conveyed to the school a cultural one—and the latter, unlike the former, does not deserve the highest constitutional protection. “[T]he reasons she consistently provided had to do with cultural considerations”, the court wrote. “She did speak of religion as ‘a way of life’, but the way of life she described was...nothing more than expression of her African heritage”.<sup>286</sup> This, the judge made clear (in a similar way to the *Isaacs* case on cultural headgear described above) was not enough, because “[c]ulture....does not in the court’s opinion equate with religion”.<sup>287</sup>

(f) Conclusions on Teachers’ Veil

As this section indicates, the approach of American courts when it comes to teachers’ insignia is, generally speaking, characterized by the existence of two conflicting factors. On the one hand the judiciary is clearly opposed to restricting teachers’ expression when they act as private individuals; on the other, however, the situation changes considerably when the religious expression is—or may be interpreted by students to be—‘state-action’.<sup>288</sup> The result is that public instructors are normally allowed to wear religious apparel in class as long as (i) it merely indicates an adherence to a specific faith and does not proselytize,<sup>289</sup> and (ii) no specific school policy or state legislation exists on the matter.<sup>290</sup>

As far as this last point is concerned, the anti-garb statutes still in existence seem to represent the most serious limit to teachers’ religious expression, because a number of cases addressing their constitutionality have upheld them—either to avoid “undue hardship”<sup>291</sup> on school boards or to ensure that a religiously-neutral educational environment is maintained. As one author observed,

<sup>282</sup> *McGlothlin v Jackson Municipal Separate Sch Dist*, 829 F Supp 853 (1992).

<sup>283</sup> *Id.* 855.

<sup>284</sup> *Id.* 853.

<sup>285</sup> *Id.* 865.

<sup>286</sup> *Id.* 864.

<sup>287</sup> *Id.* 865. That the two did not merit the same protection visibly emerged also from the school superintendent’s comments on the woman’s headgear: “[I]f she had indicated that this was a matter of ‘her religious situation’”, he was reported to say, “then, knowing the policies of the District, [I] would immediately have done something to either accommodate her or to have somehow dealt with the situation in a very different fashion”. *Id.* 860.

<sup>288</sup> On the point that public school teachers acting in their capacity as classroom teachers are ‘state actors’ see e.g. *Breen v Runkel*, 614 F.Supp 355 (1985), 358; *Doe v Duncanville Independent School District*, 70 F.2d 402 (1995), 406; *Robert v Madigan*, 921 F.2d 1047 (1990), 1054; *Downing v W Heaven Board of Education*, 162 F.Supp 2d 19, (2001), 21.

<sup>289</sup> On items conveying advocacy for a specific religion, see e.g. *Downing*, above at note 286, 27.

<sup>290</sup> In addition to the Pennsylvania and Oregon statutes quoted above, see also Nebraska’s (“Any teacher in any public school in this state who shall wear in said school or while engaged in the performance of his duty any dress or garb, indicating the fact that such teacher is a member or an adherent of any religious order, sect or denomination, shall be deemed guilty of misdemeanor”) (Neb. Rev. Stat. § 79-1274 (1992)); and North Dakota (“No teacher in any public school in this state may wear in said school or while engaged in the performance of his or her duties as such teacher any dress or garb indicating the fact that such teacher is a member of or an adherent to any religious order, sect or denomination”) (North Dakota Cent. Code §§ 15-47-29 to 30 (1993)).

<sup>291</sup> *United States* (1990), above at note 269, 885.

however, “[t]here are only [a few] states that still have religious-garb statutes remaining on their books, a fact which in and of itself suggests that the statutes are vestigial remnants of an unhappy era of religious prejudice rather than vehicles for propelling future religious intolerance”.<sup>292</sup> Furthermore, while state legislatures and school districts can restrict the wearing of religious attire, they may also enact rules that explicitly allow it—and Arkansas and Tennessee, for example, have done just that.<sup>293</sup> As for those situations where there are no legislative provisions either in favour or against religious apparel, a majority of courts seem inclined to admit non-proselytizing insignia<sup>294</sup>—and the 2005 Supreme Court decision in *Cutter v Wilkinson*, although only applicable to special institutions such as mental hospital and prisons, may indirectly support this tendency.

#### 1.3.4. RELIGIOUS SYMBOLISM IN NON-SCHOOL CASES

Although schools are by far the most sensitive environment when it comes to accommodating religious symbols, the legal challenges raised by this issue are not limited to the educational sector but include a wide variety of situations where the private right to free exercise of religion comes into conflict with public interests such as security or hygiene.<sup>295</sup> Here, as in the matter of teachers’ veils, adjustments for religious expression are prevalent—but not inevitable. The following are examples of judicial outcomes on the matter.

##### (a) Prisons

Correctional institutions are a case in point of this private-public conflict. In particular, the fact that inmates are captive under the direct responsibility of the state raises a number of issues when it comes to accommodating their religious practices. Generally speaking, the detainees’ right to wear religiously-based insignia is recognized and protected in American law—but this does not mean that it is unlimited. Already in the 1970s courts were in substantial agreement that authorities must—at a minimum—“show that a prison regulation furthers an ‘important or substantial government interest’ and that the infringement of First Amendment rights must be ‘necessary or essential’ to the protection of the governmental interest”.<sup>296</sup> On the basis of this indication, for example, a court has found invalid a prison rule prohibiting the use of headgear in the dining hall on the ground that it was “based primarily on concerns of decorum and good manners, and has no substantial basis in any security needs”.<sup>297</sup> However, other courts have given preference to the security factor and found that a rule against religious garb outside prisoners’ cells was valid.<sup>298</sup> As mentioned, the recent Supreme Court decision in *Cutter* promises to considerably improve the legal protection of religious practices in prison when it upheld the right of a group of Ohio inmates to “adhere to the dress and appearance mandates of their religions”.<sup>299</sup> In particular, the above-mentioned requirement of an “important or substantial governmental interest”<sup>300</sup> to limit detainees’ religious rights has now been substituted by the much stricter compelling-interest standard of *Verner*, with the result that the justices have self-

<sup>292</sup> See *Gunn*, above at note 214, 392.

<sup>293</sup> First Amendment Schools, *May a Teacher Wear Clothing Not Approved by a Teacher Dress Code?* available online at [www.firstamendmentschools.org](http://www.firstamendmentschools.org) (at 10 May 2006).

<sup>294</sup> See e.g. *Moore v Board of Education*, 212 NE 2d 833 (1965); *Rawlings v Butler*, 290 SW 2d 801 (1956); *Zellers v Huff*, 236 P 2d 949 (1951); *City of New Haven v Town of Torrington*, 43 A 2d 455 (1945); *Johnson v Boyd*, 28 NE 2d 256 (1940); *Gerhardt v Held*, 267 NW 127 (1936).

<sup>295</sup> For a curious example, see *American Muslim News Brief, Soccer Referee Suspended After Questioning Muslim Player’s Headscarf*, 23 June 2004.

<sup>296</sup> *Procunier v Martinez*, 416 US 413-4, 94 S Ct at 1181.

<sup>297</sup> *St Claire v Cuyler*, 481 F Supp 732 (1979), 739. See also the recent lawsuit filed by a Muslim Woman who was required to unveil while visiting an inmate in a Wisconsin prison: “We can and will make accommodations to ensure that our prison system operates safely and securely while recognizing the right that visitors have to practice their religion”, a prison official declared. *The Guardian, Wisconsin Prison to Change Headwear Policy*, 27 May 2005. See also *Fox News, Muslim Woman Sues Over Headscarf Ordeal*, 11 October 2004.

<sup>298</sup> *Blair-Bey III v Nix*, 1991 US Dist LEXIS 21066 (1991).

<sup>299</sup> *Cutter*, above at note 51, § I.

<sup>300</sup> *Procunier*, above at note 294.

admittedly “accord[ed] religious exercise heightened protection from government-imposed burdens”.<sup>301</sup>

#### (b) Police & the Military

Hair grooming regulations for the Police and the Military are areas where free exercise and public interests collide, and in such an important way, according to the Supreme Court, to warrant its direct intervention. In 1976, the Supreme Court decided in *Kelley v Johnson* (1976)<sup>302</sup> that a hair length policy for male policemen was constitutional and did not violate the First or Fourteenth Amendments on the ground that “members of the police force [perform] duties which have no counterpart with respect to the public at large”.<sup>303</sup> Judges should show great deference towards law enforcement agencies, the Supreme Court held, because “[n]either this Court, the Court of Appeals, nor the District Court is in a position to weigh the policy arguments in favour of and against a rule regulating hairstyles as a part of regulations governing a uniformed civilian service”.<sup>304</sup> This position was later confirmed in *Goldman*, where, as we have seen, the justices decided that an Air Force policy prohibiting members from wearing hats did not infringe the First Amendment rights of a Jewish serviceman “because the rule reasonably and evenhandedly regulated dress in the interest of the military’s perceived need for uniformity and discipline”.<sup>305</sup> As we shall see below, however, immediately after *Goldman* the Pentagon changed its rules and Congress passed a law permitting religious headgear over uniforms.<sup>306</sup>

#### (c) Lawyers & Courts

Grooming regulations for lawyers and proper attire before courts were addressed in unambiguous terms by the Court of Appeals of California in *Jensen* (1984).<sup>307</sup> The case was brought by a turbaned attorney who refused to answer a judge’s question about his religious headgear and was consequently denied access to the courtroom. This, the *Jensen* court held, was unacceptable, “because to require a lawyer to disclose religious beliefs as a condition to appear before a judge returns us to those troubled times our ancestors fled in their search for freedom from religious oppression”.<sup>308</sup> Only if the turban caused a disruption, the judges continued, could Mr Jensen legitimately be questioned about it<sup>309</sup>—and, they emphasized, “disruption, unlike beauty, is not in the eye of the beholder. More is required to establish interference with courtroom processes than a judge’s personal idiosyncrasies”.<sup>310</sup> A similar conclusion was reached in several other cases decided on the matter of court appearance.<sup>311</sup> In 2004, for example, a Muslim man was charged for disregarding the “no hats” sign in a courtroom and failing to take off his kufi, or religious headgear, upon entrance—but the court sided with the man.<sup>312</sup> Indeed, the judge emphasized, religious hats need to be distinguished from other ‘secular’ headgear: “Plaintiff denies that his kufi is a regular, routine hat such as a baseball cap [and] [t]here is no showing of any reason why, once security concerns are satisfied, an individual may not wear a hat of religious significance in a courtroom”.<sup>313</sup>

#### (d) IDs & Driving Licences

<sup>301</sup> Cutter, above at note 51, § I A.

<sup>302</sup> *Kelley v Johnson*, 425 US 238 (1976).

<sup>303</sup> *Id.* 245.

<sup>304</sup> *Id.* 248.

<sup>305</sup> *Goldman v Winberger*, 475 US 503 (1986).

<sup>306</sup> 10 USC § 774 (a)-(b), in Cutter, above at note 51, § II A.

<sup>307</sup> *Jensen v Superior Court of San Diego County*, 154 Cal App 3d 533 (1984).

<sup>308</sup> *Id.* 541.

<sup>309</sup> *Ibid.*

<sup>310</sup> *Id.* 542.

<sup>311</sup> See e.g. *Re Palmer*, 120 RI 250, 386 A.2d 1112 (1978); *McMillan v State*, 258 Md 147, 265 A.2d 453 (1970); *Atkin v Parama*, No CIV-86-1075E, 1987 WL 16459 (1987); *Spanks-El v Finley*, No 85-C-9259, 1987 US Dist LEXIS 3374 (1987).

<sup>312</sup> “Accepted standards of courtroom etiquette do not necessarily prevail over an individual’s exercise of his religion, if the latter does not impact courtroom security or interfere in courtroom procedures”, the judge wrote. See *Tyson v Damore*, 2004 US Dist LEXIS 16596, 17.

<sup>313</sup> *Ibid.*



Although, after 9/11, the restriction of headgear on IDs and driving licenses did form the object of a debate, the overwhelming majority of American states allows religious exceptions to “no hat” rules and does not even require verification of the belief in order to accommodate the garb.<sup>314</sup> Forty-six states have passed legislation or administrative policies addressing the needs of religiously-mandated practices, and only Georgia, Kansas, Kentucky and New Hampshire do not currently have laws on headgear in driving license pictures.<sup>315</sup> It is also interesting to note that, as a Muslim human rights organization observed, “contrary to recent news reports the trend to accommodate headgear grew after 9/11.”<sup>316</sup> The Arkansas policy, for example, provides that “[t]he only exception to [the no-hats rule] is for women of the Muslim religion. Since their religion prohibits them from appearing in public without head cover, we allow them to be photographed with their religious head cover.”<sup>317</sup> Other places are proving equally accommodating.<sup>318</sup>

Most US states have similar provisions,<sup>319</sup> and judicial decisions on the matter seem to go in the same direction—but are more cautious. In *Quaring* (1984),<sup>320</sup> for example, the Court of Appeals for the Eighth Circuit held that the state of Nebraska had to exempt a Christian woman from a photo requirement since she believed that the Second Commandment prohibited photographs of “anything in creation.”<sup>321</sup> Doing so would not impose unreasonable organizational difficulties, the judges held, because “[a] state’s interest in avoiding an administrative burden becomes compelling only when it presents administrative problems of such magnitude as to render the entire statutory scheme unworkable.”<sup>322</sup> While a similar solution was reached in a number of other instances,<sup>323</sup> it should be noted that, in a more recent case, a Muslim woman’s request to appear on a driving licence’s picture with her burqa was denied on the ground that “[t]oday is a different world than it was 20-25 years ago. It would be foolish not to recognise that there are new threats to public safety, including both foreign and domestic terrorism, and increased potential for ‘widespread abuse’.”<sup>324</sup> The no-garb rule, the judge concluded, “does not unconstitutionally burden the free exercise of religion”<sup>325</sup> because “[p]laintiff’s veiling practices must be subordinated to society’s need to identify people as quickly as possible in situations in which safety and security of others could be at risk.”<sup>326</sup> This was confirmed on appeal.<sup>327</sup>

#### (e) Private & Public Employment

<sup>314</sup> Id. 3.

<sup>315</sup> Council on American-Islamic Relations, *Religious Accommodation in Driver’s License Photographs: A Review of Codes, Policies and Practices in the 50 States* (CAIR, Washington, 2004) 2.

<sup>316</sup> Id. 5. See also: Associated Press, *Riley Administration Changes Rules on Head Scarves*, 20 February 2004; CAIR, *Alabama Driver’s Photo Rule Changed to Allow Hijab*, 20 February 2004 (emphasis added).

<sup>317</sup> State of Arkansas Department of Finance and Administration, *Driver Services Administration Procedures* (Arkansas State, Little Rock, 2000) 6. See also Louisiana Department of Public Safety, Office of Motor Vehicles, Policy Section I.

<sup>318</sup> Another guideline, for instance, reassures that “[t]he...state of California wants to be sensitive to the needs of all applicants and does allow headgear to be worn because of religious beliefs”. See California Vehicle Code, ss. 12800-5 and 13005.

<sup>319</sup> See e.g.: “The [Motorvehicles] Division is sensitive to religious covering of the head, and will allow such covering with the exception of the applicant’s face”. Utah Department of Public Safety, Driver License Division, Policy, March 2003, 15.

<sup>320</sup> *Quaring v. Peterson*, 728 F.2d 1121 (1984).

<sup>321</sup> Id. 1123.

<sup>322</sup> Id. 1227.

<sup>323</sup> *Bureau of Motor Vehicles v Pentecostal House of Prayer*, 380 NE 2d 1225 (1978); *Dennis v Charnes*, 805 F.2d 339 (1984).

<sup>324</sup> *Freeman v Florida*, Case 2002-CA-2828 (2003), 13. On the case, see also P T Currier, “*Freeman v State of Florida: Compelling State Interests and the Free Exercise of Religion in Post September 11<sup>th</sup> Courts*”, (2004) 53 *Catholic University Law Review* 913; K A Sukinik, “*Civil Liberties in the Face of 9/11: The Case of Sultaana Freeman*”, unpubl.paper (2004).

<sup>325</sup> Id. 15.

<sup>326</sup> Id. 14.

<sup>327</sup> In July 2005 the Florida Fifth District affirmed the orders entered by the trial court. “We recognize the tension created as a result of choosing between following the dictates of one’s religion and the mandates of secular law”, the judges wrote in the conclusion. “However, as long as the laws are neutral and generally applicable to the citizenry, they must be obeyed. In *Braunfeld v. Brown*, 366 U.S. 599 (1961), the Court wrote: “[W]e are a cosmopolitan nation made up of people of almost of every conceivable religious preference...Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in . . . disadvantage to some religious sects. . . .(Id. 606)”. See Florida District Court of Appeal, Fifth District, *Sultaana Lakiana Myke Freeman v Department of Highway Safety and Motor Vehicles*, No. 5D03-2296, July 2005.

Last but not least, courts have also emphasized that private as well as public employers are expected to accommodate religious headgear.<sup>328</sup> As for the former, a Muslim lady was, for instance, found to have been unlawfully discriminated against because of her veil during the recruitment process.<sup>329</sup> As for the latter, the Wisconsin Supreme Court held that imposing grooming regulations on taxi-drivers was illegal on the part of a city council, because “there [was] no rational basis for its enactment”<sup>330</sup> and the alleged health-related reasons were not supported by evidence. In a further case, finally, another city council agreed to revise its policy and allowed religious “exceptions to its dress code for city pools”<sup>331</sup> after a Muslim woman sued the facility for barring her headscarf.

### 1.3.5. CONCLUSION: A VEIL BETWEEN LAW & POLICY?

One of the most fascinating aspects surrounding the constitutional position of the Muslim veil in American law is that of the relationship between the legal and political components of the matter. As we have seen throughout this chapter, there is a curious connection between the two: while, generally speaking, they go in the same direction and provide accommodation for religious symbols, they do so with different degrees of enthusiasm and are often engaged in lively exchanges—which sometimes turn into open confrontations. This concluding section will highlight this situation both with reference to the legislative and executive branches of government—and will suggest that, when it comes to religious symbols in America, the most reliable players in the institutional scenario are federal and state administrators and politicians, rather than the judges. The judiciary does follow suit, but more cautiously and, perhaps understandably, with less fervor—an interesting point if compared with the situation of France, where as we shall see the politicians’ enthusiasm for an anti-veil law had long been fended off by the judiciary in the years leading up to the passage of Statute 228/2004. We shall first look at the relationship between Congress and the Supreme Court (1.3.5.1.) and then to the one involving the Government and the Supreme Court (1.3.5.2.).

#### 1.3.5.1. US Legislative Assemblies & Religious Symbols

##### (a) Headgear for the Military

The matter of religious headgear for the military provides a good example of the tension that sometimes surrounds legislation and judicial decisions—and of the energetic role of the former in comparison to the latter. Given the hesitation of the armed forces to accommodate religious symbols, in 1984 the US Congress attempted to introduce legislation in favour of “unobtrusive religious headgear”<sup>332</sup> for servicemen. A year later, the Department of Defense responded to this suggestion by authorizing a study-group in order to “minimize the potential conflict between the interests of members of the Armed Forces in abiding by their religious tenets and the military interest in maintaining discipline”.<sup>333</sup> When the initiative failed to translate into action, however, Congress launched a new Bill that allowed religious symbols if “the item...is neat and conservative”<sup>334</sup> and “is part of the religious faith practiced by the member”.<sup>335</sup> The Bill was approved by the House of Representatives but was narrowly defeated by the Senate.

<sup>328</sup> On the point, see B P Cavanaugh, “September 11 Backlash in Employment Discrimination”, (2004) 60 *Journal of the Missouri Bar* 186.

<sup>329</sup> See *Equal Employment Opportunity Commission v Reads*, 759 F Supp 1150 (1990); *EEOC v Alamo*, CIV02-1908-PHX-ROS (2002); *Equal Employment Opportunity Commission, EEOC and North Carolina Medical Practice Reach \$35,000 Settlement in Post-9/11 Backlash Discrimination Claim*, Press Release, 13 November 2002. But see also *EEO v Presbyterian Ministries*, 788 F Supp 1154 (1992) (deciding that a Muslim woman had no right to wear a headscarf at a Christian retirement house, because of the religious character of the employer).

<sup>330</sup> *Peppies Courtesy Cab v Kenosha*, 165 Wis 2d 397 (1991).

<sup>331</sup> *Omaha World Herald*, Hijab Case in Nebraska, 28 June 2004.

<sup>332</sup> C C Huerta, *Religious Accommodation* (Department of Defense, Washington, 1995) 3.

<sup>333</sup> *Ibid.*

<sup>334</sup> *Ibid.*

<sup>335</sup> *Ibid.*

Meanwhile, however, the matter had reached the Supreme Court, which, as mentioned, in *Goldman* held that a member of the Armed Forces did not have a constitutional right to wear a yarmulke.<sup>336</sup> Unsurprisingly, the judgment was frostily received by Congress, the majority of which fully subscribed to the dissenting opinion according to which the Supreme Court “had abdicated its role as principal expositor of the Constitution and protector of individual liberties in favour of credulous deference to unsupported assertions of military necessity”.<sup>337</sup> Just one year after *Goldman*, however, Congress finally succeeded in passing pro-religious garb legislation for the Army.<sup>338</sup> While these events are highly significant, it should be observed that they are not isolated. For in 1994 it was the turn of another contentious area of religious importance—beards and grooming rules for Sikhs in the army—to come under the Congress’ scrutiny. After the Senate Armed Services Committee ordered the Department of Defense to “review its policy on beards and turbans as it related to the Sikh”,<sup>339</sup> the Pentagon agreed to do so and the policy was amended accordingly.<sup>340</sup>

#### (b) Religious Freedom Restoration Act (RFRA)

The divergence between Supreme Court and Congress on religious insignia in the military pales in comparison to their battle on the crucial and highly controversial issue of religious exceptions to general laws—a subject that, as we have seen throughout this chapter, is partly connected to religious symbols. As mentioned, in 1990 the Supreme Court in *Smith* reversed years of *Sherbert*-based precedents and enraged the supporters of religious exemptions when it ruled that an individual’s religious beliefs did not excuse him or her from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.<sup>341</sup>

Three years later, the reply of an irritated Congress materialized in the form of the Religious Freedom Restoration Act (RFRA).<sup>342</sup> Since “in *Employment Division v Smith* the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion”,<sup>343</sup> the legislation read, “[t]he purpose[...] of this Act [is] to restore the compelling interest test as set forth in *Sherbert v Verner*...”<sup>344</sup> and re-establish the principle according to which “[g]overnment shall not substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability, except...in furtherance of a compelling governmental interest and...[if doing so is] the least restrictive means...”<sup>345</sup>

The Supreme Court did not appreciate this interference and in 1997 it reacted unsympathetically to the RFRA in *Boerne v Flores* (1997).<sup>346</sup> “The power to interpret the Constitution in a case or controversy remains in the Judiciary”,<sup>347</sup> the Highest Court held, and “[w]hen the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due to them under settled principles...”<sup>348</sup> Since “[t]he RFRA is so out of proportion...”<sup>349</sup>

<sup>336</sup> “To accomplish its mission the military must foster instinctive obedience, unity, commitment and esprit de corps”, the Supreme Court wrote. See *Goldman*, above at note 303, 246.

<sup>337</sup> *Goldman*, above at note 303, 250ff.

<sup>338</sup> “A member of the armed forces may wear an item of religious apparel while wearing the uniform”, the new rules read, “unless ‘the wearing of the item would interfere with the performance [of] military duties [or] the item of apparel is not neat and conservative’”. See 10 USC § 774 (a)-(b) in *Cutter* at II (A).

<sup>339</sup> See *Huerta*, above at note 330.

<sup>340</sup> *Navy Times*, Senate Supports Sikhs Seeking Service in Army, 4 July 1994.

<sup>341</sup> “Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation”, Justice Scalia wrote for the majority. “We have never held that, and decline to do so now”. See *Smith*, above at note 53, 881.

<sup>342</sup> 42 U.S.C. 2000bb (1993).

<sup>343</sup> Religious Freedom Restoration Act (1993), § 2 (a) (4).

<sup>344</sup> *Id.* at § 2 (b) (1).

<sup>345</sup> *Id.* at § 3 (a) and (b).

<sup>346</sup> *Boerne v Flores*, 521 US 507 (1997).

<sup>347</sup> *Id.* 524.

<sup>348</sup> *Id.* 536.

<sup>349</sup> *Id.* 530.

the justices concluded, “[t]he Act’s constitutionality is invalidated”<sup>350</sup> and the Smith standard conserved.

Partly because Flores proved highly unpopular in political circles, and partly because Smith had left the door open to state intervention and “recognised that the political branches could shield religious exercise through legislative accommodation”,<sup>351</sup> a number of pro-religion initiatives soon saw the light of the day at the state level and, by 2000, various Religious Freedom Restoration Acts had been passed in Alabama, Arizona, Connecticut,<sup>352</sup> Florida,<sup>353</sup> Idaho, Illinois,<sup>354</sup> New Mexico, Oklahoma,<sup>355</sup> Rhode Island,<sup>356</sup> South Carolina and Texas. While there were local variations, the majority of these statutes followed the federal model and reintroduced the Sherbert standard of ‘compelling government interest’ and ‘least restrictive means’ at the state level,<sup>357</sup> insofar providing a forceful protection to religiously-motivated practices.

### (c) Religious Liberty Protection Act (RLPA) and Religious Land Use and Institutionalized Persons Act (RLUIPA)

Pro-Sherbert and anti-Smith initiatives soon extended to the federal level as well. In 1999 a bill was introduced in the US Congress with the express purpose to “restore the general rule that state or local officials may not substantially burden religious exercise”.<sup>358</sup> The piece of legislation, referred to as the Religious Liberty Protection Act (RLPA),<sup>359</sup> established a strict scrutiny test for laws that infringed upon the free expression of religion and reintroduced the ‘compelling interest’ and ‘least restrictive means’ tests of Verner. In spite of serious doubts about its constitutionality in view of Boerne, the Department of Justice concluded in favour and the bill was passed by the House of Representatives in July 1999 by 306 to 118—but was stalled in the Senate the following year and never became law.

A better fate awaited the Religious Land Use and Institutionalized Persons Act (RLUIPA),<sup>360</sup> the latest in a number of legislative initiatives in favour of religion. As mentioned, this statute reintroduced the Verner standard for inmates and other special situations.<sup>361</sup> Despite the US government’s intervention in defense of the Act,<sup>362</sup> in November 2003 the Court of Appeals for the Sixth Circuit found RLUIPA unconstitutional because “[i]ts message of endorsement of [religion] has the effect of encouraging prisoners to become religious in order to enjoy greater rights”<sup>363</sup>—yet, as mentioned, in May 2005 the Supreme Court upheld the legislation.<sup>364</sup> As critics quickly pointed out, however, to what extent this Act is compatible with Smith remains very much to be seen.

### 1.3.5.2. US Government & Religious Symbols

<sup>350</sup> Id. 536.

<sup>351</sup> Cutter, above at note 51, I (A). See also Smith, above at note 53, 890.

<sup>352</sup> General Statutes of Connecticut, Section 52-571b (“Actions or Defense Authorized when State or Political Subdivision Burdens a Person’s Exercise of Religion”).

<sup>353</sup> B A Robinson, “Religious Freedom Restoration Acts—State Legislation”, in *Religious Freedom*, 18 December 2002.

<sup>354</sup> Freedom Forum, Illinois Legislature Passes Religious Freedom Protection Act, 20 May 1998; Freedom Forum, Illinois Lawmakers Pass Religious-Freedom Bill Despite Governor’s Concerns, 3 December 1998.

<sup>355</sup> Adventist News Network, Oklahoma Passes Religious Liberty Law, 13 June 2000.

<sup>356</sup> General Laws of Rhode Island, Title 42, Ch 80.1 (“Religious Freedom Restoration Act”).

<sup>357</sup> In some places, like California, the legislatures did attempt to introduce a RFRA but were vetoed by state governors out of concern that prisoners would abuse the law. A similar fear by the Illinois Governor—who was concerned that “inmates not be free to pursue gang interests under the guise of religious exercise”—was nevertheless defeated when the House overrode his veto by 110 to 3 and the Senate by 55 to 0. See Robinson, above at note 351.

<sup>358</sup> Ibid.

<sup>359</sup> Religious Liberty Protection Act (1999), House of Representatives 1691.IH.

<sup>360</sup> 42 U.S.C. §§ 2000cc.

<sup>361</sup> It provided that “No government shall impose a substantial burden on the religious exercise of a person residing in or confined in an institution unless the burden furthers a compelling governmental interest and does so by the least restrictive means” Id. at s. 3.

<sup>362</sup> See Cutter, above at note 21, § B.

<sup>363</sup> AANews, Circuit Court Strikes Down Religious ‘Special Rights’ Statute, 20 December 2003. See also Cutter, above at note 21, II (A).

<sup>364</sup> “[W]e hold that § 3 of RLUIPA fits within the corridor between the Religious Clauses [and that] the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause”, the justices held. See In Cutter at § II (A).

Like federal and state legislatures, the US government has a history of consistent and vigorous support for religious symbols in general and for school insignia in particular, and offered an early sample of this in 1989 when it sustained the most problematic apparel of all: the teachers' headscarf.<sup>365</sup> The Department of Justice submitted that "[t]he Garb Statute is in conflict with Title VII and therefore unenforceable".<sup>366</sup> Similarly to what happened for the legislative branch, however, the pro-religion stance of the executive was soon confronted with a number of legal problems—and the Court of Appeals upholding the constitutionality of the anti-garb statute (mentioned in Section 1.3.3.2. (d)) is just one illustration of judicial resistance in the face of government enthusiasm.

(a) The Memorandum on Religious Expression in Public Schools (1995)

Six years after USA, Bill Clinton's Secretary of Education and Attorney General extended to students governmental support for religious insignia in their Memorandum on Religious Expression in Public Schools (1995).<sup>367</sup> After emphasizing the central role of religion in American history, the document reminded that "nothing in the First Amendment converts our public schools into religion-free zones"<sup>368</sup> and explicitly supported pupils' religious symbolism: "When wearing particular attire such as yarmulkes and head scarves during the school day is part of students' religious practice", the document read, "under the Religious Freedom Restoration Act schools generally may not prohibit the wearing of such items".<sup>369</sup> The text added that, even if "the government may not use schools to coerce the consciences of our students or to convey official endorsement of religion, the government's schools also may not discriminate against private religious expression during the school day".<sup>370</sup> While these guidelines claim to be fully consistent with the RFRA, however, the latter's invalidation in *Boerne* does raise a number of questions as to their validity.

(b) Manual on School Uniforms (1996)

Similar doubts affect the Manual on School Uniforms (1996)<sup>371</sup> issued by the Department of Education. "A school uniform policy", the document read, "must accommodate students whose religious beliefs are substantially burdened by a uniform requirement".<sup>372</sup> After quoting the Education Secretary's Memorandum and its endorsement of religious apparel for pupils, the guidebook further emphasized that "[a] uniform policy may not prohibit students from wearing or displaying expressive items...so long as such items do not independently contribute to disruption by substantially interfering with discipline or with the rights of others".<sup>373</sup> As with the Memorandum, the Manual's reliance on the repealed statute is problematic from a legal point of view—and, critics argue, its reference to a 'substantial burden' may well run foul of the Smith standard—yet it is an important document to the extent that it conveys the US politicians' committed defense of religious expression at school.<sup>374</sup>

(c) President Clinton's Guidelines on Religious Expression in the Workplace (1997)

In 1997, President Clinton issued a number of guidelines on the subject of religious expression for federal workers, with specific reference to all "civilian executive branch agencies, officials, and

<sup>365</sup> "The United States asserts that [the school] has committed an unlawful employment practice by failing to accommodate Mr Reardon's [Muslim veil and] religious practice", the Department of Justice confidently argued in *USA v Board of Education*. See *USA v Board of Education* (1989), above at note 267, 30.

<sup>366</sup> *Id.* 885.

<sup>367</sup> In W J Clinton, *Public Papers of the President of the United States, William J Clinton* (Federal Register, Washington, 1994).

<sup>368</sup> D H Davis, "Reacting to France's Ban: Headscarves and Other Religious Attire in American Public Schools", (2004) 46 *Journal of Church and State*, 2, 221.

<sup>369</sup> *Ibid.*

<sup>370</sup> *Ibid.*

<sup>371</sup> Department of Education, *Manual on School Uniforms* (Department of Education, Washington, 1996).

<sup>372</sup> *Ibid.*

<sup>373</sup> *Ibid.*

<sup>374</sup> Were the Muslim veil to be treated as conduct rather than speech (and were to be regarded as symbolic expression), then it would of course still have a chance for protection as speech under American law. See Section 1.3.1. for details.

employees in the Federal workplace”.<sup>375</sup> “An employee”, the text read, “must be permitted to wear religious garb, such as a crucifix, a yarmulke or a head scarf or hijab, if wearing such attire during the work day is part of the employee’s religious practice or expression, so long as the wearing of such garb does not unduly interfere with the functioning of the workplace”.<sup>376</sup> While the document mainly dealt with private expression and explicitly avoided the question of “whether and when the government and its employees may engage in religious speech directed at the public”<sup>377</sup>—insofar seemingly excluding public school teachers from its scope—it did add that “[e]ven in workplaces open to the public...federal employees may wear personal religious jewellery absent special circumstances (such as safety concerns)...[and] may also display religious art and literature in their personal work areas...”.<sup>378</sup> Although these Guidelines have been roundly criticized for their vagueness,<sup>379</sup> once again their most problematic aspect lies in their explicit reference to the fact that only a “compelling interest”<sup>380</sup> and the existence of “no less restrictive means”<sup>381</sup> can limit religious expression, a clear reference to the judicially abandoned Verner standard.

(d) Department of Education Guide on Religious Garb (1999)

After the Supreme Court invalidation, in *Boerne*, of the Religious Freedom Restoration Act and the affirmation of *Smith*, Secretary of Education Richard Riley again intervened in the matter of religious symbols at school—this time to make clear that, despite the recent judicial outcome against religious exemptions, pupils were still allowed to wear their garb. “Although students have no Federal right to be exempted from religiously-neutral and generally applicable school dress rules based on their religious beliefs and practices”, he wrote, “schools may not single out religious attire in general, or attire of a particular religion, for prohibition or regulation”.<sup>382</sup> Despite the judiciary’s limitations to religious freedom, in other words, the reassuring message coming from Washington was that a “clear and special protection of religious free exercise for students in public schools”<sup>383</sup> still existed.

(e) Recent Political Developments on the Veil (2004)

Recent developments seem to confirm this protection and bring us back to this introduction’s departure point. “We have...brought suit against a school district for prohibiting a student from wearing her hijab”,<sup>384</sup> the US government announced in 2004. “[We have] ask[ed] the court to prohibit the school district from discriminating against the student, and to have the dress code policy revised to ensure that discrimination on the basis of religion does not continue”.<sup>385</sup> Also in 2004, the US Department of Justice sued the New York Transit Authority (NYTA) and charged it with discriminating against Muslim and Sikh employees who wear turbans and head scarves for religious reasons<sup>386</sup>—and, in the same year, another governmental agency, the State Department, explicitly allowed the hijab and other religious symbols in passport photos.<sup>387</sup>

<sup>375</sup> White House, Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (White House Press Secretary, Washington, 1997).

<sup>376</sup> *Id.* at § C (b).

<sup>377</sup> *Ibid.*

<sup>378</sup> *Id.* at § 4.

<sup>379</sup> See eg S S Kao, “The President’s Guidelines on Religious Exercise and Religious Expression in the Federal Workplace: A Restatement or Reinterpretation of the Law?” (1999) 8 Boston University Public Interest Law Journal 251.

<sup>380</sup> *Id.* at § C (d).

<sup>381</sup> *Ibid.* (emphasis added).

<sup>382</sup> Davis, above at 366. See also: “Religious messages on T-shirts and the like may not be singled out for suppression. Students may wear religious attire, such as yarmulkes and head scarves, and they may not be forced to wear gym clothes that they regard, on religious grounds, as immodest”. See Department of Education, Religion In The Public Schools: A Joint Statement Of Current Law (Department of Education, Washington, 1995).

<sup>383</sup> *Ibid.*

<sup>384</sup> US Department of Justice, Letter to State Governors on Religious Symbols at School, above at note 1.

<sup>385</sup> US Department of Justice, Justice Department Files Complaint Against Oklahoma School District Seeking to Protect Student’s Right to Wear Headscarf to Public School (DoJ Press Release, Washington, 30 March 2004).

<sup>386</sup> New York Times, NYC Transit Co. Sued Over Hijab Policy, 1 October 2004; New York Daily News, Hat’s Not Fair, Feds Warn TA, 15 March 2005.

<sup>387</sup> American-Arab Anti-Discrimination Committee, State Department Apologizes for Actions of US Consulate in Jerusalem: Not Allowing Hijab Passport Picture a ‘Complete Mistake’, 23 October 2004.

Even more than these events, however, it is perhaps the US government's direct and scathing criticism of the new French legislation that is most indicative of the future direction of American policy on the veil. "[A]ll persons should be able to practice their religion and their beliefs peacefully", the Bush administration's top religious advisor said in reaction to the French law, "without government interference [and] as long as they are doing so without provocation and intimidation of others in society".<sup>388</sup> As we prepare to cross the Atlantic and turn our attention to France, it should be observed that it is exactly because the Muslim veil was seen as "provocative" and "intimidating"<sup>389</sup> that French politicians have banned it.

How the same piece of cloth can be considered a sign of freedom on one side of the Atlantic and a danger on the other is, therefore, the next question that we should begin to address.



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<sup>388</sup> New York Times, US Criticizes French Proposal to Ban Religious Symbols in Schools, 18 December 2003.

<sup>389</sup> The Guardian, Something Aggressive About Veils, Says Chirac, 16 April 2005.

Part 2

**France**



## Chapter 2.1.

# The Place of Religion in French History

To describe the relationship between France and religion as “turbulent” is an understatement. For centuries considered “the oldest daughter of the Church”,<sup>1</sup> because of the spiritual fervour of its people and the determination of its governments to act as the “secular arm” of Catholicism, France has also—and perhaps not coincidentally—witnessed some of the most virulent anti-Catholic and anti-religious episodes in Europe, ones that caused civil war and brought the country perilously close to self-destruction.

Never unemotional in its approach to history, the land of the Enlightenment and the Revolution certainly shares with its European neighbours the centuries-long heritage of mixture—if not coincidence—between Church and State, the pinnacle of which was reached when kings were directly invested with the sacred mission of expressing the will of God and, as one author put it, “managing the earthly world”<sup>2</sup> on His behalf. Yet France does seem to stand out from the European crowd for its historical extremism both in favour of and against the Catholic Church, a situation that has long split the nation and partly explains the intensely divisive character of religion (viewed in contemporary France with suspicion, if not hostility)<sup>3</sup> vis-à-vis the uniting quality of the République (seen on the contrary as a consensual entity, and one morally superior to all others).<sup>4</sup>

This is a consequence of the fiercely anti-clerical character of the French Enlightenment. As Professor Jean-Louis Ormières wrote, “[n]either the English Enlightenment nor the German Aufklärung have undertaken to fight against the Church with a stubbornness similar to that of the French Lumières”.<sup>5</sup> Yet there is much more to it, because opposition to the Catholic Church translated, in France, into hostility to religion tout court—and the apex of these feelings was reached in the years of the Great Terror that followed the 1789 Revolution, a time when churches were destroyed, sacred symbols were vandalized and priests were killed. “One of the first consequences of the French Revolution”, Tocqueville commented, “was its attack on the Church, and among the passions that resulted from this Revolution, the first one to have been lit and the last one to go out was the irreligious passion”.<sup>6</sup>

This chapter regards the relationship between France and the Catholic Church as a fifteen century-long union of convenience, one characterized by frequent jealousy, open betrayal, temporary partition and even physical confrontation. The significance of this tumultuous coupling—which was symbolically contracted as early as 496 AD with the Clovis baptize and only came to an end, in great acrimony, in 1905, when France passed the law of separation between Church and State—is impossible to overestimate. In a sense, France has never fully recovered from it—and, arguably, neither has the country’s confidence in religion.<sup>7</sup>

<sup>1</sup> « La fille aînée de l’Église » See Y Bruley, 1905, *La Séparation des Églises et de l’État: Les Textes Fondateurs* (Perrin, Paris, 2004) 162.

<sup>2</sup> M D Charlier-Dagras, *La Laïcité Française à l’Epreuve de l’Intégration Européenne* (L’Harmattan, Paris, 2002) 17.

<sup>3</sup> Surveys indicate that, in a world characterized by a resurgence of spirituality, French people are becoming increasingly detached from religion. The number of atheists increased from 8% in 1970 to 25% in 1997 (see J L Ormières, *Politique et Religion en France*, Éditions Complexe, Bruxelles, 2002, 216); that of young people who “believe in God” decreased from 79% in 1977 to 46% in 1997 (Ibid.); a majority of the population believes that religion is not important (57% against 41%) (*Le Monde des Religions, Pourquoi le XXI Siècle Est Religieux*, Éditions du Monde, Paris, 2005, 41); and the number of self-proclaimed Catholics is falling rapidly (D Pelletier, *Les Catholiques en France Depuis 1815, La Découverte*, Paris, 1997, 99)—indeed so rapidly that “the possibility of a disappearance of Catholicism can no longer be excluded” (Ormières, above in this note, 215). A 2005 survey confirmed these trends and found that 48% of French people (against 26%) confessed to be “less interested than before” in spiritual matters (*Le Monde des Religions*, above, Table 6) and a majority believed that the weight of religion in society was “too important” (Ibid, Table 2 and page 38).

<sup>4</sup> See Section 2.1.4.

<sup>5</sup> Ibid.

<sup>6</sup> A De Tocqueville, *L’Ancien Régime et la Révolution* (Gallimard, Paris, 1967) 62.

<sup>7</sup> See Section 2.1.4.

This chapter will highlight the crucial passages of this exceptionally long liaison, as well as the genesis of the divorce and the consequent origin of the French idea of *laïcité*.<sup>8</sup> It will show that, unlike in the United States, in France a persistent and almost congenital union between Church and State not only caused death and persecution, but also brought about three fateful consequences over time: the weakening of the Church, the weakening of the State and—perhaps even more tragic—the weakening of spirituality at large.

### 2.1.1. THE UNION OF CHURCH & STATE IN EARLY FRANCE

#### 2.1.1.1. Church & State in Early-Europe (313 AD – 476 AD)

Because early France was part of the Roman Empire, the initial phases of French religious history coincided with those of Europe—and, in the Old Continent, religion and politics were intimately connected for centuries.<sup>9</sup> Although the Roman Emperor was already the object of sacred veneration and those Christians who refused to recognise this on the ground of their faith were persecuted, the crucial turning point in terms of a proper (if still unofficial) union between Church and State in Europe was in 313 AD, when Emperor Constantine—who called himself “emperor and theologian, king and priest”<sup>10</sup>—converted to Christianity. The self-proclaimed “universal bishop”<sup>11</sup> convened religious councils in order to resolve theological issues and settle spiritual disputes. One of the most consequential of these councils was called in Nicaea in 325 AD because Constantine wanted “to establish true and sincere doctrine in the Church of Christ, with a settled purpose utterly to root out all false and heretical fantasies and opinion”.<sup>12</sup> From that moment on, it has been observed, “nature and grace, law and Gospel, Church and State, were confounded together”.<sup>13</sup> It would take one and a half millennia to disentangle them.

Important as the Nicaea Council had been, it is only when Constantine left Rome and founded Constantinople (or Byzantium) that the idea of Rome as an independent, spiritual entity separated from the Empire and headed by a pope started to emerge. In 343 AD the Sardinia Council took a decisive step in that direction when it decided that all bishops deposed by their local synods could appeal to the Bishop of Rome (the Pope), thereby recognising for the first time his primacy in spiritual affairs. Soon afterwards, Pope Damasius spoke of Rome as the “apostolic hub” and, in 380 AD, he pushed Emperor Theodosius to make Christianity the only official religion of the land,<sup>14</sup> and by so doing formally translating it into political domination.

While subsequent popes consolidated their centralized power by writing decretales (official answers to theological questions), the Roman Empire itself was collapsing in chaos and the Church was more and more seen as the only organized structure capable of survival. And survive it did, partly thanks to its bishops, who were ready to negotiate with the barbaric invaders in order to save their territories, as well as to Pope Leon I and his Rome-saving peace talks with the Huns and Vandals. The Church emerged even stronger from these events, and it was recognised that popes would in the future have increased temporal powers with the support of the Emperor. As history soon

<sup>8</sup> The term *laïcité* is untranslatable into English. It is specifically French, context- as well as history-based and cannot be accurately conveyed by the words secularism or neutrality without losing much of its spirit. As one author puts it, “*Laïcité* cannot be defined, it can only be lived”. J Cornec, *Laïcité* (Sudel, Paris, 1965) 494. *Laïcité* is therefore, in a sense, the result of the historical evolution of Church-State relationships in France as explained in this chapter. For a detailed analysis of this point, see in particular Charlier-Dagras, above at note 2, 22-30; J P Scot, *L’État Chez Lui, l’Église Chez Elle: Comprendre la Loi de 1905* (Éditions du Seuil, Paris, 2005) 17-18; J Rivéro, *La Laïcité* (PUF, Paris, 1960) 15; and M Barbier, *La Laïcité* (L’Harmattan, Paris, 1996) 69.

<sup>9</sup> On the point see for example P Goubert, *Initiation à l’Histoire de la France* (Tallandier, Paris, 1984) 13-37; and P Miquel, *Histoire de la France* (Fayard, Paris, 1976) 13-38.

<sup>10</sup> Scot, above at note 8, 27.

<sup>11</sup> *Ibid.*

<sup>12</sup> F Lambert, *The Founding Fathers and the Place of Religion in America* (Princeton University Press, Princeton, 2003) 25.

<sup>13</sup> *Ibid.*

<sup>14</sup> Emperor Theodosius called Christianity “the religion that the divine apostle Peter has transmitted to the Romans”. H Pena-Ruiz, *La Laïcité: Textes Choisis* (Flammarion, Paris, 2003) 22.

demonstrated, however, this arrangement was to prove fragile and also a source of endless conflicts between the two.

### 2.1.1.2. The Union of Church & State in Early France

#### (i) The 'Birth' of France & the Formal Union with the Church

The disintegration of the Western Roman Empire in 476 contributed to the birth of the French kingdom and, virtually at the same time, to its union with the Church. In 481 King Louis I (Clovis) acceded to the throne of the Franks and promised to convert to Christianity after what he regarded as a miraculous victory in battle thanks to the advice of the Bishop of Reims (Rémi). "First and foremost", the clergyman had written to the King, "ensure that God does not leave you. Then ask your bishops for advice, for if you march in agreement with them, the land submitted to your authority will be better managed".<sup>15</sup> The king did win the battle and, on Christmas day of 496, was officially baptized by Rémi during a solemn ceremony. "Humbly bow your head",<sup>16</sup> the clergyman ordered the king with a formula that, given the tumultuous relationship that was to follow, acquired a significance of its own. Clovis thus became king of the Franks "for grace of God and the holy oils" and managed, in the following years, to reunite the various provinces of Gallia under both the Franks and Christian flags. The rule of "un roi, une foi, une loi"<sup>17</sup> that Constantine had inaugurated in Europe two centuries earlier found its equivalent in France from the very early days of the nation.

The following centuries were to demonstrate how close but, at the same time, how problematic this combination was. On the one hand, the king, sacred in Reims, was God on earth, was inviolable, and had received his mandate from Him, without restraints, in absolute terms. On the other, God spoke through the Church and it was a clergyman who had consecrated the king—thereby effectively limiting his authority. The result of this equilibrium was, in France, a highly hierarchical, theocratic society—*omni potestas a Deo*,<sup>18</sup> the maxim went—where the clergy played a pivotal function that was at once spiritual and temporal: "God has reserved to the clergy the most important role among the various social orders", one author underlines, "that of ensuring their cohesion and, if necessary, of eradicating the corrupting germs".<sup>19</sup> From the very beginning, therefore, clergymen were not only in charge of the souls but also of maintaining the status quo—because, in this hierarchical context, "those who want to change the society offend God".<sup>20</sup> And the Church was certainly not shy in exercising its power—a power that, in the words of Professor Pierre Miquel, "not even the king could limit. How could he, after all, given that his own authority [was] somehow created by the clergy? They consecrate[d] and [buried] the king. It is before them that oaths [were] performed, treaties were signed and unions were broken. It [was] impossible to live, marry or even die without them".<sup>21</sup>

In this context, feudalism—that system whereby the lowest stratum of the population was given protection and land to labour by people of higher rank, and worked and fought for them in return—proved extremely profitable for the Church as well as instrumental in augmenting its temporal power. Not only was the vassal's fidelity based on the Bible—the feudal landowner was very often himself a clergyman.<sup>22</sup> As Professor Goubert observes, "[t]he prestige of the Pope is immense, but distant. The real chiefs of the [French] Church are the bishops ... who more often than not come from powerful and noble families and are engaged in feudal connections".<sup>23</sup> Indeed, so prosperous was the Church at the time that it quickly turned into the biggest property owner of the French kingdom—"Three-

<sup>15</sup> H Pena-Ruiz, *Dieu et Marianne: Philosophie de la Laïcité* (PUF, Paris, 2005) 34.

<sup>16</sup> "Courbe humblement la tête, fier Sicambre!" See H Pena-Ruiz, above at note 15, 34.

<sup>17</sup> "One king, one faith, one law" ("Cuius regio, eius religio", in the Latin formula).

<sup>18</sup> "All powers from God".

<sup>19</sup> P Miquel, *Les Guerres de Religion* (Fayard, Paris, 1980) 8.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.* See also: "Apart from an evident spiritual power over Christianity, popes retained the decidedly more temporal power to judge the kings, to depose them and, from time to time, to dispose of their kingdom". Goubert, above at note 9, 55.

<sup>22</sup> Goubert, above at note 9, 21.

<sup>23</sup> "They benefit from immunities which preserve them from county and royal justice, are often noblemen as well as clergymen and are almost invariably the chiefs of their town". See Goubert, above at note 9, 23.

fourths of temporal ownership”,<sup>24</sup> according to the *procurateur général* in Paris—and its financial fortunes were estimated at two fifths of that of the State.<sup>25</sup>

(ii) The Crusades (1095 AD – 1291 AD)

Important as they certainly were, political influence and financial wealth would have had little impact without the third, crucial asset of the Church: control—in theory spiritual, but in practice very much secular—over the faithful. It was this control that allowed the institution to become so powerful as to be able to organize, from the 11<sup>th</sup> until the 13<sup>th</sup> century, an army of devoted Christians with the direct support of the Franks kings.<sup>26</sup>

In 1095 AD Pope Urbanus II climbed on a podium in the French city of Clermont and called for a “crusade” or “holy war”<sup>27</sup> conducted in the name of the Christian cross. With the aim of regaining control over the sacred city of Jerusalem, the Pope encouraged men from France and throughout Europe to join the venture and fight against Muslims in a war that was being undertaken “under the direct guidance of God”.<sup>28</sup> According to the Pope, killing in such an enterprise would have “ensured God’s favour and a place beside His throne”<sup>29</sup> and would have guaranteed exemption from all sins and crimes committed by participants.<sup>30</sup> The pope had the enthusiastic support of the Franks king Louis VII, a self-proclaimed “pious”<sup>31</sup> man, who directed the first crusade and established the Franks kingdom of Jerusalem.

The Crusades numbered seven in total, spanned almost two hundred years (1095-1291) and remain to this day a symbol of the enormous influence of the Church over temporal affairs—and over France.<sup>32</sup> As one author observed, “[e]nough sanctity had accumulated in France by the thirteenth century for a pope to concede that France was a ‘holy kingdom’ and that ‘he who carries a war against the King [of France] works against the whole Church, against the Catholic doctrine, against Holiness and Justice, and against the Holy Land’”.<sup>33</sup>

(iii) The Cathars Rebellion (1207 AD)

The influence of the Church on French affairs was far from limited to foreign policy. After the strategically unsuccessful but religiously unifying experience of the Middle East, it was not long before the Pope encouraged internal crusades against his own enemies—and in this venture, too, France turned out to be a most faithful ally.<sup>34</sup> In 1207 Pope Innocent III wrote to the King and nobles of France and exhorted them to crush militarily the Cathars heretics in the south of their country.<sup>35</sup> As a reward, His Holiness promised the property of all confiscated lands, exemption from interest debts, immunity from secular justice and absolution from all sins. His wishes were soon answered and an army of almost twenty thousand—headed by the papal envoy, the French Abbot Arnald-Amaury, alongside French nobles and knights—was sent to suppress the rebellion. They left Paris with the express licence to “ransack, deplete and expropriate private property”<sup>36</sup> and, throughout

<sup>24</sup> Miquel, above at note 19, 34.

<sup>25</sup> *Ibid.*

<sup>26</sup> In the words of one authoritative observer, “[t]he aim was to unite popular faith and the warfare ardor of the knights in a grand movement coordinated by the Church. She perfectly succeeded.” Miquel, above at note 9, 86.

<sup>27</sup> *Ibid.*

<sup>28</sup> M Baigent & R Leigh, *L’Inquisizione: Persecuzioni, Ideologia e Potere* (Il Saggiatore/Net, Milan, 2004) 19.

<sup>29</sup> *Id.* 18.

<sup>30</sup> “Like the monk or the priest”, one observer wrote, “the crusader was exempted from secular justice and was considered bound only by the spiritual one.” *Id.* 19.

<sup>31</sup> Goubert, above at note 9, 35.

<sup>32</sup> See on the point: “Noblemen could not conduct wars at pleasure. The war had to conform to the values of religion and had to be approved by the Church. The latter thus claimed the primacy of the spiritual power—which it retained—over a temporal power that, from Charlemagne, had lost the sense of its mission.” Miquel, above at note 9, 86.

<sup>33</sup> The Latin formula reads: “Igitur qui contra regem [Franciae] invehitur, laborat contra total ecclesiam, contra sanctitatem et justitiam et terram sanctam.” D Van Kley, *The Religious Origins of the French Revolution* (Yale University Press, New Haven, 1996) 18-9.

<sup>34</sup> See J Sumption, *The Albigensian Crusade* (Routledge, London, 1978) 3.

<sup>35</sup> Baigent & Leigh, above at note 28, 28.

<sup>36</sup> *Ibid.*

the south, several thousand “heretics” were burned alive.<sup>37</sup> Questioned on how it was actually possible to distinguish the renegades from those inhabitants remaining faithful to the pope, Abbot Arnald-Amaury notoriously replied: “Kill them all, God will recognise his own folks.”<sup>38</sup> Fifteen thousand people—among them women and children—were massacred: “None has been spared”, the Abbot wrote to the pope, “neither on the basis of age nor sex nor social position”.<sup>39</sup>

The Cathars rebellion was crushed for good in 1224 during another joint expedition, this time headed by the King of France himself alongside the papal emissary. The Church-State union was as healthy as never before—and had once again translated into religious repression.

### 2.1.1.3. Seeds of Disagreement

#### (i) French Gallicanism (13<sup>th</sup> century)

This close political and military union notwithstanding, such an extraordinary accumulation of wealth and influence by an organization that was supposed to be merely spiritual could not avoid tension with the temporal power—especially because it inflamed an old controversy intrinsic to this very union.<sup>40</sup> Given that it was the former who had consecrated the latter, the question was soon raised, was not the Pope hierarchically superior to the King?

The view of the religious authorities was that this was certainly so. Already in the eleventh century Pope Gregory VII wrote, in his well-known *Dictatus Papae* (1075), that only the Bishop of Rome had the power to nominate the clergy and depose emperors. Furious, King Henry IV called a council of bishops and had the Pope removed—before being in turn excommunicated. Yet the controversy did not end there, because the Church was visibly unsatisfied with a merely spiritual role and soon made it crystal clear. “There are two kinds of weapons”, Pope Gelasius I declared, “the spiritual and the secular. Both belong to the Church, yet while the first one is handled directly by her via the Pope, the second one is handled indirectly via the kings—but only to the extent that the Pope so desires”.<sup>41</sup>

This rigid attitude soon irritated French kings and was instrumental in the birth of Gallicanism,<sup>42</sup> a condition of self-professed (temporal) independence of the French monarchy from any other authority (particularly the Pope) that was to become characteristically French. According to the main theoretician of Gallicanism, Pierre Pithou, this tradition originally claimed that “[p]opes cannot command or order anything that relates to the temporal power”.<sup>43</sup> In addition, “although the Pope is sovereign when it comes to spirituality, in France the absolute power belongs to the king”<sup>44</sup> and, as a consequence, “all orders from Rome must be examined and received by the French Parliament before being declared admissible in the Kingdom of France”.<sup>45</sup>

The movement is considered to go back to the tenth century but gained prominence in 1297, when the then King of France, Phillip the Handsome, declared that “he regarded his royal titles as deriving directly from God”.<sup>46</sup> Although Pope Bonifacius VIII immediately reminded him that popes were superior to emperors because they were elevated to their position “by divine election”<sup>47</sup> with an act

<sup>37</sup> Ibid.

<sup>38</sup> Baigent & Leigh, above at note 28, 29.

<sup>39</sup> Ibid.

<sup>40</sup> See on the point N M Sutherland, *Princes, Politics and Religion* (Hambleton, London, 1984).

<sup>41</sup> Scot, above at note 8, 27. These were not isolated positions. Some time later another pope used astronomy but conveyed the same message when he declared that “[l]ike the sun, the Roman Church illuminates the world and, like the moon, kingdoms receive light from her”—while, in the thirteenth century, an encyclical simply read that “[e]very single human creature is submitted to the Roman Pope”.

<sup>42</sup> ‘Gallia’ was the Latin name for France.

<sup>43</sup> Charlier-Dagras, above at note 2, 18.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> F Autrand, *Pouvoir et Société en France (XIVe-XVe siècles)* (PUF, Paris, 1974).

<sup>47</sup> Scot, above at note 8, 30.

that was “above kings and kingdoms”,<sup>48</sup> Phillip managed to rally the nation behind what he defined as “the doctrine of absolute independence of the royal power”.<sup>49</sup> Duly excommunicated, he called a general council of the Church that put the Pope under accusation for abuse of power.<sup>50</sup>

Gallicanism has historically proved a huge problem to the hierarchically-oriented Catholic Church, because it included ideas such as the superiority of the Council over the Pope; a close relationship between the king and the national clergy; the right of the king to approve all papal legislation before it was applied in France; and his right to legislate on the organization of the French clergy. Although the latter proved initially reluctant, these measures were ultimately accepted—and Gallicanism institutionalized—in the seventeenth century, when the Declaration of the French Clergy (1682)<sup>51</sup> established that the country’s Church is “an integral part of the French State”.<sup>52</sup> “The Pope and the Church”, Article 1 of the Declaration read, “only have power over spiritual matters and not over temporal and material things,”<sup>53</sup> while Article 3 made it clear that “the rules, habits and constitutions in use within the Gallican kingdom and Church must have their own force and virtue”.<sup>54</sup>

As we shall see, Gallicanism will play a crucial role in the emergence of the French idea of *laïcité*—but it should be noted that, historically speaking, the two experiences do not coincide: although the Pope’s function in temporal affairs was being limited, there was no formal divorce with the Church, which continued to retain general competence in spiritual matters. Moreover, since the king still acted under direct guidance from God, French historian Jacques Le Goff has observed that Gallicanism simply consisted in “a transfer of saintliness from the Church to the State”<sup>55</sup> and, in a way, can be defined as the French way to the Reformation<sup>56</sup>—similar in this respect to Protestantism and Anglicanism, but without a formal divorce of the kingdom from Rome.<sup>57</sup> Because it interposed itself between the State and the Pope; because it helped shape French national identity; and because it adopted a confrontational approach with Rome, Gallicanism was to eventually prove lethal, as we shall see in a minute, to the French marriage of Church and State.

#### (ii) The Reformation (16<sup>th</sup> century)

Gallicanism was not the only problem facing the Church. Beginning in the sixteenth century, its forays into civil governance were increasingly contested in France as well as Europe—and so were the exorbitant ecclesiastic tithes it collected. Particularly abhorrent to some observers was the commerce of indulgences, a custom that consisted in asking the faithful to pay money in exchange for the spiritual redemption of their sins.<sup>58</sup> This angered the poor and favoured the rich to an extent that, one observer wrote, “it was possible to buy paradise: for the bourgeois, faith was a certainty and religious practice mere accountancy”.<sup>59</sup> In this way the Church lost the esteem of part of the population and came to “inspire profound disgust and a desire for purity”<sup>60</sup>—a feeling that eventually translated into the Protestant Reformation.<sup>61</sup>

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<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> See on the point J P Royer, *L’Église et le Royaume de France au XIV<sup>ème</sup> Siècle* (LGDJ, Paris, 1969) 342.

<sup>51</sup> See J Truchet, *Politique de Bossuet* (Armand Colin, Paris, 1966) 168-171.

<sup>52</sup> Charlier-Dagras, above at note 2, 18.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> J Le Goff, *Saint Louis* (Gallimard, Paris, 1996) 784.

<sup>56</sup> The Protestant Reformation was a sixteenth-century movement aimed at reforming the Catholic Church from the perceived corruption, ‘false doctrines’ and ‘malpractices’ of Rome, particularly concerning the sale of indulgences. See on the point E Cameron, *The European Reformation* (Oxford University Press, Oxford, 1991); D MacCulloch, *The Reformation: A History* (Penguin, New York, 2003); and W R Estep, *Renaissance & Reformation* (Eerdmans, Grand Rapids, 1986).

<sup>57</sup> See Scot, above at note 8, 31.

<sup>58</sup> Ibid.

<sup>59</sup> Miquel, above at note 19, 39.

<sup>60</sup> Miquel, above at note 9, 157.

<sup>61</sup> See on the point J Delumeau, *Naissance et Affirmation de la Réforme* (Nouvelle Cléo, Paris, 1988). R M Kingdon, *Geneva and the Coming of the Wars of Religion in France* (Droz, Geneva, 1956).

In 1509, Erasmus published an essay that denounced these abuses and called for “the eviction of the ‘princes’ ... and their ‘culpable excesses’”,<sup>62</sup> while in 1518 Luther openly contested the authority of Rome and wrote that, since “the only thing that counts is one’s faith, the bourgeois [do] not enter paradise more quickly than others”.<sup>63</sup> The Vatican retaliated: Erasmus’s works were banned and Luther was “declared a heretic, cursed and excommunicated”<sup>64</sup> by Pope Leo X, who also began a ruthless and large-scale counter-attack against heresy.<sup>65</sup>

Much to the chagrin of the Church, France was seriously affected by the Reformation—and became a major breeding ground of rebellion. In 1536, Jean Calvin, the first reformer to write in French, published his *Institution de la Religion Chrétienne*. Soon afterward a scandal broke out in Paris: placards denouncing the “unbearable abuses of the papal mass”<sup>66</sup> appeared throughout the city, and when the French King found one of them hanging on his bedroom door, the repression of the State met that of the Church. “No trouble now or in the future [should be given] to the clergy”, a Royal Edict read, “and [none will be allowed to] smash or demolish crosses or images and do other scandalous and seditious acts, on pain of death, without hope of grace or remission”.<sup>67</sup> Because the defections also came from the inside, another Royal Edict “admonished and exhorted”<sup>68</sup> the French clergy “to work for the order of the Holy Church ... so as to return those who are in error to the way of truth”.<sup>69</sup>

The king tried hard to stop the propagation of the Reformation and to convert the insurgents by force, but failed, and what followed were two centuries of bloody religious wars.<sup>70</sup> From the first protestant massacre in 1523 to the last pastor persecuted, in the eighteenth century, the confrontation of the Catholic and Protestant religions—heightened by the holy union between Church and State—caused hundreds of thousands of deaths across France.<sup>71</sup> Cities, towns and villages, down to individual families, were divided, and on both sides of the war a combination of fear, faith and violence produced terrible excesses. An exasperated Parliament of Paris deplored the “damned Lutheran sect”<sup>72</sup> and prohibited “under pain of death, to read and to ask to read any work in French and Latin containing heretical and erroneous doctrines printed in Geneva or in other suspicious cities”.<sup>73</sup> Yet the Reformation had already caused the rupture between modernity and Catholicism, and the Pope was no longer the spiritual Chief of the Western world but only of the Roman Catholic Church. Even more significantly, a permanent scar was left on France’s national consciousness: religion meant violence and terror—especially when a kingdom sided with a powerful faith and agreed to crush a part of its own population on religious grounds.<sup>74</sup>

## 2.1.2. THE CRISIS:

### THE ENLIGHTENMENT, THE REVOLUTION AND THE ‘CONCORDAT’

#### 2.1.2.1. The Enlightenment (17<sup>th</sup> century)

Beginning in the seventeenth century, in France an ideological confrontation developed between the Enlightenment and the Church. This intellectual revolution—brought about by French thinkers such as Descartes, Voltaire, Rousseau, Diderot, d’Holbach and d’Alambert—was to play a crucial role in the genesis of the revolutionary movement of 1789 and was to influence France and the world

<sup>62</sup> Miquel, above at note 9, 158.

<sup>63</sup> Id. 159.

<sup>64</sup> Ibid.

<sup>65</sup> Id. 160.

<sup>66</sup> Id. 161.

<sup>67</sup> D Potter (ed), *The French Wars of Religion: Selected Documents* (Macmillan, London, 1997) 31.

<sup>68</sup> Ibid.

<sup>69</sup> Id. 24.

<sup>70</sup> See in particular M Yardeni, *La Conscience Nationale en France pendant les Guerres de Religion: 1559-1598* (Louvain, Paris, 1971).

<sup>71</sup> Miquel, above at note 19, back cover.

<sup>72</sup> Id. 114.

<sup>73</sup> Ibid.

<sup>74</sup> As Professor Pierre Miquel aptly wrote, “[t]he [French] war of religions...[was] inexorable [because] it pushed man against man. It [did] not aim at dominating the enemy, but at destroying him—at reducing him, like the Inquisitors did, ashes”. Miquel, above at note 19, 22.

(including America) for centuries to come. As one author underlines, “[w]hen the Enlightenment started to foster a marketplace of ideas, it clashed—with an intensity that was specifically French—against the all-powerful Catholic Church, which was united to the absolute monarchy in a ubiquitous alliance”.<sup>75</sup>

And clash it certainly did. The philosopher Descartes’s motto *cogito, ergo sum*<sup>76</sup> (I think, and thus I exist), for example, and his exhortation to “[n]ever accept anything as true unless [your reason] has experienced it to be so,”<sup>77</sup> was in blatant contradiction with the Catholic Church’s dictum of *crede ut intelligas* (believe so that you can understand) and the dogma that human reason is inherently fallacious unless supported by unconditional—and uncritical—faith. “A Master like Jesus who exerts such an authority”, the theologians of the Sorbonne insisted, “certainly deserves, in spite of the obscurity of his doctrine, to be believed on His word”.<sup>78</sup> Their conclusion was simple: *Ipsa audite*, let us not look at the reasons for the truths that He teaches, because all reason consists in the fact that He has spoken”.<sup>79</sup>

The philosophes were particularly harsh with the Catholic Church’s stubbornness in clinging to the Holy Scriptures and in rejecting any scientific discovery not in accordance with the Bible.<sup>80</sup> The heliocentric theories of Copernicus, for example, later developed by Galileo and Giordano Bruno, were immediately considered anathema by Rome because they contradicted the holy books<sup>81</sup> and their authors were persecuted. Galileo was imprisoned and his texts banned, while Giordano Bruno was condemned as a heretic by the Venice inquisition and spent eight years in prison—before being publicly burned alive in 1600. As Pascal wrote, however, “[this] will do nothing to prove that the earth does not move. And if we had constant observations proving that it is the earth that indeed turns, all men in the world could do nothing to stop her from turning...”.<sup>82</sup> Pascal was also considered “anathema” and his writings were added to the List of Prohibited Books, which was by then becoming a voluminous document.<sup>83</sup>

It should nevertheless be noted that, as we have seen for Locke, Bacon and Newton in Chapter 1.1., the majority of the French philosophes were not against religion per se: their enthusiasm for knowledge and their passion for scientific and intellectual discovery were not in principle incompatible with God.<sup>84</sup> “Senses, reason and faith all have their own objects and certitude,” Pascal wrote. “If at issue is a super-natural thing, we will not judge it by the senses nor by reason but by the Bible and the decisions of the Church. [But] if at issue is a point of fact, we will have confidence in our senses”.<sup>85</sup> Nevertheless, the Enlightenment was undeniably irreconcilable with the immutable dogmas and intellectual authoritarianism of the Roman popes—and often translated, in France, into hostility to religion as a whole. “It is believed to be pious to look at one’s reason and one’s own judgement with distrust”, Spinoza wrote, “while it is considered impious not to have full confidence in those who conveyed to us the holy books. This is not piety—this is pure dementia”.<sup>86</sup>

<sup>75</sup> J M Gaillard, *L’Invention de la Laïcité*, in Scot, above at note 8, 23.

<sup>76</sup> R Descartes, *Discours de la Méthode* (Flammarion, Paris, 2000) 49. See also R Descartes, *Les Passions de l’Âme*, (Flammarion, Paris, 1996) 195.

<sup>77</sup> Pena-Ruiz, above at note 15, 32.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> As Rousseau put it, “[t]he Church decides that the Church has a right to decide”. J J Rousseau, *Émile ou l’Éducation* (Flammarion, Paris, 1966) 397 (vol. IV).

<sup>81</sup> As Luther wrote, “[t]he Sacred Scripture tells us (Joshua X, 12) that Joshua ordered the sun to stop, not the earth”. In Pena-Ruiz, above at note 15, 42 (emphasis added).

<sup>82</sup> Pascal, *Œuvres Complètes* (Gallimard, Paris, 1954) 897.

<sup>83</sup> The *Index Librorum Prohibitorum* was abandoned by the Vatican only in 1966. See Pena-Ruiz, above at note 15, 43.

<sup>84</sup> See for example J J Rousseau, *Œuvres Politiques* (Gallimard, Paris, 1970) 704.

<sup>85</sup> B Pascal, *Œuvres Complètes* (Gallimard, Paris, 1954) 897.

<sup>86</sup> B Spinoza, *Traité Théologico-Politique* (Flammarion, Paris, 1965) 251. Spinoza was not particularly liked by the Jewish hierarchy either: “By virtue of the Holy Decrees and the words of Saints”, the Amsterdam Synagogue wrote, “we ban, exclude, curse and declare anathema Baruch de Spinoza with all the curses described in the law. Cursed be he during the day, and cursed be he during the night, cursed be he when he goes to bed and cursed be he when he wakes up, when he leaves and when he arrives.” Y Yovel, *Spinoza et Autres Hérétiques* (Éditions du Seuil, Paris, 1991) 19.



On the eve of the French Revolution, such hostility was so strong—and the reputation of the Catholic Church so tarnished—that France had become the avant-garde of anti-Catholic sentiment in Europe. “The mantra of the Church about [hell and] fear is no longer compelling”,<sup>87</sup> Jean Delumeau observed. People stopped being afraid—and, when this happened, it was clergymen who started worrying. Rightly so, because the time for a change—a violent one—had indeed come.

### 2.1.2.2. The French Revolution (1789)

In the centuries-long union of Church and State, the French Revolution stands out as the most traumatic event of all. The substitution, in 1789, of the Ancien Régime—a social system whereby nobility and clergy occupied a central and crucial place—with a polity of free and equal people, had fundamental consequences for the Catholic Church and its relationship with the State.

The rupture was threefold and actually generated three different revolutions at once. First and foremost, by recognising that “[m]en are born and remain free and equal in their rights”<sup>88</sup> and that “[s]ocial distinctions can only be based on social utility”,<sup>89</sup> the Constituents carried out a democratic revolution that changed the very structure of French society and acknowledged the primacy of masses over elites. Secondly, by proclaiming that “[t]he principle of sovereignty essentially resides in the Nation”<sup>90</sup> and that “[n]o other body, no other individual can exercise any authority unless this expressly emanates from the Nation”,<sup>91</sup> the Assembly realized a secular revolution and recognised the sovereignty of the State over the Church—and the necessity to distinguish between the two. Thirdly and finally, by declaring that “[n]one should be disturbed because of his opinions, even religious ones, unless their manifestation perturbs the public order established by law”,<sup>92</sup> the Constituents generated a civil rights revolution that questioned the entire pre-1789 order. The dogmatic, legal and political union between Church and Kingdom had made the very idea of freedom of conscience, thought and religion impossible—but after several centuries, this had finally changed and a series of decrees recognised, at least in theory, the equality of Protestant and Jewish citizens.<sup>93</sup>

The logical outcome of this futuristic edifice would of course have been formal separation from the Church—yet revolutions are not logical, and in the case of France the State violently tightened its control over the Church rather than opting for separation. This was done by attacking the Catholic Church on both its temporal and spiritual authority. The first objective was reached by abolishing all ecclesiastical privileges and *dîmes* (a tax on revenues that the Church had collected for centuries)<sup>94</sup> as well as by putting “all ecclesiastical property at the disposal of the nation”.<sup>95</sup> After losing two of its most important sources of income, one author observed, “the temporal Church no longer existed”.<sup>96</sup> As far as spiritual authority was concerned, the Revolution translated into the triumph of Gallicanism, whereby the state took control of the French clergy and created a “national religion” independent of papal authority. The Civil Constitution of the Clergy, enacted in 1790, is a clear example of this political will to “francise” Catholicism and subordinate the Church to the State: the religious administration was modelled on the French one; clergymen were paid by the state; they were no longer nominated by

<sup>87</sup> Ormières, above at note 3, 23.

<sup>88</sup> Art 1 (1) of the Déclaration des Droits de l’Homme et du Citoyen of 1789 reads: « Les hommes naissent et demeurent libres et égaux en droits ». I have used F Mélin-Soucramanien (ed) *Constitution de la République Française* (Daloz, Paris, 2005) 4.

<sup>89</sup> Art 1 (2) reads: « Les distinctions sociales ne peuvent être fondées que sur l’utilité commune ».

<sup>90</sup> Art 3 (1) reads: « Le principe de toute Souveraineté réside essentiellement dans la Nation ».

<sup>91</sup> Art 3 (2) reads: « Nul corps, nul individu ne peut exercer d’autorité qui n’en émane expressément ».

<sup>92</sup> Art 10 reads: “Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l’ordre public établi par la Loi”.

<sup>93</sup> See Scot, above at note 8, 38. See also Abbé Gregoire, *Essai sur la Régénération Physique, Morale et Politique des Juifs* (Stock, Paris, 1988).

<sup>94</sup> See Charlier-Dagras, above at note 2, 55.

<sup>95</sup> « Tous les biens ecclésiastiques sont à la disposition de la Nation ». *Ibid.*

<sup>96</sup> Scot, above at note 8, 40.

Rome but elected by parishioners; and, like any other civil servant, they had to pronounce an oath of allegiance to the French State as well as to the Civil Constitution of the Clergy.<sup>97</sup>

The historic significance of these changes and their impact on the power of the Church can easily be gauged by the vitriolic reaction of the pope. In 1790 Pius VI defined the Revolution “a satanic disorder”,<sup>98</sup> writing that freedom of thought and expression was “a monstrous right”<sup>99</sup> and concluded that the 1789 Declaration of the Rights of Man and of the Citizen as well as the entire revolutionary principles were “incompatible with the Catholic tradition”.<sup>100</sup> He further called the Civil Constitution “a sacrilegious, heretic, schismatic law”<sup>101</sup> and prohibited the French Church from reciting the oath—yet he was disobeyed by a good portion of the French clergy (half of it, according to one source),<sup>102</sup> and this brought France straight into a schism and into renewed forms of anti-religious violence.

After this condemnation of the Revolution, Paris broke all diplomatic relations with Rome, while a national decree declared recalcitrant priests “suspicious people”<sup>103</sup> and thirty-thousand of them were obliged to leave the country. At the same time, there were massacres of clergy: hundreds of ministers were murdered in several Paris prisons; more than a thousand were condemned to death by revolutionary tribunals, and two thousand were summarily executed.<sup>104</sup> After the fall of the monarchy, anticlericalism reached the masses and the “de-Christianization” movement pervaded France, taking the forms of murdering priests, stopping celebrations, attacking churches, mocking sacraments, vandalizing sacred objects and defacing temples.<sup>105</sup> Indeed, so irreverent were the protestors that a prostitute was put on the altar of Notre Dame Cathedral. Once again, religion had translated into fighting and blood—and, this time, State-enforced violence played a considerable part in it.

From a religious freedom point of view, the balance sheet of the French revolution is thus mixed. Every society needs some form of spirituality and that of revolutionary France was a civil religion based on the Universal Declaration of the Rights of Man and of the Citizen.<sup>106</sup> But theory and practice sometimes differ, and this was certainly the case in post-1789 France. Indeed, one is left with the impression that, after having wisely decided to part with the Déclaration,<sup>107</sup> the State somehow changed its mind and attacked instead.

It should also be said that the Catholic hierarchy was not exactly irreproachable either. Its wealth, temporal ambition, dogmatism and authoritarianism—the Inquisition is an early but by no means isolated case in point<sup>108</sup>—had consistently pushed the Catholic Church towards an illiberal and

<sup>97</sup> “I swear to be faithful to the Nation, to the law and to the king”, the pledge read, “and to uphold to the best of my abilities the Constitution decided by the National Assembly and accepted by the King”. See T Tackett, *La Révolution, l’Église, la France: Le Serment de 1789* (CERF, Paris, 1986) 35.

<sup>98</sup> A Dansette, *Histoire Religieuse de la France Révolutionnaire* (Flammarion, Paris, 1966) 68.

<sup>99</sup> Scot, above at note 8, 45. The whole passage reads as follows: “Cette liberté absolue qui non seulement assure le droit de n’être point inquiété sur ses opinions religieuses, mais qui accorde encore cette licence de pensée, d’écrire et même de faire imprimer impunément en matière de religion tout ce que peut suggérer l’imagination la plus déréglée: droit monstrueux, qui paraît cependant à l’Assemblée résulter de l’égalité e de la liberté naturelle à tous les hommes». In J-M Gaillard, *L’Invention de la Laïcité*, in Bruley, above at note 1, 24.

<sup>100</sup> Scot, above at note 8, 45. See also A La Treille, *La Laïcité* (Flammarion, Paris, 1960) 63 (vol.VI).

<sup>101</sup> E Beau de Lomenie, *L’Église et l’État, un Problème Permanent* (Fayard, Paris, 1956) 63.

<sup>102</sup> Scot, above at note 8, 44-5.

<sup>103</sup> *Ibid.*

<sup>104</sup> See for example G Lefebvre, *La Grande Peur* (SEDES, Paris, 1932); R Cobb, *La Protestation Populaire en France* (Calmann-Lévy, Paris, 1975).

<sup>105</sup> See M Vovelle, *La Révolution contre l’Église: De la Raison à l’Être Suprême* (Éditions Complexe, Bruxelles, 1988) (especially 67-100); Van Kley, above at note 33 (especially 135-190); M Vovelle, *La Mentalité Révolutionnaire: Société et Mentalités sous la Révolution Française* (Éditions Sociales, Paris, 1985) 55-94.

<sup>106</sup> See on the point the excellent D Mornet, *Les Origines Intellectuelles de la Révolution Française* (Armand Colin, Paris, 1933).

<sup>107</sup> As one author observed, “[f]reedom of conscience implicates a separation between the private and public domain, something that ‘prepares’ the separation between Church and State and the future laïcité.” See Charlier-Dagras, above at note 2, 57.

<sup>108</sup> Few institutions illustrate the perverse effects of the connection between Church and State more effectively than the Inquisition. Officially established in 1233 by Pope Gregory IX, this organization was directly managed by Rome with the purpose of limiting the spread of ideas considered subversive and heretical—but happily relied on the secular justice to enforce its death sentences, thereby effectively using the state for its own repressive purposes. Inquisitors were given, by

intolerant stance. Apart from the above-mentioned condemnations of the Enlightenment and the Revolution by Pope Pius VI, his successor Gregory XVI was to define freedom of the press as “a most terrible, execrable right”<sup>109</sup> and freedom of conscience as a “false and absurd maxim, or rather a delirium”;<sup>110</sup> it was, he wrote, “one of the most contagious errors brought about by this absolute and unrestrained liberty that is ruining the Church as well as the State and is spreading everywhere”.<sup>111</sup> As for religious freedom, another pope, Pius IX, enumerated twenty-four “main mistakes of our time”<sup>112</sup>—and these included “freedom of conscience, modern civilization and liberalism”.<sup>113</sup> “[It is a mistake]”, he wrote, “[to say that] every man [should be] free to embrace and profess the religion that he considers true”.<sup>114</sup>

### 2.1.2.3. The ‘Concordat’ (1801)

Napoleon, too, proved to be a rather authoritarian partner for the Church.<sup>115</sup> After the violence and excesses of the Revolution, one of his priorities was to attain religious harmony—and this necessarily meant negotiating with Rome. In 1801 he signed the Concordat with Pope Pius VII, an attempt at compromise that realized an embryonic form of separation while at the same time giving birth to a religious Restoration. According to this document, Catholicism was no longer the official religion of France but remained “the religion of the great majority of French citizens”<sup>116</sup> and one which “French Consuls profess with special attachment”.<sup>117</sup> “God save the Republic, God save the Consuls”,<sup>118</sup> read the formula that had to be recited “at the end of the divine Mass in all Catholic churches of France”.<sup>119</sup> The Concordat also acknowledged that “[t]he Catholic, apostolic and Roman religion will be freely exercised in France”<sup>120</sup> and that this exercise “will be public”.<sup>121</sup>

Yet this freedom was very much relative: the clergy retained the status of civil servant and bishops were nominated by the French government (although the Pope had a veto over such nominations).<sup>122</sup> In addition, an oath of fidelity to the nation was required from all bishops, and this very much took Gallican forms. “I swear and promise to God upon the Saint Evangelists”, the oath read, “to remain obedient and faithful to the government established by the Constitution of the French Republic. I also promise not to get involved, not to participate in any council, not to join any league, either

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papal order, “the legal authority to condemn those suspected of heresy, without any possibility of appeal, and therefore, to all effect and purposes, to pronounce summary condemnations to death” (Baigent & Leigh, above at note 28, 39). As one inquisitor wrote in 1578, “[w]e must remember that the main purpose of the trial and execution is not to save the soul of the accused but to obtain the public good and permeate others with fear” (Baigent & Leigh, above at note 28, 86). Torture was performed on the ground that, as St Augustine had written, “[t]here is an unjust form of persecution, the one performed against the Church by impious people, and there is a just form of persecution, the one performed by the Church against impious people. The Church persecutes out of love while impious people do so out of cruelty.” See J Leclerc, *Histoire de la Tolérance au Siècle de la Réforme* (Albin Michel, Paris, 1988) 85. See also J A F Benimeli, *Masoneria, Iglesia e Ilustración* (Plan, Madrid, 1976); E Burman, *The Inquisition: The Hammer of Heresy* (Dorset Press, New York, 1992); and B Gui, *Il Manuale dell’Inquisitore* (Claudio Gallone, Milan, 1998).

<sup>109</sup> In Gaillard, above at note 75, 25.

<sup>110</sup> *Ibid.*

<sup>111</sup> “Cette maxime fausse et absurde, ou plutôt ce délire...erreur des plus contagieuses, à laquelle ouvre la voie cette liberté absolue et sans frein des opinions qui, pour la ruine de l’Église et de l’État, va se répandant de toutes parts”. In Gaillard, above at note 75, 25.

<sup>112</sup> The papal encyclical *Syllabus Errorum* is partly reproduced in *Le Pape Pie IX Dénonce les Erreurs du Monde Moderne*, in Bruley, above at note 1, 55-6.

<sup>113</sup> *Ibid.*

<sup>114</sup> Scot, above at note 8, 80. See also Bruley, above at note 1, 55-6.

<sup>115</sup> See in particular L Madelin, *Histoire du Consulat et de l’Empire* (Hachette, Paris, 1938) 11 (vol.3).

<sup>116</sup> The Preamble of the Concordat reads: “Le gouvernement de la République française reconnaît que la religion catholique, apostolique et romaine est la religion de la grande majorité des citoyens français. Sa Sainteté reconnaît également que cette même religion a retiré et attend encore en ce moment le plus grand bien et le plus grand éclat de l’établissement du culte catholique en France et de la profession particulière qu’en font les consuls de la République». *Concordat entre la République Française et le Saint-Siège*, in Bruley, above at note 1, 46-7.

<sup>117</sup> *Ibid.* (Preamble).

<sup>118</sup> The original Latin formula reads: «Domine, salvam fac Republicam; Domine, salvos fac Consules». In *Concordat*, above at note 116, 48.

<sup>119</sup> Article 8 of the Concordat.

<sup>120</sup> Article 1.

<sup>121</sup> *Ibid.*

<sup>122</sup> Article 4.

internal or external, that is contrary to public tranquillity; and if, in my dioceses or elsewhere, I learn that something is being plotted against the State, I shall let the Government know".<sup>123</sup> While Catholicism was given a special place, the existence of the protestant and Israelite religions was also acknowledged—but all other faiths were merely tolerated.<sup>124</sup>

This compromise at first satisfied both Rome and Paris, and on Easter Day of 1802 France celebrated the re-establishment of the Catholic religion by re-opening seminaries, renovating churches and indulging in what looked like religious concord. Pius VII even went to Paris, put the Imperial crown on Napoleon's head and solemnly acknowledged his authority. Yet the idyll was short-lived. That same year a series of unilateral measures—called Articles Organiques—were added to the Concordat, measures that effectively subordinated the Church of France to Napoleon. "No bulla, briefing, writing, order, mandate, provision or signature", the document read, "nor other expedition from Rome, even if it only concerns individual [cases or people], can be received, published, printed or otherwise implemented without the authorization of the government".<sup>125</sup> In addition, dioceses were ordered to follow only "one liturgy and one catechism"<sup>126</sup> established by Napoleon; all synods or religious councils could only convene after the assent of the French government and seminars had to conform their teachings to the "Gallican doctrine".<sup>127</sup>

Napoleon, by now a veritable Emperor who saw religion as an instrument to expand his power,<sup>128</sup> even tried to force a civic cult of his personality by imposing a catechism where he proclaimed himself "sacred by God" and "God's image on earth".<sup>129</sup> Pius VII did not approve, and when he refused to abide by the Concordat, Bonaparte quickly invaded Rome, annexed the pontifical states to the French Empire and incarcerated the pope—who promptly excommunicated him.<sup>130</sup> The union between Catholic Church and the French State was in tatters. But it was not over—not yet.

### 2.1.3. THE PARTITION: THE SEPARATION OF CHURCH & STATE IN 1905

After the fall of Napoleon in 1815, the Pope was reinstated in Rome and the Holy Alliance of Austria, Prussia and Russia attempted a restoration of the pre-revolutionary era that was at once political (implementation of the old Church-monarchy union),<sup>131</sup> ideological (condemnation of the Revolution and the Enlightenment)<sup>132</sup> and legal (abolition of religious freedom and other revolutionary rights, considered un-Godly).<sup>133</sup> In France, in particular, the regime change brought about two Catholic kings (Louis XVIII and Charles X) and, with them, a new harmony in the marriage between Church and State: Catholicism again became the official religion, divorce was suppressed and the clergy was actively involved in public education.<sup>134</sup> The two partners, it seemed, were not yet ready to part.

<sup>123</sup> «Je jure et promets à Dieu, sur les Saints Evangiles, de garder obéissance et fidélité au Gouvernement établi par la Constitution de la République française. Je promets aussi de n'avoir aucune intelligence, de n'assister à aucun conseil, de n'entretenir aucune ligue, soit au-dedans, soit au-dehors, qui soit contraire à la tranquillité publique; et si, dans ma diocèse ou ailleurs, j'apprends qu'il se trame quelque chose au préjudice de l'État, je le ferai savoir au Gouvernement». Article 6 of the Concordat, in Bruley, above at note 1, 48.

<sup>124</sup> See J Robert, *La Liberté Religieuse et le Régime des Cultes* (PUF, Paris, 1977) 44-6.

<sup>125</sup> "Aucune bulle, bref, écrit, décret, mandat, provision, signature servant de provision, ni autres expéditions de la court de Rome, même ne concernant que les particuliers, ne pourront être reçus, publiés, imprimés, ni autrement mis à exécution sans l'autorisation du gouvernement." Article 1 of the Articles Organiques, in J B Duverger, *Collection Complète de Lois, Décrets, Ordonnances, Règlements du Conseil d'État depuis 1788* (Guyot Scribe, Paris, 1836) 89 (vol.13).

<sup>126</sup> Charlier-Dagras, above at note 2, 65.

<sup>127</sup> Art 24 of the Articles Organiques, see Scot, above at note 89, 65.

<sup>128</sup> "It is by converting to Catholicism", Napoleon famously declared before the Conseil d'État, "that I ended the Vendée war, by converting to Islam that I established myself in Egypt and by getting close to the Pope that I won Italy. If I were to govern the Jews, I would convert to Salomon." In A Debidour, *Histoire des Rapports entre l'Église et l'État en France de 1789 à 1870* (Alcan, Paris, 1898) 37.

<sup>129</sup> Scot, above at note 8, 66.

<sup>130</sup> "Your Sanctity may be the sovereign of Rome, but I am its Emperor", Napoleon wrote in his defiant reply. In Bruley, above at note 1, 259.

<sup>131</sup> See on the point, Miquel, above at note 9, 323 ff.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Scot, above at note 8, 128.

Yet the shock of the Revolution and the papal humiliation by Napoleon had irreversibly changed the relationship and had made the Catholic hierarchy more nervous and confrontational than ever. The Church has a “temporal power which is both direct and indirect”, Pope Pius IX wrote in his *Syllabus Errorum*, and this “gives the Pope and his ministers the right to intervene, including by force,<sup>135</sup> in the definition of laws and customs”.<sup>136</sup> The Vatican Council I, in addition, officially made—by a “dogma revealed by God”<sup>137</sup>—the pope “infallible”<sup>138</sup> and his judgements “unreformable”,<sup>139</sup> emphasizing that “[a]ny contradiction of this definition is anathema”.<sup>140</sup>

But the nineteenth century was not the seventeenth, the events of 1789 could not simply be cancelled from people’s minds and, in France, the bourgeois had become impregnated with revolutionary ideas and were fiercely anti-clerical. The Pope had by now defined the Revolution a “divine punishment”<sup>141</sup> and condemned its principles as “diabolic”.<sup>142</sup> Moreover, the alliance of throne and altar led French liberals to see the Church as the faithful ally of absolutism and the enemy of individual freedom. “Man must accept the fact that it is impossible as well as against human nature to elevate everyone at the same level”,<sup>143</sup> the Vatican wrote—and Pope Leon XIII was even more explicit in his defence of the monarchy and status quo when he declared that “[h]uman society, as established by God, is made up of unequal elements. As a consequence, the fact that human society is made up of princes and subjects, masters and proletarians, rich and poor, savants and ignorant, nobles and plebeians, is in accordance with the order established by God”.<sup>144</sup>

Given that these were not popular ideas at that time and that they were in favour of the monarchy but opposed the Republic, the fall of the Empire and the birth of the Third Republic (1870) was accompanied by a ferocious anti-clerical violence (*la Commune*) that even took the life of the Archbishop of Paris.<sup>145</sup> The antagonism between Catholics and anti-clericals reached new heights—and, as one author wrote, the religious violence at the beginning of the Third Republic contributed to “push Catholics away from the Republican idea. The République [was] the enemy that [had to] be fought”.<sup>146</sup> By the time the Republicans won the elections in 1876, the separation between Church and State had therefore become inevitable—and so had the advent of *laïcité*.<sup>147</sup>

### 2.1.3.1. Laïcité in Education

The first crucial step in this direction was taken in relation to education, a matter especially close to the French heart. French public education had long meant Catholic education and, since Catholicism was at the time opposed to the principles of the Enlightenment and the Revolution, schools soon

<sup>135</sup> Papal Encyclical *Syllabus Errorum* at n XXIV.

<sup>136</sup> Scot, above at note 8, 80.

<sup>137</sup> Id. 82. Also Charlier-Dagras, above at note 2, 73.

<sup>138</sup> Scot, above at note 8, 82.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

<sup>141</sup> Id. 79.

<sup>142</sup> *Ibid.*

<sup>143</sup> The whole passage reads: «Le premier principe à mettre en avant, c’est que l’homme doit accepter cette nécessité de sa nature qui rend impossible dans la société civile l’élévation de tous au même niveau. Sans doute, c’est là ce que poursuivent les socialistes. Mais contre la nature tous les efforts sont vains. C’est elle en effet qui a disposé parmi les hommes des différences aussi multiples que profondes : différences d’intelligence, de talent, d’habileté, de santé, de force : différences nécessaires, d’où naît spontanément l’inégalité de conditions. Cette inégalité, d’ailleurs, tourne au profit de tous». In Pena-Ruiz, above at note 14, 28.

<sup>144</sup> «La société humaine, telle que Dieu l’a établie, est composée d’éléments inégaux. En conséquence, il est conforme à l’ordre établi par Dieu qu’il y ait dans la société humaine des princes et des sujets, des patrons et des prolétaires, des riches et des paumes, des savants et des ignorants, des nobles et des plébéiens». Pius X, *Encyclique de Décembre 1903*, in Pena-Ruiz, above at note 14, 91.

<sup>145</sup> See A Mellor, *Histoire de l’Anticléricalisme Français* (Marne, Paris, 1996) 123.

<sup>146</sup> Charlier-Dagras, above at note 2, 76.

<sup>147</sup> See on the point R E Charlier, *La Survie de la Troisième République*, in Charlier-Dagras, above at note 2, 21.

became the battleground between les deux Frances, the clerical and the laïque.<sup>148</sup> “Those who abdicate their personal rights and become entangled<sup>149</sup> to a religious authority”, Emile Combes—French politician and future Prime Minister—wrote, “do not have the right to teach [in public schools, because] he who is not free cannot shape free citizens. The State”, he concluded, “has the duty to preserve its youth from their influence”.<sup>150</sup> Educational neutrality was nevertheless strenuously opposed by the Catholic Church—it was, the Vatican called it, a “pestilence, an inherently false principle and a disastrous one in terms of consequences”.<sup>151</sup> Yet the idea was by then irreversible, because schools came to symbolize the uniting character of the République vis-à-vis the sectarianism and divisiveness of religion. As one intellectual put it at the time, “[t]here must be a place where unity, peace and civil concord are taught [which counters] the inexorable divisions of faiths and religions”.<sup>152</sup>

With the educational laws of the end of the nineteenth century, this place was found and was called école laïque. French public schools became free of charge (1881), neutral (1882) and God-free (1882). In addition, all religious symbols at school were prohibited; the clergy lost its right “of inspection, surveillance and direction”<sup>153</sup> of primary schools; and only professional teachers—excluding any member of religious groups—could instruct. According to then Education Minister Jules Ferry, the state had a “right to direct the education of French youth”,<sup>154</sup> to “organize humanity without God and without King”<sup>155</sup> and to obtain the closure of those schools “where a counter-revolutionary discourse is preached”.<sup>156</sup>

This, it should be noted, was not the usual “religion or non-religion in education” issue. The purpose of the new legislation, Ferry noted, was to “inculcate French schoolchildren with the religion of their mother country”.<sup>157</sup> To implant a patriotic sentiment, children were taught to sing nationalistic songs such as *Les Chants du Soldat de Déroulède* and to read books such as *Le Tour de la France de Deux Enfants* by Guyau. The aim was not only to limit the impact of religion but to create a new national consciousness that united rather than divided—and this was based on the principles of the Enlightenment and the Revolution. As one author observed, “[t]he veneration for the mother country appears to be very much like [a civil] religion that takes the place of the Catholic religion.”<sup>158</sup> As we shall see in Chapter 3.1., this kind of national education was to be extremely successful in its unifying purpose of creating French citizens—and, as an author wrote, was nothing short of a “cultural revolution that has translated into the birth, at the beginning of the twentieth century, of a new average French who is more distant from the mentality of his parents and grandparents...”<sup>159</sup>—and also from their religious polarization.<sup>160</sup>

<sup>148</sup> See for example A Prost, «L'École de la République», in *Projet n.213*, 1998, 91; C Coutel, *La République et l'École: Une Anthologie* (Pocket, Paris, 1991); A Lanfrey, *Sécularisation, Séparation et Guerre Scolaire. Les Catholiques Français et l'École (1901-14)* (Éditions du Cerf, Paris, 2003).

<sup>149</sup> The virtually untranslatable French expression is “s'inféoder”.

<sup>150</sup> Scot, above at note 8, 125. For a vitriolic intervention against Catholic education, see the following passage by Victor Hugo: “The history of the Church is indeed part of the history of human progress—except that it is written verso. It opposed everything. It is [the Church] that beat up Prinelli for saying that the stars were not to fall. It is [the Church] that persecuted Campanella for saying that the number of worlds was finite. It is the Church that mistreated Harvey for proving that the blood circulated. Quoting Josué, it imprisoned Galileo; quoting Saint Paul, it incarcerated Christopher Columbus. To discover the law of the universe was an impiety; to discover a new world was heresy. It was the Church that declared Pascal anathema on the ground of religion, Montaigne on ground of morals, and Molière on grounds of both religion and morals. And you want to be the masters of education!” V Hugo, *Discours de 1850*, in Pena-Ruiz, above at note 15, 48.

<sup>151</sup> A Dansette, *Histoire Religieuse de la France Contemporaine* (Flammarion, Paris, 1965) 638.

<sup>152</sup> E Quinet, *L'Enseignement du Peuple* (Hachette, Paris, 2001) 76.

<sup>153</sup> Charlier-Dagras, above at note 2, 78, note 263.

<sup>154</sup> J Gadille, *La Pensée et l'Action Politique des Evêques Français au Début de la IIIème République* (Hachette, Paris, 1976) 45.

<sup>155</sup> Charlier-Dagras, above at note 2, 78, note 263.

<sup>156</sup> Gadille, above at note 154, 45.

<sup>157</sup> See in this respect: «C'est cette religion de la patrie, c'est ce culte et cet amour à la fois ardent et raisonné, dont nous voulons pénétrer le cœur et l'esprit de l'enfant, dont nous voulons l'imprégner jusqu'aux moelles: c'est ce que fera l'enseignement civique». J P Azéma & M Winock, *La Troisième République* (Calmann-Lévy, Paris, 1978) 181.

<sup>158</sup> Ormières, above at note 3, 120.

<sup>159</sup> Scot, above at note 8, 114.

<sup>160</sup> See Section 2.4.1.

### 2.1.3.2. The Separation of Church & State (1905)

Separation in education soon translated into separation tout court. Indeed, at the beginning of the twentieth century opposition to the Catholic Church had become so strong in France that Waldeck-Rousseau, then Prime Minister, defined the Vatican as “a power no longer hidden”<sup>161</sup> and openly denounced the “constitution, within the state, of a veritable enemy”.<sup>162</sup> A series of diplomatic incidents with Rome over its unilateral nomination of a number of French bishops (despite the fact that the Concordat required the consent of Paris) further contributed to heighten the tension. Then a secret letter from the Pope was leaked to the French press, stating that “[t]he Heads of Catholic countries have a duty to show the highest respect to the Supreme Pastor of the Church...and this is particularly the case for the French President, who presides over a Nation that is linked to the Roman Pontificate by the closest traditional relations”.<sup>163</sup> Paris was also “deplored and reproved”<sup>164</sup> by Pius X for its rebelliousness and the passage of the educational laws.

At this point, the split became inevitable and irreversible. In May 1905, 420 French MPs (out of 510) voted in favour of the rupture of diplomatic relations with Rome and, in September, Emile Combes told Parliament that, “[t]he religious Power [of Rome] has blatantly torn the Concordat [and] I, for one, have no intention to patch it up. The only path available to the two conflicting powers”, he concluded, “is the same that is available to a couple in a crisis: divorce, and preferably divorce by mutual consensus”.<sup>165</sup>

After fifteen centuries of holy and unholy union and after several failed attempts,<sup>166</sup> this partition was finally achieved in December 1905 when the Law of Separation between Church and State (*La Loi Concernant la Séparation des Églises et de l'État*) was passed. “The Republic does not recognize, pay or subsidize any religion”, Article 2 reads. The Catholic Church was no longer given official recognition because no religion was officially acknowledged. As a consequence, Catholic priests stopped being paid by the State (Article 2) except for those services which were necessary to “ensure the free exercise of religion in public establishments”,<sup>167</sup> such as schools, hospices, prisons, etc. As for Catholic churches and other religious buildings, they remained the property of the French state. However, the state granted them for the free and unlimited enjoyment of the religious associations that the law, under the principle of *laïcité*, required to be created.<sup>168</sup>

As we shall see in the following chapter, and despite its turbulent adoption, the 1905 law is a compromise giving pre-eminence to religious freedom and expression:<sup>169</sup> all faiths are encouraged to choose their own dignitaries, establish their own sacred buildings and organize their own administrative structures, because, as one MP observed at the time, only in this way will “[r]eligions gain in freedom and the state in legitimacy”.<sup>170</sup> A momentous page in the history of France—and a fifteen centuries old one—had been turned.

<sup>161</sup> R. Waldeck-Rousseau, *La Défense Républicaine* (Eugène Fasquelle, Paris, 1902) 155.

<sup>162</sup> *Ibid.*

<sup>163</sup> In *Dans l'Humanité*, Jaurès Révèle la Note de Protestation du Vatican, in Bruley, above at note 1, 138.

<sup>164</sup> See *Actes de Pie X*, in Scot, above at note 8, 170.

<sup>165</sup> Scot, above at note 8, 174.

<sup>166</sup> In 1897 the *laïcité* principle was defeated by 310 votes against 138; in 1898 by 311 versus 183, in 1899 by 329 versus 179 and in 1900 by 315 versus 194. See for details L. Crouzil, *Le Régime Légal du Culte Catholique. Étude Théorique et Pratique* (Action Populaire, Reims, Undated) 13-14.

<sup>167</sup> The complete passage reads: «Pourront toutefois être inscrites auxdits budgets les dépenses relatives à des services d'aumônerie et destinées à assurer le libre exercice des cultes dans les établissements publics tels que lycées, collèges, écoles, hospices, asiles et prisons» (Article 2)

<sup>168</sup> Article 13 reads: «Les édifices servant à l'exercice public du culte, ainsi que les objets mobiliers les garnissant, seront laissés gratuitement à la disposition des établissements publics du culte, puis des associations appelées à les remplacer auxquelles les biens de ces établissements auront été attribués par application des dispositions du titre II».

<sup>169</sup> “The Republic ensures freedom of conscience,” Article 1 reads. “It guarantees the free exercise of religion with the only restrictions mentioned below in the interest of public order”. For a good commentary see J. Robert, *La Liberté Religieuse et le Régime des Cultes* (PUF, Paris, 1977) 40 to 50; B. Basdevant-Gaudemet, «Droit et Religions en France», (1998) 2 *Revue Internationale de Droit Comparé*, 335-366.

<sup>170</sup> Bruley, above at note 1, 14. See also: “To live and to grow, religions only need one thing: freedom”. J. Haussonville, *Après la Séparation* (Perrin, Paris, 1906) 62.

### 2.1.3.3. Rome Rejects (1906) Then Finally Accepts (1924) la Laïcité

Yet consensual the separation was most certainly not, and the acrimony of the divorce more than matched that of the marriage.<sup>171</sup> While the Protestant and Jewish religions declared themselves to be “ready to accept with confidence the Separation with the State”,<sup>172</sup> the Vatican reacted in fury. Pius X had already made it clear in 1903 that “[t]he Pope, by virtue of the task assigned to him, cannot absolutely separate political affairs from faith and tradition”.<sup>173</sup> The papal bulla *Vehementer Nos* (1906) confirmed this position, condemned the general idea of separation between Church and State as “a very clear negation of the supernatural order”<sup>174</sup> and directly attacked the new French law. “By virtue of the supreme authority that God has conferred [upon me]”, he wrote, “[I] condemn the law voted in France on the separation of Church and State as deeply injurious for God [and I] denounce it and condemn it as severely dangerous for the dignity of this apostolic seat, for our person, for the clergy and for the entirety of French Catholics”.<sup>175</sup> Shortly afterward a second bulla, *Gravissimo Offici* (1906), prohibited the French clergy from complying with the law—and, one year later, a third one, *Une Fois Encore* (1907), openly stated that “[i]t is God that [the French Government] wants to efface from the human heart and spirit”.<sup>176</sup>

This situation caused serious religious incidents in France,<sup>177</sup> but the much-feared schism did not materialize and in 1924 the Vatican finally accepted the French law in the bulla *Maximam Gravissimamque*.<sup>178</sup> As for the general mission of the Catholic Church, it was only in 1962 that Rome reversed its posture and in the end acknowledged that, “[t]he Church, for the nature of her role and competence, is separated from the political community and is not linked to any political system”.<sup>179</sup> After fifteen centuries of almost permanent union, after thousands of deaths and much religious violence, the union was really over.

### 2.1.4. WHAT PLACE FOR RELIGION IN FRENCH HISTORY?

As this chapter has shown, the history of France is the history of an endless and ruthless competition between spiritual and secular power. Kings and popes visibly distrusted each other, but they both had something that the other wanted—military dominance in the first case, spiritual supremacy in the second—and their quest for domination pushed them into an unhealthy union with no love but plenty of violence. Conceived by the Enlightenment, attempted but immediately aborted by the Revolution and finally realized by the République, the separation was certainly traumatic and took centuries to materialize—but it was the French state that had the courage and determination to part,

<sup>171</sup> See for example E M Maudit & J Maudit, *La France Contre la France. La Séparation de l'Église et de l'État 1900-1906* (Plon, Paris, 1984) 371.

<sup>172</sup> Scot, above at note 8, 212.

<sup>173</sup> “...le Pontife, en vertu même du magistère dont il est investi, ne peut nullement séparer les affaires politiques de ce qui concerne la foi et les moeurs”. *Le Pape Déclare: «Il Est Nécessaire que Nous Occupions Aussi de la Politique»*, in Bruley, above at note 1, 117.

<sup>174</sup> Scot, above at note 8, 274. See also the following statement by Abby Gayraud during the parliamentary debates on the separation: “I will tell you quite frankly what the Catholic Church teaches and what all the faithful children of Rome think about the separation of Church and State. For us, dear colleagues, the ideal relationship between Church and State is not the separation. Our ideal is the union of the civil and the religious society”. *Motion de l'Abbé Gayraud pour Surseoir au Débat afin d'Engager une Négociation avec les Églises*, in Bruley, above at note 1, 213.

<sup>175</sup> “...en vertu de l'autorité suprême que Dieu [m'] a conféré...[je] condamne la loi votée en France sur la séparation de l'Église et de l'État comme profondément injurieuse vis-à-vis de Dieu...Nous la réprouvons et condamnons comme gravement attentatoire pour la dignité de ce siège apostolique, pour notre personne, pour le clergé et tous les catholiques français». Scot, above at note 8, 275.

<sup>176</sup> Scot, above at note 8, 296. Shortly afterward, it was the time of French bishops to formally declare that the French law was unjust and should be disobeyed: “The laws on laïcité are the product of impiety, which the most culpable expression of injustice, while the Catholic religion is the expression of the highest justice”, they wrote. In Pena-Ruiz, above at note 34, 181.

<sup>177</sup> See the interesting (although dated) analysis of Mgr Baudrillart, *La Vocation Catholique de la France et Sa Fidélité au Saint-Siège à travers les Ages* (Spès, Paris, 1928) 190.

<sup>178</sup> *Le Pape Pie XI Autorise la Création des Associations Diocésaines*, in Bruley, above at note 1, 429-432.

<sup>179</sup> *Vatican Ecumenical Council II, Inter Mirifica: Decree on the Media of Social Communications* (IntraText Èulogos Digital, 1963).



and by the time the partition finally came, the country had lost a great deal of confidence in religion simply because in France, unlike in America, religion had long stopped being associated with freedom and had become a synonym for despotism and violence.

Given this strong association between *laïcité* and *république*, it is not surprising that modern France literally reveres the former and, as we shall see in the forthcoming chapter, gives it a high constitutional value.<sup>180</sup> It was also to be expected that, at the social level, too, the separation of Church and State is unanimously regarded in contemporary France as the pivotal principle of the Nation. “Separation has never unified as much as today”, one author observed, and “every religion, including Catholicism<sup>181</sup>...claims a place in the history of French *laïcité*”.<sup>182</sup> Yet the exceptionally violent religious history of France does seem to have left a message on her national consciousness—a message that reads: ‘Religion divides, la République unites’.

Perhaps it is this message that French people unconsciously convey when they proudly declare their distinctive detachment from religion.<sup>183</sup> Perhaps it is because of this message that the French *laïcité* reportedly “denies to religion any official role in civil society”<sup>184</sup> and is reluctant to admit it—or, more accurately and as we shall see in the following chapter, is reluctant to formally admit it—as a visible presence in the public space and political debate. And perhaps it is this message that contributes to make the French separation something more than an institutional, horizontal division—something similar to a vertical partition where la République occupies not only a different but also a higher place than religion.<sup>185</sup>

As I will show in the forthcoming pages, the legal situation is far more complex than France’s turbulent religious history would suggest.<sup>186</sup> Yet the historical fact remains that the place of religion in France has been in the past and is still today not only controversial but also highly disruptive, and this situation was perhaps best conveyed by Adolphe Thiers, one of the fathers of modern France, when he said that “la République is the system that divides us the least”.<sup>187</sup>

It certainly seems to divide the French less than religion, and how the French legal system deals with the highly contentious character of religious devotion is the the point we now turn to.



<sup>180</sup> “France is an indivisible, *laïque*, democratic and social Republic”, the very first article of the French Constitution reads. («La France est une République indivisible, *laïque*, démocratique et sociale»). Constitution de la République Française, in Mélin-Soucramanien, above at note 88, 27.

<sup>181</sup> See also: “The secularization of the spirits has won over the Catholics too”, Scot, above at note 8, 311.

<sup>182</sup> A Damien, *Un Siècle Après 1905: Les Leçons de l’Histoire*, in Bruley, above at note 8, 463.

<sup>183</sup> See the surveys on the religiosity of French people, above at note 3. See also R Rémond, «Le Fait Religieux dans la Société Française», (1993) 161 *Adm* 24.

<sup>184</sup> Gaillard, above at note 75, 20.

<sup>185</sup> See on the point J Roman, «La Laïcité comme Religion Civile» (1991) 175 *Ésprit* 114; M Barbier, *La Laïcité* (L’Harmattan, Paris, 1996) 69.

<sup>186</sup> As we shall see in the forthcoming chapter, if one considers that freedom of conscience was one of the pillars of the *laïque* building inspired by the 1789 Revolution and crafted by the 1905 law, this is not surprising.

<sup>187</sup> «La République est le régime qui nous divise le moins». Ormières, above at note 3, 106.

## Chapter 2.2.

# The Place of Religion in French Law

### 2.2.1. LAÏCITÉ v RELIGIOUS FREEDOM?

There seems to be a near unanimity, in France, on the fact that laïcité is central to the country's identity. The French historian Madeleine Rébérioux wrote of French people's "love"<sup>1</sup> for it, and, given the turbulent religious past of the nation, this is understandable.<sup>2</sup> Yet try to ask what laïcité exactly means and you are unlikely to find a satisfactory answer. An impressive number of adjectives have appeared—open laïcité,<sup>3</sup> closed laïcité,<sup>4</sup> strict laïcité,<sup>5</sup> relative laïcité<sup>6</sup>—yet this erudite and prolific debate has not resulted in a well-defined and commonly accepted explanation of the term.<sup>7</sup> Everyone pays tribute to the concept, in other words, but none seems to know exactly what it means.<sup>8</sup> While the topic can be overwhelming<sup>9</sup> and a remarkable number of interpretations are possible, this chapter will briefly focus on those aspects of laïcité that the author regards as essential in order to understand the veil issue in comparative perspective. In particular, the following pages will argue that the main reason behind this concept's vagueness lies with the fact that laïcité is both a historical and a legal notion—and that, in this matter, history and law markedly diverge.

Historically speaking, there is little doubt that the French idea of laïcité has developed in opposition to the Catholic Church and is the product of the events leading up to the unilateral and painful divorce of 1905 (what the French call 'laïcité de combat').<sup>10</sup> This separation was characterized, perhaps inevitably, by a certain degree of hostility toward religion in general and Catholicism in particular and is to this day considered an attainment realized in spite of the Catholic Church. "Separation and laïcité are, historically speaking, very much a secular achievement against Catholic resistance", one author underlined. "They are certainly not a Catholic accomplishment, even though the Catholic Church later came to terms with them".<sup>11</sup> As we have seen in the previous chapter, French history provides plenty of evidence in support of this assertion<sup>12</sup> and although the Catholic

<sup>1</sup> B Chélini-Pont & T J Gunn, *Dieu en France et aux États-Unis* (Berg International, Paris, 2005) 16.

<sup>2</sup> See for example C Nicolet, *L'Idée Républicaine en France: Essai d'Histoire Critique (1789-1924)* (Gallimard, Paris, 1982); and J Baubérot, *Laïcité 1905-2005: Entre Passion et Raison* (Éditions du Seuil, Paris, 2004) (esp. 163-186).

<sup>3</sup> For a definition of "laïcité ouverte" see M-D Charlier-Dagras, *La Laïcité Française à l'Épreuve de l'Intégration Européenne: Pluralisme et Convergences* (L'Harmattan, Paris, 2002) 26. See also J-M Belorgey, «Laïcité et Démocratie: La Laïcité dans une Société Ouverte», Intervention au Colloque du 25/6 Novembre 1999 sur la Laïcité (unpublished paper provided by the author).

<sup>4</sup> "Laïcité de combat". See later in the section. See also J Robert, *La Fin de la Laïcité?* (Odile Jacob, Paris, 2004) (esp. 31-75). É Poulat, *Liberté, Laïcité: La Guerre des Deux France et le Principe de la Modernité* (Éditions du Cerf, Paris, 1987) (esp. 189-246).

<sup>5</sup> For an example of "laïcité stricte" see H Pena-Ruiz, *Dieu et Marianne: Philosophie de la Laïcité* (PUF, Paris, 2005) (esp. 61-111).

<sup>6</sup> For an example of "laïcité relative" see P Airiau, *1905-2005: Cent Ans de Laïcité Française* (Presses de la Renaissance, Paris, 2005) (esp 17-55).

<sup>7</sup> As one author underlined, "[t]here is no exact and unanimously accepted definition of the separation as witnessed by the numerous controversies, still not solved, on this issue". See F Messner, P H Prélôt, J M Woehrling & I Riassetto, *Traité de Droit Français des Religions* (Litec, Paris, 2003) 393. See also M Barbier, «Pour une Définition de la Laïcité Française», in «Laïcité: Questions à Propos d'Une Loi Centenaire», (2003) 124 *Débat*, 158-174.

<sup>8</sup> The only certainty about laïcité seems to be its etymology. The word derives from the Ancient Greek λαϊκος ('laïkos'), which originally meant 'people' but soon came to indicate a layman in opposition to someone who taught religion and administered religious practices, who was referred to as κληρικος ('clerikos'). On the point, see P Fiala, «Les Termes de la Laïcité: Différentiation Morphologique et Conflits Sémantiques», in *Mots*, 27 June 1991, 48-50.

<sup>9</sup> One has only to consider the sheer number of French books on the matter, particularly in the running up to the 2004 law on religious symbols at school, to understand the importance attached to laïcité by the French. This density is graphically conveyed by the lengthy footnotes to this chapter.

<sup>10</sup> 'Confrontational laïcité'.

<sup>11</sup> É Poulat, *Notre Laïcité Publique* (Berg, Paris, 2003) 119.

<sup>12</sup> "The laïcité laws are wrong", the Catholic hierarchy was writing as late as in 1925, twenty years after the separation of Church and State, "[because] they are contrary to God, stem from atheism and replace the real God with the false gods of freedom, solidarity, humanity and science...We cannot obey [them] and we have the right and duty to fight them". Assembly

hierarchy nowadays fully recognises the ‘virtues’ of the separation principle,<sup>13</sup> one of French history’s most crucial passages has indeed consisted in this shift from a theocratic *principe de catholicité*<sup>14</sup> to a secular *principe de laïcité*—a long and painful adjustment, to be sure, but one that an overwhelming majority of French people (religious and non-religious alike) regard as fundamental to the birth of Modern France.

If the historical component of *laïcité* is unambiguous in its confrontational attitude toward the Catholic Church, the legal development of the concept has been far more complex and nuanced.<sup>15</sup> In French law, *laïcité* is the combined product of the 1905 separation legislation as well as the rich constitutional framework developed since the 1789 Revolution (in particular, the 1789 Declaration of Human Rights, the 1946 and 1958 Constitutions,<sup>16</sup> and EU and international law). The difficulty arises from the fact that, although *laïcité* is universally regarded as a key principle of French law,<sup>17</sup> it has never been properly and consistently defined in legal terms.<sup>18</sup> “*Laïcité*...awakens passionate and contradictory feelings”, an observer explained, “and this results not only in a polarization between those in favour and against the idea but also in a certain confusion over the [legal] meaning of the word and over its implications”.<sup>19</sup> It is precisely because of this lack of legal accuracy—coupled with the country’s tumultuous history—that several commentators interpret French law as the battleground of an epic struggle between secularism and religion—and between *laïcité* at the one end and religious freedom on the other.<sup>20</sup> As we shall see in the next chapter, the 2004 law on religious symbols at school was partly justified on this confrontational basis.<sup>21</sup>

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of the Cardinals and Bishops of France, *Déclaration du 10 Mars 1925*, in H Pena-Ruiz, *La Laïcité: Textes Choisis* (Flammarion, Paris, 2003) 181.

<sup>13</sup> It was not until 1962 that the Catholic Church accepted the separation—grudgingly at first, more decidedly in the following years. On the point, see the previous chapter. See also H Salton, “A Long Marriage of Convenience: The Origins and Historical Development of Church-State Relationship in France”, (2006) 3 *New Zealand Postgraduate Law e-Journal*, 33.

<sup>14</sup> As one author observed, “[t]he principle of *catholicité*—based on the model of *Cujus Regio Ejus Religio*—was exclusive: one needed to be Catholic to be a citizen of the French kingdom. The principle of *laïcité* is on the contrary inclusive: it recognises to every person freedom of conscience and thought”. Poulat, above at note 11, 120.

<sup>15</sup> Among the most quoted definitions of *laïcité*, see for example the following: “[*Laïcité* is] [t]he deep delimitation between the temporal and the spiritual [spheres], a delimitation that has entered our culture in an irreversible way” (F Buisson, *Dictionnaire de Pédagogie et d’Instruction Primaire*, Hachette, Paris, 1887, 1469 (vol.2)). “[*Laïcité* is] the neutrality of the State on religious matters” (E Littré, quoted by E Renan, *Œuvres Complètes*, Calman-Lévy, Paris, 1947, 774 (vol.1)). “[*Laïcité*] conveys the idea of a separation between civil and religious society, [for] the State does not have any religious power and religions have no political power” (H Capitant, *Vocabulaire Juridique*, PUF, Paris, 1936, 305). “[*Laïcité* is] a principle that excludes religions from the exercise of political and administrative power, particularly from the administration of public schools” (*Encyclopédie Universalis*, Definition of *Laïcité*, CD-ROM, 1997).

<sup>16</sup> The current French Constitution is composed of four different elements: the text of the 1958 Constitution, the Declaration of Human Rights of 1789, the Preamble of the 1946 Constitution and the ‘fundamental principles recognized by the laws of the Republic’ (*principes fondamentaux reconnus par les lois de la République*, or *PFRLR*). These fundamental principles are drawn by the case law of the *Conseil Constitutionnel* and the *Conseil d’État* and are currently the following: the right of association (*Décision 71-44 DC* of 16 July 1977); the rights of defence (*Décision 76-70 DC* of 2 December 1976); the freedom of instruction (*Décision 77-87 DC* of 23 November 1977); the freedom of conscience (*Décision 77-87 DC* of 23 November 1977); the independence of administrative courts (*Décision 80-119* of 20 July 1980); the independence of university professors (*Décision 83-165 DC* of 20 January 1984); and the exclusive competence of administrative courts to void acts of public authorities (*Décision 86-224 DC* of 23 January 1987).

<sup>17</sup> Like freedom of conscience, *laïcité* possesses a high constitutional value within the French legal system and was recognized by the Constitutional Council as one of the fundamental principles of French law. See *Conseil Constitutionnel*, 23 Novembre 1977, *Liberté d’Enseignement et de Conscience*: *Rec. Cons. Const.*, p.42; *GDCC* n.26; *RJC* I, p.52; *AJDA* 1978, p.565 note J. Rivero. See also Messner, Prélôt, Woehrling & Riassetto, above at note 7, 393. Furthermore, according to Professors Rivéro, Duffar and Robert, the first two articles of the 1905 Law are the founding principles of the French idea of *laïcité*. See J Rivéro, *Les Libertés Publiques, Le Régime des Principales Libertés* (PUF, Paris, 1977) 184; J Duffart, «Le Régime Constitutionnel des Cultes», in *Le Statut Constitutionnel des Cultes Dans les Pays de l’Union Européenne* (Litec, Paris, 1995) 1-34.

<sup>18</sup> According to Professor Jacques Robert, “[e]ven though the Constitution did not expressly say that the Republic is *laïque*, the 1905 Law introduced a ‘fundamental principle which is recognized by the laws of the French Republic’. See for details J Robert, «La Notion Juridique de *Laïcité* et Sa Valeur Constitutionnelle», in H Bost, (ed), «Génèse et Enjeux de la *Laïcité*», *Actes du Colloque 2-3 Mars 1990*, Labor et Fidès, 1990, 89.

<sup>19</sup> J Rivéro, «La Notion Juridique de *Laïcité*», in *Recueil Dallos*, 1949, *Chronique XXXIII*, 137.

<sup>20</sup> According to the French philosopher Henri Pena-Ruiz, for instance, *laïcité* must be considered in its original and strict version, i.e. the idea according to which there is a fundamental and impenetrable separation between the religious domain and the secular one. The advocates of this rigid version of *laïcité* oppose any interference of the state on religious matters—and of course vice-versa. See e.g. H Pena-Ruiz, *Dieu et Marianne* (PUF, Paris, 2005); H Pena-Ruiz, *Histoire de la Laïcité* (Gallimard, Paris,

This chapter adopts a different perspective. It will argue that, from a legal point of view, *laïcité* and religious freedom are not competitors but, on the contrary, complement each other, because the French legal idea of *laïcité* (in opposition to the historical one as explained in the previous chapter) is inseparable from—and already contains—the guarantee of freedom of religion. Indeed, it is possible to maintain that one cannot exist without the other. As France’s history shows all too well, *laïcité* is an indispensable pre-condition for religious liberty, while a situation of *laïcité* without religious tolerance would be inherently contradictory because it would betray the very legal construction of the 1905 law and of French constitutional law. The genius of the separation’s founders, I will argue, lies exactly in their refusal to exclude religion from the rights and freedoms the Revolution had so dearly fought for.

## 2.2.2. THE PRINCIPLE OF RELIGIOUS FREEDOM<sup>22</sup> IN FRENCH LAW: A CONTROVERSIAL BUT CRUCIAL IDEA

### 2.2.2.1. The Protection of Religious Freedom in French Law

#### (i) National Protection

The commonly held belief according to which *laïcité* is the cornerstone of modern France may be historically sound but is legally inaccurate. Indeed, when it comes to the law, the idea of *laïcité* is chronologically posterior to that of religious freedom: the former was introduced by the education statutes of the 1880s and by the 1905 law on separation of Church and State, while the latter goes back to the 18<sup>th</sup> century.

The 1789 Universal Declaration of Human Rights, drafted “in presence and under the auspices of the Supreme Being”,<sup>23</sup> ignored the idea of *laïcité* but recognised freedom of expression and religion. This was conveyed by Article 11— “[t]he free communication of thoughts and opinions is one of mankind’s most fundamental rights: every citizen can therefore speak, write and publish freely with the only limits provided for by the law in case of abuses”<sup>24</sup>—as well as by its Article 10— “[n]one should be disturbed in his or her opinions, also religious ones, to the extent that their manifestation does not trouble public order”.<sup>25</sup> While these provisions are not without controversy,<sup>26</sup> there is little doubt that they were prescient in extending the protection of the law to religious as well as political, philosophical and other opinions and in granting religious freedom at a time when this was in very short supply. This liberal approach of the *Déclaration* seems further confirmed by the fact that one of the proposed drafts of Article 10—“Every citizen who does not trouble the established [Catholic] Church should not be disturbed”<sup>27</sup>—was openly rejected as a violation of religious liberty and was

2005); A Bergounioux, «La *Laïcité*, Valeur de la République», in *Pouvoirs*, 1995, n.75; and J Bur, *Laïcité et Problème Scolaire* (B. Presse, Paris, 1959).

<sup>21</sup> See the following chapter for details.

<sup>22</sup> According to some authors there is a difference, in French law, between freedom of conscience (*liberté de conscience*) and freedom of religion (*liberté des cultes*). The former consists, one author wrote, “in the right, for every individual, to adopt the religious belief that he or she chooses or not to have any”, while *la liberté des cultes* “consists in the right to manifest through religious practices and external acts a person’s religious beliefs”. See P Reutenauer, *Nouveau Régime des Cultes en France. Commentaire de la Loi du 9 Décembre 1905 sur la Séparation des Églises et de l’État, des Décrets des 29 Décembre, 19 Janvier et 16 Mars 1906 avec Références aux Circulaires Ministerielles* (Administration du Bulletin, Paris, 1906) 35-6 (emphasis added).

<sup>23</sup> *Déclaration des Droits de l’Homme et du Citoyen* (1789), Préambule, in F Mélin-Soucramanien, *Constitution de la République Française* (Daloz, Paris, 2005) 4.

<sup>24</sup> «La libre communication des pensées et des opinions est un des droits les plus précieux de l’Homme: tout Citoyen peut donc parler, écrire, imprimer librement, sauf à répondre à l’abus de cette liberté dans les cas déterminés par la Loi». *Déclaration des Droits de l’Homme et du Citoyen* (1789), Article 11 in Mélin-Soucramanien, above at note 23, 7.

<sup>25</sup> «Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l’ordre établi par la loi». *Déclaration des Droits de l’Homme et du Citoyen* (1789), Article 10, in Mélin-Soucramanien, above at note 23, 7.

<sup>26</sup> The question could be asked, for instance, whether the expression “also religious ones” (*même religieuses*) is a diminutive to be interpreted as “even though religious” or rather a repetition used to reinforce the article’s egalitarian significance like in “including the religious ones”. See on the point G Koubi, «En Marge d’un Conflit: Observations sur la Liberté d’Opinions, «Mêmes» Religieuses», in *Petites Affiches*, 1991, n.36, 16.

<sup>27</sup> See on the point T Celerier, «Dieu dans la Constitution» (1991) *Petites Affiches*, n.67, 16.

never taken up again in the drafting process, representing an interesting parallel with the situation in America, where similar positions were explicitly rejected during the passage of the US Bill of Rights in 1791.<sup>28</sup>

The recognition of religious liberty in the 1789 Declaration was confirmed in a majority of post-Revolution charters. The 1791 Constitution, for example, granted “the freedom for every man...to exercise the religion to which he belongs”,<sup>29</sup> while the 1793 text<sup>30</sup> emphasized that “the free exercise of religions”<sup>31</sup> could not be prohibited. Furthermore, the Constitution of 1795 provided that “[n]one can be prevented from exercising, within the limit of the law, the religion of his choice”,<sup>32</sup> and the 1814 Constitutional Charter confirmed freedom of religion while at the same time relying on “the Divine providence”<sup>33</sup> and acknowledging the Catholic Church as official religion.<sup>34</sup> Finally, the 1848 Constitution, drafted “in the presence of God and in the name of French people”,<sup>35</sup> acknowledged that “[e]veryone can freely exercise his religion and receive from the state, for such an exercise, equal protection”.<sup>36</sup> While it is true that only the 1789 Declaration is still part of French law, the above-mentioned historical provisions are significant in that they demonstrate how religious freedom has more often than not been central to the post-revolutionary French constitutional framers. Although the Catholic Church was still the official religion of France, in other words, centuries of religious wars and the combined and long-lasting effects of the Enlightenment and the Revolution had made religious freedom a necessity—not a luxury—that laid the groundwork for the eventual separation of Church and State.

We have seen in the previous chapter how this long union was unilaterally broken by France in 1905 and how acrimonious and rancorous the separation proved to be. Yet it is interesting to note that the 1905 statute, commonly regarded as the ‘Bible’ of French secularism, actually begins with a message of religious tolerance: “The Republic guarantees freedom of conscience”, the first paragraph of the first article of the 1905 law reads: “She guarantees the free exercise of religions with the only exceptions provided for in the interest of public order”.<sup>37</sup> The public powers must, in other words, prevent and fight any violation of religious freedom—a fundamental principle that produced an equally fundamental consequence: by ensuring freedom of conscience and by granting the free exercise of religion to all faiths, the State leaves to each and every religion the liberty to organize its own activities—a marked departure from the ‘Gallican’ tendencies of the previous centuries.<sup>38</sup> The State also, in this way, implicitly acknowledges the existence of a domain which is protected from public intervention except in cases where the public order is in danger.<sup>39</sup>

Importantly, this 1905 text was later confirmed by the 1946 Constitution, according to which “[e]very human being, without distinction of race, religion or belief, possesses inalienable and sacred

<sup>28</sup> The parallel between the rejection of an established religion by the US and French founding fathers will be considered in the comparative portion (Part 3) of this thesis.

<sup>29</sup> “...la liberté à tout home...d'exercer le culte religieux auquel il est attaché”. Constitution du 3 Septembre 1791, Titre 1<sup>er</sup>, in Messner, Prélot, Woehrling & Riassetto, above at note 7, 385.

<sup>30</sup> As the Preamble of this text emphasizes, the 1793 Constitution was written “in the presence of the Supreme Being”. See Id. 389.

<sup>31</sup> “Le libre exercice des cultes”. Constitution du 24 Juin 1793, Article 7.

<sup>32</sup> “Nul ne peut être empêché d'exercer, en se conformant aux lois, le culte qu'il a choisi. Nul ne peut être forcé de contribuer aux dépenses d'un culte. La République n'en salarie aucun». Constitution du 22 Août 1795, Article 354.

<sup>33</sup> Id. 389.

<sup>34</sup> Charte Constitutionnelle du 4 Juin 1814, Article 5 and 6. Id. 385.

<sup>35</sup> Messner, Prélot, Woehrling & Riassetto, above at note 7, 389.

<sup>36</sup> « Chacun professe librement sa religion, et reçoit de l'État, pour l'exercice de son culte, une égale profession. ». Constitution du 4 Novembre 1848, Article 7.

<sup>37</sup> « La République assure la liberté de conscience. Elle garantit le libre exercice des cultes sous les seules restrictions édictées ci-après dans l'intérêt de l'ordre public ». Loi du 9 Décembre 1905 Concernant la Séparation des Églises et de l'État, Article 1 (1), in Bruley, Y. 1905, *La Séparation des Églises et de l'État: Les Textes Fondateurs*, Paris: Perrin, 2004, 435.

<sup>38</sup> For an overview of French Gallicanism, see Chapters 2.2. & 3.1.

<sup>39</sup> As the 1905 statute explicitly reminds us and as one author underlines, “[t]he only limits to the free exercise of religion are those that the general law imposes to all private activities, that is to say, the respect of public order”. See Rivéro & Moutouh, below at note 50, 159. For a comment on this point see also « Les Nouvelles Données du Problème de la Laïcité », VIe Colloque Inter-Universitaire des Aïmoneries de Paris, in (1997) *Petites Affiches*, n.119, 4.

rights<sup>40</sup> and was finally validated by the 1958 Constitution, the first article of which emphasizes that “[France] ensures the equality before the law of all citizens, without distinction on the basis of origin, race or religion. She respects all faiths”.<sup>41</sup>

### (ii) International Protection

In addition to these domestic provisions, a number of international documents ratified by France equally guarantee freedom of belief, the most important of which are the International Covenant for Civil and Political Rights (ICCPR),<sup>42</sup> the International Convention for the Protection of the Rights of the Child (ICPRC),<sup>43</sup> the Declaration on the Elimination of Religious Discrimination (DERD)<sup>44</sup> and the European Convention for Human Rights (ECHR).<sup>45</sup> The last of these is particularly important, for not only does the French Constitution give international treaties “an authority which is superior to that of ordinary statutes”,<sup>46</sup> European law is an integral part of French constitutional law. “Everyone has the right to freedom of thought, conscience and religion”, Article 1(1) ECHR reads. “This right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance”.<sup>47</sup>

### (iii) Judicial Protection

The judicial application of these national and international provisions in France has over the years confirmed the essential place reserved by the French legal system to freedom of conscience and religion. In 1977, the Conseil Constitutionnel<sup>48</sup> openly acknowledged that “[f]reedom of conscience must be recognized as one of the fundamental principles accepted by the laws of the Republic”.<sup>49</sup> As for the 1905 statute, it has consistently been interpreted as burdening the French state with a condition of neutrality that is not only negative (all religious beliefs are admitted yet none is officially recognised) but also positive (public authorities must intervene to guarantee religious freedom).<sup>50</sup> This implies, for the State, the obligation to positively ensure that everyone, in his or her daily life, can freely

<sup>40</sup> « Tout être humain, sans distinction de race, de religion ni de croyance possède des droits inaliénables et sacrés ». Constitution du 1946, Preamble, in Messner, Prélôt, Woehrling & Riassetto, above at note 7, 387.

<sup>41</sup> “[La France] assure l’égalité devant la loi de tous les citoyens sans distinction d’origine, de race ou de religion. Elle respecte toutes les croyances ». Constitution du 4 Octobre 1958, Article 1. In Mélin-Soucramanien, above at note 23, 28.

<sup>42</sup> See in particular Article 2 (prohibition of discrimination on the basis of religion) and Article 18 (freedom of religion and freedom to manifest one’s religion only subject to limitations “as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”). International Covenant on Civil and Political Rights, in P R Gandhi, *International Human Rights Documents* (Blackstone, London, 2000) 63-76.

<sup>43</sup> See in particular Article 12.

<sup>44</sup> See in particular Articles 2 and 4.

<sup>45</sup> In addition to Article 9 quoted below, see also Article 14 (guarantee of freedom of conscience without distinction based on sex or religion).

<sup>46</sup> See Constitution du 4 Octobre 1958, Article 55, in Mélin-Soucramanien, above at note 23, 64. See also Messner, Prélôt, Woehrling & Riassetto, above at note 7, 391.

<sup>47</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Article 9, in Gandhi, above at note 42, 195. As for the boundaries associated with this liberty, they are restricted, as we shall see below, in a similar way to most other French, ECHR and international human rights: “Freedom to manifest one’s religion or beliefs”, the same article reads, “shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health and morals, or for the protection of the rights and freedoms of others”.

<sup>48</sup> The powers and prerogatives of the Conseil Constitutionnel are described in articles 56 to 63 of the 1958 Constitution and in Part 3 of this thesis. An English version of the 1958 Constitution is available on the website of the Assemblée Nationale at <http://www.assemblee-nationale.fr/english/8ab.asp#TITLE%20VII> (at 8 March 2007).

<sup>49</sup> Conseil Constitutionnel, 23 Novembre 1977, *Liberté d’Enseignement et de Conscience*: Rec. Cons. Const. p.42; GDCC n.26; RJC I, p.52; AJDA 1978, p.565 note J Rivéro. This was a crucial passage, because the inclusion of a certain right into the very restricted ‘fundamental constitutional principles’ category of French law gives it the highest possible protection. On the point, see E Tawil, *La Liberté de Culte, Liberté Fondamentale de Valeur Constitutionnelle? La Semaine Juridique, Administrations et Collectivités Territoriales*, n. 9, 23 February 2004, 285-7; and, from the same author, *Constitutional Council, Constitution for Europe and Secularism*, 2005, unpublished paper.

<sup>50</sup> As Professor Rivéro observed, “[a]lthough secular (laïque), the State must ensure freedom of conscience, which is the personal freedom to believe or not to believe. Indeed, [the State] must make a [double] commitment towards this freedom: not only will [it] respect it but it will also guarantee it [against the violations committed by others], that is to say, it will prevent any infringement”. J Rivéro & H Moutouh, « La Liberté Religieuse », in *Libertés Publiques* (PUF, Paris, 2003) 158 (vol.2).

practise his or her religion—the duty, as Professor Jacques Robert observed, to “put at the disposal of citizens, if necessary, the public means that allow them to fulfil their religious tenets”.<sup>51</sup>

As we shall see in detail below, it is from this obligation that flows a series of provisions—spiritual assistance for detainees in prisons and other places managed by the state (‘aumôniers’),<sup>52</sup> recognizance of conscientious objection for military personnel,<sup>53</sup> regulations on the religious slaughtering of animals,<sup>54</sup> supply of halal and other religious food in school canteens,<sup>55</sup> etc—which the State must positively implement. It is in this light, furthermore, that Articles 31 and 32 of the 1905 law should be read: despite the system of separation, it is the task of the state to defend the religious practices of its citizens—and one way to do so is to bring the criminal law to bear against those who commit acts of religious discrimination or prevent the free exercise of religion.<sup>56</sup>

The importance of the French constitutional and statutory provisions on religious freedom is also apparent from the language adopted during the separation process. Article 1 of the 1905 law obliges the State to “ensure” (‘assurer’) and then “guarantee” (‘garantir’) freedom of conscience and belief, arguably introducing a progression in the protection mechanism that, as has been observed, “does not exclude a certain interventionism from the State”.<sup>57</sup> While this may seem logical and to some extent even redundant in the context of other religious freedom instruments such as the US First Amendment, it is by no means a minor feature for a statute that ended fifteen centuries of exceptionally violent religious history.

#### 2.2.2.2. The Main Limit to Religious Freedom in French Law: Public Order

##### (i) Public Order in French Law

Like most civil liberties, religious freedom is not unrestricted in French law. The following section (2.2.3.) will ask whether *laïcité* can be regarded as a limit to such freedom and the next chapter (2.3.) will deal with the limitations concerning the veil controversy. Yet for comparative purposes and for the benefit of future discussion of the veil, it should be mentioned here that the only general boundary to religious expression consistently and positively recognised by French, European and international law is public order.<sup>58</sup> The 1789 Declaration of Human Rights protects the expression of religious beliefs “to the extent that their manifestation does not disturb the public order”.<sup>59</sup> This is echoed in the 1905 Separation law, which guarantees the free exercise of religion “with the only exceptions

<sup>51</sup> J Robert, « La Liberté Religieuse », in (1994) 2 *Revue Internationale de Droit Comparé*, 633.

<sup>52</sup> See Section 2.2.4. (a) for details.

<sup>53</sup> See Section 2.2.4. (b) for details.

<sup>54</sup> See Section 2.2.4. (e) for details.

<sup>55</sup> See Section 2.2.4. (e) for details.

<sup>56</sup> Article 31 of the 1905 law reads: “Those who, through acts of violence or threat, oblige a person to exercise or not to exercise a given religion, to be part or not to be part of a religious association, to contribute or not to contribute to the finances of a religion, by threatening him or her with a loss of employment or by exposing him or her to damage to his or her person, family or goods, will be punished with a 5<sup>th</sup> class criminal sanction”. *Loi de Séparation du 1905*, in Bruley, above at note 37, 446. Article 32 reads: “Those who prevent, delay or interrupt the exercise of a religion in the form of troubles or disorders in the premises dedicated to such exercise will be punished in the same way [as per article 31]”. *Loi de Séparation du 1905*, *Ibid.*

<sup>57</sup> Charlier-Dagras, above at note 3, 112.

<sup>58</sup> For an interesting overview of the subject, see e.g. C Evans, *Freedom of Religion Under the European Convention on Human Rights* (Oxford University Press, Oxford, 2001); E Benvenisti, “Margin of Appreciation, Consensus and Universal Standards”, (1999) 31 *New York University Journal of International Law and Politics*, n. 4, 843; M R Hutchinson, “The Margin of Appreciation Doctrine in the European Court of Human Rights”, (1999) 48 *International and Comparative Law Quarterly*, n.3, 638; A H Català i Bas, *La (In)tolerancia en el Estado de Derecho: Un Análisis de la Jurisprudencia del Tribunal Europeo de Derechos Humanos y de la del Tribunal Constitucional* (Ediciones Revista General de Derecho, Valencia, 2002) 44; G Cohen-Johnathan, “Les Lignes de Force de l’Evolution du Droit de la Convention Européenne des Droits de l’Homme”, (2000) 13 *Revue Québécoise de Droit International*, n.1, 63.

<sup>59</sup> « Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l’ordre établi par la loi ». *Déclaration des Droits de l’Homme et du Citoyen (1789)*, Article 10, in Mélin-Soucramanien, above at note 23, 7 (emphasis added).

provided for in the interest of public order”.<sup>60</sup> Indeed, it is “the general spirit of French law”, one author observed, “that [religious] freedom must be understood...in the context of the respect of public order”.<sup>61</sup>

European and international law are congruent. The European Convention for Human Rights, for example, quotes “public safety”,<sup>62</sup> “public order”,<sup>63</sup> “health”,<sup>64</sup> “morals”<sup>65</sup> and “other peoples’ rights”<sup>66</sup> as the only possible limits to freedom of expression—most of which fit easily into the broader concept of “public order”.<sup>67</sup> Similarly, the Universal Declaration of Human Rights (1948) mentions “the rights and freedoms of others”<sup>68</sup> as well as “the just requirements of morality, public order and general welfare in a democratic society”,<sup>69</sup> while the International Covenant for Civil and Political Rights provides limitations “as prescribed by law and necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others”.<sup>70</sup> Both the International Convention for the Protection of the Rights of the Child<sup>71</sup> and the Declaration on the Elimination of Religious Discrimination<sup>72</sup> have similar provisions.

#### (ii) Public Order in the Conseil d’État Jurisprudence

Importantly, this has also been the consistent position of the Conseil d’État, France’s highest administrative jurisdiction. Indeed, ever since 1905 the Conseil has applied the public order limit sparingly—always as the last resort and always as an exception to the general rule of religious freedom. For instance, all prohibitions of religious manifestations (processions, meetings, ceremonies) not justified by reasons of public order have been held illegal by the Conseil d’État,<sup>73</sup> especially if such events were carried out in conformity to local traditions.<sup>74</sup> Similarly, religious processions have been prohibited<sup>75</sup> only when the risk of disturbance to public order was so serious that the Mayor could not maintain the peace through the available police forces,<sup>76</sup> while if the danger to safety was insufficient, even non-traditional religious ceremonies have usually been permitted.<sup>77</sup>

The same public order limitations apply to another—equally aged but historically significant—issue of French law: the discipline of church bells. Citing religious freedom, the Conseil d’État

<sup>60</sup> «La République assure la liberté de conscience. Elle garantit le libre exercice des cultes sous les seules restrictions édictées ci-après dans l’intérêt de l’ordre public». Loi du 9 Décembre 1905 Concernant la Séparation des Églises et de l’État, Article 1 (1), in Bruley, above at note 37, 435 (emphasis added).

<sup>61</sup> See Charlier-Dagras, above at note 3, 115.

<sup>62</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Article 9.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> See on the point H Surrel, «La Liberté Religieuse devant la Court Européenne des Droits de l’Homme», (1995) *Revue Française de Droit Administratif (RFDA)*, n.573.

<sup>68</sup> Universal Declaration of Human Rights (1948), Article 29 (2).

<sup>69</sup> Ibid.

<sup>70</sup> International Covenant on Civil and Political Rights, in Gandhi, above at note 42, 63-76.

<sup>71</sup> See in particular Article 12. See also G Raymond, «La Convention sur les Droits de l’Enfant et le Droit Français de l’Enfance», (1990) *JCP I*, 4351; and D Youf, *Penser le Droit de l’Enfant* (PUF, Paris, 2002).

<sup>72</sup> See in particular Articles 2 and 4. See also J A Walkate, «La Déclaration des Nations Unies sur l’Élimination de Toutes les Formes d’Intolérance: Aperçu Historique», in (1991) *Conscience et Liberté*, n.42, 7.

<sup>73</sup> See for example the following decisions: Conseil d’État, Abbé Chalmaudron, 27 January 1911; Conseil d’État, Abbé Plisson, 22 November 1912; Conseil d’État, Abbé Didier, 1st May 1914; Conseil d’État, Rochette et Autres, 16 June 1926; Conseil d’État, Claverie, 17 November 1926; Conseil d’État, Abbé Richob, 23 November 1932; Conseil d’État, Abbé Châtel, 12 December 1934.

<sup>74</sup> In 1933, for instance, the highest administrative court annulled the decision of a Mayor who had prohibited a series of local religious ceremonies on the ground that “no reason founded on public order could be invoked in support of this decision” (Conseil d’État, Abbé Cretin, 10 June 1931). A virtually identical mayoral ordinance was also annulled by the Conseil d’État in 1933, again for a lack of public order reasons (Conseil d’État, Abbé Coiffier, 25 January 1933), while Palais Royal upheld a decision prohibiting a public demonstration on the ground that this event “was of such a nature as to threaten public order” (Conseil d’État, Sieur Guiller, 2 July 1947). See also Conseil d’État, Abbé Desmarest, 22 December 1928; Conseil d’État, Abbé Vroman, 26 July 1932.

<sup>75</sup> See for example Conseil d’État, Abbé Rerolle, 5 May 1928.

<sup>76</sup> See in particular Conseil d’État, Rennus, 31 January 1934; and Conseil d’État, Cuiller, 2 July 1947.

<sup>77</sup> See for example Conseil d’État, Jeunesse Indépendante Chrétienne, 5 March 1948.



consistently annulled administrative measures that had the effect of limiting or suppressing the sound of church bells unless such limitations were founded on public order.<sup>78</sup> In this respect, the Conseil seems to have acknowledged and bowed to the liberal spirit of the 1905 legislation from a very early stage, for as the statute's rapporteur, Aristide Briand, emphasized during the parliamentary debates, "[e]very time that the public order limit cannot be legitimately invoked, it is the liberal interpretation that will be most respectful of the wishes of the [1905] legislature".<sup>79</sup>

While this case law on religious demonstrations and church bells may appear outdated in 21<sup>st</sup> century France, the importance attributed by the Conseil d'État to public order as the main limit to religious freedom is, as we shall see in relation to the veil,<sup>80</sup> by no means a remnant of a bygone age but seems to be living law. In 1982, for example, the Conseil annulled the decision taken by a préfet to prohibit the access, for some members of the Krishna cult, to their place of religious worship on the ground that civil servants "have no authority to prohibit a religious ceremony in a given building...except for exceptional reasons of danger to the public order".<sup>81</sup> And as Chapter 3.1. will show in detail, even in relation to the highly sensitive issue of Islam and the Muslim veil at school the Conseil d'État has, at least until the passage of Statute 228/2004, insisted that only when the headscarf becomes a public order issue can it be legitimately forbidden.<sup>82</sup> Finally, it is precisely such a liberal position that led the judges sitting at Palais Royal to regard, either implicitly or explicitly, religious practices such as the ritual slaughter of animals,<sup>83</sup> circumcision,<sup>84</sup> parental rights to their child's religious education,<sup>85</sup> absence from school for religious reasons<sup>86</sup> and the broadcasting of religious programmes on national public networks<sup>87</sup> as in accordance with laïcité.

Public order aside, there is nevertheless another limit that is regularly brought to justify important restrictions to religious freedom in France—and this is laïcité. Given its importance and impact over the issue of the Islamic veil at school, I shall now briefly introduce this concept.

### 2.2.3. THE CONCEPT OF LAÏCITÉ IN FRENCH LAW: A PRINCIPLE OF TOLERANCE, NOT CONFLICT

As mentioned in the previous chapter, the French idea of laïcité was born at school as a part of what came to be known as the war of "the two Frances",<sup>88</sup> the first of which was favourable to the status quo

<sup>78</sup> See for example Conseil d'État, Morel, 5 August 1908; Conseil d'État, Abbé Carlin, 8 July 1910; Conseil d'État, Steur, Lebrun, Curé d'Harancourt, 12 January 1923; and Conseil d'État, Abbé Savarin, 13 January 1911.

<sup>79</sup> Charlier-Dagras, above at note 3, 187. As this author wrote, "[t]he general limits of Article 1 of the 1905 law are those traditionally attached to any other freedom. [These limits] merely translate the common spirit of French law according to which a freedom logically stops where another begins and [must respect] the laws of the State, that is to say, public order". Id. 115.

<sup>80</sup> The public order issue will be discussed at length in the following chapters but needs to be considered here because one of the effects of the passage of Statute 228/2004 has been a certain tendency to downplay (and to some extent even eliminate) the public order limit. See Chapter 2.3., 3.2. and 3.3. for details.

<sup>81</sup> Conseil d'État, Association Internationale Pour la Conscience de Krishna, 14 May 1982. This case is commented on in P Boinot & C Debouy, «Note Sous Conseil d'État, 14 Mai 1982, Association Internationale Pour la Conscience de Krishna», D. 1982, III, 516.

<sup>82</sup> See also: "La laïcité must allow the expression of [French] society's religious diversity—and this includes the possibility for the various religions to cohabit within the public space to the extent that no issue of public order arises". Conseil d'État, Rapport Public: Un Siècle de Laïcité (Documentation Française, Paris, 2004) 276.

<sup>83</sup> See A Garay, B Chélini-Pont, E Tawil & Z Anseur, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in France", (2005) 2 Emory International Law Review, vol.19, 798. But see also Circulaire du Ministre de l'Éducation Nationale, «Composition des Repas Servis en Restauration Scolaire et Sécurité des Aliments», 25 June 2001, in BOEN, n. spécial, 28 June 2001.

<sup>84</sup> See e.g. Conseil d'État, Hôpital Joseph-Imbert d-Arles, 3 November 1997; commented on in Revue Française de Droit Administratif (RFDA), 14, 1, Jan-Feb. 1998, 90. See also Tribunal de Grande Instance de Grenoble, Mutuelle d'Assurances du Corps Sanitaire Français c/ Benzaid, 20 March 1986. Incidentally, circumcision is regarded in French law as a surgical procedure and is thus reimbursed by the health insurance plan.

<sup>85</sup> See for details D Laszlo-Fenouillet, «La Conscience», in Bibliothèque de Droit Privé, vol.235, L.G.D.J., 1993, n.254.

<sup>86</sup> Conseil d'État, Consistoire Central des Israélites de France et Autres, 14 April 1995; commented on in Revue Française de Droit Administratif (RFDA), 1995, 58.

<sup>87</sup> See Article 56 of the Law of 30 September 1986, Journaux Officiels, Lois et Décrets, 1 October 1986, 11760.

<sup>88</sup> See e.g. J Baubérot, La Laïcité: Analyses et Réflexions (Service d'Information du Gouvernement Français, Paris, 2001) 2. The expression has also been recently used, in a different context, by J Marseille, La Guerre des Deux Frances (Perrin, Paris, 2005).

(i.e. Catholic education) while the second one supported secular teaching. It is important to remember that at this time French public education was exclusively Catholic and that until the 19<sup>th</sup> century the Education Minister was also Minister of Religious Affairs and was a bishop.<sup>89</sup>

This centuries-long hegemony ended in 1882 when, after the victory of the new centre-left coalition, the first of the *grandes lois laïques* established that “in primary schools, the religious teaching is given outside school buildings and programs”,<sup>90</sup> while in the same year another piece of legislation emphasized that “in public schools of all levels, the teaching activities are exclusively assigned to non-religious [‘laïque’] personnel”.<sup>91</sup> Although the word ‘laïque’ was not defined, this truly was a revolutionary moment—and an irreversible one—that was later completed by a series of other legislative measures such as the substitution, in primary schools, of the “moral and religious instruction”<sup>92</sup> with a “moral and civic instruction”;<sup>93</sup> the abolition of religious distinctions in public cemeteries;<sup>94</sup> the re-establishment of divorce;<sup>95</sup> the abolition of public prayers in Parliament and the crucifix in public schools;<sup>96</sup> and the establishment of a state monopoly for funeral services.<sup>97</sup>

Although the education laws of the end of the 19<sup>th</sup> century were inevitably accompanied by a strong anti-Catholic feeling, the philosophy behind them was not, it should be noted, anti-religious: “We are not the enemies of religion”, Léon Gambetta said in a 1878 speech. “On the contrary, we are the servants of freedom of conscience and we are respectful of all religious and philosophical opinions”.<sup>98</sup> The same message was conveyed two years later by Jules Ferry, the architect of the Education laws, when he declared in Parliament that laïcité by no means equates with aversion towards religion but rather with “the doctrine of freedom of conscience and the independence of...civil society from the religious one”.<sup>99</sup> It was the historical influence of the Catholic Church over French institutions that these 19<sup>th</sup> century politicians wanted to efface, in other words, not religious feelings in general.

### 2.2.3.2. Tolerant Spirit of Legislative History & Parliamentary Debates of 1905 Law

The legislative history and parliamentary debates of the 1905 statute seem to confirm this stance and show unmistakably that the Law of Separation was by no means intended to be an act of hostility towards religion. As the *rapporteur général* and main architect of the law, Aristide Briand, told the French Parliament during the discussion,<sup>100</sup>

I remain more convinced than ever that the separation must be done in a spirit of marked liberalism. On this point, dear colleagues, I want to insist again ... You are taking back your freedom, so it is only fair that you should leave to the Church her own freedom and that you should let her enjoy it within the limits of public order. This, dear colleagues, is the separation.

Once the law was passed, Mr Briand congratulated MPs and summarized the spirit of the legislation in the following words: “The separation [should] not be the product of inter-religious fights [for] the law must be respectful of all faiths and must leave to them the possibility to freely express themselves”.<sup>101</sup>

<sup>89</sup> See G Cholvy & N J Chaline, *L'Enseignement Catholique en France aux XIXe et XXe Siècles* (Éditions du Cerf, Paris, 1995).

<sup>90</sup> Conseil d'État, Avis n.346.893 du 27 Novembre 1989, Assemblée Générale (Section de l'Intérieur), in Conseil d'État, *Jurisprudence du Conseil d'État sur le Port du 'Foulard Islamique' dans les Établissements Scolaires* (Centre de Documentation du Conseil d'État, Paris, 1997) (unpublished volume provided to the author by the Centre de Documentation of the Conseil d'État), § 1.

<sup>91</sup> *Ibid.*

<sup>92</sup> Loi du 18 Mars 1882 sur l'enseignement Primaire, in C Hafiz & G Devers, *Droit et Religion Musulmane* (Daloz, Paris, 2005) 17.

<sup>93</sup> *Ibid.*

<sup>94</sup> Loi du 5 Avril 1884, *Ibid.*

<sup>95</sup> Loi du 27 Juillet 1884, *Ibid.*

<sup>96</sup> Loi Constitutionnelle du 14 Août 1884, *Ibid.*

<sup>97</sup> Loi du 28 Décembre 1904, *Ibid.*

<sup>98</sup> See J-P Scot, *L'État Chez Lui, l'Église Chez Elle: Comprendre la Loi de 1905* (Éditions du Seuil, Paris, 2005) 95.

<sup>99</sup> *Id.* 97.

<sup>100</sup> A Briand, *Débats Parlementaires sur la Loi de Séparation de l'État et des Églises*, Séance du 25 Mai 1905. In Bruley, above at note 37, 331.

<sup>101</sup> *Id.* 343.

It is certainly true that a number of parliamentarians, particularly at the extreme left of the political spectrum, voted for the separation because of their hostility to religion in general and Catholicism in particular.<sup>102</sup> Yet this does not appear to have been the case for the French Parliament as a whole. The government of Emile Combes, for example, had initially submitted a much more radical draft that had put the separation principle as its sole priority and that lacked any meaningful reminder that religious freedom was to be equally protected.<sup>103</sup> It was, as has been observed, an “anti-clerical and partisan”<sup>104</sup> text that the relevant parliamentary commission did not hesitate to reject altogether until substantial changes were introduced, changes that eventually led to the successful bill introduced by Mr Briand.

There are further indications of the liberal character of the 1905 legislation. The Minister of Education of the time, Jean-Baptiste Bienvenu-Martin, explicitly defended the idea of separation on the basis that *laïcité* was the best way of granting citizens a more developed and comprehensive religious freedom than had in the past been the case. “The statute we are discussing here”, he said, “abrogates this kind of unwritten [anti-religious] stance [of the French State] and, at the same time that it proclaims the principle of freedom of conscience, it establishes its necessary component, i.e. freedom of religion”.<sup>105</sup> As for the Minister of Religious Affairs, he similarly declared during the parliamentary debates that it was not his intention to subtract “from religions even the smallest bit of freedom, and [that] the Bill introduced to the Senate ha[d], on the contrary, the purpose of providing France’s various religions with an autonomy that they [had] never known in the past”.<sup>106</sup> Once given the choice between “a separation accompanied by freedom and another without it”,<sup>107</sup> in other words, the French government as well as Parliament of 1905 seem to have deliberately chosen the former.

That the 1905 law was meant to be conciliatory is finally suggested by a simple mathematical consideration: the bill would have never been passed with such a comfortable majority (341 votes versus 233) without reaching out to at least part of the Catholic MPs and public. “In this country where millions of Catholics practise their religion”, the *rapporteur* emphasized during the debates, “it [should be] impossible to even think of a separation that is unacceptable to them”.<sup>108</sup> The fact that the Vatican did not immediately accept the partition<sup>109</sup> does not impinge the liberal character of the legislation, a liberalism that is clearly reflected in its prominent provision in favor of religious freedom as well as in a remarkable number of exceptions to the *laïcité* principle. After such a long interpenetration of Church and State, the separation was certainly hard—historically, psychologically and financially—for the Catholic Church to accept, but the 1905 law was not hostile to religion. It was hostile to the idea of an established religion<sup>110</sup>—and this, as the First Amendment of the American Constitution shows, is quite a different thing.

As this short overview suggests, it is possible to argue that *laïcité* does not imply hostility or even indifference but rather neutrality on the part of the State—and the exceptions to the separation principle are, as we shall see in a moment, so numerous and significant in their favorable attitude toward religious freedom that one cannot help reaching the conclusion that the separation of Church

<sup>102</sup> *Ibid.*

<sup>103</sup> Interesting comments on this project are to be found in the report compiled by Aristide Briand, *rapporteur* of the 1905 law, in A Briand, *Rapport Fait Au Nom de la Commission Relative A La Séparation des Églises et de l’État*, *Journaux Officiels*, Documentation Parlementaire, Session Extraordinaire, Annexe 2302, 254-302. See also M Lecomte, *Rapport Fait Au Nom de la Commission Chargée d’Examiner le Projet de Loi Adopté par la Chambre des Députés Concernant la Séparation des Églises et de l’État*, *Journaux Officiels*, Documentation Parlementaire, Sénat, 1905, Session Extraordinaire, Annexe 260, 529-567.

<sup>104</sup> See Charlier-Dagras, above at note 3, 91.

<sup>105</sup> In *Débats Parlementaires*, Séance du 4 Avril 1905, *Journaux Officiels*, Chambre des Députés, 1211.

<sup>106</sup> In *Débats Parlementaires*, Séance du 18 Novembre 1905, *Journaux Officiels*, Sénat, 1397.

<sup>107</sup> See C Benoist, in *Débats Parlementaires*, Séance du 27 Mars 1905, *Journaux Officiels*, Chambre des Députés, 28 Mars 1905.

<sup>108</sup> *Id.* 340 (emphasis added).

<sup>109</sup> The Catholic journal *La Croix* defined Separation Day as “an abysmal day, one of the most painful and humiliating of our times, and one that marks for France the beginning of a troubling era”. See 5 Juillet 1905, *Date Funeste*, in Bruley, above at note 37, 346.

<sup>110</sup> As it was observed during the parliamentary debates of the 1905 law, “[i]f the Catholic Church cannot live without state subsidies, then it means that it is already dead”. *Id.* 344.

and State is and was always meant to be, in France, all but absolute and that the two concepts are inseparable in that they define the limits of the other. To see them as conflicting ideas is, in my opinion, to lose sight of this truth and to grossly underestimate the magnitude of the separation endeavour.

### 2.2.3.3. French Exceptions to the Laïcité Principle:<sup>111</sup> The Triumph of an ‘Open Laïcité’

Given the important and highly sensitive role played by religion in France, simply ignoring this social phenomenon would have been a dangerous attitude for the State to adopt. As it emerges from the earlier discussion, the 1905 separation legislation did not run that risk. The formal principles it establishes are, to be sure, those of formal non-recognizance and non-financing, yet the exceptions to these principles are so frequent and widespread to call into question the extent and significance of such separation. These exemptions are also interesting grounds for comparison with America, for as we have seen in Chapter 1.2. and as we shall consider in the comparative part of this thesis (3.1.), the US separation seems to be, at least at the ‘financial’ level, even stricter and more uncompromising than that of supposedly ‘secular’ France. The following should thus be taken as examples of how the French legal system, contrary to what is commonly assumed, respects its engagements to protect freedom of religion and regards it as a most important right—even more important than the venerated laïcité. Indeed, such exceptions demonstrate that, more often than not, it is the laïcité that is limited by religious freedom—not the opposite.

#### (a) Religious Services in Prison (‘Aumônerie’) & Other Public Places

The first exception to the separation principle is also the most obvious for it is explicitly mentioned by the 1905 law: “[a]ll public expenses concerning the exercise of religions will be expunged from the [public] budget”, Article 2 reads, except for “those necessary to ensure the free exercise of religion in public buildings such as primary, middle and secondary schools, hospices, kindergartens and prisons”.<sup>112</sup> The state is laïque and must respect the principle of neutrality, therefore, but the warranty of freedom of religion posed by Article 1 of the 1905 law (and by French constitutional law in general) requires it to provide spiritual services to those who cannot freely reach their places of worship.<sup>113</sup> The principle of laïcité seems thus here subordinated to a fundamental freedom that is hierarchically superior to it, and a regime of strict separation between Church and State is in this instance impossible to achieve lest freedom of religion be violated—a choice that the 1905 law explicitly rejects.<sup>114</sup> It should also be noted that, when it comes to spiritual services in public places, the clerical personnel is chosen by the State—another exception to the separation principle: in the army, clergymen are jointly named by the Defence Minister and the concerned religion, at school they are submitted to the consent of the principal and in prison they are appointed by the Interior Minister and paid by the State.<sup>115</sup>

<sup>111</sup> As mentioned, the subject of laïcité is highly controversial and extensively debated in contemporary France. In this chapter, I take the unconventional—but by no means unprecedented—step of approaching it from the system of exceptions that the 1905 law introduces rather than from the dogma it is supposed to embody. To put it in another way, I regard the ‘derogations’ to the laïcité principle as conveying the essence of the 1905 statute on separation of Church and State. For as it has been observed, “[i]n many respects it is possible to say that it is the exceptions to the separation regime that allow us to approach, a contrario, a definition [of laïcité]”. See Messner, Prélot, Woehrling & Riassetto, above at note 7, 393. This is a position shared by a number of commentators. See e.g. Charlier-Dagras, above at note 3, 203; Garay, Chélini-Pont, Tawil & Anseur, above at note 83, 797; and Hafiz & Devers, above at note 92, 26.

<sup>112</sup> Loi du 9 Décembre 1905 Concernant la Séparation des Églises et de l’État, Article 2, in Bruley, above at note 37, 435. As it was observed, Article 2 “embodies the vanishing of the official character of Catholic ministers” (C Hunkins, *La Séparation de l’Église et de l’État en France*, Davy, Paris, 1910, 52) for the State no longer interferes in matters of religious discipline and “has no longer any right to intervene in spiritual matters” (L. Crouzil, *Quarante Ans de Séparation: Étude Historique et Juridique 1905-1945*, Didier, Toulouse, 1946, 106).

<sup>113</sup> See for example J-B Trotabas, *La Notion de Laïcité dans le Droit de l’Église Catholique et de l’État Républicain* (LGDJ, Paris, 1960) 150-7; L. Crouzil, *Quarante Ans de Séparation: Étude Historique et Juridique* (Didier, Paris, 1946) 129-30; J-M Lemoyne De Forges, « Laïcité et Liberté Religieuse en France », in J-B D’Onorio, *La Liberté Religieuse Dans le Monde* (Éditions Universitaires, Paris, 1991) 154-5.

<sup>114</sup> See on the point A Delavesne, *Du Culte et de Son Exercice Public d’Après la Loi du 9 Décembre 1905 sur la Séparation des Églises et de l’État* (Rousseau, Paris, 1905) 63.

<sup>115</sup> Charlier-Dagras, above at note 3, 126.

## b) Recognition of Religious Hierarchies

Article 2 of the 1905 law ensures that “[t]he Republic does not recognize...any religion”,<sup>116</sup> yet as the previous exception about the *aumônerie* suggests, this is a legal fiction. The French State has always had, both before and after 1905, fruitful and long-lasting relationships with all major religions present on French territory. Due to the sovereign status of the Vatican, the relationship with the Catholic Church is the most visible since it follows the rules of international law and both countries have diplomatic missions in their respective territories. In the Eastern France lands of Alsace-Moselle, moreover, the French President still has a veto over nominations (which are usually decided by the Vatican) of the bishops of Metz and Strasburg,<sup>117</sup> while the representatives of the Jewish, Muslim and other religions are also regularly consulted by the French State through the Religions Office (*Bureau des Cultes*) of the Ministry of Internal Affairs and by the Division for Religious Affairs (*Division des Affaires Religieuses*) of the Foreign Office.<sup>118</sup> The absence of official recognition does not consequently prevent the State from engaging in discussions with religious authorities both in France and abroad, as the recent state-sponsored creation of the *Conseil Français du Culte Musulman* (CFCM) clearly suggests. In some cases, these relationships take curious forms indeed: the French President is for example co-prince, with a Spanish bishop, of the Andorra Kingdom (a place where Catholicism is still the official religion) and he is also *Chanoine honoraire* (honorary clergyman) of the Lateran basilica in Rome.<sup>119</sup>

## (c) Financial Exceptions for Religious Activities

A third, important derogation to the separation regime concerns public subventions in favour of religious activities.<sup>120</sup> The formal rule, as we have seen, is strict prohibition of any form of financing to religions—yet in this case, too, the French regime of *laïcité* shows a curious divide between theory and practice.<sup>121</sup> The fact that “[t]he Republic...does not finance or subsidizes any religion”<sup>122</sup> by no means prevents the French State from giving monetary aid to religions or individuals when this money is meant to support religious activities that (i) are considered of general interest or that (ii) are necessary to ensure the free exercise of religion.

An example of the first case is given by the payment granted to priests for the above-mentioned work of spiritual counselling (*aumôneries*) in prisons, schools, etc. or for celebrating religious funerals of soldiers or even statesmen<sup>123</sup>—a payment that the *Conseil d’État* explicitly defined as “a legitimate remuneration for a given service”.<sup>124</sup>

As for those forms of financing accorded in order to guarantee freedom of religion, a case in point is the regime of religious buildings. According to the law of separation, the French State remains the formal owner of a substantial number of places of Catholic worship, yet religious associations have the right to use them free of charge.<sup>125</sup> A 1909 statute, in addition, exempts these buildings as well as those belonging to religious associations from property, finance and tax revenues obligations,<sup>126</sup> while

<sup>116</sup> Loi du 9 Décembre 1905 Concernant la Séparation des Églises et de l’État, Article 2, in Bruley, above at note 37, 435.

<sup>117</sup> See e.g. R Metz, «Le Président de la République Française, Dernier et Unique Chef d’État Au Monde Qui Nomme Encore des Evêques», in (1986) *Revue de Sciences Religieuses*, n.60, 63.

<sup>118</sup> Charlier-Dagras, above at note 3, 128. See also Hafiz-Devers, above at note 92, 23.

<sup>119</sup> Charlier-Dagras, above at note 3, 130.

<sup>120</sup> A good discussion of the point is O Schrameck, «La Fin de la Laïcité Fiscale», *Actualité Juridique Droit Administratif* (AJDA), (1988), n.17, 267-9.

<sup>121</sup> Indeed, given the following cases, it is possible to argue that the principle established by Article 2 of the 1905 law (prohibition of subventions to religions) is purely theoretical—and that this is necessarily so, because French local authorities (particularly *les communes*) can by no means ignore religious affairs for the simple reason that they own a good portion of the (Catholic) places of worship.

<sup>122</sup> Loi du 9 Décembre 1905 Concernant la Séparation des Églises et de l’État, in Bruley, above at note 37, 435.

<sup>123</sup> See for example *Conseil d’État*, *Commune de Perquié*, 6 January 1922.

<sup>124</sup> *Ibid.*

<sup>125</sup> On the point, see the previous chapter. See also G Lamarzelle & H Taudiere, *Commentaire Théorique et Pratique de la Loi du 9 Décembre 1905* (Plon, Paris, 1906) 94.

<sup>126</sup> See Loi du 19 Juillet 1909, Articles 1382-4, *Code Général des Impôts*.

other recognized examples of public financing in favour of religion are the VAT immunity for all activities of religious associations;<sup>127</sup> the indirect public financing for erecting religious edifices that also include a conference room, a museum or a cultural centre;<sup>128</sup> and the maintenance expenses that local governments face to redecorate the religious buildings they own.<sup>129</sup> It should finally be mentioned that the generous French welfare system assists religious personnel too: clergymen and members of religious associations benefit from a number of social security measures (such as illness, pension and maternity leaves) which are covered by the State through a specially-created religious personnel system ('Caisse d'Assurance Veillesse des Cultes', 'Caisse d'Assurance Maladie des Cultes', etc).<sup>130</sup>

#### (d) Religious Freedom in Private & Public Education

As we have seen in the previous section, laïcité was born at school as a religious versus secular education issue, so it is not surprising that French people are particularly attached to their learning system and regard it as the highest expression of the separation between Church and State. While it is certainly true, as we shall see in the next chapter, that l'école laïque is an especially sensitive area in France, this does not mean that it is hostile to religion. French school canteens, for example, provide a special dietary service approved by the Jewish and Muslim authorities—and the same situation can be found in the army.<sup>131</sup> The Conseil d'État has recognised this as a religious right and supervises it so that the sanitary rules regulating the religious slaughtering of animals are both respectful of hygiene and religious tenets.<sup>132</sup> Another exception to the laïcité at school is given by religious holidays: again, France's Conseil acknowledged that children can legitimately excuse themselves from school on the official holy days of their religion<sup>133</sup> and that this situation is fully in accordance with the 1905 law.

But it is perhaps in reference to private education that the religious tolerance of the French legal system is most significant. Freedom of teaching (and therefore freedom to impart and receive a private—and thus also religious—education) has been recognized as a right having constitutional value in France,<sup>134</sup> and a 1959 law explicitly allows the State to financially support both private and public schools, subject to an agreement ('contrat') with the institute.<sup>135</sup> While the contents of these agreements have often been a matter of controversy,<sup>136</sup> in 1994 the Conseil Constitutionnel openly acknowledged that "the legislator can give financial help to private teaching institutions on the basis of the nature and importance of their contribution to the accomplishment of the teaching mission".<sup>137</sup> Without derogating from laïcité, therefore, the French state can and does finance religious instruction, insofar further showing that French law does not favour a system of strict separation but one that takes into account the religious freedom of its citizens.<sup>138</sup> This approach is further confirmed by the matter of religious instruction in class: although this cannot be carried out within school

<sup>127</sup> Charlier-Dagras, above at note 3, 143.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid. See also, on the point, C Goyard, «Police des Cultes et Conseil d'État du Concordat à la Séparation», (1994) *Revue Administrative*, 344.

<sup>130</sup> Ibid.

<sup>131</sup> Charlier-Dagras, above at note 3, 128.

<sup>132</sup> See Conseil d'État, *Rapport Public: Un Siècle de Laïcité*, above at note 82, 325.

<sup>133</sup> Ibid. See also M-R Goy, *Du Droit Interne au Droit International: Le Facteur Religieux et l'Exigence des Droits de l'Homme* (Publications de l'Université de Rouen, Rouen, 2000) 217-235.

<sup>134</sup> See *Loi des Finances du 31 Mars 1931*, in *Journal Officiel*, 1 April 1931, 3585.

<sup>135</sup> See P Chevallier, B Groperrin & J Maillet, *L'Enseignement Français de la Révolution à Nos Jours* (Mouton, Paris, 1968) 101.

<sup>136</sup> In French law, a school can sign a contract with the State ('école sous contrat') or not ('école hors contrat'). Contrary to the latter, the former benefits from a number of financial advantages but must conform to rules that are substantially similar to those regulating public education. In particular, the écoles sous contrat must respect the religious freedom of their students and are obliged to welcome pupils irrespectively of their religious beliefs. See for details Article L-442-1 of the French Code de l'Éducation.

<sup>137</sup> Conseil Constitutionnel, *Journal Officiel*, 15 January 1994, 832.

<sup>138</sup> See in this sense D Amson & Al, «Les Libertés de l'Ésprit», in *Protection des Libertés et Droits Fondamentaux* (Montchrestien, Paris, 2004) esp. 203-294.

programmes, the law dedicates one day a week, usually a Wednesday, to optional religious teaching.<sup>139</sup>

(e) Geographical Exceptions to Separation: Colonial Algeria, Alsace/Moselle & French Overseas Territories

Few exceptions to the *laïcité* and separation principles are more visible than the geographical ones. Just to mention one noticeable example, France has never applied the 1905 law to its Algerian colony and the relationships with the Catholic Church in Algerian France were all pervasive, while the connection with Islam was even closer. Indeed, it was the French State that paid imams and, among them, only those whose name had previously been agreed with French authorities could preach in the mosques.<sup>140</sup> Even the organization of the pilgrimage to the Mecca was carried out by the French General Governor of Algeria.<sup>141</sup>

Geographical exceptions to the *laïcité*, it should be noted, are by no means limited to bygone times but are still very much alive. The three departments of the Alsace-Moselle in Eastern France are to this day subject to a different regime and the 1905 law of separation does not apply to them.<sup>142</sup> While the reasons for this situation are both historical (the events of the First World War)<sup>143</sup> and sociological (the special attachment of the people of these lands to religion),<sup>144</sup> the consequences of this special regime are nevertheless momentous: in Alsace-Moselle, the French state officially recognizes four religions only (Catholicism, Protestantism, Judaism and Lutheranism—but not Islam);<sup>145</sup> the school separation between Church and State does not apply and, indeed, public schools provide students with a religious teaching in the four recognized religions;<sup>146</sup> as mentioned above, the French President, a unique case among secular countries, directly intervenes in—and has a veto power over—the nominations of the Catholic bishops of Strasburg and Metz as well as those of the other recognized religions;<sup>147</sup> and, finally, the prohibition of public financing does not apply there either and religious ministers from the recognized churches all receive their salary directly from the French State.<sup>148</sup> It should also be noted that, in 1925, the Conseil d'État acknowledged the specificity of the Alsace-Moselle regime and confirmed that the 1905 law of separation does not affect those territories.<sup>149</sup>

The Alsace-Moselle exception is not an isolated case. For historical reasons or because of the significant power of the local churches,<sup>150</sup> the 1905 law does not concern a number of French overseas territories ('Départements d'Outre-Mer' or DOM, and 'Territoires d'Outre-Mer' or TOM) such as the Wallis and Futuna Islands (located in the South Pacific, between Fiji and Samoa), New Caledonia (located in Melanesia, in the South-West Pacific) and French Polynesia<sup>151</sup> (located in the Southern Pacific Ocean). In these distant lands, the French State retains significant influence over religious affairs and

<sup>139</sup> See Article 56 of the law of September 30, 1986, *Journaux Officiels, Lois et Décrets*, 1<sup>er</sup> Octobre 1986, 11760. See also *Journal Officiel*, 24 April 1991, 5408-9 and J Sitruk, *L'État et les Religions en France: Réflexions et Perspectives* (Grand Rabinat de France, Paris, 2003).

<sup>140</sup> See on the point S. Pierre-Caps, « Les 'Nouveaux Cultes' et Le Droit Public » (1990) *Revue du Droit Public* 1073 at 1076-7.

<sup>141</sup> Haut Conseil à l'Intégration, *L'Islam dans la République: Rapport* (HCI, Paris, 2000), 17.

<sup>142</sup> On the special situation in Alsace-Moselle, see for example J Regula, *Le Droit Applicable en Alsace et en Lorraine* (Daloz, Paris, 1938) 134; and P Kessler, *Régime Concordataire et Droit Public en Alsace-Lorraine* (Strasbourg, Doctoral Thesis, 1954).

<sup>143</sup> These territories were conquered by Germany in 1871 and were returned to France only after WWI. Germany having maintained the regime of Napoleon's Concordat, France decided, once it regained the lands in 1918, not to change their status. See B Basdevant-Gaudemet & F Messner (eds), *Les Origines Historiques du Statut des Confessions Religieuses dans les Pays de l'Union Européenne* (PUF, Paris, 1999) 77-92.

<sup>144</sup> See e.g. Hafiz & Devers, above at note 92, 26, 126 and 129.

<sup>145</sup> Conseil d'État, *Rapport Public: Un Siècle de Laïcité*, above at note 82, 266.

<sup>146</sup> See e.g. B Leannec, *Cultes et Enseignement en Alsace et en Moselle* (Cerdic, Strasbourg, 1977) 30-40.

<sup>147</sup> See Charlier-Dagras, above at note 3, 126. See also: R Metz, *Le Président de la République Française, Dernier et Unique Chef d'État au Monde qui Nomme Encore des Evêques*, in (1986) *Revue des Sciences Religieuses*, n.60, 63.

<sup>148</sup> *Ibid.*

<sup>149</sup> See Conseil d'État, *Syndicat National Des Enseignants du Second Degré, Actualité Juridique Droit Administratif (AJDA)*, 2002, 63 note B. Toulemond.

<sup>150</sup> See on the point Conseil d'État, *Rapport Public: Un Siècle de Laïcité*, above at note 82, 269.

<sup>151</sup> See on the point Y Berre, « Quelques Aspects du Régime Juridique des Cultes dans les Dom/Tom », in (1985) *Supplément*, n.155, 149-151.

continues to co-manage religious activities and oversees religious communities, while priests are formally submitted to the authority of the representatives of the French state, i.e. the Préfet and the Gouvernateur.<sup>152</sup> The Mayotte Island in the Indian Ocean (between Madagascar and Mozambique) is a particularly interesting example of this: the overwhelming majority of the local population being Muslim, the 1905 law of separation does not affect this territory and instead a special regime applies that coheres to the particular sociological and demographic circumstances of the island.<sup>153</sup>

When it comes to geographical exceptions, therefore, the conclusion seems inescapable that laïcité was never meant to be an immutable dogma but rather a flexible concept that conveyed the willingness of the French legal system to respect the habits of the various components of the population.<sup>154</sup> “La [l]aïcité is at its best when it is applied in a tolerant way”,<sup>155</sup> one author observed. As we shall see in the next chapter, this regime of exemptions will not sit well with—and will be a powerful argument against—the position taken by the French parliament in Statute 228/2004, for it leaves considerable leeway to precisely those ‘communalist’ tendencies (such as the wearing of a Muslim veil) that French society and politicians so wholeheartedly abhor.<sup>156</sup>

#### 2.2.4. CONCLUSION: WHAT PLACE FOR RELIGION IN FRENCH LAW?

As we have seen in this chapter, the study of laïcité and its application to French law suggests that the historical component of French secularism should not be confused with the legal one.

Historically speaking, there is no doubt that laïcité was in France the result of a long and painful conflict through which the French State emancipated itself from religion—and religion in France has for centuries meant the Catholic Church.<sup>157</sup> As one author underlined, this historical heritage “has [regrettably] accredited an ideal and somehow mythic vision of laïcité, which is often considered as a condition of complete indifference towards religious activities. Since the State does not (formally) recognise any religion, in other words, some observers have deduced that it should ignore them all. While this is not the state of the law, it is a vision still very much present in French national culture”.<sup>158</sup> As we shall see below, and paradoxically, this vision partly explains the historical tendency of the French state to control and micro-manage the religious phenomenon.<sup>159</sup>

Yet as this chapter has argued, the genius of the French separation movement consists exactly in the fact that it possessed the courage to separate history and law—and to produce a statute that went in a direction of tolerance, not conflict.<sup>160</sup> “One principle is at the heart of the 1905 law: freedom”, Dominique de Villepin, a former Prime Minister but also an expert on the Separation, wrote in 2004.

<sup>152</sup> Ibid.

<sup>153</sup> Conseil d’État, Rapport Public: Un Siècle de Laïcité, above at note 82, 271. As we shall see in Chapter 2.3., however, Statute 228/2004 on conspicuous religious signs at school does apply to the Mayotte Island, an interesting situation as well as a source of embarrassment for French MPs given that the population is overwhelmingly Muslim. For details, see Chapter 2.3.

<sup>154</sup> See e.g. F Messner, *Régime des Cultes: Caractères et Principes Généraux* (Jurisclasseur, Paris, 2000), 2 (Fasc 230).

<sup>155</sup> C Goyard, «Police des Cultes et Conseil d’État du Concordat à la Séparation», (1984) *Revue Administrative*, n.11, 344.

<sup>156</sup> For further comments on the matter, see Chapters 3.2. & 3.3.

<sup>157</sup> Not for nothing was the country called “Gallia Devota”. See Poulat, above at note 11, 324. As mentioned, because of these circumstances it is undeniable that the historical dimension of laïcité possesses certain elements of anti-Catholicism and anti-religion that are difficult to get rid of.

<sup>158</sup> Messner, Prélot, Woehrling & Riassetto, above at note 7, 422. See also J Robert & J Duffar, *Droits de l’Homme et Libertés Fondamentales* (Montchrestien, Paris, 1999) 587-614.

<sup>159</sup> I will consider this phenomenon in some detail in Chapter 2.3. when dealing with the events leading up to the adoption of Statute 228/2004. For the moment, the reader may benefit from the following observation: “The French State follows the ‘Bonapartist’ model of religious management. Because of the State’s sovereignty, its jurisdiction is potentially unlimited in the area of religious organization, and religious communities are under an obligation to respect the State’s right. Sovereignty defined in this way implies that the State defines its own power and the limits of its own jurisdiction. Because the State is sovereign, it can find that part or all of its agencies have capacity to review all the activities of religious communities or that they lack jurisdiction in the religious field”. See Garay, Chélini-Pont, Tawil & Anseur, above at note 83, 813.

<sup>160</sup> See e.g. G Koubi, «La Laïcité dans le Texte de la Constitution», (1997) *Revue de Droit Public*, 1301; C Choucrocy, «Les Principes Constitutionnelles de la Liberté de Religion», in *La Cours de Cassation et la Constitution de la République* (PUAM, Paris, 1995) 219; and T Célérier, *Dieu dans la Constitution*, (1991) *Petites Affiches*, n.67, 15.



“The law establishes a direct link between laïcité and the revolutionary ideas affirmed in the 1789 Declaration of Human Rights”<sup>161</sup> and, as such, it is “a law of tolerance and peace”.<sup>162</sup> The last thing the 1905 legislature wanted, in other words, was to reignite the religious wars of the past centuries.<sup>163</sup> There had been too much blood, violence and division for this: the time had come for tolerance—religious and otherwise—and the only way to ensure such tolerance was to separate the destiny of the French State from that of any religion.<sup>164</sup> Not unlike their American cousins, the greatness of the Separation Fathers consists in the fact that, in the midst of the storm, they chose freedom over oppression.<sup>165</sup>

It is exactly for this reason that, since 1905, France’s highest administrative court has consistently espoused a tolerant reading of laïcité. “The Conseil d’État has [adopted] a liberal approach as well as an open conception of laïcité”, the institution of Palais Royal wrote, in the third person, in its 2004 Report, which was compiled in the midst of the Muslim veil controversy. “It has always attempted to ensure a liberal application of the separation law by remaining vigilant over the day-to-day implementation of the principle of free exercise of religion, except for those restrictions required by public order or the organizational rules of the different religions”.<sup>166</sup> In so doing, the high judges seem to have embraced—at least until 2004—the position of Montesquieu, who famously asked in his *Ésprit des Lois* whether “it is not the distinctive sign of the genius to know where uniformity is needed and where exceptions are required”.<sup>167</sup>

As I shall explain in the following chapter, at the beginning of the 1980s this tolerant attitude came under serious attack from politicians and the French public alike, particularly in the run up to the veil controversy. Moderation, we will soon realize, does not always pay<sup>168</sup>—especially when history, law and politics are faced with the explosive matter of Islam.



<sup>161</sup> D De Villepin, *Une Certaine Idée de la République*, in Bruley, above at note 37, 8. See also, *Ibid.*: “...the law of 1905 [is] foundational for our republican identity [and is] indissolubly liberal and laïque”.

<sup>162</sup> Scot, above at note 98, 337.

<sup>163</sup> If French law had to blindly follow the emotional path of the country’s religious past, in other words, the 1905 statute would have provided not a separation—strict or loose—between Church and State and a limitation of religious freedom, but a prohibition of religion tout court. Yet this was not the choice of the French framers. Their choice was to make freedom of conscience and religion—which they saw as a socio-cultural necessity—prevail over a situation of hostility towards religion—which they interpreted as a contingent historical situation, soon destined to fade away.

<sup>164</sup> In the same sense, see J-J Israel, *Droit des Libertés Fondamentales* (LJDJ, Paris, 1998); and J-M Belorgey, «Laïcité, Religions Spirituelles, Sectes», (1999) *Regards sur l’Actualité*, 39-51 (unpublished paper provided by the author).

<sup>165</sup> In this respect, the country’s violent religious past has certainly left its mark on the legal system, but the 1905 statute did not and could not translate into a situation of forcible ignorance of—and least of all opposition to—religion, for the French framers, like their American counterparts, realized at a very early stage that doing so would have killed freedom and would have demolished the very foundation of the separation they were trying to build—as well as a good portion of the constellation of rights provided by the revolutionary era.

<sup>166</sup> *Id.* 265. See also *Revue Française de Droit Administratif* (RFDA), *Le Juge Administratif et les Libertés Publiques*, Colloque du 30 Septembre 2003, Dossier de la RFDA, 1045-1124.

<sup>167</sup> «La grandeur du génie ne consisterait-elle pas à savoir dans quel cas il faut l’uniformité et dans quel cas il faut des différences?» Montesquieu, *Esprit des Lois*, XXIX, 18, quoted in Charlier Dagrás, above at note 3, 15.

<sup>168</sup> See for a related problem G Van Tuong, «Comment Concilier la Liberté Religieuse et l’Obligation d’Assiduité Scolaire», (1995) *La Semaine Juridique*, n.21.

## Chapter 2.3.

# The Place of the Muslim Veil in French Law & Policy

### 2.3.1. STATUTE 228/2004, RELIGIOUS FREEDOM & THE CONSEIL D'ÉTAT

On 17 March 2004 the French Parliament approved statute 228/2004, a piece of legislation that soon came to be known as the 'anti-veil law'. "In elementary, intermediate and secondary schools", it reads, "the wearing of signs or clothes through which students conspicuously manifest a religious affiliation is prohibited".<sup>1</sup> A few months later, an application circular explained that "[t]he signs and clothes that are prohibited are those that lead someone to be immediately recognized for his or her religious allegiance, such as the Islamic veil, whatever its name, the kippa or a cross of manifestly excessive dimension".<sup>2</sup> The new statute modified the Education Code ('Code de l'Éducation') and represents the epilogue of a long and intense national debate commenced at the end of the 1980s and concluded fifteen years later with the approval of a text that took the world by surprise but that was generally well-received in France. Strongly supported by school teachers and principals (the people who, according to the pre-2004 jurisprudence, were responsible for deciding whether the Muslim veil was admissible in class); repeatedly demanded by parliamentarians from the ruling UMP party ('Union pour un Mouvement Populaire')<sup>3</sup> and, more recently, the Socialist party ('Parti Socialiste');<sup>4</sup> and favoured by a majority of the public (according to one survey, 75% of French people approved of the legislation),<sup>5</sup> the adoption of the law enjoyed a near unanimity in France's parliament.

Indeed, with 494 votes in favour versus 36 against at the Assemblée Nationale, and 276 versus 20 at the Sénat, the French Congress gave the impression of a veritable landslide.<sup>6</sup> "I congratulate the republican dialogue that we have engaged during the examination of this bill", a satisfied Jean-Pierre Raffarin, then Prime-Minister, told applauding MPs. "After this debate, after a vote of this magnitude,

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<sup>1</sup> Article 1 reads, in its entirety, as follows: « Il est inséré, dans le code de l'éducation...un article L. 141-5-1 ainsi rédigé: 'Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement un appartenance religieuse est interdit. Le règlement intérieure rappelle que la mise en œuvre d'une procédure disciplinaire est précédée d'un dialogue avec l'élève'. Journal Officiel, Loi 2004-228 du 15 Mars 2004 Encadrant, en Application du Principe de Laïcité, le Port de Signes ou de Tenues Manifestant une Appartenance Religieuse Dans les Écoles, Collèges et Lycées Publics, Journal Officiel n. 65 du 17 Mars 2004, 5190.

<sup>2</sup> « Les signes et tenues qui sont interdits sont ceux dont le port conduit à se faire immédiatement reconnaître par son appartenance religieuse tels que le voile islamique, quel que soit le nom qu'on lui donne, la kippa ou une croix de dimension manifestement excessive ». Journal Officiel, Circulaire Relative à la Mise en Oeuvre de la Loi n.2004-228 du 15 Mars 2004 Encadrant, en Application du Principe de Laïcité, le Port des Signes ou de Tenues Manifestant une Appartenance Religieuse dans les Écoles, Collèges et Lycées Publics, in Journaux Officiels, Application du Principe de Laïcité dans les Écoles, Collèges et Lycées Publics (Éditions des Journaux Officiels, Paris, 2005).

<sup>3</sup> The UMP Party was founded in 2002 in order to support the then newly re-elected President Jacques Chirac. France's main conservative/gaullist (centre-right) party, it was established as a merger between the Gaullist-conservative Rassemblement pour la République (RPR), the conservative-liberal Démocratie Libérale (DL) and a good part of the centrist Union pour la Démocratie Française (UDF). In May 2007 Nicolas Sarkozy, formerly Interior Minister and President of the UMP, was elected President of the French Republic and appointed François Fillon (who in 2004 was Education Minister and wrote a circular on the application of Statute 228-2004) as his Prime Minister. The UMP introduced and strongly supported the bill on conspicuous religious signs at school. For further information see R Harmsen & M Spiering, *Party Politics, National Identity and European Integration* (Rodopi, Amsterdam & New York, 2004) (esp. 37 ff). See also [http://www.u-m-p.org/site/index.php/ump/l\\_ump/notre\\_histoire](http://www.u-m-p.org/site/index.php/ump/l_ump/notre_histoire) (at 10 March 2007).

<sup>4</sup> The French Socialist Party (centre-left) was founded by François Mitterand in 1971. Inspired by the theories developed in the first part of the 19<sup>th</sup> century by the first socialist thinkers such as Saint-Simon, Fourier, Cabet and Leroux, it soon established itself as the second most important political party in France. On the Muslim veil issue, it adopted a swinging attitude: initially opposed to a new statute, in 2003 it rallied to the ruling UMP and its support ensured the final landslide vote. For more information, see e.g. D Bergougnieux, *Des Poings et Des Roses: Le Siècle des Socialistes* (La Martinière, Paris, 2005); and P Bezbakh, *Histoire du Socialisme Français* (Larousse, Paris, 2005).

<sup>5</sup> F Lorcerie, *La Politisation du Voile: L'Affaire en France, en Europe et dans le Monde Arabe* (L'Harmattan, Paris, 2005) 20.

<sup>6</sup> Assemblée Nationale, *Analyse du Scrutin*, in *Laïcité: Le Débat à l'Assemblée Nationale. Séances Publiques du 3 au 10 Février 2004* (Documentation Française, Paris, 2004) 325-7 (hereinafter, 'Débats').

the Republic and laïcité come out reinforced”.<sup>7</sup> “This is not a text of the majority but of all the representatives of the Republic”,<sup>8</sup> the UMP spokesperson said after his party approved the legislation with 330 votes against 18. And very much the same message came from the centre-left benches: “The law here proposed has become a necessary one”, the leader of the Parti Socialiste declared in explaining his group’s position. “[And] it is exactly because this is a necessary law that the Socialists have approached the debate with a responsible and constructive spirit”.<sup>9</sup> Once again, the figures do not leave much room for interpretation: out of the 142 votes expressed by the Socialist Party, 140 were in favour and only 2 MPs opposed the legislation.<sup>10</sup> At least in terms of numbers, therefore, the 2004 law did not come about by chance but was the pinnacle of a political enterprise that, as we shall see, developed from a series of parliamentary initiatives at the beginning of the new millennium.

This national consensus, however, did not render the French legislation acceptable in the eyes of foreign observers. Why prohibit ‘conspicuous’ religious symbols, they asked? Apart from the three signs explicitly mentioned by the ministerial circular, how is it possible to distinguish a ‘discreet’ symbol from a ‘conspicuous’ one? And why exclude religious insignia but admit all others? If the aim of French MPs, as the parliamentary debates suggest, was to produce a symbolic law, send a strong warning and forcefully reassert the existence of an exception française, one must acknowledge that they succeeded.

But what kind of signal does the new law convey? This chapter argues that the message is both complex and contradictory. As we have seen in Chapter 2.1., France is no stranger to religious excesses and the inter-relationship between Church and State resulted, historically speaking, in an endless and painful process that only came to an end in 1905.<sup>11</sup> Considering this historical legacy, a number of observers maintain, it is no wonder that France and her people have since 1905 been witnessing an ever-increasing detachment from religion.<sup>12</sup> The 2004 statute, so this argument goes, is simply the latest expression of such aloofness.

While this analysis contains elements of truth, it overlooks three fundamental issues that will form the basis of this chapter.

The first is French law: as we have seen in Chapter 2.2., both the letter and the spirit of the 1905 legislation and subsequent jurisprudence are characterized by a consistent tolerance toward religion. French law has recognized freedom of conscience as one of its fundamental principles and the Conseil d’État has consistently limited religious liberty only when the public order is infringed. So how does the new legislation fit into this framework?

As we shall see in this chapter, the answer is not very well—indeed, one could argue that the new statute represents the reversal of decades of accepted jurisprudence. When the veil controversy first arose in 1989, the Conseil d’État adapted its moderate religious freedom stance to it and held that any veil dispute had to be dealt with by school authorities according to an individual, case-by-case approach.<sup>13</sup> In the following years the Conseil confirmed this position and decided, in a series of important judgments, that the protection of religious freedom accorded by French law did not permit any general or absolute interdiction of religious signs at school (1992<sup>14</sup> and 1994),<sup>15</sup> that the Muslim

<sup>7</sup> Débats, above at note 6, 316.

<sup>8</sup> Clément, P. In Débats, above at note 6, 309.

<sup>9</sup> Galvany, J. In Débats, above at note 6, 313.

<sup>10</sup> See Analyse du Scrutin, above at note 6, 325-6.

<sup>11</sup> For examples of rejection of the separation law by the Catholic hierarchy, see Chapter 2.1.

<sup>12</sup> For surveys on French people’s ‘reluctance’ towards religion, see Chapter 2.1.

<sup>13</sup> See Conseil d’État, Avis n.346.893 du 27 Novembre 1989, Assemblée Générale (Section de l’Intérieur), in Conseil d’État, Jurisprudence du Conseil d’État sur le Port du ‘Foulard Islamique’ dans les Etablissements Scolaires (Centre de Documentation du Conseil d’État, Paris, 1997) §1 (unpublished volume provided by the Centre de Documentation of the Conseil d’État). See also the following section for details.

<sup>14</sup> See Conseil d’État, Kherouaa, 2 November 1992, Req. n. 130394 in Conseil d’État, Jurisprudence du Conseil d’État sur le Port du ‘Foulard Islamique’ dans les Etablissements Scolaires, above at note 13, 15-16.

<sup>15</sup> Conseil d’État, Melles Yilmaz, 14 March 1994, Req. 145656, in Conseil d’État, Jurisprudence du Conseil d’État sur le Port du ‘Foulard Islamique’ dans les Etablissements Scolaires, above at note 13, 39-55.

veil was not, in itself, incompatible with the *laïcité* principle (1994);<sup>16</sup> and that only in very specific and narrow circumstances could this piece of cloth—like any other symbol—be forbidden.<sup>17</sup> These exceptions were limited to cases of refusal to participate in gym and sports classes (1995);<sup>18</sup> specific and proven episodes of proselytism or propaganda that resulted in public disorder (1996);<sup>19</sup> and disruptions and protests that disrupted the public order of the school (1996).<sup>20</sup>

Yet over these years it became more and more obvious that the accommodation reached by the Conseil d'État was not appreciated by a large portion of France's politicians. Ultimately, in 2004 they enacted a new statute that, while entirely legitimate and the result of an intensely democratic choice, introduced an entirely different approach to the matter: religious signs at school are henceforth the exception rather than the rule. And years of consistent Conseil d'État jurisprudence was repudiated. Consequently, the second question that the new law poses concerns the relationship between the legal and political sides of the new legislation. Statute 228, I will argue, is an essentially political enterprise—French politicians' proud answer to what they considered as a legal deadlock—and represents in some respects the triumph of politics over law. It also embodies, in my opinion, a certain setback for French law, for it leaves the impression that, one century after the separation statute, the anti-religious dimension of French history has unexpectedly re-emerged.

This leads us to the third and last problem posed by the new legislation: is it a general law—the distinctive product of the French *laïcité*—targeted against all religious signs at school, or is it rather directed to a specific religion and object?

Adopting a chronological approach, this chapter will first explain how the veil affair arose and will then consider the Conseil d'État jurisprudence. It will also highlight the political attempts made over time in order to disavow the method of the administrative judge and adopt a stricter, more repressive solution. And it will then deal with the preparation, discussion, interpretation and application of Statute 228/2004. Only by doing so will we be able to understand the impact of the new legislation on French law, separate the statute's political dimension from the legal one, and measure whether and to what extent this piece of legislation is anti-religious or simply anti-Muslim.

### 2.3.2. ORIGINS OF THE VEIL AFFAIR (1989), POSITION OF THE CONSEIL D'ÉTAT (1989) & JOSPIN CIRCULAR (1989)

#### 2.3.2.1. The Veil Affair (October 1989)

The origins of the French veil controversy go back to the end of the 1980s, when a number of young girls decided to go to class with a veil (or hijab) on their head as a sign of their faith in Islam.<sup>21</sup> These numerically insignificant<sup>22</sup> but highly symbolic episodes created a sense of unease among teachers and principals, a feeling that reached its pinnacle in October 1989 when the head of a suburban school in Creil, in the Oise Department, decided, after consulting the educational community, to forbid the veil on the ground that it conflicted with the *laïcité* principle and to refuse to admit three recalcitrant girls.<sup>23</sup> Due to the backlash of the Rushdie affair in Europe<sup>24</sup> and remembering that Islam, with its five

<sup>16</sup> See Sections 2.3.3. and 2.3.4. for details.

<sup>17</sup> See Sections 2.3.3. and 2.3.4. for details.

<sup>18</sup> Conseil d'État, Aoukili, 10 March 1995, Req. 159981, in Conseil d'État, *Jurisprudence du Conseil d'État sur le Port du 'Foulard Islamique' dans les Établissements Scolaires*, above at note 13, 63-7.

<sup>19</sup> Conseil d'État, *Jurisprudence du Conseil d'État sur le Port du 'Foulard Islamique' dans les Établissements Scolaires*, above at note 13, 95.

<sup>20</sup> Conseil d'État, Chabou, 27 November 1996, Req. 170207-8, in Conseil d'État, *Jurisprudence du Conseil d'État sur le Port du 'Foulard Islamique' dans les Établissements Scolaires*, above at note 13, 123.

<sup>21</sup> See on the point Zouari, F. *Ce Voile qui Déchire la France* (Ramsay, Paris, 2004) 174. See also R Kastoryano, «France's Veil Affair: National Institutions and Transnational Identities», (2004) *Inroads*, n.15, 63-79; A Garay & E Tawil, *Tumulte Autour de la Laïcité* (Daloz, Paris, 2004), Croniques, 225.

<sup>22</sup> According to one report, the 1989 incidents “never really threatened public order and involved no more than 200 out of the 300.000 Muslim girls at school”. M Laroque, «Le Principe de Laïcité et les Signes d'Appartenance à une Communauté Religieuse», *Actualité Juridique du Droit Administratif (AJDA)*, 20 January 1990, 42.

<sup>23</sup> Two of them were Moroccans and one Tunisian. See on the point F Zouari, above at note 21, 19-20.

million adherents in France, is by a long way the second most popular religion there, the Creil episode immediately gained national prominence and generated continuous media attention.<sup>25</sup> It should also be noted that, since the Iranian Revolution<sup>26</sup> and a series of terrorist attacks against French interests,<sup>27</sup> the image of the Muslim veil had irreparably deteriorated in France and this piece of cloth was increasingly associated with violence and religious fundamentalism (in 1986, under the picture of a heavily-veiled woman, *Le Figaro* magazine asked whether “We will still be French in 30 years”).<sup>28</sup> The Creil controversy, therefore, touched a sore spot at a problematic time for France’s identity. As one author underlined, “[t]he Eternal France, dear to General De Gaulle, appeared brutally menaced at her very roots, as if the headscarf issue had brought the proof that a threat was hanging over the country’s identity”.<sup>29</sup>

The rapid and exceptionally intense publicity of the headscarf controversy seemed to take France’s political landscape by surprise. The centre-left government led by Michel Rocard had consistently defended both anti-racism and *laïcité*, and was plainly uneasy about a *laïcité* that appeared to be especially directed against the Muslims. As for the centre-right coalition, which had traditionally been more critical of immigrants’ impact on French identity, it had just ended a long political fight in favour of private Catholic education and it was hardly in a position to raise its voice in defence of a strict interpretation of *laïcité*. At the beginning, therefore, both coalitions appeared troubled by the veil issue—a confusion graphically conveyed by the words of Bernard Stasi, then Deputy-President of the Social Democrats but later Chairman of President Chirac’s *Laïcité* Commission: “It is of course preferable, considering the *laïcité* principle, that there should not be too many visible religious signs at school”, he declared, “but the most important thing is not to exclude [students]”.<sup>30</sup> As for Education Minister Lionel Jospin, after much hesitation he expressed his hostility to the school exclusions and emphasized that “[t]he purpose of French schools is to welcome students, not reject them”.<sup>31</sup> Although, as we shall see, politicians soon changed their minds, the debate on the veil in 1989 took the form of a veritable media race joined by all major French TV stations and newspapers—and so in a matter of weeks new headscarf cases emerged in Marseille, Avignon, Noyon, Poissy and several other French cities and schools. The veil question, a previously non-existent problem, had suddenly turned into a national crisis.

With the purpose of solving the Creil controversy and placating this exceptional media pressure, in October 1989 Education Minister Lionel Jospin decided to request a legal advice (*‘Avis’*) from the *Conseil d’État*, France’s highest administrative court.<sup>32</sup> He wanted to know, in particular, “[w]hether, considering the Constitution and republican laws and taking into account the organizational rules of

<sup>24</sup> In 1988, Salman Rushdie’s novel *Satanic Verses* sparked a major controversy by questioning the divine status of the Prophet Muhammad and the sanctity of the Koran. Muslims burned the book, which was banned in several countries and became infamous when in 1989 the Ayatollah Khomeini issued a fatwa against Rushdie and his publisher. Threatening their lives, Rushdie had to go into hiding. See e.g. W R Benét, *The Reader’s Encyclopaedia* (A & C Black, London, 1988) 914.

<sup>25</sup> For an extensive analysis of the ways French media inflated the veil issue, see T Deltombe, *L’Islam Imaginaire: La Construction Médiatique de l’Islamophobie en France, 1975-2005* (La Découverte, Paris, 2005) (esp. 98-121).

<sup>26</sup> The term ‘Iranian Revolution’ indicates the momentous events that transformed Iran from a monarchy (under King Mohammad Reza Pahlavi) to an Islamic Republic (under Ayatollah Ruhollah Khomeini, the leader of the revolution and founder of the Islamic Republic). Although these dates are disputed, the time span of the revolution might be said to have begun in January 1978 with a series of major demonstrations and to have ended with the approval of the new theocratic Constitution. For more information see e.g. S A Arjomand, *Turban for the Crown: The Islamic Revolution in Iran* (Oxford University Press, Oxford, 1988); E Abrahamian, *Iran Between Two Revolutions* (Princeton University Press, Princeton, 1982); and D Harris, *The Crisis: The President, The Prophet, and The Shah: 1979 and The Coming of Militant Islam* (Little & Brown, London, 2004).

<sup>27</sup> See e.g. M Hecker, *La Presse Française et la Première Guerre du Golfe* (L’Harmattan, Paris, 2003); and R Saddek, *L’Islam Dans le Discours Médiatique: Comment les Médias Se Représentent l’Islam and France?* (Editions Al-Bouraq, Beyrouth, 1988).

<sup>28</sup> *Id.* 99.

<sup>29</sup> “Yet [this issue was merely the result] of the shock produced by the discovery of the immovability of a [Muslim] population that everyone had previously considered as foreign”. See F Gaspard & F Khosrokhavar, *Le Foulard et la République* (La Découverte, Paris, 1995) 63.

<sup>30</sup> RFI, 26 October 1989 in Deltombe, above at note 25, 103.

<sup>31</sup> *Id.* 102.

<sup>32</sup> The *Avis* of the *Conseil d’État* are not published unless governments so decide. Given the importance of the 1989 case, the Minister of Education made it public. See Laroque, above at note 22, 42.

the public school [system], wearing signs of allegiance to a religious community is or is not compatible with the principle of laïcité”.<sup>33</sup>

### 2.3.3.2. The ‘Avis’ of the Conseil d’État (27 November 1989)

In what is commonly regarded as the landmark decision on the matter, the Conseil d’État replied on 27 November 1989 that the wearing of religious signs was compatible with laïcité, unless a series of conditions were met.<sup>34</sup> The judges wrote:<sup>35</sup>

Students’ freedom implies the right to express and manifest their religious beliefs within school buildings, in respect of the principle of pluralism and freedom of others, and unless this threatens [“sans qu’il soit porté atteinte”] the teaching activities, the content of programmes and the duty to attend classes”.<sup>36</sup>

As a consequence, the Conseil d’État stressed that

“the wearing of signs through which students intend to manifest their religious allegiance is not per se incompatible with the principle of laïcité, to the extent that this constitutes their exercise of freedom of expression and freedom to manifest their religious allegiance.

Yet the administrative court placed some limits on this liberty by mentioning a number of situations where the Islamic veil—like any other religious symbol—could legitimately be forbidden. In an exceptionally dense passage, it emphasized that<sup>37</sup>

This freedom does not permit students to wear religious signs that, because of their nature, because of the conditions in which they are worn or because of their conspicuous or defiant [“revendicatif”] character, constitute an act of pressure, provocation, proselytism, propaganda, or threaten the dignity or liberty of the student or other members of the educational community, or compromise their health or security, or disturb the normal functioning of school activities and their educational role, or finally trouble the school’s order or the normal functioning of the education service.

In accordance with the purpose of the French schooling system, the Conseil also noted that religious signs<sup>38</sup>

should not be an obstacle to the accomplishment of those missions that parliament conferred to public education, which must allow in particular the cultural development of the child, his or her preparation

<sup>33</sup> F Messner, P H Prélot, J M Woehrling & I Riassetto, *Traité de Droit Français des Religions* (Éditions du Juris-Classeur, Paris, 2003) 1134.

<sup>34</sup> For an analysis of the 1989 Avis, see J Rivéro, «L’Avis de l’Assemblée Générale du Conseil d’État en Date du 27 Novembre 1989», in *Revue Française de Droit Administratif* (RFDA), vol. 6, n.1, January-February 1990, 1-6.

<sup>35</sup> “...le port par les élèves de signes par lesquels ils entendent manifester leur appartenance à une religion n’est pas, par lui-même, incompatible avec le principe de laïcité, dans la mesure où il constitue l’exercice de la liberté d’expression et de manifestation de croyances religieuses”. Conseil d’État, Avis N.346.893 du 27 Novembre 1989, above at note 13, § 1.

<sup>36</sup> “La liberté ainsi reconnue aux élèves comporte pour eux le droit d’exprimer et de manifester leurs croyances religieuses à l’intérieur des établissements scolaires, dans le respect du pluralisme et de la liberté d’autrui, et sans qu’il soit porté atteinte aux activités d’enseignement, au contenu des programmes et à l’obligation d’assiduité”. Conseil d’État, Avis n.346.893 du 27 Novembre 1989, Assemblée Générale (Section de l’Intérieur), in Conseil d’État, *Jurisprudence du Conseil d’État sur le Port du ‘Foulard Islamique’ dans les Etablissements Scolaires*, above at note 13, § 1.

<sup>37</sup> “...cette liberté ne saurait permettre aux élèves d’arborer des signes d’appartenance religieuse qui, par leur nature, par les conditions dans lesquelles ils seraient portés individuellement ou collectivement, ou par leur caractère ostentatoire ou revendicatif, constitueraient un acte de pression, de provocation, de prosélytisme ou de propagande, porteraient atteinte à la dignité ou à la liberté de l’élève ou d’autres membres de la communauté éducative, compromettraient leur santé ou leur sécurité, perturberaient le déroulement des activités d’enseignement et le rôle éducatif des enseignements, enfin troubleraient l’ordre dans l’établissement ou le fonctionnement normal du service public». Conseil d’État, Avis n.346.893 du 27 Novembre 1989, above at note 13, § 1.

<sup>38</sup> “...ne saurait faire obstacle à l’accomplissement des missions dévolues par le législateur au service public de l’éducation, qui doit notamment permettre l’acquisition par l’enfant d’une culture, sa préparation à la vie professionnelle et à ses responsabilités d’homme et de citoyen, le développement de sa personnalité, et doit permettre de lui inculquer le respect de l’individu et de garantir l’égalité entre hommes et femmes». Conseil d’État, *Un Siècle de Laïcité: Rapport Public* (Documentation Française, Paris, 2004) 338.

for professional life and his or her responsibilities as a man and citizen, the development of his or her personality, and must inculcate in the child the respect for others and the equality of men and women.

Like any other religious sign, the judges concluded, the Muslim veil was not incompatible with the concept of *laïcité* and had to be allowed—unless it came with one of the above-mentioned conditions, in which case it could be forbidden.<sup>39</sup> In any event, it was up to school principals and disciplinary commissions across the country to assess each case individually, implying that any general ban was contrary to the law. “It is up to those school authorities invested with disciplinary powers to evaluate, under the control of the administrative judge, if the wearing by a student...of a sign of religious allegiance...constitutes so serious a violation to call for the application of disciplinary sanctions...[such as] exclusion from the school”,<sup>40</sup> the judges wrote. The result was that, as the *Commissaire du Gouvernement*<sup>41</sup> emphasized, “[t]he issue of the Islamic veil is not one of principle but a matter to be considered case-by-case and no general interdiction can accordingly be accepted”.<sup>42</sup>

Tolerance was thus the rule—four fifths of exclusions of veiled schoolgirls which came before the *Conseil d’État* during the 1990s were declared illegal<sup>43</sup>—and any prohibition was, in accordance with national and international law, based either on a disturbance to public order<sup>44</sup> or on a violation of the duty to attend classes.<sup>45</sup> As one author observed, furthermore, “[b]y avoiding entanglement with the question of the meaning of the Islamic veil and by respecting its symbolic nature, the [Conseil d’État] considered [it] like any other symbol through which students wish to individually manifest their religious allegiance within the public school [system]”.<sup>46</sup> The problem was not the symbol, the *Conseil d’État* repeatedly emphasized, but the behaviour.

### 2.3.2.3 The ‘Jospin’ Circular (12 December 1989)

It soon became clear, however, that this cautious approach by the *Conseil d’État* was not appreciated by politicians, who were obviously not impenetrable to the marked hostility of French people to the Muslim veil.

With the aim of clarifying the *Conseil d’État* decision for the benefit of those school principals confronted with veil incidents, two weeks after the *Avis* was delivered the Ministry of Education issued a circular (‘*Circulaire Jospin*’) that took a far more restrictive approach to the matter. “I would like to give you some directions and indications that will help you apply, firmly and within the scope

<sup>39</sup> As one author underlined, «The supreme administrative jurisprudence has rejected the arguments that stigmatized the abstract and presumed meanings of the Muslim veil and which had nevertheless been recognized by certain administrative tribunals”. See A Ferrari, «La Lutte des Symboles et l’Espoir du Droit: Laïcité et Voile Islamique en France au Début du Nouveau Millénaire», (2004) *Migrations Société*, vol.16, n.96, 86. In 1995, for example, the administrative tribunal of Clermont-Ferrand described the veil as “per se conspicuous and linked to an obedience of foreign-based religious extremism”. See A Ferrari, above at note 39, note 84, 86.

<sup>40</sup> *Conseil d’État*, *Avis* n.346.893 du 27 Novembre 1989, above at note 13, § 3.

<sup>41</sup> The position of ‘*Commissaire du Gouvernement*’ was created on 12 March 1831. According to Article L7 of the *Code de Justice Administrative*, the *Commissaire* is a member of the *Conseil d’État* who “exposes publicly and in total independence his or her opinions on a certain legal case and suggests a solution”. The opinion is not binding for the final decision. On the point, see B Asso & F Morena, *Contentieux Administratif* (Studyrama, Paris, 2006); D Chauvaux & J H Stahl, «Le *Commissaire*, le *Délibéré* et l’*Équité* du Procès », *Actualité Juridique Droit Administratif* (AJDA), *Chroniques*, 2116; O Schwartz, *La Compatibilité Entre la Conception Française et la Conception Européenne du Commissaire du Gouvernement près le Conseil d’État*, (Université de Lille II, Lille, 2002) (Master’s Thesis).

<sup>42</sup> In C Hafiz & G Devers, *Droit et Religion Musulmane* (Daloz, Paris, 2005) 197.

<sup>43</sup> See for example *Haut Conseil à l’Intégration*, *L’Islam dans la République: Rapport au Premier Ministre* (Documentation Française, Paris, 2001) 240.

<sup>44</sup> As one author observed, “[t]he *Conseil d’État* established the principle according to which students have the right to express their religious beliefs within school buildings, to the extent that certain limits are respected, limits that concern public order”. Hafiz & Devers, above at note 42, 195.

<sup>45</sup> As one author observed, “[b]y affirming the [Islamic veil’s] non-violation of the *laïcité* principle and by condemning provocations and proselytism, the *Conseil d’État* fostered a spirit of tolerance over all kinds of integralism, the acceptance of differences over the rejection of the others”. Laroque, above at note 22, 45. See Section 2.3.4. for details.

<sup>46</sup> Ferrari, above at note 39, 85.

of the law, the *laïcité* principle”,<sup>47</sup> Lionel Jospin wrote to all French teachers. After acknowledging that “[t]he Conseil d’État established that there cannot be a general and absolute interdiction of the veil or any other religious sign”,<sup>48</sup> the document curiously went on to state that “[w]hen a conflict emerges in reference to a religious symbol, a dialogue must immediately be engaged with the youth and parents so that, in the interest of the student and the good functioning of the school, the wearing of these signs be renounced”.<sup>49</sup> It was therefore in the withdrawal of the veil that, according to the Minister, a solution to the problem had to be found—quite a peculiar reading of a judicial decision that was inspired by toleration rather than prohibition.<sup>50</sup> As one author underlined, “[f]or this circular the wearing of a religious sign [is] of itself regrettable”.<sup>51</sup>

As we shall see, this position soon became dominant within France’s political and educational cultures. Indeed, the Jospin Circular was enthusiastically welcomed by school teachers and principals<sup>52</sup> alike and can be regarded as the first of a long series of attempts by French politicians to temper the liberalism of the Conseil d’État. It is to these other attempts that I now turn.

### 2.3.3. THE JUDICIAL APPLICATION OF THE 1989 ‘AVIS’ BY THE CONSEIL D’ÉTAT (1989-1994)

Despite the overconfident political stance taken by the Jospin Circular, in the following years the jurisprudence of the Conseil d’État systematically reaffirmed its 1989 position. Although limits were possible—particularly for those behaviours that threatened public order<sup>53</sup> or the security of children,<sup>54</sup> or that translated into a refusal of the duty of assiduity<sup>55</sup>—any general prohibition of the

<sup>47</sup> Ministère de l’Education Nationale, Circulaire du 12 Décembre 1989 (Respect de la Laïcité, port de Signes Religieux par les Elèves et Caractère Obligatoire des Enseignements), in *Application du Principe de Laïcité dans les Écoles, Collèges et Lycées Publics*, above at note 2, 329.

<sup>48</sup> *Ibid.*

<sup>49</sup> «Lorsqu’un conflit surgit à propos du port des signes d’appartenance religieuse...le dialogue doit être immédiatement engagé avec le jeune et ses parents afin que, dans l’intérêt de l’élève et le souci du bon fonctionnement de l’école, il soit renoncé au port de ces signes». Ministère de l’Education Nationale, Circulaire du 12 Décembre 1989, in *Application du Principe de Laïcité*, above at note 2, 330.

<sup>50</sup> As an authoritative source wrote, “[o]bviously the Conseil d’État wanted to defuse the grenade of intolerance at school”. Laroque, above at note 22, 43.

<sup>51</sup> Hafiz & Devers, above at note 42, 196. In this sense see also: “Under the pretext of explaining the decision, the Jospin Circular betrayed its spirit”. (G Lebreton, «Port de Signes Religieux et Laïcité de l’Enseignement Public: Note à la Décision Kherouaa», *Petites Affiches*, 24 May 1993, n.62, § B); “...the Minister’s circular is more restrictive than the [1989] *Avisto* to the extent that it incited heads of schools to invite young people to renounce religious signs”. (D Kessler, «Neutralité de l’Enseignement Public et Liberté d’Opinion des Elèves: A Propos du Port de Signes Distinctifs d’Appartenance Religieuse dans les Etablissements Scolaires», *Revue Française de Droit Administratif (RFDA)*, Jan-Feb. 1993, 9 (1), 117); “Attached to the specific function of the *laïcité*, the Education Minister’s Circular willingly restricted its application”. (G Koubi, *Commentaire à la Décision Kherouaa*, *Recueil Dalloz Sirey*, 1993, n.9, 110). For a commentary of the Jospin Circular, see finally V-C Durand-Prinborgne, «Laïcité Scolaire et Signes d’Appartenance Religieuse: La Circulaire Jospin du 12 Décembre 1989», *Revue Française de Droit Administratif (RFDA)*, 1990, 11.

<sup>52</sup> “...the Jospin Circular has been applied with little hesitation by school authorities, particularly since these were already in favour of a *laïcité de combat* (‘confrontational *laïcité*’). See Lebreton, above at note 51, I (b).

<sup>53</sup> The Conseil d’État, for instance, confirmed the exclusion of some veiled students “who had protested in the school and had gravely disturbed the normal functioning of the institution even though the object of these manifestations was to ensure the free expression of the beliefs”. See R Schwartz, *La Jurisprudence de la Loi de 1905*, unpublished paper sent to me by the author on 22 September 2005.

<sup>54</sup> According to one author, “[a]lthough the Conseil d’État...admitted the possibility to exclude signs that represented a threat to the ‘dignity or liberty of the student or other members of the educational community’, it has never regarded the veil as belonging to this category, insofar considerably weakening the argument of those who consider this piece of clothing as an element of discrimination against women”. Ferrari, above at note 39, 86.

<sup>55</sup> According to French Family Minister François Jakob, this duty was introduced into French law by the 28 March 1882 education statute and implies a double obligation: to enrol any child between the age of 6 and 16 in a school (or to provide him or her with a family-based education) and to attend classes—which in turn implies the duty for the French state to provide the pedagogical tools necessary for the child’s education. See C Jakob, *Communication en Conseil des Ministres de Monsieur Christian Jacob, Ministre délégué à la Famille, Sur la Question de l’Assiduité Scolaire et la Responsabilité des Familles* (Ministère de la Famille, Paris, 26 March 2003). This duty is provided by Article L.111-2 of the Code de l’Éducation (“Tout enfant a droit à une formation scolaire qui, complétant l’action des familles, concourt à son éducation. La formation scolaire favorise l’épanouissement de l’enfant, lui permet d’acquérir une culture, lui prépare à la vie professionnelle et à l’exercice de ses responsabilités d’homme et de citoyen. Elle constitue la base de l’éducation permanente. Les familles sont associées à l’accomplissement de ces missions”). See Conseil d’État, *Association ‘Un Sysiphe’*, 10 July 1995, *Actualité Juridique Droit Administratif (AJDA)*, 1995, p.644, concl R Schwartz; *Rec CE* p.292.



veil or other religious signs was considered illegal by the supreme judges and thus annulled.<sup>56</sup> “The distinction has not been sufficiently made between the obligations of students and those of teachers”, the Commissaire du Gouvernement wrote in 1992. “Since teaching must be secular, the obligation of neutrality is absolute for teachers who cannot express a religious faith in their activities. On the contrary, since freedom of conscience is the rule, such a principle cannot be imposed upon students who are free to manifest their faith, the only limit to this manifestation being other people’s rights”.<sup>57</sup> It is testament to this tolerance that of the forty-nine expulsions of veiled schoolgirls from French public schools that came before the Conseil d’État between 1992 and 1999, only eight were upheld.<sup>58</sup> Three important judgments—decided in 1992, 1994 and 1995 respectively—are representative of this tolerant approach and deserve to be considered here in some detail.

### 2.3.3.1. The ‘Kherouaa’ Case (1992): Any General Prohibition of the Muslim Veil is Illegal

The Kherouaa case<sup>59</sup> represents the first judicial application of the 1989 Avis and is possibly the most important of these Conseil d’État decisions. In September 1990, the Montfermeil College adopted a new rule that explicitly “prohibit[ed] the wearing of the Muslim veil”<sup>60</sup> and, soon afterward, three Muslim girls refused to withdraw their headscarves and rejected all conciliatory attempts made by school authorities. As a response, the college began disciplinary action against these students, who sued on the ground of religious discrimination. While the matter was being assessed by the courts, however, the school amended the internal rule in order to give it a more general (and less facially discriminatory) dimension: under the title “Respect of Laïcité”, the revised regulation stated that “[a]ll distinctive signs—related to clothes or otherwise—of a religious, political or philosophical nature are strictly prohibited”.<sup>61</sup> In December 1990 the three girls were excluded from the college and, in July 1991, the Paris Administrative Tribunal<sup>62</sup> rejected their challenge, basing its decision on a strict interpretation of the laïcité principle and on the Jospin Circular.<sup>63</sup>

The girls’ appeal to the Conseil d’État had a radically different outcome. After criticizing the Jospin Circular as a document that had “altered the spirit”<sup>64</sup> of the 1989 Avis and “incited heads of schools to request young people to renounce [their] religious signs”,<sup>65</sup> the Commissaire du Gouvernement expressed his regret that the 1989 Avis was being given a subordinate and less liberal interpretation than the judges at Palais Royal had intended. “We are startled by the resistance that this Avis has aroused”, Mr Kessler continued, because “in the present affair, both the Education Minister and the [Paris] Administrative Court have been willing to interpret it in a [different and more restrictive] sense”.<sup>66</sup> Yet the 1989 decision, the Commissaire reminded, was moderate and wished to “reverse an exceedingly rigid approach”<sup>67</sup> of the laïcité at school, while at the same time he stressed that “la laïcité in teaching

<sup>56</sup> “The jurisprudence reproduces the equilibrium reached by the Avis of the General Assembly”, the institution of Palais Royal wrote: “Any automatic interdiction (“interdiction par principe”) is illegal, but it is possible to sanction those behaviors that threaten public order, endanger the security of students or that translate into a refusal of the obligation of assiduity”. Conseil d’État, Note sur les Décisions Relatives au ‘Foulard Islamique’ Rendues par le Conseil d’État Statuant aux Contentieux, above at note 13. See also the following decisions: Conseil d’État, Kherouaa et Autres, 2 November 1992, AJDA 1993, 833; Diles Yilmaz, 14 March 1994, JCP G 1994, IV, 1989.

<sup>57</sup> See Conseil d’État, Kherouaa et Autres, 2 November 1992, AJDA 1993, p.833.

<sup>58</sup> Haut Conseil à l’Intégration, above at note 43, 240.

<sup>59</sup> Conseil d’État, Kherouaa et Autres, 2 November 1992, AJDA 1993, p.833. See on the point B Legros, Les Conditions de l’Expression des Croyances Religieuses par les Elèves dans les Etablissements d’Enseignement Scolaires Publics: A Propos du Port du Voile Islamique (Daloz, Paris, 1995) 135.

<sup>60</sup> Kessler, above at note 51, 113.

<sup>61</sup> For a discussion on the point see R Cabrillac, M Frison-Roche & T Revet, Libertés et Droits Fondamentaux (Daloz, Paris, 2005) 361.

<sup>62</sup> Tribunal Administratif de Paris, Kherouaa J.C.P. 1992.II.21837, 2 July 1991, Note C. Bertrand.

<sup>63</sup> As an author underlined, “[t]his judgment was closer to the Minister’s Circular than the [Conseil d’État] Avis: the administrative court adopted the [Circular’s] restrictive thesis and [consequently] rejected the request to wear the Muslim veil”. P Tedeschi, «Le Port du Foulard Islamique Comme Signe Distinctif par des Elèves à l’Interieur d’un Etablissement d’Enseignement Public», La Semaine Juridique (JCP), Ed. G. n. 6, § 2 (C).

<sup>64</sup> Kessler, above at note 51, 113.

<sup>65</sup> Id. 117.

<sup>66</sup> Ibid.

<sup>67</sup> Id. 114.

does not mean prohibition of the expression of the various religions but toleration of them all”.<sup>68</sup> The motivations of the school officials also were severely criticized (“These college officials have apparently interpreted the Islamic veil as a sign in itself threatening for pupils’ dignity”)<sup>69</sup> and the point was made that French society appeared to be increasingly hostile to the veil: “The public opinion will only note your [pro-veil] answer”, the Commissaire wrote, “and I am by no means sure that it is ready for it”.<sup>70</sup> Yet while this was going to be “a difficult decision given the stakes this question raises in terms of social peace”,<sup>71</sup> the 1989 Avis could not and should not be interpreted as regarding the Muslim veil as incompatible with the principle of the equality of sexes or dignity of students: “We are firmly opposed to this approach”,<sup>72</sup> the Commissaire wrote.

The judgment of the Conseil d’État followed the conclusions of the Commissaire and unambiguously rejected any ban on the Muslim veil. The high judges wrote:<sup>73</sup>

Because of the generic character of this [amended school] prohibition, the latter creates a general and absolute interdiction [that conflicts] with the freedom of expression allowed to students by the neutrality and laïcité rules of the public education system.

Although the Muslim veil—like any other sign—could certainly be forbidden if one of the requirements of the 1989 Avis were met, any general interdiction similar to the one introduced by the Montfermeil College was illegal and had to be cancelled. The highest administrative court concluded that.<sup>74</sup>

[It has not] been proved nor even alleged [by school authorities] that the conditions in which the Muslim veil was worn were of such a nature [as to constitute] an act of oppression, provocation, proselytism or propaganda, or one that threatened the dignity, liberty, health or security of students, or one that troubled the school’s order or the normal functioning of the education service.

The Muslim veil was to be admitted unless one of these circumstances had been proved.

### 2.3.3.2. The ‘Yilmaz’ Case (1994): A Geographically Limited Prohibition of the Veil is also Illegal

In *Yilmaz*,<sup>75</sup> decided two years after *Kherouaa*, the Conseil d’État confirmed its case-by-case stance<sup>76</sup> as well as the tolerant character of laïcité.<sup>77</sup> On 11 June 1991 the Joachim du Bellay College in Angers adopted an internal rule according to which “[s]tudents must have proper clothing and attire at school. No pupil will be admitted in class, study room or canteen with his or her head covered”.<sup>78</sup> Two Muslim girls challenged the regulation as discriminatory and, on 13 June 1992, the Nantes Appeals Court rejected their request on three grounds. First, the judges wrote, the rule “was meant to translate, in respect of the founding principles of the Republic, the agreement existing within the educational community and did not create any discrimination based on belief”.<sup>79</sup> Secondly, the prohibition “only concerned religious signs related to head covers and...was not applicable to

<sup>68</sup> Ibid. In the same sense see: “The laïcité principle, established by the Republican laws and confirmed by the 1946 and 1958 Constitutions, imposes a strict observation of the neutrality of the public service in order to better guarantee users’ freedom of conscience, even assigning to this public service the mission to verify that the free exercise of religion is assured”. *Commentaire à la Décision Kherouaa*, *Actualité Juridique de Droit Administratif (AJDA)*, 20 December 1992, 791.

<sup>69</sup> Id. 117.

<sup>70</sup> Id. 117. See also: “Perfectly in accordance with France’s legal tradition, the *Kherouaa* decision is also in line with the international treaties ratified by France”. See LeBreton, above at note 51, I (a).

<sup>71</sup> Id. 118.

<sup>72</sup> Ibid.

<sup>73</sup> Conseil d’État, *Kherouaa et Autres*, 2 November 1992, *AJDA* 1993, 833;

<sup>74</sup> Ibid. This, as we shall see, is the almost ‘ritual’ formula used by the Conseil d’État in a majority of pre-2004 veil cases.

<sup>75</sup> Conseil d’État, *Yilmaz*, 14 March 1994, 145656, in *Jurisprudence du Conseil d’État*, above at note 13, 43.

<sup>76</sup> As one author wrote, “[t]he *Yilmaz* decision confirms the preference [of the Conseil d’État] for a case-by-case method”. J-F Flauss, « Le Port des Signes Religieux Distinctifs à l’École: Vers l’Épilogue », *Petites Affiches*, 1 March 1995, n.26, 24.

<sup>77</sup> As one author underlined, “a tolerant form of laïcité is from now on the only legitimate form of religious neutrality of the Republic”. Flauss, above at note 76, 24.

<sup>78</sup> Centre de Documentation du Conseil d’État, « Communiqué de Presse: Le Conseil d’État Statue Pour la Deuxième Fois au Contentieux sur le Port du Foulard à l’École », in *Jurisprudence du Conseil d’État*, above at note 13, 41.

<sup>79</sup> M Kessler, « Conclusions sur le Cas *Yilmaz* », in *Jurisprudence du Conseil d’État*, above at note 13, 46.

corridors, playgrounds or administrative offices”.<sup>80</sup> Lastly, “the law does not prevent those students who are unwilling to adopt rules of behavior out of line with their religious beliefs to get an education outside the public system”.<sup>81</sup>

The Conseil d’État, once again, strongly disagreed. To the extent that it had not been proved that special circumstances were at the basis of such regulation, the internal rule of the college violated the freedom of expression of students and had to be annulled. The highest justices wrote that <sup>82</sup>

The principle of laïcité...forbids...every kind of discrimination based on students’ religious beliefs in their access to public education. Since it has not been established that special circumstances justified [the prohibition] measure, the latter violate[d] the freedom of expression which is recognized to students by the neutrality and laïcité principles of the public education system.

Specifically targeted against the Muslim veil,<sup>83</sup> in other words, this school interdiction infringed upon students’ freedom because it went beyond a more limited prohibition that other reasons such as the security of students or the normal functioning of the education system might have justified.<sup>84</sup> As the Commissaire du Gouvernement underlined,<sup>85</sup>

We might [have] admit[ed] this rule if it [had been] seriously argued that it was adopted with the aim of avoiding severe incidents or violence among groups of students which [could have] perturb[ed] the educational community. [But in this case] Ms Yilmaz was the only one to wear the veil and this did not create a climate of violence which might have justified, at least temporarily, such prohibition.

As for the argument that the veil was still admitted in some school premises, it was equally rejected: “This rule institutes a permanent prohibition which covers the majority of school premises...”,<sup>86</sup> the judges of Palais Royal wrote. As a consequence, “[i]t would be...contrary to the 1989 Avis to admit such limitations [because] the Conseil d’État never wished to generically forbid a religious sign, and in particular the Muslim veil, in class”.<sup>87</sup>

Like the Kherouaa case, the Yilmaz judgment was harshly criticized by a good portion of French public opinion and scholars as ‘too lax’: “Yilmaz consecrate[es] an almost absolute right of wearing religious signs”,<sup>88</sup> an author wrote, by adopting a “messianic case-by-case approach...that makes happy the Conseil d’État members sitting at Palais Royal but not heads of schools or teachers”.<sup>89</sup> This hostility was even acknowledged by the Commissaire du Gouvernement: “We must recognize”, he wrote, “that public opinion has not entirely appreciated your [Kherouaa] decision since it considered it simpler to prohibit religious symbols tout court”.<sup>90</sup> This was not the position of the Conseil d’État and of French law, however, and Ms Yilmaz’s veil was therefore to be allowed and the school rule annulled.

### 2.3.3.3. The ‘Aouiki’ Case (1995): A Prohibition of the Veil in Sports Classes is Legitimate

The third, fundamental decision of the Conseil d’État on the interpretation of its 1989 Avis is given by the Aoukili<sup>91</sup> judgment.<sup>92</sup> At the end of 1993, two Muslim girls were asked by their teacher to

<sup>80</sup> Flauss, above at note 76, 26.

<sup>81</sup> Kessler, above at note 79, 46.

<sup>82</sup> Conseil d’État, Yilmaz, above at 75, 43-4.

<sup>83</sup> As the Commissaire du Gouvernement underlined in his conclusions, “...it is clear that...this rule aims at targeting religious symbols and, in particular, the Islamic veil”. Kessler, above at note 79, 51.

<sup>84</sup> Centre de Documentation du Conseil d’État, Communiqué de Presse, above at note 78, 41.

<sup>85</sup> Kessler, above at note 79, 52.

<sup>86</sup> Conseil d’État, Yilmaz, above at note 75, 44.

<sup>87</sup> Kessler, above at note 79, 51. “The laïcité principle is a guarantee for the student”, the Commissaire concluded; “It certainly imposes the respect of that communal good which is the school, but this aspect is not threatened when a religious sign, or a foulard, is worn”. Kessler, above at note 79, 53. See in the same sense: “...the laïcité principle constitutes the very foundation of students’ rights to wear religious signs”. Flauss, above at note 79, 24.

<sup>88</sup> Flauss, above at note 76, 26.

<sup>89</sup> Ibid.

<sup>90</sup> Kessler, above at note 79, 53.

<sup>91</sup> Conseil d’État, Aoukili, 10 March 1995, in JCP G 1995, II, 33431, note by Nguyen Van Tuong.

withdraw their veils during a gym class for security reasons (it was argued that the headscarf may hamper their movements) and because a school regulation so required. The latter, approved in March 1993, read as follows: “Students’ obligations...include the duty to attend classes and respect the rules related to the functioning of the institution. The allegiance to a religion, political party or philosophical group cannot be invoked in order to exempt a student from attending certain classes or with the effect of violating certain educational requirements”.<sup>93</sup>

After Fouzia and Fatima refused to remove their veils and were suspended, the father challenged this decision as discriminatory. Once again, the lower tribunal—in this case the Lyon Appeals Court—ruled against the girls on the ground that the prohibition was justified by security reasons and by the fact that, in the specific circumstances of the case, the girls’ behaviour and that of their father had seriously disturbed the public order of the school. “Wearing the veil is obviously dangerous when practising sports”,<sup>94</sup> the Tribunal wrote. “[T]he attacked decisions are not based on the violation...of a general and absolute prohibition of wearing a religious sign [and] do not have the purpose or effect of discriminatorily threatening the free exercise of religion...”<sup>95</sup> because “they only and simply reproduce [the 1989] Avis”.<sup>96</sup>

This time the Conseil d’État agreed. Due to safety issues and because both teachers and schools were legally responsible in the event of injuries or accidents to students, “[t]he fact of wearing the veil is incompatible with gym classes”,<sup>97</sup> the judges of Palais Royal held.<sup>98</sup> In addition, it said, “the school regulation only recalls the principles [of laïcité and freedom of expression] as well as the limits posed to religious signs at school [and does] not have the purpose or effect of forbidding [such signs] in a general and absolute way”.<sup>99</sup> The Conseil d’État also mentioned the fact that such exclusion was justified “[because of] the troubles that such a refusal [to wear the veil] had caused to the functioning of the institution [and because such troubles had been] aggravated by the protests of the students’ father at the entrance of the school”.<sup>100</sup> Due to this misbehaviour, “problems [had] arisen within and outside school premises [such as] a teachers’ strike, a series of protests outside school buildings..., a climate of general excitement, work overload for administrative personnel and a number of proselytising acts”.<sup>101</sup> As the Commissaire du Gouvernement wrote, in this case “[the girls’] parents showed an unusual degree of intransigence [and] radicalism that conflicted with a situation of reciprocal tolerance...and appears to us as an act of proselytism or provocation according to the 1989 Avis”.<sup>102</sup> As a consequence—and since “[the Conseil d’État has] never refused the possibility to limit, in

<sup>92</sup> A case that, albeit decided after the appearance of the Circulaire Bayrou (discussed below), ignored such a document since the facts were anterior to it. See on the point Y Aguila, «Conclusions du Commissaire du Gouvernement sur le Cas Aoukili», *Actualité Juridique Droit Administratif (AJDA)*, 20 April 1995, 333.

<sup>93</sup> Tribunal Administratif de Lyon, Aoukili, 4<sup>e</sup> Chambre, 10 May 1994, in *Petites Affiches*, 30 November 1994, n.143 (Conclusions du Commissaire).

<sup>94</sup> “Apart from the visual impairment it is likely to cause”, the Court continued, “it could result in physical damage (such as the risk of choking or cranial damage)”. See Tribunal Administratif de Lyon, above at note 93. See also in the same sense: “...their participation to the exercises could have raised a number of risks for their security”. K Koubi, «Exclusion Définitive d’élèves d’un Collège Ayant Refusé d’ôter Leur Foulard Islamique pour Participer au Cours d’Éducation Physique», *Recueil Dalloz Jurisprudence*, 1995, 365.

<sup>95</sup> Tribunal Administratif de Lyon, above at note 93. See in the same sense: “...this decision cannot be regarded as a general and absolute prohibition of all religious, political or philosophical signs”. Tribunal Administratif de Lyon, above at note 93, (Conclusions du Commissaire). This position was confirmed by Conseil d’État, Aoukili, 10 March 1995, Req. 159981, in *Jurisprudence du Conseil d’État*, above at note 13, 66.

<sup>96</sup> Aguila, above at note 92, 333.

<sup>97</sup> «Le port de ce foulard est incompatible avec le bon déroulement des cours d’éducation physique». Conseil d’État, Aoukili, above at note 91, 66.

<sup>98</sup> As an author underlined, “...the security of gym classes, the responsibility of the teacher as well as that of the state [were involved]”. N Van Tuong, «Note à la Décision Aoukili», in *Jurisprudence du Conseil d’État*, above at note 13, 66.

<sup>99</sup> Conseil d’État, Aoukili, above at note 91, 66.

<sup>100</sup> *Id.* 65.

<sup>101</sup> Tribunal Administratif de Lyon, above at note 93 (Conclusions du Commissaire).

<sup>102</sup> Aguila, above at note 92, 334. As the Lyon Appeals Court had written, “...the conditions in which the veil was worn constitute[d] an act of proselytism (especially towards other students), caused troubles in the school and the normal functioning of the education system and were of such a nature as to justify a disciplinary sanction”. Tribunal Administratif de Lyon, above at note 93, 143.

certain cases, the wearing of signs of religious allegiance<sup>103</sup>—the exclusion of the two girls was here justified.<sup>104</sup>

### 2.3.4. THE 'BAYROU' CIRCULAR & ITS JUDICIAL INTERPRETATION (1994-2003)

#### 2.3.4.1. The 'Bayrou' Circular (1994)

Despite the more restrictive posture taken in the Aoukili decision, a number of school principals remained unhappy about the permissive position of the Conseil d'État. In particular, they argued that it generated confusion and uncertainty—and so politicians intervened. On 20 September 1994 Education Minister François Bayrou issued a highly controversial circular<sup>105</sup> that had the purpose of restricting the liberal character of the 1989 Conseil d'État decision by adopting a threefold approach.

First of all—and for the first time—the veil was linked to the immigration issue: “The French idea of Republic”, the document read, “rejects the explosion of the nation into separate communities, indifferent to each other, attached only to their own rules and laws, and engaged in simple coexistence. The nation is not only a group of citizens with individual rights—it is a community of destiny [‘une communauté de destin’]”.<sup>106</sup> The debate on religious signs at school had thus suddenly translated into a question of integration of minorities—and the matter was moving from a legal one (as conceived by the Conseil d'État) to being political.

Secondly, the document did not target religious signs but signs tout court: in other words, it was no longer the religious character of the sign that was contested, but its very nature as a distinctive mark, as a symbol of belonging, as a stamp of ‘communalist’ membership.

Thirdly and even more significantly, the Circulaire created a novel dichotomy: that of ostentatious symbols (prohibited per se) in opposition to discreet symbols (which were allowed).<sup>107</sup> “It is not possible to accept...the presence and multiplication of signs so ostentatious [‘ostentatoires’] that their meaning is precisely to separate some students from the common rules of the school”, Mr Bayrou wrote. “These signs are by themselves signs of proselytism”<sup>108</sup> and need to be forbidden. Although the circular carefully avoided any definition of ‘ostentatious symbols’, it referred to discreet symbols as those “manifesting a personal attachment to convictions, especially religious convictions”<sup>109</sup> and invited school principals to adopt the following text as an internal rule:<sup>110</sup>

<sup>103</sup> Aguila, above at note 92, 334. On a similar position, see for example: “These two affairs...do not exemplify the complexity but rather the coherence of the jurisprudence of the High Administrative Court”. Van Tuong, above at note 98, 66.

<sup>104</sup> On the point see N Van Tuong, «Légalité de l'Exclusion Définitive de Deux Elèves Ayant Refusé d'Oter le Foulard Islamique à un Cours d'Education Physique», *La Semaine Juridique Edition Générale*, n.20, 17 May 1995, II 22431; R Schwartz, *Les Limites à la Liberté d'Expression Religieuse des Elèves dans les Collèges et Lycées* (Recueil Dalloz Jurisprudence, Paris, 2000) 251.

<sup>105</sup> See *Ministre de l'Education Nationale, Circulaire n. 1649 du 20 Septembre 1994 Relative à la Neutralité de l'Enseignement Public: Port de Signes Ostentatoires dans les Etablissements Scolaire*, in *Journaux Officiels, Application du Principe de Laïcité dans les Ecoles, les Collèges et les Lycées Publics*, above at note 2, 337-8. Section 3.2.5.2. of this thesis will deal in detail with the confusing topic of ministerial circulars, the role of which remains a problem in French law. Issued by one member of the executive, these documents' purpose is to guide the administration in its day-to-day duties. They convey a superior's instruction to his or her subordinates (in the veil matter, that of the Minister to heads of schools) who are thus under the obligation to follow them. For details, see *Les Sources Classiques du Droit Français* (Defidoc, Paris, 2006).

<sup>106</sup> Messner, Prélôt, Woehrling & Riassetto, above at note 33, 1136.

<sup>107</sup> The Circulaire concluded with the following invitation addressed to teachers and principals: “I thus ask you to please propose...the interdiction of these ostentatious signs (“signes ostentatoires”), bearing in mind that the presence of more discreet signs (“signes plus discrets”) merely expressing the attachment to a personal conviction (“traduisant seulement l'attachement à une conviction personnelle”) cannot be the object of the same prohibition, as the Conseil d'État and the administrative case law have recalled”. See *Ministre de l'Education Nationale, Circulaire n. 1649 du 20 Septembre 1994*, above at note 105, 337.

<sup>108</sup> *Ibid.*

<sup>109</sup> “...manifestant un attachement personnel à des convictions notamment religieuses”. See *Ministre de l'Education Nationale, Circulaire n. 1649 du 20 Septembre 1994*, above at note 105, 337-8.

<sup>110</sup> *Ministère de l'Education Nationale, «Annexe: Proposition d'Article à Insérer dans le Règlement Intérieur des Etablissements»*, in *Circulaire n. 1649 du 20 Septembre 1994*, above at note 105, 337.

Discreet student signs manifesting a personal attachment to beliefs, and particularly religious beliefs, are admitted at school, [yet] ostentatious signs ['signes ostentatoires'] that constitute elements of proselytism or discrimination are forbidden. Forbidden also are provocative attitudes, violations of the assiduité and security obligations as well as those behaviors that can be regarded as acts of pressure over other students or that disturb teaching activities or trouble the school order.

It implicitly follows from this circular, therefore, that certain religious signs, first and foremost the veil, are automatically ostentatious and are per se prohibited because they signify the attachment to a certain community. This was a peculiar interpretation, and a far cry from the liberal spirit of the administrative jurisprudence. It was, however, the approach that was to triumph ten years later in the 2004 law. As one author observed,<sup>111</sup>

By contradicting the unitary interpretation of religious signs proposed by the jurisprudence—which was concerned about the intentional component rather than the alleged objective significance of the sign—[and by] suggesting the equation Islamic veil = ostentatious sign, the Circulaire encouraged an explicit prohibition of this piece of clothing, manifestly going against the established case law without nevertheless respecting the hierarchy of sources which would have required not a doubtful 'normative circular' but a statute to try to reach that aim.

As for the fact that the 1994 circular indirectly targeted the Muslim veil, the Commissaire du Government had no doubts. He wrote that <sup>112</sup>

The Minister has taken care not to define in the circular what he considered as ostentatious signs. If he had said that a Muslim veil was per se ostentatious, this would have been contrary to [the Conseil d'État] jurisprudence and thus the law...No doubt the minister implicitly has this understanding of the Muslim veil...but he has been very careful, in the circular, not to transcribe what seems to be his personal position.

The Bayrou Circular was immediately welcomed by principals and teachers alike, and a portion of French schools promptly adopted its recommended regulation—which was perceived as being openly hostile to the Muslim veil—with the consequence that, after 1994, the number of headscarf exclusions significantly increased.<sup>113</sup> Further litigation on the point became therefore inevitable and, once again, the Conseil d'État was asked to rule on the headscarf matter.

#### 2.3.4.2. The Conseil d'État 'Neutralizes' the 'Bayrou' Circular

##### (i) The 'Un Sysiphe' Case (1995)

Although it took great care to avoid an open confrontation with the Minister, the Conseil d'État disapproved of this Circulaire and made its disdain clear. The Education Minister was only giving "his

<sup>111</sup> Ferrari, above at page 39, 94. See also, in the same sense, Cabrillac, Frison, Roche & Revet, above at note 61, 361 (emphasis added). The legal position of circulars within the sources of law in the French system will be considered in detail in Part 3 of this thesis.

<sup>112</sup> In Conseil d'État, Association Un Sysiphe, 10 July 1995, Req.162718, Actualité Juridique du Droit Administratif, (AJDA), 20 September 1995, p.647. For a similar position, see also: "[J]ustified as a response to the request for 'clear instructions' by heads of schools and teachers, the circular's aim was to provide a legal tool which forbade not all 'conspicuous' religious signs at school but, more specifically, the Muslim veil. This aim was never denied by politicians and least of all by the Education Minister, who had openly expressed his opposition to this religious sign". A Ashworth, «Légalité de la Circulaire Bayrou du 20 Septembre 1994 Relative au Port de Signes Ostentatoires dans les Etablissements Scolaires», in Semaine Juridique Edition Générale, n.43, 25 October 1995, II 22519, § 3. Curiously enough, the same author recalls, in note 4, that the Prime Minister had reassured the Jewish community that the kippa was not to be regarded as an 'conspicuous' symbol (See Le Monde, 30 November 1994).

<sup>113</sup> As the Commissaire du Gouvernement underlined, "[s]ince the publication of the Bayrou circular [and] the declarations of the Minister, school principals and a majority of the educational community felt comforted in their adoption of a strict position". See Schwartz, in Jurisprudence du Conseil d'État, above at note 13, 83. In the same sense see: "From its very appearance this circular, drafted in equivocal terms, had the effect of multiplying the number of exclusions of veiled girls". Z Anseur, «Le Couple Laïcité-Liberté Religieuse: De L'Union à la Rupture? Réflexions à Partir de l'Affaire Ait Ahmad», Revue Trimestrelle des Droits de l'Homme, 2001, 83.

interpretation of the laïcité principle”,<sup>114</sup> the judges wrote, and this document “[did] not contain, in itself, any rule directly applicable to students [‘les administrés’].<sup>115</sup> Unable, because of procedural reasons and its previous jurisprudence on ministerial circulars,<sup>116</sup> to invalidate the Minister’s document, the Conseil d’État nevertheless downplayed its significance as much as possible and stuck to its previous case law. So did the lower courts, for as one author observed, “[t]he administrative tribunals applied the Conseil d’État jurisprudence without taking into account...the Bayrou Circular”.<sup>117</sup> Without formally declaring the document illegal, therefore, the Conseil d’État confirmed its position of tolerance and support for an ad-hoc approach: “The veil worn by young girls may have a cultural as well as a religious meaning”, the Commissaire du Gouvernement wrote in the *Un Sysiphe* decision, “[and] it is not up to the judge or school [authorities] to...interpret its symbolic sense, that is to say, to enter into interpretations of religions”.<sup>118</sup>

(ii) The ‘Saglamers’ Case (1995)

Decided together with ‘*Un Sysiphe*’, the *Saglamers* judgment is the second Conseil d’État case to intervene after the adoption of the Bayrou Circular and further illustrates the judges’ accommodating approach on the veil. In October 1994 the Jean Rostrand College in Strasbourg adopted an internal rule in line with that proposed in the Bayrou circular. Soon afterward a series of veil incidents—involving 45 girls—took place in the school, and although the majority of these students later renounced the veil, some did not and were excluded. One of them, Ms Saglamers, sued the institution for religious discrimination and, in May 1995, the Strasbourg Administrative Tribunal ruled in her favour. Although the veil incidents had indeed caused public disorder at school such as sit-ins, protests and demonstrations, Ms Saglamers played no part in them and was excluded purely on the basis of her Muslim veil. “The rector of the Strasbourg academy acknowledged the persistence of [Ms Saglamers] in wearing the Muslim veil...but [did] not allege—nor was it proved that the student’s attitude constituted or was accompanied by—proselytising or discriminatory acts or behaviours”,<sup>119</sup> the Court wrote. As a matter of fact, “[n]o proof exists that a threat to the school’s public order or good functioning of the education system was imputable to Ms Saglamers”.<sup>120</sup>

Education Minister François Bayrou, however, disagreed and appealed to the Conseil d’État—yet the latter, against the advice of its own Commissaire du Gouvernement,<sup>121</sup> upheld the Strasbourg decision saying that “[n]one of the reasons invoked [by the Minister] in his appeal seem good enough to justify

<sup>114</sup> Conseil d’État, *Association un Sysiphe*, 10 July 1995, in *Application du Principe de Laïcité*, above at note 2, 127. See also Rapport Clément, in *Application du Principe de Laïcité*, above at note 2, 25.

<sup>115</sup> Conseil d’État, *Association un Sysiphe*, above at note 114, 128. As a consequence, the institution of Palais Royal wrote, «[i]n conformity to its well-established jurisprudence concerning circulars, the Conseil d’État rejected as un-receivable the lawsuits brought against an administrative document [the 1994 circular] that did not per se create any legal effect for the students”. Conseil d’État, *Un Siècle de Laïcité: Rapport Annuel*, above at note 38, 339. See also, on the point: R Schwartz, *Conclusions de M. Schwartz, Commissaire du Gouvernement*, in *Association ‘Un Sysiphe’*, above at note 114, 8-11.

<sup>116</sup> According to the Conseil d’État, a circular cannot be declared illegal for “it does not have the purpose or effect of modifying or completing legislative texts or other norms”. (C Marliac & J Hamme, *Petites Affiches*, 18 August 1995, n.99, § II (A)). As it was observed by the Commissaire du Gouvernement, these documents “only draw the consequences of legislative texts...or the positions that the Conseil d’État has expressed either in its Avis or decisions” (Id. 15). Yet as we shall see in Part 3, one cannot help noticing that virtually every single circular that intervened on the veil issue since 1989 at best added something that the law never said and at worst conflicted with it. On the point, see Section 3.2.5.2. See also *Les Sources Classiques du Droit Français*, above at note 105.

<sup>117</sup> “[Consequently], those exclusions merely based on the fact that the student had manifested her religious allegiance via a Muslim veil were annulled [and] the post-circular jurisprudence [was in most cases] enough to discourage school authorities from conforming to the letter and spirit of the circular”. See Ashworth, above at note 112, § 14. See also B Seiller, «Sécurité, Tranquillité, Continuité, Assiduité: Les Limites Contentieuses du Port de Signes Religieux à l’École», *La Semaine Juridique Edition Générale*, n.12, 19 March 1997, II 22808.

<sup>118</sup> Schwartz, above at note 115, 80.

<sup>119</sup> Tribunal Administratif de Strasbourg, *Mlle Saglamers c/ Recteur de l’Académie de Strasbourg*, 3 May 1995, in *Jurisprudence du Conseil d’État*, above at note 13, 92.

<sup>120</sup> *Ibid.*

<sup>121</sup> “We thus advise you to annul the execution of the Strasbourg Administrative Tribunal of 3 May 1995 which cancelled the decree of the Strasbourg rector that had in turn pronounced the exclusion of Ms Saglamers from the Jean Rostand lycée”. Schwartz, above at note 13, 84.

the reversal of the [Strasbourg] judgment”.<sup>122</sup> Although this was not, strictly speaking, a decision on the merits of the case,<sup>123</sup> it “confirm[ed] the position of the administrative tribunal”,<sup>124</sup> the Conseil d’État wrote in its press release announcing the outcome of the lawsuit, because “[t]his case-by-case evaluation of the circumstances...is directly inspired by the Conseil d’État jurisprudence since the 1989 Avis and the Kherouaa, Yilmaz and Aoukili decisions”.<sup>125</sup>

As far as the internal rule of the college was concerned, the Conseil d’État wrote that “it did not represent a general and absolute interdiction of the Islamic veil at school, which remains permitted to the extent that it is not accompanied by a proselytic or discriminatory behavior”.<sup>126</sup> Although the Bayrou-inspired school prohibition was not invalidated, therefore, the Conseil d’État made it clear that it was to be interpreted in the narrowest possible way: ostentatious religious signs could in theory be prohibited at school, but since the ‘ostentatiousness’ always needs to be assessed on a case-by-case basis, no religious sign—and least of all the Muslim veil—could be regarded as automatically ostentatious.<sup>127</sup> So, without formally invalidating the Bayrou Circular, this decision effectively “neutralized” it.<sup>128</sup>

### (iii) The ‘Ali’ Case (1996)

A number of subsequent judgments confirmed this position. On 20 May 1996 the Conseil d’État annulled the decision of a college principal who had excluded a schoolgirl merely on the basis of her Islamic veil. “This sanction...was not based on the girl’s behavior but on the perceived incompatibility of the headscarf with the laïcité principle [and] is therefore illegal”,<sup>129</sup> the judges wrote, because “there is no evidence that the conditions in which Ms Ali wore the veil...constituted an act of proselytism or pressure [and] it was not alleged or established that [she] caused troubles to the school’s public order”.<sup>130</sup> According to the Conseil d’État, therefore, the fact of wearing a symbol of religious belonging was in no way incompatible with the principle of laïcité,<sup>131</sup> yet there is another relevant consequence that can be drawn from the Ali case. Contrary to what Mr Bayrou had implicitly suggested in his circular, the Conseil seemed to make the point that the Muslim veil should not be regarded as a symbol of belonging to a community (ethnic, religious or otherwise) but simply as an individual choice: “The veil”, it was observed, “like any other individual symbol, is not fundamentally a sign of allegiance to a religious community [but merely] a way to express and manifest a religious belief—the product of a personal choice”.<sup>132</sup>

### (iv) The ‘Unal’ & ‘Jeouit’ Cases (1996)

That the Muslim veil could not be automatically considered as a sign of proselytism or discrimination was also confirmed by the Conseil d’État in Unal. “The veil through which Ms Unal wanted to express her religious beliefs cannot be regarded as a sign in itself conspicuous or confrontational, or constituting an act of pressure or proselytism”,<sup>133</sup> the Conseil wrote. Although the application of the

<sup>122</sup> Conseil d’État, Ministère de l’Education Nationale c/ Mlle Saglamer, 10 July 1995, in *Jurisprudence du Conseil d’État*, above at note 13, 90.

<sup>123</sup> The Conseil was merely performing a formal control on the legitimacy of the challenged decision.

<sup>124</sup> Conseil d’État, Communiqué de Presse, in *Jurisprudence du Conseil d’État*, above at note 13, 73.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Id.* 92.

<sup>127</sup> This position was subsequently confirmed by the Conseil d’État in virtually all subsequent veil cases. See for example: Conseil d’État, M. et Mme Wissaadane, M. et Mme Hossein Chedouane, 27 November 1996, Req. 170209.

<sup>128</sup> Conseil d’État, Aoukili, 10 March 1995, in JCP G 1995, II, Req. 33431, note by Nguyen Van Tuong. See also Conseil d’État, Ligue Islamique du Nord, Wissaadane et Jeouit, 27 November 1996, JCP G 1997- II 22808, note by Seiller; and Conseil d’État, Université de Lille II, 27 November 1996, *Revue Française de Droit Administratif* (RFDA), 1997, 170.

<sup>129</sup> Conseil d’État, *Ministre de l’Education Nationale v Ali*, 170343, 20 May 1996, in *Jurisprudence du Conseil d’État*, above at note 13, 99.

<sup>130</sup> *Ibid.*

<sup>131</sup> “Wearing a religious sign cannot be interpreted as a form of resistance to the rules of the school”, a commentator emphasized. See G Koubi, « Commentaire à la Décision Ali », in *Jurisprudence du Conseil d’État*, above at note 13, 99.

<sup>132</sup> *Ibid.*

<sup>133</sup> Conseil d’État, *Ministre de l’Education Nationale c/ Mlle Unal*, 9 October 1996, n.172725, in *Jurisprudence du Conseil d’État*, above at note 13, 103.



new internal rules in the girl's school had indeed created tensions at the end of September 1994, once again these incidents could not be attributed to Ms Unal and school authorities could not legitimately justify a general suppression of the headscarf. "It was not established that Ms Unal wore her veil in conditions [of] proselytism or propaganda" or that she caused troubles to public order, the Conseil d'État wrote, and "the appeal of the Education Minister is [thus to be] rejected".<sup>134</sup>

An identical conclusion was reached a month later in another similar case.<sup>135</sup> And when, in another lawsuit, a lower administrative tribunal described the veil as "per se conspicuous and linked to an obedience of foreign-based religious extremism",<sup>136</sup> the Commissaire du Gouvernement unmistakably rejected this interpretation and emphasized that<sup>137</sup>

such an approach is not based on the sign but on its perception. At issue here is obviously not the veil but the symbol it represents—the interpretation given to the place of this symbol within the Muslim religion—some people seeing in it, rightly or wrongly, as an instrument of oppression. Yet neither the administration nor the judge can adopt this logic without violating the principle of *laïcité* of the State and those of freedom of religion and respect of consciences.

### 2.3.4.3. The Veil & the Public Order Limit: When is the Muslim Veil Exactly Prohibited for the Conseil d'État?

As the above case law suggests, the Conseil d'État identifies the fact of violating the school's public order as a possible justification for the exclusion of veiled students from school. But what does 'public order' mean and when does this exception to the general rule apply?

#### (i) The 'Ligue Islamique du Nord' Case (1996)

A number of cases dealt with this issue. In *Ligue Islamique du Nord, Chabu & Autres*, for example, the Conseil mentioned repeated student protests and the intervention of people external to the school as possible causes of violation of public order. The judges wrote:<sup>138</sup>

The 17 students participated, especially on 3 October 1994, in a number of protest movements which gravely perturbed the normal functioning of the school and were supported by people external to the institution. These students have exceeded the limits of their right to express their religious beliefs within the school [and] their permanent exclusion is legally justified by the facts of the case.

The conclusions of the Commissaire, followed by the Conseil d'État, provide further clues as to proper interpretation of public order: "This protest expressed a willingness of proselytism, propaganda and pressure", he wrote, "especially toward those Muslim students who did not want to wear the veil. These acts of pressure and proselytism, performed with the support of the Islamic League of Lille and seriously unsettling for the functioning of the school, are exactly the kind of acts that [the Conseil d'État] prohibit[s]".<sup>139</sup>

<sup>134</sup> *Ibid.*

<sup>135</sup> "The veil through which Ms Jeouit wanted to express her religious beliefs cannot be regarded as a sign in itself conspicuous or confrontational and wearing it does not amount to an act of pressure or provocation"... Conseil d'État, *M. et Mme Jeouit*, 27 November 1996, Req. 172686. See also in the same sense Conseil d'État, *M. et Mme Antar, M. et Mme El Mafta*, 27 November 1996, Req. 172989; Conseil d'État, *M. et Mme Naderan*, 27 November 1996, Req. 170941; and Conseil d'État, *Ministre de l'Éducation Nationale c/ M. Khalid et Mme Sefiani*, 27 November 1996, Req. 172787. See also: "Once again, the principal only based [his decision] on the religious sign of the [student]", the Commissaire wrote, and "[t]his out-of-principle refusal is illegal...". See Schwartz, R. *Conclusions sur le Cas Wissadane*, in *Jurisprudence du Conseil d'État*, above at note 13, 111.

<sup>136</sup> Tribunal Administratif de Clermont-Ferrand, 6 April 1995, *Naderan c/ Recteur de l'Académie de Clermont-Ferrand*, *Petites Affiches*, n. 99, 18 August 1995, in Hafiz- Devers, above at note 42, 198.

<sup>137</sup> *Ibid.* (emphasis added). See in the same sense: "You refuse to interpret religions and religious signs". Schwartz, R. *Conclusions sur le Cas Wissadane*, in *Jurisprudence du Conseil d'État*, above at note 13, 107.

<sup>138</sup> Conseil d'État, *Ligue Islamique du Nord, M. et Mme Chabou et Autres*, 27 November 1996, Req. 170207-8. (The exact same expressions are used in Conseil d'État, *M. et Mme Tlaouziti*, 27 November 1996, Req. 172685).

<sup>139</sup> R. Schwartz, *Conclusions sur le Cas Wissadane*, in *Jurisprudence du Conseil d'État*, above at note 13, 116. Very much the same conclusion was reached some months later by the Conseil d'État in *Époux Mehila*: "[The students] engaged—especially by collecting signatures for petitions at the school entrance—in protests which gravely disturbed the normal functioning of the Sévigné lycée, exceeded the limits of their right to manifest their religious beliefs within school buildings [and] attempted to

(ii) The 'Kaddouri' Case (1997)

Yet as the above-mentioned Saglamer case suggests, the Conseil d'État has required school principals to prove that there were problems pertaining to order, with the result that these kinds of exclusions have been carefully assessed by the administrative judge and very much constitute an exception to the tolerance rule. "The circumstance that the number of veiled girls increased since the 1994-5 scholastic year is not, in itself, sufficient to justify the prohibition of the veil at the Jean Rostand Lycée",<sup>140</sup> the Conseil d'État wrote in Kaddouri. "[Likewise], the fact that some troubles followed the adoption of new internal measures on conspicuous religious signs...might [have] legitimately justif[ied] disciplinary measures against the authors of these troubles [but] could not legally validate a general interdiction of the veil in the school".<sup>141</sup>

(iii) The 'Wissaadane' (1996) & 'Ait Ahmad' (1999) Cases

Apart from public order, the other major exception to the veil-in-class rule concerns safety issues—and it is on the basis of this parameter (first introduced by the above-mentioned Aoukili case) that the Conseil d'État confirmed the exclusion of a number of girls who refused to withdraw their veil during their gym and technology classes.<sup>142</sup> In Wissaadane, the high judges wrote:<sup>143</sup>

It is clear from the facts of the case and especially from the medical certificates, that with the exception of swimming lessons the plaintiffs' daughters were able to take part in gym classes; that their repeated absence from such classes was not justified by a valid reason; [and] that their permanent exclusion was [thus] legally warranted.

This position was later confirmed in another case,<sup>144</sup> while a further decision followed this path and considered the veil as *per se* incompatible with sports and technology classes. In Ait Ahmad, the judges wrote that<sup>145</sup>

The exercise of freedom of expression and manifestation of a religious belief does not prevent school principals and, in some cases, teachers, to expect from students the wearing of clothes that are compatible with the good performance in the various subjects—especially technology, gymnastics and sports classes. The Appeals Administrative Court has [thus] erred in requiring the school to justify the prohibition of a veil in technology and sports classes by establishing, in each individual case, the existence of a danger for the student or other users of the school.

As a consequence, wearing a veil is presumed dangerous in certain school subjects and the burden of proving otherwise falls on the students.<sup>146</sup>

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pressure other students...". Conseil d'État, *Ministre de l'Éducation Nationale c/ Epoux Mehila et Autres*, 2 April 1997, Req. 173103. See also Conseil d'État, *M et Mme Boutakrouf, M. et Mme Atouf*, 27 November 1996, Req. 170210.

<sup>140</sup> Conseil d'État, *Ministre de l'Éducation Nationale c/ Mlle Kaddouri*, 10 March 1997, Req. 169523.

<sup>141</sup> *Ibid.* For similar decisions, see for example Conseil d'État, *Ministre de l'Éducation Nationale c/ Fatiha Aousdi*, 10 March 1997, Req. 169526; Conseil d'État, *Ministre de l'Éducation Nationale c/Mlle Avci*, 10 March 1997, Req. 169527; Conseil d'État, *Ministre de l'Éducation Nationale c/Mlle Bourhayel*, 10 March 1997, Req. 169528; Conseil d'État, *Ministre de l'Éducation Nationale c/Mlle Sencar*, 10 March 1997, Req. 159530; Conseil d'État, *Ministre de l'Éducation Nationale c/Mlle Yildiz*, 10 March 1997, Req. 169523. The same formula is also used in Conseil d'État, *Ministre de l'Éducation Nationale c/ Kokmen*, 5 November 1997, Req. 172721.

<sup>142</sup> See G Guglielmi, « Le Port du Foulard et le Principe de Sécurité », *Semaine Juridique Ed.Générale*, n.19, 10 May 2000, II 10306.

<sup>143</sup> Conseil d'État, *M. et Mme Wissaadane, M. et Mme Hossein Chedouane*, 27 November 1996, 170209. See in the same sense: "The students missed their gym and sports classes several times, [and since] assiduity is an imperative rule that they could not violate, their behaviour is illegitimate..." R Schwartz, *Conclusions sur le Cas Wissadane*, in *Jurisprudence du Conseil d'État*, above at note 13, 118.

<sup>144</sup> "[Since] October 1994, the students refused to participate in gym and sports classes while the school doctor certified that they were able to perform sport [activities]...[Furthermore], they have brought no proof of the fact that they are not able to participate in such courses». Conseil d'État, *M. et Mme Ait Maskour et Autres*, 17 January 1997, Req. 172937.

<sup>145</sup> Conseil d'État, *Ministre de l'Éducation Nationale c/ M. et Mme Ait Ahmad*, 181486 (emphasis added).

<sup>146</sup> See on the point F De la Morena, « Note à la Décision Ait Ahmad », *Actualité Juridique Droit Administratif (AJDA)*, 20 February 2000, 169.

#### 2.3.4.4. Conclusion on the Conseil d'État Jurisprudence & the 'Bayrou' Circular

Although the 1989 Avis is not easy to interpret, the jurisprudence of the Conseil d'État compensated for this vagueness by providing in no uncertain terms that the supreme administrative jurisdiction took a tolerant approach to the matter.<sup>147</sup> Since the 1933 decision in the Benjamin judgment,<sup>148</sup> in particular, the Conseil d'État adopted a case-by-case method as the only one considered capable of balancing the exercise of fundamental freedoms with the exigencies of public order.<sup>149</sup> “[L]ocal authorities have sometimes tended to sanction the very fact of wearing the veil [“le principe même du port du foulard”], the judges wrote, “insofar adopting sanctions that would have certainly incurred the opposition of the Conseil d'État”.<sup>150</sup> In so writing, the highest administrative jurisdiction confirmed its preference for the position according to which ostentatious can only be a behaviour, never a sign alone,<sup>151</sup> an important point upon which I shall return in Part 3 of this thesis.

Yet this nuanced approach was much disliked by school principals and politicians, who increasingly demanded a clear-cut political answer to what they regarded as a legal stalemate. The best way out, they soon concurred, was a new statute.

#### 2.3.5. PREPARING THE 2004 LAW: THE POLITICIANS TAKE OVER

When, after several years of reluctance, the Socialists decided to support the position of the ruling UMP party and called for a new law on the matter, criticism of the case-by-case approach of the Conseil d'État—and popular opposition to the Islamic veil—became virtually unanimous and permeated the entire French political spectrum.<sup>152</sup> Notwithstanding that the number of girls wearing the veil at school apparently decreased,<sup>153</sup> the Conseil was openly accused of timidity and of leaving the heavy responsibility of a decision on the headscarf issue to individual teachers and school principals.<sup>154</sup> “After consulting the judges”, one author aptly observed, “the executive [and legislative]

<sup>147</sup> See in this sense: “By affirming the [Islamic veil’s] non-violation of the laïcité principle and by condemning provocations and proselytism, the Conseil wanted to emphasize the spirit of tolerance over all kinds of integralism, the acceptance of differences over the rejection of the others”. Laroque, above at note 22, 45. For a different perspective, see however O Carton, *Les Limites à la Liberté d’Expression Religieuse: Entre Fermeté et Errements du Conseil d’État* (Droit Perspectives, Paris, 2000) 4.

<sup>148</sup> As the Conseil d’État wrote, “[t]he Benjamin jurisprudence strives to conciliate, keeping in mind the circumstances of each individual case, the exigencies of public order and the exercise of fundamental freedoms in that any restriction imposed to the said liberties must be justified with respect to the legitimate purposes pursued”. See Conseil d’État, Benjamin, 19 May 1933, Rec. p. 541.

<sup>149</sup> As the Commissaire du Government observed, “[t]he most original aspect of the [1989] decision is that it established a method. By admitting the wearing of religious signs but, at the same time, recognizing numerous exceptions, it necessarily implied that only a case-by-case analysis can determine whether the religious sign is legal or not... [In so doing] the Conseil d’État has chosen... an ad-hoc approach”. D Kessler, «Neutralité de l’Enseignement Public et Liberté d’Opinion des Elèves: A Propos de Port de Signes Distinctifs d’Appartenance Religieuse dans les Etablissements Scolaires», in *Conclusions du Conseil d’État*, 2 November 1992, *Revue Française de Droit Administratif* (RFDA), vol.9, n.1, January-February 1992, 112-8.

<sup>150</sup> Conseil d’État, Note sur les Décisions Relatives au ‘Foulard Islamique’ Rendues par le Conseil d’État Statuant aux Contentieux, above at note 13, 2.

<sup>151</sup> “The wearing of a per se ostentatious sign is impossible”, one author underlined in the note to the Wissaadane et Jeouit decisions. “The sanction pronounced for this only reason will not pass judicial scrutiny [and] it will always be necessary to bring other elements, independent from the religious sign, in order to prove the ostentatious character of the symbol”. B Seiller, note of Conseil d’État, Ligue Islamique du Nord, Wissaadane et Jeouit, above at note 128. In the same sense see also: “The Conseil d’État has remained faithful, at the beginning, with a great sense of responsibility, to its initial jurisprudence. Refusal of condemnation en bloc of any religious sign; but on the contrary examination, case by case, of the significance of this sign in terms of proselytism and public order. It looks like it has recently become more liberal”. Cabrillac, Frison, Roche & Revet, above at note 61, 362.

<sup>152</sup> As one Socialist leader put it, “[a]t the time, we did not have the same awareness of the danger posed by extremist islamisation. We were perhaps a bit naive”. In Zouari, above at note 21, 180. See also on the point G Manceron, *Opinion Publique et Forces Politiques: Le Débat dans le Champ Politique Français*, in F Lorcerie, *La Politisation du Voile: L’Affaire en France, en Europe et dans le Monde Arabe* (L’Harmattan, Paris, 2005) 65.

<sup>153</sup> F Lorcerie, *À l’Assaut de l’Agenda Public: La Politisation du Voile Islamique en 2003-2004*, in Lorcerie, above at note 152, 20.

<sup>154</sup> Part of the French press soon joined the wagon of criticism: «The Conseil d’État veiled its own face” (“Le Conseil d’État se voile la face”), the daily *Le Figaro* wrote after the Kherouaa decision in 1992.

power was visibly embarrassed by their response”.<sup>155</sup> September 11 having reinforced the country’s alertness to Islamic extremism as well as its opposition to the veil,<sup>156</sup> the dance of political propositions against school signs began and what had originated as a legal issue turned into an eminently political matter that only came to an end in March 2004 with the adoption of the controversial statute.<sup>157</sup> This section analyzes the parliamentary passages leading up to that adoption, while the following ones will be dedicated to the discussion, interpretation and application of the new statute.

### 2.3.5.1. Parliamentary Bills against School Signs

Important as the issue of religious signs at school had been in the 1980s and 1990s, few legislative proposals for change had come forth until 2002, when the French parliament was confronted with a number of bills aimed at regulating a situation that some school exclusions,<sup>158</sup> unprecedented media frenzy<sup>159</sup> and widespread political opportunism<sup>160</sup> had depicted as explosive. While these proposals used diverse language and differed in breadth and scope, they coalesced in the assumption that a general, nationwide rule needed to be implemented and that the ad hoc jurisprudential approach of administrative judges had become inadequate to solve the problem.

The bill introduced to the *Assemblée Nationale* in August 2002 by a MP belonging to the ruling UMP party is emblematic of this ‘tough’ approach aimed not only against religious symbols but other ‘sensitive’ emblems as well. This measure forbade “[t]he wearing of all ostentatious signs expressing a religious, philosophical or political allegiance or proselytism at school”<sup>161</sup> and any violation of the rule was to be sanctioned criminally, albeit with a monetary penalty. This was said to have nothing to do with religion: within the school environment, distinctive signs were considered divisive, represented per se a disciplinary problem, and consequently needed to be forbidden.

In December 2002 it was the turn of another MP—this time belonging to the UDF (‘Union Pour la Démocratie Française’) party<sup>162</sup>—to propose the “prohibition of every manifestation of political or religious allegiance within school buildings”.<sup>163</sup> In May 2003, the *Sénat* too faced this issue when a group of Communist senators introduced a bill which was midway between the interdiction of ‘ostentatious’ symbols and total prohibition: they proposed that “[a]ll visible signs expressing a political or religious allegiance”<sup>164</sup> had to be forbidden and that a penal sanction was needed as a deterrent. The concept of ‘visibility’ thus entered into the political debate.

<sup>155</sup> Ferrari, above at note 39, 93.

<sup>156</sup> According to several surveys on the issue taken at the end of 2003, 75% of French people were in favor of a law against religious signs at school. For an analysis of the issue and its connections to Islamic religious extremism, see Lorcerie, above at note 152, 20.

<sup>157</sup> As one observer wrote, “[i]t would be unjust to reprimand the *Conseil d’État* for having provided a legal answer, because this is exactly its role (even if parts of the public perhaps expected something else from the institution)”. See M Laroque, «Le Principe de Laïcité et les Signes d’Appartenance à une Communauté Religieuse», *Actualité Juridique du Droit Administratif* (AJDA), 20 January 1990, 44.

<sup>158</sup> Particularly important in this respect was the exclusion of Lila and Alma, the two schoolgirls from Aubervilliers, in 2004. See their book L Lévy & A Lévy, *Des Filles Comme Des Autres: Au Delà du Foulard* (La Découverte, Paris, 2004).

<sup>159</sup> On the mediatization of the veil issue, see T Deltombe, 2003-2004: *Foulards et Intégration, Suite et Fin?* In *L’Islam Imaginaire*, above at note 25.

<sup>160</sup> On the politisation of the veil issue in France, see Lorcerie, above at note 152, 65-71.

<sup>161</sup> «...le port de tout signe ostentatoire d’appartenance ou de prosélytisme religieux, philosophique ou politique dans l’enceinte des établissements d’enseignement». *Assemblée Nationale, Proposition de Loi Visant à Garantir la Laïcité et la Neutralité du Service Public de l’Éducation*, Bill n.172 introduced by Jacques Myard MP, (UMP) (emphasis added).

<sup>162</sup> The current leader of the UDF is François Bayrou, author of the 1994 circular on the veil. The UDF party is positioned at the centre of the French political spectrum. See for details [http://www.udf.org/connaitre/charte\\_valeurs.html](http://www.udf.org/connaitre/charte_valeurs.html) (accessed 10 March 2007).

<sup>163</sup> «...interdire toute manifestation d’appartenance politique ou religieuse dans l’enceinte des établissements scolaires publics». *Assemblée Nationale, Proposition de Loi Relative au Respect du Principe de Laïcité dans le Cadre Scolaire*, Bill n.500 introduced by Maurice Leroy MP (UDF) (emphasis added).

<sup>164</sup> *Sénat, Proposition de Loi Visant à Garantir le Respect du Principe de Laïcité au Sein de l’École Publique et de la Fonction Publique*, Bill n. 288 annexed to the 13 May 2003 session and introduced by François Autain, Jean-Yves Autexier and Paul Loridant, MPs (Communistes, Républicains et Citoyens) (emphasis added).

While these proposals were important, the real breakthrough in terms of parliamentary numbers came from the Socialists. The party had long supported the case-by-case position of the Conseil d'État but, in May 2003, during a convention in Dijon, a number of prominent figures of the PS openly called for a change in the law. The Dijon meeting was quickly followed by the legislative proposal of six Socialist senators: "Every apparent political, trade union, association or religious sign of whatever nature"<sup>165</sup> should be prohibited, the text read, because it threatens the school environment and adversely affects teaching activities. A few days later, a further suggestion—this time from a MP belonging to the ruling UMP party—clearly targeted the Islamic veil when it recommended the adoption of penal sanctions for those parents who had deprived a minor of compulsory education "by obliging or by allowing [the student] to wear any form of ostentatious religious sign that prevented [him or her] from accessing school course[s]".<sup>166</sup>

The end of 2003 saw a multiplication of legislative initiatives. In November, a more comprehensive measure consisting of both positive and negative components was suggested to the Sénat by the Socialist group. It supported the introduction of the study of laïcité and a 'history of religions' in all primary and secondary school programmes, but it also suggested the prohibition of "all religious, political or philosophical signs...within public school buildings as well as during any external activity organized by the school".<sup>167</sup> A few days before the end of the year, finally, an additional bill was presented by an UMP parliamentarian demanding from students "behavioral and clothing choices respectful of the principle of laïcité in the context of the activities and places of public teaching"<sup>168</sup> and consequently advocated a ban on "the ostentatious wearing of signs of any religious, political or philosophical allegiance".<sup>169</sup>

Although none of these proposals became law due to the lack of a parliamentary support and disagreement over the language, the die was cast and a comprehensive, coherent and well-supported approach in favour of a ban started to emerge within the French polity—an approach that soon took the institutional shape of a Parliamentary Mission on the veil issue.

### 2.3.5.2. The Debré Mission on Religious Signs at School

On May 27<sup>th</sup>, 2003, the Assemblée Nationale established an Information Mission on Religious Signs at School ('Mission d'Information sur la Question des Signes Religieux à l'École', hereinafter Mission Debré) chaired by the then President of the Lower House, Jean-Louis Debré. The Mission comprised 31 MPs: 18 from the ruling UMP, 8 from the PS, 2 from the UDF, 2 from the Communists and 1 non-registered.<sup>170</sup> The Mission interviewed, over six months, more than 120 people during 26 sessions and 37 hearings. On 4 December 2003, it published its proceedings as well as a number of propositions—unanimously adopted by its members—on the veil issue that set the tone for subsequent parliamentary work and need to be briefly mentioned here.

<sup>165</sup> «...tout signe politique, syndical, associatif ou religieux apparent de quelle nature que ce soit». Sénat, Proposition de Loi Relative à la Sécularisation des Rituels Civils dans la République et au Respect de la Neutralité de l'État et des Services Publics, Bill n.432 annexed to the 24 July 2003 session and introduced in September 2003 by Michel Charasse, Jean Louis Carrère, Alain Journet, Jean-Marc Pastor, Guy Penne and Josette Durrieu MPs (PS).

<sup>166</sup> «...le contraignant ou le laissant porter une forme quelconque de signe religieux ostentatoire l'empêchant d'accéder au cours». Assemblée Nationale, Proposition de Loi Tendante à Sauvegarder le Droit à l'Éducation des Enfants qui Risquent l'Exclusion des Cours du Fait du Port de Signes Religieux Ostentatoires, Bill n. 1076, XII legislature, introduced by Didier Julia MP (UMP) (emphasis added).

<sup>167</sup> «...le port apparent de signes religieux, politiques ou philosophiques...dans l'enceinte des établissements publics d'enseignement ainsi que dans toutes les activités extérieures organisées par eux». Sénat, Proposition de Loi Relative au Renforcement du Principe de Laïcité à l'École, Bill n.68 introduced on 14 November 2003 by Serge Lagache (PS). This Bill was introduced almost verbatim also at the Assemblée Nationale. See Assemblée Nationale, Proposition de Loi Visant à Interdire le Port Apparent de Signes Religieux, Politiques ou Philosophiques à l'École, Bill n. 1227 introduced on 18 November 2003 by Jack Lang (PS).

<sup>168</sup> «...un comportement et des choix vestimentaires respectueux du principe de laïcité propres aux activités et aux lieux d'enseignement public». Assemblée Nationale, Proposition de Loi Portant sur le Respect du Principe de Laïcité dans les Établissements d'Enseignement Public, Bill n. 1302 introduced on 17 December 2003 by Laurent Hénart (UMP).

<sup>169</sup> «...le port ostentatoire de signes d'appartenance religieuse, politique ou philosophique". Ibid. (emphasis added).

<sup>170</sup> See on the point Ferrari, above at note 39, footnote 152.

The Mission opened its report by paying tribute to laïcité, “one of the founding principles of the Republic”<sup>171</sup> that “is part of our heritage”.<sup>172</sup> The originality of the French model, the MPs explained, is not limited to its legal status but is very much formed by historical developments that caused the laïcité to acquire “an important symbolic value that is indissociable from the existence of the République”.<sup>173</sup> Indeed, they said, “it is possible to argue that République and laïcité are the same”.<sup>174</sup> Unlike political or religious allegiances, the ideal of laïcité was said to have united French people into a nation by taking them from their separate communities and by placing them into a space characterized by common rights and obligations: “The ‘laïque contract’”, the MPs wrote, “like the revolutionary attempts, was meant to bind everyone with identical rules...by introducing a joint principle of neutrality and respect of pluralism”.<sup>175</sup> Because of its educational duty and because of the historical coincidence between Church and State in France, it was at school that the laïcité was first born. That the headscarf controversy developed there, the Mission emphasized, was certainly not a coincidence.

Mindful of the centrality of the education system for the principle of laïcité, the MPs harshly criticized the Conseil d’État jurisprudence and made it clear that the question of religious signs at school was in desperate need of a political solution. After recalling that the highest administrative jurisdiction favored a case-by-case approach whereby “religious signs at school are the rule and their prohibition the exception”,<sup>176</sup> the Mission emphasized that this resulted in serious practical problems for heads of schools. The document read:<sup>177</sup>

Confronted with an increasing number of students willing to manifest their religious convictions, school principals must apply a case law, as defined by the Conseil d’État, that no longer achieves a balance between freedom of religion and laïcité, and this results today in a weakening [‘dans une fragilisation’] of the principle of laïcité at school.

The Avis of the Conseil d’État, parliamentarians wrote, was expressed in “general terms”,<sup>178</sup> was questionable “for not reaffirming the laïcité principle enough”<sup>179</sup> and resulted in “a veritable local law”.<sup>180</sup> It also distinguished the condition of teachers (who are not allowed to wear signs) from that of students (who were) and this was a “regrettable distinction”<sup>181</sup> because “students are also part of the ‘educational community’ and go to school in order to learn the ideas of citizenship and communal living”.<sup>182</sup> “Pupils”, the document emphasized, “are not simple users of the public service, they are people growing up within an institution that must shape them”.<sup>183</sup> Finally, MPs wrote, taking into account—as the Conseil d’État did—the behaviour rather than the sign complicated the matter even further and caused a dangerous impasse, because “it is sometimes difficult to draw a line between wearing a religious sign in an ostentatious or confrontational way—an act of proselytism prohibited by the [existing] jurisprudence—and doing so in the ‘normal’ way”.<sup>184</sup> The result was evident: “The current legal system...is fragile at the level of principles and delicate in terms of its application, [and] the intervention of Parliament appears thus justified”.<sup>185</sup>

The third point developed by the Mission concerned the dangerousness of religious and political signs at school—a leitmotif, as we have seen, of all previous bills on the veil issue. An additional

<sup>171</sup> Assemblée Nationale, Rapport Debré, in *Laïcité: Le Débat à l’Assemblée Nationale*, above at note 6, 131.

<sup>172</sup> *Ibid.*

<sup>173</sup> *Id.* 144.

<sup>174</sup> *Ibid.*

<sup>175</sup> *Id.* 133.

<sup>176</sup> *Id.* 161.

<sup>177</sup> *Id.* 157.

<sup>178</sup> *Id.* 167.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*

<sup>181</sup> *Id.* 174.

<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.*

<sup>184</sup> *Id.* 170.

<sup>185</sup> *Id.* 176.

problem with the Conseil d'État jurisprudence, the MPs wrote, was that it did not take into account the extent to which religious and political signs disturb the normal functioning of the educational process, are divisive and create confusion among teachers and students, with deleterious results for the learning scheme. "The wearing of signs of religious or political belonging", it was observed, "is a risk to the extent that, by substituting the traditional principle of 'living together' with that of 'living side-by-side', it represents an element of division in a place where students are supposed to learn social liaison".<sup>186</sup> This was particularly the case with religious signs because they "often provoke enough tension to create divisions among teachers and perturb the normal functioning of the school".<sup>187</sup>

Yet the Mission went further than this and explicitly stated that few objects are as antithetical to the French idea of *laïcité* and integration as the Muslim headscarf. The MPs wrote:<sup>188</sup>

For the members of this Mission, the veil...cannot be reduced to a simple sign of religious allegiance [because] it often—if not always—conveys the political will of affirming an identity and, perhaps even more, a certain idea of the place of women in society. Rare, in fact, are those girls who wear it spontaneously, beyond pressures from the family or their living environment.

Contrary to what the statistical evidence showed,<sup>189</sup> the Debré Mission emphasized that the situation was turning into a veritable national emergency and that it was up to politicians to intervene by prohibiting all visible religious and political signs at school. As the Mission's President wrote on behalf of his colleagues,<sup>190</sup>

All members of the Commission have acquired the conviction that it is imperative to act immediately to prevent the current situation from degenerating to the point of becoming unmanageable. Today the answer to the problem we are facing looks fundamentally political to me. This Mission [thus] proposes the introduction of a short, simple, clear statute that is not open to interpretation, posing the principle of interdiction of any visible religious and political sign within public school buildings.

The criterion adopted by the Mission was one of visibility and the prohibition was meant to apply to all religious and political signs. As we will see, however, the final law differed considerably from these proposals—and was at the same time more nebulous and less extreme than French MPs had wished.

### 2.3.5.3 The Stasi Commission, President Chirac's Speech & Introduction of Bill to Parliament

The Debré Mission completed its work on 4 December 2003, only a week before another Commission—presided over by the National Ombudsman ('Le Médiateur de la République')<sup>191</sup> Bernard Stasi and comprising nineteen other 'sages'—delivered its conclusions on 11 December 2003.<sup>192</sup> This body was composed of academics, practitioners and immigration experts and had been set up by President Chirac on 3 July 2003 "in order to carry out an enquiry about the application of the *laïcité* principle in France".<sup>193</sup>

<sup>186</sup> Id. 155.

<sup>187</sup> Id. 171.

<sup>188</sup> Assemblée Nationale, Rapport Debré, in *Laïcité: Le Débat à l'Assemblée Nationale*, above at note 6.

<sup>189</sup> According to the Interior Minister, in 2002 there were 1500 veil-related cases, 100 mediations and 10 lawsuits while in 2003 there were 1256 cases, 20 unresolved cases and only 4 exclusions. According to the médiatrice of the Education Ministry, "the situation in schools has in a certain sense calmed down". See Manceron, above at note 152, 67.

<sup>190</sup> Assemblée Nationale, Rapport Debré, in *Laïcité: Le Débat à l'Assemblée Nationale*, above at note 6.

<sup>191</sup> The Médiateur de la République, appointed for 6 years by the French President, examines—on a case-by-case basis—the inappropriateness of certain statutes and procedures as well as their interpretation. He proposes made-to-measure solutions and fundamental reforms. For further information, see <http://www.mediateur-republique.fr/> (accessed at 10 March 2007).

<sup>192</sup> See B Stasi, *Rapport de la Commission de Réflexion sur l'Application du Principe de Laïcité* (Documentation Française, Paris, 2004) (hereinafter, 'Stasi Report'). See also *Le Monde*, *Le Rapport de la Commission Stasi sur la Laïcité*, 12 December 2003; J Baubérot, *La Commission Stasi Vue par l'Un de Ses Membres*, in (2004) 3 *French Politics, Culture and Society* 135-141; P Weil, *Lifting the Veil*, in (2004) 3 *French Politics, Culture and Society* 142-147; and S Gemie, *Stasi's Republic: the School and the 'Veil'*, (2004) 12 *Modern and Contemporary France*, n.3, 387-397.

<sup>193</sup> J Chirac, *Lettre de Mission du 3 Juillet 2003 à Monsieur Bernard Stasi*, in Stasi, above at note 192, 5. "I believe that the time has come today to carry out a detailed and calm analysis of the consequences that the respect of the principle of *laïcité* requires of each [French] citizen", President Chirac wrote in his appointment letter to Mr Stasi. Id. 6.

The Stasi Report shares with the Parliamentary Mission a number of points, first and foremost the ‘automatically disruptive’ nature of religious signs in French schools. “The *laïque* state cannot remain indifferent when public order violations, pressure, threats and discriminatory or racist practices founded on religious or spiritual reasons, undermine the foundations of [our] school [system]”,<sup>194</sup> it wrote. Yet as with the Parliamentary Mission, it soon became clear that it was the Muslim veil that the Commission singled out from all other signs, for only this object was regarded as a political symbol imposed on a number of women by their husbands, brothers or communities.<sup>195</sup> The Stasi Commission wrote:<sup>196</sup>

After having heard a wide variety of testimonies, the Commission believes that today the matter is no longer one concerning freedom of conscience but public order. The context has changed in recent years. Religiously-motivated tensions and clashes at school have become far too frequent. The normal functioning of the education system can no longer be guaranteed. Pressures are exercised upon young girls in order to force them to wear the Muslim veil. Their social and family environments oblige them to make choices that are not free. The République cannot remain indifferent to the distress call of these young girls.

While it should be noted that no quantitative analysis was carried out<sup>197</sup> (a point upon which I shall return in Part 3 of this thesis) and that the interviewing process was criticized by a number of observers (including some Commission’s members) for concentrating heavily on the opponents to the veil,<sup>198</sup> the Stasi Commission proposed a number of constructive remedies to this situation. In particular, it recommended a long series of ‘affirmative’ measures (adoption of a ‘Charte de la Laïcité’;<sup>199</sup> a fight against racism and anti-semitism;<sup>200</sup> institution of a national day dedicated to *laïcité* and République;<sup>201</sup> combat in favour of the integration of minorities;<sup>202</sup> creation of a national civil service;<sup>203</sup> establishment of Islamic and Jewish festivities as national holidays);<sup>204</sup> as well as a ‘negative’ one (legislating against ‘conspicuous’ [ostensibles] religious and political signs at school).<sup>205</sup> Because of its high profile and due to the considerable media coverage,<sup>206</sup> however, it was on the ‘prohibition’ measure that public attention (and the attention of Mr Chirac) concentrated. The crucial recommendation read as follows:<sup>207</sup>

<sup>194</sup> Stasi, above at note 192, 34-5.

<sup>195</sup> This point was confirmed some time later by another member of the Commission: “[T]he wearing of a headscarf or the imposition of it on others is much more than an issue of individual freedom: it has become a France-wide strategy pursued by fundamentalist groups who use public schools as their battleground”. P Weil, *A Nation in Diversity: France, Muslims and the Headscarf*, in *OpenDemocracy.net: Free Thinking for the World*, 25 March 2004.

<sup>196</sup> Stasi, above at note 192, 128.

<sup>197</sup> As the Commission wrote in another passage, “[i]n far too many schools, the interviews have demonstrated that identity-based conflicts can turn into violence, threaten individual liberties and disturb the public order”. Stasi, above at note 192, 125 (emphasis added). See also: “At school, the wearing of conspicuous religious symbols —the big cross, the kippa or the veil—is already enough to disrupt school peace”. Stasi, above at note 192, 90.

<sup>198</sup> Professor Jean Baubérot, the only member of the Stasi Commission who refused to vote in favour of the prohibition of ‘conspicuous’ religious symbols at school (he abstained on the basis that this was ‘a bad law adopted for good reasons’), later criticized the functioning of the body. “I have not been entirely satisfied with the working of the Commission”, he wrote. “The choice of people to be interviewed has in certain instances been debatable (especially in the case of teachers: all the teachers interviewed by us were firmly opposed to the wearing of the Muslim veil at school, while French teachers as a whole were very much divided on the issue). Above all, the interviews have been taken at face value, without any kind of critical perspective. No quantitative assessment has been made. The Commission had some clues, not a verifiable knowledge [of the issue] based on its own researches and analyses. In my opinion, Islam is the symptom of a larger malaise affecting French *laïcité* today, and it was these difficulties that the Commission should have analyzed”. J Baubérot, *La Commission Stasi Vue Par l’Un de Ses Membres*, above at note 192, 140.

<sup>199</sup> Stasi, above at note 192, 111, 122 & 137.

<sup>200</sup> Id. 111 & 135.

<sup>201</sup> Id. 112.

<sup>202</sup> Id. 115.

<sup>203</sup> Id. 124.

<sup>204</sup> Id. 142.

<sup>205</sup> Id. 149.

<sup>206</sup> Virtually all interviews made by the Stasi Commission were broadcast ‘live’ on French Senate TV.

<sup>207</sup> Stasi, above at note 192, 149-150.



While respecting the freedom of conscience and the special system of private schools under contract with the state, those clothes [‘tenues’] or signs [‘signes’] manifesting a religious or political allegiance [should be] prohibited in primary, intermediate and secondary schools ... The clothes or signs that [should be] forbidden are only the conspicuous ones [‘signes ostensibles’], such as a big cross, veil or kippa. Discreet signs, for example medals, small crosses, David stars, Fatima’s hands or small Korans, are not regarded as signs manifesting a religious allegiance.

It soon became clear that the work of the Commission was characterized (and, according to a number of authors, greatly influenced) by two concomitant factors. First, this body functioned at the very same time of the Parliamentary Mission and interviewed virtually all the same people (a circumstance that one of its members, the French historian René Rémond, did not hesitate to call “ridiculous”).<sup>208</sup> Secondly, the Commission worked under extremely tight time constraints. President Chirac had given the end of December 2003 as a deadline for the delivery of the Report, but at very short notice he required Mr Stasi to complete his work three weeks ahead of schedule.<sup>209</sup> The consequence was that, as Jean Baubérot<sup>210</sup>—another Stasi member and the only one who abstained on the conspicuous signs proposal—wrote, there remained very little time for discussion on the final recommendations, which were decided over the last two days.<sup>211</sup> “The last choices were made on Tuesday 9 December in the afternoon”, the Rapporteur Général explained, “and the Report was finalized on the morning of Tuesday 11 December”.<sup>212</sup> At 9am that same morning, in great haste, the commissioners delivered it to President Chirac.<sup>213</sup>

Be that as it may, it was only the negative proposition on ‘conspicuous’ religious symbols that President Chirac accepted when, on 17 December 2003, in a solemn speech widely applauded across the political spectrum, he called for a law against “the wearing of signs which conspicuously manifest [‘manifestent ostensiblement’] a religious allegiance”<sup>214</sup> in public schools. He defined conspicuous signs [‘signes ostensibles’] as those “signs the wearing of which leads someone to be immediately recognized for his religious allegiance”<sup>215</sup> and emphasized that “a law is evidently necessary. I hope that it will be adopted by parliament and that it will be in force from the next school year”.<sup>216</sup>

A few days later, at the initiative of Prime Minister Jean-Pierre Raffarin, the parliamentary passage of what was to become Statute 228 of 2004 started at the Assemblée Nationale. It took less than two months to become law.<sup>217</sup>

<sup>208</sup> “C’était du ridicule”. Notes from my interview with René Rémond, 29 September 2005. Mr Rémond nevertheless voted in favour of the Rapport Stasi.

<sup>209</sup> Ibid.

<sup>210</sup> Jean Baubérot proposed a recommendation based on public order instead: “Freedom of expression and the wearing of visible [religious] signs is legitimate only to the extent that it respects the public order [‘le respect du bon ordre’] and the rights of other students”. J Baubérot, « Proposition Faite à la ‘Commission Stasi’ », 6 December 2003, in J Baubérot, Voile, École, Femmes, Laïcité, in J Baubérot, D Bouzat, J Costa-Lascoux & A Hounziaux, *Le Voile, Que Cache-t-il?* (Atelier, Paris, 2004) 116. Later he commented: “The fact of focussing on certain religious signs per se and of going from a prohibition of the behaviours that threaten the public order to a total prohibition of certain religious signs [in themselves] is a dangerous step to take. We then get into a mechanism whereby the religious sign becomes a public order problem per se, i.e. a political problem, while it is [merely] a social practice [as well as a form of] freedom of conscience”. J Baubérot, Voile, École, Femmes, Laïcité, in Baubérot, Bouzat, Costa-Lascoux & Hounziaux, above at note 210, 72.

<sup>211</sup> “In the next two remaining days we have to come up with a number of ‘recommendations,’” he wrote to his colleagues in an open letter only five days before the Commission delivered the Report. “My only worry is...the extremely tight deadline ... I do think that we need to acknowledge that it will be simply impossible for us to explain our positions”. Id. 111.

<sup>212</sup> R Schwartz, *Chronologie d’Un Rapport*, in Stasi, above at note 192, 19.

<sup>213</sup> During the months of July and August 2003 the Commission’s work focused on the theory of the laïcité, while September, October and November were dedicated to interviewing approximately one hundred people (including politicians, heads of schools, hospitals and clinics, plus teachers and civil rights activists) in addition to conducting thirty closed-door interviews. Between 24 November and 9 December 2003 the Commission completed the first two parts of the Report. « Première Partie: La Laïcité, Principe Universel, Valeur Républicain »; « Deuxième Partie: La Laïcité à la Française, Un Principe Juridique Appliqué Avec Empirisme ». See Stasi, above at note 192, 4.

<sup>214</sup> J Chirac, *Discours Prononcé par M Jacques Chirac, Président de la République, Relatif au Respect de la Laïcité dans la République*, in *Application du Principe de Laïcité dans les Écoles, Collèges et Lycées Publics*, above at note 2, 7.

<sup>215</sup> Ibid.

<sup>216</sup> Ibid.

<sup>217</sup> For a more detailed analysis of the legislative history and parliamentary debates of Statute 228/2004 see my H Salton, “A Political Duty: An Analysis of the French Law on Religious Signs at School through the Prism of Its Parliamentary History”,

### 2.3.6. DISCUSSING THE 2004 LAW: THE PARLIAMENTARY DEBATES

The debates before the *Assemblée Nationale* were opened by Prime Minister Jean-Pierre Raffarin on 3 February 2004, they lasted for about a week and, according to the President of the Assembly, took place in a “climate of freedom, attention and tolerance”.<sup>218</sup> They also attracted considerable media and popular attention, and involved a record number of politicians (120) contributing to the debate. The debates’ importance is two-fold: they allow us to discern the public position of French MPs on the delicate matter of religious signs at school; and they are important epiphenomena of the extent to which the agreement on the final text was real.<sup>219</sup> This section deals with both issues and highlights seven main areas of consensus reached by the French Parliament in passing the 2004 legislation.

#### (i) Real Matter is Muslim Veil

The first point of agreement is crystal clear: although the legislative bill officially dealt with religious symbols at school, the real issue was the Muslim headscarf. “We must acknowledge that today certain religious signs, among which is the Islamic veil, multiply<sup>220</sup> in our schools”, Prime Minister Raffarin said before being interrupted by applauding MPs. “They acquire a political meaning and can no longer be considered as personal signs of religious allegiance”.<sup>221</sup> “The generative cause of our debate is the Islamic veil”,<sup>222</sup> another MP—who voted in favour of the project—acknowledged, while another one who opposed it recognized that “[i]t is a law on the veil on which we are going to vote, and none will be able to deny this”.<sup>223</sup> This perspective was widely shared across the political spectrum,<sup>224</sup> yet behind the headscarf issue was something even bigger, a number of parliamentarians openly observed: “It is the place of Islam in today’s France that is at issue”,<sup>225</sup> one MP supportive of the legislation declared; while another one who opposed the bill said: “[i]t is not ‘religious signs’ that you are targeting here: this law concerns the veil and Islam...”<sup>226</sup>

#### (ii) Criticism of the Conseil d’État Jurisprudence

The second point of agreement reflected an issue thoroughly discussed during the works of the Debré Mission: the inadequacy of the jurisprudence of the Conseil d’État, and the necessity to take back this issue into a political forum. Contrary to the relatively moderate stance adopted at the Mission level, however, during the parliamentary discussion MPs from all sides were remarkably damning in their criticism of the administrative judges.

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(2007) *Journal of Law and Religion*, forthcoming. See also my H Salton, “Una Legge Senza Delitto? La Nuova Normativa Francese Sui Simboli Religiosi a Scuola Tra Diritto, Politica e Laicità” (Centro Studi Nuove Religioni, Turin, 2006).

<sup>218</sup> J L Debré. In *Débats*, above at note 6, 5.

<sup>219</sup> Unless otherwise stated, quotes from this paragraph are taken from *Assemblée Nationale, Laïcité: Le Débat à l’Assemblée Nationale, Séances Publiques du 3 au 10 Février 2004* (Documentation Française, Paris, 2004 (‘*Débats*’)).

<sup>220</sup> As mentioned, the actual numbers are a contentious issue, for the majority of official statistics do not support the view that the Muslim veil was on the increase at school. For details on the matter, see Part 3 and the Conclusion to this thesis.

<sup>221</sup> *Ibid.*

<sup>222</sup> H Mariton (UMP, in favour). In *Débats*, above at note 219, 159-160.

<sup>223</sup> B Le Roux (NR). In *Débats*, above at note 219, 219.

<sup>224</sup> See for example: “Everyone knows it: rather than religious signs, we are here discussing the Islamic veil at school” (M Billard, non-registered, abstained, above at note 219, 93); “The question is whether the national representation accepts or rejects the Islamic veil in our public schools” (J P Grand, UMP, in favour, above at note 219, 217); “It is very much the matter of the Islamic veil—and obviously no other—that thrusts us to reaffirm the laïcité principle” (D Bousquet, PS, in favour, above at note 219, 149); “This [is] a debate on the veil at school, not a grand debate on the laïcité” (A Jung, above at note 219, 207); “Under a semantic cloth, the real question is indeed that of the Muslim veil at school”. (P Braouezec, Communists, against, above at note 219, 109).

<sup>225</sup> R Dosièrè (PS, in favour). In *Débats*, above at note 219, 133.

<sup>226</sup> N Mamère (NR, against). In *Débats*, above at note 219, 140. See in the same sense: “The law aims at targeting the veil, a conspicuous sign of religious belief, and, as a result, with it, all other religious signs. But in fact it is of Islam that we are talking about...” (J-J Descampes, UMP, abstained, above at note 219, 254).

The rapporteur<sup>227</sup> of the law, Mr Pascal Clément, opened fire when he declared that legal confusion was the reason the bill was necessary—and that the Conseil d'État was fully responsible for that confusion. “This text is indispensable”, he said, “because the case law [is] contradictory [and] the administrative judge relies not on religious signs—which, I remind you, [are] allowed by the Conseil d'État—but on public order”.<sup>228</sup> His party colleagues proved even less charitable: the “Avis of the Conseil d'État has solved nothing”,<sup>229</sup> another MP declared, while a third one emphasized that it was “ambiguous and does not permit the countering of ‘communalist’ impulses”.<sup>230</sup>

It was not only the centre-right coalition that was critical, for the left proved equally abrasive. “The jurisprudence developed on the basis of the 1989 Circular”, Laurent Fabius, a former Prime Minister, declared on behalf of the Parti Socialiste, “has progressively betrayed the spirit of the 1905 law and the other laws on education [because] the rule today allows the wearing of religious signs, prohibition of such being limited to exceptional cases”.<sup>231</sup> This jurisprudence was characterized by “worrying contents and effects”,<sup>232</sup> he continued, before giving the final blow: “I know that it is politically incorrect to criticize the Conseil d'État. Yet we must acknowledge that over the years the latter has ended up attributing to the 1905 law things that are the reverse of what this piece of legislation intended to say. Thence the necessity to legislate”.<sup>233</sup> The consensus on the point was so strong that even the very few MPs who opposed the law criticized the existing legal position: “It is”, one of them said, “the government of judges, and in this case those of the Conseil d'État, that brought us [to this situation]”.<sup>234</sup>

(iii) Issue is Political, Not Legal, Because Muslim Veil is a Political, Not Religious Symbol

It was exactly because of this alleged uncertainty, MPs concluded, that a strong signal was needed in order to counter the eminently political character of the headscarf issue. As one MP put it, “[i]t [is] indispensable to make a law because, for far too many years, the politician has dismissed [the problem], giving the impression that this question was merely legal or that it only concerned isolated cases. But like all republican principles, the laïcité is very much a political issue, in the noblest sense of the word, which is why today we need to send a political message, a conspicuous message I dare to say, i.e. a law”.<sup>235</sup> Another MP said: “It is hard not to regret that we have had to wait fifteen years before the public powers dealt with this problem and acted. For having left it to administrative judges and then—not very courageously—to heads of schools to take the responsibility of solving an eminently political problem, governments are the first culprits in the weakening of the social pact”.<sup>236</sup>

<sup>227</sup> Within the French legislative process, the rapporteur introduces and defends the draft text of a bill both before the various legislative commissions and the plenary assembly of Parliament. See e.g. Assemblée Nationale, *La Procédure Législative* (Assemblée Nationale, Paris, 2007).

<sup>228</sup> P Clément (UMP, in favour). In *Débats*, above at note 219, 309. In the same line see: “It is certain that, when one refers, like the case law of the Conseil d'État does, to the notion of public order, interpretative problems will be posed, something that will complicate the task of heads of schools”. F Auberger (UMP, in favour). In *Débats*, above at note 219, 221.

<sup>229</sup> M-H Des Esgauls (UMP, in favour). In *Débats*, above at note 219, 258.

<sup>230</sup> E Raoult (UMP, in favour). In *Débats*, above at note 219, 131. Another MP referred to “...the turbulences of the Conseil d'État jurisprudence”. See C Goasguen (UMP, in favour). In *Débats*, above at note 219, 154.

<sup>231</sup> L Fabius (PS, in favour). In *Débats*, above at note 219, 277.

<sup>232</sup> *Ibid.*

<sup>233</sup> *Id.* 278 (see also 115). On a similar tone, see the following left-wing commentaries: “The current legal corpus and the contradictory jurisprudence place heads of schools before too heavy a discretionary responsibility, because the application of the law is entrusted to them under the pretext of adapting it to the peculiarities of each single case”. J Bruhnes (Communistes, in favour). In *Débats*, above at note 219, 69. See also the reference to “...the limits of the Conseil d'État jurisprudence...” in J-C Cambadélis (PS, in favour). In *Débats*, above at note 219, 162.

<sup>234</sup> C Vanneste (UMP-against). In *Débats*, above at note 219, 165. Left-wing MP Noel Mamère spoke in a similar vein when he declared that “...during too many years our institutions have withdrawn behind a long Avis of the Conseil d'État. The law must not be a clone of this Avis, no matter how eminent it is”. N Mamère (left-against). In *Débats*, above at note 219, 230.

<sup>235</sup> X Bertrand (UMP, in favour). In *Débats*, above at note 219, 201.

<sup>236</sup> G Teissier (UMP, in favour). In *Débats*, above at note 219, 63. In the same sense, but from a different political side, see also: “It is the task of the politician to rebuild the ethical base of the laïcité, to defend public services—school, but also universities, hospitals—to redefine the rights and duties of individuals in society”. M Charzat (PS, in favour). In *Débats*, above at note 219, 263.

The majority of socialist MPs agreed: forget these “[legal] technicalities—the problem is political and concrete”,<sup>237</sup> one wrote, and what is needed is “a political answer to a political problem”.<sup>238</sup>

Yet why was the problem political? Because, according to an overwhelming majority of French MPs, the veil is not only a religious sign but also a political sign—a point that I shall deal with more in detail in Part 3 of this thesis. As one socialist MP declared, it is a mistake “[t]o see in the veil a merely religious matter”.<sup>239</sup> “The wearing of the veil at school by some girls of Muslim faith and culture”, another MP who initially opposed the legislation said, “consciously or unconsciously goes well beyond the mere freedom to respect religious precepts”.<sup>240</sup> Again, this position was so common within the French Parliament that even those who opposed the law expressed a similar message: “I consider [the veil] above all as a sign of political allegiance”, one ‘rebellious’ MP declared, “because religion in this affair [is] only a pretext”.<sup>241</sup>

#### (iv) Muslim Headscarf is a Symbol of Religious Integralism

The Muslim veil was perceived in France as a political sign because, according to French MPs, it conveyed a message that endangered Republican values.<sup>242</sup> On this point, parliamentary support was overwhelming and strongly bipartisan. “The Islamic veil is...a threat to the neutrality of the public space...and, more widely, to the French model”, one centre-right MP said, before concluding that “[t]he question posed is [thus] religious and political at once”.<sup>243</sup> As for the socialist MPs, they very much agreed: “The veil represents, as we know, an epiphenomenon”, one of them declared before his colleagues. “Because of a perverted passage from the religious to the political [sphere], it conveys—not always, but often—proselytism or Islamic fanaticism and integralism, which aims at destabilizing the republican pact and opens the way to ‘communalism’, thus threatening the very identity of France, which is based on universalism, equality and humanism”.<sup>244</sup>

MPs from the ruling centre-right party agreed and focused on the fact that the Muslim headscarf implicitly expressed disdain for Republican values. “Wearing the Muslim veil at school”, one conservative parliamentarian declared, “poses a peculiar problem to our society because it breaks the pact, often tacit, that links French citizens”.<sup>245</sup> In addition, and somehow ironically, given the most common criticism levied against the 2004 law, the Muslim veil was seen as incompatible with freedom of conscience: “The main problem of the veil is the re-questioning of one of the principles most fervently related to *laïcité*: freedom of conscience”,<sup>246</sup> an UMP parliamentarian said.

According to this vision, the state must guarantee not only positive but also negative religious expression because “[t]he [public] school has a duty to protect youths against those influences that, far from liberating them or permitting them to affirm their free choice, tie them or threaten them”,<sup>247</sup> another MP stressed. By banning the veil, in other words, MPs wanted to protect those women who did not wish to wear it (in conscience) but were forced to—an issue intimately connected to the

<sup>237</sup> J Glavany (PS, in favour). In *Débats*, above at note 219, 287.

<sup>238</sup> R Dosière (PS in favour). In *Débats*, above at note 219, 283–4.

<sup>239</sup> C Lacuey (PS, in favour). In *Débats*, above at note 219, 102.

<sup>240</sup> R Couanau (UMP, in favour). In *Débats*, above at note 219, 168.

<sup>241</sup> M Le Fur (UMP, against). In *Débats*, above at note 219, 92. See also: “As regards the ‘generative fact’ of this bill, ie the Muslim veil, a number of those audited made it clear that the question was political at least as much as it was religious”. H Mariton (UMP, in favour). In *Débats*, above at note 219, 291.

<sup>242</sup> On the Muslim veil being implicitly seen as a per se sign of proselytism, see the following passage: “Some behaviors expressing a proselytic religious attachment are not compatible with the exigency of *laïcité* in school establishments...”. G Léonard (UMP, in favour). In *Débats*, above at note 219, 141.

<sup>243</sup> H Mariton (UMP, in favour). In *Débats*, above at note 219, 159–160.

<sup>244</sup> R Dosière (PS in favour). In *Débats*, above at note 219, 136. See also in the same sense: “The veil issue irrupted into and threatens our national community, because [this piece of cloth] seems to hide everything that our republic fights against: an individual’s withdrawal behind a ‘communalist’ symbol; the intrusion of the religious sphere into the public one; proselytism and sexism”. D Bousquet (PS, in favour). In *Débats*, above at note 219, 149.

<sup>245</sup> R Couanau (UMP, in favour). In *Débats*, above at note 219, 168.

<sup>246</sup> D Garrigue (UMP, in favour). In *Débats*, above at note 219, 255.

<sup>247</sup> P-A Périssol (UMP, in favour). In *Débats*, above at note 219, 150. For other comments see *Débats*, above at note 219, at pages 200, 204, 209, 215, 240, 256, 270.

'sexist' accusations levied by French politicians against the Muslim headscarf and to which I shall return in Part 3 of this thesis, when analysing the compatibility of Statute 228 to EU law. "The school has the duty to protect non-veiled girls and those who did not make their choice freely but who have, like all other students, the right to exercise their freedom of conscience".<sup>248</sup>

(v) The New Statute is a Message to France & the World

Another area of consensus involved the emblematic nature of this bill. This was a momentous piece of legislation, French MPs agreed, because it conveyed a message addressed both to the nation and the world. "We have to respond to a symbol with a symbol", one MP put it during the discussion. "[As] the veil has become the symbol of a proselytising Islam used by a minority of Muslims, the law must pose itself as a counter-symbol".<sup>249</sup>

Yet what did this legislative symbol stand for? According to a majority of parliamentarians, it embodied the triumph of freedom against the oppression of religious fanaticism—and of Republican principles over 'communalist' impulses.<sup>250</sup> "This law is important because of the value of its message", it was noted, "a message from France, a message from all Republicans, a nation-wide message against all threats of proselytism at school and against our republican values, a message of support to all those who live in fear of having one day to wear the veil, a message to all those who want to integrate into our Republic and its space of freedom".<sup>251</sup>

The debates also bespoke the high profile of the headscarf affair—"We are going to act in order to reassure Frenchmen and women",<sup>252</sup> one MP said—as well as the unifying purpose of a legislative project that was meant to send "a strong signal, a signal that rallies all French people behind those essentials values, symbols and behaviours that we regard as necessary to the republican ideal".<sup>253</sup>

(vi) Response to International Criticism of the New Statute

The law, however, was not only aimed at France but also possessed a strong international dimension. As one MP emphasized, "[t]his message is addressed firstly to Frenchmen and women, to remind them that the founding values of our Republic are all the more valid today. But it is also addressed to the world, to this globalized world that mixes up peoples and ideas, to inform everyone that, wherever the French flag flies, the law of the French Republic applies".<sup>254</sup>

French MPs were also very much aware of the strong international criticism that the bill on religious signs at school was attracting.<sup>255</sup> "Our attitude intrigues foreigners", one MP observed, "[and] the French *laïcité* surprises them. They also question us on a hypothetical demographic and political force relationship. In a word: can 'communalism' be avoided?"<sup>256</sup>

<sup>248</sup> Ibid.

<sup>249</sup> J Domergue (UMP, in favour). In *Débats*, above at note 219, 187.

<sup>250</sup> See in this respect: "This law...must put an end to the political extremism of religions". G Biancheri (UMP in favour). In *Débats*, above at note 219, 191. "[W]hile the world witnesses increasing attacks against democracy, and while communalism develops, including in France, it seems to us indispensable to reaffirm our attachment to the founding values of our Republic". J-Y Le Déaut (PS in favour). In *Débats*, above at note 219, 244.

<sup>251</sup> G Biancheri (UMP in favour). In *Débats*, above at note 219, 191. See also: "We all want to assign to this law a great purpose: to reaffirm a principle, quite unbelievable to the rest of the world, that in France is called *laïcité* and that allows our youth, be they born in France or not, to discover the communal living through the respect of each other and each other's ideas, in that place of integration that is the school". P Clément (UMP, in favour). In *Débats*, above at note 219, 293.

<sup>252</sup> C Brunel (UMP in favour). In *Débats*, above at note 219, 206.

<sup>253</sup> A Poniatowski (UMP, favour). In *Débats*, above at note 219, 210.

<sup>254</sup> A Herth (UMP, in favour). In *Débats*, above at note 219, 276. This is, of course, a rather ironic passage given the geographic exceptions to the application of the 1905 Separation law seen in Chapter 2.2.

<sup>255</sup> See in this sense: "Our response is awaited by the world...We have repeatedly been told that by legislating in this way, France would shock the arab-Muslim world and enrage a series of countries where she is influential. I think this is not true". A Juppé (UMP-favour). In *Débats*, above at note 219, 111.

<sup>256</sup> H Mariton (UMP, in favour), In *Débats*, above at note 219, 161.

The answer parliamentarians gave was a powerful yes—but they went much further than that and directly criticized the Anglo-Saxon world<sup>257</sup> for giving lectures on a topic that it did not quite understand itself. One socialist MP sarcastically observed:<sup>258</sup>

It is paradoxical that our current debate is criticized by some Western leaders like those of the UK, a country that has [long] failed to solve the violence of the religious communities in Northern Ireland; or the USA, where a number of decisions of the Bush administration are taken in the name of God and where certain MPs with educational responsibilities recommend, for school programmes, the suppression of Darwin's theory because it rejects the truth of the Genesis. These practices are worthy of a theocracy...

“France is a *laïque* nation”, another MP of the centre-right ruling party agreed. “Here, the President does not swear on the bible. Here, everyone is submitted to the laws of the Republic, not to those of God”.<sup>259</sup> Criticism from the Muslim world was equally rejected and returned to the sender with an even harsher message:<sup>260</sup>

Some people would like to suggest that this text bespeaks the Islamophobia and intolerance of French society. This is all the more unacceptable since these are the same people who, from Teheran to Cairo, justify hate, anti-Semitism or the most barbarous practices of the sharia.

#### (vii) Statute 228/2004 Respects Religious Freedom & International Law

The last point of general agreement concerned what MPs saw as the ‘liberal’ character of this legislation, which was meant to guarantee—not trample—religious rights. “The law will not limit the fundamental right to religious expression and conscience”, one MP belonging to the ruling coalition confidently stated, “[i]t is on the contrary for the purpose of reinforcing this right that it will restrain extremist expressions at school”<sup>261</sup> while at the same time allowing discreet ones. “Let us be clear”, another parliamentarian, this time affiliated with the opposition Socialist Party, observed: “It is first and foremost in the name of human rights and equality of sexes that we have a duty to oppose the veil at school”.<sup>262</sup> For this reason, this was not a law of “combat”<sup>263</sup> but of “tolerance”<sup>264</sup> or “respect”,<sup>265</sup> and while MPs believed that an attempt was under way to convince public opinion that a law prohibiting the veil violated freedom, “[i]t is exactly in order to guarantee freedom and equality [that this law is being discussed]”.<sup>266</sup>

One of the few dissonant voices was that of former Prime Minister Edouard Balladur (UMP), who regarded the language of the new statute as highly problematic and proposed an amendment prohibiting only those religious clothes that “were such as to disturb public order”<sup>267</sup>—in many

<sup>257</sup> Criticism of the bill and then statute did not merely come from the ‘Anglo-Saxons’, of course, but French MPs seemed to concentrate on countries such as the UK and the USA—perhaps because of the tumultuous relationship France has with these nations. The parliamentary discussion of Statute 228, it should also be noted, intervened only months after the US-led invasion of Iraq, a military operation to which France was firmly opposed, as her veto at the UN Security Council made crystal clear. For an interesting overview of these issues and of Franco-American relations in general, see e.g. R Roger, *The American Enemy: The History of French Anti-Americanism* (University of Chicago Press, Chicago, 2005).

<sup>258</sup> H Nayrou (PS, in favour). In *Débats*, above at note 219, 107.

<sup>259</sup> B Bourg-Broc (UMP, abstention). In *Débats*, above at note 219, 86.

<sup>260</sup> B Carayon (UMP-in favour). In *Débats*, above at note 219, 173. See also: “And none dare come and talk to us of ‘respect for difference’, because France never stopped respecting difference. But today the general interest, like the interests of our youth, is to reaffirm the values that unite us”. D Habib (PS-favour). In *Débats*, above at note 219, 90.

<sup>261</sup> P-A Périsol (UMP, in favour). In *Débats*, above at note 219, 150-1.

<sup>262</sup> G Peiro (PS, in favour). In *Débats*, above at note 219, 257. In a similar sense, see the following observations from other Socialist MPs: “It is on the contrary in the name of human rights that a law is necessary”. J-P Blazy (PS, in favour). In *Débats*, above at note 219, 223. “Not to legislate now would mean committing imprudence by all those who defend freedom of conscience and thought”. M Charzat (PS, in favour). In *Débats*, above at note 219, 262.

<sup>263</sup> A Juppé (UMP, in favour). In *Débats*, above at note 219, 111.

<sup>264</sup> J-P Decool (UMP, in favour). In *Débats*, above at note 219, 267.

<sup>265</sup> A Juppé (UMP, in favour). In *Débats*, above at note 219, 111. In the same sense see for example: “This law does not combat religions, it protects them by allowing believers to live together”. B Barrot (UMP, in favour). In *Débats*, above at note 219, 312.

<sup>266</sup> R Rouquet (PS, in favour). In *Débats*, above at note 219, 269.

<sup>267</sup> The issue of the statute’s language was one of the very few areas of disagreement within the French 2004 Parliament and will be considered in detail in Section 3.3.3.

respects the approach of the Conseil d'État. "A measure of general and automatic prohibition [like this]", he pragmatically warned his colleagues, "risks being contrary to the law".<sup>268</sup> National and international legislation as well as the jurisprudence of the Conseil d'État had to be respected, he told MPs, before reminding them that<sup>269</sup>

[i]n a free society, dear colleagues, the intervention of the judge is not an element of uncertainty but certainty. Let us therefore stop dreaming about an automatically applicable text because this would violate the superior law...contained in the Déclaration des Droits de l'Homme and the European Convention on Human Rights [and] let us prohibit a religious sign [only] when it is such to disturb the good order of the school.

The position of Mr Balladur, however, was regarded as unpersuasive and his amendment was overwhelmingly rejected.<sup>270</sup>

### 2.3.7. INTERPRETING THE 2004 LAW: THE FILLON CIRCULAR OF MAY 2004

The new statute on religious signs at school was approved overwhelmingly by the French Parliament in March 2004,<sup>271</sup> but it took two months before the Education Minister François Fillon wrote to all French heads of school and principals a circular setting out the wording of the legislation.<sup>272</sup> As one French MP confessed during the parliamentary debates, "[l]ike many among us, I impatiently await the circular that is being drafted and that will clarify in what circumstances the internal regulations will translate the obligations fixed by the statute".<sup>273</sup> Given the statute's broad language and brevity, the 2004 ministerial document could not avoid dealing with a number of problematic issues in some detail.

The circular began by defending the new statute. It is a piece of legislation, the Minister said, that "expresses the willingness of the representatives of the Nation to provide comfort to France's schools"<sup>274</sup>—and justified it by referring to very broad ideas such as human dignity and the equality of sexes. "The school has the mission of transmitting the Republic's values among which are the dignity of all human beings, the equality between men and women, and everyone's freedom, including in his or her way of living", the Minister wrote. "It is precisely the task of [French] schools to ensure the [respect] of these values, develop and guarantee everyone's freedom, ensure students' equality and promote a fraternity which is open to everyone".<sup>275</sup> Given the parliamentary debates and legislative history of the new legislation, it is not unreasonable to interpret these generic references as a direct criticism of certain religious signs—particularly the Islamic veil—which as we have seen was considered antithetical to the legitimate objectives to be pursued by French schools. In this respect, the circular is similar to the tenor of the parliamentary debates and the language of the Bayrou document, especially when it comes to emphasizing the eminently 'political' character of the veil issue and the problem of integrating France's minorities.

The second interesting point raised by the ministerial document concerns its application. While the Minister observed that the new directive abrogated both the Jospin Circular of 1989 and the Bayrou one of 1994,<sup>276</sup> he also made it clear that, following the approval of the new legislation, the previous jurisprudence of the Conseil d'État was no longer apposite and consequently should not be followed by school principals. "[I]t will be useful to insert the text of the 2004 law into public schools' internal rules", the Minister wrote, "and ensure that these rules no longer refer to the notion of 'conspicuous' signs, a [case-by-case] approach based on the jurisprudence of the Conseil d'État

<sup>268</sup> E Balladur (UMP, abstained). In *Débats*, above at note 219, 295.

<sup>269</sup> *Ibid.*

<sup>270</sup> See *Débats*, above at note 219, 317.

<sup>271</sup> See Section 2.3.6. for details.

<sup>272</sup> *Journal Officiel*, Circulaire Relative à la Mise en Oeuvre de la Loi n.2004-228 du 15 Mars 2004, above at note 2, 324-5.

<sup>273</sup> J Remiller (UMP in favour). In *Débats*, above at note 219, 244.

<sup>274</sup> Circulaire Fillon, above at note 2 ('Introduction').

<sup>275</sup> *Id.* § 1.

<sup>276</sup> *Id.* ('Introduction').

which is now replaced by the new law”.<sup>277</sup> French schools had in other words to adapt to this new situation and prohibit what the Conseil d’État had so far ordered to admit.<sup>278</sup>

Thirdly and most importantly, the circular was eagerly awaited because few people (including MPs) seemed to know what the expression ‘conspicuous signs’ meant and which religious symbols were actually prohibited (this was not true, of course, of the Muslim veil, which no one ever doubted was banned). It is therefore to this definition that a good portion of the circular is devoted. The document reads:<sup>279</sup>

The signs and clothes that are prohibited are those that lead someone to be immediately recognized for his or her religious allegiance, such as the Islamic veil, whatever its name, the kippa or a cross of manifestly excessive dimension.

It went on:<sup>280</sup>

The statute does not affect students’ right to wear discreet religious signs [and] does not prohibit accessories and clothes that are commonly worn by students without any religious significance. On the other hand, the law forbids a student to take advantage of the religious character of that [symbol] in order to refuse to conform to the rules regulating students’ attire at school.

While this explanation closely follows the reasons for the adoption of the 2004 law given in Parliament by former Education Minister Luc Ferry,<sup>281</sup> it raises three significant issues.

The first concerns the criterion chosen by the circular. By explaining the adverb ‘conspicuously’ through a standard of ‘immediate recognition’ and by failing to define ‘discreet signs’,<sup>282</sup> Mr Fillon may have raised more doubts than he hoped to resolve.<sup>283</sup> Apart from the fact that ‘discreet signs’ (e.g. a Christian cross) too can be ‘immediately recognizable’ and that, as we shall see in Section 3.3.3. (and particularly 3.3.3.4.), French MPs explicitly refused to adopt a ‘visibility’ criterion, it is clear that an interpretation—and a necessarily subjective one—will in the future be required in order to establish whether the symbol worn by the student is (i) one through which he or she ‘conspicuously manifests a religious allegiance’; (ii) ‘discreet’; (iii) ‘immediately recognizable’; or (iv) falls within the automatically forbidden category of ‘veils, kippas or crosses of a manifestly excessive dimension’.

The second observation is related to the first and has to do with the difficulty of the task assigned to school officials. These people—and ultimately the administrative judge—are supposed to

<sup>277</sup> Id. § 4.

<sup>278</sup> As an author underlined, “...a legislative regime of prohibition of ostensible religious signs follows a judicial regime of freedom to wear such signs”. O Dord, «Laïcité à l’École: L’Obscure Clarté de la Circulaire Fillon du 18 Mai 2004», *Actualité Juridique Droit Administratif (AJDA)*, 26 July 2004, 1523. For further comments, see Part 3 of this thesis. As we shall see there as well as in the concluding part of this thesis, there is of course nothing per se wrong with the fact of Parliament overruling the case law—particularly in France, where the legislative assembly is elected by the people while judges are not. The problem is that in 2004 the French Parliament seemed to single out one specific religious symbol in particular, so rubber-stamping the Islamophobic position of French society and ‘un-doing’ several years of settled and considerate (if not always clear) jurisprudence. I shall return to this point in the Conclusion.

<sup>279</sup> «Les signes et tenues qui sont interdits sont ceux dont le port conduit à se faire immédiatement reconnaître par son appartenance religieuse tels que le voile islamique, quel que soit le nom qu’on lui donne, la kippa ou une croix de dimension manifestement excessive». Circulaire Fillon, above at note 2, 324-5.

<sup>280</sup> «La loi ne remet pas en cause le droit des élèves de porter des signes religieux discrets. Elle n’interdit pas les accessoires et les tenues qui sont portés communément par des élèves en dehors de toute signification religieuse. En revanche, la loi interdit à un élève de se prévaloir du caractère religieux qu’il y attacherait, par exemple, pour refuser de se conformer aux règles applicables à la tenue des élèves dans l’établissement». Circulaire Fillon, above at note 2, 325.

<sup>281</sup> Former Education Minister Luc Ferry had defined “conspicuous religious signs” as those “signs or clothes the wearing of which leads to immediate recognition of one’s religious allegiance. These signs—the Islamic veil, whatever its name, the kippa or the cross of manifestly excessive dimension—do not have a place within the school of the republic. On the other hand, discreet signs of religious belonging will of course be allowed”. Ferry, L. *Exposé des Motifs*, in *Débats*, above at note 219, 18.

<sup>282</sup> The same worry was expressed by Professor Dord: “The circular does not provide any example of these discreet religious signs”. Dord, above at note 278, 1524.

<sup>283</sup> As it was observed, “[t]he 2004 circular does not give any definition of ostensible sign or clothing, although this term should be intended as having replaced the notion of ‘conspicuous sign’ introduced by the administrative judge”. E Tawil, «L’interprétation Administrative de la Loi du 15 Mars 2004 sur le Port de Signes Religieux dans les Etablissements Scolaires», *La Semaine Juridique Administrations et Collectivités Territoriales*, n. 25, 14 June 2004, 842.



recognize those signs which are not *per se* religious but could become so if given a religious meaning by the student who wears them. “It is the task of the administration to qualify a piece of cloth or a symbol as religious by founding its decision on what the ... head of school knows of the existing religions”, one author underlined. “[Yet] the head of school will also need to make this assessment on the basis of what he or she regards as a malign intention in the student who is wearing a sign which is not *per se* religious but to which the student could attach a religious meaning”.<sup>284</sup> In the name of the *laïcité*, therefore, school principals—and ultimately judges—have been assigned the thorny task of speculating about the religious character of certain signs, rarely a gratifying endeavour and one that cannot but lead to exactly the outcome (judges determining what can and cannot be worn at school) that the parliamentarians were so unhappy about regarding the Conseil d’État.<sup>285</sup> In so doing, therefore, the circular requires the administration to engage in a subjective interpretation of religious as well as non-religious beliefs and intentions,<sup>286</sup> a matter that I shall consider in detail in Part 3 of this thesis.

The third and final remark concerns cultural signs. Contrary to the religious ones, these cultural objects seem to be allowed no matter how conspicuous they are, and this merely on the basis of their ‘non-religiousness’. As it was aptly observed, therefore, one curious aspect of the 2004 circular is that “[i]t actually preserves those cultural dresses and headscarves which signify, beyond any religious meaning, the individual or collective attachment of certain students to their cultural or geographic origins”.<sup>287</sup> While this still needs to be confirmed in terms of case law, if one literally follows the letter of the circular, a cultural hat would be allowed in class while a religious one would not. Part 3 of this thesis will clarify this area.

### 2.3.8. APPLYING THE 2004 LAW: POST-2004 JURISPRUDENCE ON THE VEIL

#### 2.3.8.1. The ‘Fillon’ Circular is Legal: The Case ‘Union Française pour la Cohésion Nationale’ (October 2004)

The first judicial application of the Fillon Circular by the Conseil d’État took place in October 2004, when the highest administrative court was seized of a case that directly attacked the legality of this ministerial document.<sup>288</sup> In *Union Française pour la Cohésion Nationale*, the Conseil d’État concluded that the Fillon circular merely clarifies the interpretation that heads of schools should give to the 2004 law and concluded that such interpretation, in light of the law’s parliamentary debates, was not illegal because it appears to be in accordance with the intention of the legislator. The highest administrative judges wrote:<sup>289</sup>

[B]y giving examples of such [forbidden] signs as the Islamic veil, kippa or cross of manifestly excessive dimension, signs that were widely quoted during the parliamentary works and debates of this law, the Education Minister...[merely] gave details on the interpretation of this text...[and] did not exceed his competence nor misinterpret the sense or coverage of the 2004 law....

<sup>284</sup> Dord, above at note 278, 1525.

<sup>285</sup> As one author observed, “the administrative judge will have to decide what is a conspicuous manifestation and what is not, what is a ‘cross of manifestly excessive dimension’..., whether cultural clothing can in certain circumstances have a religious meaning and whether physical signs (such as hair) can be regarded as religious signs. This is a curious task indeed in a Republic that ‘recognizes...no religion’”. See F Rolin, «Le Conseil d’État Abandonne la Doctrine de l’Avis de 1989 sur la Laïcité», *Actualité Juridique Droit Administratif (AJDA)*, 10 January 2005, 45.

<sup>286</sup> See also: “Unfortunately the new legislation requires the public administration to engage in the delicate question of what is a religious sign. In practice, the head of school will first need to decide whether a certain sign conveys a religious allegiance; then whether the fact for a student to wear this sign conveys his or her religious allegiance; and finally to decide, if the sign is religious, whether it is discreet enough to be allowed. It is doubtful whether it is the task of a *laïque* administration to enter into this kind of assessment”. Dord, above at note 278, 1524.

<sup>287</sup> *Ibid.*

<sup>288</sup> As we have seen in the case of the Bayrou circular, the judges of Palais Royal had traditionally been reluctant to assess ministerial circulars, yet this changed in *Duvignères* in 2002 when the Conseil d’État reversed its previous jurisprudence on the issue and declared its competence to assess those circulars that contained imperative orders. See E Tawil, «La Loi et la Circulaire sur Les Signes Religieux à l’École Publique: Epilogue Devant le Conseil d’État», *La Semaine Juridique Administrations et Collectivités Territoriales*, n. 45, 2 November 2004, 1412.

<sup>289</sup> Conseil d’État, *Union Française pour la Cohésion Nationale c/ Ministère de l’Education Nationale*, 8 October 2004, Req. 269077.

While this is only partly correct to the extent that, as we shall see in Section 3.3.3., the French Parliament explicitly rejected the visibility criterion adopted by the Fillon Circular and adopted the far more ambiguous adjective ‘ostensiblement’, the same conclusion was reached by the *Commissaire du Gouvernement*:<sup>290</sup>

We think that the Minister, in giving as examples the Islamic veil, kippa or big cross, has not fixed a new rule. To be sure, the law did not list the prohibited signs, but it is enough to refer to the parliamentary debates...and reasons for the law to realize that the legislator has always meant to prohibit the Islamic veil, kippa and big cross.

For the same reason, the highest judges did not consider the Fillon circular as contrary per se to EU law:<sup>291</sup>

The dispositions of the circular do not misinterpret the provisions of article 9 of the ECHR nor those of article 18 of the ICCPR to the extent that the prohibition created by this law and recalled by the circular does not exceedingly limit freedom of thought, conscience and religion in respect of the principle of *laïcité* in public schools.

Yet the *Conseil d'État* also—and crucially—pointed out that the administrative judge is not competent to state whether the 2004 statute is compatible with French constitutional law—for that task is for the *Conseil Constitutionnel*.<sup>292</sup> As we shall see in detail in Section 3.3.6. (which deals with the relationship between Statute 228 and French law), for technical reasons the *Conseil Constitutionnel* never directly ruled on the constitutionality of Statute 228 but did so indirectly, in its *Décision* 505/2004 on the proposed (and never implemented) Constitution for Europe.<sup>293</sup> As one author underlined, “[t]he *Conseil d'État* does not believe that the examination of the legality of a circular brings it to indirectly control the constitutionality of a statute. It [simply] reject[ed] the argument according to which the 2004 circular would be illegal”.<sup>294</sup>

### 2.3.8.2. Post-2004 Veil Legislation

#### (i) Reasons for Limited Case-Law

Although in the months following the passage of the new law French administrative courts were beset with a number of cases concerning the application of Statute 228, post-2004 litigation on the

<sup>290</sup> R Keller, «La Validité de la Circulaire sur le Port des Signes Religieux dans les Établissements Scolaires Publics: Conclusions sur Conseil d'État, 8 Octobre 2004, Union Française pour la Cohésion Nationale», in *Revue Française de Droit Administratif (RFDA)*, September–October 2004, 978.

<sup>291</sup> *Conseil d'État, Union Française pour la Cohésion Nationale c/ Ministère de l'Éducation Nationale*, 8 October 2004, Req. 269077. On the point see E Tawil, *Strasbourg Vu du Palais Royal: Invocation et Réception de la Convention Européenne des Droits de l'Homme dans le Traitement Juridique du Voile Islamique en France (LIDEMS, Aix-en-Provence and Marseille, 2005)* 2.

<sup>292</sup> The *Conseil d'État* has jurisdiction in determining lawfulness vis-à-vis the European Convention of Human Rights and/or international law, but not in terms of domestic (French) constitutional law, for that is a matter for the *Conseil Constitutionnel* to consider. In the veil controversy, however, the latter was never invested with such a task because the government as well as an overwhelming majority of French MPs approved of the legislation. For an analysis on the point see Part 3. See also Messner, Prélot, Woehrling & Riassetto, above at note 33, 422; and J Robert & J Duffar, *Droits de l'Homme et Libertés Fondamentales* (Montchrestien, Paris, 1999) 587-614.

<sup>293</sup> *Conseil Constitutionnel, Décision n. 2004-505 DC du 19 Novembre 2004*. For a comment, see for example C Gauthier, «Note Sous Court Européenne des Droits de l'Homme», 29 June 2004, *Leila Şahin*, JCPA 2004, n.1831. See Section 3.3.6. for details.

<sup>294</sup> E Tawil, «La Loi et la Circulaire sur Les Signes Religieux à l'École Publique: Épilogue Devant le Conseil d'État», *La Semaine Juridique Administrations et Collectivités Territoriales*, n. 45, 2 November 2004, 1413. As the *Commissaire du Gouvernement* wrote in the conclusions, “[You cannot] verify the conformity of the law to the Constitution”. R Keller, «La Validité de la Circulaire sur le Port des Signes Religieux dans les Établissements Scolaires Publics: Conclusions sur Conseil d'État, 8 Octobre 2004, Union Française pour la Cohésion Nationale», in *Revue Française de Droit Administratif (RFDA)*, September–October 2004, 978. See also in the same sense: “What did not change, however, is the refusal [of the *Conseil d'État*] to exercise a constitutionality check on the law”. F Rolin, «Le Conseil d'État Abandonne la Doctrine de l'Avis de 1989 sur la Laïcité», *Actualité Juridique Droit Administratif (AJDA)*, 10 January 2005, 44. Finally, see also *Ibid.*: “...it is not its task to check the constitutionality of a law interpreted by a circular”.

veil has been significantly lower than expected.<sup>295</sup> This was partly due to a series of current events.<sup>296</sup> When two French journalists were kidnapped in Iraq in 2004, the Islamic fundamentalist movement which was holding them put as a condition for their liberation the repeal by the French government of the 2004 law on religious signs at school.<sup>297</sup> This proposal was overwhelmingly rejected by virtually the entire Muslim community of France, which consequently had little political choice but to rally behind a law that they disliked. The journalists were subsequently freed, apparently after a ransom was paid.

Another reason behind the limited post-2004 litigation, however, may well be that, as Hanifa Cherifi—coordinator of the veil issue at the Education Ministry—wrote in a Report, “the law has obtained its objective: to dissuade young Muslim girls from wearing the veil [at school]”.<sup>298</sup> The numbers seem to confirm this: while during the 2003-4 school year the Education Minister had reported 1.465 incidents involving religious signs, in 2004-5 there were just 639 of them, among which only 47 involved a formal exclusion.<sup>299</sup> “We have more than 10 million [public school] students in France ... and only 70 cases of exclusions based on the refusal to withdraw the veil have so far been registered”,<sup>300</sup> Rémy Schwartz, Conseiller d’État and Rapporteur Général of the Stasi Commission told me in an April 2006 interview.<sup>301</sup>

Nevertheless, a number of incidents and subsequent litigation have occurred.<sup>302</sup> While it should be noted that virtually all of them have been dismissed by the administrative jurisdictions<sup>303</sup> and others are still being assessed by French courts, four cases are worthy of mention here as examples of what may turn out to be a more general trend.

#### (ii) Bandana: The ‘Radda X’ Case (September 2004)

In September 2004, Ms Radda X went to school with her hair partly wrapped in a piece of cloth similar to a bandana—a symbol which, she maintained, had no religious or cultural motivation but was worn for aesthetic reasons. The girl was suspended and the parents sued the school on the ground that this was a severe and manifestly illegal violation of her right to education. The Conseil d’État, however, in a procedural decision which did not extensively consider the details of the case, rejected their request and wrote that the prohibition of a bandana was not manifestly illegal on the basis of the 2004 law. The judges wrote:<sup>304</sup>

Even though a doubt existed ... as to the reason for wearing the bandana by the young student, it does not seem that the school, in deciding to temporarily suspend Ms X while engaging in a dialogue with the family [and assessing whether the bandana had a religious motivation], has interpreted the 15 March 2004 law in a way that is manifestly illegal.

<sup>295</sup> H Salton, «Le Voile et la France: Entretien avec Rémy Schwartz, Conseiller d’État and Rapporteur Général of the Stasi Commission pour l’Application du Principe de Laïcité à l’École», (2006) 3 New Zealand Postgraduate Law eJournal, 14.

<sup>296</sup> On the point, see Deltombe, above at note 25, 337.

<sup>297</sup> Ibid.

<sup>298</sup> Liberation, *Loi sur le Voile: Le Ministère Content*, 26 August 2005.

<sup>299</sup> Le Monde, *Une Douzaine de Cas de Signes Religieux Ostensibles Ont Été Recensés dans les Écoles Depuis la Rentrée*, 10 September 2005.

On the point see also Collectif Contre l’Islamophobie, *Le Bilan de la Loi du 15 Mars 2004 et de Ses Effets Pervers*, (CCI, Paris, 2005).

<sup>300</sup> Salton, above at note 295, § 8.

<sup>301</sup> See also: “In this context of school harmony, the administrative judge has been asked to decide on some lawsuits either by Muslim girls or Sikh students. Yet these can be counted in tens, whereas, in France, first instance administrative judges generally receive 130.000 lawsuits each year”. R Schwartz quoted by Salton, *Le Voile et la France*, above at note 295, § 8.

<sup>302</sup> See for example Tribunal Administratif de Grenoble, *Ms Essakkaki*, 21 May 2005, n.0406566 (“Ms Essakkaki went to school, on 6 September 2004, with a veil on her hair...and she should be considered as having worn a sign through which she conspicuously manifested a religious belonging”). See also on the same case S Morel, «Conclusions du Commissaire du Gouvernement sur le Cas Ms Essakkaki», *Actualité Juridique Droit Administratif (AJDA)*, 19 September 2005, 1746. For an example of a post-2004 Veil Exclusion in a Private School, see on the other hand Cour de Cassation, 02-19.831, 21 June 2005.

<sup>303</sup> Ibid (emphasis added).

<sup>304</sup> Conseil d’État, *Mlle X*, 8 October 2004, 272926 (emphasis added). See also E Tawil, «L’Interprétation de la Loi sur Les Signes Religieux à l’École Publique», *La Semaine Juridique Administrations et Collectivités Territoriales*, n.53, 27 December 2004, 1713.

In this case, therefore, the ‘immediate recognition’ criterion of the Fillon Circular seemed to prevail over the student’s subjective considerations on the religiousness of the sign.

(iii) Right to Natural Justice (October 2004)

A second post-2004 decision concerned the right to natural justice. At the end of 2004, a Sikh boy was excluded from the Louise Michel College of Bobigny because he refused to remove his turban. He was given access to a study room but after several weeks a decision had not been made by school authorities and a lower administrative tribunal ruled that this delay represented a violation of his procedural rights.<sup>305</sup>

While the 2004 law prescribes ... that the wearing of signs or symbols manifesting a religious allegiance is prohibited in school and ... that a dialogue with the student must precede the application of the disciplinary sanction, these provisions do not allow any exclusion of the student before such procedure is concluded.

The circumstances of the case were such that the student could not properly defend himself for a considerable amount of time—and this, irrespective of his fault, was unacceptable. As an author underlined, in this case “it is not the exclusion that represents a serious and manifestly illegal menace to a fundamental freedom but such a [suspension] beyond any form of disciplinary action”.<sup>306</sup>

(iv) The Sikh Turban is Prohibited: April 2005

In November 2004, a Sikh student (together with two colleagues) was expelled from a school in North-East Paris because he refused to take off his turban. He sued the school but the Melun Administrative Tribunal ruled against him<sup>307</sup> on the ground that the 2004 law justified such exclusion irrespective of any public order problem.<sup>308</sup>

The legal prohibition [founded on the 2004 law] could regularly be imposed on the student from the moment when, insisting on wearing the turban or Keski Sikh, he carried a piece of cloth which made him immediately recognizable as belonging to the Sikh religion, and this without any need for the administration to assess the willingness of the student to adopt a confrontational or proselytic attitude or to establish that [he] violated public order.

As for the sanction of exclusion from school, this was equally envisaged by the 2004 law and circular and was thus neither illegal nor a violation of the student’s dignity: “[T]he disciplinary measure of exclusion”, the judge wrote, “is not a threat to the student’s human dignity and is not a discriminatory measure toward the Sikh religion, to the extent that this measure is the last resort prescribed in the case of non-respect of the laïcité law”.<sup>309</sup>

(v) The Sikh Turban is Prohibited: July 2005

In July 2005 the Paris Appeals Court confirmed this exclusion. “Mr Singh ... does not contest the religious character [of the turban] and although the latter is smaller and less colourful than the

<sup>305</sup> Tribunal Administratif de Cergy-Pontoise, M. Singh, 21 October 2004, Req. 0407980 (emphasis added). See also, Ibid.: “...[There was no] possibility for the student to present his defence before the disciplinary commission [and] it was not alleged that there existed a risk of violation of the public order”.

<sup>306</sup> S Deygas, «Port de Signes Religieux dans un Lycée et Droits de la Défense», in Procédures, n.3, March 2005, 79.

<sup>307</sup> Associated Press, French Court Upholds Exclusion of Sikh Students, 20 April 2005.

<sup>308</sup> Tribunal Administratif de Melun, M. Singh, 19 April 2005, n.0507665, Actualité Juridique Droit Administratif (AJDA), 2005, Informations Rapides, 917. See also, *ibid.*: “[I]t results both from the terms of the law and the parliamentary works that prepared it that, since 1 September 2004, on the one hand the wearing of certain religious signs is considered in itself as ostentatiously manifesting a religious allegiance and can be prohibited even in the absence of proselytic behaviours which would render [them] confrontational or conspicuous, and, on the other hand, that the signs or symbols prohibited are those that lead someone to be immediately recognized for his or her religious belonging such as the Muslim veil, the kippa or a cross of manifestly excessive dimension”.

<sup>309</sup> Tribunal Administratif de Melun, M. Singh, 19 April 2005, n.0507665, Actualité Juridique Droit Administratif (AJDA), 2005, Informations Rapides, 917 (note how this judgment identifies Statute 228 and laïcité).

traditional version, it cannot be qualified as a discreet sign”,<sup>310</sup> the judges wrote. As a consequence, and “although his intention was not to manifest his faith”,<sup>311</sup> “in wearing it within the school buildings he conspicuously manifested his allegiance to the Sikh religion...and adopted an attitude which is contrary to the law”.<sup>312</sup> The sanction of exclusion from school was therefore legitimate, the judgment concluded, because<sup>313</sup>

the mere violation of this law ... may imply a disciplinary punishment even though such a violation [is] not accompanied by an act of proselytism and [does] not disturb public order.

Yet the Court went further and seemed to confirm that the expulsion of a high school student over religious insignia is proportionate to the secular mission of the French educational system:<sup>314</sup>

Considering the importance of the laïcité principle in French public schools, the sanction pronounced against a student who violates the prohibition of wearing conspicuous religious signs does not represent an excessive limitation of the freedom of thought, conscience and religion [and] ... cannot be regarded as a measure of discrimination based on religion.

On the basis of the new—and far more restrictive—interpretation of the laïcité principle introduced by the 2004 statute, therefore, Mr Singh’s challenge was rejected.

### 2.3.9. CONCLUSION: A LAW WITHOUT A CRIME?

As this chapter has shown and as we shall see in Part 3 of this thesis, no one can be in any doubt about the significance of the veil issue in contemporary France. Yet what exactly did change in 2004? The French ‘veil revolution’ was threefold, I have argued, and covered both the legal and political dimensions of the headscarf controversy.

As far as legal challenges are concerned, the shift could have hardly been more spectacular. In 1989, when the Conseil d’État first ruled on the headscarf matter, there was no statutory provision directly dealing with the position of the Muslim veil at school and the supreme administrative judges had in a sense to ‘make’ the law in the form of their 1989 Avis. This judgment was certainly complex and to some extent ambiguous—its isolated reference to signs ‘by their nature’ conspicuous was, in light of the subsequent jurisprudence and as we shall see in Part 3, particularly unfortunate—yet it was followed by a constant case-by-case approach that resisted any formulaic simplification and confirmed the highest court’s intention to deal with each case and the behaviour of the student rather than focusing solely on the sign. The result was a generally tolerant jurisprudence, largely in favour of the wearing of religious signs at school and, contrary to what politicians argued during the parliamentary debates, remarkable for its constancy.<sup>315</sup>

The adoption of the new statute in 2004 spectacularly changed this situation and the Conseil d’État eventually acknowledged the change. As the Commissaire du Gouvernement wrote in October 2004, “[the Conseil d’État’s] balanced jurisprudence has in the past allowed ... a case by case evaluation [of the veil

<sup>310</sup> Cour Administrative d’Appel de Paris, *Singh v Ministère de l’Education Nationale*, 19 July 2005, 05PA01831.

<sup>311</sup> *Ibid.*

<sup>312</sup> *Ibid.*

<sup>313</sup> *Ibid.* Once again, it was not the student’s subjective reasons for wearing the religious symbol that French judges retained but rather a criterion of material visibility, a point upon which I shall return in Part 3.

<sup>314</sup> *Ibid.*

<sup>315</sup> As René Rémond, French historian, member of the Academie Française and former member of the Stasi Commission, told me in Paris, “[t]he Conseil d’État jurisprudence was coherent and liberal, not like the result we have today with the new statute. It was favorable to the veil in itself, except when there was proselytism. Today, on the contrary, every religious veil is proselytic. This law does not go forward but backward”. Notes from my interview with René Rémond, 29 September 2005. For a similar position by a honorary member of the Conseil d’État, see R Errera, *Signes Religieux: Une Loi Inutile et Nuisible*, in *Le Monde*, 6 December 2003.

issue] but ... several voices have asked for the adoption of a more rigorous rule”.<sup>316</sup> This rule was overwhelmingly and enthusiastically adopted by the French Parliament in March 2004 and the Conseil d’État finally recognized it and applied it.<sup>317</sup> There are certainly a number of pitfalls in this process of (reluctant) recognition and these will appear clearly in Part 3 of this thesis, where the standards adopted by Palais Royal will be put side by side with those of American law.<sup>318</sup>

Yet the fact remains that the real 2004 ‘revolution’ is not to be found in French law but in the French political milieu. As an author observed, “[w]hat has changed [since 1989] is the political and social context that the 2004 law and parliamentary debates convey so well. The evolution of this social and political context and the consensus it is based upon justify a new reading of the relations between the laïcité principle and that of freedom of religious expression”.<sup>319</sup> This new reading—imposed by the politicians and reluctantly accepted by the judges—is at the basis of the 2004 revirement of the Conseil d’État and represents the new important lens through which the veil issue should be analyzed in the post-2004 era. The adoption of a comparative perspective in Part 3 will highlight the peculiarity as well as the ambiguities of this revirement.

So the legal dimension of the headscarf affair in France is important, but the political aspect is even more crucial. In this respect—and despite its reference to ‘religious signs’—there is no doubt that Statute 228 was passed as a response to the (real or perceived) problems posed by the Muslim veil in French schools. The genuine issue has always been the Islamic headscarf—no one seriously maintains that kippas or big crosses ever represented a problem in France—and the debates at the Assemblée Nationale leave no doubt about this. They confirm also the extent to which French politicians regarded the veil controversy as a political matter, mainly because this object was perceived as a highly political sign as well as a symbol of extremism and sexual oppression.

France has been roundly and harshly condemned for enacting this piece of legislation. Yet while many of these criticisms are warranted, there is a tendency to condemn the French approach as simple anti-religious extremism. This depiction is inadequate. It is true that a considerable number of religious symbols—contrary to other signs—are now officially restricted in French schools; yet one should keep in mind that the main target of the law was not religious signs but the Islamic veil—and the verbal acrobatics used during the parliamentary debates (considered in Section 3.3.3.) in justifying the vocabulary reflects this fundamental bias. If Islam had not been France’s second religion and if it had not been seen as a mounting threat, in other words, the law would have been unthinkable and the kippa and Christian crosses would still be allowed in French classrooms. They were, like the other religious symbols, the collateral damage of French politicians’ anti-veil attitude.<sup>320</sup>

As we shall see in Part 3, the issues raised by Statute 228/2004 are by no means limited to these matters and indeed comprise a series of further and even more complex lessons—yet these are better considered in light of the American situation, so they will be discussed in the comparative part. There is nevertheless a concluding lesson that should be highlighted here: Statute 228 is an eminently political enterprise—French politicians’ proud answer to what they regarded as a legal deadlock—

<sup>316</sup> R Keller, «La Validité de la Circulaire sur le Port des Signes Religieux dans les Etablissements Scolaires Publics: Conclusions sur Conseil d’État, 8 Octobre 2004, Union Française pour la Cohésion Nationale», in *Revue Française de Droit Administratif* (RFDA), September-October 2004, 977.

<sup>317</sup> On the point see V Fabre-Alibert, «La Loi Française du 15 Mars 2004 Encadrant, En Application du Principe de Laïcité, Le Port de Signes ou de Tenues Manifestant une Appartenance Religieuse dans les Écoles, Collèges et Lycées Publics: Vers un Pacte Social Laïque?», *Revue Trimestrielle des Droits de l’Homme*, n.59, 2004, 575-609. See also C Durand-Prinborgne, «La Loi sur la Laïcité, une Volonté Politique au Centre des Débats de Société», *Actualité Juridique Droit Administratif* (AJDA), 5 April 2004, 704-9; G Koubi, «Une Précision Tenue pour Insigne: A Propos de la Loi n. 2004/228 du 15 Mars 2004», *La Semaine Juridique, Administrations et Collectivités Territoriales*, n.13, 22 March 2004, 405-409.

<sup>318</sup> See in particular Section 3.3.5.

<sup>319</sup> F Rolin, «Le Conseil d’État Abandonne la Doctrine de l’Avis de 1989 sur la Laïcité», *Actualité Juridique Droit Administratif* (AJDA), 10 January 2005, 45.

<sup>320</sup> As a former member of the Conseil d’État told me, “[i]t is not a matter of being in favour or against the veil—the veil can and indeed should be banned if it causes problems in class. With this law, however, every single headscarf is automatically considered a problem—and this is very much objectionable”.

and embodies in many respects the triumph of politics over the law. As a satisfied Education Minister declared in Parliament in 2004,<sup>321</sup>

[t]he Avis of the Conseil d'État in 1989... had the effect of authorizing certain religious signs as such [but] from now on they will clearly be forbidden and the 1994 Circular written by François Bayrou will finally have the value of law and it will no longer be possible to disavow it in the event of lawsuits.

After ten years of attempts and discussions—and after fifteen years of disputes with the administrative judges—the political choice finally turned into law and the Muslim veil, together with other 'non-discreet' religious signs (whatever this means), is in France officially 'conspicuous' and thus prohibited.



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<sup>321</sup> L. Ferry, in *Débats*, above at note 219, 113.





Part 3  
**The Comparison**

## Chapter 3.1.

# Introducing the Comparison: Secularism, Republicanism & French Imperialism

Any comparison between America and France on matters of religion must begin from the history of each nation, not only because a country's past usually sheds crucial light on its present but also because the French and American processes of historical separation between Church and State have been pivotal in the development of their respective legal systems and also have inspired several other secular nations throughout the world. The 1789 French Declaration of Human Rights and the 1791 American Bill of Rights, in particular, are commonly regarded as the philosophical (and secular) basis of what is today called international human rights law and are admired abroad and revered at home with an enthusiasm that borders on devotion. Although the French take pride in their chronological primacy, the Americans usually retort that the Déclaration remained unapplied for decades as France was engaged in constant conflicts—yet typical of their complex relationship, both countries regard themselves as the land of human rights.<sup>1</sup>

Important as they certainly are, however, these 18<sup>th</sup> century legal achievements should not overshadow the fundamental differences between—and contradictions of—the French and American religious histories, for if it is true that these two countries have produced pioneering secular laws it is also correct to say that such a result was reached in radically different ways. Part of this difference, I will suggest in this chapter, is due to the intimate connection between *laïcité* and French imperialism—an interesting conceptual angle when it comes to the issue of the Muslim veil. For the benefit of future discussion and forthcoming comparison, therefore, and because they are often invoked as a justification for the two countries' different approaches to religion in general and the Muslim veil in particular,<sup>2</sup> it is important to put these historical differences side by side before we begin the legal comparison.

Consequently, I will first carry out an assement of the differences in the role of religion in America and France (3.1.1.) and I will then connect them to the other historically significant event for the veil issue: French imperialism (3.1.2.). Once this is done, I will concentrate on the comparison proper (3.2. and 3.3.).

### 3.1.1. LAÏCITÉ AND THE HISTORICAL ROLE OF RELIGION IN AMERICA & FRANCE

#### 3.1.1.1. Separation in America and France

Like any polity, those in America and France have witnessed various degrees of entanglement between Church and State—a fact that certainly did not come as a surprise to Tocqueville, who famously wrote that “[a]longside every religion lies some political opinion which is linked to it by affinity. If the human mind is allowed to follow its own bent, it will regulate political society and the City of God in the same uniform manner and will, I dare say, seek to harmonize earth and heaven”.<sup>3</sup> A complete and impregnable separation of Church and State is thus impossible to achieve in any society, in part because religion can be considered a *sui generis* form of government.

<sup>1</sup> See B Chélini-Pont & T J Gunn, *Dieu en France et Aux États-Unis* (Berg International, Paris, 2005) 14-5.

<sup>2</sup> The 2004 law on religious signs at school was partly justified as one of the 'natural' outcomes of France's travailed religious history. See for example A Garay & E Tawil, *Tumulte Autour de la Laïcité* (Daloz, Paris, 2004) 225 (Chroniques).

<sup>3</sup> A De Tocqueville, *Democracy in America and Two Essays on America* (Penguin, London, 2003) 336; *De la Démocratie en Amérique* (Gallimard, Paris, 1986) 426 (vol.I).

As we have seen in previous chapters, French history provides one of the longest and most persistent examples of such difficulty, but it should be noted that, throughout Europe, Church-State union has been historically the rule rather than the exception. Perhaps the most symbolic example of this took place in Saint Peter's Cathedral in Rome on Christmas Eve in the year 800, when Pope Leo III put the Roman imperial crown on the head of Charlemagne as a sign of gratitude for having contributed to the imposition of Christianity in Europe. Typical of the future controversial relationship between the institutions they represented, both men thought they were gaining something to the detriment of the other—Charlemagne because he became Emperor and could thus claim the Church's holy stamp; the Pontiff because, by doing the crowning, he considered himself above the Emperor. The Investiture Controversy—a vicious row between papacy and empire on the right to convey God's will—was soon to develop and the result was a series of savage religious wars throughout Europe.<sup>4</sup> As we have seen in Chapter 2.1., this situation of spiritual and temporal union was only broken in France in 1905, when the strategic alliance with the Catholic Church was broken and the basis for a new legal system based on *laïcité* and religious neutrality was formed.

In America, too, the early days were characterized by union rather than separation, and it is important to remember that the established churches of the Puritan Fathers entailed vicious forms of religious persecution against people belonging to different faiths and were a far cry from the principles of tolerance and secularism that the Founding Fathers were to solemnly enshrine in the 1791 Bill of Rights.<sup>5</sup> Yet while in France the tumultuous marriage with the Catholic Church thrived virtually uninterrupted for almost one and a half millennia, in America the established churches founded by the English colonies in the 17<sup>th</sup> century started to collapse after a mere century and the separation between the temporal and the spiritual was reached, at least at the constitutional level, as early as 1791.

The chronology of the separation is intimately connected with the two countries' religious landscape. The 'secular' precocity of the new world in comparison to the old one was not only the consequence of a peculiar interpretation of the new Enlightenment ideas but also reflected an extraordinary demographic change—a change that, as we have seen in Chapter 1.1., soon resulted in the doubling and re-doubling of the colonies' population and brought to America an impressive array of different religious groups.<sup>6</sup> In contrast to the situation in France, where the spiritual landscape had been monopolized by the all-powerful Catholic Church, in America demographic diversity soon brought along religious diversity—and to such an extent that the established churches eventually found it impossible to resist the competition of literally hundreds of different spiritual groups and religious affiliations.

The greatness of the American Founding Fathers consisted in their timely acknowledgement of these momentous changes and in their conclusion that the separation was not only the best guarantee of good government but also the only viable alternative in a multi-religious America. “[Religious] freedom”, Madison presciently wrote, “arises from that multiplicity of sects which pervades America and which is the best and the only security for religious liberty in any society, for where there is such a variety of sects there cannot be a majority of any one sect to suppress and persecute the others”.<sup>7</sup>

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<sup>4</sup> See Religion, Society and Politics in Modern Times, in H S Stout, *Religion in American History: A Reader* (Oxford University Press, Oxford, 1998) 486.

<sup>5</sup> Similarly to France, therefore, and well into the 18<sup>th</sup> century, early America considered religion a useful policy instrument, because, as one Massachusetts delegate declared, “[t]he fear and reverence of God, and the terrors of eternity, are the most powerful restraints upon the minds of men and hence it is of special importance in a free government...[that] it will hold up the Gospel as a great rule of faith and practice”. J H Hutson, *Religion and the New Republic: Faith in the Founding of America* (Rowman & Littlefield, Oxford, 2002), 8.

<sup>6</sup> According to one source, “[i]n America there are more than 2.000 denominations which each identify a religion, without taking into account the innumerable independent churches and belief communities”. E Zoller, «La Laïcité Aux États Unis ou La Séparation des Églises et de l'État dans la Société Pluraliste», in E Zoller, *La Conception Américaine de la Laïcité* (Daloz, Paris, 2005) 11.

<sup>7</sup> M McConnell, “The Origins and Historical Understanding of Free Exercise of Religion”, (1990) 103 *Harvard Law Review* 1479.

Look at the all-pervasive and monopolistic presence of the Catholic Church in France, Madison might well have thought, and you will understand why a marketplace of religions is crucial.<sup>8</sup>

### 3.1.1.2. Revolution in America and France

To these socio-cultural differences, already momentous at the beginning of the 18<sup>th</sup> century, other and more ideological ones were added by the revolutionary era of the *fin de siècle*, a crucial time for us since it exposed the different historical role of religion in the two countries. In the 18<sup>th</sup> century, it should be noted, the starting point for both America and France was the same: the Enlightenment. Also their conclusion was the same: revolution. Yet there were a number of crucial differences.

Whereas the French revolutionaries saw religion as conflicting with the age of reason, their American counterparts viewed it as its most powerful expression. So, while the French confiscated Church property, replaced the Christian calendar by a revolutionary one and substituted Christianity with a civil religion, the Americans believed that reason and revelation were not incompatible because, religion being the foundation of republican virtue, it was possible (indeed, desirable) to be a religious nation without having a religious government.

The consequence was that France had an ‘atheist’ revolution, whereas America had a deeply religious one. To put it differently, France used the Enlightenment to revolt against religion (which, due to the Church-State entanglement and Catholic support for the monarchy and aristocracy, was seen as a form of oppression), whereas America, equally inspired by the Enlightenment, revolted in favour of religion (which was perceived as a source of freedom).<sup>9</sup> “In America, the fires of revolution were lit by the Puritan preachers of New England and their counterparts throughout the thirteen colonies”, one author observed. “By contrast, the fury of the revolution in France was directed against church and synagogue, and in Paris the revolutionaries installed a prostitute upon the altar of Notre Dame Cathedral”.<sup>10</sup>

It should also be noted that the intentions of the French and American revolutionaries were different. In France, the Jacobins wanted to destroy the *ancien régime* of the Bourbons, whereas in America, the aim was to re-establish the previous regime, namely that of Anglo-Saxon liberties. This also explains the fact that, on the two sides of the Atlantic, the revolutionary style was very different: in America it consisted in long and sophisticated deliberations that aimed at reaching a broad consensus, while in France it took the far quicker and simpler form of the guillotine.

It is thus important to notice that two countries, equipped with the same philosophical basis (the Enlightenment), endowed with the same religious belief (Christianity) and inspired by the same noble purpose (freedom), generated strikingly different outcomes. In a way, this was the big paradox of Christianity. In France, partly because of the role played by aristocracies, religion became a synonym for oppression and abuse—and, when the revolution came, it was ridiculed as mere superstition. In America, thanks to the marketplace of religions, Christianity became a symbol of freedom and pluralism—and it inspired the revolution as well as the Founding Fathers.<sup>11</sup>

Why this difference? The answer is perhaps provided by Tocqueville. Keep religion out of state affairs, he suggested, and you will indeed diminish its apparent force but augment its real power.<sup>12</sup>

<sup>8</sup> Voltaire very much agreed: “Two religions would get at each other’s throat but, if there are thirty of them, they will leave each other in peace”. Voltaire, *Lettres Philosophiques* (Flammarion, Paris, 1964) 47 (vol.6).

<sup>9</sup> On the point, see for example W Safran, “Religion and Laïcité in a Jacobin Republic: The Case of France”, in W Safran, *The Secular and the Sacred: Nation, Religion and Politics* (Frank Cass, London, 2003) 51ss; I Kramnick & L Moore, *The Godless Constitution: The Case Against Religious Correctness* (Norton, New York, 1996) 139.

<sup>10</sup> Hutson, above at note 5, 162. On the point, see also R L Moore, *Insiders and Outsiders in American Historical Narrative and American History*, in Stout, above at note 4, 198.

<sup>11</sup> Hutson, above at note 5, 164.

<sup>12</sup> Tocqueville, *Democracy*, above at note 3, 347; *De la Démocratie*, above at note 3, 437.

When a religion seeks to base its empire only upon the desire for immortality which torments every human heart equally, it can aspire to universality, but when it happens to combine with a government, it has to adopt maxims which only apply to certain nations. Therefore, by allying itself to a political power, religion increases its authority over some but loses the hope of reigning over all.

Here is where European Christianity got it tragically wrong: by mingling with worldly affairs, it ended up losing its most precious asset—spirituality—and it became as fragile as those worldly powers. Interestingly for our comparison, this is exactly the point where the great message of both the American and French revolutions rests—and where the genius of the Founding Fathers meets that of Tocqueville. The journey was certainly different and France took a further century to pass from the theory (1789) to the practice (1905) of the separation, but the conceptual arrival point was the same and was expressed by Tocqueville in very graphic terms: “I am so deeply convinced of the almost unavoidable dangers which face beliefs when their interpreters meddle in public affairs...that I would sooner chain up the priests in their sanctuaries than allow them to leave them”.<sup>13</sup> This is a conclusion that the majority of the Founding Fathers would have wholeheartedly embraced.

### 3.1.1.3. Republicanism in America and France

These historical circumstances resulted in major differences in the foundational underpinnings of the two nations. While the American Republic was the immediate result of the Revolution, the French state—and its union with the Catholic Church—was already several centuries old when the Revolution attempted to modernize it in 1789. As a consequence, while the American Revolution was immediately and uncontroversially identified with the new nation, and the constitutional principles enshrined by the Founding Fathers formed the object of a large popular consensus, the same was not true of France.

In France, la République was born out of an exceptionally fierce ideological confrontation between the State and the Catholic Church and the long and painful process of separation that led up to 1905 kept France constantly on the verge of civil war. The relatively peaceful (when it came to religion, at least) beginnings of the American republic,<sup>14</sup> therefore, contrast with the tumultuous and violent birth of the French République,<sup>15</sup> whose foundational years were characterized by a partisan and intransigent approach for the simple reason that the very existence of the newborn polity was considered in constant danger because of an ‘internal’ and all-powerful enemy that could still mobilize—spiritually if not physically—millions of people. “It is necessary for France to kill the Catholic Church if France does not want to be killed by it”,<sup>16</sup> Victor Hugo candidly told the French Parliament on the eve of the separation.

The awareness of this menace explains why la République was constantly trying to find the best way to prevail over the counter-revolutionary impulses of its enemy as well as establish a consensual constitutional framework. While the American Revolution gave birth to the unified and previously non-existent American nation, therefore, the French Revolution exposed a momentous fracture between les deux France, a fracture that could only disappear, it was widely believed at the time, with an increased role for the state and a progressive marginalization of the Catholic Church—a passage from a principe de catholicité to a principe de laïcité<sup>17</sup> that was to invest all sectors of society, beginning with the education laws at the end of the 1880s.

<sup>13</sup> Tocqueville, *Democracy*, above at note 3, 634; *De la Démocratie*, above at note 3, 204.

<sup>14</sup> See on the point B Bailyn, *To Begin the World Anew: The Genius and Ambiguities of the American Founders* (Knopf, New York, 2003) 136.

<sup>15</sup> See for example H Pena-Ruiz, *La Laïcité: Textes Choisis* (Flammarion, Paris, 2003).

<sup>16</sup> V Hugo, *Discours sur la Liberté d'Enseignement du 15 Janvier 1850*, in *Œuvres Complètes* (Laffont, Paris, 1985) 219-200 (vol.4).

<sup>17</sup> See in particular L'Apogée de la République Anti-Cléricale, in Y Bruley, 1905, *La Séparation des Églises et de l'État: Les Textes Fondateurs* (Perrin, Paris, 2004) 113-130.

#### 3.1.1.4. French Gallicanism and Civil Religion

Confrontation between Church and State in France was by no means limited to the revolutionary era—and this represents another major difference with America. As we have seen in Chapter 2.1., the relationship between French kings and the Catholic Church was never exactly festive: the enormous spiritual and temporal power of the Church created important tensions very early in the relationship because French kings saw this influence as a threat to their own power. The reason why France is special is not that this conflict existed—European history is a product of that confrontation—but that French kings soon stood up to the Church with unusual stubbornness and strength. What is special, in other words, is French Gallicanism and its centuries-long attempt to limit the power of the Catholic Church (and thus religion), a tendency that some observers still consider at the core of France’s relationship with her religious groups.

This very French political philosophy, which was to prove lethal to the union of Church and State and still nowadays influences, *mutatis mutandis*, France’s approach to religion, emerged as early as in 1297 when Philip the Handsome declared that he “regarded his royal titles as deriving directly from God”,<sup>18</sup> was confirmed in 1682 when the Declaration of the French Clergy emphasized that “the Pope and the Church only have power over spiritual matters”,<sup>19</sup> received a major boost in 1790 when the Civil Constitution of the Clergy imposed on Catholic priests an oath of allegiance to the French state,<sup>20</sup> was strengthened, Napoleon-style, in 1801 when the Emperor required a much more radical oath of allegiance from the clergy,<sup>21</sup> and was confirmed in 1905 when the French state formally decided, in the sober words of the 1905 law, not to “recognize...any religion”<sup>22</sup>—but organized at the same time a system of separation that, as we have seen in Chapter 2.2., is still to some extent characterized by Gallican tendencies. As late as 2000—and within the context of the creation of the Conseil Français du Culte Musulman (CFCM)—the French state was asking representatives of the Muslim religion to sign a solemn declaration that certified the compatibility of Islam with the laws and values of la République. “The full adhesion...to these principles”, the document read, “indicates the willingness to be bound by the legal framework that simultaneously provides in France freedom of religion and the *laïque* character of French institutions”.<sup>23</sup>

Yet the uniqueness of the French experience, we have seen, as well as its most relevant difference with the United States, lies not in the fact that the French state has historically been a competitor to the Catholic Church in terms of temporal power but that this Gallican challenge soon extended to the area of ‘moral’ authority as well—a situation which became evident in the years leading up to the birth of the Third Republic at the end of the 19<sup>th</sup> century. “French *laïcité*”, one author wrote, “is unique precisely because the French state...offered a model of moral enchantment which replaces that of the Catholic Church”.<sup>24</sup> At the end of the 19<sup>th</sup> century there emerged, in France, a popular consensus over the fact that la République was incompatible with the Catholic Church—and thus with religion tout court—because, in France, a republican was at the time (and still is today) a person who is attached to the French Revolution and its ideals of egalitarianism, free thinking, human rights and primacy of human over religious law—all values that the Catholic Church rejected at the time. In addition, because the counter-revolution historically found its principal basis in the Catholic Church, which

<sup>18</sup> F Autrand, *Pouvoir et Société en France: XIVe-XVe siècles* (PUF, Paris, 1974) 44.

<sup>19</sup> M-D Charlier-Dagras, *La Laïcité à l’Épreuve de l’Intégration Européenne: Pluralisme et Convergences* (L’Harmattan, Paris, 2002) 18.

<sup>20</sup> “I swear to be faithful to the Nation, to the law and to the King”, the pledge read, “and to uphold to the best of my abilities the Constitution decided by the National Assembly and accepted by the King” See T Tackett, *La Révolution, l’Église, la France: Le Serment de 1789* (CERF, Paris, 1986) 35.

<sup>21</sup> “I swear and promise to God upon the Saint Evangels”, the oath read, “to remain obedient and faithful to the government established by the Constitution of the French Republic. I also promise not to get involved, not to participate in any council, not to join any league, either internal or external, that is contrary to public tranquillity; and if, in my dioceses or elsewhere, I learn that something is being plotted against the State, I shall let the Government know”. Article 6 of the Concordat, in Bruley, above at note 17, 48.

<sup>22</sup> Article 2 of the 1905 law. I have used the *Loi du 9 Décembre 1905 concernant la Séparation des Églises et de l’État*, in Bruley, above at note 17, 435.

<sup>23</sup> See *Principes et Fondements Juridiques Régissant les Rapports entre les Pouvoirs Publics et le Culte Musulman en France*, in C Hafiz & G Devers, *Droit et Religion Musulmane* (Daloz, Paris, 2005) 84.

<sup>24</sup> J-L Ormières, *Politique et Religion en France* (Éditions Complexe, Bruxelles, 2002) 8.

was strongly pro-aristocratic and pro-monarchic, the supporters of the République drew their best-known conclusion: their attachment to the French idea of *laïcité*, which came part and parcel with a vigorous anti-clericalism and was often hard to separate from anti-religiousness.

Because of this confrontational situation, the word *républicain* came to identify a person who believes in something higher than France's institutions. "[A] republican is not only a good citizen as understood by Plutarch or Washington", it was observed, "and not only a supporter of the republican form of government; he or she must be, in addition, a devote son or daughter of the Revolution, a friend of Freedom, of the People, of the Motherland, an enemy of clericalism—a *laïque* person, in common parlance".<sup>25</sup> This is why, in France, terms like République and *républicain* are not only part of the constitutional jargon but represent the symbols of an ideological combat that goes well beyond the institutional structure of the state.<sup>26</sup> Interestingly for present purposes, the effects of this very French approach are not limited to a bygone age but very much inform contemporary France. Virtually all sides of the French political spectrum nowadays agree that *laïcité*—and therefore la République—is a foundational value of the nation. As an author observed, "[l]aïcité is a fundamental principle of Modern [France]. [Yet] there still is, in our French idea of *laïcité*, something that remains unexpressed and that is an alter-ego of *laïcité*: republicanism".<sup>27</sup> Contrary to the USA, where the separation of Church and State is merely an institutional mechanism without any kind of 'spiritual' underpinning and certainly without any pretension of moral superiority vis-à-vis religion and spirituality, in France la République has historically been identified with *laïcité*, which in turn is thought as indissociable from typically French values such as equality and freedom.

This situation has momentous consequences for the way in which France and America look at religion. The purpose of the separation in France was to protect the state from the deleterious effects of the Catholic Church (and therefore religion), while in America the aim of the Founding Fathers was to defend religious freedom from the possible excesses of the state.<sup>28</sup> Historically speaking, therefore, France seems unwilling to acknowledge the existence of a moral authority higher than the state, while the United States not only admits it but considers this religiosity as the very foundation of the nation, because, as an author wrote,<sup>29</sup>

the theoretical underpinning of the Free Exercise Clause, best reflected in Madison's writings, is that the claims of the 'universal sovereign' precede the claims of civil society, both in time and in authority, and that when the people vested power in the government over civil affairs, they necessarily reserved their unalienable right to free exercise of religion in accordance with the dictates of conscience.

This is quite different from the situation in France.<sup>30</sup>

### 3.1.15. Religion and Education in America and France

French schools are the best example—as well as the most crucial place for developing—this 'civic religion' that drew its sources directly from the Revolution. Given that "[b]etween the state, purveyor of freedom, and the individuals, who receive this freedom, the Revolution did not accept any intermediate body, any partial grouping, any religious faction",<sup>31</sup> as one of the separation founders, Jean Jaurès, wrote in 1904, no separation was possible without a radical 'de-catholicisation' of French

<sup>25</sup> M Agulhon, «Républicain à la Française», (1992) 13 *Revue de Tocqueville*, n.1, 112.

<sup>26</sup> As it has been observed, "[t]he old Gallican freedoms positively contributed to the emancipation of the French monarchy vis-à-vis the Vatican [and] the République is thus the heir of parliamentary Gallicanism in its affirmation of national sovereignty". J-P Scot, *L'État Chez Lui, l'Église Chez Elle: Comprendre la Loi de 1905* (Éditions du Seuil, Paris, 2005) 25.

<sup>27</sup> A Renault & A Touraine, *Un Débat sur la Laïcité* (Stock, Paris, 2005) 13.

<sup>28</sup> This view is not uncontroversial (the ACLU would find it objectionable, for instance), but seems to be relatively dominant. See for example The Brookings Center on the United States and Europe and the Pew Forum on Religion and Public Life, *The Veil Controversy: International Perspectives on Religion in Public Life* (Brookings Institution, Washington, 2004) 9.

<sup>29</sup> McConnell, above at note 7, 1512.

<sup>30</sup> There, as one author observed, "freedom of religion is a concept which is external to the intellectual and legal culture of [the country], whereas freedom of thought and rejection of religious belief are founding ones". See B Chélini-Pont, «L'Héritage Culturel Français Face au Pluralisme Religieux», in *Annuaire Droit et Religions* (PUAM, Aix-Marseille, 2005) 302.

<sup>31</sup> Bruley, above at note 17, 127.

schools. For who would let one's own children be educated by his adversary? "The mission of Christ's soldiers has in the past been easy", Aristide Briand, the moderate architect of the 1905 law, told Parliament in 1904, "for government has left the [school] doors open to the enemies of the state".<sup>32</sup> Those doors were sealed in the 1880s with the passage of legislation that prevented, among other things, any person belonging to a religious order from teaching in French primary schools and which caused a veritable *guerre scolaire*, a new religious conflict that once again pitted Church and State against one another, angered the Vatican and was the precursor to the sharper separation of 1905.

Regarded as a veritable 'education to freedom'—*l'école de la liberté*—because of its humanistic message of emancipation and intellectual liberation from the dogmas and infallible precepts of the Catholic Church, the French education system soon acquired, at the end of the 19<sup>th</sup> century, a symbolic importance. Indeed, French schools came to embody a philosophical and almost mystical idea of knowledge as a journey towards free thinking and enlightened criticism. Yet there was another crucial mission that schools were called to fulfil: the unification of France after centuries of religious wars and the strengthening of the République vis-à-vis the Catholic Church. "There must be a place where conciliation, union, peace, civic concord are taught instead of the inexorable conflicts caused by beliefs and churches, and this place is the *laïque* school",<sup>33</sup> Edgar Quinet wrote in his work on the role of French schools, which schools soon became the "sanctuaries"<sup>34</sup> of modern France.

To say that they became *laïques* does not mean, as we have seen in Chapter 2.2., that French schools became atheist. Quite the contrary, since the first thing the 1905 separation did was grant freedom of conscience to everyone. Yet it does mean that they have since purveyed a certain idea of human relations that is founded on the revolutionary principles of universality, equality, *républicanisme à la française* and self-sufficiency of the human mind. It is arguably this universalistic tendency of French education that has managed to successfully unite a previously divided country behind a common cause and which has formed independent-thinking French citizens.

However, critics maintain, this egalitarian attitude also had negative effects in terms of discouraging diversity and anything that could look like a 'communalist' ('*communautaire*') tendency—particularly at the religious level. As it has been observed, and quite apart from any legal consideration,<sup>35</sup>

the Republican ideology ... considers religion as a potential danger, a danger for consciences [and] a danger for the dearly fought right to personal freedom .... As it is supposed to unite all French people around their République, secularism needs enemies whom it must fight.

A civic faith negatively interpreted as a 'release from religion' can hardly be farther—conceptually, historically and philosophically—from the intentions of both the Puritan and the Founding Fathers of the United States.<sup>36</sup>

### 3.1.1.6. Conclusion: Religion in American and French History

When it comes to their religious histories, the most significant difference between America and France lies therefore with the chronology and circumstances of the separation. In France, the République was the result of religious fighting and the 1905 law intervened at the end of a long and painful conflict, like an armistice that warring parties have slowly come to accept. In America, on the contrary, the First Amendment coincided with the birth of the new Republic and was thus associated, from the very beginning, with the founding project of the nation. Unlike the controversial and violent

<sup>32</sup> Scot, above at note 26, 76.

<sup>33</sup> E Quinet, *L'Enseignement du Peuple* (Hachette, Paris, 2001).

<sup>34</sup> See P Charlot (ed.) *Jules Ferry et l'École* (SCIP, Paris, 1984) ; and R Rémond, *Religion et Société en Europe: La Sécularisation aux XIXe et XXe Siècles* (Éditions du Seuil, Paris, 2000).

<sup>35</sup> A Garay, B Chélini Pont, E Tawil & Z Anseur, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in France", (2005) 19 *Emory International Law Review*, n.2, 821.

<sup>36</sup> See for example J Witte, "A Most Mild and Equitable Establishment of Religion: John Adams and the Massachusetts Experiment", in Hutson, above at note 5, 1-8.



character of the French *laïcité*, which was contested by the Catholic Church until well after the First World War, the American constitution (although not its interpretation) is thus relatively uncontroversial and is conceived as the basic instrument that guarantees individual rights within the federal state. The result is that while *laïcité* is seen in France as a synonym for the unifying character of the *République*, which is in turn regarded as the byword for freedom and incompatible with the illiberal character of the Catholic Church (and thus religion), in America secularism only represents a rule of the institutional game, not a ‘metaphysical’ value in itself. To say that the word *laïcité* possesses in France a strong anti-Catholic and anti-religious component is hence, historically speaking, accurate, because religion has in that country been mostly associated with violence and oppression.<sup>37</sup>

### 3.1.2. IMPERIALISM, FRENCH ASSIMILATIONISM & AMERICAN MULTICULTURALISM

“Imperialism”, Hannah Arendt wrote, “[is] the one great crime in which America was never involved”.<sup>38</sup> This was not true of France, whose colonial<sup>39</sup> adventures proved to be a unifying and consensual force throughout the 19<sup>th</sup> and 20<sup>th</sup> century. From 1880 to 1900 alone, the French nation gained 3.5 million square miles and 26 million people, a good portion of whom practised the Muslim faith and were to become the bulk of France’s ethnic and religious minorities.<sup>40</sup> Far-fetched as it may appear to American eyes,<sup>41</sup> the colonial connection is therefore essential in order to understand the French approach to the Muslim veil and its differences with America—for at least four reasons.

Firstly, colonialism, republicanism and *laïcité* were in France historically as well as conceptually related. The French overseas expansion received a major encouragement by the Third Republic (1870-1940) and was thus strongly supported by the same politicians and opinion leaders who crafted the 1905 law. Secondly, the theoretical underpinnings of French colonialism rested upon those same secular and universal ideals of the Enlightenment and French Revolution that were enthusiastically conveyed by the *école laïque* of the Third Republic and its civil religion. Thirdly, colonialism is still today regarded as one of the causes of France’s alleged difficulty in acknowledging diversity (religious or otherwise) and is often quoted as the paramount example of—if not the reason for—her assimilation tendencies (the 2004 law being regarded as the latest example of this).<sup>42</sup> And, fourthly, the French Empire played a crucial role in the immigration issue, because the migratory trends of the

<sup>37</sup> In light of this, it is perhaps not surprising that surveys routinely find the United States to be one of the most religious societies of the Western world, while the French one is among those most detached from religion. A 2003 study, for example, reported that religion plays a very important role in the lives of 60% of US citizens vis-à-vis 10% of the French. See *The Economist*, *A Nation Apart: A Survey of America*, 8 November 2003.

<sup>38</sup> H Arendt, ‘Reflections on Little Rock’, in (1959) *Dissent* 6/1, 33.

<sup>39</sup> By ‘colonialism’ I mean the practice through which a country directly controls other countries in order to increase its power or wealth. By ‘imperialism’ I mean the most advanced form of colonialism. See M Taylor, ‘Imperium et Libertas? Rethinking the Radical Critique of Imperialism during the Nineteenth Century’, (1991) 23 *Journal of Imperial & Commonwealth History*, 19.

<sup>40</sup> For a more general analysis see J Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton University Press, Princeton, 2005). French imperialism was not as successful as the British, whose colonial possessions increased, in the same time span, by 4.5 million square miles and 66 million inhabitants, but was more sizeable than the German (which won a new empire of a million square miles and 13 million natives) and of the Belgium one (which acquired 900.000 square miles and 8.5 million people). See H Arendt, *The Origins of Totalitarianism* (Harcourt, New York, 1994) 124.

<sup>41</sup> “The United States is not a nation-state in the European sense and never was. The principle of its political structure is, and always has been, independent of a homogeneous population and of a common past”. H Arendt, ‘Reflections on Little Rock’, above at note 38, 33.

<sup>42</sup> As it has been observed, “due to the importance of colonisation, France’s relationship towards the other can often be ascribed to the relationship between dominant and dominated”. Renault & Touraine, above at note 27, 25. For interesting works on French colonialism in English, see M Thomas, *The French Empire Between the Wars: Imperialism, Politics & Society* (Manchester University Press, Manchester, 2005); A Becker, *War & Faith: The Religious Imagination of France, 1914-1930* (Berg, Oxford, 1998); R Betts, *France & Decolonialization, 1900-1960* (Macmillan, London, 1991); A L Conklin, *A Mission to Civilize: The Republican Idea of Empire in France & West Africa, 18950-1930* (Stanford University Press, Stanford, 1997); G W Johnson (ed), *Double Impact: France & Africa in the Age of Imperialism* (Greenwood Press, Westport, CT, 1985); H Lebovics, *True France: The Wars Over Cultural Identity, 1900-1945* (Cornell University Press, Ithaca, NY, 1992); N MacMaster, *Colonial Migrants & Racism: Algerians in France, 1900-1962* (Macmillan, London, 1997); M Silverman, *Deconstructing the Nation: Immigration, Racism & Citizenship in Modern France* (Routledge, London, 1992).

20<sup>th</sup> century inevitably attracted former colonial subjects to the motherland. This section briefly deals with these points.

### 3.1.2.1. French Imperialism and the French Revolution

A modern observer may find it difficult to conceptually connect the French Revolution and imperialism, for what is more opposed to *liberté, égalité* and *fraternité* than the two elements common to colonialism everywhere, that is to say, racism and (the actual or ever present threat of) violence?<sup>43</sup> As far as France is concerned, the link was strong and unambiguous, for it was because the country was thought to have discovered the universal principle of equality of all human beings that she—more than any other nation—was believed to possess the right to spread it around the world.<sup>44</sup> If the French Revolution was based upon worldwide values that transcended national territories and could be applied to all human beings, surely it was France's duty to teach them everywhere?<sup>45</sup> So it is not surprising that the *mission civilisatrice* and its underlying tag of progress, equality and *grandeur* soon became the central dogma of colonial discourse. This idea was graphically conveyed by a delegate during a Human Rights League conference in Paris in 1931:<sup>46</sup>

To teach science to the peoples who ignore it, to provide them with roads, canals, railways, cars, telegraphs, telephones, toilets, and to finally teach them the great message of human rights, this is a brotherly mission. The country that has proclaimed human rights, that has contributed to the advancement of science, that has created the *laïque* school, the country that more than any other is the champion of freedom, is bestowed with the mission of spreading far and wide the ideas that make it great. We should consider ourselves invested with the task of teaching, raising, emancipating, enriching and coming to the rescue of those peoples who need our help.

These were not the words of an extremist, for French colonialism did not grow out of extremism. It grew out of an extended interpretation of the revolutionary ideals of universality and human rights and was based upon the assumption that, with the help of France, any 'savage' could indeed be 'cultured'.<sup>47</sup> "An uncivilized person is like a child",<sup>48</sup> Victor Hugo used to say, insofar implying that French education could indeed instruct and imbue him or her with the values of France—it could, in a certain sense, turn the 'savage' not only into a French citizen but into a 'culturally' French person. The historian Jules Michelet understood this as early as in 1835 when he wrote, in his *Introduction à l'Histoire Universelle*, that<sup>49</sup>

[w]hat the Frenchman wants to do most is to transfer his character to the vanquished, a character that he does not regard as his own but as embodying the archetype of Good. Such is his naïve conviction, and he truly believes he cannot do anything more profitable than giving his ideas, habits and way of life to the conquered.

The 'uncivilized' were indeed able to learn, and the task of bringing to these people the revolutionary flame of reason fell naturally upon the Frenchman.

<sup>43</sup> As one author wrote, "[t]he colonizer highlights those differential traits which distinguish him from the colonized and constructs them as the symbol of his superiority and the reason for his own pre-eminence". A Memmi, «La Fin d'Une Illusion?», in A Ruscio, *Le Crédo de l'Homme Blanc: Regards Coloniaux Français XIXe-Xxe Siècles* (Éditions Complexe, Bruxelles, 1995) ix.

<sup>44</sup> C Nicolet, *L'Idée Républicaine de la France (1789-1924)* (Gallimard, Paris, 1994) 132.

<sup>45</sup> As Hannah Arendt wrote, "[a] great enthusiasm for 'new specimen of mankind' (Herder) filled the hearts of the heroes of the French Revolution who together with the French nation liberated every people of every colour under the French flag. This enthusiasm for strange and foreign countries culminated in the message of fraternity, because it was inspired by the desire to prove in every new and surprising 'specimen of mankind' the old saying of La Bruyère: 'Reason is the same everywhere'". H Arendt, above at note 40, 161-2.

<sup>46</sup> C-R Ageron, *France Coloniale ou Parti Colonial* (PUF, Paris, 1978) 70.

<sup>47</sup> See in this respect R Girardet, *L'Idée Coloniale en France de 1871 à 1962* (Hachette, Paris, 1990).

<sup>48</sup> Ruscio, above at note 43, 59.

<sup>49</sup> Id. 94.

### 3.1.2.2. French Imperialism and Separation

Perhaps because the 1905 separation occupies such a sacred place in the collective consciousness of the French, it is often forgotten that imperialism and Church-State separation are intimately connected in France. The secular Third Republic that passed the 1905 law and struggled against the Catholic Church fully supported imperial expansion and gave a decisive impulse to the great military conquests that began in 1880 and lasted until 1910.<sup>50</sup> As Jean Jaurès, one of the separation Fathers, declared in Parliament,<sup>51</sup>

[w]hen we take control of a country, we have to carry with us the glory of France, and be assured that it will be welcomed everywhere, because such a glory is pure, great and filled with justice and righteousness.

The left-wing separation Fathers defended with equal vigour the virtues of colonialism and secularism. This was a logical consequence of their universal approach to human rights, which were, the French Revolution had taught, valid anywhere, anytime, for everyone, and which France had a duty to export. As Aristide Briand, the architect of the 1905 law, told Parliament on the eve of the separation of Church and State,<sup>52</sup>

[t]here are some peoples who can live in freedom, through a federal system, but who, among themselves, need a connection.... By building this connection for them, France provides them with the most important service they can wish for.

The colonial enterprise perfectly dovetailed with the ideological system emerging from secular republican ideology, because colonization—which was associated with the Republican values of progress, equality and grandeur—was constructed from the very beginning as a veritable project that united all French people, social groups and political parties and represented a powerful antidote to the divisiveness of the religious issue.<sup>53</sup>

It should be noted, however, that in their quest for universality and support for colonialism, the French separation fathers were doubly inconsistent. Although they truly wanted to be modernizing and universal, they were not shy to talk about—and apparently believe in—the existence of unequal races.<sup>54</sup> “We must have the courage to openly say that the superior races have a duty towards the inferior ones”,<sup>55</sup> Jules Ferry—Prime Minister and the author of the secular education laws of the 1880s—told Parliament. Unsurprisingly, these men had a patronising mindset that was typical of the European Christian missionary of the period,<sup>56</sup> for as one author observed, “[a]t the same time when

<sup>50</sup> As it has been observed, “[t]he most fervent republicans were the ones who gave the decisive support to the colonial conquests and structured the first modern colonial discourse”. N Bancel, P Blanchard & S Lemaire, «La Fracture Coloniale: Une Crise Française», in P Blanchard & S Lemaire, *Culture Impériale: Les Colonies au Coeur de la République* (Éditions Autrement, Paris, 2004) 26. This is not necessarily a French characteristic, however, for as an author observed, “[m]ost liberals supported the Empire, though often for different reasons”. D S A Bell, “Empire and International Relations in Victorian Political Thought”, (2006) 49 *The Historical Journal*, I, 285.

<sup>51</sup> “There where France rules, people love her, and there where she leaves, people regret her departure. Wherever her light shines, it brings righteousness; and there where it does no longer shine, a crepuscule is left behind”. Ruscio, above at note 43, 92. This was reflected on the veil matter, particularly given that, as an author observed, the ‘Algerian woman, in the eyes of the observer, is unmistakably ‘she who hides behind a veil’”. See F Fanon, *A Dying Colonialism* (Grove Press, New York, 1965) 36-8. The following words of the French colonial administrator of Algeria are emblematic of the symbolic importance of the veil issue: “If we want to destroy the structure of Algerian society”, he wrote, “its capacity for resistance, we must first of all conquer the women: we must go and find them behind the veil where they hide themselves and in the houses where the men keep them out of sight”. In A Abu-Rabia, “The Veil and Muslim Women in France: Religious and Political Aspects”, (2006) 1 *Anthropology of the Middle East*, n.2, 97.

<sup>52</sup> Id. 91.

<sup>53</sup> See in this respect also A Conklin, *Mission to Civilize: The Republican Idea of Empire in France and West Africa* (Stanford University Press, Stanford, 1997).

<sup>54</sup> See E Ezra, *The Colonial Unconscious: Race and Culture in Interwar France* (Cornell University Press, Ithaca, NY, 2000).

<sup>55</sup> Id. 35.

<sup>56</sup> See in this respect: “In preaching the equality of man in the sight of God, the early Christians soon developed the proselytizing spirit inherent in Christian teachings and converted much of the Western world to their religion”. R F Betts, *Assimilation and Association in French Colonial Theory: 1840-1914* (University of Nebraska Press, Lincoln, 2005) 11. Interesting

Europe was submitting and exploiting its colonies, the European proclaimed himself as the [God-mandated] protector, the educator, the tutor of these peoples who were trying to make up for their delay in the journey towards civilization”.<sup>57</sup>

### 3.1.2.3. French Imperialism and Education

Education was to play a crucial role in this formative mission of Imperial France. The secular education system of the Third Republic—reflecting, as it did, the egalitarian, unifying and universal aspirations of the *école laïque*—was regarded as ideally suited to serve both the developing needs of the ‘savages’ as well as the imperial urges of the motherland.<sup>58</sup> The colonies represented an excellent chance for France to apply abroad what she was trying to realize at home: an ever-stronger state, the unity of all social strata, the reduction of racial as well as religious differences behind the same common project—republicanism—and a shared enthusiasm for the national and egalitarian ideals of the *République*. “Everything has been attempted in order to create ‘colonial citizens’”,<sup>59</sup> one author stressed.<sup>60</sup>

The connection between the mission civilisatrice of France and her educational ideals was thus a powerful one, and the French Empire soon became an integral part of the civic religion taught in the nation’s *laïque* schools as well as in her colonial dependencies.<sup>61</sup> As Emile Combes said before the French Senate in 1892,<sup>62</sup>

More than strength, the instruction of indigenous primary school kids ... will manage to effectively bridge the [civilization] gap and, by instilling in them [French] values, will teach them to regard themselves as members of the same human family, of the same nation.

This, however, did not mean that French children were taught equality. “The white race”, a Third Republic school manual read, “[is the one] you belong to and [the one] you know very well”.<sup>63</sup> Yet teaching children to be part of the Empire contributed to the collective feeling of belonging to the nation—to be colonial was, in this sense, to be French and represented a necessary component of French national identity and common destiny. “Colonial knowledge and education of the French people are an evident and pressing necessity”, the French Colonial Minister declared, “and the propaganda in favour of our colonies is an essential component of our policy”.<sup>64</sup> Like individuals, nations need self-reassurance—especially if they are of tender age like the *République* was at the time—and the education system of Imperial France proved remarkably successful in this.

### 3.1.2.4. French Imperialism and Assimilation

Combine the universal human rights message of the French Revolution with the tendency towards homogeneity of the *République* and the unifying mission of French *laïque* schools, and the result can only be a strong assimilation policy, which was the paramount characteristic of French imperialism at

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observations, from an African perspective, about the “axiom of missionaries for whom to be Christian meant to be civilized and to be civilized meant to be Christian” are in N Mandela, *Un Long Chemin Vers la Liberté* (Fayard, Paris, 2005) 19.

<sup>57</sup> Ruscio, above at note 43, 93.

<sup>58</sup> See for example J-F Chanet, *L'École Républicaine et les Petites Patries* (Aubier, Paris, 1996).

<sup>59</sup> P Blanchard & S Lemaire, *Culture Impériale: Les Colonies au Coeur de la République* (Éditions Autrement, Paris, 2004) 27.

<sup>60</sup> “This fiction has worked not because of hypocrisy or opportunism, but very simply because the school has happily participated in this colonial immersion ... This imperial culture greatly contributed, through the formation and edification of the youth, to construct the *homo imperialis*”. N Bancel & D Denis, «Éduquer: Comment Dévient-on ‘Homo Imperialis’?» in Blanchard & Lemaire, above at note 59, 93. See also J Frayssinet-Dominjon, *Les Manuels d'Histoire de l'École Libre 1881-1959* (Presses de la FNSP, Paris, 1969).

<sup>61</sup> “The Frenchman is persuaded that the only difference among human species is education. The deep mental differences that separate human races look superficial to him and he thinks he can overcome that gap and engage in a sterile fight against genetic laws”. Ruscio, above at note 43, 102.

<sup>62</sup> Id. 101.

<sup>63</sup> Id. 28.

<sup>64</sup> Letter of Colonies Minister Moutet, 11 May 1937, quoted by S Lemaire, «Promouvoir: Fabriquer le Colonial», in Blanchard-Lemaire, above at note 59, 50.

least before disenchantment came later in the 20<sup>th</sup> century.<sup>65</sup> “A good law is good for every man”, Condorcet wrote, and he was supported in this by an unlikely ally, Charles De Gaulle, for whom “[t]he best recipe for the complicated East are simple ideas”.<sup>67</sup>

Such ideas rested upon the belief that reason was the virtue of the world, that men were universally equal and that French laws could thus be applied anywhere. In other words, they rested upon strongly republican principles. “[L]iberty, equality, fraternity”, an author observed, “the vocabulary relating to the doctrine of assimilation and that relating to these republican ideals were the same. These French ears attuned to republican phraseology also found familiar the phraseology in which the expansion of France overseas was justified”.<sup>68</sup> French colonies were thus to become an integral part of the motherland and their societies and populations were made in the image of France—because, as an Education Inspector wrote in 1890, “[w]e will never be the masters of Algeria until this country speaks French”.<sup>69</sup> That same year, the French National Colonial Congress passed a resolution proposing “[t]hat the efforts of colonization in all countries under French authority be directed in the sense of propagation among the natives of the language, habits and mindset of the métropole”.<sup>70</sup>

This was a fundamentally different approach from the one taken by the other great Empire of the time, Britain.<sup>71</sup> For instead of conquering and imposing their own laws to their subjects, the British rejected the universalistic concept of the French doctrine and, in the words of a cynic Frenchman, “were never so foolish as to believe that the same system was suitable for all these peoples”.<sup>72</sup> Partly due to the fact that the multifarious institutional structure of the United Kingdom never favoured outright assimilation of the colonized populations, the British did not think their legislation was valid everywhere and supported local laws insofar as they were in accordance with the interests of the British Empire. This was a far cry from the French policy, which aimed at incorporating overseas possessions into the national body by treating conquered people as “...both brothers and subjects—brothers in the fraternity of a common French civilization, and subjects in that they are disciples of French light and followers of French leading”.<sup>73</sup> The result, Hannah Arendt observed, was that “[c]ompared with this blind desperate [French] nationalism, British imperialists compromising on the mandate system looked like guardians of the self-determination of peoples”.<sup>74</sup>

France was certainly not alone in rejecting local cultures in favour of the national one, for imperialism is to some extent indissociable from assimilation.<sup>75</sup> What sets the French colonial experience apart, however, is that France believed in assimilation so forcefully—that she practised it “more consciously”<sup>76</sup> than any other country. The fact that such an assimilationist impulse coincided

<sup>65</sup> In 1905 Joseph Caillaux recognized that “our policy must gradually be a policy of association”. In the same year Clémentel, the Colonial Minister, declared that “[t]his policy of collaboration, of association, is, moreover, a necessary policy. It constitutes not only a policy of justice but also a policy of foresight and of security”. Yet even though association later became the official policy of France, “the ghost of assimilation lingered on and could still be seen fluttering in and out of French colonial affairs”. Betts, above at note 56, 165.

<sup>66</sup> Ruscio, above at note 43, x.

<sup>67</sup> «Vers l’orient compliqué, je parlais avec des idées simples». C De Gaulle quoted by Ruscio, above at note 43, vi.

<sup>68</sup> Betts, above at note 56, 30-1. See also, on the point: “Nourished by the Republic as a symbol of equality, the idea of assimilation never ceased henceforth to play an important role in colonial policy and doctrine”. Id. 16.

<sup>69</sup> Ruscio, above at note 43, 101. Only a few years ago, it should be noted, François Mitterrand declared that “Algeria is France”. Ibid.

<sup>70</sup> G Hanotaux, *L’Énergie Française* (Flammarion, Paris, 1902) 365.

<sup>71</sup> On the difference between French, British and German colonialism see N Bancel & P Blanchard, “Les Origines Républicaines de la Fracture Coloniale”, in P Blanchard, N Bancel & S Lemaire, *La Fracture Coloniale: La Société Française au Prisme de l’Héritage Colonial* (La Découverte, Paris, 2005) 38. See also H L Wessling, *The European Colonial Empires 1815-1919* (Pearson, London, 2004).

<sup>72</sup> P-P Leroy-Beaulieu, «Les Colonies Anglaises et les Projets d’Organisation de l’Empire Britannique», *Revue des Deux Mondes*, cxxxix, 1 January 1897, 122. In Betts, above at note 56, 45. This did not of course mean that the British believed in equality. As an author underlined, “[t]he British considered themselves an imperial race, made for universal domination...and too disdainful to initiate inferior races in the secrets of their superiority”. Betts, above at note 56, 45.

<sup>73</sup> E Barker, *Ideas and Ideals of the British Empire* (Cambridge University Press, Cambridge, 1941) 4.

<sup>74</sup> Arendt, above at note 38, 129-130.

<sup>75</sup> See for example P Gilroy, *Postcolonial Melancholia* (Columbia University Press, New York, 2004).

<sup>76</sup> Betts, above at note 56, 168.

with the birth of the République and with the psychological need to rally behind the nation and its fight against the Catholic Church significantly contributed to the imperialist momentum and creed. And while the ideal—the equality of all human beings—was high and noble, the result was cultural imperialism and the rejection of local differences to the benefit of metropolitan France, a tendency that some observers still consider at the heart of the country’s forceful disdain for any form of ‘communalism’ and multiculturalism à l’anglo-saxonne.<sup>77</sup>

### 3.1.2.5. French Imperialism and Immigration

“The great difficulty of our [colonial] conquest”, Emile Zola wrote in his *Fecondité* (1899), “[is] this terrible problem of Islam, a matter against which we will always clash until it is solved once and for all”.<sup>78</sup> When they began their colonial adventures, French colonialists thought they had it all: a noble historical underpinning (the Revolution), a unifying ideology (republicanism), a simple methodology (assimilation), a common and sympathetic religion (Christianity) and the material and psychological support of an entire nation.

In Asia, things worked out relatively well, for Confucianism and Buddhism were considered compatible with Christianity. Yet in Northern Africa, France immediately clashed with Islam, and Zola was not alone in emphasizing this confrontation. “[Islam] is the enemy of civilization”, François-René De Chateaubriand wrote in his *Génie du Christianisme*, “[and it is] inherently a source of ignorance, despotism and slavery”.<sup>79</sup> Guy de Maupassant also expressed French colonial disappointment at the difficulty of assimilating Muslims: “These Arabs, whom we initially considered civilized, who were apparently inclined to accept our habits, share our ideas and support our actions, become all of a sudden, as soon as the Ramadan begins, savage fanatics and stupid extremists”.<sup>80</sup> The French colonists were, in other words, prepared for everything—except for the possibility that some ‘subjects’ would resist French culture. How was this possible, given that it was bringing them the revolutionary freedoms?<sup>81</sup> And that it was, after all, the best?

At the beginning of the 20<sup>th</sup> century, when the migratory pendulum started to change and the former ‘savages’ travelled to France—first to fight in the First World War and then, encouraged by a manpower-hungry economy, to work and live there with their families—the Islam ‘problem’, which had been so graphically identified by Zola, Chateaubriand and Maupassant, demographically and figuratively moved from Africa to France.<sup>82</sup> Today, the country’s Muslim population makes up an estimated 10% of the French population (about 5 million people),<sup>83</sup> whereas the Muslim presence in America—which is unconnected to colonialism and is voluntary—is a mere 0,5% (about 1.1 million).<sup>84</sup>

<sup>77</sup>As it has been observed, “[n]o other verb better translates the colonial spirit than...‘assimilate’, the first and foremost meaning of which was ‘making similar to’”. Ruscio, above at note 43, 12.

<sup>78</sup>Id. 119.

<sup>79</sup>Quoted in Ruscio, above at note 43, 113.

<sup>80</sup>Id. 114.

<sup>81</sup>Perhaps one reason was that, during the colonial time, the spirit of the Enlightenment and the French Revolution percolated to the ‘savages’ only in microscopic doses. French citizenship was, for example, refused to Algerian people of Muslim faith and only in 1947 was it possible for them to be French and Muslim—but still with the stigma of being registered as French Muslims. Algeria was French, in other words, but not French enough to grant French citizenship to her people (See J Bastier, *Le Droit Colonial et la Conversion au Christianisme des Arabes d’Algérie*, *Annales de l’Université de Sciences Sociales de Toulouse*, Fasc.37, 1990, 33). Even more peculiarly, the 1905 law of separation never applied to Algeria, so while the French state became secular in metropolitan France, it never became so in Algeria (See C-R Ageron, *Histoire de l’Algérie Contemporaine, 1877-1954*, PUF, Paris, 1979) and religious freedom was limited by a local civil administration whose purpose was largely to keep Islam under control. Only in 1947 was the Muslim faith rendered independent from the State. See C Hafiz & G Devers, *Droit et Religion Musulmane* (Dalloz, Paris, 2005) 77.

<sup>82</sup>See in this respect H Lebovics, *Bringing the Empire Back Home: France in the Global Age* (Duke University Press, Durham, 2004); M Bekraoui, *La Genèse de l’Emigration Marocaine en France* (Publications de l’Université de Provence, Aix-en-Provence, 1992).

<sup>83</sup>These numbers are fluid, for France does not allow the collection of official data about ethnic or religious minorities. See in this respect B Etienne, *La France et l’Islam* (Hachette, Paris, 1989); J Cesari, «De l’Immigré au Minoritaire: Les Maghrébins en France», (1993) *Revue Européenne des Migrations Internationales*, vol.9; J Laurence, *Islam in France* (Brookings Institution, Washington, 2001). See also, more recently, *Le Monde*, *Récollement «Ethnique»: Le Débat Français*, 10 November 2006.

<sup>84</sup>See B A Kosmin & A Keysar, *Religion in a Free Market: Religious and Non-Religious Americans. Who, What, Why, Where* (New York: Paramount) 2006. For slightly different numbers, see also J Vaisse, *Veiled Meaning: The French Law Banning Religious Symbols in Public Schools* (Brookings Institution, Washington, 2004) 3.

Yet the experience of the French Empire suggests that it is not only a matter of numbers: if it is true, as an author wrote, that “the colonial spirit is the legitimate child of the refusal of diversity”,<sup>85</sup> it is also correct to say that, because of reasons that are together historical (the almost simultaneous birth of République and colonialism), theoretical (the universal humanism of the French Revolution) and practical (the quest for domination), France established a system whereby local cultures and institutions were systematically rejected in favour of French ones.

Given this historical situation, it is difficult to ignore the connection between France’s colonial policy of assimilation and her current integration model, which is sceptical—if not openly hostile—to any ‘communalist’ status offered on the basis of allegiance to a given group (religious or otherwise).<sup>86</sup> As one French critic wrote, “[i]n France we confuse assimilation and uniformity. We are still with the old Platonic idea of universals. We want to model everyone in our own image, as if it had attained an absolute perfection, and as if all Frenchmen were alike”.<sup>87</sup> Far from being purely theoretical, this assimilationist propensity occasionally surfaces at the legal level too: in 1991, for example, the Conseil Constitutionnel ruled that the expression ‘Corsican people’ is “contrary to the French Constitution, which only knows of the French people, the latter being made up of all French citizens without distinction of origin, race or religion”.<sup>88</sup> And in 1995, it was the turn of the Conseil d’État to write that “the idea of minority in an ethnic sense is contrary to the concept of French people and contrary to the principle of indivisibility of the Republic, something that leads [us] to reject any other category other than that of ‘French people’ understood as the community of all French citizens”.<sup>89</sup>

While this noble policy might have successfully created national ties in the relatively uniform France of the 19<sup>th</sup> century, it is bound to generate a number of problems in the increasingly multi-cultural and multi-religious France of the 21<sup>st</sup> century<sup>90</sup>—and the veil matter can be regarded as a good case in point. Having prepared the historical and conceptual background for it, it is to the legal comparison involving this piece of cloth in the French and American systems that I shall now turn.



<sup>85</sup> Ruscio, above at note 43, 12. For slightly different numbers see B Chélini-Pont, «L’Héritage Culturel Français Face au Pluralisme Religieux», in *Annuaire Droits et Religions* (PUAM, Aix-Marseille, 2005) 294.

<sup>86</sup> The connection is particularly strong, critics maintain, because both in colonial and contemporary France the emphasis is placed on formal rather than ‘practical’ equality. In many respects, the following remarks about the French Empire could still be valid today for French immigrants: “Citizenship, equality, fraternity [were] tempered: citizens but colonized, equals but not entirely so, brothers but younger brothers”. See F Vergès, «L’Outre-Mer, Une Survivance de l’Utopie Coloniale Républicaine?», in *Fracture Coloniale*, above at note 71, 73.

<sup>87</sup> Y Guyot, *Lettres sur la Politique Coloniale* (Reinswald, Paris, 1885) 215.

<sup>88</sup> Conseil Constitutionnel, DC n. 91.290 of 9 May 1991 («Statut de la Corse»).

<sup>89</sup> In Hafiz & Devers, above at note 81, 38, footnote 16. See also D Lochak, «Les Minorités et le Droit Public Français: Du Refus des Différences à la Gestion des Différences», in A Fenet & G Soulier, *Les Minorités et Leur Droits Depuis 1789* (L’Harmattan, Paris, 1989).

<sup>90</sup> See in this sense P Weil, *La République et Sa Diversité: Immigration, Intégration, Discrimination* (Seuil, Paris, 2005). See also: “In the name of a Republic which we must try to protect at all costs, we act as if, in order to better integrate individuals, it were necessary to eliminate the differences upon which they bestowed a part of their individuality. This misunderstanding is in my opinion a sign of the very feeble degree of tolerance, if not intolerance, towards visible diversity in France”. Renault & Touraine, above at note 27, 29.

## The Veil in American & French Law Before 2004

“The Muslim veil is a specifically French obsession and it is in France more than anywhere else that it creates problems”.<sup>1</sup> So wrote in 2004 a French observer, and it is true that in few other countries has the Islamic headscarf stirred so much popular controversy, caused such a major political debate and created so many legal problems. Legislative bills were introduced with the purpose of banning it; parliamentary commissions were established with the same intention; sit-ins and other protests were organized throughout France both for and against it; and virtually every single French intellectual participated in a public discussion that was remarkable both for its length and intensity.

As we have seen in the preceding pages, this storm was due to the fact that the Islamic headscarf lies at the crossroad of four of the most highly controversial themes in French national debate: *laïcité*/religion, republicanism, education and Islam. There is, in other words, a crucial link between French history and the Muslim veil, a link that originates from the lofty ideals of the Revolution's freedoms, involves French imperialism and colonialism in Muslim lands, touches the 1905 separation and *laïcité* and finally reaches the multi-religious France of the 21<sup>st</sup> century. That the latter is currently the only Western nation to prohibit the headscarf both for public school students and teachers and that more than 70%<sup>2</sup> of her population is supportive of such a ban says a great deal about the existence of an *exception française* on the matter.

This French peculiarity looks all the more startling if observed from the other side of the Atlantic. While America is certainly not immune to Islamophobia,<sup>3</sup> there the student veil has never been the object of mainstream popular hostility, has never translated into a public policy issue and has consistently been treated as a purely private matter—something upon which the state has no right to intrude. And while the aversion of French people and politicians for this piece of cloth soon led them to regard it as a direct attack on *laïcité*, US citizens and policy-makers would hardly think of the student headscarf as a sign that threatens the neutrality of public services, violates the Church-State separation or constitutes an excessive entanglement with religion. From a social and political perspective, therefore, the divergence between the two countries could hardly be greater and this is why considerable space has been given to history in the preceding chapters of this thesis.

Yet as we have seen in previous pages, the legal dimension of the issue is more convoluted than the statements of French and American politicians would lead us to believe—and a detailed comparison between the two systems will confirm this. For it is at the pre-2004 legal level, I will argue, that the similarities between the French and American approaches are most visible. This section will thus put side by side the solutions provided by the French and American legal systems to the veil controversy as outlined in the previous chapters and will conclude that the core of the French model was, before 2004, substantially similar to the American counterpart. Indeed, it will be suggested that it is because French veil law—and particularly the jurisprudence of the *Conseil d'État*—was regarded as too 'tolerant' and accommodating that public and political opinion turned against it in France and eventually became prominent with the passage, in the spring of 2004, of the controversial legislation on religious signs at school.

<sup>1</sup> F Zouari, *Ce Voile Qui Déchire la France* (Ramsay, Paris, 2004) 9.

<sup>2</sup> Interesting statistics are in B Chélini-Pont, «L'Héritage Culturel Français Face au Pluralisme Religieux», in *Annuaire Droit et Religions* (PUAM, Aix-Marseille, 2005) 298. See also M Barthélémy, *Les Français et la Laïcité* (CEVIPOF, Paris, 2004).

<sup>3</sup> See e.g. D A Harris, "An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001", (2004) *Utah Law Review* 913; L Braber, "Korematsu's Ghost: A Post-September 11<sup>th</sup> Analysis of Race and National Security", (2002) 47 *Villanova Law Review* 451; K R Johnson, "Racial Profiling After September 11: The Department of Justice Guidelines", (2004) 50 *Loyola Law Review* 67; L Cainkar, "Special Regulation: A Fervour for Muslims", (2003) 7 *Journal of Islamic Law and Culture* 73; M Wolfe, "As the Smoke Began to Clear: Reflections on Islam in America after September 11<sup>th</sup>", (2002) 7 *Journal of Islamic Law and Culture* 165.



This chapter is divided into seven parts. After a short overview of the sources of the veil law in both countries (3.2.1.), I will outline the way in which these two legal systems saw, before 2004, the issue of the Muslim veil as a private right (3.2.2.) that could only be limited by reasons of school order (3.2.3.). I will then ask to what extent the case-by-case approach taken by the French and US systems (3.2.4.) and their refusal to engage in interpretations of religious signs (3.2.5.) are similar, and I will finally compare the French principle of *assiduité* with America's 'regular school attendance' (3.2.6). Last but not least, I will compare the two countries' solutions to the issue of the teachers' headscarf (3.2.7).

### 3.2.1. SOURCES OF VEIL LAW IN AMERICA & FRANCE

One remarkable difference between the American and French legal systems when it comes to the veil issue is the dearth of legal provisions in the US compared with the abundance of regulations in France. As we have seen in Chapters 1.2. and 1.3, in US law the whole matter usually comes down to the judicial interpretation of the First Amendment of the Constitution, according to which "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof..."<sup>4</sup> Yet since the wearing of religious signs by students is regarded in American law as a form of private protected speech or a religious practice that is not usually considered to cause problems in terms of state neutrality and establishment of religion, it is ultimately to the interpretation of the Free Speech and Free Exercise Clause that the entire question is limited. The Fourteenth Amendment<sup>5</sup> is sometimes quoted by American judges as additionally supporting the constitutionality as expressive conduct in the wearing of clothes in general and the veil in particular,<sup>6</sup> yet since the protection offered by the First Amendment is far more substantial than that of the Fourteenth, the latter's contribution to the understanding of the US law on the veil is minor. How American judges in general—and the Supreme Court in particular—have interpreted the Free Speech and Free Exercise Clause is thus almost everything one needs to know on the point. As the reader will recall from Chapter 1.3., the highest court has never directly dealt with the headscarf issue and lower court decisions are quite rare. This paucity of judicial discussion is perhaps the best indication—particularly in a highly-litigious common law country like America—that the wearing of the Muslim headscarf is regarded there as a right and that the law on the point is considered uncontroversial.

This stands in stark contrast with France, a country where the veil has in the past twenty years generated considerable litigation and where the legal system has developed an impressive range of instruments directly or indirectly to deal with it. As Chapter 1.3. has explained, this overabundance is partly due to the fact that the Muslim veil is widely—but until 2004 not legally—considered as a threat to the *laïcité* principle, which, contrary to the situation in the United States, brings into play the entire legal corpus of French regulations dealing with government neutrality and the separation of Church and State. In contrast to the brevity (which definitely does not equate to simplicity) of the American First Amendment, one can marshal on the French side the following legislative provisions related to wearing the veil: (i) the 1789 Declaration of Human Rights granting freedom of conscience for all;<sup>7</sup> (ii) the 1886 law on primary education, which prescribes that "in all public schools, the teaching is exclusively assigned to *laïque* personnel";<sup>8</sup> (iii) the Preamble of the 1946 Constitution, which mandates that "the organization of a public, free and *laïque* teaching at all levels is the duty of

<sup>4</sup> US Constitution, 1<sup>st</sup> Amendment.

<sup>5</sup> "No State [shall] deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws". US Constitution, XIV Amendment (hereinafter, the Fourteenth Amendment).

<sup>6</sup> See for example: *Richards v Thurston* (C. A. 1, 1970), 424 F. 2d 1281; *Dwen v Barry*, 483 F. 2d 1126 (2<sup>nd</sup> Circ 1973); *Massie v Henry* (C. A. 4, 1972), 455 F. 2d 779; *Long v Zopp* (C. A. 4, 1973), 476 F. 2d 180; *Mick v Sullivan* (C. A. 4, 1973), 476 F. 2d 973; *Holsapple v Woods* (C. A. 7, 1974), 500 F. 2d 49, certiorari denied, 419 U.S. 901; *Arnold v Carpenter* (C. A. 7, 1972), 459 F. 2d 939; *Crews v Cloncs* (C. A. 7, 1970), 432 F. 2d 1259; *Breen v Kahl* (C. A. 7, 1969), 419 F. 2d 1034, certiorari denied, 398 U.S. 937; *Torvik v Decorah Community Schools* (C. A. 8, 1972), 453 F. 2d 779; *Bishop v Colaw* (C. A. 8, 1971), 450 F. 2d 1069.

<sup>7</sup> Article 10 of the UDHR reads: "None should be disturbed in his or her opinions, also religious ones, to the extent that their manifestation does not trouble public order" («Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre établi par la loi»). Déclaration des Droits de l'Homme et du Citoyen (1789), Article 10, in F Mélin-Soucramanien, *Constitution de la République Française* (Dalloz, Paris, 2005) 7.

<sup>8</sup> Conseil d'État, Assemblée Générale (Section de l'Intérieur), n.346.893, 27 November 1989.

the State”;<sup>9</sup> (iv) Article 2 of the 1958 Constitution, according to which “France is a...laïque republic” and “guarantees the equality before the law of all her citizens without distinction of origin, race or religion”;<sup>10</sup> and (v) the 1905 law of separation of Church and State, which emphasizes that France “guarantees freedom of conscience” (Article 1) but at the same time “does not recognize, pay or subsidize any religion”<sup>11</sup> (Article 2).

To this ‘fundamental’ block of higher norms generically dealing with laïcité and religious freedom one then needs to add EU and international law (which in France come second in rank only to the Constitution)<sup>12</sup> as well as an overabundance of lesser sources—administrative and judicial—that directly involve the headscarf issue. This more specific (and mainly judge-made) legal corpus constitutes the French law on the veil and comprises: (i) the 1989 Code de l’Éducation, which expressly deals with students rights in class; (ii) the 1989 Avis of the Conseil d’État, which is the first and most important of a long list of judicial statements on the matter; (iii) the 1989 Jospin Circular which interpreted the Avis (1989); (iv) the Kherouaa (1992), Yilmaz (1994) and Aoukili (1995) decisions; (v) the controversial 1994 Bayrou Circular on religious signs at school; (vi) the other copious Conseil d’État case law on the matter;<sup>13</sup> (vii) and, finally, Statute 228/2004 as well as the Fillon Circular (2004) that interpreted it, together with the (rare) case law that is currently accumulating. This, it should be noted, is in addition to the plethora of lower courts decisions (Tribunals Administratifs, Courts d’Appel, etc) on the student veil and does not include the pivotal Conseil d’État case Mlle Marteaux of 2000 and its subsequent judicial applications, a decision that seems to have settled the law on the matter of teachers’ veils. Last but not least, since Statute 228/2004 is succinct in form and vague in its application, one also needs to take into account its legislative history as well as the parliamentary debates that led to its approval.

One preliminary observation that can be made in comparing the French and American approaches to the veil matter is thus quantitative: compared with the virtual absence of legislation and, especially, with the paucity of case law on the veil in America, this remarkable amount of French law and high-profile litigation can be taken as a sign that the matter of the Muslim headscarf is frequently regarded, in France, as highly controversial as well as worthy of being brought to the attention of the judges. Given that French society is usually seen as far less litigious than America’s,<sup>14</sup> this is in itself an interesting tendency.

### 3.2.2. VEIL AS A PRIVATE RIGHT IN BOTH AMERICA & FRANCE

That the French and American sources of veil law differ in quantity does not however mean that they fundamentally differ in meaning or approach. In brief, prior to the adoption of Statute 228 in 2004, the legal systems of both countries regarded the student headscarf as a private right not to be interfered with by the state except in exceptional circumstances. Because of the importance of this point and for the benefit of later discussion, the two approaches need to be briefly recalled and compared here.

<sup>9</sup> In Mélin-Soucramanien, above at note 7, 16.

<sup>10</sup> Id. 28.

<sup>11</sup> Loi du 9 Décembre 1905 Concernant la Séparation des Églises et de l’État, in Y Bruley, 1905, *La Séparation des Églises et de l’État: Les Textes Fondateurs* (Perrin, Paris, 2004) 435.

<sup>12</sup> Ibid.

<sup>13</sup> Particularly the decisions Un Sysiphe (1995), Saglamer (1995), Ali (1996), Unal and Jeouit (1996), Ligue Islamique du Nord (1996), Wisaadane (1996), Kaddouri (1997) and Ait Ahmad (1999).

<sup>14</sup> See on the point E Feldman, “Blood Justice: Courts, Conflict and Compensation in Japan, France and the United States”, (2000) 34 *Law and Society Review* 561; B Markesinis, “Litigation-Mania in England, Germany, and the USA: Are We So Very Different?”, (1990) 49 *Cambridge Law Journal* 233; and J M Sellers, “Litigation as a Local Political Resource: Courts in Controversies over Land Use in France, Germany and the United States”, (1995) 29 *Law and Society Review* 475. See also R A Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, Cambridge, MA, 2001) 8; R A Kagan & L Axelrad (eds), *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism* (University of California Press, Berkeley, 2000); W Pfennigstorf & D G Gifford (eds), *A Comparative Study of Liability Law and Compensation Schemes in Ten Countries and the United States* (Insurance Research Council, Oak Brook, Ill, 1991).

### 3.2.2.1. The American Approach

The ‘individual right’ dimension of the Muslim veil is certainly present in US law, where a headscarf worn by a student for religious reasons could be regarded either as private speech under the *Spence* and *Tinker* tests, or as private religious conduct under *Smith*—and would thus be protected by the Free Speech and Free Exercise Clauses of the First Amendment respectively.

As for the first Clause, although in *Spence* the Supreme Court dealt, as I explained in Chapter 1.3., with a privately-owned flag which had been hung on a balcony and was meant to convey a peace message, this case set out two important criteria that are regularly used by US courts to determine student dress cases. According to the first one, student clothing is a form of constitutionally protected speech if (i) the student wears it with the “intent to convey a particularized message”<sup>15</sup> and (ii) “the likelihood [is great] that the message would be understood [as such] by those who view it”.<sup>16</sup> This criterion usually is met by the Muslim headscarf, whose expressive point is generally apparent to the student who wears it as well as to his or her classmates. As the Court wrote in *Spence*, “the nature of appellant’s activities, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression”<sup>17</sup> because “[h]is message was direct, likely to be understood and within the contours of the First Amendment”<sup>18</sup> and it was thus protected activity in which the State had no right to intervene. This stance was confirmed in a series of other Supreme Court judgments on the ‘marketplace of ideas’ model<sup>19</sup> and was also indirectly corroborated by the plethora of lower courts cases on student dress codes described in Chapter 1.3., where we have seen that hair styles and symbols such as tattoos and earrings were often considered unworthy of the First Amendment protection granted to political and religious messages because they did not meet the *Spence* standard.<sup>20</sup>

Under US law, once a Muslim headscarf is determined to be ‘pure speech’, the next step is to see to what extent such expression is protected. In this respect, the *Spence* test must be seen in light of *Tinker*, which is the leading case to be considered in all instances involving student expression. In *Tinker*, the Supreme Court ruled that student speech cannot be censored by school authorities unless they can “reasonably forecast”<sup>21</sup> that it will “cause material and substantial disruption”<sup>22</sup> to school activities or “collide with other students’ rights”.<sup>23</sup> “A silent, passive expression of opinion”, the Court wrote, “unaccompanied by any disorder or disturbance on the part of the [students]”<sup>24</sup> is permissible because “it will hardly be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution”.<sup>25</sup> “Discomfort”<sup>26</sup> or “unpleasantness”<sup>27</sup> are, as we shall see below, insufficient grounds for regulating a student’s speech, for, according to the Supreme Court, “the classroom is peculiarly ‘the marketplace of ideas’ [and] the Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas

<sup>15</sup> *Spence v Washington*, 418 US 405, 410-1 (1974).

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Id.* 415.

<sup>19</sup> *West Virginia State Board of Education v Barnette*, 319 US 624 (holding that public authority has no power to compel what is orthodox in politics, nationalism, religion etc); *Tinker v Des Moines Independent School District*, 393 US 503 (holding that only a material and substantial disruption to school activities can justify limits to student speech); *Brandenburg v Ohio*, 395 US 444 (holding that racist views are allowed because of marketplace of ideas); *Cohen v California*, 403 US 15 (holding that the expression ‘Fuck the Draft’ is allowed in courtroom because of free speech rights); *Texas v Johnson*, 491 US 397 (holding that flag burning must be allowed as free speech); *RAV v City of Saint Paul*, 505 US 377 (holding that racially-motivated burning cross on private property is legal because the statute prohibiting it was an unconstitutional content-based limitation of free speech).

<sup>20</sup> See Section 3.3.5.2.

<sup>21</sup> *Tinker* at 514.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Id.* 508.

<sup>25</sup> *Id.* 512. A “fear of a disturbance” (*Id.* 508) is not enough to overcome the right to free speech, the justices added, and the school must have specific facts from which it can “reasonably forecast substantial disruption” (*Id.* 514).

<sup>26</sup> *Id.* 509.

<sup>27</sup> *Ibid.*

which discovers truth out of a multitude of tongues [rather] than through any kind of authoritative selection”.<sup>28</sup> The conclusion seems thus inevitable that the Supreme Court justices regard student expression—at least in its ‘pure speech’ dimension, into which the Muslim veil falls—as being an essential component of the ‘free marketplace of ideas’ model of freedom of speech and that they give it the highest possible protection, making it subject only to specific public order limitations, which American law has developed through the years and which will be considered in detail below.<sup>29</sup>

As mentioned in Section 1.3.1., however, the Muslim veil could also be regarded as religious conduct rather than speech—in which case it would be protected by the lower standard of the Free Exercise Clause of the First Amendment rather than the Free Speech Clause, because in US law protection for religious speech is much more robust than protection for the free exercise of religion. Yet even in this case the veil would be regarded in American law as a private right—and one that cannot be unfavourably singled out for prohibition unless non-religious conduct is treated in the same way. For the significance of the Free Exercise Clause—at least before *Smith*—lay precisely in the fact that federal and state authorities should refrain from making laws that limit the free exercise of religion unless this is absolutely necessary. From 1963 until 1990 this approach was well accepted: the Supreme Court consistently applied the *Sherbert* test and required any governmental legislation that burdened religion to be the least restrictive means of achieving a clearly compelling governmental interest.<sup>30</sup> In 1990, however, a divided Supreme Court in *Smith* changed its position, holding that the Free Exercise clause protects people’s religious rights only against “non-neutral” laws that intentionally burden their religious practices. As we have seen in Chapter 1.3., this change of doctrine is only partly relevant for the Muslim veil issue in comparative American perspective—for two reasons. First, the French statute—targeting, as it does, religious symbols only and prohibiting “the wearing of signs or clothes through which students ostensibly manifest a religious belonging”<sup>31</sup>—would probably be regarded as “non-neutral” and as an intentional burden on religion. In other words, it would be deemed unconstitutional irrespective of the religious exceptions controversy, for it is one thing to say that religious exceptions to generally applicable laws are not admitted, but quite another to openly discriminate against religion.

Secondly, the *Smith* standard itself has been the object of much controversy in America and, as we have seen, the political establishment has repeatedly tried to pass legislation that reinstates *Sherbert*. In this respect, the 1997 Supreme Court decision in *Boerne*—which declared the Religious Freedom Restoration Act (RFRA) unconstitutional—did not dissuade several American states from adopting non-federal RFRAs so that the *Verner* standard is often maintained at the state level, an approach that was explicitly admitted by the Supreme Court in 1997.<sup>32</sup> Recent decisions—such as that relating to the constitutionality of the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2005<sup>33</sup> and the case *O Centro Espirita Beneficente União do Vegetal* in 2006<sup>34</sup>—confirm this. Irrespective of the *Smith* impasse, therefore, the statutory protection of the Muslim veil as a private right—at least at the same level as any other non-religious speech—seems relatively well settled in American law.

### 3.2.2.2. The French Approach

This was also the case for French law before 2004. As we have seen in Chapter 2.3., at the constitutional level the 1789 Declaration of Human Rights provides that “[n]one can be disturbed in the enjoyment of his or her opinions, even religious ones, to the extent that their manifestation does

<sup>28</sup> *Id.* 512.

<sup>29</sup> Important cases for the protection of religious speech are the *Jehovah’s witnesses* cases quoted in Section 1.2.2.1. Examples of more recent cases are *Capitol Square Review Board v Pinette*, 515 US 753 (1995); *Rosenberg v University of Virginia*, 515 US 819 (1995); and *Good News Club v Milford Central School*, 533 US 98 (2001). For details, see D Laycock, “A Survey of Religious Liberty in the US”, 47 *Ohio State L.J.* 409, 419-20 (1986).

<sup>30</sup> *Sherbert v Verner*, 374 U.S. 398 (1963).

<sup>31</sup> *Journal Officiel*, Loi n. 2004-228 du 15 Mars 2004, Encadrant, En Application du Principe de Laïcité, le Port de Signes ou de Tenues Manifestant une Appartenance Religieuse dans les Écoles, Collèges et Lycées Publics, Paris: *Journal Officiel* n.65, 17 March 2004, 5190 (Article 1).

<sup>32</sup> *Boerne v Flores*, 521 U.S. 507 (1997).

<sup>33</sup> See *Cutter v Wilkinson*, 544 U.S. 709 (2005).

<sup>34</sup> *Gonzales v O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418 (2006).

not trouble the public order as established by law”.<sup>35</sup> Furthermore, Article 2 of the 1958 Constitution states that “France...guarantees the equality before the law of all her citizens without distinction of origin, race or religion”<sup>36</sup> and Article 1 of the 1905 law of separation emphasizes that the country “guarantees freedom of conscience”.<sup>37</sup> Article 511-2 of the Code de l’Éducation, finally, positively and more specifically confirms French pupils’ freedom of expression when it proclaims that “[s]tudents have, with due respect to pluralism and the neutrality principle, freedom of information and freedom of expression, the exercise of which cannot trouble teaching activities”.<sup>38</sup>

These constitutional and legislative provisions have consistently been interpreted by the Conseil d’État as founding the basis of French students’ right to free expression at school and in the classroom, be it religious speech or otherwise, and the first and most authoritative decision in this regard was the prominent Conseil d’État Avis of 1989. There, the highest French administrative court made it clear that religious symbols are a right for every student in French schools:<sup>39</sup>

The conclusion to be drawn from both [French] constitutional and international law is that the principle of laïcité of public teaching...requires, on the one hand, the respect by teachers of the neutrality principle in school programmes and, on the other, freedom of conscience for students. It prohibits...every form of discrimination in accessing the public school system based on the religious conscience or the beliefs of students.

Yet the Conseil d’État went further and, in the course of the veil controversy, unambiguously allowed the Muslim headscarf in French classrooms.<sup>40</sup> The Conseil d’État certainly listed in its Avis a number of circumstances where the veil—like any other symbol—could be prohibited, yet its subsequent case law confirmed in no uncertain terms that these examples were regarded as exceptional and, as we shall see in detail below, can be said to fall into the notion of ‘disruption to school order’ used by the US Supreme Court in *Tinker* and other American school cases.<sup>41</sup> In the *Kherouaa* case, which was the first judicial application of the 1989 Avis and which was consistently confirmed until the 2004 revirement, the judges of the Palais Royal followed the advice of the Commissaire du Gouvernement, who had told them to simply consider the Muslim veil as a private matter of freedom of expression—exactly the same approach taken by the US Supreme Court. The Commissaire wrote:<sup>42</sup>

The [1989] avis has rejected...the far too rigorous approach of some of the most fervent supporters of the laïcité. The latter does not appear to be a principle that justifies the interdiction of every religious manifestation [for] the teaching is laïque not because it prohibits the expression of the various beliefs but on the contrary because it tolerates them all. This [approach] treats freedom as the rule and any prohibition as the exception...

In the following years, the Conseil d’État confirmed this stance by consistently holding that any automatic prohibition of the Muslim veil on the ground of its incompatibility with laïcité was unconstitutional and bound to be annulled.<sup>43</sup> Consequently—and not unlike the position of the Supreme Court in the United States regarding student expression (religious and otherwise)—the

<sup>35</sup> Conseil d’État, Assemblée Générale (Section de l’Intérieur), n.346.893, 27 November 1989.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Code de l’Éducation, Article 511-2.

<sup>39</sup> Conseil d’État, Assemblée Générale (Section de l’Intérieur), n.346.893, 27 November 1989, § 1.

<sup>40</sup> “[T]he wearing by students of signs through which they manifest their belonging to a religion is not incompatible with the principle of laïcité...This student freedom implies the right for them to express and manifest their religious beliefs within the school buildings, with due respect to the principle of pluralism and freedom of others and unless this threatens teaching activities, the content of programmes and the duty to attend classes”. Ibid.

<sup>41</sup> “Because of the broad character of its terms”, the Conseil d’État wrote in 1992, “[this veil prohibition] crafts a general and absolute interdiction which goes against the [constitutional] principles and especially against the students’ freedom of expression, which is recognised to them within the framework of the neutrality and laïcité of public school teaching”. See Conseil d’État, *M. Kherouaa et Mme Kachour, M. Balo et Mme Kizic*, n. 130394, 2 November 1992.

<sup>42</sup> D Kessler, «Conclusions sur Conseil d’État, 2 Novembre 1992, M. Kherouaa et Mme Kachour, M.Balo et Mme Kizic», in *Revue Française de Droit Administratif (RFDA)*, 9 (1), Jan-Feb 1993, 114.

<sup>43</sup> See Sections 3.2.3. & 3.2.4.

approach of the Conseil d'État has until 2004 showed a clear aversion to any prohibition of student religious signs other than for reasons of school order, a matter to which I shall now turn.

### 3.2.3. THE VEIL & THE SCHOOL ORDER LIMIT

Public order is an internationally recognized limitation to religious expression<sup>44</sup> as well as almost all other human rights, so it is not surprising that the prevention of disruption of school order is potentially a reasonable restraint on the private freedom of wearing a Muslim headscarf. This seems to have been the case both in French and American law prior to 2004.

#### 3.2.3.1. The French Approach

Generally speaking, the French legal system acknowledges the *ordre public* limit and has construed it as being made up of four different components: (i) security or “the prevention of events that threaten society and individuals”;<sup>45</sup> (ii) health/‘salubrité’ or “the prevention of illnesses and pandemics”;<sup>46</sup> (iii) tranquillity or “the prevention of troubles to public peace”;<sup>47</sup> and (iv) morality and human dignity. These limits are in line with those contained in Article 9 of the European Convention for Human Rights.<sup>48</sup> Leaving aside the health criteria (which is virtually irrelevant for the veil issue) as well as the morality one (which is not commonly used by the Conseil d'État due to its lack of precision),<sup>49</sup> we can turn directly to the question of whether in French law a student's right to wear a headscarf can be limited on grounds of security and tranquillity.

Before the law of 2004, the Conseil d'État would have answered that this is possible in theory but rarely achieved in practice. As mentioned above, its 1989 Avis treated the Muslim veil as a right for students but added that it can be prohibited if it threatens “the school order or the normal functioning of the public service”.<sup>50</sup> “[t]he automatic prohibition [of the veil] is illegal but it is indeed possible to sanction those behaviours that threaten public order, endanger students' security or reject the assiduity principle”.<sup>51</sup> Yet the subsequent judicial application of this Avis demonstrates that the judges intended to use the public order factor sparingly, in line with their general jurisprudence in the Benjamin case,<sup>52</sup> whereby “police measures should limit the exercise of public freedoms only to the extent that it is strictly necessary to maintain the public order”.<sup>53</sup>

<sup>44</sup> O Carton, «Les Limites à la Liberté d'Expression Religieuse: Entre Fermeté et Errements du Conseil d'État», *Droit Processif*, RRJ 2000, n.4, 1570.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> Article 9 (2) ECHR reads: “Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”.

<sup>49</sup> *Ibid.*

<sup>50</sup> Conseil d'État, 1989 Avis, in Centre de Documentation, below at note 50, § 1. As an author observed, the judges of France's highest court apply the administrative standard of «bon fonctionnement du service public» to the school, and consequently talk, on the one hand, of «bon déroulement des activités d'enseignement» and, on the other, of «bon ordre dans l'établissement». G Koubi, «Exclusion Définitive d'Elèves d'Un Collège Ayant Refusé d'Oter Leur Foulard Islamique Pour Participer au Cours d'Education Physique», *Recueil Dalloz*, 1995, *Jurisprudence*, 365.

<sup>51</sup> Conseil d'État, Note sur les Décisions Relatives au 'Foulard Islamique' Rendues par le Conseil d'État Statuant au Contentieux, in Centre de Documentation du Conseil d'État, *Jurisprudence du Conseil d'État sur le Port du 'Foulard Islamique' dans les Etablissements Scolaires* (Conseil d'État, Paris, 1997) (unpublished volume provided by the Centre de Documentation of the Conseil d'État), 2.

<sup>52</sup> Conseil d'État, Benjamin, 19 Mai 1933.

<sup>53</sup> In *Jurisprudence du Conseil d'État*, above at note 50, 2. As one Conseiller d'État underlined, in French law “only exceptionally severe circumstances [of public order] can allow the restriction of the exercise of fundamental freedoms”. E Belliard, «Le Conseil d'État et les Libertés Religieuses», in *Annuaire Droit et Religions*, above at note 2, 49.

The consequence was that the broad wording of the 1989 Avis was followed by a decade of cautious application of the public order limit.<sup>54</sup> In *Kherouaa* (1992), for example, the Conseil d'État wrote that it was not “established nor even alleged”<sup>55</sup> that the veil worn by the student might have “threaten[ed]...students’ security or perturb[ed] school order or activities”.<sup>56</sup> As a matter of fact, the anti-headscarf rule of the Montfermeil school was a general and impermissible prohibition that violated students’ rights to religious expression and was annulled, for no public order reason justified a different outcome. Very much the same attitude emerged two years later in the *Yilmaz* case, where the Commissaire du Gouvernement wrote:<sup>57</sup>

We might have considered upholding [the prohibition] if it had been seriously argued that it was adopted in order to prevent severe incidents or violence between groups of students that were likely to perturb the school community, [b]ut Ms Yilmaz was the only one to wear the veil and this did not create a climate of violence that could at least in theory justify such prohibition.<sup>58</sup>

It was only in 1995 that the Conseil d'État applied for the first time the public order limit in a student veil lawsuit. Even before reaching the highest administrative court, however, a Lyon Tribunal had already emphasized that the *Aoukili* case was special in that it involved a “climat de troubles”,<sup>59</sup> that is to say, serious threats to public order that translated into “disturbances within and outside the school, a teachers’ strike on 12 October 1993, the suspension of courses and the absence of students from their classes, protests in front of the school, a declaration to the press, a climate of general overexcitement, additional work for administrative personnel and proselytism episodes”.<sup>60</sup> As a consequence, when the matter reached the Conseil d'État, the Commissaire du Gouvernement advised it that the expulsion of the veiled girls was justified because here the issue was not one of freedom of religion but public order<sup>61</sup>—and the highest judges followed his advice. “Teaching activities have been very seriously disturbed by the attitude of these students”, the Conseil d'État wrote, “ [so] the[se] facts represent a violation of the school order that [justifies] the sanction of permanent exclusion”.<sup>62</sup>

Four months after *Aoukili*, the Conseil d'État intervened again, in *Saglam*, to emphasize that when school problems arise in connection with the headscarf issue, a veiled girl can be sanctioned—and her right to wear the veil can be limited—only to the extent that she is personally responsible for the disruption.<sup>63</sup> As a consequence, under the pre-2004 jurisprudence of the Conseil d'État, even serious disturbances to the school’s public order cannot excuse a general ban of the headscarf and any prohibition or sanction needed to be personally related and proportional, for “no tension can legally justify a generic ban of the veil at school”.<sup>64</sup> This position was confirmed in *Ligue Islamique du Nord*, a

<sup>54</sup> See for example: “The exclusion of a pupil who has just enrolled or the refusal to enrol a student...can only be justified by a threat to public order of the school or to the normal functioning of the educational service”. Conseil d'État, 1989 Avis, above at note 49, § 3.

<sup>55</sup> Conseil d'État, *Kherouaa et Autres*, 2 November 1992, AJDA 1993, p.833. See on the point B Legros, *Les Conditions de l'Expression des Croyances Religieuses par les Élèves dans les Établissements d'Enseignement Scolaires Publics: A Propos du Port du Voile Islamique* (Recueil Dalloz, Paris, 1995) 135.

<sup>56</sup> *Ibid.*

<sup>57</sup> Here, the Conseil d'État ruled that “since it has not been established that special circumstances justified this [prohibition], the latter violates students’ freedom of expression”. See Conseil d'État, *Yilmaz*, 14 March 1994, 145656, in *Jurisprudence du Conseil d'État*, above at note 50, 44. See also: “...the laïcité principle...prohibits...any form of discrimination founded on students’ religious beliefs in access to schooling”. *Id.* 43.

<sup>58</sup> Kessler, in *Jurisprudence du Conseil d'État*, above at note 50, 52.

<sup>59</sup> Conseil d'État, *Aoukili*, 10 March 1995, in JCP G 1995, II, 33431, note by Nguyen Van Tuong.

<sup>60</sup> Tribunal Administratif de Lyon, 4ème Chambre, 10 Mai 1994 in *Petites Affiches*, 30 Novembre 1993, n.143.

<sup>61</sup> “These troubles cannot be seriously denied”, he wrote. See Y Aguila, in *Jurisprudence du Conseil d'État*, above at note 50, 70.

<sup>62</sup> See Conseil d'État, *Aoukili*, in *Jurisprudence du Conseil d'État*, above at note 50, 65. Furthermore, while these disturbances may not have been “directly the consequence of the parents or their daughters”, the Commissaire added that “they have been caused by their intransigence [and the sanctions are thus warranted, because] it is the initial responsibility that should be singled out when considering whether a public order trouble calls for a sanction”. See Y Aguila, «Conclusions du Commissaire du Gouvernement sous *Aoukili*», *Actualité Juridique Droit Administratif (AJDA)*, 20 Avril 1995, 334.

<sup>63</sup> “The head of school [has] not allege[d] or demonstrated...that [the] threat to public order and good functioning of the school and its teaching [activities] were attributable to Ms Saglam”. See Conseil d'État, *Saglam*, in *Jurisprudence du Conseil d'État*, above at note 50, 92.

<sup>64</sup> Conseil d'État, *Ministère de l'Education Nationale v Unal*, n. 172725, 9 Octobre 1996.

case where the veiled students directly contributed to a number of disturbances that were also supported by an Islamic organization—an aggravating factor, in the opinion of the judges.<sup>65</sup>

### 3.2.3.2. The American Approach

Despite the lack of direct US Supreme Court authority on the headscarf issue, there are strong hints that the solution provided by American law is not, *mutatis mutandis*, significantly different from the one adopted by the Conseil d'État before 2004 and that, in both jurisdictions, only a substantial disruption that is objectively verifiable and that involves the personal responsibility of a veiled student could limit her right to express her religious beliefs through wearing a Muslim headscarf.<sup>66</sup> Like French law, the US legal system has of course developed through the years its own conception of public order, which most notably includes the limitation of public speech in case of “clear and present danger”,<sup>67</sup> offensive expression which is likely to cause violence (“fighting words”),<sup>68</sup> “obscenity”,<sup>69</sup> “child pornography”,<sup>70</sup> “vulgar, lewd and offensive speech”<sup>71</sup> and “immorality”.<sup>72</sup> While there are a number of similarities between these US categories and those of security, tranquillity, health and morality developed by French law, it is at the level of school disruption and disturbance of educational activities that this resemblance becomes most apparent—and a comparison between the crucial Supreme Court case on the matter (*Tinker*)<sup>73</sup> and the veil jurisprudence of the Conseil d'État is instructive.

As it is well-known, *Tinker* dealt with black armbands worn by students in order to protest American involvement in Vietnam—that is to say, with a piece of cloth displayed for ideological reasons that the school found potentially disruptive. The school district had learned of the intention of some students to wear the signs and had quickly adopted a ‘no-armband’ policy on the assumption that allowing the demonstration would have disturbed school activities. Not unlike the veil policy of some French schools, any student wearing the armband was asked to remove it and, if this request was refused, s/he was suspended until s/he returned without it.<sup>74</sup> A number of students who wore the armband were suspended and in turn they sued, claiming the school violated their First Amendment rights. As we have seen in Chapter 1.3., the Supreme Court upheld their claims, yet the circumstances of the case and the reasoning of the justices are, for our comparative purposes, as important as the conclusions reached, for although not a freedom of religion case, *Tinker* presents an interesting parallel with the French veil controversy.

The first principle established by the Supreme Court in *Tinker* closely resembles the one accepted by the Conseil d'État in the 1990s: an actual disruption of educational activities is necessary for a school to legitimately curtail student expression. This was not the situation in *Tinker*. There, the “school officials banned and sought to punish petitioners for a silent, passive expression of opinion

<sup>65</sup> “[T]he seventeen students partook...in protest movements that gravely disturbed the normal functioning of the school and have been supported by people external to the school”, the Conseil d'État wrote. “[I]n so doing, they have exceeded the limits of their right to express and manifest their religious beliefs within school buildings [and] the permanent exclusion sanction...is [therefore] legally justified by the facts of the case”. See Conseil d'État, *Ligue Islamique du Nord*, 27 November 1996, n.170207-8. See also: “The plaintiff did create troubles within the school. A member of his family exterior to the school even illegally trespassed the school and verbally aggressed an employee”. R Schwartz, «Conclusions du Commissaire du Gouvernement sous Chabou», 27 Novembre 1996, in *Jurisprudence du Conseil d'État*, above at note 50, 117. Almost the same conclusion was reached in Conseil d'État, *M et Mme Tlaouziti*, 27 Novembre 1996, n.172685; and Conseil d'État, *M. et Mme Jeouit*, 27 Novembre 1996, 172686.

<sup>66</sup> On the point, see for example: “The permanent exclusion of these students can only be founded on the troubles to the school order and/or on the disturbances during teaching activities”. Koubi, G. *Observations Sous M.Ali*, in *Jurisprudence du Conseil d'État*, above at note 50, 100.

<sup>67</sup> *Schenck v USA*, 249 US 47 (1919).

<sup>68</sup> *Chaplinsky v New Hampshire*, 315 US 568 (1942).

<sup>69</sup> *Roth v USA* 54 US 476 (1957) and *Miller v California* 415 US 13 (1973).

<sup>70</sup> *New York v Ferber*, 458 US 747 (1982).

<sup>71</sup> *Bethel School District v Fraser*, 478 US 675 (1986).

<sup>72</sup> *Barnes v Glen Theatre*, 501 US 560 (1991).

<sup>73</sup> *Tinker v Des Moines Independent School District*, 393 US 503 (1969).

<sup>74</sup> *Id.* 504.



unaccompanied by any disorder or disturbance on the part of petitioners. There is no evidence whatever”, the justices held, “of petitioners’ interference, actual or nascent, with the schools’ work or of collision with the rights of other students to be secure and to be let alone”.<sup>75</sup> School order, in other words, was not disrupted by the armbands, and in these circumstances the prohibition was illegal because “where there is no finding and no showing that engaging in forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school’, the prohibition cannot be sustained”.<sup>76</sup> This is precisely the message sent by the Conseil d’État in the Kherouaa, Yilmaz, Ali, Unal, Kaddouri and Jeouit cases, where the students’ rights to wear their veil were upheld unless public order problems—not fear or apprehension or anxiety about them—were proved.

This brings us straight to the second point made by the Supreme Court in *Tinker*: a disruption of school activities, if proved, has indeed the potential of limiting students’ expressive rights, because the latter cannot prevail over the good functioning of the educational system. “[C]onduct by the student, in class or out of it, which for any reason...materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech”,<sup>77</sup> the justices wrote. Yet the *Tinker* armband did not possess these characteristics, for “[t]he problem posed by the present case...does not concern aggressive, disruptive action or even demonstrations...”.<sup>78</sup> Not unlike the veil issue in France, the Vietnam war (against which the *Tinker* students were protesting) was certainly a source of fierce debate and had indeed excited millions of citizens and involved numerous protests across America, yet, as the Supreme Court emphasized, *Tinker* itself concerned a peaceful, non-disruptive symbol.<sup>79</sup> It is true that, while both the headscarf and the Vietnam controversy are socially-sensitive matters in their respective countries, the veil affair in French schools has proved far more disruptive<sup>80</sup> than the anti-Vietnam armbands in American schools. Yet the crucial point for us is that, despite these differences, the two countries’ highest courts reached a very similar conclusion and held that only a material disruption of school order in the case under examination—and not in society in general—could legitimately limit students’ expressive rights.<sup>81</sup>

That the two legal systems were not so far apart from each other is also highlighted by the fact that both in America and France the highest courts adopted, pre-2004, an uncompromising approach towards those encroachments of student expression by school authorities that were purely ‘ideological’, i.e. not founded on the circumstances of the case but on a general aversion to the student symbol. In France, we have already seen that the pre-2004 Conseil d’État jurisprudence was punctilious in striking down any veil ban based on hostility to the headscarf, on its presumed incompatibility with laïcité or on its potential for disruption. In America, the Supreme Court adopted a similar approach when it acknowledged, in *Tinker*, that a principled opposition to the student armband not founded on public order was illegal. “[T]he testimony of school authorities at trial indicates that it

<sup>75</sup> Id. 508.

<sup>76</sup> *Tinker* at 509. See also *Tinker* at 505-6: “[T]he wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to ‘pure speech’ which, we have repeatedly held, is entitled comprehensive protection under the First Amendment”. Finally, see Id at 508-9: “A generic fear of possible troubles to school activities cannot justify an encroachment of First Amendment rights, the Supreme Court confirmed, because “[i]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression”.

<sup>77</sup> Id. 513.

<sup>78</sup> Id. 507-8.

<sup>79</sup> “Only a few of the 18,000 students in the school system wore the black armband [and] only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing the armbands, but there were no threats or act of violence on school premises”. Id. 508.

<sup>80</sup> For comments on the statistics surrounding the enactment of Statute 228, see C Hafiz & G Devers, *Droit et Religion Musulmane* (Daloz, Paris, 2005) 202.

<sup>81</sup> The Supreme Court, however, is certainly more clear than the Conseil d’État in making the point that only a disruption on the part of the student speakers justifies suppression—a conclusion that, given the high sensitivity of the issue in France, the Palais Royal judges reach with more difficulty. Furthermore, for the Washington Justices proselytizing cannot justify speech suppression, because it is clearly protected in US law. See later in the thesis. See also the *Jehovah’s Witnesses* cases quoted in Chapter 1.1., as well as *Watchtower Bible & Tract Society v Village of Stratton*, 536 US 150 (2002).

was not [disruption] that motivated the regulation prohibiting the armbands [but that] the regulation was directed against ‘the principle of the demonstration’ itself. School authorities simply felt that ‘the schools are no place for demonstrations’...”.<sup>82</sup> This approach, the Supreme Court noted, was unacceptable, and it was not, one may add, substantially dissimilar from the way the Muslim veil was treated by certain French schools, whose boards often were concerned to prohibit it precisely because they were either opposed to it out of principle or thought educational institutions were no place for (religious) demonstrations.

Considering all this, therefore, it is likely that a majority of the judges at the Conseil d’État would have joined their American colleagues in dismissing the following dissenting opinion in *Tinker* as a violation of student expression. In dissent, Justice Black wrote:<sup>83</sup>

Even if the record were silent as to protests against the Vietnam war distracting students from their assigned class work, members of this Court, like all other citizens, know, without being told, that the disputes over the wisdom of the Vietnam War have disrupted and divided the country as few other issues have.

This ‘presumption of distraction’ is not enough to curtail student expression in either country, I argue, and a piece of cloth worn by a pupil and meant to convey a specific message—be it religious or otherwise—that does not disturb the public order and that is targeted ‘out of principle’ by school authorities was thus, before 2004, protected speech in both American and French law. “[These students’] deviation consisted only in wearing...a band of black cloth”, the Supreme Court wrote in *Tinker*, “[and] in the circumstances our Constitution does not permit officials of the State to deny their form of expression”.<sup>84</sup> *Mutatis mutandis*, these could well be the words of a French judge sitting at the Palais Royal rather than those of an American one writing in Washington.<sup>85</sup>

#### 3.2.4. THE CASE-BY-CASE APPROACH TO THE MUSLIM VEIL

The fact that before 2004 both American and French law treated the Muslim veil as a private matter of religious expression that could only be limited on public order grounds had another fundamental consequence, namely, that both legal systems adopted a case-by-case approach to the headscarf and rejected any general hard-and-fast rule either in favour or against this piece of cloth. As we have seen above, there certainly was, in both American and pre-2004 French law, a presumption that wearing the veil was a lawful exercise of the students’ freedom of conscience, yet both systems did admit the possibility of prohibiting this piece of cloth in certain circumstances and this obviously implied that only an assessment of the specific facts of the case could reveal whether the religious message conveyed by the veil could legitimately be restricted. While common lawyers may find it superfluous to stress this *ad hoc* approach, the point is crucial in light of the French ‘revolution’ of 2004, for it is this case-by-case method that France’s politicians endeavoured—but, as we shall see, did not entirely manage<sup>86</sup>—to eliminate in 2004 with the adoption of the statute on religious symbols at school.

##### 3.2.4.1. The American Approach

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<sup>82</sup> *Tinker* at 509, Note 3. See also *Tinker* at 510, Note 4: “The district court found that the school authorities, in prohibiting black armbands, were influenced by the fact that ‘the Viet Nam war and the involvement of the United States therein has been the subject of a major controversy for some time. When the arm band regulation involved here was promulgated, debate over the Viet Nam war had become vehement in many localities. A protest march against the war had been recently held...a wave of card-burning incidents protesting the war...both individuals supporting the war and those opposing it were quite vocal in expressing their views’”.

<sup>83</sup> *Tinker* at 524.

<sup>84</sup> *Tinker* at 514.

<sup>85</sup> Equally evocative of the French veil controversy is the following passage: “[A] particular symbol—black armbands worn to exhibit opposition to this Nation’s involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork discipline, is not constitutionally permissible”. *Tinker* at 510-511.

<sup>86</sup> See for details Sections 3.3.3.

To say that the approach of American law to the veil is case-based risks being tautological, because far from being limited to the headscarf matter, such an empirical attitude characterizes the US legal system as a whole and arguably separates the Anglo-Saxon conception of law from the Roman one. As it was authoritatively observed, “[t]he tradition of the English Common Law has been one of gradual development from decision to decision [and], historically speaking, it is case-law, not enacted law”.<sup>87</sup> In contrast with the situation on the Continent where the reception of Justinian’s *Corpus Juris* favoured the codification of theoretical rules and where lawyers “think abstractly [and] in terms of institutions, in England [they do so] concretely, in terms of cases, the relationship of the parties, ‘rights and duties’”.<sup>88</sup> Anglo-Saxon lawyers, in other words, “feel their way gradually from case to case”,<sup>89</sup> whereas the Continental legal method in general—and the French one in particular—favours a more holistic approach and is attracted by the (apparently) reassuring and systematic character of codes and statutes.<sup>90</sup>

There are, to be sure, substantial differences between English and American law,<sup>91</sup> yet these two legal systems share this pragmatic approach and, as we have seen in previous pages, the US veil law is a good example of this. The two crucial Supreme Court cases on student expression, *Spence* and *Tinker*, take for granted that the circumstances of the matter are vital in determining whether student expression qualifies as speech (*Spence*) and whether a material and substantial disruption to school order has been proved (*Tinker*). *Spence*, in particular, gives prominent importance to “the nature of appellant’s activities”<sup>92</sup> and mentions “the factual context and environment in which it was undertaken”,<sup>93</sup> before reaching the conclusion that the “message was direct, likely to be understood and within the contours of the First Amendment”.<sup>94</sup> As for *Tinker*, the Supreme Court took an equally pragmatic view, writing that “[t]here is no evidence whatever of petitioners’ interference, actual or nascent, with the school work”<sup>95</sup> and emphasizing that “[i]n the present case”<sup>96</sup> the School Board failed to prove such a disturbance, with the result that the armband had been illegitimately prohibited.<sup>97</sup>

### 3.2.4.2. The French Approach

As we have seen already, French veil law as developed by the Conseil d’État shared, before its spectacular U-turn in 2004 at the hands of the legislature, the case-by-case approach of its American cousin and rejected any general rule on the matter. In doing so, it consistently resisted the mounting calls for a blanket prohibition that, beginning in the 1990s, were raised by French society as well as politicians and that finally prevailed with the adoption of Statute 228/2004. As the Conseil d’État wrote in 1989,<sup>98</sup>

<sup>87</sup> K Zweigert & H Kötz, *An Introduction to Comparative Law* (Clarendon Press, Oxford, 1995) 70.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> Interesting observations on the point can be found in A Malmström, “The System of Legal Systems: Notes on a Problem of Classification in Comparative Law”, (1960) 13 *Scand Stud* 12; R David, *Les Grands Systèmes de Droit Contemporain* (Daloz, Paris, 1982); and A Esmin, *Le Droit Comparé et l’Enseignement du Droit*, in *Congrès International de Droit Comparé, Procès-Verbaux de Séances et Documents*, I (1905), 445.

<sup>91</sup> See in this respect Zweigert-Kötz, above at note 85, 247ff.

<sup>92</sup> *Spence v Washington*, 418 US 405, 415.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Tinker* at 508.

<sup>96</sup> *Tinker* at 509.

<sup>97</sup> Although it is prevalent with reference to the matter of the Muslim veil (and thus ‘pure speech’), this practical approach of American law should not be taken for granted, because at least in one area strictly intertwined with the veil matter—student dress codes—American judges seem to have been tempted by a general rule. In *Karr v Schmidt*, for example, in the middle of the ‘hair-length’ controversy of the 1970s, an Appellate Court ruled that school hair grooming regulations were per se legal and this allowed lower courts to automatically dismiss any ‘long-hair’ case in order to avoid the increasing litigation on the matter. “We think it proper to announce a per se rule that such [school grooming] regulations are presumptively valid”, the *Karr* court concluded. See G Graham, “Flaunting the Freak Flag: *Karr v Schmidt* and the Great Hair Debate in American High Schools 1965-1975”, in (2004) 3 *Journal of American History*, 522. For more information on the disruptiveness parameter, see later in the text.

<sup>98</sup> Conseil d’État, 1989 *Avis*, above at note 38, § 3.

It is up to school authorities bestowed with the disciplinary power to appreciate, under the control of the administrative judge, if the wearing by a pupil...of a sign of religious belonging represents [as per this Avis] a violation that can justify a disciplinary procedure and the application ... of one of the sanctions provided by the relevant texts, among which is exclusion from the school.

So it is not appropriate to abstractly and generically determine whether the Muslim veil is admitted or not in French schools, because only teachers and heads of schools are in a position to make a realistic assessment which must be based on the specific circumstances of the case. Furthermore, since the matter is legal and not political, it is the administrative judge who must have the last word in the event of disputes, for he or she is—unlike the legislator—in a position to consider the particulars of each individual case.<sup>99</sup>

The post-1989 jurisprudence of the Conseil d'État proved remarkably consistent in this regard. In 1992 the Conseil ruled in *Kherouaa* that the anti-veil measure promulgated by the school was illegal on the ground that it was not “established nor even alleged that the conditions in which [this girl] wore the veil...were such to...perturb the school order or teaching activities”.<sup>100</sup> Exactly the same message came from *Yilmaz* in 1994—“[s]ince it was not established”, the Conseil d'État wrote, “that special circumstances justified this measure, the latter [ignores] students' freedom of expression...”<sup>101</sup>—as well as from *Saglam*<sup>102</sup> and *Ali*.<sup>103</sup> In this last case, in particular, the Conseil stressed that any general prohibition of the veil based on its presumed incongruity with *laïcité* was unconstitutional.<sup>104</sup> This approach confirmed the original findings of *Kherouaa* (1992), a case where the Commissaire du Gouvernement had already spelled out what was to become at the same time a mantra for the Conseil d'État and an aberration for French politicians: “[T]he veil question is not a matter of principle but a case-by-case issue and precisely because it is a case-by-case issue, no general interdiction can be tolerated”.<sup>105</sup> As we have seen, this position proved socially as well as politically unacceptable in France exactly because the country's aversion to the Muslim headscarf was founded not on reasons of circumstance (disturbances in schools) but of principle (a negative perception of the veil), an important matter to which I now turn.

### 3.2.5. THE REFUSAL TO INTERPRET RELIGIOUS SYMBOLS

The case-by-case approach adopted by French and US law before 2004 resulted in another significant point of convergence between these legal systems, namely, their opposition to any abstract interpretation of religious signs and their conclusion that engaging in this sort of speculation would be a violation of the principles of neutrality and Church-State separation that characterize both legal systems.

#### 3.2.5.1. The US Approach

In US law, getting involved in the interpretation of the possible meanings of the Muslim veil—not to mention attaching to it a sexual inequality message or a proselytic danger—would represent an infringement of the Establishment Clause of the First Amendment, which, according to the

<sup>99</sup> *Ibid.*

<sup>100</sup> Conseil d'État, *Kherouaa*, in *Jurisprudence du Conseil d'État*, above at note 50, 15.

<sup>101</sup> Conseil d'État, *Yilmaz*, in *Jurisprudence du Conseil d'État*, above at note 50, 44.

<sup>102</sup> Conseil d'État, *Ministère de l'Éducation Nationale c/ Mlle Saglam*, 10 July 1995, in *Jurisprudence du Conseil d'État*, above at note 50, 90.

<sup>103</sup> Conseil d'État, *Ministère de l'Éducation Nationale v Ali*, 170343, 20 May 1996, in *Jurisprudence du Conseil d'État*, above at note 50, 99.

<sup>104</sup> “The exclusion [of this schoolgirl] was not based on her behaviour but on the perceived incompatibility of the headscarf with the *laïcité* principle”, it was observed, “[and this] is illegal [because] there is no evidence that the conditions in which Ms Ali wore the veil...constituted an act of proselytism or pressure [and] it was not alleged nor established that [she] caused troubles to the school's public order”. See Conseil d'État, *Ministère de l'Éducation Nationale c/ Ali*, 20 May 1996, n. 170343.

<sup>105</sup> Conseil d'État, *Kherouaa*, in *Revue Française Droit Administratif (RFDA)*, 9 (1), Jan-Feb, 1993, 118.

jurisprudence of the Supreme Court, prevents government from any “excessive entanglement”<sup>106</sup> in religion. In *Lemon*, the justices wrote:<sup>107</sup>

As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal [because] the Constitution decrees that religion must be a private matter for the individual, the family and the institutions of private choice, and that, while some involvement and entanglement [with the State] are inevitable, lines must be drawn.

In US law, the line is bright and is stringently enforced. Since religious signs are regarded as a private expressive right not to be tampered with by the State except in exceptional circumstances, the intervention of the judge is usually restricted to a judicial acknowledgement of whether the person’s religious belief is “sincerely held”,<sup>108</sup> a necessary condition to meet if someone is to benefit from the extensive protection provided by the Free Exercise Clause of the First Amendment. In other words, most important in US law is what the religious conviction means to the person who holds it, not to other people or to the religion’s leading theologians.

An example of this approach can be found in the Supreme Court’s assessment of whether the religious affection of the Amish people—and their religiously-based opposition to public education—was sincere. After having heard expert testimony on the history of the Amish<sup>109</sup> and taken into account the position of the Amish themselves,<sup>110</sup> the justices came to the conclusion that the group’s religious belief was indeed heartfelt: “Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society”, they wrote, “the Amish have demonstrated the sincerity of their religious beliefs”<sup>111</sup> through “almost 300 years of continuous practice and strong evidence of a sustained faith pervading and regulating respondents’ entire mode of life”.<sup>112</sup> In *Yoder*, the Court did take into account the principles of the Amish faith,<sup>113</sup> but only to the extent that this was necessary to establish that the Amish request for an educational exemption was genuinely based on religion, a conclusion that the Supreme Court reached when it acknowledged that “this concept of life aloof from the world and its values is central to [the Amish] faith”.<sup>114</sup>

This methodology resembles very much the one adopted by a lower court in a case involving hair length at school for American Indians. Here, too, a judicial acknowledgement of the religious practice (“the hair...was sacred and...to cut [it] was a complicated and significant procedure”)<sup>115</sup> could only be justified on the basis that it was necessary to consider whether the belief was sincere and benefited from the protection of the law (“the minor members of the Tribe have a sincerely held religious belief in the spiritual properties of wearing the hair long”).<sup>116</sup> To come back to the Supreme Court, in *Goldman* (1986) the justices seemed to confirm this position with respect to a Jewish yarmulke when they wrote that “[the plaintiff’s] devotion to his faith [was] readily apparent”<sup>117</sup> and did not need

<sup>106</sup> *Lemon v Kurtzman*, 403 US 602, 625 (1971).

<sup>107</sup> *Ibid.*

<sup>108</sup> See for example: “To establish that a state regulation violates the First Amendment free exercise clause, the claimants must show that they have a sincerely held religious belief which conflicts with and is burdened by the regulation (*L H Tribe, American Constitutional Law*, § 12-14, at 1242, 1988)”. *Alabama and Coushatta Tribes of Texas v Big Sandy Independent School District*, 817 F. Supp. 1319, 1328 (1993). See also: *Wisconsin v Yoder*, 406 US 205 (1972); *United States v Ballard*, 322 US 78, 86-7, 88 L. Ed 1148, 64 US 882 (1944); *Teterud v Burns*, 522 F. 2d 357 (8<sup>th</sup> Circ.1975) (Native American inmate allowed to wear long braided hair in the penitentiary in accordance with his sincerely held religious beliefs).

<sup>109</sup> See for example *Yoder* at 219.

<sup>110</sup> *Id.* 211-212.

<sup>111</sup> *Wisconsin v Yoder*, 406 US 205.

<sup>112</sup> *Id.* 219.

<sup>113</sup> “Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a Church community separate and apart from the world...” *Id.* 210.

<sup>114</sup> *Id.* 210. See also in this respect the Court’s conclusion at 219.

<sup>115</sup> *Alabama and Coushatta Tribes of Texas v Big Sandy Independent School District*, 817 F. Supp. 1319, 1323 (1993). See also, *Ibid.*: “There has been a strong movement in North America in recent years among younger Native Americans...to return to their traditional culture and heritage”.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Goldman v Weinberger*, 475 US 503, 510-511 (1986).

further investigation as to its ‘sincerity’, especially considering that “[t]he yarmulke is a familiar...sight”.<sup>118</sup>

Headgear and school dress cases seem to go in a similar direction and suggest that, in US law, what matters most is the religious person’s attachment to the belief rather than the belief itself. The Supreme Court implicitly recognized this when it ruled, in 1981, that “religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection”<sup>119</sup>—they just need to be ‘sincerely held’. This is an approach that US lower courts seem to apply consistently. “The fact finder...may not delve into the question of religious verity or the reasonableness of the belief”,<sup>120</sup> a judge ruled in 1981; while another one emphasized that “whether the court finds that the plaintiff’s belief is reasonable is of no consequence “as there is no requirement that a religion meet any organizational or doctrinal test to qualify for First Amendment protection [and] orthodoxy is not an issue [either]”.<sup>121</sup> In American law, therefore, the job of the judge is narrowly limited to an analysis of whether the religious feeling is genuine, and theological consistency or appropriateness are largely irrelevant. As one judge wrote in a controversial case involving a Muslim headscarf,<sup>122</sup>

The court finds it immaterial whether Plaintiff is in the majority or minority of any given sect or practicing Muslims [and we] will not choose between competing experts on Islam to determine whether Plaintiff’s religious belief is justifiable or reasonable. The Court [simply] finds that Plaintiff is motivated by a sincerely held religious belief to remain veiled.

Finally, there are indications in US law that the expression “religious belief” should be broadly interpreted, because, as one judge emphasized, “the enquiry should not come to an end if traditional characteristics are not present, [for] whenever a belief system encompasses fundamental questions of the nature of reality and relationship of human beings to reality, it deals with essentially religious questions”.<sup>123</sup>

### 3.2.5.2. The French Approach

Like American law, in French law prior to 2004 the refusal to engage in abstract discussions on the meaning of religious signs in general and the Muslim veil in particular was well established at the highest judicial level. As we have seen earlier, those exclusions of veiled schoolgirls decided on the basis of internal rules prohibiting the headscarf “out of principle” were consistently annulled by the

<sup>118</sup> Ibid.

<sup>119</sup> *Thomas v Review Board*, 450 US 707, 714 (1981); *Society of Separationists v Herman*, 939 F.2d 1207, 1215 (5<sup>th</sup> Circ 1991); See also *Hobbie v Unemployment Appeals Commission*, 480 US 136, 144. 94 L. Ed. 190, 107 S. Ct 1046 (1987) (sincere religious beliefs, although recently acquired, are fully protected). The consequence drawn by the *Coushatta* court above was that “[e]ven if the wearing of long hair is not a fundamental tenet of Native American religious orthodoxy, proof that the practice is deeply rooted in religious belief is sufficient [because] once the plaintiffs have proven the sincerity of their religious belief, the burden then shifts to the state or governmental agency to show that the regulation advances an unusually important governmental goal, and that the exemption would substantially hinder the fulfilment of that goal”. See *Alabama and Coushatta Tribes of Texas v Big Sandy Independent School District*, above at note 106, 1329.

<sup>120</sup> *United States v Ballard*, 322 US 78, 86-7, 88 L. Ed 1148, 64 US 882 (1944); *Teterud v Burns*, 522 F. 2d 357 (8<sup>th</sup> Circ.1975) (Native American inmate allowed to wear long braided hair in the penitentiary in accordance with his sincerely held religious beliefs).

<sup>121</sup> *Gallaghan v Hollyfield*, 516 F. Supp. 1004, 1006 (E.D. Va 1981), aff’d, 670 F.2d 1345 (4<sup>th</sup> Circ 1982).

<sup>122</sup> *Sultaana Lakiana Myke Freeman v Florida*, Case n. 2002-CA-2828 (2003) 14 (emphasis in original). This was reaffirmed on appeal, 2005 WL 2108094; affirmed on rehearing 924 So.2d 48 (Fla App 2006); and the review was denied in *Florida Sup Ct 940 So.2d 1124* (Fla 2006). It should be noted that even in this controversial and highly publicized case where the request of a Muslim woman to appear in her niqab (or full veil covering the entire face except for the eyes) on her driving licence was dismissed and where terrorism was indeed mentioned by the judge, no interpretation of the religious dress was given and there was no suggestion, unlike in several French cases, that the veil might pose in itself a problem. The no-veil-in-driving-licences was thus conceived as a security-related limitation (“[there is] increased potential for ‘widespread abuse...’”, p.13) and the prohibition was firmly limited to IDs (“Plaintiff certainly has the right in America to wear her niqab and hijab in public and even while driving, but that is not the same thing as presenting a masked photo for ID purposes”, p.12). An approach somewhat similar to *Sultaana Freeman* was adopted in 1999 when a court ruled that the fact of a schoolgirl considering “[her] head wrap to be an African cultural symbol” and wearing it “to school to celebrate her African-American and Jamaican cultural heritage” was enough to confer to the sign a cultural dimension: *Isaacs v Board of Education of Howard County*, 40 F. Supp. 2d 335 (1999).

<sup>123</sup> *Alabama and Coushatta Tribes of Texas v Big Sandy Independent School District*, cit, 1329.

Conseil d'État<sup>124</sup> and those founded on the veil's presumed incompatibility with laïcité encountered a similar fate.<sup>125</sup> Yet unlike in America, the combination of a series of international events and a number of highly publicized school incidents in the 1990s dramatically heightened French people's aversion for the Muslim headscarf and it was a widely-shared perception that the position of the Conseil d'État was too lenient. This liberal jurisprudence came under increased popular and political attack and the roots of the 2004 statute on religious signs at school can be seen in this disaffection. Yet while, as we shall see, it is certainly true that the Conseil d'État resisted these attacks and that its pre-2004 jurisprudence is a testimony to this resilience, it should be noted that some of the difficulties encountered by the Conseil in the 1990s were self-inflicted, for their pacifying 1989 Avis also contained enough ambiguity to ensure protracted veil litigation in the future. Before we proceed further in our comparison, therefore, we need to delve further into the French conundrum.

(i) Criticism of the 1989 Avis

The main problem with this 1989 Avis lay in the fact that some parts of it could be read—and were in some quarters—as a negation of precisely that 'no-interpretation-of-religious-signs' rule that was going to become the mantra of the Conseil d'État in the years between 1989 and 2004. The first indication of difficulty involved the thorny issue of sexual equality and concerned, in particular, the following sentence:<sup>126</sup>

Students' freedom [to display their religious symbols at school] can be limited if it is an obstacle to the accomplishment of those missions that parliament conferred on public education, which notably...guarantees and favours the equality of men and women.

As it turned out, this reference to sexual equality largely disappeared from the post-1989 case law of the Conseil d'État, was unrelated to the Muslim veil controversy and had been included because the French Education Law of 1989 provides, among other things, that "[s]chools, colleges, lycées and other teaching institutions...contribute to foster the equality between men and women".<sup>127</sup> There was, it seems, no intention on the part of the Conseil d'État to suggest that the Muslim veil was in itself a violation of sexual equality, a conclusion that would after all have clashed head-on with its 1989 rationale according to which no general ban can be applied to religious symbols at school.<sup>128</sup> The 1989 Avis, it must also be said, was not a ruling deciding a specific lawsuit but a piece of advice that the Conseil d'État gave to the government on a controversial point of law (students' rights to wear religious signs in class). For this reason, the advice had to be generally expressed because it had to cover a variety of future circumstances and could not be limited to the Muslim veil. Yet the fact remains that the 1989 Avis was delivered—and had been solicited—right in the middle of France's first Muslim headscarf crisis, and since sexual inequality was precisely one of the accusations levied against the Muslim veil by a number of French intellectuals and politicians,<sup>129</sup> the above-mentioned reference was taken by some as a legal endorsement of a supposed ideological incompatibility between the headscarf and the French education system.

Yet the 1989 Avis contained another, possibly even more serious, ambiguity. After emphasizing that "the fact for students of wearing signs through which they want to manifest their allegiance to a religion is not in itself ["par lui-même"] incompatible with the laïcité principle",<sup>130</sup> the Conseil d'État added that such a liberty "cannot permit students to wear signs of religious allegiance that, because of their nature ["par leur nature"], because of the conditions in which they are individually or collectively

<sup>124</sup> See e.g. Kherouaa in 1992 and Yilmaz in 1994.

<sup>125</sup> See e.g. Ali in 1996 and Kaddouri in 1997.

<sup>126</sup> Conseil d'État, 1989 Avis, above at note 50, § 1.

<sup>127</sup> Ibid.

<sup>128</sup> In this sense, see also: «To the extent that a contested sign is not in itself incompatible with the principles that the education system must protect, its wearing is protected if there is no provocation or incitation to proselytism". D Kessler, «Conclusions sous Conseil d'État, 2 Novembre 1992, M. Kherouaa et Mme Kachour, M.Balo et Mme Kizic», in *Revue Française de Droit Administratif (RFDA)*, 9 (1), Jan-Feb 1993, 117.

<sup>129</sup> See Sections 3.3.1. for details.

<sup>130</sup> Conseil d'État, 1989 Avis, above at note 50, § 1.

worn or because of their conspicuous or confrontational character, constitute an act of pressure, provocation, proselytism or propaganda”<sup>131</sup> and may result in a violation of school order or other students’ rights. While the general message of the *Avis*, as we have seen, was that each headscarf case ought to be analyzed separately and that no general prohibition of the veil was possible, this reference to signs that may ‘because of their nature’ result in pressure, provocation, proselytism or propaganda proved unfortunate, because (i) it seemed to contradict the court’s subsequent ‘no-interpretation-of-religious-sign’ position; (ii) it did not square with the Conseil d’État’s previous jurisprudence according to which, when civil liberties are involved, “it is forbidden to proceed with general and absolute prohibitions”;<sup>132</sup> and (iii) considering the heated atmosphere of the time and the widely-shared perception among the French population of a connection between the veil and fundamentalism, it was taken by some school officials as a possible ground upon which a ban of the Muslim headscarf could be legally based. As the Commissaire du Gouvernement wrote in the first judicial application of the 1989 opinion,<sup>133</sup>

[S]ome people have...read in our *Avis* the possibility of establishing a prohibition of the [Muslim] veil on those lines. However, we are firmly opposed to this approach [which] is not based on the veil itself but on its perception. The problem here is not obviously the veil but the symbol it represents and the interpretation given to that symbol within the Muslim community, some people seeing it, rightly or wrongly, as an instrument of oppression. Yet neither the administration nor least of all the judge can adopt this [interpretative] approach without gravely violating the principles of the laïcité of the State, the freedom of religion and the respect of beliefs.

In harmony with this position—and not unlike its American counterpart—the Conseil d’État rejected, in the following years, any call for a judicial interpretation of religious signs and emphasized that the problem was not the sign itself but the behaviour of the student—that public order, in other words, depended on conduct, not symbolism, and that “[t]he wearing of a sign cannot be misconstrued as an [automatic] resistance to school rules”.<sup>134</sup> “The principle of laïcité is first and foremost a guarantee for the student”, the Commissaire observed in 1994. “It also implies respect for that collective good which is the education system, but this respect is not compromised when a religious sign is worn, even if that sign is a Muslim veil”.<sup>135</sup> Tellingly, until 2004 there was no trace, in the Conseil d’État record, of a religious symbol prohibited in itself, something that renders the 1989 formulation even more regrettable. The highest administrative jurisdiction refused to regard the Muslim veil as an emblem signifying the wearer’s allegiance to a specific group, be it religious or ethnic.<sup>136</sup> Although the US Supreme Court is far less ambiguous and does not share the ‘communalist’ and multicultural worries that seem to preoccupy French institutions, the American approach does not appear substantially different from the pre-2004 approach of the Conseil d’État.

#### (ii) Political Pressure to Interpret the Veil

It was this refusal of the highest judges to see the veil as a problem in itself, together with the above-mentioned ambiguities in the 1989 *Avis*, that frustrated French politicians throughout the 1990s and finally persuaded them to intervene with a legislative solution. We have partly dealt with these issues in Chapter 2.3., yet they are so crucial for the subsequent developments of French law that they need to be briefly revisited here.

<sup>131</sup> *Ibid.*

<sup>132</sup> Conseil d’État, Dardignac, 22 June 1951. On the matter see also C Marliac & J Hamme, «Le Foulard Islamique à l’École Primaire», *Petites Affiches*, 18 August 1995, n.99, 15 (note 4).

<sup>133</sup> D Kessler, above at note 126, 117.

<sup>134</sup> G Koubi, «Observations Sous M. Ali», in *Jurisprudence du Conseil d’État*, above at note 50, 100.

<sup>135</sup> Kessler, in *Jurisprudence du Conseil d’État*, above at note 50, 53.

<sup>136</sup> “Like any other symbol worn by an individual”, an author observed, “the headscarf is not [interpreted by the high court as] a sign of belonging to a religious community [but rather] as a form of expression and manifestation of a religious conviction as well as the result of a personal choice”. See G Koubi, *Observations Sous M. Ali*, in *Jurisprudence du Conseil d’État*, above at note 50, 100.



In July 1994 a legislative bill was introduced to Parliament that can be seen in many respects as the precursor of the 2004 statute, proposing the prohibition of “the conspicuous wearing of all signs of religious, political or philosophical belonging”<sup>137</sup> at school. While the bill was not specifically aimed at religious emblems, the circumstances surrounding its introduction and the explanation given by its author left little doubt as to its real target. Mr Chénier declared that:<sup>138</sup>

ostentatious signs are [those] exaggeratedly [‘exagérément’] visible and expressive [‘démonstratifs’]. It absolutely is no question of banning discreet signs that are worn more for oneself than for others and which can include a small cross, a medal, a Fatima’s hand, the name of the Prophet or even the Star of David.

Although the bill ultimately stalled due to the (then firm) opposition of the Socialists to any general prohibition, it did inspire Education Minister François Bayrou, who, two months later, issued a circular that, as we have seen in Chapter 2.3., seemed to attach for the first time an ‘official’ (negative) interpretation to the Muslim veil by introducing a difference between “ostentatious signs”<sup>139</sup> and discreet ones and connecting this to the immigration and multicultural issues.<sup>140</sup> While such a distinction was subsequently largely ignored by the Conseil d’État on the ground that the Minister’s circular was not legally binding for students,<sup>141</sup> this document appeared hostile to the Muslim veil per se. Clearly targeted at this religious sign rather than at symbols more generally, the circular never mentioned the headscarf but referred to a number of “incidents”,<sup>142</sup> “spectacular episodes of religious or ‘communalist’ allegiance”<sup>143</sup> and a “multiplication”<sup>144</sup> of signs at school. This at a time when, by admission of the same Minister, the highly publicized veil issue did not involve, throughout France, more than a few hundred students out of 10 million and led to the exclusion of only 52 of them.<sup>145</sup> Without making any reference to public order or the veil, this document implied that wearing the Muslim veil was no longer to be considered a matter of individual rights but a public policy issue. It depicts the political frustration of the time and anticipates what was to come ten years later.

To the ambiguities of the 1989 Avis, therefore, one should also add the confusing (omni)presence of ministerial circulars, the role of which remains in French law obscure. Issued by one member of the executive who might not even be an elected representative but merely a high-ranking civil servant, these documents—the purpose of which is to guide the administration in its day-to-day duties—are not part of the formal sources of French law.<sup>146</sup> And yet they are important, for they convey a superior’s instruction to his or her subordinates (in the veil matter, that of the Minister to heads of schools) who are thus under the obligation to follow them.

<sup>137</sup> See the explanation of this bill by E Chénier in *Le Monde*, 2 November 2004.

<sup>138</sup> Assemblée Nationale, Proposition de Loi visant à Réaffirmer la Laïcité du Service Public d’Éducation, Élément Essentiel de la Laïcité de l’État et de la Neutralité des Services Publics, Par la Modification de la Loi d’Orientation sur l’Éducation n.89-436 du 10 Juillet 1989, 10ème Législature, n.1515, enregistrée le 28 Juillet 1994.

<sup>139</sup> *Ibid.* See further Chapter 2.3.

<sup>140</sup> As the Minister wrote, “[Because] the national and republican mission of France...is incompatible with the explosion of the country into separate communities that are indifferent to each other, that are attached only to their own rules and laws and that are engaged in simple coexistence, the presence and multiplication of signs so conspicuous that their purpose is precisely to separate some students from the common rules of the school [can no longer be tolerated, for] these signs are in themselves elements of proselytism”. See F Bayrou, *Circulaire n. 1649 du 20 Septembre 1994 Relative à la Neutralité de l’Enseignement Public: Port de Signes Ostentatoires dans les Établissements Scolaires*, in *Application du Principe de Laïcité dans Les Écoles, Collèges et les Lycées Publics* (Journaux Officiels, Paris, 2005) 337.

<sup>141</sup> Conseil d’État, *Association Un Sysiphe*, in Centre de Documentation, above at note 50, 128. See also, on the point: R Schwartz, «Conclusions de M Schwartz, Commissaire du Gouvernement, Association ‘Un Sysiphe’», 10 July 1995, in *Jurisprudence du Conseil d’État*, above at note 50, 8-11.

<sup>142</sup> Bayrou, above at note 138, 337.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

<sup>145</sup> B Chélini-Pont & T J Gunn, *Dieu en France et Aux États-Unis* (Berg International, Paris, 2005) 49, fn 1.

<sup>146</sup> A good discussion of the point is in *Les Sources Classiques du Droit Français* (Defidoc, Paris, 2006) («Une circulaire est en fait un mode d’emploi de l’administration concernant l’application de la réglementation. Ce type de texte s’impose à l’administration qui est tenue d’appliquer les textes officiels dans le sens préconisé par la circulaire»).

The reply of the Conseil d'État to the Bayrou Circular was, as we have seen, a legal escamotage that allowed the judges to effectively neutralize it without declaring it illegal<sup>147</sup> (something that, incidentally, would have been politically explosive).<sup>148</sup> If one considers that the Conseil d'État's general attitude towards circulars has been confusing, this position is hardly surprising. According to the high judges, a circular cannot be declared illegal for "it does not have the purpose or effect of modifying or completing legislative texts or other norms".<sup>149</sup> As it was observed by the Commissaire du Gouvernement, these documents "only draw the consequences of legislative texts...or the positions that the Conseil d'État has expressed either in its Avis or decisions".<sup>150</sup> Yet one cannot help noticing—and the matter has already been considered in Chapter 2.3.—that virtually every single circular that intervened on the veil issue since 1989 at best added something that the law never said and at worst conflicted with it. In explicitly discouraging the wearing of religious signs,<sup>151</sup> for example, the Jospin Circular of 1989 ordered heads of schools to do something that the 1989 Avis never suggested, while the Bayrou document of 1994 created a distinction—ostentatious versus discreet signs<sup>152</sup>—that arguably did not exist before. As for the Fillon Circular of 2004, it went, as we shall see in detail, even further, for it interpreted Statute 228 as a clear red light to veils, kippas and big crosses—yet if this is correct at the level of parliamentary debates and legislative history, these three symbols are nowhere to be found in the text of the law, which obscurely prohibits "the wearing of clothes or symbols through which students conspicuously manifest a religious allegiance",<sup>153</sup> leaving open several interpretations.

### (iii) Conseil d'État Rejects Calls for an Interpretation of the Veil

To come back to 1994, Mr Bayrou's opposition to the veil did not go unnoticed, for in the following years there was a surge in the number of exclusions of veiled girls from French schools. As for the Conseil d'État, it explicitly rejected this political request to prohibit the Muslim veil on the basis of its perceived incompatibility with laïcité or France's immigration policy, and continued to strike down any general prohibition, emphasizing that it was not the task of the judge to enter into interpretations of religious signs.<sup>154</sup>

The contrast between a political, Bayrou-based, approach to the Muslim veil and the strictly legal one favoured by the Conseil d'État is patent in the Naderan case (1995). Here, a school had introduced as an internal regulation the text recommended by Mr Bayrou and the parents of a girl had sued on the

<sup>147</sup> Conseil d'État, *Association un Sisyphé*, in *Jurisprudence du Conseil d'État*, above at note 50, 128. See also: «In conformity to its well-established jurisprudence concerning circulars, the Conseil d'État rejected the judicial actions taken against an administrative document [the 1994 circular] which does not create in itself any legal effect for the students". Conseil d'État, *Rapport Public: Un Siècle de Laïcité* (Documentation Française, Paris, 2004) 339.

<sup>148</sup> A further rubber-stamping of ministerial circulars by the Conseil d'État can be found in its 1989 Avis, where it was noted that "[t]he minister...can, through a series of instructions, define the orientations or give some indications that will help the relevant authorities to draft the school's internal rules and their application". Conseil d'État, *Avis n.346.893*, 27 November 1989, § II (A).

<sup>149</sup> *C Marliac & J Hamme*, above at note 130, 15.

<sup>150</sup> *Id.* 15.

<sup>151</sup> "When a conflict emerges in reference to a religious symbol...a dialogue must immediately be engaged with the youth and parents so that, in the interests of the student and the good functioning of the school, the wearing of these signs be renounced". Ministère de l'Éducation Nationale, *Circulaire du 12 Décembre 1989*, in *Application du Principe de Laïcité dans les Écoles, les Collèges et les Lycées Publics*, above at note 138, 330.

<sup>152</sup> "Discreet student signs manifesting a personal attachment to beliefs, and particularly religious beliefs, are admitted at school, [yet] ostentatious signs ('signes ostentatoires') that constitute elements of proselytism or discrimination are forbidden. Forbidden are also provocative attitudes, violations of the assiduity and security obligations as well as those behaviours that can be regarded as acts of pressure over other students or that perturb teaching activities or trouble the school order". Ministère de l'Éducation Nationale: *Annexe: Proposition d'Article à Insérer dans le Règlement Intérieur des Établissements*, in *Circulaire n. 1649 du 20 Septembre 1994*, in *Application du Principe de Laïcité dans les Écoles, les Collèges et les Lycées Publics*, above at note 138, 337.

<sup>153</sup> "In primary, intermediate and secondary schools, the wearing of clothes or signs through which students conspicuously manifest a religious allegiance is prohibited". *Journal Officiel*, *Loi n. 2004-228 du 15 Mars 2004*, above at note 30, 5190.

<sup>154</sup> According to the Conseil d'État, one author observed, "to believe that the simple fact of wearing a religious symbol is in itself incompatible with the laïcité principle is to make an erroneous interpretation of the legal relationship between laïcité and freedom of religion". See *G Koubi*, «Observations Sous M. Ali», in *Jurisprudence du Conseil d'État*, above at note 50, 100.

basis of discrimination. The Clermont-Ferrand Administrative Tribunal, attaching an obviously political meaning to the veil, wrote words that could hardly be misinterpreted:<sup>155</sup>

[The hijab] is, in today's France, an identification sign that conveys allegiance and obedience to a foreign-born extremist religious ideology ("une obédience religieuse extrémiste d'origine étrangère"). [T]his obedience, which has an international dimension, is based on a particularly intolerant view that refuses to women the equality benefits that are granted to them by French democratic institutions, tries to erect barriers to the integration of French and foreign-born Muslims into French culture, opposes the principle of *laïcité* and [finally] preaches the superiority of religious rules...over French law in the hope of a triumph of religious institutions...

According to this tribunal, therefore, the Muslim veil was 'in itself' conspicuous, yet in view of the post-1989 Conseil d'État jurisprudence, this was a bold position for a court to take. While this decision seemed to be the exception rather than the rule—only a week after Naderan, the Lille Administrative Tribunal held that "the Muslim veil has wrongly been 'considered in itself as an conspicuous religious sign'"<sup>156</sup>—it should be noted that the Clermont-Ferrand court merely conveyed openly what Mr Bayrou had suggested implicitly. Yet the crucial point here is that this 'political' approach to the matter was entirely rejected by the Conseil d'État, which in November 1996 struck down the Clermont-Ferrand judgment with a formula that was to appear in virtually every subsequent veil case decided until 2004<sup>157</sup> and that can consequently be regarded as the pre-2004 position of French law on the veil matter. The Conseil wrote:<sup>158</sup>

the veil through which Ms Ensieh Naderan wanted to express her religious beliefs cannot be regarded as a sign by its nature ["par sa nature"] conspicuous or confrontational and the fact of wearing it does not result in all cases in an act of pressure or proselytism. [Since] it does not emerge from the record of this case that Ms Naderan wore it in such [proselytic] circumstances ... the decision of the Clermont-Ferrand Tribunal is annulled.

This refusal to attach any general or 'official' meaning to the Muslim veil—and the insistence to simply regard it as a private sign of religious allegiance that could only be limited in special circumstances—is all the more noticeable because the Conseil d'État had the chance of repeatedly thwarting internal suggestions, coming most notably from its own Commissaire du Gouvernement, in favour of an interpretation of religious signs. In the *Un Sysiphe* decision, for example, the Commissaire, Mr Schwartz, reiterated the no-interpretation-of-religious-signs rule of the Conseil but (as we will see in a moment) also expressed frustration at the way the veil issue was being handled, a frustration that is in many respects emblematic of the change that was going to take place ten years later (in 2004 Mr Schwartz was to be appointed Rapporteur General of the Stasi Commission, the consultative body that recommended the prohibition of "conspicuous political or religious signs"<sup>159</sup> at school and that paved the way for Statute 228/2004). "[As you have ruled in the past]", the Commissaire wrote in 1995,<sup>160</sup>

it is not the task of the judge or the [school] administration to interpret the veil, that is to say, to enter into the elucidation of religions. Neither the administration nor the judge can give one specific appraisal to a religious sign and engage in that perilous exercise which is the interpretation of religions' beliefs and their content. Both the judge and the [school] administration are thus immobilized. This powerlessness largely explains, in my opinion, the educational community's opposition to the Muslim veil, [especially considering] the [negative] perception of this sign, a perception that is at times justified but that we cannot endorse.

<sup>155</sup> Tribunal Administratif de Clermont-Ferrand, *M et Mme Naderan*, 6 April 1995.

<sup>156</sup> Tribunal Administratif de Lille, 13 April 1995, in Marliac & Hamme, above at note 130, 15.

<sup>157</sup> See for example: Conseil d'État, *M. et Mme Boutakrouf*, *M. et Mme Atouf*, 27 November 1996, n.170210; Conseil d'État, *M. et Mme Tlaouziti*, 27 November 1996, n.172685; Conseil d'État, *M. et Mme Jeuit*, 27 November 1996, n.172686; Conseil d'État, *M. et Mme Antar*, *M. et Mme El Mafta*, 27 November 1996, n.172989; Conseil d'État, *Epoux Mehila et Autres*, 2 April 1997, n.173103; Conseil d'État, *M. et Mme Kokmen*, n.172721. See also: Court Administratif d'Appel de Lyon, *Mlle Rajal*, 5 November 2002, n.99LY00771.

<sup>158</sup> Conseil d'État, *M. et Mme Naderan*, 27 November 1996, n.170941.

<sup>159</sup> B Stasi, *Rapport de la Commission de Réflexion sur l'Application du Principe de Laïcité dans la République* (Documentation Française, Paris, 2004) (hereinafter, 'Stasi Report') 149-150.

<sup>160</sup> R Schwartz, « Conclusions sous *Un Sysiphe* », 10 Juillet 1995, in *Jurisprudence du Conseil d'État*, above at note 50, 80.

As we have seen in Chapter 2.3., the decision of the Conseil d'État in *Un Sysiphe* turned out to be merely procedural and the Conseil did not have in that case the chance to take a position on these observations of their Commissaire. Yet it implicitly did so one year later in *Wisadaane*, which was decided in conjunction with *Naderan*. There, the Commissaire reiterated his perplexities over the non-interpretation rule of the Conseil d'État in even more explicit terms, criticising in particular the Conseil's unwillingness to see certain religious signs as expressing a sexual inequality message:<sup>161</sup>

In your [1989] *Avis* [you have] recalled that one of the purposes of the education system is...to favour the equality of men and women. Yet you refuse to engage in interpretations of religions and religious signs and to affirm in general terms that this or that symbol has a meaning that could be contrary to the purposes [of the French education system]. You [thus] assert the necessity to respect the equality between men and women, yet by acknowledging your inability to interpret the meaning of religious signs, it seems that you do not have the means to enforce this principle.

Interestingly, the Commissaire also commented on the inherently 'proselytic' character of certain religious emblems:<sup>162</sup>

You have yet to rule on those signs which, either in themselves, because of their nature or because of the way they are worn, are proselytic, conspicuous or confrontational. This question is extremely delicate because you will need to make a distinction between the sign that conveys a normal manifestation of religious expression ["une manifestation normale d'une liberté religieuse"] and the one that goes beyond this normal manifestation and conveys a proselytic, propagandistic or conspicuous message. Personally, I believe that, for example, the wearing by a student of neckwear such as a large cross or of an Iranian-style female dress could be regarded as proselytic and conspicuous. I believe that the school would then be entitled to ask these students to wear more discreet signs that are not [as proselytic and conspicuous].

While the Conseil d'État followed the conclusions of the Commissaire in that particular case, it once again declined to interpret religious signs and repeated its position that "the veil through which Ms *Wisaadane* and *Chedouane* wanted to express her religious beliefs cannot be regarded as a sign by its nature ["par sa nature"] conspicuous or confrontational and the fact of wearing it does not represent in all cases an act of pressure or proselytism".<sup>163</sup> As for the question of when pressure or proselytism can be prohibited, the Conseil d'État confirmed that public order can limit a student's private expression of religion only to the extent that the violation is founded on the specific circumstances of the case and the behaviour of the pupil, not on a general and abstract fear of disruption—what the US Supreme Court called in *Tinker* "a fear or apprehension of a disturbance".<sup>164</sup>

So when the Commissaire advised the high judges, in *Saglamer*, that the veiled student's exclusion ought to have been approved irrespective of her conduct because the veil issue proved disruptive for the school as a whole, the Conseil refused to budge. "Perhaps Ms *Saglamer*'s veil did not possess, as far as she was concerned, a conspicuous or proselytic character", the Commissaire wrote, "[b]ut it is collectively that the wearing of the veil [was] conspicuous and proselytic [for] the head of school could not ask the majority to take off their veil and allow one or two to keep it".<sup>165</sup> The Conseil d'État nevertheless rejected this approach and once again confirmed its 'personal responsibility' criterion.<sup>166</sup>

[T]he head of school...only acknowledged the student's persistence in wearing a veil through which she manifestly conveyed her attachment to her religious beliefs...[but] did not allege, and it is not possible to conclude from this case, that the veil worn by the student represented or was accompanied by acts or behaviours notoriously proselytic or discriminatory. [Since] it does result from the case that a violation of the school's public order and good functioning was attributable to Ms *Saglamer*...[and

<sup>161</sup> R Schwartz, « Conclusions sous *Wissaadane* », 27 Novembre 1996, in *Jurisprudence du Conseil d'État*, above at note 50, 2.

<sup>162</sup> *Id.* 108.

<sup>163</sup> Conseil d'État, *M. et Mme Wissaane, M. et Mme Hossein Chedouane*, 27 November 1996, n. 170209.

<sup>164</sup> *Tinker* at 508.

<sup>165</sup> R Schwartz, « Conclusions du Commissaire du Gouvernement dans *Un Sysiphe* », 10 Juillet 1995, in *Centre de Documentation*, above at note 50, 84.

<sup>166</sup> Conseil d'État, *Saglamer*, in *Centre de Documentation*, above at note 50, 92.

since] the only ground for the school decision was that the girl wore an Islamic veil, which was considered by its nature a conspicuous religious sign,...[Ms Saglamer]'s request to void the school exclusion is grounded.

#### (iv) Conclusion on French & American Refusal to Interpret Religious Signs

In conclusion, it is safe to say that the path taken by the Conseil d'État in relation to the interpretation of religious signs has been far more tortuous than that followed by the US Supreme Court, but the arrival point was not, before 2004, substantially different. Despite the ambiguities surrounding its 1989 Avis, in particular, such an approach consisted in a steady and forceful refusal to attach to the Muslim veil (or any other religious sign) a general or 'official' meaning. Not unlike the Supreme Court, the Conseil d'État thought that it was up to students—not the State—to reflect on the significance or appropriateness of the veil and, in the pre-2004 French law, all that mattered was the public order limit and the personal responsibility of the pupil. Yet the message conveyed by the French jurisprudence was a somewhat wider one: "With laudable prudence, French law [as developed by the Conseil d'État] refuses to regard religions [as received thinking] and chooses to see them as a means of [personal] development",<sup>167</sup> one author wrote. It was perhaps this message—which also represents the position of the US Supreme Court—that French politicians and the public found most difficult to accept.

### 3.2.6. VEIL VERSUS 'ASSIDUITÉ' (OR REGULAR CLASS ATTENDANCE)

One exception to the case-by-case approach adopted by the Conseil d'État on the veil matter—and one point of divergence between French and American law even before 2004—is the application of the combined principles of assiduité (or 'regular school attendance') and safety. These concepts led France's highest administrative court to prohibit the Muslim veil during gym, sports and technology classes on the ground that the presence of this piece of cloth may pose safety issues for the student who wears it and for other pupils.<sup>168</sup>

#### 3.2.6.1. The French Approach

In French law, the assiduité principle consists in the duty for students to attend all classes and conform to the curriculum requirements determined by school programmes and teachers.<sup>169</sup> Because school instruction is neutral and identical for all students irrespectively of their religious or political affiliation, a pupil's refusal to attend a certain class or his or her opposition to programme contents or curriculum requirements is regarded by French law as a violation of the disciplinary code<sup>170</sup> and can lead to his or her exclusion.<sup>171</sup> Although this concept had existed in French law for some time, it was first codified in the French Education law of 1989, according to which "students' obligations consist in the performance of those tasks related to their studies [and] include the duty of assiduité".<sup>172</sup> This was confirmed, a few months later, by the Conseil d'État Avis of November 1989, where it was emphasized that "[t]he students' freedom...to express and manifest their religious beliefs at school [must not] threaten teaching activities, the contents of school programs and the assiduité obligation".<sup>173</sup>

In 1995, partly in response to a perceived surge in school incidents<sup>174</sup> caused by the refusal of some Muslim girls to take off their veil during gym classes or to partake in them altogether on grounds of

<sup>167</sup> G Lebreton, «Port de Signes Religieux et Laïcité de l'Enseignement Public: Commentaire Sous Kherouaa», Petites Affiches, 24 Mai 1993, n. 62, 9.

<sup>168</sup> See Conseil d'État, Aoukili, in Centre de Documentation, above at note 50, 65.

<sup>169</sup> F Messner, P H Prélot, J M Woehrling & I Riassetto, *Traité de Droit Français des Religions* (Litec, Paris, 2003) 1125.

<sup>170</sup> Ibid.

<sup>171</sup> See also Conseil d'État, *Rapport Public*, above at note 145, 340.

<sup>172</sup> Code de l'Éducation, in *Application du Principe de Laïcité dans la République*, above at note 138, 261.

<sup>173</sup> Conseil d'État, 1989 Avis, above at note 49, § 1.

<sup>174</sup> A perception that was not substantiated by official statistics. See below for details.

religious modesty, the Conseil d'État held in Aoukili that only genuine health reasons could excuse students from participating in such activities or conform to the clothes requirements of gym, sports and technology lectures. The judges also emphasized that the matter involved not only assiduité but also security issues. "Wearing religious accessory is evidently dangerous in sports activities", a lower administrative tribunal had already found in Aoukili. "Apart from a reduced vision span, it could unsafely cling or result in strangulation or serious cranial damage [and] one wonders whether, in these cases, the girls' parents would blame an unfortunate event [rather than invoke school responsibility]".<sup>175</sup> The Conseil d'État agreed—" [t]he wearing of [the] veil is incompatible with the smooth running of gym classes"<sup>176</sup>—and this position was confirmed one year later in Wisaadane, while in Ait Ahmad (1999) the Conseil was even more explicit.<sup>177</sup>

More controversially, however, in Ait Ahmad, the Conseil d'État emphasized that the safety risk caused by the Muslim veil during gym, technology and sport activities had to be presumed<sup>178</sup> and that no proof of it was required from school authorities. It was not necessary to "establish, in each specific case, the existence of a danger for the student or the other school users".<sup>179</sup> Since the quality of French public education depends on its smooth day-to-day performance, the schools must take into account the risks associated with some symbols or clothes during certain activities, even if these signs are mandated by genuine religious beliefs. "It is normal that, for these specific [school] subjects, both for reasons of security (technology and sports classes) as well as hygiene and public health, schools should be able to exceptionally impose special clothing",<sup>180</sup> the Commissaire du Gouvernement emphasized.<sup>181</sup>

Yet as the Nancy Administrative Tribunal had originally found in Ait Ahmad, "[w]hile the wearing of a veil can be irreconcilable with the performance of certain activities, the administration must prove what exactly these risks consist of"<sup>182</sup>—a position that was confirmed by the Appeals Court but was eventually dismissed by the Conseil d'État in its final ruling, presumably on the ground that "teachers cannot verify, on a case-by-case basis, that each student wears correct clothing".<sup>183</sup> During these specific subjects, therefore, the veil no longer seems to possess a religious dimension and becomes a simple piece of cloth subject to the same security rules of any other dress item. While this makes perfect sense in terms of school organization, this automatic presumption of disruptiveness runs the risk, as one author observed, of "paving the way for a trivialization of religious freedom...and risks translating into a neutralization of the...veil".<sup>184</sup> This criticism should not be dismissed lightly given that only four years after Ait Ahmad the veil was banned from French schools altogether. Although there are reasons to believe that the judges of the Palais Royal would regard this automatic

<sup>175</sup> Tribunal Administratif de Lyon, 4ème Chambre, 10 Mai 1994 in *Petites Affiches*, 30 Novembre 1993, n.143.

<sup>176</sup> Conseil d'État, Aoukili, in *Centre de Documentation*, above at note 50, 65.

<sup>177</sup> "The exercise of freedom of expression and religion does not prevent heads of schools or teachers from requiring students to wear clothes that are compatible with the good functioning of classes [ "le port de tenues compatibles avec le bon déroulement des cours"], particularly [in] technology, sports and gym classes". See Conseil d'État, *Ministère de l'Éducation Nationale c. M. et Mme Ait Ahmad*, Req. n. 181486, *Actualité Juridique Droit Administratif (AJDA)*, 20 Février 2000, 165.

<sup>178</sup> See for example: "In case of violation to the regular school attendance rule in the form of repeated absences to the gym classes, you have almost automatically confirmed the exclusions". R Schwartz, *Les Limites à la Liberté d'Expression Religieuse des Élèves dans les Collèges et les Lycées* (Recueil Dalloz, Paris, 2000) (II) (2) (A).

<sup>179</sup> *Ibid.*

<sup>180</sup> Schwartz, above at note 176, 251. On the matter of technology classes, see: « Le problème est similaire lors des séances de travaux pratiques qui se réalisent en laboratoires et obligent le maniement d'objets spécifiques ou de produits volatiles et corrosifs ». See also: «...dans la mesure où le port par les élèves d'un signe d'appartenance religieuse comporterait le risque de compromettre leur santé ou leur sécurité, par leur participation aux cours considérés, il ne saurait, en tout état de cause, être admis, ce, quelle que soit la nature du signe en cause et quelle que soit sa texture ». G Koubi, « Exclusion Définitive d'Élèves d'Un Collège Ayant Refusé d'Oter Leur Foulard Islamique Pour Participer au Cours d'Éducation Physique » (Recueil Dalloz, Paris, 1995) 365.

<sup>181</sup> "No distinction [is] to be made among pupils", another author wrote, "[for] the security measures are motivated by risk prevention [and may thus] not [be] compatible with the exercise of free expression and religion at school". See J Guglielmi, « Le Port du Foulard et le Principe de Sécurité », *La Semaine Juridique Édition Générale*, n.19, 10 Mai 2000, § 2 (B).

<sup>182</sup> Guglielmi, above at note 179, § 2 (B). See also Z Anseur, « Le Couple Laïcité-Liberté Religieuse: de l'Union à la Rupture? Réflexions à Partir de l'Affaire Ait Ahmad », (2001) *Revue Trimestrielle des Droits de l'Homme*, 77.

<sup>183</sup> Schwartz, above at note 176 (III).

<sup>184</sup> Anseur, above at note 180, 92.

'no-veil' rule in gym and technology classes as perfectly consistent with the public order limits mentioned above<sup>185</sup> as well as with the *assiduité* principle, it represents a departure—although a limited one—from the case-by-case approach adopted by the high court in previous years.<sup>186</sup>

### 3.2.6.2. The US Approach

From an American perspective, the position of the Conseil d'État on gym classes and *assiduité* looks particularly intriguing. In the US, safety is a rational and legitimate educational interest and school districts can certainly pass rules based on it, yet a case-by-case approach is usually essential in order to assess such risks and, when First Amendment rights are involved, a prohibition based on safety reasons may still be problematic—and is likely to be ruled unconstitutional—if it is overbroad or generic.<sup>187</sup> The automatic prohibition—without any proof of a substantial danger—of the Muslim veil during sports, technology and gym classes as developed by the Conseil d'État would be difficult to justify in America. Although there is no litigation on the matter,<sup>188</sup> US courts seem to have sent interesting signals in this direction in relation to another source of symbolism (and one of American schools' most pressing problems): gang signs.

In spite of the fact that these emblems can indeed contribute to school violence and may represent a security and public order hazard, their general and automatic prohibition by school authorities has often aroused the scepticism of American courts, particularly if they take religious forms. Since they usually meet the Spence standard and convey a particularized message that is likely to be understood as such by the viewer, they are often regarded by American courts as a form of protected expression, with the result that the US judiciary has struck down several anti-gang measures as vague and violative of First Amendment rights.<sup>189</sup> "The six-pointed star...is protected by the rights of free speech and free exercise of religion under the First Amendment",<sup>190</sup> an American court ruled for example in 1996, and the regulation forbidding it was declared unconstitutional. A year later an appellate court reached a similar conclusion, annulling a school gang rule as overbroad on the basis that "the symbolic speech at issue in this case is a form of religious expression protected under the First Amendment".<sup>191</sup>

As regards specifically the Conseil d'État's automatic prohibition of the Muslim veil in gym classes, the absence of corresponding American litigation suggests that the matter is not considered controversial in the US. Indeed, the Guidelines on Religious Expression in Public Schools published by the US Department of Education in 1995 (incidentally, the same year of the Aoukili decision introducing the no-veil-in-sports-classes rule) seem to suggest that a mechanical presumption of incompatibility of religious signs, even for safety reasons, is inconsistent with the American mindset. As an observer of the Guidelines wrote, the message conveyed is that students "may not be forced to wear gym clothes that they regard, on religious grounds, as immodest".<sup>192</sup>

<sup>185</sup> See for example Centre de Documentation, above at note 50, 1-2.

<sup>186</sup> See in this respect Guglielmi, above at note 179, II-10306.

<sup>187</sup> In 1984 the Court of Appeals for the Eleventh Circuit dismissed, in *Davenport v Randolph County Board of Education*, the lawsuit brought by two high school students against their institution's 'clean shaven' policy for participation in athletics classes. The court found that "the disputed policy is within the school board's power to regulate grooming" but immediately added that "the plaintiffs have not proven unique circumstances that would render the policy arbitrary or unreasonable". See *Davenport v Randolph County Board of Education*, 730 F.2d 1395, 1398. There are thus reasons to believe that, in light of Supreme Court precedents, this case would have had a different outcome had it involved religious symbols rather than aesthetic reasons.

<sup>188</sup> In 1999 a Maryland District Court ruled that a cultural hat, contrary to a religious one, could legitimately be banned from a classroom if it contravened the school's dress code rules, because the first did not convey 'pure speech' protected by the First Amendment whereas the second one did (in this case, the school had an exemption from the no-hat rule for religious reasons). See *Shermia Isaacs v Board of Education of Howard County*, 40 F. Supp. 2d 335.

<sup>189</sup> For a case where gang symbols were prohibited, however, see *Jeglin v Sanc Jacinto Unified School District*, 827 F Supp 1459 (1993).

<sup>190</sup> *Harvard v Gaut*, 660 N E 2d 259, 263 (1996).

<sup>191</sup> *Chalifoux v New Caney Independent School District*, 976 F Supp 664 (1997). As a school official declared after lifting a ban against gang symbols, "[w]e realized that [the regulation] infringed on freedom of religious expression, and that freedom supersedes the safety issue". *Times Union, Star of David Ban Lifted by Board*, 28 August 1999.

<sup>192</sup> See US Department of Education, *Religious Expression in Public Schools* (Department of Education, Washington, 1995). See also Anti-Defamation League, *Religion in Public Schools: Dress Codes* (ADL, Washington, 2004).

Like the safety issue, *assiduité* as developed by the Conseil d'État represents another fascinating ground for comparison with America. As mentioned above, this principle was originally conceived of as a French student's duty to attend "all classes prescribed by the school curriculum"<sup>193</sup> and articulated the country's aversion to an education "à la carte",<sup>194</sup> that is to say, tailored to suit special ethnic, political or religious preferences. The mission of French schools being, since the birth of the Third Republic in the 1880s, to mould French citizens and train them in the very French values of republicanism, freedom and *laïcité*, this required a certain level of homogeneity and could not but result, at the very minimum, in the compulsory character of school programmes and the acceptance of their curriculum requirements.<sup>195</sup> Yet while French politicians and judges were developing the *assiduité* principle (which later evolved into the automatic prohibition of the Muslim veil during gym, sports and technology classes), the American Supreme Court decided *Wisconsin v Yoder*,<sup>196</sup> which privileged religious beliefs over public education programmes and school dress requirements. *Yoder* appears at odds not only with *assiduité*, but also with the very conception upon which the French education system is based and deserves to be briefly recalled here.

In *Yoder*, the Old Order Amish objected, on religious grounds, not merely to a certain school syllabus or programme but to attendance at the public high school system, on the ground that "the values they teach [at school] are in marked variance with Amish values and the Amish way of life"<sup>197</sup> and that "[i]n the Amish belief, higher learning tends to develop values they reject as influences that alienate man from God".<sup>198</sup> While it is possible to argue that the mission of the French education system has not been substantially dissimilar from the one proclaimed by the Amish for it consists of implanting certain (republican) values into students on the assumption that otherwise they will 'always be crooked' (because of religion),<sup>199</sup> this kind of request for religious exemption would most certainly be dismissed by French judges (the Conseil d'État included) as unacceptably 'communalist'. Yet it is interesting to note that the American Supreme Court went in an opposite direction: "[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests such as those specifically protected by the Free Exercise Clause of the First Amendment",<sup>200</sup> the justices ruled.<sup>201</sup> This historical justification resembles very much the argument in favour of *laïcité* evoked by several French commentators in supporting the anti-veil legislation during the 2004 affair,<sup>202</sup> but which has never been legally endorsed by the Conseil d'État.

There is another reason why *Yoder* is interesting, for among the grounds mentioned by the Amish for withdrawing their children from public schools was the fact that Amish girls could not be allowed, for modesty reasons and because of their religious head coverings,<sup>203</sup> to participate in gym classes. "God designs clothes to cover the body, not display it",<sup>204</sup> they argued, and so Amish girls had to wear their head coverings which, according to the trial's record (and similarly to a widely-shared

<sup>193</sup> B Seiller, «Sécurité, Tranquillité, Continuité, Assiduité: Les Limites Contentieuses du Port de Signes Religieux à l'École», *Semaine Juridique Edition Générale* n.12, 19 Mars 1997.

<sup>194</sup> *Ibid.*

<sup>195</sup> See in particular Messner, Prélôt, Woehrling & Riassetto, above at note 167, 1124.

<sup>196</sup> *Wisconsin v Yoder*, 406 US 205, 210-211 (1972).

<sup>197</sup> *Id.* 210-211.

<sup>198</sup> *Id.* 212.

<sup>199</sup> Emblematic in this respect is Article 1 of the Education Law of 28 March 1882, which substituted, in primary school programmes, the expression "religious morality" with "moral and civic teaching". "Primary school teaching includes moral and civic instruction", it reads. See Messner, Prélôt, Woehrling & Riassetto, above at note 167, 1124.

<sup>200</sup> *Id.* 214.

<sup>201</sup> Making an exception for the Amish was thus warranted, because in America, "[l]ong before there was general acknowledgement of the need for universal formal education, the Religious Clauses had specifically and firmly fixed the right to free exercise of religious beliefs". See *Ibid.*

<sup>202</sup> See for details Section 3.3.1.

<sup>203</sup> "The women and girls dressed extraordinarily plainly as well, outfitting themselves in simple dresses and head coverings. Like all Amish garments, the head coverings were not merely ornaments, for they signified the wearers' 'subjection to God and to man'. Women tucked their uncut, braided hair beneath these caps". F P Shawn, *The Yoder Case: Religious Freedom, Education and Parental Rights* (Kansas University Press, Kansas, 2003) 10.

<sup>204</sup> *Id.* 10.



perception of the Muslim veil) “signified the wearers’ ‘subjection to God and to man’”.<sup>205</sup> As Professor Peters has pointed out,<sup>206</sup>

[Mr] Yoder articulated several serious objections to his daughter’s participation in gym classes. In keeping with their family’s tradition, Amish girls dressed modestly, sporting loose-fitting, ankle-length dresses. To participate in physical education classes, however, they would have to wear the short and somewhat tight uniforms mandated by their school. Yoder was uncomfortable with his daughters wearing such immodest clothing; he felt that it was inappropriately modern and worldly. For similar reasons, he also objected to the requirement that his daughters change and shower with other girls following physical education classes.

As mentioned in Chapter 1.3., Yoder specifically carved out an exception to compulsory school attendance for the Amish<sup>207</sup> and did not translate this into a general exemption to public education for religious reasons, so the case needs to be read with caution.<sup>208</sup> Also, the Supreme Court did not take an explicit position as to the Amish girls’ right to wear their head-coverings at school, therefore no general conclusion can be drawn on that matter. Yet Amish children were indeed exempted, on religious grounds, from public high school education and the justices’ finale is thus particularly noteworthy in light of the French controversy over the Muslim veil and the *assiduité* dogma of French law. The Supreme Court wrote:<sup>209</sup>

The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals and values in conflict with beliefs, and by substantially interfering with the integration of the Amish child into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child [and must thus succumb to such belief].

These words could have never been written at the Palais Royal.

### 3.2.7. TEACHERS’ VEIL v NEUTRALITY

Both in France and America, the question of the wearing of religious symbols for teachers and civil servants involves substantially different issues from those arising from the student veil—but there are three reasons for considering this issue at this juncture. Firstly, it represents in many respects a second erosion of the case-by-case approach adopted by the Conseil d’État on religious symbolism. Secondly, the French statute of 2004 requires of students a standard of neutrality that is closer to the more exacting one expected from teachers than from other users of public services, and so it is necessary to view the student veil in this wider perspective. And thirdly and finally, the private/public division involved in teachers’ symbolism sheds interesting light on the two countries’ approaches to neutrality and Church-State separation.

#### 3.2.7.1. The French Approach

In French law, an important distinction is drawn between private and public employment (or ‘*fonction publique*’). The mission of public employment is to guarantee the good functioning of the public service through the implementation of the three principles of continuity (‘*continuité*’), impartiality (‘*impartialité*’)

<sup>205</sup> Ibid.

<sup>206</sup> Id. 22.

<sup>207</sup> See for example: “It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some ‘progressive’ or more enlightened process for rearing children for modern life”. *Wisconsin v Yoder*, above at note 194, 235.

<sup>208</sup> Especially given that some courts established this as an all-or-nothing right. According to this view, one can go to public schools, or private schools, or home schools, but if one goes to public schools, he or she must take the whole curriculum, without the possibility to opt out of offensive matters. See e.g. *Mozert v Hawkins County Board of Education* (6 Cir 1987).

<sup>209</sup> *Wisconsin v Yoder*, above at note 194, 144. See also: “...Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs”. Id. 218.

and efficiency ('*efficience*').<sup>210</sup> While this necessarily requires a more rigorous organization of the role and mission of civil servants in comparison with other employees, it does not automatically mean that they are denied the possibility to express their views at work. In addition to the general guarantees contained in French constitutional law and in Article 1 of the Law of Separation of Church and State of 1905, Article 6 of the Civil Service Act of 1984 specifically provides that "[f]reedom of expression is granted to civil servants"<sup>211</sup> and adds that "[n]o distinction shall be made on the basis of their political, trade-union, philosophical or religious opinions, nor of their sex, health, disability or ethnic allegiance".<sup>212</sup> This provision is completed by a series of non-discrimination instructions that most notably forbids any mention of the civil servant's opinions or beliefs in any official document. The Conseil d'État has been strict in holding any such mention as discriminatory.<sup>213</sup>

Yet alongside this liberty to express opinions and be shielded from any form of resultant discrimination stands a fundamental dogma of French law: the equality of all users of the civil service, which necessarily implies the latter's duty of neutrality towards them.<sup>214</sup> This requirement does not explicitly result from a legislative text but that has been developed by the Conseil d'État<sup>215</sup> and Conseil Constitutionnel<sup>216</sup> over the years and is partly a response to the long historical union of Church and State in France. Since every user of the French public administration must be treated equally irrespectively of his or her religious or political opinions<sup>217</sup>—and since the civil servant is a representative of the administration and thus of the French state—his or her freedom to manifest opinions or beliefs is subject to a series of important limitations that have no counterpart in other sectors of life and that are justified by the employer's special characteristics.<sup>218</sup> French civil servants, in particular, are not only under the obligation to fairly treat every user but must also be seen to be neutral and impartial, because doing otherwise would impair the State's own neutrality towards its citizens. As a consequence, civil servants are substantially limited in the manifestation of their freedom of expression and religion by an extensive *devoir de réserve* ('duty of neutrality'), which prescribes that the employee's opinions must in no way affect the civil service.<sup>219</sup> As the Commissaire du Gouvernement wrote, "the State can ask the civil servant to abstain from all and every act that could result in doubts about [its] neutrality"<sup>220</sup>—and, as we shall see, it is precisely from this principle that the Conseil d'État drew, in 2000, its general and automatic interdiction of religious signs for civil servants. In addition to this *devoir de réserve*, and more conventionally, French civil servants also cannot engage in acts of political, ideological or religious propaganda<sup>221</sup> and their violation of the neutrality principle can lead to disciplinary action.<sup>222</sup> The emphasis of French law is thus, on the one hand, in the protection of civil servants from possible discrimination from their employer and, on the other, in

<sup>210</sup> See in this respect Tribunal des Conflits, Blanco, 8 February 1873. See also P Langeron, «L'Accès à la Fonction Publique et la Religion», *Semaine Juridique Administrations et Collectivités Territoriales*, n.12, 21 March 2005, 1142, and, *Ibid.*, J Berthoud, «La Neutralité Religieuse du Fonctionnaire» as well as V Saint-James, «La Liberté Religieuse du Fonctionnaire» (at 1143).

<sup>211</sup> Loi du 11 Janvier 1984, Article 6.

<sup>212</sup> *Ibid.*

<sup>213</sup> See Conseil d'État, Chereul, 16 July 1982; Conseil d'État, Ministre des PTT, 8 June 1962. See also Tribunal Administratif de Châlon, Mathieu, 21 April 1959. And D Jean-Pierre, «Introduction», *Semaine Juridique Administrations et Collectivités Territoriales*, n.12, 21 March 2005, 1140.

<sup>214</sup> Conseil d'État, Société l'Alcool Dénaturé, 1 April 1938; Conseil d'État, Société du Journal l'Aurore, 25 June 1948.

<sup>215</sup> See in particular Conseil d'État, Société des Concerts du Conservatoire, 9 March 1951. According to this decision, every person situated in an identical position vis-à-vis the civil service must be treated in the same way and be governed by the same rules.

<sup>216</sup> In 1986, the principle of equality and neutrality were acknowledged by the French Constitutional Council as "fundamental principles of the civil service". Conseil Constitutionnel, Décision 86-217, 18 September 1986.

<sup>217</sup> Conseil d'État, Rudent, 8 November 1985. See in particular *Revue Française de Droit Administratif*, 1986, p.630, concl. M. Laroque; *Actualité Juridique Droit Administratif (AJDA)*, 1985, 712, note F. Fubac et M. Azibert; *Revue de Droit Public*, 1986, p.244, note F. Llorens; and finally G. Koubi, «A la Recherche d'Une Définition Spécifique de l'Obligation de Neutralité des Fonctionnaires et des Agents Publics», *Petites Affiches*, 26 June 1991, 21.

<sup>218</sup> B Chélini-Pont, "Neutrality and Freedom of Conscience in French Law", unpublished manuscript sent by the author in May 2006.

<sup>219</sup> See on the point J Rivéro, «Sur l'Obligation de Réserve», *Actualité Juridique Droit Administratif (AJDA)*, 1977, 579; J-Y Vincent, «L'Obligation de Réserve des Agents Publics», (1973) *Rev. Adm.*, 141 and 272.

<sup>220</sup> Conseil d'État, Dlle Jamet, 3 May 1950.

<sup>221</sup> Conseil d'État, Église de Scientologie de Paris, 17 February 1992. See also on the point *Actualité Juridique Droit Administratif (AJDA)*, 1992, p.460, note Deves.

<sup>222</sup> Conseil d'État, Pasteau, 8 December 1948.

defending the State from the deleterious effects that a real or perceived lack of neutrality could bring about.<sup>223</sup>

Despite French law's almost obsessive concern about impartiality, the approach taken by the Conseil d'État has been a nuanced one—at least until the year 2000. In the important case *Abbé Bouteyre* (1912), which occurred only seven years after the adoption of the controversial 1905 law of separation of Church and State and which is thus significant in order to understand the judges' position on *laïcité*, the Conseil ruled that to prevent the plaintiff (a priest) from becoming a secondary school teacher was legitimate and partly based this decision on the fact that the education sector was special and required a high degree of neutrality towards all pupils, especially given that France had just emerged from centuries of religiously-imposed education.<sup>224</sup> Yet the *Commissaire du Gouvernement* also seemed to emphasize that this was not a hard and fast rule and that a different solution might be envisaged—that, in other words, a more relaxed notion of *laïcité* could well be adopted according to the circumstances of the case once the trauma of the separation was over.<sup>225</sup>

It is perfectly reasonable that, depending on the periods and times, those who exercise a spiritual power may be prevented from getting involved in a temporal one. [Yet] this is a matter of appreciation that does not necessarily need to be decided in the same way [in the future] as it is today...The Minister [only] wanted to say that at this time, considering the conditions and spirit of the general legislation, the interest of the service which he must preserve does not appear to him to admit [this] clergyman in the public secondary school system.

This cautious approach to *laïcité* seemed to be confirmed in the following years and the 1989 *Avis* on the student veil and its ensuing jurisprudence is not the only case in point. In 1972, for example, in another important *Avis* delivered to the Education Minister, the Conseil d'État held that a secondary school teacher who had become a priest after being admitted to his teaching post could not be excluded from the education system. “[W]hile it is true that the constitutional provisions that established the *laïcité* of the State and of public education impose the neutrality of all public services and particularly of public education towards all religions”, it wrote, “they are not in themselves an obstacle to the possibility of devolving some of these [educational] functions to a member of the clergy...”<sup>226</sup> Even within the public education system, therefore, the fact of being a clergyman or woman was not considered in itself incompatible with the neutrality principle and, as one author observed, “it was not required of the civil servant to renounce his or her ecclesiastical title or exterior signs of religious belonging, [including] his or her religious clothes”.<sup>227</sup> This was an important development since the *Bouteyre* ruling of 1912, as well as a clear departure from the stern opposition to religious teaching that characterized the adoption of the 1905 law of separation of Church and State; so much so that one commentator wondered whether “[i]t is not the French idea of *laïcité* that is changing through the years”.<sup>228</sup>

At the end of the 1980s, perhaps as a result of the mounting publicity and importance of the Muslim headscarf controversy in French schools, the wind started to change and a different, stricter, conception of *laïcité* seemed to emerge. The Jospin Circular of 1989—written, as we have seen, in order to interpret the 1989 *Avis* on the student veil—suggested among other things that teachers' personal convictions should not be visibly displayed and emphasized that “[i]n the exercise of their functions, the teachers, because of the example they explicitly or implicitly transmit to their students, must imperatively avoid any distinctive sign of philosophical, religious or political nature which threatens the students' freedom of conscience as well as the educative role that is recognized to [their]

<sup>223</sup> See in this respect Y Madiot, «Les Tendances Récentes de la Fonction Publique», *Dalloz* 1974, *chron.*p.751; M Voisset, «Concentration et Contractualisation dans la Fonction Publique», *Actualité Juridique Droit Administratif (AJDA)*, 1970, 388; J Rivéro, «Vers la Fin du Droit de la Fonction Publique», *Dalloz* 1947, *chron.*p.149.

<sup>224</sup> See Conseil d'État, *Abbé Bouteyre*, 10 May 1912. See in particular *Revue de Droit Public*, 1912, p.453, note G. Jeze.

<sup>225</sup> *Ibid.*

<sup>226</sup> Conseil d'État, *Avis n. 309.354 sur la Laïcité du Corps Enseignant*, 21 September 1972.

<sup>227</sup> *Ibid.*

<sup>228</sup> J P Costa, quoted by Hafiz & Devers, above at note 79, 240.

families”.<sup>229</sup> A few years later, the wearing of a Muslim headscarf by a civil servant was censored by an administrative tribunal<sup>230</sup> and, in 2000, the Conseil d’État directly decided the matter in *Marteaux*, a case where a teacher’s contract was terminated by her school on the ground that she had refused to take off her veil at work.

With an *Avis* that symbolized in many respects the turning point in the Conseil d’État’s approach to the matter, the high court wrote that this instructor had been legitimately fired. “While public teachers benefit, like all other civil servants, from the freedom of conscience that prohibits any religion-based discrimination in their access to the public service and career”, the judges of the Palais Royal wrote, “the *laïcité* principle is an obstacle to their right to manifest their religious allegiance during service [and] no distinction should be made in this respect between teachers and other civil servants”.<sup>231</sup> Yet the high judges went further and wrote that the *laïcité* and neutrality of French schools automatically clashes with the possibility of wearing signs of religious belonging for teachers:<sup>232</sup>

[T]he fact of a civil servant assigned to public education manifesting, at work, his or her religious beliefs, particularly by wearing a sign with the purpose of displaying his or her belonging to a religion, represents a violation of his or her [professional] obligations. The consequences to be attached to this violation, especially at the disciplinary level, must be assessed by the administration under the control of the judge and must take into account the nature as well as the degree of ostentatiousness of this sign [“*compte tenu de la nature et du degré du caractère ostentatoire de ce signe*”] together with other circumstances in which this violation is observed.

As a consequence, since 2000 the wearing of signs of religious belonging by a civil servant is regarded by the Conseil d’État as per se incompatible with the *laïcité* and neutrality principles of French law. This is a fundamental change of perspective from the above-mentioned 1972 *Avis* as well as from the *Abbé Bouteyre* decision (1912), where the Commissaire du Gouvernement had written that “it is not this or that category of citizens that must be subject to interdiction but rather an individual to whom the civil service can be denied if he or she commits an act that renders impossible for the minister to admit him or her to the service”.<sup>233</sup> While it is true that the *Marteaux* court was ruling on different circumstances—in question here was no longer a clergyman but a teacher and the contentious object did not involve a Catholic dress but a Muslim veil, i.e. one of France’s most controversial social issues—it is precisely this case-by-case approach that seems to have been lost in *Marteaux* and that, as we shall see below, fundamentally distinguishes the French and American experiences.

The impact and significance of *Marteaux* is best understood in relation to a case decided by the European Court of Human Rights less than one year later and which is sometimes approvingly referred to in France as the European ‘endorsement’ of the French approach on religious signs for teachers.<sup>234</sup> *Dahlab v Switzerland*<sup>235</sup> involved the case of a Muslim mentor who had been excluded from the civil service for wearing her veil in class. While the European Court confirmed her exclusion in an interesting decision that, as we shall see in Section 3.3.7.1., also contained direct criticism of the Muslim veil, it did not seem, unlike the Conseil d’État, to establish an explicit ‘out of principle’ incompatibility between veil and state neutrality in that it stressed the importance of the specific circumstances of the case and, particularly, of the young age (4-8 years) of the pupils at issue. After acknowledging that “it is very difficult to appreciate the impact that a powerful exterior sign like

<sup>229</sup> Ministère de l’Education Nationale, Circulaire du 12 Décembre 1989, above at note 149. See also Messner, Prélôt, Woehrling & Riassetto, above at note 167, 1129.

<sup>230</sup> Tribunal Administratif de Versailles, *Mlle Braza c/ Collège ‘Parc des Tourelles’*, in *Revue Juridique et Judiciaire du Ressort de la Court d’Appel de Versailles*, Apr-Sept 1993, n.28-29, 77-95, note O. Cayla.

<sup>231</sup> Conseil d’État, *Avis n.217017, Mlle Marteaux*, 3 May 2000. For interesting comments on this decision see the following: *Cahiers de la Fonction Publique*, 2000, n.193, 34; *Actualité Juridique Droit Administratif (AJDA)*, 2000, 597 and 673, note M. Guyomar and P. Colin; and G. Koubi, « Neutralité du Service, Neutralité dans le Service », *Dalloz*, 2000, 747.

<sup>232</sup> Conseil d’État, *Avis n.217017, Mlle Marteaux*, 3 May 2000.

<sup>233</sup> Conseil d’État, *Abbé Bouteyre*, cit. in Hafiz & Devers, above at note 79, 244.

<sup>234</sup> Interesting comments on the matter can be found in *Actualité Juridique Droit Administratif (AJDA)*, 2001, p.481, note J.F. Flauss.

<sup>235</sup> European Court of Human Rights, *Dahlab c/ Suisse*, 15 February 2001. For a French commentary, see *Actualité Juridique Droit Administratif (AJDA)*, 2001, p.480, note J.F. Flauss.

[this] veil can have on the freedom of conscience and religion of young children” (a passage to which I shall return in Chapter 3.3.), the Court wrote.<sup>236</sup>

Having considered the teacher’s right to manifest her religion as well as the protection due to students through the safeguard of religious peace, the Court believes that in these circumstances, and especially considering the tender age of the children for whom the plaintiff was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation.

To see whether a teacher’s veil can be prohibited, the Court seemed to suggest that a case-by-case assessment was necessary and that any exclusion should also take into account the functions of the civil servant, because the neutrality expected from a teacher or a judge might not be the same as that required of a nurse or a social services employee.<sup>237</sup> As a consequence, and although the final outcome was the same, the approaches adopted by Marteaux and Dahlab do not seem to coincide and it is possible to argue that the European solution is to some extent closer to the Conseil d’État’s Avis of 1972 rather than to Marteaux. As a Conseiller d’État wrote, “[t]his [European] attitude is poles apart from the absolutist, Weberian conception of civil service neutrality that very clearly emerges from the Mlle Marteaux Avis”,<sup>238</sup> while another commentator observed that “[t]here is [in Dahlab] a potentially radical condemnation of the French system, because very little, if anything at all, remains of the solution provided by Mlle Marteaux”.<sup>239</sup> As we shall see below, however, Dahlab is a complex decision to the extent that it does convey a negative image of the Muslim veil—insofar as it displays a number of similarities with Statute 228-2004—and we will thus need to consider it further in Section 3.3.7.1.

Be that as it may,<sup>240</sup> in France the post-Marteaux jurisprudence seemed to uphold the position of the Conseil d’État. In 2002, the Paris Administrative Tribunal upheld the decision not to renew the contract of a social assistant who had refused to take off her veil,<sup>241</sup> while in July 2003 the Lyon Administrative Tribunal went even further and ruled that a civil servant’s Muslim headscarf was not only incompatible with laïcité but also highly problematic as a sign per se, thus engaging in an interpretation of this symbol that brings to mind those given by parts of the French lower judiciary on the student headscarf:<sup>242</sup>

This [refusal to take off her veil]...instilled, both in [this lady’s] colleagues and in the users of the public service, a doubt not only about her neutrality [as a civil servant] but also about her loyalty to the [republican] institutions and her fidelity to that tradition of the French Republic which must preserve freedom of conscience—including the religious one—in a context of civil peace.

While this decision was criticized for equating Muslim veil to infidelity to republican values,<sup>243</sup> it intervened in the midst of the student headscarf controversy and was decided only a few months before the adoption of Statute 228/2004, and was therefore, in this context, not entirely surprising. It should also be said that its relevance was partly tempered by the final ruling of the Lyon Appeals Court in November 2003, where the judges did confirm the Marteaux principle according to which wearing a veil constitutes, for a civil servant, a disciplinary offence but at the same time annulled the disciplinary sanction taken against the teacher because of a lack of reasoning based on the specific facts of the case. “[I]n order to appreciate the importance of this infringement [to the neutrality principle] and above all to say whether it represents a serious infringement”, they wrote, “one has to

<sup>236</sup> As quoted in Hafiz & Devers, above at note 79, 249.

<sup>237</sup> Ibid.

<sup>238</sup> An interesting commentary on this case is in *Revue Française de Droit Administratif* (RFDA), 2003, p.536, note by N. Chauvin.

<sup>239</sup> See *ibid.*, note by N. Kolbert.

<sup>240</sup> The question of the European Court of Human Rights will be considered in Chapter 3.3.

<sup>241</sup> Tribunal Administratif de Paris, Madame E., 17 October 2002, *Actualité Juridique Droit Administratif* (AJDA), 2003, 99, note M-C Montecler.

<sup>242</sup> Tribunal Administratif de Lyon, Mlle Nadjat Ben A, 8 July 2003. In *Annuaire Droit et Religions*, above at note 2, 420.

<sup>243</sup> As an author underlined, “[s]uch comments...suggest that the people concerned are likely to be less faithful towards the institutions and traditions of the Republic [merely] on the ground that they belong to the Muslim religion and manifest their religious allegiance through a veil, [an approach] that seems to have little regard for the principles of pluralism and respect for all faiths that [this same decision] mentions”. E Tawil, «Note Sous TA Lyon, 8 Juillet 2003 et CAA Lyon, 27 Novembre 2003», in *Annuaire Droit et Religions*, above at note 2, 424.

take into account the circumstances of the case, the nature and degree of the sign's ostentatiousness as well as the functions of the civil servant..."<sup>244</sup> The veil remains therefore, for this Court, automatically prohibited but an assessment is still necessary in order to determine the disciplinary sanction to be applied to the civil servant.<sup>245</sup>

### 3.2.7.2. The American Approach

The position adopted by US law on the matter of teachers' symbolism looks both substantially different from and partially similar to the one implemented in France. It is substantially different because an automatic prohibition of teachers' religious insignia as created by the Conseil d'État and without any proof of a proselytic activity is likely to be regarded by the Supreme Court as a violation of First Amendment rights.<sup>246</sup> Yet it is also partly similar, because as we have seen in Chapter 1.3., the Supreme Court seems to show some deference towards those 'no-garb' rules that still exist in a limited number of US states,<sup>247</sup> with the result that teachers in these states might, like in France, be prohibited from wearing their religious signs irrespectively of any proselytism.<sup>248</sup> While it is true that these aged pieces of legislation are gradually disappearing from the American legal landscape,<sup>249</sup> thus bringing the French and US approaches further apart, the Supreme Court has never held them unconstitutional<sup>250</sup> and they should not be forgotten, if only because they are historical proof of a legal development that clashes with the one intervened in France, where the tendency has gone, as we have seen above, from cautious tolerance to automatic prohibition rather than the reverse.

Like French law, the departure point of the US legal system is the protection of teachers' freedom of expression—yet while this guarantee is, in France, the combined result of the various constitutions and of the Civil Service Act, in America it was most prominently conveyed by *Tinker*, a case where the Supreme Court emphasized that, similarly to students, teachers' constitutional freedoms are not "shed at the schoolhouse gate"<sup>251</sup> because "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students".<sup>252</sup> In line with this position, a federal appeals court ruled that anti-war armbands worn in class by teachers are protected constitutional expression to the extent that they (i) do not interfere with classroom duties<sup>253</sup> and (ii) do not have the purpose or effect of "arbitrarily inculcating doctrinaire views in the minds of students".<sup>254</sup> Similarly to the matter of students' veils, therefore, public order is, in US law, an important limit to teachers' freedom of expression—yet unlike student expression, it is not the only one.<sup>255</sup> In the same way as the liberal provisions of French constitutional law on teachers' rights by no

<sup>244</sup> Court Administratif d'Appel de Lyon, Ben Abdallah, 27 November 2003, *Actualité Juridique Droit Administratif (AJDA)*, 2004, 154, note F. Melleray (emphasis added). See also *Revue Française Droit Administratif (AJDA)*, 2004, 588.

<sup>245</sup> See in this respect F Melleray, «Port du Foulard Islamique par un Fonctionnaire et Principe de Laïcité», *Actualité Juridique Droit Administratif (AJDA)*, 26 Janvier 2004, 154. A case-by-case approach seemed to have been adopted also, *mutatis mutandis*, in a case involving a private employee's veil. See *Conseil de Proud'Hommes de Lyon*, n.02/03452, 14 January 2004.

<sup>246</sup> See for example *Tinker des Moines Independent School District*, 393 US 503 (1969) (on the disruption standard); *Spence v Washington*, 418 US 405 (1974) (on the expressive character of a sign); *Hazelwood School District v Kuhlmeier*, 484 US 260 (1988) (on the distinction between private and public speech).

<sup>247</sup> This also comes out clearly in the Court's narrow interpretation of statutory requirements that employees accommodate the religious practices of their employees. See eg *Board of Education v Philbrook*, 479 U.S. 60 (1986); *Trans World Airlines v Hardison* 432 U.S. 63 (1977).

<sup>248</sup> See in this sense *US v Board of Education*, 911 F.2d 882 (3<sup>rd</sup> Cir.1990); *Cooper v Eugene School District N.41*, 301 Ore 358 (1986); *Cooper v Eugene School District N.41*, 480 US 942 (1987) (appeal dismissed); *Moore v Board of Education*, 212 N.E.2d 833 (Ohio 1965); *Rawlings v Butler*, 290 S.W.2d 801 (Ky. 1956); *Zellers v Huff*, 236 P.2d 949 (N.M. 1951); *City of New Haven v Town of Torrington*, 43 A.2d 455 (Conn.1945); *Johnson v Boyd*, 28 N.E. 2d 256 (Ind.1940); *Gerhardt v Heid*, 267 N.W. 127 (N.D. 1936).

<sup>249</sup> For an interesting analysis on the point see T J Gunn, "Neutrality, Expression and Oppression", (1994) 23 *Journal of Law and Education* 391 in reply to H L Schachter, "Public School Teachers and Religiously Distinctive Dress: A Diversity-Centered Approach", (1993) 22 *Journal of Law and Education* 61, 64.

<sup>250</sup> In fact it has refused to do so in *Cooper v Eugene School District N.41*, 480 US 942 (1987) (appeal dismissed).

<sup>251</sup> *Tinker des Moines Independent School District*, 393 US 503, 506 (1969).

<sup>252</sup> *Ibid.*

<sup>253</sup> *James v Board of Education*, 461 F.2d 566, 572 (2nd Circ, 1972). *Certiorari Denied*, 409 US 1042.

<sup>254</sup> *Id.* 573. See also, *ibid.*: "Any limitation on the exercise of constitutional rights", it was observed, "can be justified only by a conclusion, based upon reasonable inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially jeopardized...".

<sup>255</sup> Note also that, unlike teachers, proselytism is allowed for student speech. See Chapters 1.2. and 1.3. for details.

means tell all the story and need to be balanced by the rules of *neutralité* and the *devoir de réserve*, one should be cautious about concluding that students' and teachers' rights are, in American law, equally protected, for this would overlook the Establishment Clause.

As is well known, the Establishment Clause precludes government from taking sides on religious matters and requires it to maintain a position of strict neutrality where religion is concerned.<sup>256</sup> It also forbids the administration from acting with the purpose or effect of advancing or inhibiting religion, becoming excessively entangled with religion, endorsing religion or coercing individuals to participate in religious practice.<sup>257</sup> Because teachers are not only private individuals but also public officials,<sup>258</sup> their freedom to express religious views may in certain circumstances clash with the principles of neutrality or non-establishment and to ascertain whether this is the case, a critical distinction needs to be made in US law between private and official speech. As the Supreme Court wrote in *Mergens*, “[t]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Exercise Clause protects.”<sup>259</sup> When a teacher acts in his or her private capacity, therefore, irrespectively of whether this happens at home or at school,<sup>260</sup> the government will not normally be able to restrict his or her religious expression, while the situation changes if the instructor is regarded as conveying the school's message. This, however, is not an easy line to draw, for according to the Supreme Court 'school-sponsored' expression also encompasses “expressive activities that students, parents or members of the public might reasonably perceive to bear the imprimatur of the school, whether or not they occur in a traditional classroom setting”.<sup>261</sup> While this difficult assessment needs to be based on the circumstances in which the religious message came about and must also take into account the viewpoint of the reasonable observer, ‘reasonableness’ is a subjective criterion<sup>262</sup> and courts and commentators are also much divided over which constitutional standard should be applied to determine whether a certain action or message constitutes an establishment of religion.<sup>263</sup>

In the absence of direct Supreme Court case law on the matter, and as explained in Chapter 1.3., the situation is therefore complex—yet for our comparative purposes it is enough to note that while the French model as developed by the *Conseil d'État* in *Marteaux* automatically prohibits any religious symbol worn by a civil servant in the performance of his or her duties irrespectively of the way it is worn or perceived by the public, US law is very much concerned about the private/public character conveyed by the religious message. The crucial question of whether teachers' religious symbols (and more specifically a Muslim headscarf) convey a private or an official message—a dilemma that, as we have seen, troubles American lawyers and can make all the difference between legitimate and illegitimate religious signs for teachers—is largely ignored by French law, because since *Marteaux* a religious message worn by a civil servant at work is prohibited regardless of the wearer's intentions and the users' perception. The self-assurance of French law on the matter, therefore, contrasts with the complex and multifarious approach of the American legal system, which refuses to give a simple answer about whether a teacher's veil is prohibited or not because the final outcome depends on the

<sup>256</sup> The Establishment Clause provides that “Congress shall make no law respecting an establishment of religion...”.

<sup>257</sup> *Lee v Weisman*, 505 US 577 (1992); *Lynch v Donnelly*, 465 US 668 (1984); *Lemon v Kurtzman*, 403 US 602 (1971).

<sup>258</sup> As the Supreme Court wrote in *Pickering*, “[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in communicating upon matters of public concern, and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees”. *Pickering v Board of Education*, 391 US 563, 568 (1968).

<sup>259</sup> *Board of Education of Westside Community Schools v Mergens*, 496 US 226, 250 (1990).

<sup>260</sup> As it has been observed, “[p]rivate religious expression is protected by the Freedom of Expression Clause even though it takes place within public school buildings or any other public property”. D O Conkle, «Expression et Symbolisme Religieux Dans la Tradition Constitutionnelle Américaine: Neutralité de l'État, Mais Pas Indifférence», in E Zoller, *La Conception Américaine de la Laïcité* (Daloz, Paris, 2005) 167.

<sup>261</sup> *Hazelwood School District v Kuhlmeier*, 484 US 260, 271 (1988) (emphasis added).

<sup>262</sup> *Id.* 273. In *Hazelwood*, in particular, the Supreme Court held that courts should “defer to [any] school decision to dissociate itself from speech that a reasonable person would view as bearing the imprimatur of the school” to the extent that such a decision “is reasonably related to legitimate pedagogical concerns”.

<sup>263</sup> See in this respect, in criticising the Government's Guidelines on Religious Freedom for Federal Employees: S S Kao, “The President's Guidelines on Religious Exercise and Religious Expression in the Federal Workplace: A Restatement or Reinterpretation of Law?” (1999) 8 *Boston University Public International Law Journal* 251, 258.

specific circumstances of the case—it depends, in other words, on a case-by-case assessment, which is precisely the point where the French and American models part.

These differences are not limited to methodology but also influence the final outcome. Contrary to French law, US law seems to acknowledge that, unless a local statute specifically prohibits teachers' religious signs at school, these insignia are allowed—unlike the 'at-work'/'not-at-work' distinction of the Conseil d'État—to the extent that they merely indicate the teacher's personal attachment to a specific religion and do not proselytise.<sup>264</sup> This most notably results from the Hysong case of 1894, where the Pennsylvania Supreme Court—not unlike the French Conseil d'État in 1972—held that a group of Catholic nuns could legitimately teach in public schools and keep their religious garb without this representing a problem in terms of the Establishment Clause, because, it was observed, in the specific circumstances of the case that “the [veiled] Catholic teachers were qualified to teach”<sup>265</sup> and did not proselytize. A similar conclusion was reached, in the following years, in a number of other cases related to headgear.<sup>266</sup>

It is thus relatively safe to say that the religious expression of teachers and civil servants in America does not meet the opposition and concern that characterizes France—and this seems the case at the political level too. “Executive departments and agencies shall permit personal religious expression by Federal employees to the greatest extent possible”,<sup>267</sup> the Guidelines on Religious Exercise and Religious Expression in the Federal Workplace proclaimed in 1997. “[E]ven in workplaces open to the public, not all private employees' religious expression is forbidden [and] Federal employees may [for example] wear personal religious jewellery absent special circumstances (such as safety concerns) that might require a ban on all similar nonreligious jewellery”.<sup>268</sup>

While these guidelines have been criticized for being a reinterpretation rather than a restatement of the law,<sup>269</sup> they do convey an attitude that seems different from the one encountered in France, for it is very difficult to imagine the French Presidency taking a similar stance and promoting religious symbols for civil servants. It is also very difficult to imagine the Supreme Court regarding, like the Conseil d'État, all religious insignia as prohibited per se, for this would probably be taken in the US as a discrimination against religion—that is to say, a viewpoint discrimination that would most likely be unconstitutional. As it has been observed, “the Supreme Court generally believes that governmental actions which discriminate against a religious message are not only founded on the content but also on the elimination of a viewpoint. According to the Court, to discriminate against a religious message favours secular perspectives over religious ones and obstructs the search for truth that freedom of speech is supposed to facilitate, [with the consequence that] the discrimination of a specific viewpoint is presumed unconstitutional”.<sup>270</sup>

While these differences between France and America are certainly substantial, it should be noted that the presence of an anti-garb statute at the state level may, as we have mentioned in Chapter 1.3, make a key difference and may turn this dissimilarity into an interesting—although statistically limited<sup>271</sup>—resemblance.

<sup>264</sup> See for example *Hysong v Gallitzin Borough School District*, 164 Pa 629, 657 (1894); *Rawlings v Butler*, 290 SW 2d 801, 804 (Kent, 1956). See also H M Bastian, “Case Comment: Religious Garb Statutes and Title VII: An Uneasy Coexistence”, (1991) 80 *Georgetown Law Journal*, 211, 214.

<sup>265</sup> *Hysong* 164 Pa at 657. In *Gunn*, above at note 245, 395.

<sup>266</sup> See for example *Rawlings*, 290 S.W.2d at 804; *State ex. rel. Johnson v Boyd*, 217 Ind. 348 (1940); *Gerhardt v Heid*, 66 N.D. 444 (1936). See also: “In jurisdictions where no religious garb statute or regulation exists, courts have cited *Hysong* with approval and held that the wearing of religious garb by public school teachers does not constitute sectarian teaching”. Bastian, above at 259, 214.

<sup>267</sup> The White House, *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace* (Office of the Press Secretary, Washington, 14 August 1997) (“Introduction”).

<sup>268</sup> *Id* at (4).

<sup>269</sup> S S Kao, “The President's Guidelines on Religious Exercise and Religious Expression in the Federal Workplace: A Restatement or Reinterpretation of Law?” (1999) 8 *Boston University Public International Law Journal* 251.

<sup>270</sup> Conkle, above at note 255, 163.

<sup>271</sup> As it was observed, although “thirty-six such statutes were enacted between 1895 and 1946” (Schachter, above at note 245, 64) “[t]here are only four states that still have religious-garb statutes remaining on the books...” (Gunn, above at note 245, 392).



A good case in point is in this respect Philadelphia, where a teacher was suspended on the basis of a Pennsylvania anti-garb statute introduced immediately after *Hysong*.<sup>272</sup> Citing *Hysong*, the District Court dismissed as “unpersuasive”<sup>273</sup> the school’s view according to which a teacher’s garb could be taken by students as a school endorsement of religion, because “the mere acquiescence of the Board in [this instructor’s] religious practice would not create an environment establishing a symbolic union of government and religion...”<sup>274</sup> As we have seen in Part 1, the United States government agreed and intervened in the lawsuit, arguing that the woman had been unfairly dismissed<sup>275</sup> because of a “pattern or practice of resistance to the full enjoyment by public school teachers...of their right of equal employment opportunities without discrimination based on religion”<sup>276</sup>—yet the Court of Appeals upheld the suspension.

Not unlike the Conseil d’État in France,<sup>277</sup> these judges based their decision on the incompatibility—which the above-mentioned garb statute took for granted—between the teacher’s veil and the neutrality principle, writing that to accommodate the religious headscarf would have constituted, for the school, an “undue hardship”<sup>278</sup> because it would have required school authorities to violate a criminal and valid statute and would have also represented a “significant threat to the maintenance of religious neutrality in the public school system”.<sup>279</sup> As a consequence, the Court concluded, the Pennsylvania garb statute was constitutional and should be observed, because “the preservation of an atmosphere of religious neutrality is a compelling state interest”.<sup>280</sup> Three years earlier, the Oregon Supreme Court had reached an identical conclusion in a case involving a Sikh teacher and had ruled that the local garb statute was constitutional on the ground that “the aim of maintaining the religious neutrality of the public schools furthers a constitutional obligation beyond an ordinary policy preference for the legislature”.<sup>281</sup> Interestingly, the American Supreme Court declined to hear the appeal on this case,<sup>282</sup> something that the Philadelphia Third Circuit took as an implicit declaration of constitutionality of these pieces of legislation.<sup>283</sup>

In conclusion, compared to the complexities and nuances of the American approach, which (except where a garb rule exists at the state level) takes into account the individual circumstances and makes a case-by-case assessment of whether a teacher’s veil conveys a private or a public message, stands the contrasting simplicity of the solution provided by the Conseil d’État, which in its post-2000 phase constructs a general incompatibility in the workplace and dismisses any religious symbol for civil servants as per se irreconcilable with the principle of *laïcité* and impartiality of the State.

<sup>272</sup> “No teacher in any public school shall wear in said school or while engaged in the performance of his duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination” See *United States of America v Board of Education for the School District of Philadelphia*, 1989 US Dist LEXIS 5437, 3.

<sup>273</sup> *Id.* 29.

<sup>274</sup> *Id.* 44. See also, *Id.* 45-9: “I decline to apply the establishment clause in an absolutist fashion”, this court wrote, “[and] conclude that permitting [this teacher] to wear her religiously-required garb does not have the principal or primary effect of endorsing and thus advancing her religion or of inhibiting the religious beliefs of others or their freedom to have no religious beliefs at all”.

<sup>275</sup> *Id.* 30.

<sup>276</sup> *United States of America v Board of Education for the School District of Philadelphia*, 911 F.2d 882, 885 (1990).

<sup>277</sup> See for example: “Teaching young people is such an important function in society—and the first imprint left on their spirit remains so significant in the course of their life—that when the State assumed the responsibility to organize the public education system it could only have wished it to be impartial and independent from all religious doctrine. This independence and impartiality must have as a necessary corollary the respect for all beliefs and the freedom of conscience. As a consequence, the public education system must be characterized by strict neutrality”. Conseil d’État, *Abbé Bouteyre*, 10 May 1912. See in particular *Revue de Droit Public*, 1912, p.453, note G. Jeze.

<sup>278</sup> *United States of America v Board of Education for the School District of Philadelphia*, 911 F.2d 882, 885 (1990).

<sup>279</sup> *Id.* 894.

<sup>280</sup> *Id.* 893.

<sup>281</sup> *Cooper v Eugene School District*, 301 Ore. 358 (1986). A further application of this prohibitive approach was the O’Connor case of 1905. See *O’Connor v Hendrick*, 109 AD 361, 372-3 (1905).

<sup>282</sup> *Cooper v Eugene School District*, Appeal Dismissed 480 US 942 (1987).

<sup>283</sup> *United States of America v Board of Education for the School District of Philadelphia*, 911 F.2d 882, 893 (1990).

While this difference obviously conveys two distinctive sensibilities on the matter of secularism and neutrality,<sup>284</sup> one also wonders, especially given the restrictive approach of the Conseil d'État since 2004, whether France has a generic and all-encompassing aversion to religious symbolism in general or rather a more selective one to the Muslim veil. For in May 2002, at the same time that a number of legislative bills were being introduced into the French Parliament with the more or less explicit purpose of banning the Islamic headscarf in public schools, the French Government took the highly unusual step of defending another religious sign—the Catholic garb—in relation to the traditional, state-sponsored religious services offered by Catholic nuns in French prisons.<sup>285</sup> The Government wrote:<sup>286</sup>

As far as these nuns are concerned, it is very obvious that the religious clothes worn by them do not in any way possess a confrontational [*revendicatif*] character. The administrative judge [only] sanctions acts of pressure, provocation, proselytism or propaganda, or those which threaten [people's] dignity or liberty, or pose risks associated with health, security, public order and the good functioning of the public service. The wearing of [this] religious dress cannot [consequently] be sanctioned [and] [t]he principle of *laïcité* is not violated [by these garbs] to the extent that these nuns [*les intervenantes*] abstain from any act of proselytism, from any intolerant behaviour and from any violation of the detainees' freedom of opinion, expression and religion.

As we prepare to study the 'revolution' of 2004 and to take into account the French government's passionate pleas about the inherently proselytic and fundamentalist character of the Muslim veil (not to speak about its intrinsic incompatibility with *laïcité* and with the principle of equality between men and women), one wonders whether the above-mentioned words could have been written with reference to the Islamic headscarf—and it is to this matter that I shall now turn.




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<sup>284</sup> As an author observed, "[t]he answer to the religious dress issue will be found [neither in the simplistic solution of banning religious attire...nor in the equally unsatisfying solution of simply permitting teachers to wear whatever they choose". Gunn, above at note 245, 396.

<sup>285</sup> Incidentally, the Conseil d'État declared this public subvention legitimate. See Conseil d'État, *Syndicat National Pénitentiaire Force Ouvrière Direction*, 29 Mai 2002, n.235.806.

<sup>286</sup> In Hafiz & Devers, above at note 79, 247.

### The Veil in American & French Law After 2004

The passage by the French Parliament, in March 2004, of Statute 228 on religious signs at school represented an abrupt and significant change of direction in comparison to the approach developed by the Conseil d'État during the 1980s and 1990s and considerably sharpened the divide between American and French law on the veil.<sup>1</sup> Voted as an antidote against the perceived surge of 'communalist tendencies' ('tendances communautaristes') in French schools, the legislation self-admittedly conveyed a policy answer to what was regarded as a political as much as religious sign: the Muslim headscarf.<sup>2</sup> While the extent and effects of this 'revolution' can be questioned, there is little doubt that the new statute clashes with the three 'rules' identified by the Conseil d'État in its pre-2004 jurisprudence: (i) case-by-case approach and hostility towards any general prohibition; (ii) public order as the main limit to religious insignia in French schools; and (iii) refusal to interpret religious signs. "[This piece of legislation] reverses the perspective of the Conseil d'État", Education Minister Luc Ferry told French senators during the parliamentary debates, "[because] certain religious signs such as the kippa and the Islamic veil...are [now] clearly forbidden and a referral of the matter to the Conseil d'État becomes impossible".<sup>3</sup> Yet the brevity and vagueness of this legislative provision raised from the very beginning a number of fundamental interpretative issues at the lexical as well as conceptual levels, and it is precisely the aim of this chapter to highlight these issues and contrast them with some of the outcomes offered by US law. This, however, can only be done after a close look at the French approach, for it is French law that in 2004 departed from its American counterpart, not the reverse.

#### 3.3.1. NEGATIVE 'OFFICIAL' PERCEPTION OF THE MUSLIM VEIL: THE HEADSCARF AS A SYMBOL OF SEXUAL DISCRIMINATION

The single most important change introduced by Statute 228 is that the French Parliament now regards certain religious symbols worn by students as incompatible per se with the laïcité principle. In official parlance, these are 'conspicuous signs' that can no longer be allowed in French schools because their presence is considered inconsistent with the secular mission of the French education system. As we shall see below and as the legislative history and parliamentary debates copiously demonstrate, considerable vagueness surrounds the expression 'conspicuous signs' and it is no wonder that during the legislative process several doubts arose as to which religious insignia would exactly fall under the prohibition of the law. At some point or another in this process, Christian crosses,<sup>4</sup> Jewish kippas,<sup>5</sup> Sikh turbans<sup>6</sup> and 'secular' bandanas<sup>7</sup> were discussed as possible candidates as conspicuous signs. Significantly, the only sign for which no doubt was ever expressed either within the French Parliament or in French society at large was the Muslim veil.<sup>8</sup> It was the one certain inclusion on the blacklist.

<sup>1</sup> Article 1 reads, in its entirety, as follows: « In the Education Code, the following article must be inserted: 141-5-1. 'In primary, middle and high schools, the wearing of clothes or symbols through which students conspicuously manifest a religious allegiance is prohibited. The internal regulation reminds that the application of a disciplinary action is preceded by a dialogue with the student'. Journal Officiel, Loi n. 2004-228 du 15 Mars 2004, Encadrant, En Application du Principe de Laïcité, le Port de Signes ou de Tenues Manifestant une Appartenance Religieuse dans les Écoles, Collèges et Lycées Publics, 17 March 2004, 5190.

<sup>2</sup> For details, see Sections 3.3.1. & 3.3.3.

<sup>3</sup> Sénat, Séance du 2 Mars 2004: Laïcité dans les Écoles, Collèges et Lycées Publics-Compte Rendu Intégral des Débats, Intervention de M. Luc Ferry, Ministre de l'Éducation, dans la Discussion de l'Article 1 (Éditions des Journaux Officiels, Paris, 2004).

<sup>4</sup> Assemblée Nationale, Laïcité: Le Débat à l'Assemblée Nationale. Séances Publiques du 3 au 10 Février 2004 (Documentation Française, Paris, 2004). See also Sénat, Compte Rendu Intégral des Débats au Sénat (Documentation Française, Paris, 2004), Séance du 2 Mars 2004.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

Given that Statute 228 is largely (if not exclusively) the product of a negative perception of the Islamic headscarf in particular and Islam in general, this is not surprising. Ever since the first veil affair of 1989 a number of French politicians had voiced their hostility towards the veil, which they regarded as the dangerous expression of an extremist attitude as well as a manifestation of sexual inequality and oppression of women.<sup>9</sup> Partly ignited by international events such as the Rushdie affair in 1989, the Gulf War in 1990 and a series of terrorist acts against French interests during the 1990s,<sup>10</sup> this antagonism deepened in the new millennium and became palpable in the parliamentary works leading up to the adoption of the 2004 legislation, when the Muslim veil was the only religious sign openly attacked as per se proselytic as well as embodying—if not advocating—the inferiority of women.<sup>11</sup> While we have already dealt with this in terms of parliamentary debates,<sup>12</sup> it should be noted that the momentous change when it comes to the perception of the veil in France concerned the authors rather than the contents of the criticism, because by the end of 2003 this hostility was no longer limited to individual MPs but very much reflected the position of a majority of the interventions at the *Assemblée Nationale* and *Sénat* as well as the approach of those in the highest spheres of the French Government. This transformation from private opinion to an official policy that soon became a legislative bill and then a statute deserves examination.

Official hostility to the headscarf, as we have seen, took a variety of forms but almost invariably involved the automatic dismissal of the veil as an ‘aggressive’ ‘political’ message that threatened sexual equality as well as the French education system as a whole. While the Bayrou Circular of 1994 can be regarded as the first ‘official’ attack against this ‘sexist’ symbol, it pales in comparison with the far more explicit positions adopted by French institutions on the eve of the approval of Statute 228. “For the members of this Mission, the veil...cannot be reduced to a simple sign of religious allegiance [because] it often, if not always, conveys...a certain idea of the place of women in society”, the President of the Parliamentary Commission on Religious Signs at School wrote in December 2003, before adding that “[r]are are those girls who wear it spontaneously, beyond pressures from the family or their living environment”.<sup>13</sup> Similarly, the Report delivered to President Chirac by Bernard Stasi in December 2003 mentioned “the equality of men and women”<sup>14</sup> as one of the threatened values that justified a legislative intervention and added that the case law of the *Conseil d’État* “did not allow [the high court] to assess the discriminations between men and women that...can result from the wearing of the veil by some girls”.<sup>15</sup> This was a serious fault, the Report added, for “[y]oung men order [girls] to wear asexual and enveloping clothes, to lower their gaze when they see a man and, if they do not comply, they are stigmatized as ‘whores’”.<sup>16</sup>

In his televised speech announcing the introduction of the Bill in Parliament, President Chirac followed a similar—albeit more diplomatic—path. After encouraging the creation of “a culturally-French Islam”,<sup>17</sup> he strongly defended the national education system and defined it as a “republican

<sup>9</sup> See for example: “The Islamic veil is...a threat to the neutrality of the public space, of male and female equality and, more widely, of the French model”. H Mariton (UMP, centre-right). In *Débats*, above at note 4, 159-160. See also: “Because of a perverted passage from the religious to the political [sphere], it conveys—not always, but often—proselytism or Islamic fanaticism and integralism, which aims at destabilizing the republican pact and opens the way to communalism, thus threatening the identity of France, which is based on universalism, equality and humanism”. R Dosière (PS, centre-left). In *Débats*, above at note 4, 136. On the point, an interesting commentary can be found in T Deltombe, *L’Islam Imaginaire: La Construction Médiatique de l’Islamophobie en France 1975-2005* (La Découverte, Paris, 2005) esp. 98-104.

<sup>10</sup> See Deltombe, above at note 9, esp. chapters 3 & 4. See also F Lorcerie, *La Politisation du Voile Islamique en 2003-2004*, in F Lorcerie, *La Politisation du Voile en France, en Europe et dans le Monde Arabe* (Hachette, Paris, 2005) 11-36.

<sup>11</sup> See in this respect, in the Parliamentary Debates, above at note 4, the interventions at the following pages: 95, 134, 136, 141, 148, 150, 157, 160, 168, 172, 182, 187, 192, 193, 200, 204, 206, 209, 212, 215, 229, 230, 237, 238, 240, 248, 255, 256, 270. On the perceived ‘political’ dimension of the veil, see pages 92, 168, 169, 172, 225, 274, 291.

<sup>12</sup> H Salton, “A Political Duty: An Analysis of the French Law on Religious Signs at School Through the Prism of Its Parliamentary Debates”, (2007) *Journal of Law & Religion*, forthcoming.

<sup>13</sup> *Assemblée Nationale, Mission d’Information sur la Question des Signes Religieux à l’École* (hereinafter *Mission Debré*), (Introduction), in *Application du Principe de Laïcité dans Les Écoles, Collèges et les Lycées Publics* (Journaux Officiels, Paris, 2005).

<sup>14</sup> B Stasi, *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* (Documentation Française, Paris, 2004) 35 (hereinafter, ‘Stasi Report’).

<sup>15</sup> *Id.* 69.

<sup>16</sup> *Id.* 102.

<sup>17</sup> J Chirac, *Discours Relatif au Respect de la Laïcité dans la République*, in *Application*, above at note 13, 6.

sanctuary<sup>18</sup> founded on the principles of “equality of girls and boys”<sup>19</sup> and on “the [sexually] mixed character of teaching activities”<sup>20</sup> and emphasized the necessity to “protect our children”,<sup>21</sup> while very much the same approach was adopted by Prime Minister Jean-Pierre Raffarin when he denounced, in presenting the Bill to Parliament, “proselytism, ‘communist impulses and the refusal of sexual equality as threat[s] to freedom of conscience, which is a fundamental liberty inscribed at the very heart of our republican pact”.<sup>22</sup> By keeping ‘conspicuous religious signs’—and most notably the Muslim veil—out of French schools, the Prime Minister emphasized, Statute 228 was aimed at tackling these issues. He was followed in this by Education Minister Luc Ferry, who in his explanations of the Bill declared that “the [French] education [system] must be protected so as to ensure...the equality between girls and boys and the rejection of single-sex education, particularly in gym and sports classes”.<sup>23</sup> Substantially the same message was conveyed by the Fillon Circular on the application of the new statute.<sup>24</sup>

This negative perception of the Muslim veil as an inherently ‘sexist’ object was not limited to the ‘political’ birth of Statute 228, but very much characterized the drafting as well. The Muslim headscarf “testifies of a regression of women’s conditions in certain neighbourhoods and of the very strong pressures to which they are subject in order to wear it”,<sup>25</sup> the President of the Constitutional Commission, Jacques Valade, wrote in his final (and favourable) report on the Bill. Similar conclusions were reached by the Commission for Cultural, Familial and Social Affairs, whose president emphasized that “[w]earing the veil is rarely a free choice for young girls. It is more often the result of a familial or environmental demands or a way to protect oneself from masculine aggression. It is also sometimes an instrument of pressure or condemnation of those girls who do not want to wear it and who represent the great majority of students”.<sup>26</sup> As for the Rapporteur Général of what was to become Statute 228, he reflected his colleagues’ position when he enthused, in his defence of the Bill in front of Parliament, about the ‘emancipatory’ character of a veil prohibition at school: “I think about those women who, in Afghanistan, Iraq, Saudi Arabia or anywhere else in the world, fight against humiliation, violence and sometimes even death by stoning like in Nigeria”, he declared. “May they perceive this strong symbolic act as a veritable sign of encouragement from our Republic”.<sup>27</sup> These observations, it should be noted, were not based on statistical or sociological evidence, were exclusively reserved for the Muslim headscarf and had no counterpart when it came to other religious signs, no matter how ‘conspicuous’. They also mirrored a mounting degree of popular hostility towards the veil. On the eve of the adoption of Statute 228 a survey showed that as many as 84% of French people believed that wearing the Islamic headscarf at school was “intolerable”,<sup>28</sup> while 82% of them thought that the *laïcité* was “threatened by Islam”.<sup>29</sup>

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> J-P Raffarin, *Présentation du Projet de Loi sur l’Application du Principe de Laïcité dans la République*, in *Débats*, above at note 4, 10.

<sup>23</sup> L Ferry, *Exposé des Motifs*, in *Application*, above at note 13, 17.

<sup>24</sup> “The mission of the school is to transmit the values of the Republic among which are the equal dignity of all human beings, the equality of men and women and the freedom of every individual, including the choice of his or her lifestyle. It is up to the school to preserve these values, to develop and strengthen everybody’s freedom, to guarantee the equality among pupils and to promote an open kind of fraternity”. F Fillon, *Circulaire n. 2004-084 du 18-5-2004*, in *Bulletin Officiel* n.21, 27 May 2004 (Introduction).

<sup>25</sup> *Assemblée Nationale, Rapport Clément*, in *Application*, above at note 13, 29.

<sup>26</sup> *Assemblée Nationale, Rapport Dubernard*, in *Application*, above at note 13, 55.

<sup>27</sup> P Clément, in *Débats*, above at note 4, 44.

<sup>28</sup> B Chélini-Pont, «L’Héritage Culturel Français Face au Pluralisme Religieux», in *Annuaire Droit et Religions (PUAM, Aix-Marseille, 2005)* 298. The survey is commented on in M Barthélémy, *Les Français et la Laïcité (CEVIPOF, Paris, 2004)*.

<sup>29</sup> Ibid.

3.3.2. IMMEDIATE RECOGNITION  
& ABANDONMENT OF THE PUBLIC ORDER LIMIT

One important and obvious effect of Statute 228 was that the approach developed by the Conseil d'État through the years—admission of the veil to the extent that no school order problem arose—was abruptly replaced with a prohibition on wearing the veil. Irrespective of whether or not it causes troubles, the new legislation prohibits the 'conspicuous manifestation' of religious signs. This was affirmed in April 2005, when a French Administrative Tribunal applied the statute in a blanket fashion. "The...student...insisted on wearing a Sikh turban [and] made himself immediately recognizable as belonging to the Sikh religion", the Court wrote. "[Accordingly, his exclusion was justified and there is] no need for the school to prove his willingness to adopt a confrontational or proselytic attitude or to establish that [he] violated public order".<sup>30</sup>

The crux of the matter was therefore immediate recognition. President Chirac defined conspicuous religious signs as "those that lead [someone] to be immediately noticed and recognized because of a religious allegiance".<sup>31</sup> He observed that "there is no place for these signs—the Islamic veil, whatever its name, the kippa and a cross of manifestly excessive dimensions—in French schools",<sup>32</sup> and also added that "[d]iscreet signs, for example a cross, a Star of David or a Fatima's hand, will naturally remain possible".<sup>33</sup> In his introduction of the bill before Parliament, Education Minister Luc Ferry gave very much the same definition—"conspicuous religious signs are those signs or clothes the wearing of which leads someone to be immediately recognized for his or her religious allegiance",<sup>34</sup> as did the Fillon Circular of May 2004.<sup>35</sup>

While these are interesting observations, the most comprehensive legal explanation of the changes introduced by Statute 228 was offered by the Rapporteur of the law, Pascal Clément. After reminding Parliament that the Conseil d'État "refuses to consider a religious sign as per se conspicuous [on the ground] that it is not the sign which is or can be conspicuous but the way of wearing it and thus the ensuing behaviour [of the student]",<sup>36</sup> Mr Clément emphasized that this was precisely the problem as well as the cause of the lawsuits brought on the veil matter. "The consequence [of the Conseil d'État's position] is a legal regime that depends on local compromises, and these compromises are a source of legal uncertainty and of a dilution of the laïcité principle".<sup>37</sup> The change introduced by Statute 228 was from the very beginning meant to be radical, Mr Clément implied, for it aimed at overruling the approach adopted by the judges of Palais Royal. "What this is all about is reversing the logic of appreciation of the equilibrium between [religious freedom and laïcité] and clarifying the legal situation", Mr Clément wrote. "The rule becomes the prohibition of wearing religious signs through which students conspicuously manifest a religious allegiance, but this leaves room for a legitimate manifestation of religious beliefs to the extent that it is discreet".<sup>38</sup> Mr Clément further elaborated on the point when he stressed that the role of heads of schools was going to be easier after the

<sup>30</sup> Tribunal Administratif de Melun, M. Singh, 19 April 2005.

<sup>31</sup> J Chirac, above at note 17, 7.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> L Ferry, above at note 23, 17.

<sup>35</sup> "The signs or clothes that are prohibited are those the wearing of which leads someone to be immediately recognized for his or her religious allegiance, such as the Islamic veil, whatever its name, the kippa or a cross of manifestly excessive dimension". See Fillon, above at note 24, § 2.1.

<sup>36</sup> P Clément, Rapport de M. Pascal Clément Fait à Nom de la Commission des Lois Constitutionnelles, de la Législation et de l'Administration Générale de la République sur le Projet de Loi (n.1378) Relatif à l'Application du Principe de Laïcité dans les Écoles, les Collèges et les Lycées Publics, 28 January 2004, in *Application du Principe de Laïcité dans la République*, above at note 13, 25.

<sup>37</sup> Id. 22.

<sup>38</sup> Id. 22. As a consequence, "[p]rohibited will be those signs the wearing of which leads someone to be immediately recognized for his religious allegiance. It is thus no longer the behaviour which is targeted, like in the current legal regime, but precisely certain religious signs as such ['certains signes religieux en tant que tels']". See Clément, above at note 36, 35. This point was also conveyed by Mr Clément during the parliamentary debates: "What does the bill propose? To reverse the problem: it is the sign that now becomes prohibited. The logic is thus very much reversed...In my opinion the bill is the exact opposite of the 1989 [Avis]: the latter admitted the sign whereas the former prohibits it. In its Avis and decisions, the Conseil d'État adopted an attitude that was favourable towards religious signs. Now the logic will be one of non-wearing of religious signs". P Clément, in *Débats*, above at note 4, 279.

introduction of Statute 228, for “contrary to the previous legal situation, the sign (or cloth) will be considered conspicuous in itself [‘à lui seul’] if it is immediately recognizable as a manifestation of religious allegiance”.<sup>39</sup>

The automatic prohibition rendered irrelevant the hitherto public order exception. This was intended, as can be seen from the rejection of an amendment introduced by former Prime Minister Edouard Balladur seeking to limit the prohibition of religious signs “to the extent that [this] causes troubles to the good order of the school”.<sup>40</sup> The Rapporteur openly opposed this proposal on the ground that “the introduction of the concept of ‘good order’ would only enlarge the margin of appreciation [of the judge], particularly since this notion, which has already been used by the Conseil d’État, is not the object of unanimous interpretation by the judiciary and heads of schools”.<sup>41</sup> Unhappy with this response, Mr Balladur re-introduced his amendment during the general discussion of Statute 228 at the Assemblée Nationale, yet it was again ignored.<sup>42</sup> At the Sénat, too, a similar amendment was proposed by Senator Chérioux, who recommended the prohibition of a religious sign “to the extent that it has the effect of disrupting the public order of the school”<sup>43</sup>—“[i]t is not a matter of appearances but of using [religious signs] with proselytic or provocation purposes”,<sup>44</sup> he declared—yet like the amendment of Mr Balladur, this too was rejected. “I have a feeling that you [would] return to the [same] situation where heads of schools found themselves after the Conseil d’État Avis of 1989”, Jacques Valade, President of the Commission for Cultural, Familial and Social Affairs, told Mr Chérioux. “[It would result in] legal uncertainty and in the development of local laws [and] we would [thus] relinquish the main purpose of this bill, which is the reversal of the previous situation and the imposition of a uniform rule”.<sup>45</sup>

Although the paucity of post-2004 litigation on the veil does not allow any comprehensive assessment, the few cases that have arisen since suggest that the public order limit has gone and that ‘visibility’ and ‘immediate recognition’ (irrespective of the students’ intentions) are the new criteria against which the French judiciary will assess whether a religious sign at school falls under the scope of Statute 228. For example, on 8 October 2004, the Conseil d’État ruled that the prohibition of a bandana on the basis of the new law was not manifestly illegal,<sup>46</sup> leading one commentator to observe that “the statute prohibits a group of signs and clothes no matter what the religion of the student who wears them and the reasons for wearing them [and] the task of composing such a list [of prohibited symbols] falls on the judge”.<sup>47</sup> A few days later, the Cergy-Pontoise Administrative Tribunal held that “a Sikh turban [can] be regarded as a piece of cloth [in itself] manifesting a religious allegiance as per statute 228/2004”.<sup>48</sup> This was followed on 19 April 2005 by the Melun Administrative Tribunal (with the judgment quoted above). Three months later, in what appears to date to be the most comprehensive (and authoritative) application of Statute 228, the Paris Appeals Court held:<sup>49</sup>

<sup>39</sup> Clément, above at note 36, 37.

<sup>40</sup> E Balladur, Amendement n.1 Corrigé Présenté par M. Balladur, in Annexe: Amendements Mis en Discussion, in Débats, above at note 4, 317. See also: “A measure of automatic prohibition like [the government’s bill]”, Mr Balladur told Parliament, “risks being contrary to the law...Let us [thus] stop dreaming about an automatically applicable text because this would violate the superior law...contained in the Declaration and the European Convention [and] let us prohibit a religious sign [only] when it is such as to perturb the good order of the school”. See Balladur, in Débats, above at note 4, 295.

<sup>41</sup> Clément, above at note 36, 46. A similar position was expressed by another MP during the debates: “What is certain is that as soon as one makes reference, like the jurisprudence of the Conseil d’État did, to the notion of ‘trouble to public order’, a number of interpretative problems will be raised, something that will complicate the task of heads of schools”. P Auberger, in Débats, above at note 4, 221.

<sup>42</sup> See Débats, above at note 4, Discussion of Article 1.

<sup>43</sup> J Chérioux, *Compte Rendu Intégral des Débats au Sénat*, above at note 3 (‘discussion de l’Article 1’).

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> Conseil d’État, *Radda X*, 8 October 2004.

<sup>47</sup> See E Tawil, «L’Interprétation de la Loi sur les Signes Religieux à l’École Publique», in *Semaine Juridique Administrations et Collectivités Territoriales*, n.53, 27 December 2004, 1714.

<sup>48</sup> See Tribunal Administratif de Cergy-Pontoise, *M. Singh*, 21 October 2004, in S Deygas, «Port des Signes Religieux dans un Lycée et Droits de la Défense», *Procédures*, n.3, March 2005, comm.79.

<sup>49</sup> Court Administrative d’Appel de Paris, *Singh*, 19 July 2005.

Despite the fact that this turban is smaller and darker than the traditional [Sikh] one, it cannot qualify as a discreet sign...[and] by wearing it within school buildings, [the student has] conspicuously manifested his belonging to the Sikh religion [with the consequence that his exclusion was justified] even if his intention was not to exteriorize his faith [and] even if [his behaviour] was not accompanied by proselytism...or public order problems.

Furthermore, on 25 May 2005 the Grenoble Administrative Tribunal confirmed that a bandana is to be regarded “as a piece of cloth through which [a student] conspicuously manifest[s] a religious allegiance”,<sup>50</sup> insofar partly confirming the Radda X case mentioned above. Less than a month later, finally, the Court de Cassation held that private schools under contract with the state can also forbid conspicuous religious signs if they so wish.<sup>51</sup> “The prohibition of the veil...did not affect the neutrality of teaching activities, the freedom of conscience of students or their religious convictions but only a simple means of conspicuous expression of those convictions”, the Court ruled. As a consequence, such a prohibition “[merely] affected the organization of the school without violating the obligation of welcoming all children irrespectively of any distinction based on origin, opinion or belief<sup>52</sup> and was thus legal.

### 3.3.3. THE VOCABULARY ISSUE:

‘OSTENTATOIRE’ (‘OSTENTATIOUS’), ‘OSTENSIBLE’ (‘CONSPICUOUS’),  
‘OSTENSIBLEMENT’ (‘CONSPICUOUSLY’) OR ‘VISIBLE’ (‘VISIBLE’)?

One important terminological question to raise in relation to Statute 228 is the following. If ‘visibility’ and ‘immediate recognition’ (regardless of public order concerns or the student’s purposes) were the criteria favoured by the French government and a majority of the legislators on the matter of religious symbols, why did they not forbid ‘visible’ religious signs instead of referring to the far more convoluted formula ‘the wearing of signs or clothes through which students conspicuously manifest a religious allegiance’? Why, in other words, did they not clearly convey the idea supposedly underlying this legislation, that is to say, that it is an interdiction against certain signs that Statute 228 targets and not, like in the previous and much-despised Conseil d’État regime, against behaviours or attitudes that violate public order?

This question raises important interpretative issues. Due to the brevity of the Statute, one needs to turn to the parliamentary works as an essential source of information if one is to understand the legislator’s choice. For this is precisely what it was, a choice, and the conscious rejection of the adjective ‘visible’—several amendments to this effect were defeated during the parliamentary debates<sup>53</sup>—and the final preference for the adverbial form ‘conspicuous’ do not leave much doubt about it. As the Rapporteur told the Assemblée Nationale just before the final vote, “[t]he government has made a choice after careful consideration”.<sup>54</sup> It is thus important to understand the significance and consequences of this decision as well as the reasons why Parliament agreed to it.

<sup>50</sup> Tribunal Administratif de Grenoble, Mlle Essakaki, 25 May 2005.

<sup>51</sup> This is not, in France, as automatic a conclusion as it may appear. Under French law, private schools may or may not conclude an agreement with the state. In the first case they receive public funding to the extent that they meet some educational and curriculum requirements established by the Ministry of Education, while in the second their ineligibility for public money is compensated by substantially softer checks and controls, which are usually limited to health and safety issues. On the point, see Messner F Messner, P H Prélot, J M Woehrling & I Riassetto, *Traité de Droit Français des Religions* (Litec, Paris, 2003) 401-2.

<sup>52</sup> Court de Cassation, M et Mme Benmehania, 21 June 2005.

<sup>53</sup> Amendment n. 15, proposed by Ayrault, Dosière, Durand and Glavany, MPs, suggested the prohibition of “the visible wearing of any sign of religious belonging”, while Amendment n.20, proposed by Brard, MP, went in the same direction. Amendment 23, again proposed by Brard, MP, suggested on the other hand the prohibition of “the apparent wearing of any sign of religious belonging”. See Amendments Mis en Discussion, in *Débats*, above at note 4, 318-9.

<sup>54</sup> P Clément, in *Débats*, above at note 4, 305.



### 3.3.3.1. The Rejection of ‘Ostentatoire’ (‘Ostentatious’)

The first thing that emerges very clearly from the parliamentary debates is that the adjective ‘ostentatoire’ (‘ostentatious’) was rejected out of hand. As we saw earlier, this word had first appeared in the 1989 Avis of the Conseil d’État, but was never employed separately from the public order limit because, according to the judges sitting at Palais Royal, a religious sign was never ‘ostentatoire’ in itself, but only became so if the student who was wearing it behaved inappropriately in terms of proselytism and propaganda. If, in other words, he or she violated public order and other people’s rights. Precisely for this reason, this adjective was unanimously denounced during the debates on Statute 228, with MPs on both sides criticising it as a confusing and weak limit that should be abandoned, and it was.<sup>55</sup> What was needed, parliamentarians agreed, was a simple and clear criterion that lifted those doubts and uncertainties created by the Conseil d’État’s reference to public order.

### 3.3.3.2. ‘Visible’ (‘Visible’) or ‘Ostensible’ (‘Conspicuous’)?

But which of the other expressions on offer was the best? The Parliamentary Mission on Religious Signs at School chaired by the President of the Assemblée Nationale concluded in favour of a prohibition of “all visible religious and political signs within public school buildings”<sup>56</sup> and a majority of MPs also manifested a clear preference for this adjective, which was regarded as more objective and less prone to judicial interpretations than any other. As one MP told the Rapporteur in Parliament, “[i]f you do not accept the adjective ‘visible’, we will continue to have the same lawsuits and the same application problems”.<sup>57</sup> The Stasi Commission, however, adopted a different stance and opted for the more limited prohibition of “conspicuous [religious and political] signs”,<sup>58</sup> while admitting “discreet”<sup>59</sup> symbols such as medals, small crosses, David stars, Fatima’s hands or small Korans and thus basically re-introduced the distinction suggested in 1994 by the Bayrou Circular. More importantly, the Stasi choice was adopted by President Chirac in his December 2003 speech and quickly transferred, in January 2004, into Bill 1378 and then Statute 228—except for two relevant details. First, the presidential version targeted only religious signs and not political ones, a matter that will be considered in the next section. Secondly, the adjective ‘conspicuous’ (‘ostensible’) was replaced by the adverbial form ‘conspicuously’ (‘ostensiblement’), with the result that what was prohibited in the end was “the wearing of signs through which students conspicuously manifest a religious allegiance”<sup>60</sup> and not “conspicuous signs” as per the Stasi proposal.

### 3.3.3.3. The Choice of the Adverbial Form ‘Ostensiblement’ (‘Conspicuously’)

Why this preference for the adverb? Far from being simply a stylistic matter, this turned out to be a carefully-planned choice that was going to have substantial implications for the interpretation of Statute 228. According to the President of the Commission for Cultural, Familial and Social Affairs,<sup>61</sup>

the preference for the word ‘conspicuous’ in its adverbial form simultaneously allows considerable firmness in reaffirming the laïcité principle at school as well as great flexibility in applying the law...The formula retained by the government will [also] permit the prohibition of other signs that the fecund imagination of adolescents will indubitably generate in order to derail the statute. As a consequence, certain signs that are previously unknown but which, because of the common use and willingness of the wearer to attach to them a religious message, conspicuously manifest a religious allegiance, will [also] be covered by the law.

<sup>55</sup> See in this respect the following pages of the parliamentary debates (above at note 4): 72, 152, 157, 164, 165, 170, 176, 182, 188, 192, 198, 202, 205, 214, 241, 258, 260, 283, 294.

<sup>56</sup> Assemblée Nationale, Rapport Debré, above at note 13, Introduction.

<sup>57</sup> J Glavany, in Débats, above at note 4, 288.

<sup>58</sup> B Stasi, above at note 14, 149-150.

<sup>59</sup> Ibid.

<sup>60</sup> J Chirac, above at note 17, 7.

<sup>61</sup> J-M Dubernard, in Application, above at note 13, 63.

Yet this explanation—and especially the use of the term ‘willingness’ [‘la volonté’]—raises an awkward question. Was not Statute 228 intended to make the student’s behaviour and purposes entirely irrelevant as regards the prohibition on the very fact of wearing a sign?

The answer seems to be, not entirely, and herein lies one of the major contradictions of this piece of legislation. “The adverbial form requires at the same time the fact of wearing the sign as well as the intention of making oneself recognizable”,<sup>62</sup> Mr Dubernard continued. Far from being an isolated position, this emphasis on the behaviour was confirmed by the President of the Commission for Cultural Affairs at the Sénat, for whom “the use of the verb ‘manifest’ and the adverbial form ‘conspicuously’ convey an intention of the student, a willingness to be noticed and to be singled out on the basis of religious beliefs”.<sup>63</sup> This stance seemed to be reinforced by another Minister, Xavier Darcos, during his interview in front of the Commission on Constitutional Matters at the Sénat: “The use of the adverbial form is justified both linguistically and legally for it allows [us] to target at the same time a sign and a behaviour...[although t]he most important thing is the intention rather than the sign [‘ce qui compte, c’est davantage l’intention que le signe’]”.<sup>64</sup> Prime Minister Raffarin himself seemed to confirm this approach when he declared before the Assemblée Nationale that “[t]he ‘conspicuous manifestation’ must be understood as the willingness to externalize and assert [‘revendiquer’] a religious allegiance”.<sup>65</sup> If one follows these indications, therefore, the adverbial form was chosen in order to emphasize the behaviour of the wearer as much as the sign, with the result that the French government and Parliament on the one hand justified the new statute with the necessity to ban signs in themselves, while on the other intentionally chose ambiguous language that seems to prohibit ‘conspicuous’ conduct as well as symbols.<sup>66</sup>

This situation of uncertainty is nowhere better exposed than in an exchange that preceded the final vote of Bill 1378 at the Sénat. To one senator who had introduced an amendment based on the public order criterion,<sup>67</sup> Education Minister Luc Ferry gave the following reply:<sup>68</sup>

The formulation of the statute...shows that it is not the sign as such that is targeted [or] considered excessive, but rather the fact of wearing this sign in the context of [that] educational institution. Consequently, what the Statute targets is precisely what you target, that is to say, those signs which are such as to perturb public order...

Following this explanation, those amendments based on the public order criterion were withdrawn—yet as it was emphasized by another senator, they were withdrawn on the specific understanding that public order remained an essential criterion to assess whether a religious sign is ostensibly worn (and thus prohibited) or not.<sup>69</sup> Senator Mercier told Mr Ferry:<sup>70</sup>

In the circular that you are going to send out to heads of schools, dear Minister, you will need to explain in detail the definition of public order that they must consider in order to apply [this] statute...Anyway, let us no longer discuss these legal issues. You have told us that it is upon this notion

<sup>62</sup> Id. 67.

<sup>63</sup> J Valade, above at note 13, 97.

<sup>64</sup> Commission des Affaires Culturelles, Familiales et Sociales du Sénat, Audition Commune Avec la Commission des Lois Constitutionnelles, de la Législation et de l’Administration Générale de la République, de M. Luc Ferry, Ministre de la Jeunesse, de l’Education Nationale et de la Recherche, et de M. Xavier Darcos, Ministre Délégué à l’Enseignement Scolaire, sur l’Application du Principe de Laïcité dans les Écoles, Collèges et Lycées Publics, Compte Rendu n.25, Mardi 20 Janvier 2004, Séance de 10 h 30.

<sup>65</sup> J-P Raffarin, In Débats, above at note 4, 11.

<sup>66</sup> As it has been observed, “[q]uestions remain as to the meaning of the[se] legislative formulas because, departing from an idea of ‘conspicuous signs’, they make a redundant link between a verb and an adverb (‘conspicuously manifesting’)...” G Koubi, «Une Précision Tenue Pour Insigne: A Propos de la Loi n.2004-228 du 15 Mars 2004», La Semaine Juridique Administrations et Collectivités Territoriales, n.13, 22 March 2004, 407. Similarly, see: “The student remains subject to the vocabulary subtleties retained by the legislator [and by] a terminology that, when it comes to the adverb ‘conspicuously’, is imprecise and confusing”. A Garay, «Laïcité, École et Appartenance Religieuse: Pour un Bilan Exigeant de la Loi n.2004-228 du 15 Mars 2004», unpublished article sent by the author, 2005, 10.

<sup>67</sup> J Chérioux, In Sénat, above at note 3 (Votation de l’Article 1<sup>er</sup>).

<sup>68</sup> L Ferry, in Débats au Sénat, above at note 3.

<sup>69</sup> Ibid.

<sup>70</sup> C Mercier, in Débats au Sénat, above at note 3.

of respect for public order that the application of the statute will be based. The fact that this [principle] is reaffirmed is sufficient for us. Consequently, I withdraw my amendment.

As I have mentioned above, however, the Fillon Circular (Mr Fillon succeeded Mr Ferry at the Education Ministry in the Spring of 2004) adopts a criterion of ‘immediate recognition’ and does not mention ‘public order’: “The signs or clothes which are prohibited”, it reads, “are those the wearing of which leads someone to be immediately recognized for his or her religious allegiance such as the Islamic veil, whatever its name, the kippa or a cross of manifestly excessive dimension”.<sup>71</sup>

### 3.3.3.4. The Terminological Row in Parliament

The confusing and contradictory implications of this situation were noticed during the parliamentary debates, and criticism of the government’s choice of words was voiced not only by the Socialists but also by a substantial number of MPs belonging to the ruling centre-right coalition. “The language retained by the bill...only reinforces the subjectivity of the evaluation of the forbidden behavior”, one majority parliamentarian commented. “The adverbial form ‘conspicuously’ clearly indicates that it is indeed the intention which will be targeted and not the fact itself”.<sup>72</sup> “Why conceal”, another majority MP declared, “that I, too, would have preferred a stronger, clearer text, maintaining the adjective ‘visible’ as suggested by the Mission Debré rather than the adverb ‘conspicuously’, which is subject to a myriad of interpretations?”<sup>73</sup> Former Prime Minister Balladur added, it is the verdict of the judge that is going to decide what ‘conspicuously’ actually means—precisely the result that MPs had long criticized about the Conseil d’État jurisprudence and exactly what they wished to avoid. “As soon as a reference is made to the ‘conspicuous manifestation of a religious sign”, he said, “the latter will need to be assessed by the [school] principal...[and] as soon as the [matter] involves the decision of a principal, it will be up to the judge to evaluate its validity. Yet the judge will need to do so by applying the principles of freedom of conscience, which are superior to [this] statute”.<sup>74</sup>

As for the Socialists, they were uniformly opposed to the adverb ‘conspicuously’ and tried until the very last minute to convince their majority colleagues to adopt ‘visible’ instead, which they regarded as more objective and less prone to confusion.<sup>75</sup> “The adverb ‘conspicuously’ implies a necessarily subjective interpretation of the intentions of the wearer”, one politician declared. “This vocabulary is going to produce the same difficulties as the interpretation and application of the current situation, and will thus cause the same lawsuits”.<sup>76</sup> The language retained by the Government had another

<sup>71</sup> Fillon, above at note 24, § 2.1. In the Spring of 2004, Mr Fillon succeeded Mr Ferry at the Education Ministry. A further criticism that can be levied against this circular is that, while there is no doubt that the three mentioned signs were widely quoted in the parliamentary works as ‘conspicuous’ and thus prohibited, they are nowhere to be found in the statute, with the result that the circular does something more than applying the law—it interprets the statute on the basis of the parliamentary works. See in this respect O Dord, «Laïcité à l’École: l’Obscure Clarté de la Circulaire Fillon», *Actualité Juridique Droit Administratif (AJDA)*, 26 July 2004, 1523-1529.

<sup>72</sup> C Vanneste (UMP, against), in *Débats*, above at note 4, 165.

<sup>73</sup> P Lellouche (UMP, in favour), in *Débats*, above at note 4, 176. See also, similarly: “The exegetes are not in agreement on the adjectives—visible, ostensible, conspicuous—nor on the categorization—religious or political sign?” Nesme, J-M. (UMP, abstention), in *Débats*, above at note 4, 260.

<sup>74</sup> E Balladur (UMP, abstained), in *Débats*, above at note 4, 294-5.

<sup>75</sup> “The word ‘visible’ is not, for us, a semantic elegance. We want to vote with you a law as simple, clear, applicable and effective as possible”. J-C Cambadélis (PS, in favour), in *Débats*, above at note 4, 164.

<sup>76</sup> J Bascou (PS, in favour), in *Débats*, above at note 4, 152. See also the following passages: “To prohibit ‘conspicuous’ religious signs is to impose confusion and place our teachers, our principals in impossible situations. Will there need to be a rule to measure the size of a cross? Will we need to measure the size of a veil? Will it be necessary, dear Minister, for me to cut, even partially, my beard?” P Roy (PS, in favour), in *Débats*, above at note 4, 198. “The text proposed by the government does not meet the requirement of clarity. By making reference to those signs or clothes that ‘conspicuously’ manifest religious allegiance, the bill adopts a formula that is too fluid and that will give birth to numerous lawsuits. The explication of the reasons indicates that discreet signs will remain possible. Where will be the difference between a conspicuous cross and a discreet one?” M Dolez (PS, in favour), in *Débats*, above at note 4, 182. See also: “I fear that the adverb ‘conspicuously’”, another Socialist MP said, “is only a stylistic variation of the term ‘ostentatious’ used by the Conseil d’État and will hardly be of any help to the pedagogical teams [because] it will be, dear Minister, as difficult to say what is ostensible as it is awkward to define what is conspicuous”.<sup>76</sup> See E Guigou (PS, in favour), in *Débats*, above at note 4, 157. Likewise, see: “I would have preferred, like many others, to ban ‘visible’ or ‘apparent’ religious signs rather than those worn in a ‘conspicuous’ way. Actually, what is it that distinguishes ‘ostentatious’ signs from those worn in a ‘conspicuous’ way? In both cases, nothing allows an objective assessment”. S Janquin (PS, in favour), in *Débats*, above at note 4, 170. “It is not religious signs that will be

deplorable effect, the Socialists observed, for it reinforced the impression of a statute targeted at certain religious signs—particularly the Muslim veil—rather than treating them all in the same way. “We are very much aware that, by proposing the prohibition of ‘visible’ signs, we are being stricter than the government”, one MP declared, “[and] without a doubt discreet religious signs would no longer be permitted. Yet apart from the fact that the term ‘visible’ had been retained by the Mission that you have chaired, Mr President, we think it is more clear and puts all faiths at the same level” instead of being “directed against those signs belonging to the Muslim religion”.<sup>77</sup> Despite the efforts of the Socialists and a number of ‘rebellious’ UMP members,<sup>78</sup> however, the majority did not waver and the adverb ‘conspicuously’ was retained. Unwilling to sacrifice the whole statute because of a query over wording, the Parti Socialiste eventually rallied behind the majority and voted for the Bill.

### 3.3.3.5. Conclusion on the Vocabulary Choice

In sticking with the adverbial form, the legislator sent contradictory messages. The use of the adverb seems a compromise between the adjective ‘visible’, which appeared too wide, and ‘ostentatious’, which was regarded as too narrow. As one author observed, the problem was that “[t]he legal formula had to be sufficiently broad so as not to be considered discriminatory [towards the Muslim veil], but also sufficiently narrow lest it be taken as a violation of religious freedom”.<sup>79</sup> Yet by using imprecise terminology and by introducing what have been defined as “intentionally indetermined criteria”,<sup>80</sup> the French Government and Parliament have left a sizeable grey area when it comes to the target of this law—and this cannot but result in significant uncertainty.

True, it is no longer the ‘ostentatiousness’ of a religious sign that heads of schools must assess but rather its ‘conspicuousness’ and the difference between a discreet and a conspicuous symbol—yet this does not make their task substantially easier. The three ‘named-and-shamed’ symbols—Muslim veils, Jewish kippas and Christian crosses of manifestly excessive dimension<sup>81</sup>—are now most certainly prohibited in French schools, but as far as all other signs are concerned, the interpretation question remains, because the conspicuous character of a sign is a subjective criterion and the same can be said for the elusive concept of ‘discreet symbols’. Here lies a further contradiction in the Government’s position, for while ‘conspicuousness’ has been explained against a criterion of ‘immediate recognition’, the three examples of ‘discreet signs’ mentioned by the government (small crosses, David Stars or Fatima’s hands) can be (and usually are) immediately recognizable too. As former Prime Minister Laurent Fabius pointed out, the result is that “the Government fixes one criterion in...the law—which is the intention of the student; fixes another criterion in the explanations of the law—which is the immediate recognition; and adds some examples that contradict what has just been stated”.<sup>82</sup>

It is important to note that the Conseil d’État had a hand in the drafting process. Before its introduction to Parliament, Bill 1378 was sent to Palais Royal for approval. Curiously, the administrative judges recommended, in an unpublished *Avis Préalable* issued on 28 January 2004,<sup>83</sup> a

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prohibited but the fact of ‘conspicuously’ manifesting a religious allegiance”, former Prime Minister Laurent Fabius observed, with the result that “we risk getting entangled into multiple interpretations and arguments”. L Fabius, in *Débats*, above at note 4, 116-117.

<sup>77</sup> R Dosière (PS, in favour), in *Débats*, above at note 4, 283. See in the same sense: “If you don’t write ‘visible’ in the law, the text will have the effect of forbidding the veil while authorizing, as a matter of fact, the more discreet religious signs of other religions. You would run the risk of stigmatizing the Muslim population and you would betray honest republicans, because you would not strictly apply the principle of laïcité”. G Peiro (PS-in favour), in *Débats*, above at note 4, 258.

<sup>78</sup> “Dear Minister”, one Socialist MP pleaded, “do not hold on to your stance, show us your capacity to listen by replacing ‘conspicuous’ with ‘visible’. It is a matter of good sense. We would then exclude the risk of incomprehension, and this law, which is a symbol, would be easily applicable and comprehensible by all citizens”. A Néri (PS, in favour), above at note 4, 205.

<sup>79</sup> F Bussy, *Le Débat sur la Laïcité et la Loi* (Daloz, Paris, 2004) 31 (Chroniques).

<sup>80</sup> Undetermined notions, it has been observed, express “a willingness of auto-limitation of the statute”. See J-C Bécane & M Courdec, *La Loi* (Daloz, Paris, 2000) 281. See also F Terré, *Introduction Générale au Droit* (Précis Daloz, Paris, 2003), 436.

<sup>81</sup> This was a sign that, incidentally, even the Education Minister recognized as “involving only a very small number of cases”. See L Ferry, in *Débats au Sénat*, above at note 3 (Votation de l’Article 1<sup>er</sup>).

<sup>82</sup> L Fabius, in *Débats*, above at note 3, 116-117.

<sup>83</sup> Conseil d’État, *Avis Préalable*, 28 January 2004 (unpublished), see C Durand-Prinborgne, «La Loi sur la Laïcité, une Volonté Politique au Centre de Débats de Société», *Actualité Juridique de Droit Administratif* (AJDA), 5 April 2004, 708.

subtle but interesting adjustment. While the original government draft referred to “the signs or clothes that conspicuously manifest a religious allegiance”<sup>84</sup> [“les signes et tenues qui manifestent ostensiblement une appartenance religieuse”], the Conseil d’État advised that this formula ought to be changed into “the wearing of signs or clothes through which students conspicuously manifest a religious allegiance” [“le port des signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse”], thus arguably emphasizing the behavior of the student rather than the symbol as such. The question of the high court’s judicial application and legal endorsement of Statute 228 will be considered below, but this recommended adjustment could be seen as a last minute attempt by the judges to stick to their pre-2004 position. As it has been authoritatively observed, by requiring this change<sup>85</sup>

the Conseil d’État...has, like in the past, retained the [criterion] of the wearing of the sign [with the consequence that] to be prohibited is the militant act. The central question is the student’s way of expressing an allegiance...[and] heads of schools will [thus] not be exempted from an individual examination of behaviours, [f]or this [formula] leads to the appreciation of a conduct and...this appreciation will be first and foremost carried out through an investigation of the pupil’s intention and willingness to be identified in a certain way.

As we shall see below, the actual relevance of the amendment suggested by the Conseil d’État is questionable to the extent that the high court subsequently gave the impression of being (politically) unwilling and (legally) unable to reopen a vexed question, yet there is little doubt that the January 2004 change adds to the confusion about whether Statute 228 prohibits an object, a behavior or both—and the result is that, as one commentator observed, “[w]hat we have here is a deliberate and proud political pronouncement enveloped in humble and modest legal clothing”.<sup>86</sup>

### 3.3.4. RELIGIOUS VIS-A-VIS POLITICAL & CULTURAL SIGNS

Statute 228 specifically targets signs of religious allegiance but ignores all other symbols, so it is a legitimate question to ask whether this piece of legislation was animated by a discriminatory purpose against religion. I propose to ascertain this by investigating the attitude of the French establishment towards political and cultural signs as it emerges from the parliamentary debates leading up to Statute 228. As we shall see in this section, this approach highlights a further difficulty with the new law, because by singling out religious signs this piece of legislation necessarily requires heads of schools and administrative judges to assess whether a certain symbol is political, religious, cultural or otherwise—and this, as the confusion evident during the parliamentary debates makes clear, is not as easy a task as it may appear.

#### 3.3.4.1. Political Signs

Like the discussion over phraseology, the question of whether political signs ought to be covered by the new legislation was not overlooked by French MPs, and while the final choice of the government went in a different direction, both the Parliamentary Mission and the Stasi Commission recommended covering both political and religious symbols.<sup>87</sup> “The wearing of signs of religious or political allegiance at school”, the President of the Assemblée Nationale wrote in his final report, “is a risk to the extent that by substituting the traditional principle of ‘living together’ with the principle of ‘living side-by-side’, it represents a divisive factor in a place which is supposed to teach the social liaison”.<sup>88</sup> In a very similar tone, the Stasi Commission wrote that French schools are “a special space subject to special rules which allow the transfer of knowledge in a context of serenity”<sup>89</sup> and this

<sup>84</sup> Durand-Prinborgne, above at note 83, 708.

<sup>85</sup> Ibid.

<sup>86</sup> Id. 709.

<sup>87</sup> The Jospin Circular of 1989 adopted a substantially similar approach when it emphasized that “[t]hese observations must be applied in the same way to signs or behaviours of a political nature and character”. Jospin Circular, in Application, above at note 13, 330.

<sup>88</sup> Debré, in Application, above at note 13, 155.

<sup>89</sup> Stasi, above at note 14, 124.

implies that “[conspicuous] clothes or signs manifesting a religious or political allegiance [should be] forbidden”.<sup>90</sup>

Despite these conclusions, however, both commissions devoted the rest of their attention and observations to *laïcité* and religious matters and made only very marginal references to political signs.<sup>91</sup> As for President Chirac, he seemed to adopt the opposite approach: after putting much emphasis, in his televised discourse announcing the Bill, on the necessity to reject every form of sectarianism—“identity or community-based claims”, he said, “are rising and often result in social abandonment, egoism and even intolerance”<sup>92</sup>—he opted in the end for a “proscription”<sup>93</sup> of religious symbols only, with the result that, as the Fillon Circular emphasized, “[Statute 228] does not prohibit accessories and clothes which are commonly used by students beyond any religious significance [but it] does prevent students from exploiting the religious character [of a sign] by refusing, for instance, to conform to the applicable rules about student clothing at school”.<sup>94</sup> As a result, it seems undeniable that the new legislation exclusively targets religious signs, while all other insignia were deliberately excluded from the prohibition.

Far from being the end of the story, however, this raises a number of problems. The first is that the Islamic veil was regarded, during the parliamentary works, as much a political sign as a religious one and so the ‘special treatment’ afforded to religious signs appears particularly difficult to justify. “The veil is the instrument of a veritable political strategy [and] has very little to do with religious beliefs”,<sup>95</sup> one MP declared during the debates; while the same message was conveyed by another MP, who said that “[t]he wearing of the veil at school by certain girls of Muslim culture and religion consciously or unconsciously goes well beyond the mere willingness to respect religious precepts”.<sup>96</sup> This was a widely shared position amongst members of the French Parliament.<sup>97</sup> Most importantly, it appears also to be the ‘official’ stance of French institutions. Both the Debré and Stasi Commissions emphasized the political character of the Muslim veil, a circumstance that might explain why they favoured including political insignia into the statute. “For the members of this Mission”, the President of the *Assemblée Nationale* wrote, “the veil...cannot be reduced to a simple sign of religious allegiance [because] it often, if not always, conveys the political will to assert a difference...”.<sup>98</sup> This point was also implied by the Stasi Commission with reference to ‘politico-religious groups’ that allegedly pressure civil servants and Muslim girls to veil.<sup>99</sup> The French Government took an even more explicit stance. “One cannot but acknowledge”, Prime Minister Raffarin told Parliament at the beginning of

<sup>90</sup> Stasi, above at note 14, 129.

<sup>91</sup> A cursory analysis of the topics covered by the two bodies confirms the paramount importance given to religion. As far as the Parliamentary Mission is concerned, see the following portions: *Is the Wearing of Religious Signs at School Compatible with the French Principle of Laïcité?* (Part I); *Laïcité: A Historical as much as Legal Principle* (I); *The Historical Foundations of the Laïcité* (Part I, Chapter I, Section A); *The Importance of the School Environment in the Application of the Laïcité Principle* (P.I, Ch.I, Sec.B); *The French Exception: An Original Model to be Confirmed* (P.I, Ch.II); *The Legal Regime of Religious Signs at School Does Not Guarantee the Respect of Laïcité at School* (Part III); *The Wearing of Religious Signs at School: The Necessary Conciliation between Freedom of Religion and the Laïcité Principle* (P.III, Ch.I); *The Wearing of Religious Signs at School: A Contested and Fragile Legal Regime* (P.III, Ch.II). As far as the Stasi Commission is concerned, see: *La Laïcité, Universal Principle, Republican Value* (Part I); *The French Laïcité: A Legal Principle Empirically Applied* (Part II); *The Challenge of Laïcité* (Part III); *Reaffirming a Strict and Unifying Laïcité* (Part V).

<sup>92</sup> Chirac, in *Application*, above at note 13, 1.

<sup>93</sup> *Id.* 7.

<sup>94</sup> Fillon, above at note 24, § 2.1.

<sup>95</sup> M Leroy, in *Débats*, above at note 4, 67.

<sup>96</sup> R Couanau, in *Débats*, above at note 4, 168.

<sup>97</sup> See e.g.: “I regard the veil above all as a political sign [because] religion here is only a pretext...”, another MP stated. See M Le Fur, in *Débats*, cit. 92. See also, in the same sense: “Of course none will have the naivety to ignore that some occult and exterior influences exploit this situation in order to satisfy their religious and political proselytism”. R Couanau, in *Débats*, above at note 4, 169.

<sup>98</sup> Debré Report, above at note 13 (Introduction). This was further elaborated by the members of the Mission belonging to the UDF party: “...the wearing of the Islamic veil is not only the expression of a religious belief but, through this religious belief, it conveys a certain degrading idea of women, of society and of humanity as a whole”.

<sup>99</sup> “Some civil servants have requested to wear, at work, a kippa or a veil manifesting their religious allegiance. Recently, some medical personnel have also expressed the same willingness. Such behaviours...are seriously worrying. We must be aware that they are often the result of organized groups which are testing the resistance of the Republic”. Stasi Report, above at note 14, 95. A similar reference to pressures exercised on young girls by ‘politico-religious’ groups in order to make them wear the veil is in the Stasi Report, above at note 14, 101.

the debates, “that certain religious signs, among which is the Muslim veil,...acquire a political significance and can no longer be regarded as personal signs of religious allegiance”.<sup>100</sup>

Yet if this is indeed the case, why were political signs ignored altogether by Statute 228? As one MP observed, “[o]ne needs to be coherent. If the Prime Minister wants to prohibit religious signs that ‘actually have a political significance’, [then] we should prohibit political signs at school. It is not possible to prohibit the Islamic veil on the ground that it is a political sign and at the same time authorize the other conspicuous political signs”.<sup>101</sup> As we shall see, and not unlike the debate over language, this turned out to be a conscious and much-discussed decision, for the French Parliament explicitly rejected<sup>102</sup> an amendment prohibiting political insignia,<sup>103</sup> while the government founded its stance on both legal and policy grounds.

As far as the law is concerned, the ‘official’ explanation went as follows. A circular issued in 1936 by then Minister Jean Zay had already prohibited political signs at school and had broadly defined them as “every manifestation [of a political credo] that is likely to provoke a manifestation against it”.<sup>104</sup> As a consequence, the Rapporteur of Statute 228 wrote, “all political signs, even discreet ones, are already prohibited [in French schools, with the consequence that] to include political symbols in this bill would paradoxically forbid conspicuous political signs only and would thus weaken the current legal regime”.<sup>105</sup> The same argument was repeatedly raised during the parliamentary debates<sup>106</sup> and one specific amendment—aimed at “extending the prohibition to those signs the wearing of which manifest a political engagement”<sup>107</sup>—was rejected precisely on the basis of the Zay Circular.<sup>108</sup>

Yet apart from the fact that an 80-year-old circular does not have the force of a law,<sup>109</sup> and not to speak of the psychological might and spectacular leverage of Statute 228, it is often forgotten that a few months after his first circular, Jean Zay issued a second document that “assimilated religious signs to the political ones”.<sup>110</sup> If one were to follow the Rapporteur and give credit to these aged documents, therefore, both political and religious signs were already prohibited in French schools when Parliament met to discuss the 2004 Bill, and the fact that this objection was never raised in Parliament—and that both the Debré and Stasi commissions ignored the Zay Circulars—confirms the impression of a forgotten and unapplied set of documents. It is also interesting to note that, contrary to Statute 228, the Zay circulars were not based on *laïcité* at all but on public order, for as an author underlined, “Jean Zay did not worry about *laïcité*, it was not his problem. What he worried about was public order....”.<sup>111</sup>

<sup>100</sup> Raffarin, in *Débats*, above at note 4, 10.

<sup>101</sup> R-G Schwartzberg (PS in favour), in *Débats*, above at note 4, 274.

<sup>102</sup> See *Débats*, above at note 4, 294.

<sup>103</sup> See the following statement by Mariton, MP, defending his amendment aiming at a prohibition of conspicuous political as well as religious signs: “[T]he problem of religious signs can quickly acquire a political dimension. As far as the ‘generating factor’ of this bill is concerned, that is to say the Islamic veil, a number of audited people at the hearings have told us that the matter is as much political as it is religious”. H Mariton, in *Débats*, above at note 4, 291.

<sup>104</sup> É Poulat, *Notre Laïcité Publique*, in *Annuaire Droit et Religions*, above at note 28, 25.

<sup>105</sup> Clément, in *Application*, above at note 13, 36.

<sup>106</sup> The President of the Commission for Cultural, Familial and Social Affairs was slightly more direct when he wrote that “...this legislative bill wishes to limit itself to a strict reaffirmation of the *laïcité* principle that organizes the relationship between State and religion”. Avis Dubernard, in *Application*, above at note 13, 64. He also wrote that “[t]his legislative bill does not only wish to regulate the wearing of religious signs at school but also clarify the way the *laïcité* principle is to be applied...”. Avis Dubernard, in *Application*, above at note 13, 74.

<sup>107</sup> Rapport Clément, in *Application*, above at note 13, 45.

<sup>108</sup> *Ibid.*

<sup>109</sup> As it was observed, “...it is obviously possible to discuss whether the Jean Zay Circular of 1936 is still valid or not”. L Ferry, above at note 3. See also: “...the Zay circulars are not high enough in the legal hierarchy to ensure [their] efficient and durable application, as the subsequent circulars and decrees demonstrate”. Rapport Clément, in *Application*, above at note 13, 45.

<sup>110</sup> Poulat, above at note 104, 25. As it was observed, “[t]he Circular by Jean Zay...was based on the necessity to preserve ‘school order and peace within school buildings’ and prohibited religious and political propaganda as well as every form of proselytism at school”. See F Bussy, *Le Débat sur la Laïcité et la Loi* (Daloz, Paris, 2004) 2666.

<sup>111</sup> *Ibid.*

Be that as it may, this (weak) legal explanation was quickly followed by a (much stronger) political justification and it soon became apparent that it was the latter that the French Government (and later Parliament) regarded as superseding any legal consideration. “Very honestly”, the Rapporteur told Parliament before the final vote, “I think that we should not weaken this text which will be much stronger if we only prohibit religious signs”.<sup>112</sup> “We all want to give this law a noble mission: reaffirming a principle, quite incredible to the rest of the world, which we call *laïcité*... Let us thus not kill [‘abîmer’] the statute...by adding something else than what we want to say. This is why I consider it inappropriate to retain such an idea [of prohibiting political signs] which, although well grounded, is not opportune for our bill”.<sup>113</sup> Questioned on the point, Education Minister Luc Ferry confirmed that the government had “the same position as the Commission”<sup>114</sup> and the amendment in favor of the inclusion of political signs was thus overwhelmingly rejected.<sup>115</sup>

### 3.3.4.2. Cultural Signs

Cultural signs are an even more useful ground of analysis if one wishes to understand the context of the adoption—and the effects of the application—of Statute 228. Both the phrasing and parliamentary history of this piece of legislation suggest that such symbols were intentionally allowed in French schools. The Fillon Circular explicitly states that the new law “does not prohibit accessories and clothes which are commonly used by students beyond any religious significance...”,<sup>116</sup> while a number of declarations made during the parliamentary debates express an explicit and unmistakable position in favour of cultural insignia.<sup>117</sup>

The matter is particularly intriguing with reference to those French overseas territories where the local population wear a variety of headgears that were expressly ‘condoned’ during the debates on Statute 228—but only on the understanding (and upon the condition) that they did not convey a religious message.<sup>118</sup> On the Mayotte Island, for example, where the inhabitants are 90% Muslim and where justice is still partly rendered by the *kadis*,<sup>119</sup> young girls use hairstyle and headgear that were ‘excused’ by the 2004 legislator precisely because they were (regarded as) ‘cultural’ and not religious signs. “On the Mayotte Island”, the Rapporteur of Statute 228 wrote, “the application of the statute will not create legal or practical problems [because] young girls over there do not wear a veil but rather the ‘kishall’ and the ‘salouva’ (a kind of bandana) which are African—not Muslim—traditional clothes and which are thus [allowed because they are] entirely outside the scope of application of this bill”.<sup>120</sup>

<sup>112</sup> Clément, in *Débats*, above at note 4, 290.

<sup>113</sup> *Id.* 293.

<sup>114</sup> L. Ferry, in *Débats*, above at note 4, 293.

<sup>115</sup> That the 2004 legislator wanted to target religion to the exclusion of any other symbol was also highlighted by the discussion on the formal title of the law: “We want to teach French children what *laïcité* is” (P Clément, in *Débats*, above at note 4, 308), the Rapporteur declared, and so the heading of Statute 228 turned out to be one that clearly singles out religion and reaffirms the French Parliament’s preference for a strict interpretation of the *laïcité* principle (“Law n.2004-228 of 15 March 2004 regulating, in application of the principle of *laïcité*, the wearing of signs or clothes manifesting a religious allegiance in primary, middle and secondary schools”). See *Débats*, above at note 4, 306.

<sup>116</sup> Fillon, above at note 24, § 2.1.

<sup>117</sup> This led one author to write that this statute “preserves the wearing of headgear or traditional costumes which, beyond any reference to a religious allegiance, signify the individual or collective attachment of certain students to their cultural or geographical origins”. See Dord, above at note 71, 1524. “We can think for example”, this author continued, “about the turban of the Sikhs, the *kishali* of the young girls from the Mayotte or the African *boubou*, but also about the Basque *beret*”. As a further testimony of the confusion on the issue, the Sikh turban was later regarded by the French government as a ‘conspicuous’ religious sign in itself (see the upcoming text).

<sup>118</sup> For an interesting reference to the situation in French overseas territories see for example: “People from the Antilles live the *laïcité* in an intense and rigorous way [but this bill] has separated the holy and the profane: the classroom [becomes] a sacred space...I have the terrible impression that French society is unable to accept the way it looks today and that it still has not digested the post-colonial heritage”. V Lurel, in *Débats*, above at note 4, 252.

<sup>119</sup> See C Taubira, in *Débats*, above at note 4, 180.

<sup>120</sup> Rapport Clément, above at note 36, 49. See also in the same sense: “As far as the Mayotte Island is concerned...what the young girls of the archipelago wear is not the Islamic veil but some sort of African head covering, without religious significance, and [therefore] the application of this statute will not create problems [over there]”. Rapport Clément, above at note 36, 46. See also M Kamardine, in *Débats*, above at note 4, 249-251.



Yet as the discussions concerning other objects suggest, singling out cultural, religious and personal signs may not be as easy as the French government and politicians had anticipated. As one parliamentarian observed, “[w]hat will it happen to the tika, this poutou or red point that young girls, according to the Hindu tradition, wear on their forehead? Will they need to erase it before their enter the classroom?”<sup>121</sup> Even an apparently innocuous beard may raise serious problems, another MP observed, for “[given that it] embodies, for certain Muslim men, their chance to manifest their [religious] allegiance, the beard obviously represents the male equivalent of the veil. Does this mean that will be prohibited too?”<sup>122</sup>

To these doubts, the French government replied that if a symbol does not have (or, as we have seen in the previous pages, is not meant by the author to have) religious significance, then it must be allowed. “It is typical of human beings to invent [new] signs and their creativity [on the point] is infinite”, the Education Minister declared. “It is possible to create a sign out of a beard [so] if a beard acquires a religious meaning, then it will fall under the scope of the law [and will be prohibited]”.<sup>123</sup> The same approach, it should be noted, was adopted for bandanas—“[the bandana] can be a clothing accessory without any religious significance”,<sup>124</sup> Mr Ferry declared, so “[b]andanas will be prohibited [only] to the extent that they are worn as a religious sign...”<sup>125</sup>—while the Sikh turban was regarded as automatically possessing a religious connotation and is thus prohibited in all circumstances: “Like people of other religions”, Mr Ferry stated, “the Sikhs will need to conform to the law [although]...mediation may result in the withdrawal of the turban in favour of a more discreet symbol”.<sup>126</sup>

These observations on cultural signs allow us to reach a broader conclusion when it comes to the interpretation of Statute 228, for given the above-mentioned declarations it is legitimate to argue that the French government—and, through its positive vote, the legislature—wanted to prohibit two separate kinds of religious insignia: (i) those regarded as ‘conspicuous by nature’ (such as the Muslim veil, the kippa and big crosses) on the ground that they are automatically thought to convey a religious meaning; and (ii) those considered ‘conspicuous by destination’, that is to say, symbols which are not in themselves religious but that could ‘become’ so if the student wearing them attaches to them a religious meaning. To the interpretative problems associated with the first category, therefore—particularly the fact that a distinction between religious and cultural signs can be subtle—one also needs to add those of the second, because looking out for signs that could become religious depending on the intentions of the student exposes not only a noticeable degree of hostility (if not obsession) against religions but also the necessity, for school principals and judges, to engage in a highly subjective interpretation of student symbolism.

If one is to follow this line of interpretation, therefore, French school principals and judges will in the future be required to make a double assessment in order to ascertain whether a symbol is prohibited under Statute 228. They will have to qualify a certain sign as ‘religious’ on the basis of (i) what they know about religions; or (ii) what they interpret as some sort of ‘malign intention’ from the wearer in displaying a sign that is not in itself religious but that the student might regard as such. In May 2005, this approach seemed to be confirmed in *Essakaki*, one of the rare post-2004 cases on the matter: “It does not seem to me that the mere fact of wearing a bandana is enough to characterize a sign or cloth [as one] that conspicuously manifests a religious allegiance”, the Commissaire du Gouvernement wrote, “[for] it will be up to the case-by-case evaluation of the school principal to verify that the conditions in which this bandana is worn [by the student] result in a conspicuous manifestation of a religious allegiance”.<sup>127</sup> This case supports the view that a bandana worn for

<sup>121</sup> H Bello, in *Débats*, above at note 4, 50.

<sup>122</sup> M Le Fur, in *Débats*, above at note 4, 93.

<sup>123</sup> L Ferry, *Déclaration Devant la Commission des Lois et des Affaires Constitutionnelles de l'Assemblée Nationale le 20 Janvier 2004*, *Le Monde*, 22 Janvier 2004.

<sup>124</sup> L Ferry, quoted in *Le Monde*, 9 January 2004. Quoted by Bussy, above at note 110, footnote 79.

<sup>125</sup> L Ferry, in *Débats au Sénat*, above at note 3 (‘Audition du Ministre Ferry’).

<sup>126</sup> *Ibid.*

<sup>127</sup> Commissaire du Gouvernement Stephane Morel sous Tribunal Administratif de Grenoble, *Mlle Essakaki*, 25 May 2005.

religious reasons is prohibited under the new law, while the same bandana is perfectly legitimate if the person wearing it does not attach any religious meaning to it.

In conclusion, what Statute 228 (and the Fillon Circular) asks schools and judges to do is to engage in speculations about students' religious beliefs and intentions when it comes to clothing—and this is something that, if rigorously followed, would turn Statute 228 into a sweepingly authoritarian instrument, because it is questionable whether the public administration of a secular country—not to mention one where the neutrality principle seems to be so highly valued as in France—should be involved in this kind of conjecture. This seems particularly the case if one considers the potential for abuse of such a requirement, because, as one commentator aptly observed, “[between] a blond student wearing a bandana and a Middle Eastern one wearing the same bandana it is easy, much too easy, to anticipate which one will attract the attention of the school principal”.<sup>128</sup>

### 3.3.5. STATUTE 228 AND US LAW

Having analyzed the main interpretative features of Statute 228 it is now time to ask whether the new French legislation could be legally transplanted into American law. As mentioned earlier and despite the Supreme Court's silence on the matter, there are strong indications that the US legal system would declare the new French statute as unconstitutional. This section briefly looks at the three reasons why that is believed to be the case (3.3.5.1.) and concludes by suggesting that it is with reference to the treatment of cultural and non-religious signs (both of which seem to be, unlike religious signs, more protected in French than in American law) that the post-2004 divide between the two countries appears most clearly (3.3.5.2.).

#### 3.3.5.1. Three Likely Grounds of Unconstitutionality of Statute 228 under US Law

The first reason why the new French legislation would likely be held unconstitutional in America is that the Supreme Court would regard the student headscarf as a private form of religious expression which the state has no right to prohibit unless this piece of cloth creates substantial problems in terms of maintaining school order.<sup>129</sup> As we have seen in Part 1 of this thesis, the US legal system gives, through its First Amendment, maximum protection to the expression of religious and political messages, which are regarded as 'pure speech'. This is not only the result of the country's historical legacy but also seems to be firmly grounded in law, for although the First Amendment specifically refers to freedom of speech,<sup>130</sup> US courts have broadly constructed this constitutional provision as protecting also other forms of expressive conduct<sup>131</sup>—and the test in *Spence* is commonly used to determine whether a certain conduct constitutes speech.<sup>132</sup> Like in the case of the students wearing armbands, therefore, a Muslim girl wearing a headscarf would likely be regarded by US law as sending a specific message that is understood as such by the other students, with the result that her viewpoint would be considered “closely akin to pure speech”<sup>133</sup> and would fall under the protective constitutional regime of *Tinker*.

Secondly, and again unlike the French situation, there are indications that in America Church-State separation would not be thought violated when the Muslim headscarf is worn by a student, for the Establishment Clause tells what government can or cannot do but does not apply to the private speech of students. Consequently, when a free speech dispute arises within the school context, the first thing that a school official needs to ask is how the speech is being conveyed. If it is conveyed

<sup>128</sup> Dord, above at note 71, 1525.

<sup>129</sup> See in particular: “The record does not demonstrate any facts which might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities, and no disturbance or disorders on the school premises in fact occurred”. *Tinker v Des Moines Independent School District*, 393 US 503, 514 (1969).

<sup>130</sup> The First Amendment of the US Constitution provides that [c]ongress shall make no law...abridging the freedom of speech...”.

<sup>131</sup> *Spence v Washington*, 418 US 405, 409-410 (1974).

<sup>132</sup> To qualify as 'expressive' under this standard, the conduct must be such that (i) the actor “intend[s] to convey a particularized message” and (ii) the probability must be high “that the message would be understood by those who viewed it”. *Id.* 410-411.

<sup>133</sup> *Tinker* at 505.

through the preferential use of school property<sup>134</sup> or as a part of an official school activity, then it will most likely be taken as ‘school sponsored’ expression and it will be regulated “so long as the regulations are reasonably related to legitimate pedagogical concerns”.<sup>135</sup> But if the fact of the speech being performed at school is, like in the case of the Muslim veil, merely coincidental, then it will be regarded as “school tolerated expression” and will only be limited to the extent that it “materially and substantially interferes with requirements of appropriate discipline in the operation of the school”,<sup>136</sup> i.e., it will be protected by the considerably higher threshold fixed by *Tinker*. As the Supreme Court wrote:<sup>137</sup>

The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators’ ability to silence a student’s personal expression that happens to occur in school premises. The latter question concerns educators’ authority over school sponsored publications, theatrical productions and other expressive activities that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school.

Unlike in France, therefore, where every religious activity in the public space is seen as a potential threat to the country’s commitment to *laïcité* and is generally perceived with scepticism, in America the expression of a religious belief is prohibited only to the extent that the government is supporting or advancing that activity, something that the French legal system finds superfluous. “No sponsorship by the state is involved when students wear headscarves [in America]”, one author observed, “thus there is no violation of the law”.<sup>138</sup> The 2004 French legislation, as we have seen, takes an opposite approach and regards the very fact, for a student, of wearing a headscarf within school buildings as an automatic violation of the *laïcité* principle and explicitly prohibits it.

Thirdly and lastly, the French statute would most likely be struck down by the American Supreme Court because this piece of legislation intentionally and specifically targets religious signs to the exclusion of all others—and this, regardless of whether the Muslim veil is considered as religious speech or religious conduct.

This thesis has argued that the first case is more likely and that the veil should be put on a par with political speech and should thus be protected by the strict scrutiny standard of the First Amendment. This implies that, under the Free Speech Clause, a government regulation limiting certain messages purely on the basis of their content is highly suspicious in that it is regarded as a content-based restriction aimed at limiting a specific type of speech—and such restrictions are, under established Supreme Court precedents, presumptively unconstitutional. “Clearly, the prohibition of expression of one particular opinion...is not constitutionally permissible”,<sup>139</sup> the Supreme Court judges wrote in *Tinker*, while in *O’Brien* they sent very much the same message when they emphasized that “[a] government regulation is sufficiently justified if...the governmental interest is unrelated to the suppression of free expression”.<sup>140</sup> In *RAV*, finally, the Supreme Court explicitly spelt out this rule and confirmed that “content-based regulations are presumptively invalid”,<sup>141</sup> the only exceptions being those forms of expression which are traditionally considered of slight social value (such as, for example, obscene and defamatory speech).<sup>142</sup> Since the new French legislation merely prohibits

<sup>134</sup> Note that students can engage in religious speech on school property. It is the preferential use of such property—ie, allowing religious speech or meetings on terms better than those allowed to other kinds of speech—that makes the speech school-sponsored and triggers the Establishment Clause. See eg *Santa Fe Indep.Sch Dist v Doe*, 530 US 290 (2000); *Lee v Weisman*, 505 US 577 (1992); *Wallace v Jaffree*, 472 US 38 (1985); *School District v Schempp*, 374 US 203 (1963); *Engel v Vitale*, 370 US 421 (1962).

<sup>135</sup> *Kuhlmeier* 484 US, at 273.

<sup>136</sup> *Tinker* at 509.

<sup>137</sup> *Kuhlmeier* at 270-271.

<sup>138</sup> D H Davis, “Reacting to France’s Ban: Headscarves and Other Religious Attire in American Public Schools”, (2004) 46 *Journal of Church and State*, n.2, 221.

<sup>139</sup> *Tinker* at 511.

<sup>140</sup> *United States v O’Brien*, 391 US 167, 377 (1968).

<sup>141</sup> *RAV v City of St Paul*, 505 US 382 (1992).

<sup>142</sup> *Id.* 383-384. See also *Bethel School District v Fraser*, 478 US 675 (1986).

religious expression to the exclusion of all other, it would most likely be regarded by the Supreme Court as presumptively invalid on the basis that it imposes a content-based limitation of a constitutionally-protected and private message.

Yet it is interesting to note that even if the Muslim veil were accorded the lesser protection reserved for religious conduct rather than religious speech, the French legislation would still be unconstitutional under American law. The reason for this is that the Free Exercise Clause would still regard the singling out of religious behaviour for prohibition that does not apply to analogous secular behaviour as burdening religion pursuant to a law that is not neutral and generally applicable (ex *Smith*) and is thus unconstitutional. No matter whether the Islamic headscarf is seen as religious speech or conduct by American judges, therefore, the result is the same—and the statute would not pass judicial scrutiny.

### 3.3.5.2. Cultural and Other Personal Signs

These theoretical differences between the French and American system find a practical application in relation to cultural and other non-religious insignia. As we have seen above, post-2004 French law explicitly and intentionally targets religious signs but allows cultural ones to the extent that no religious message is either objectively or subjectively conveyed by the student. Leaving aside the application problems that such a regime involves, it is interesting to note that the position of US law on the matter is almost exactly the reverse: religious (and political) signs benefit from the highest possible protection of the First Amendment, with the result that they can only be prohibited if a substantial interference with the school order is proved,<sup>143</sup> while cultural signs (and, for some judges, personal ones relating to student's appearances such as hairstyle, tattoos, etc.) are usually protected by the much lower standard of the Fourteenth Amendment, with the result that they often succumb if the school simply proves the reasonableness of the attacked regulation or the institution's legitimate interest in it.

Keeping in mind what has been said above about cultural signs in post-2004 France, one good example of the contrast between the French and American approaches is provided by the *Isaacs* case. There, it will be recalled, a school had established a 'no-hat-in-class' rule on the ground that the institution wished to create and maintain "a safe, respectful and focused educational environment"<sup>144</sup> and had thus asked an African-American girl to take off her Jamaican headgear (which her mother, aunt and grandmother also wore as a well-established cultural tradition). The school policy explicitly made exceptions for "religious headgear such as yarmulkes and Muslim hijabs, including headscarves".<sup>145</sup> Although, by the admission of the same school, the girl's head wrap had caused no disturbance,<sup>146</sup> the judge sided with the institution and made it clear that if *Shermia's* message had been religious, she would have won the case.<sup>147</sup>

While this is already a substantial departure from the post-2004 French legal regime, this judge, in addition, applying the *O'Brien* test, held that *Shermia's* cultural head wrap had been legitimately prohibited because (i) the school regulation was found to be within the government's constitutional power; (ii) such regulation furthered an important or substantial government interest; (iii) such interest was unrelated to the suppression of free expression; and (iv) the incidental restriction of rights was no greater than necessary to further that interest. "There are alternative ways for *Shermia* to express her message within the school's dress code, including wearing traditional African dress and

<sup>143</sup> *Tinker* at 511.

<sup>144</sup> *Isaacs v Board of Education of Howard County*, 40 F.Supp.2d 335, 339 (1999).

<sup>145</sup> *Id.* 336.

<sup>146</sup> "It is also true that the head wrap did not cause any notable disturbances in the few hours that *Shermia* wore it at school. Therefore, the school system's concerns, as they apply to *Shermia's* head wrap, are all 'potential problems' rather than documented ones". *Id.* 339-340.

<sup>147</sup> "[I]t does not automatically run afoul of the Constitution for the defendants to protect religious speech more strictly than non-religious speech", the *Isaacs* judge held in 1999, "[because] the Supreme Court recognized that where a Fourteenth Amendment liberty interest is combined with First Amendment free exercise concerns, the rights are fundamental and merit strict scrutiny, while infringements of the Fourteenth Amendment interest alone are subject only to rational basis scrutiny". See *Id.* 338.

jewellery to class”,<sup>148</sup> the court wrote in a sentence that obliquely reminds us of the intolerance of some French judgments against the Muslim veil. As for the absence of disruption, it was ignored on the basis that this was not a Tinker case and the threshold was thus considerably lower: “None contends that a hat or a head wrap would be constantly disruptive in class”, the judge concluded. “However, the relative likelihood of disruption is great enough to justify the school system’s decision to bar hats from the class”.<sup>149</sup>

Very much the same message was conveyed in 2005 by *Wilkins*, another case that could have never been decided in post-2004 France. In *Wilkins*, a school dress code required students to wear uniforms but explicitly made an exception for “sincerely held religious beliefs”,<sup>150</sup> thereby allowing headscarves and other religious insignia. To an atheist mother who sued on the basis that such a policy unfairly discriminated in favour of religion, the New Jersey Appeals Court simply responded that “[t]he religious exemption is rationally drawn to further the legitimate interest in accommodating students’ free exercise of religion without undermining the pedagogical goals of the school uniform policy”.<sup>151</sup> As a result, religious signs were admitted while non-religious ones had to succumb to the school uniform requirement.

The paramount importance given by American law to religious expression—and the contrast between this situation and the post-2004 French legal regime—noticeably emerges also with reference to the US decisions concerning student hair-length, hair-style, clothing, beards and other personal non-religious symbols such as earrings, tattoos, etc. seen in Chapter 1.3. As mentioned there, American Courts are divided on whether clothes and personal signs represent ‘speech’ under the First Amendment rather than conduct,<sup>152</sup> yet for our comparative purposes it suffices to say that a good number of US judges have been rather strict towards student symbolism and those challenges levied against school dress codes—unless a sincerely held religious belief was behind the pupils’ requests.<sup>153</sup> As a consequence, Beatles’-style hair worn for personal and ‘anti-establishment’ reasons was consistently prohibited during the 1970s on the ground that it might have caused “commotion, trouble, distraction and a disturbance in the school”<sup>154</sup> and that “the interest of the state in maintaining an effective and efficient school system [was] of paramount importance”.<sup>155</sup> Beards, moustaches and long hair were equally banned in a number of cases on the ground that “extreme hairstyle may, and probably would, be a disruptive influence on a student body which does not wear them”.<sup>156</sup> Furthermore, a number of courts found that hair length was not speech at all, because, as one judge wrote, “at most hairstyle is an indefinite and vague expression of personality, individuality or of an idiosyncrasy much like the colour or style of clothes or deportment”,<sup>157</sup> with the result that, another court held, “the students are not purporting to say anything”.<sup>158</sup>

<sup>148</sup> Id. 338.

<sup>149</sup> Id. 340.

<sup>150</sup> *Wilkins v Penns Grove-Carneys School District*, 123 Fed.Appx 493, 2005 WL 348363 (3rd Cir.N.J.).

<sup>151</sup> Id. at II.

<sup>152</sup> In US law, the Muslim veil could be regarded as both a form of religious expression and of religious practice. In the latter case, it would be a practice with limited protection under the Free Exercise Clause as interpreted in *Smith*. In the former, it would be a form of expression with strong protection under the Free Speech Clause. For details on the speech/conduct distinction, see Section 1.3.1.

<sup>153</sup> The First, Fourth, Seventh and Eighth Circuits seem more receptive to the idea that a student may have a constitutional right to select a particular hair style or hair length, although without agreement as to the source of such a right. The various opinions have been based upon the First Amendment freedom of speech clause, the Ninth Amendment rights retained by the people, the equal protection clause of the Fourteenth Amendment, and the due process guarantees of the Fifth and Fourteenth Amendments. See, e.g. *Richards v Thurston* (C. A. 1, 1970), 424 F. 2d 1281; *Dwen v Barry*, 483 F 2d 1126 (2<sup>nd</sup> Circ 1973); *Massie v Henry* (C. A. 4, 1972), 455 F. 2d 779; *Long v Zopp* (C. A. 4, 1973), 476 F. 2d 180; *Mick v Sullivan* (C. A. 4, 1973), 476 F. 2d 973; *Holsapple v Woods* (C. A. 7, 1974), 500 F. 2d 49, certiorari denied, 419 U.S. 901; *Arnold v Carpenter* (C. A. 7, 1972), 459 F. 2d 939; *Crews v Cloncs* (C. A. 7, 1970), 432 F. 2d 1259; *Breen v Kahl* (C. A. 7, 1969), 419 F. 2d 1034, certiorari denied, 398 U.S. 937; *Torvik v Decorah Community Schools* (C. A. 8, 1972), 453 F. 2d 779; *Bishop v Colaw* (C. A. 8, 1971), 450 F. 2d 1069.

<sup>154</sup> *Ferrel v Dallas Independent School District*, 261 F.Supp 545 (1966); 392 F.2d 697 (1969); 393 US 856 (1968).

<sup>155</sup> Id. 703.

<sup>156</sup> *Woods v Alamo Heights Independent School District* (1970), 308 F.Supp.551, 552.

<sup>157</sup> See G. Graham, “Flaunting the Freak Flag: *Karr v Schmidt* and the Great Hair Debate in American High Schools 1965-1975”, (2004) *Journal of American History*, September Issue, 522.

<sup>158</sup> *King v Saddleback Junior College District*, 445 F.2d 932 (1971), 937.

As for the disruption criterion, a number of courts dismissed it entirely, adopting a position that is not substantially different from the ‘immediate recognition’ standard lying behind Statute 228: “[D]isruption, of course, if related, would be significant”, one judge observed, “[but] its absence does not establish that long-haired males cannot be a distracting influence which would interfere with the educative process the same as any extreme appearance, dress or deportment”.<sup>159</sup> These, it should be noted, are not judicial relicts of a bygone age, for as late as in 1997 the Texas Supreme Court was uncompromisingly and confidently holding that “constitutional challenges to hair-length policies adopted by elementary and secondary-school students “do not manifest such an affront to [a student’s] constitutional rights as to merit our attention”.<sup>160</sup> Yet American judges seem considerably more sympathetic when religion is at stake. “Appellants have not established that the uniform policy has interfered with their right to free exercise of religion”,<sup>161</sup> one court wrote in 1979,<sup>162</sup> while in 1993 a judge declared a school dress code invalid because it did not permit an exception in favour of a group of American Indians who regarded their hair as ‘sacred’ and refused to cut it.<sup>163</sup>

While this already contrasts in some important ways with the post-2004 situation in France, it should be noted also that, under American law, sincerely-held religious beliefs might, contrary to cultural ones, justify school grooming exceptions for teachers—a circumstance that France finds unacceptable since the 2000 Conseil d’État Avis in Mlle Marteaux (2000).<sup>164</sup> An example of this situation emerged in 1992, when a Mississippi court held that a teacher’s aide had been rightly fired for wearing what she regarded as a cultural as well as religious hat on the ground that she had not properly conveyed the religious dimension of her headgear, implying that had she done so, her claim would have prevailed.<sup>165</sup>

### 3.3.6. STATUTE 228 AND FRENCH LAW

Despite the serious interpretative issues raised by the new legislation and regardless of the doubts surrounding its compatibility with the notion of *laïcité* developed by the pre-2004 Conseil d’État jurisprudence,<sup>166</sup> Statute 228 had from the very beginning little (if any) chance of being ruled unconstitutional for it was passed with such an overwhelming parliamentary majority that the internal mechanisms of constitutional review provided for by the French legal system were never activated.

The reason is that the Conseil d’État is the highest jurisdictional venue only as far as litigation between the French State and private parties is concerned and is thus just one of the country’s three high courts, the other two being the Court de Cassation (the final instance for cases between

<sup>159</sup> *Ibid.*

<sup>160</sup> *Bastrop v Toungate*, 958 S.W.2d 365, 368 (1997). The US Supreme Court seemed to implicitly uphold this position when it wrote, in *Tinker*, that “the problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style or deportment”<sup>160</sup> and refused to hear an appeal against a prominent student hair-length case. See *Ferrel v Dallas Independent School District*, 393 US 856 (1968).

<sup>161</sup> *Canady v Littlefield* at 7.

<sup>162</sup> Another court upheld the religious exception provided by a school uniform regulation and found it perfectly constitutional. See: “The uniform policy includes an ‘opt-out’ provision whereby parents and students with ‘bona-fide’ religious or philosophical objections to the wearing of a uniform can apply for an exemption to the Policy”. See *Rogers v Brockette*, 588 F.2d 1057 (1979).

<sup>163</sup> *Alabama v Coushatta Tribes of Texas v Big Sandy Independent School District*, 817 F.Supp.1319, 1334 (1993). See also, *ibidem*: “Unlike the plaintiff in *Karr*”, the judge wrote, “plaintiffs in the present action have alleged that the Board’s hair regulation infringes upon several fundamental rights, including the free exercise of religion, and undermines the right of parents and the Tribe to direct the religious upbringing of their children”.

<sup>164</sup> Conseil d’État, Avis n.217017, Mlle Marteaux, 3 May 2000.

<sup>165</sup> “[T]he reasons she consistently provided had to do with cultural considerations”, the McGlothlin court wrote. “She did speak of religion as ‘a way of life’ but the way of life she described was...nothing more than expression of her African heritage”. This, the judge made clear, was not enough, because “[c]ulture....does not in the court’s opinion equate with religion”. See *McGlothlin v Jackson Municipal Separate Sch Dist*, 829 F Supp 853 (1992), 864.

<sup>166</sup> On this point, see Chapter 2.2.

individuals)<sup>167</sup> and the Conseil Constitutionnel (which is competent to declare a statute unconstitutional).<sup>168</sup> As a consequence, the formal prerogative of deciding whether Statute 228 complied with French constitutional law fell on the Conseil Constitutionnel, not on the Conseil d'État.<sup>169</sup> Yet unlike the latter, the former's jurisdiction is subject to two important limitations that, in the case of the new legislation, proved fatal to any constitutional challenge: (i) the Conseil Constitutionnel can only consider issues raised by a very restricted number of high ranking government officials (the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate and, since 1974,<sup>170</sup> sixty deputies or senators),<sup>171</sup> but not the general public;<sup>172</sup> and (ii) it can only do so while a bill is under debate or before a law has gone into effect, with the result that once the statute is operative, it can no longer be declared unconstitutional.<sup>173</sup> Because the French legislation on religious signs at school was introduced by Prime Minister Raffarin following a direct request by President Chirac; because both presidents of the Lower (Debré) and Upper (Poncelet) Houses belonged to Mr Chirac's party and supported the legislation; and because the statute was so popular that it would have proved impossible to find sixty MPs or senators willing to challenge it, the constitutionality of this piece of legislation was never questioned, and when a maverick MP raised, during the parliamentary debates, the possibility of the new law being referred to the Conseil Constitutionnel, a colleague pointedly asked: "On the basis of a request made by whom?"<sup>174</sup>

Moreover, even if the statute had been referred to the Conseil Constitutionnel, the composition of that body would have meant that a decision against the new statute would have been improbable anyway. Unlike the Conseil d'État, whose members are chosen on the basis of a rigorous national examination,<sup>175</sup> the Conseil Constitutionnel personnel is selected through a highly political procedure.<sup>176</sup> According to Article 56 of the Constitution, in addition to former Presidents of the Republic (who are members in their own right), this body is made up of nine people, three of whom are nominated by the Head of State, three by the President of the Lower House and three by the President of the Senate.<sup>177</sup> The

<sup>167</sup> See Title VIII of the 1958 Constitution. A recent analysis of the role and functions of the Court de Cassation within the French jurisdictional system can be found in J-F Weber, *La Court de Cassation* (Documentation Française, Paris, 2006). Interesting information, in English, is also available at [http://www.courdecassation.fr/court\\_of\\_9256.html](http://www.courdecassation.fr/court_of_9256.html) (at 10 May 2007).

<sup>168</sup> The powers and prerogatives of the Conseil Constitutionnel are described in articles 56 to 63 of the 1958 Constitution. An English version is available on the website of the Assemblée Nationale at <http://www.assemblee-nationale.fr/english/8ab.asp#TITLE%20VII> (at 11 March 2007).

<sup>169</sup> As it has been observed, "[i]n French law, neither judicial nor administrative courts are competent for constitutional review, because these courts are considered to be servants of the law. This is a traditional principle in French law, as was confirmed [in 2004]. There is only one exception: if a law is at odds with an international treaty, any court can declare that it is ultra vires and that administrations and citizens shall not abide by it". See E Tawil, "Constitutional Council, Constitution for Europe and Secularism", Colloque de Budapest, June 2005, unpublished manuscript kindly provided by the author. On the point, see also L Favoreu, «Jurisdiction Constitutionnelle» in O Duhamel & Y Mény (eds), *Dictionnaire Constitutionnel* (PUF, Paris, 1992).

<sup>170</sup> See for example A Stone Sweet, "Constitutional Dialogues: Protecting Human Rights in France, Germany, Italy and Spain", in S J Kenney (ed), *Constitutional Dialogues in Comparative Perspective* (Palgrave, London, 1999) 11.

<sup>171</sup> Article 61 of the 1958 Constitution reads: "...Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, or sixty deputies or sixty senators". (Official translation by the Translation Office of the Assemblée Nationale).

<sup>172</sup> A 1989 proposal by President François Mitterrand to extend the possibility of requiring the intervention of the Conseil Constitutionnel to individual citizens for alleged human rights violations was defeated by the Senate the following year. See A West, *The French Legal System* (Butterworths, London, 1998) 161.

<sup>173</sup> See Article 61 of the 1958 Constitution above. See also: F Mélin-Soucramanien, *Le Principe d'Égalité dans la Jurisprudence du Conseil Constitutionnel* (PUAM, Aix-Marseille, 1997); and O Dord, «Le Conseil Constitutionnel Face à la Constitution Européenne: Contrôle des Apparences ou Apparence de Contrôle?», *Actualité Juridique Droit Administratif (AJDA)*, 2005.

<sup>174</sup> Assemblée Nationale, *Laïcité: Le Débat à l'Assemblée Nationale. Séances Publiques du 3 au 10 Février 2004* (Documentation Française, Paris, 2004) 142.

<sup>175</sup> For an overview of the recruiting system, see the Conseil d'État website at [http://www.conseil-etat.fr/ce/organi/index\\_or\\_me01.shtml](http://www.conseil-etat.fr/ce/organi/index_or_me01.shtml) (at 10 April 2007).

<sup>176</sup> Interesting statistics on the Conseil's composition are available in A S Sweet, *The French Constitutional Council, Workshop on Appointments on Constitutional Courts*, Rome, May 28-29, 2003, available at [http://www.jeanmonnetprogram.org/JMC/rome\\_workshop/a.stone.pdf](http://www.jeanmonnetprogram.org/JMC/rome_workshop/a.stone.pdf) (at 20 March 2007).

<sup>177</sup> Article 56 of the 1958 Constitution reads: "The Constitutional Council shall consist of nine members, whose term of office shall be nine years and shall not be renewable. One third of the membership of the Constitutional Council shall be renewed every three years. Three of its members shall be appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate. In addition to the nine members provided for above, former

President of the Conseil Constitutionnel is also nominated by the Head of State and has a casting vote in case of a split decision. The considerable dependence of the Conseil Constitutionnel on executive appointment (in 2004, all but one of its members had been appointed by Mr Chirac) is currently the object of criticism in France<sup>178</sup> and the prospect of such a body striking down the new and extremely popular legislation was consequently remote.<sup>179</sup>

For different reasons, therefore, neither the Conseil d'État nor the Conseil Constitutionnel directly ruled on the constitutionality of Statute 228 and since EU law is hierarchically superior to—and prevails over—French statutes,<sup>180</sup> only the European Court of Human Rights is currently in a position to take an institutional stance against this piece of legislation and invite the French authorities to reconsider it. While the viability of this option will be assessed in the next section, it is nevertheless interesting to note that in 2004 both the Conseil d'État and the Conseil Constitutionnel did intervene, albeit indirectly so, on the matter of Statute 228. These interventions are worth mentioning here, for they are emblematic of—and can provide important clues about—the radical change of direction experienced by the French legal system in 2004.

### 3.3.6.1. Statute 228 and the Conseil d'État

As mentioned in Section 2.3.8., in October 2004 the Conseil d'État was asked to make a decision on a challenge brought against the Fillon Circular, i.e., the administrative act issued by Education Minister François Fillon in order to interpret Statute 228. Unsurprisingly, in *Union Française pour la Cohésion Nationale*<sup>181</sup> the Conseil did not directly rule on the constitutionality of the new legislation—as the Commissaire du Gouvernement reminded the administrative judges, “[you cannot] verify the conformity of the law to the Constitution”<sup>182</sup>—but concluded that the Fillon Circular “gave details as to the interpretation of this statute” and “did not exceed its competences nor misinterpreted the sense or span of the 2004 law”.<sup>183</sup> Yet the judges went further than that and seemed to suggest that not only the circular but also the statute complied with EU law—again, not so unforeseen a conclusion if one considers that by mentioning veils, kippas and large crosses, the Circular appears far more inclusive (and thus legally braver) than the Statute. The judges wrote:<sup>184</sup>

The dispositions of the circular misinterpret neither the provisions of Article 9 of the European Convention for Human Rights nor those of Article 18 of the International Covenant on Civil and Political Rights to the extent that the prohibition created by this law and recalled by the circular does not

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Presidents of the Republic shall be ex officio life members of the Constitutional Council. The President shall be appointed by the President of the Republic. He shall have a casting vote in the event of a tie”. See <http://www.assemblee-nationale.fr/english/8ab.asp#TITLE%20VII> (at 20 March 2007).

<sup>178</sup> See for example *Le Monde*, *Dix 'Sages' En Première Ligne*, 1 April 2006.

<sup>179</sup> See for example *Le Monde*, *Accusée de Partialité, l'Institution Subit un Eternel Procès*, 1 April 2006. See also, more generally, N Lenoir, “The Constitutional Council and the European Convention of Human Rights: The French Paradox”, in S Hadley & B Gordon Slynn, *Judicial Review in International Perspective* (Kluwer, The Hague, 2000) 145-176.

<sup>180</sup> Article 55 of the 1958 Constitution provides that “[t]he treaties or agreements regularly ratified or approved possess, from their publication, an authority which is superior to that of ordinary statutes...” On 20 October 1989 the Conseil d'État acknowledged for the first time the superiority of international conventions over internal statutes, even posterior ones, in its *Nicolo* case and, in its *Avis* of 27 November 1989 on the veil, the high judges confirmed this position when they referred to the European Convention of Human Rights as having a value which is superior to that of ordinary laws. See E Tawil, «Strasbourg Vu du Palais Royal: Invocation et Réception de la Convention Européenne des Droits de l'Homme dans le Traitement Juridique du Voile Islamique en France», *Colloque de Budapest*, June 2005, unpublished manuscript provided by the author.

<sup>181</sup> For a commentary on this decision, see B Chélini-Pont & E Tawil, «Note Sous Conseil d'État, *Union Française pour la Cohésion Nationale*», 8 Octobre 2004, n.269077, in *Annuaire Droit et Religions* 2005, above at note 28, 457-460.

<sup>182</sup> R Keller, «La Validité de la Circulaire sur le Port des Signes Religieux dans les Etablissements Scolaires Publiques: Conclusions Sous Conseil d'État», 8 Octobre 2004, *Union Française pour la Cohésion Nationale*, in *Revue Française de Droit Administratif (RFDA)*, Sept-Oct. 2004, 978. See also: “The administrative judge is incompetent when it comes to pronouncing the conformity to the...Constitution of an administrative act that only reiterates rules posed by the legislator”. Conseil d'État, *Communiqué de Presse: Circulaire d'Application de la Loi sur le Port des Signes Religieux à l'École: Le Conseil d'État Rejette une Requête Présentée au Nom du Respect des Croyances*, 8 Octobre 2004. This is an application of the theory of the so-called *loi écran*, which was first established in Conseil d'État, *Arrighi*, 6 November 1936 (Rec. CE 1936, p.966).

<sup>183</sup> Conseil d'État, *Union Française pour la Cohésion Nationale*, 8 Octobre 2004, n.269077.

<sup>184</sup> *Ibid.* (emphasis added).



exceedingly limit freedom of thought, conscience and religion in respect to the principle of *laïcité* in public schools.

Yet if, according to the Conseil d'État, Mr Fillon simply clarified the contents of the 2004 statute when he mentioned veils, kippas and large crosses as examples of signs the wearing of which conspicuously manifest a religious allegiance, the judges also seemed to suggest that the new legislation was compatible with EU law as well as with the *laïcité* principle contained in the French Constitution—a position that appears at odds with fifteen years of its established jurisprudence. The Conseil d'État, however, seemed to be directly influenced by the ruling of the European Court of Human Rights in *Şahin v Turkey* decided three months earlier.<sup>185</sup> This impression was conveyed by the official press release announcing the decision on the Fillon Circular:<sup>186</sup>

The Conseil d'État has reached the conclusion that the limitation of freedom of thought, conscience and religion brought about by this Statute [228] and mentioned by the circular is proportionate to the general interests' objective of ensuring the respect of the *laïcité* principle in public schools. In so deciding, the ruling of the Conseil d'État is in line with the most recent jurisprudence of the European Court on Human Rights which gives States a large margin of appreciation to define, in line with their national traditions, the most appropriate measures in order to reconcile freedom of religion and *laïcité*.

Interestingly, this position dovetails perfectly with the written advice given by the Commissaire du Gouvernement in *Union Française*. There, Mr Keller hinted that the new legislation is not only compatible with the European case law but also respectful of the *laïcité* principle enshrined in French law:<sup>187</sup>

While the European case law cannot be directly transposed into the French context, it nevertheless sends a message...that seems rather favourable to the French legislation. As regards the jurisprudence of the European Court of Human Rights, it seems to me that the prohibition against wearing the Islamic veil, the kippa or a cross of manifestly excessive dimension can be justified by the real and increasingly frequent difficulties which the wearing of such signs cause in public schools. This prohibition is compatible with the legitimate objective of maintaining public order and with the achievement of the educational mission. I also believe that, given these objectives, such a measure does not create an excessive limitation to religious freedom.

Although the Conseil d'État did not expressly say so, therefore, it appears to have given a favourable opinion on the conformity of the new legislation not only in relation to EU law but also with the *laïcité* principle enshrined in the French Constitution. This development is surprising insofar as it contrasts from the Conseil d'État's previous jurisprudence, but it was not completely unexpected. As noted earlier, in January 2004 the Conseil had provided the French government, in its *Avis Préable*,<sup>188</sup> with a favourable opinion on the new legislation and thus was hardly in a position to take back at the jurisdictional level ('contentieux') what it had granted in its advisory capacity ('consultatif').<sup>189</sup>

### 3.3.6.2. Statute 228 and the Conseil Constitutionnel

Only a month after the Conseil d'État decision in *Union Française pour la Cohesion Nationale*, the Conseil Constitutionnel also indirectly commented on Statute 228. In its Decision 505/2004,<sup>190</sup> the Court was

<sup>185</sup> European Court of Human Rights, *Leyla Şahin v Turkey*, Application n.44774/98, 29 June 2004.

<sup>186</sup> Conseil d'État, *Communiqué de Presse*, above at note 180.

<sup>187</sup> Keller, above at note 180, 979.

<sup>188</sup> See V Fabre-Alibert, «La Loi Française du 15 Mars 2004 Encadrant, En Application du Principe de *Laïcité*, Le Port des Signes ou de Tenues Manifestant une Appartenance Religieuse dans les Écoles, les Collèges et les Lycées Publics: Vers Un Pacte Social Laïque?», (2004) *Revue Trimestrielle des Droits de l'Homme*, n.59, 587. See also *Le Monde*, *Le Conseil d'État Juge le Projet de Loi sur la *Laïcité* Conforme à la Constitution*, 27 January 2004.

<sup>189</sup> As one author underlined, "[t]he Conseil d'État thus asked [the government] for a prohibition based not on religious signs but on the conditions in which they are worn, [for] it seems that the [high judges] believed that, in this case, there would have been no contradiction between the European Convention of Human Rights and the legislative bill". Tawil, above at note 178, 6.

<sup>190</sup> Conseil Constitutionnel, *Décision n. 2004-505 DC du 19 Novembre 2004*. For a comment, see for example C Gauthier, «Note Sous Court Européenne des Droits de l'Homme», 29 June 2004, *Leila Şahin*, *JCPA* 2004, n.1831.

called to rule on the constitutionality of Article II-70 (corresponding to Article 9 of the European Convention) of the proposed Constitution pour l'Europe (a document later rejected by a French popular referendum). Decision 505/2004 reads:<sup>191</sup>

Article 9 of the Convention has been constantly applied by the European Court of Human Rights—and most recently by the above mentioned [*Şahin*] decision—alongside the constitutional tradition of each Member state. [Consequently] the Court has taken into account the importance of the principle of *laïcité* as acknowledged by the constitutional traditions of several nations and leaves Member states a large margin of appreciation in order to define the most appropriate measures [on the subject], in line with their national traditions and with the purpose of reconciling freedom of religion and *laïcité*.

Given the extent and importance of this margin of appreciation, the Conseil also seemed to conclude that the stricter version of *laïcité* adopted by French authorities in 2004 is indeed respectful of the French Constitution as well as of the European Convention of Human Rights. In what appeared to many as an oblique reference to (and endorsement of) Statute 228, the Conseil commented that:<sup>192</sup>

the formula contained in Article 1 of the French Constitution according to which 'France is a *laïque* Republic'...prohibits anyone from using his or her religious beliefs in order to circumvent the common rules that inform the relationships between the [French] State and the individuals.

Two points need to be mentioned about this decision. First, this was the only case where the Conseil Constitutionnel actually mentioned a judgment of the European Court for Human Rights<sup>193</sup>—and it is significant that the case was the headscarf ruling in *Şahin v Turkey*. Second, the wording of Decision 505 suggests that the Conseil Constitutionnel agreed with the *Şahin* case and, more controversially, the Court seemed to regard it as the decision interpreting Article 9 of the European Convention on Human Rights—a position that led some commentators to conclude that, like the post-2004 Conseil d'État, the Conseil Constitutionnel viewed Statute 228 as constitutional as well as in accordance with EU law.<sup>194</sup>

### 3.3.6.3. Conclusion on Statute 228 and French Law

Fifteen years after the first Conseil d'État Avis on the veil, what has changed, one may ask, in the attitude of the French supreme courts (and especially the judges sitting at Palais Royal) towards the headscarf? Certainly not the (formal) refusal of the Conseil d'État to assess the constitutionality of statutes, for such a rejection has been confirmed also in the case *Syndicat Lutte Pénitentiaire*.<sup>195</sup> Nor, it should be noted, the relevance given by France's highest courts to European and international treaties, for these appear in the 'vistas' of both the 1989 Avis and the 2004 judgment (although it is remarkable how the same legal instruments ultimately led the high judges to embrace two very different, if not opposite, notions of *laïcité*).

What appears to have changed is, first, the 2005 decision of the European Court of Human Rights in *Şahin*, a ruling that has been interpreted by the Conseil d'État and Conseil Constitutionnel as confirming the compatibility of Statute 228 with EU law. The second thing that has changed is the jurisprudence of the Conseil d'État on circulars, for while in 1995 the administrative judges refused to decide on the legality of the Bayrou Circular on the ground that it "did not directly apply to students",<sup>196</sup> after the

<sup>191</sup> Id. 18.

<sup>192</sup> Ibid.

<sup>193</sup> See for example B Chélini-Pont B. & Tawil, E. «Note Sous Conseil Constitutionnel, Décision n.2004-505 du 19 Novembre 2004», in *Annuaire Droit et Religions* 2005, above at note 28, 473-475.

<sup>194</sup> As it has been observed, "[b]y mentioning the *Şahin* decision and by defining the principle of *laïcité* as it did, what the Constitutional Council wanted most was to convey the message that, in the eyes of its members, Statute 228 on religious signs at school is perfectly in accordance not only with the French Constitution but also with the case law of the Strasbourg Court". Chélini-Pont & Tawil, above at note 189, 475.

<sup>195</sup> Conseil d'État, *Syndicat Lutte Pénitentiaire*, 28 December 2001, n.214675.

<sup>196</sup> Conseil d'État, *Association Un Sysiphe*, 10 July 1995, *Actualité Juridique Droit Administratif (AJDA)*, 1995, 644.

Duvernès case (2002)<sup>197</sup> and the abandonment of the previous jurisprudence in *Notre-Dame du Kreisker*, the Conseil d'État claims exactly such a competence (or "recours pour excès de pouvoir").<sup>198</sup> And lastly and most importantly, what appears to have changed is the political and social landscape of France, something that is graphically illustrated by the parliamentary history of Statute 228 and the popular consensus in the country. According to the post-2004 Conseil d'État, it is this new situation that justifies a novel reading of the relationship between laïcité and religious freedom—and Statute 228 is regarded as a legitimate reading of that relationship and the public mood.

Yet rather than settling the matter, the positions adopted by the Conseil d'État and Conseil Constitutionnel raise two difficult questions. First, is the definition of laïcité they refer to really in line with French law, and, in particular, how does it fit with the Conseil d'État's pre-2004 position, according to which laïcité does not exclude, but on the contrary implies, freedom of religion, neutrality and pluralism?<sup>199</sup> And secondly, is the interpretation of EU law espoused by these two courts accurate? While the former question involves a fundamental issue that is considered elsewhere in this thesis, the second is less elusive and, given the importance of EU law within the French context, is dealt with below.

### 3.3.7. STATUTE 228 AND EUROPEAN LAW

In October 2003, giving evidence before the Stasi Commission, the Vice-President of the European Court of Human Rights, the Frenchman Jean-Paul Costa, said: "If statute [228] were submitted to our Court, it would be found to be in accordance with the French model of laïcité and thus with the European Convention of Human Rights"<sup>200</sup> and the Court would have "no problem with it at all".<sup>201</sup> In the veil-obsessed France of 2003, Vice-President's Costa's highly-publicized (yet unpublished)<sup>202</sup> testimony was soon accorded an authority that one author likened to that of the Delphic Oracle.<sup>203</sup> When, two months after this interview, Mr Stasi delivered to President Chirac the Commission's Report in favour of the new legislation, he partly based his legal arguments upon Mr Costa's testimony.<sup>204</sup> And when, four months later, the French Parliament passed Statute 228 by an overwhelming majority, MPs likewise heavily relied on Mr Costa's assurance that a European challenge against it would be unsuccessful.<sup>205</sup> "Some colleagues have even brandished the ire of the European Court of Human Rights", one prominent politician declared, "but they have been proven wrong by its Vice-President, whom we have interviewed. He has been extremely clear: all these

<sup>197</sup> Conseil d'État, *Duvernès*, 18 December 2002, n. 233618. For interesting comments on this decision see: *Grands Arrêts de la Jurisprudence Administrative*, Dalloz, 14th ed, n.118; *JCPA* 2003, p.1064, note J. Moreau; *Actualité Juridique Droit Administratif (AJDA)*, 2003, p.487, chr. F. Donnat and D. Cassas; *Revue Française Droit Administratif (RFDA)*, 2003, p.274, concl. P. Fombeur.

<sup>198</sup> As a consequence, the lawsuit against the Fillon Circular was only rejected by the Conseil d'État after acknowledging that such a document was indeed a replication of Statute 228, a replication which was deemed compatible with both EU and international law.

<sup>199</sup> See Conseil d'État, *Rapport Public 2004: Un Siècle de Laïcité* (Documentation Française, Paris, 2004) esp. 263-265.

<sup>200</sup> Agence France Press (AFP), *La Court Européenne des Droits de l'Homme Ne Verrait 'Aucun Problème' À Une Loi En France*, 19 October 2003.

<sup>201</sup> *Ibid.*

<sup>202</sup> Unlike the interviews of the Parliamentary Mission on Laïcité, those of the Stasi Commission have not been published and one has thus to rely on newspaper sources. According to the Stasi Report, Mr Costa was interviewed on 17 October 2006. Stasi, above at note 14, 160 ('Auditions Publiques').

<sup>203</sup> My Interview with Professor René Rémond, 29 September 2005.

<sup>204</sup> Stasi, above at note 14, esp. 45-50. "His words have been pivotal", one of the Commission's members confirmed, "because by declaring the new statute in line with European law, Mr Costa lifted a major obstacle". See My Interview with René Rémond, 29 September 2005.

<sup>205</sup> See for example the following interventions: "I add that I am not at all convinced by the arguments according to which there would be a contradiction between [this statute and] the European Declaration of Human Rights, for I clearly remember the words pronounced last autumn by Mr Jean-Paul Costa...who said that States have full latitude when it comes to arrange their relationships with religions to the extent that this is prescribed by law". M David, in *Débats*, above at note 4, 147. "Even the Vice-President of the European Court told us that the important thing is to make a law". J Glavany, in *Débats*, above at note 4, 287.

questions concerning the legal regime between state and religions...are of national competence and the Court thus takes into account the national legislation. All the rest is fallacious".<sup>206</sup>

But is this really the case? Mr Costa's remarks raise a number of questions: to what extent does his estimation coincide with that of a 17-member strong Court? How could he be so sure, given the uncertainties that always accompany legal challenges (especially at the European level and particularly when the subject is the controversial Statute 228)? And was it appropriate for him to publicly state his position, given his close association with an institution that could in the future rule on this issue? These questions are also interesting because (i) they highlight the strong, albeit often downplayed, connection between Statute 228 and European law; and (ii) if one is to judge by the most recent judicial developments coming from Strasbourg, Mr Costa might very well be right and the critics of Statute 228 might not find much comfort in the position of the European Court, for when it comes to accommodating the Muslim headscarf, one cannot help noticing a number of similarities between post-2004 French law and the jurisprudence of the Strasbourg Court. Indeed, the latter appears in a certain sense even less charitable than the pre-2004 position of the Conseil d'État.

The Court has given two judgments relating to the headscarf. The first, *Dahlab v Switzerland* (2001)<sup>207</sup> involved a Swiss primary school teacher who converted to Islam and challenged the institution's decision to prohibit the veil. Like the Swiss tribunals, the European Court ruled that the matter was "manifestly ill-founded"<sup>208</sup> and that the complaint did not deserve to proceed to the merits phase. The second case, *Şahin v Turkey* (2004),<sup>209</sup> concerned a fifth year medical student at Istanbul University who challenged the Vice-Chancellor's circular instructing lecturers and staff to refuse access to university grounds for those "students whose heads are covered (who wear the Islamic headscarf) and students with beards".<sup>210</sup> Contrary to *Dahlab*, the Court found *Şahin* admissible but rejected it on its merits both at first instance (*Şahin I*)<sup>211</sup> and in the Grand Chamber (*Şahin II*).<sup>212</sup>

As mentioned, there is a strong connection between these judgments and Statute 228—both in terms of factual background and underlying 'spirit'. The *Dahlab* decision (2001) was construed in 2003 France not only as an endorsement of the Conseil d'État decision in *Mlle Marteaux* (2000) but also as an indication that the European Court somehow 'sided' with the proposed Bill on religious signs at school.<sup>213</sup> As for *Şahin*, it was examined by the Court at the very time when France was dealing with the headscarf controversy, it had long been awaited by the Conseil d'État (which expressly referred to it in its *Rapport Public 2004*)<sup>214</sup> and, once delivered, it was interpreted by French politicians and the public alike as an explicit endorsement of Statute 228.<sup>215</sup> It is interesting to note that the attraction was mutual, for the European Court in *Şahin* explicitly mentioned what was to become Statute 228<sup>216</sup>

<sup>206</sup> J-P Brard, in *Débats*, above at note 4, 282.

<sup>207</sup> *Dahlab v Switzerland* (2001) V Eur Court HR 449 ('*Dahlab*').

<sup>208</sup> *Dahlab* at 456-7.

<sup>209</sup> *Şahin v Turkey*, Appl.n.44774/98, 29 June 2004 ('*Şahin I*'). *Şahin v Turkey*, Appl. n. 44774/98, 10 November 2005 ('*Şahin II*').

<sup>210</sup> *Şahin II*, 16.

<sup>211</sup> *Şahin v Turkey*, Application n. 44774/98 (Eur Court HR, June 29, 2004) ('*Şahin I*').

<sup>212</sup> *Şahin v Turkey*, Application n. 44774/98 (Eur Court HR, November 10, 2005) ('*Şahin II*').

<sup>213</sup> See for example Tawil, above at note 178, 3. As an author observed, "...the French government, in drafting the new law against the wearing of religious symbols in public schools, perceives the foregoing European court's verdict as supporting its proposal to prohibit the headscarf". W Shadid & P S Van Koningsveld, "Muslim Dress in Europe: Debates on the Headscarf", (2005) 16 *Journal of Islamic Studies*, n.1, 41.

<sup>214</sup> "It is difficult to determine whether this decision [Karaduman, 3 May 1993] is transposable to the French context. A case *Şahin v Turkey* concerning the wearing of the veil and beard at university by some students, yet to be decided, will perhaps make it possible to clarify the position of the Court on this matter". Conseil d'État, *Un Siècle de Laïcité*, above at note 197, 365.

<sup>215</sup> See for example Tawil, above at note 178, 5. See also, *ibid*: "The conventionality of Statute 2004-228...prohibiting the wearing of ostensible religious signs is certain" (Flauss). But see also, *ibid*: "Any attempt to transplant [*Şahin*] into the French situation...would be bold to the extent that the [Court's] decision is circumscribed to the Turkish context" (Sudre).

<sup>216</sup> In *Şahin I*, § 54-55, the European Court seems to divide its comparative law analysis into a 'France versus other countries' dichotomy. "54. In France, where secularism is regarded as one of the cornerstones of republican values, the question of the Islamic headscarf in State schools has given rise to a very lively debate. After the Commission on Secularism had reported to the President of the Republic with its opinion, the National Assembly approved a bill on 10 February 2004 regulating, pursuant to the principle of secularism, the wearing of signs or dress manifesting a religious affiliation in State primary and secondary schools. As regards universities, the Commission on Secularism considered that precedence should be given to the

as well as the “very lively debate”<sup>217</sup> that the headscarf controversy was giving rise to in France. The correlation between the French and European contexts is all the stronger if one considers that Vice-President Costa—a known supporter, especially after his public interview before the Stasi Commission, of the French legislation—directly participated in the final judgment of *Şahin II*.<sup>218</sup>

The similarities between these two European Court judgments and the French ‘revolution’ of 2004 appear too strong to be coincidental, and while the two Strasbourg decisions vary in form and content, they do seem to share the following traits: (i) a negative perception of the Muslim headscarf as conveying a message of sexism and sexual inequality; (ii) a proclivity to regard this sign as automatically (*Şahin*) or potentially (*Dahlab*) proselytic and to concentrate on it alone rather than on the wearer’s behaviour; (iii) a view of the Islamic veil as a political emblem threatening secularism and the abandonment in practice (but not in theory) of public order as a limit to religious freedom. As the reader will appreciate, these are also, *mutatis mutandis*, the characteristics of the French 2004 ‘revolution’ and it is thus important to consider them separately (although briefly)<sup>219</sup> here.

### 3.3.7.1. ‘Sexist’ Nature of Muslim Headscarf: Veiled Women as ‘Victims’

“The Court has frequently emphasised...that the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed...”<sup>220</sup> This thoughtful message—which was included in the *Şahin II*<sup>221</sup> case and which the Strasbourg judges had been sending for some time<sup>222</sup>—seemed a promising way for the European Court to approach the veil issue, particularly since it dovetailed perfectly with the refusal, analyzed in the previous sections, by the US Supreme Court and the pre-2004 Conseil d’État to engage in interpretations of religious symbols. So it is surprising that in *Dahlab*, *Şahin I* and *Şahin II* the Court seemed to do precisely what it insisted the States must not do: assess the legitimacy and inner value of the religious practice of veiling.

For assessment there certainly was and the European Court—like France in 2003—sent a number of clear messages opposing the Muslim headscarf. In *Dahlab*, for example, the Strasbourg judges started by uncritically accepting the Swiss Tribunal’s vocabulary and dubbed the Muslim headscarf “a powerful religious symbol”,<sup>223</sup> where “powerful” may be interpreted as conveying the French idea of ‘conspicuousness’ or ‘ostentatiousness’ and thus seemed to possess a negative connotation.<sup>224</sup> This emerged more clearly as the decision unfolded: again citing the Swiss Tribunal—and while stressing, as we have seen in Section 3.2.7.1., the importance of the circumstances of the case—the Court wrote

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students’ right to express their religious, political and philosophical convictions. However, it stated in its report that such expression should not lead to transgressions of the rules on the functioning of universities”. See also C Skach, “International Decisions: Comment to *Şahin v Turkey*”, (2006) 100 *American Journal of International Law*, 188. A more detailed comparative analysis is made by the Grand Chamber in *Sahin II*, §55 to §65.

<sup>217</sup> M Lombard, «La Court Européenne des Droits de l’Homme et le Port de Signes Religieux», *Droit Administratif* n.10, October 2004, Comm.146.

<sup>218</sup> The seventeen-member Grand Chamber in *Sahin II* was composed of Judges Wildhaber (CH), Rozakis (GR), Costa (F), Zupančič (SLO), Türmen (TUR), Tulkens (B), Birsan (ROM), Jungwiert (CZ), Butkevych (UKR), Vajić (CRO), Ugrekhelidze (GEO), Mularoni (SM), Borrego Borrego (ESP), Fura-Sandström (SWE), Gyulumyan (ARM), Myjer (NL) and Jebens (NOR). Judges Rozakis and Vajić expressed a joint concurring opinion, while Judge Tulkens expressed a dissenting opinion.

<sup>219</sup> The following is not (and should not be taken as) a comprehensive examination of the headscarf issue under the ECHR, for my analysis will be limited to those aspects which I regard as most relevant with reference to the corresponding situation in France. For an interesting and extensive commentary on the two European decisions, see C Evans, “The ‘Islamic Headscarf’ in the European Court of Human Rights”, (2006) 7 *Melbourne Journal of International Law* 52.

<sup>220</sup> *Şahin II*, §107.

<sup>221</sup> *Şahin II*, §107.

<sup>222</sup> See for example *Manoussakis and Others v. Greece*, 26 September 1996, Reports 1996-IV, p. 1365, § 47; *Hassan and Tchaouch v. Bulgaria* [GC], no. 30985/96, § 78, ECHR 2000-XI; *Refah Partisi and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II.

<sup>223</sup> *Dahlab* (A). “What is at issue, therefore, is the wearing of a powerful religious symbol by a teacher at a State school in the performance of her professional duties”.

<sup>224</sup> The Swiss Tribunal had written that “[t]he wearing of a headscarf and loose-fitting clothes...may even be said to constitute a ‘powerful’ religious symbol, that is to say, a sign that is immediately visible to others and provides a clear indication that the person concerned belongs to a particular religion”. See *Dahlab* (A).

that “it is difficult to reconcile the wearing of a [Muslim] headscarf with the principle of gender equality, which is a fundamental value of our society...”<sup>225</sup> Yet the Strasburg judges did more than quote approvingly national judges and directly engaged in precisely the kind of assessment that the US Supreme Court—and the pre-2004 Conseil d’État—would find unacceptable.<sup>226</sup>

The wearing of a headscarf appears<sup>227</sup> to be imposed<sup>228</sup> on women by a precept which is laid down in the Koran and which...is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.

This passage can hardly be said to represent an isolated faux pas, for the European judges reproduced it verbatim in *Şahin I*<sup>229</sup> and *Şahin II*.<sup>230</sup> In these cases, moreover, the Court went to great lengths to defend the principle of sexual equality and explicitly suggested that the Muslim headscarf contradicted it: “[T]he advancement of equality of the sexes is today a major goal in the member States of the Council of Europe”,<sup>231</sup> the judges wrote, and “[g]ender equality [is] recognized by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States ...”.<sup>232</sup> As a consequence, they concluded in a passage that was also repeated in *Şahin II*.<sup>233</sup>

[i]t is understandable in such a context where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women, are being taught and applied in practice, that the relevant authorities would consider that it ran counter to the furtherance of such values to accept the wearing of religious insignia, including as in the present case, that women students cover their heads with a headscarf while on university premises.

It is interesting to note that the attachment of this sexual inequality message to the Muslim veil was conveyed by a male-dominated Court (12 male judges against 5 females, one of whom dissented) which accepted the (stereotypical) assertions of gender inequality made by the (male-dominated) Government of Turkey, while at the same time dismissing the two female plaintiffs’ (unchallenged) evidence according to which they wore the headscarf entirely voluntarily rather than because of their subordination to men.<sup>234</sup> Furthermore, in *Dahlab*, *Şahin I* and *Şahin II* the plaintiffs seemed to epitomize the reverse of what the widespread (and now regrettably official) typecast of Muslim women suggests: both were well-educated, professional women (a teacher and a medical student) who were prepared to litigate at the national and international level in order to protect their religious dress and who did not give any impression (let alone was there any evidence) of being subordinated to men.<sup>235</sup>

Since all the proof pointed otherwise, the Court’s negative evaluation can only be based—not unlike France in 2003—on the idea that the mere fact of wearing the veil, independently of the women’s intentions or beliefs, was enough to demonstrate their acceptance and perpetuation of

<sup>225</sup> *Dahlab (A)*.

<sup>226</sup> *Dahlab (“The Law, I”)*.

<sup>227</sup> As one author underlined, this “appears” surprising for “[a]re appearances—or at least the perception of the veil among the population—more important than the reality? In this case, the mere fact of being misunderstood would negatively impact on this religious sign”. N Chauvin, «Le Port du Foulard Islamique Par une Enseignante: A Propos de la Décision de la Court Européenne des Droits de l’Homme du 15 Février 2001, Mme Dahlab c/ Suisse», *Revue Française de Droit Administratif (RFDA)*, n.3, May-June 2003, note 10, 538.

<sup>228</sup> “The Court gives here an interpretation of a religious sign the meaning of which is notoriously contested. Are we sure that the Koran ‘imposes’ the veil, or does it merely recommend its use?” Id. 539.

<sup>229</sup> *Şahin I*, §98.

<sup>230</sup> *Şahin II*, §111.

<sup>231</sup> *Dahlab (“The Law, II”)*.

<sup>232</sup> *Şahin I*, §107.

<sup>233</sup> *Şahin II*, §116. See *Şahin I*, §110.

<sup>234</sup> *Şahin II*, Tulkens Dissenting §12.

<sup>235</sup> As it was observed, “there was nothing in evidence to suggest that either woman considered herself less than equal to men or that she wished to perpetuate gender inequality in society more generally”. Evans, above at note 217, 66.

gender inequality<sup>236</sup>—and this is particularly revealing when it is borne in mind that “the Court had never before admitted the possibility of...assessing religious signs as such”.<sup>237</sup> Yet as its failure to identify the multiplicity of meanings that can be given to the Muslim headscarf shows, it is doubtful whether the European Court should engage in—and whether it is the most competent body to carry out<sup>238</sup>—this kind of evaluation. As the only dissenting judge (female) in *Şahin II* emphasized, “[i]t is not the Court’s role to make an appraisal of this type—in this instance a unilateral and negative one—of a religion or religious practice, just as it is not its role to determine in a general and abstract way the signification of wearing the headscarf or to impose its viewpoint on the applicant”.<sup>239</sup> The reader will certainly recognize, in the Belgian judge’s words, the approach adopted by the US courts and the pre-2004 Conseil d’État.

### 3.3.7.2. Proselytising Nature of Muslim Headscarf: Veiled Women as ‘Threats’ to Religious Freedom

Sexual inequality was not the only negative meaning attached by the European Court to the Islamic headscarf, for the Strasbourg judges also seemed to equate this religious symbol with proselytism, and once again regardless of the wearer’s behaviour. Dahlab is a good example of this proclivity. As the judges wrote:<sup>240</sup>

in displaying a powerful religious attribute on the school premises—indeed, in the classroom—the appellant may have interfered with the religious beliefs of her pupils, other pupils at the school and the pupils’ parents...Schools would be in danger of becoming places of religious conflict if teachers were allowed to manifest their religious beliefs through their conduct and, in particular, their clothing.

The use of the hypothetical form is interesting in itself. The whole Dahlab decision is structured on that basis, something that one author explained by the lack of evidence before the Court,<sup>241</sup> as there was no proof of such interference at all. Not only had Ms Dahlab’s professionalism never been questioned during the proceedings, it soon emerged that she had adopted an exceptionally cautious approach and had not even told her students that she was a Muslim (she justified her veil with aesthetic reasons).<sup>242</sup> Quoting the Swiss Tribunal, the Court acknowledged that “she is not accused of proselytising or even of talking to her pupils about her beliefs”.<sup>243</sup> However, this did not prevent the European judges from concluding that the very presence of the veil was problematic in that it could potentially create a situation of pressure upon the children. Nor did it stop the court from speculating on the facts of the case:<sup>244</sup>

Admittedly, there have been no complaints from parents or pupils to date. But that does not mean that students have not been affected [by this situation]. Some may well have decided not to complain so as not to aggravate the situation, in the hope that the authorities will react autonomously.

As for Ms Dahlab’s silence in class about her veil, the Court approvingly quoted the Swiss Tribunal, concluding that what this woman had successfully managed to do for four years—i.e., teaching

<sup>236</sup> These European judgments thus perpetuated the “assumption that veil equals ignorance and oppression [and] means that young Muslim women have to invest a considerable amount of energy to establish themselves as thinking, rational, literate students/individuals, both in their classrooms and outside”. H Hoodfar, “The Veil in Their Minds and on Our Heads: Veiling Practices and Muslim Women”, in L Lowe & D Llyod (eds) *The Politics of Culture in the Shadow of Capital* (Duke University Press, Durham, 1997) 249.

<sup>237</sup> Chauvin, above at note 225, 538.

<sup>238</sup> As one author underlined, “the audacity of the Court is here double: firstly, because to assess the meaning of a religious symbol in general is audacious in itself; and secondly, because to interpret the meaning attached by this specific applicant to the veil is equally audacious and even objectionable”. Chauvin, above at note 225, 538.

<sup>239</sup> *Şahin II*, Tulkens Dissenting § 12.

<sup>240</sup> Dahlab (4a) (emphasis added).

<sup>241</sup> “This wording is a roundabout way of saying that there was no evidence whatsoever presented to the Court of any harmful or proselytising effect beyond the mere assertion of the Government that the proselytising effect existed”. Evans, above at note 217, 63.

<sup>242</sup> Dahlab (4a).

<sup>243</sup> Dahlab (4a).

<sup>244</sup> Dahlab (4a) (emphasis added).

without attaching any importance to the veil and without arousing any negative response for it from the students—was simply impossible.<sup>245</sup>

The appellant can scarcely avoid the questions which her pupils have not missed the opportunity to ask. It would seem somewhat awkward for her to reply by citing aesthetic considerations or sensitivity to the cold—the approach she claims to have adopted to date, according to the file—because the children will realise that she is evading the issue. It is therefore difficult for her to reply without stating her beliefs.

Yet this seems precisely what she had managed to do—until the (prejudiced) grown-ups intervened.

While the tender age of the pupils certainly played a role in Dahlab<sup>246</sup> and might be a perfectly legitimate factor to consider, surprisingly in the very different context of a university student the approach of the European Court did not vary significantly. In both Şahin I and II the Court extensively quoted Dahlab<sup>247</sup> and reached the conclusion that “there must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it”.<sup>248</sup>

Yet again there was no tangible evidence that Ms Şahin used the headscarf in a “conspicuous or aggressive”<sup>249</sup> manner or to “exert pressure, to provoke a reaction, to proselytize or to spread propaganda”.<sup>250</sup> As the dissenting judge observed, “it has been neither suggested nor demonstrated that there was any disruption in teaching or in everyday life at the University, or any disorderly conduct, as a result of the applicant’s wearing the headscarf [and] no disciplinary proceedings were taken against her”.<sup>251</sup> The Şahin conclusion seems even stranger if one considers that Jewish students were allowed to wear their skullcap and Christian students the crucifix.<sup>252</sup>

It should be pointed out that in Şahin the judges gave significant weight to the Turkish context. “The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts”.<sup>253</sup> Yet it seems doubtful whether a different result would have been reached had a similar case arisen from another country (such as France). For the Court indicated in Şahin that the margin of appreciation accorded to national states in matters of religion is especially large when it comes to religious clothing.<sup>254</sup>

Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance. This will notably be the case when it comes to regulating the

<sup>245</sup> Dahlab(4a).

<sup>246</sup> See for example: “The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant’s pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect...”. Dahlab, (“The Law”, 1).

<sup>247</sup> Şahin I, §98; Şahin II, §109-§111.

<sup>248</sup> Şahin I, §108.

<sup>249</sup> Skach, above at note 214, 192.

<sup>250</sup> Ibid.

<sup>251</sup> Şahin II, Tulkens Dissenting § 8. As another author concluded, “[w]ith her religious freedom on one side of the equation, there was, in effect, nothing on the other. There was, as it were...nothing tangible in the discussion against which Şahin’s religious freedom would be weighed or balanced”. Skach, above at note 214, 193.

<sup>252</sup> Şahin I, §88.

<sup>253</sup> Şahin I, §109.

<sup>254</sup> Şahin II, §109 (quotations omitted). The same point was expressed in Şahin I as follows: “Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance” (Şahin I, §101) ... “A margin of appreciation is particularly appropriate when it comes to the regulation by the Contracting States of the wearing of religious symbols in teaching institutions, since rules on the subject vary from one country to another depending on national traditions and there is no uniform European conception of the requirements of ‘the protection of the rights of others’ and of ‘public order’”. (Şahin I, §102).



wearing of religious symbols in educational institutions, especially...in view of the diversity of the approaches taken by national authorities on the issue.

According to some commentators, with these words the Court has given the green light to France's Statute 228.

While this goes beyond the scope of our analysis, the Court's inclination to see the veil as proselytic is problematic in light of its previous jurisprudence on religious expression. Well before *Şahin*, the European judges had accepted the idea that the simple fact of trying to convince someone of the truth of one's religion is not illegal but, on the contrary, a fully protected manifestation of religious freedom<sup>255</sup>—and that merely attempting to persuade others to change their faith is not prohibited either.<sup>256</sup> As Judge Pettiti noted in *Kokkinakis*, proselytism is actually “the main expression of freedom of religion” and “attempting to make converts is not in itself an attack on the freedom and beliefs of others or an infringement of their rights”.<sup>257</sup>

Even if we were to accept the proselytic character of the Muslim veil, therefore, it is possible to argue that a hypothetical attempt, active or passive, by Ms *Şahin* to convince her grown up female colleagues to adopt the veil would have been perfectly tolerable and indeed protected by European law. Granted, public order and the rights of others may limit such an activity, yet as it was observed in *Kokkinakis*, “in the sphere of freedom of expression the Court has never accepted that interference with the exercise of the right to freedom of expression can be justified by the fact that the ideas or views concerned are not shared by everyone and may even offend some people”.<sup>258</sup> While the European judges' (admirable) desire to protect vulnerable subjects<sup>259</sup> would prevent Ms *Dahlab* from inviting her young pupils to embrace Islam, therefore, it seems to me that Ms *Şahin* had every right (according to the Court's earlier jurisprudence) to encourage, either actively or passively, her grown-up colleagues to veil to the extent that her actions did not violate public order and did not negatively affect other peoples' rights.

### 3.3.7.3 'Political' Nature of the Headscarf: Veiled Women as 'Threats' to Secularism and Public Order

“The Islamic headscarf is no longer simply considered as a religious symbol but is increasingly perceived as a political symbol that has, in and of itself, negative implications for public order and individual freedom in a democratic society”.<sup>260</sup> So wrote one author commenting on the *Şahin* decision, and considering the approach adopted by the European Court on the veil, it is difficult to ignore the similarities between the message coming from Strasbourg and the one sent by France in the run up to Statute 228.

For the third and last stereotype attached to the Muslim headscarf by the European judges consists precisely in the fact of seeing it as a political as much as a religious sign—or, at least, of having assumed through the years a political significance which is quite independent of the wearer's intentions and which the Strasbourg judges seemed to equate, not unlike in 2003 France, with Islamic extremism and with a direct threat to secularism. Quoting the Swiss Tribunal, the *Dahlab* Court began by saying that<sup>261</sup>

[t]he wearing of a headscarf and loose-fitting clothes...indicates allegiance to a particular faith and a desire to behave in accordance with the precepts laid down by that faith. Such garments may even be said to constitute a 'powerful' religious symbol—that is to say, a sign that is immediately visible to others and provides a clear indication that the person concerned belongs to a particular religion.

<sup>255</sup> See in particular *Kokkinakis v Greece* (1993), 260 Eur Court HR (ser A) 6, 8; 17 EHRR 397, 399. See also in this sense C Evans, *Freedom of Religion Under the European Convention on Human Rights* (Oxford University Press, Oxford, 2001) 163.

<sup>256</sup> *Id.* 17 and 414.

<sup>257</sup> *Kokkinakis v Greece*, 260-A Eur Ct HR (ser A) at 23 (1993), partly concurring judgment.

<sup>258</sup> *Şahin II*, Tulkens Dissenting § 9.

<sup>259</sup> *Larissis v Greece* (1998) 1 Eur Court HR 362, 367-8, 381; 27 EHRR 329, 334-6, 351.

<sup>260</sup> *Skach*, above at note 214, 192.

<sup>261</sup> *Dahlab*, (a).

While this may sound an innocuous observation to make in the context of religious symbolism in general, the fact that it was specifically directed at Islam and the sexism and proselytism stereotypes previously attached to the veil by the Strasburg Court suggests otherwise. Indeed, one wonders whether a Christian cross (visible as it may be) or a Catholic nun's veil would be considered by the European judges so 'powerful' a sign—and so significant a threat to secularism—as the Islamic headscarf.

Be that as it may, the *Şahin* Court went much further than simply quoting national tribunals and explicitly acknowledged—but, as we have seen, never actually demonstrated<sup>262</sup>—the 'political' nature of the veil and the fact that it represents an obstacle to secularism, even if worn by a university student (as opposed to the Dahlab teacher) who never supported religious fundamentalism but on the contrary endorsed, despite being a devout Muslim, the separation of Church and State.<sup>263</sup> In the Court's own words,<sup>264</sup>

Imposing limitations on freedom in this sphere may be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims [the protection of the rights and freedoms of others and the maintenance of public order], especially since...this religious symbol has taken on political significance in Turkey in recent years.

As for the fact of regarding secularism as a value in itself—and of being ready to sacrifice individual rights on that altar—the Court did not leave much room for interpretation.<sup>265</sup>

It is the principle of secularism...which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.

While it should be kept in mind that *Şahin* did not involve, as the Court implied here, a general prohibition of 'religious attire' but rather a ban against the Muslim veil only, it is interesting to note that the *Şahin* conclusion compares unfavourably with a judgment on freedom of expression decided by the European Court in 2003. In *Gunduz v Turkey*,<sup>266</sup> the action brought by Turkish authorities against an extremist Muslim cleric for openly attacking secularism, for using offensive names to identify babies born out of wedlock and for advocating the establishment of sharia over secular law was dismissed by the European judges on the ground that deciding otherwise would have violated his free expression rights. As a consequence, the intolerant message of a militant Islamist who did cause public order concerns was regarded as worthy of protection, while the peaceful rights of religious expression of Ms *Şahin*—who never advocated the overthrow of Turkish secularism and merely wore a veil out of private devotion—were sacrificed on the altar of secularism and other peoples' rights.<sup>267</sup>

It should also be noted that the fact of having officially interpreted the Muslim veil as sexist, proselytic and politically dangerous—regardless of the wearer's behaviour or intention—has one fundamental consequence when it comes to the protection offered by the European Court: the abandonment—in practice, if not in theory—of the public order criterion as the most important limit to religious freedom. Or rather, as it has been observed, the adoption of the French position according

<sup>262</sup> As one author observed, "the problem is that the Turkish government does not really appear to have proved that the wearing of the veil at university causes a public order problem, except for the visual distaste expressed by other students and the suspected pressure exercised by fundamentalist groups". B Chélini-Pont, «Note Sous Leyla Şahin c. Turquie», in *Annuaire Droit et Religions*, above at note 28, 360.

<sup>263</sup> *Şahin* I, §85-6.

<sup>264</sup> *Şahin* I, §108.

<sup>265</sup> *Şahin* II, §116.

<sup>266</sup> *Gunduz v Turkey* (2003) XI Eur Ct HR 259, 262-6; 41 EHRR 59, 61-5.

<sup>267</sup> Substantially the same can be said for the Court's dismissal of Dahlab. There, the European judges' observation that "...religious harmony ultimately remains fragile in spite of everything and the appellant's attitude is likely to provoke reactions, or even conflict, which are to be avoided" (Dahlab (4cc) seems even more surprising when compared with their decision in *Gunduz v Turkey*.

to which the Muslim veil violates public order automatically, without the need to prove that this is actually the case in practice.<sup>268</sup> For it is obvious that if the Islamic veil is regarded—in and of itself—as the expression of sexual inequality, proselytism and fundamentalism rather than as a simple religious sign, then this symbol's prohibition on public order grounds may become acceptable. As one French author favourable to such an approach wrote, “[e]ven if we admitted that the veil is a religious sign or that it can be regarded as such, it would still be possible to legally prohibit it on the ground of the frequent public order problems it causes at school, [for] in this case there would be a limitation of religious freedom and freedom of expression for a legitimate reason”.<sup>269</sup> While this may sound a long (and legally dubious) stretch to the extent that neither in *Dahlab* nor *Şahin* had the veil been shown to raise public order issues, it is in many respects the approach adopted in France in 2004 and it does not seem very far removed from the one embraced by the European Court in its two most recent veil judgments.

This similarity is particularly interesting if one considers that the European system has often been criticised for being unduly deferential when it comes to assessing the states' claims of public order violations. While this again goes beyond the scope of this thesis, the European Commission has held, for example, that national authorities were justified in using the public order criterion to restrain someone whose actions had merely caused “public indignation”<sup>270</sup>—a significantly lower test than the one set out in the Convention. As an author aptly observed, “the reasons given [by States and often accepted by the Court] for limiting manifestations of religion or belief have tended to focus more on administrative convenience and broad concepts of public order”<sup>271</sup> than anything else (what another commentator described as “public interest limitations”)<sup>272</sup> and this seems to create de facto a considerably lower threshold than the one originally intended by the ECHR framers.<sup>273</sup> In this context, a prohibition on the veil such as the one laid down by Statute 228 may well be found by the Court to be a legitimate restriction of Muslim women's rights—especially if one considers the breadth of the margin of appreciation granted by European judges to national states on religious matters.<sup>274</sup>

#### 3.3.7.4. Conclusion: (a) Three Messages from Strasburg

It has been the purpose of the above discussion to suggest that a hypothetical European challenge to Statute 228 would probably, if based on Article 9 ECHR, be unsuccessful. It is certainly true, as we have already highlighted, that the tender age of the *Dahlab* children and the Turkish focus in *Şahin* played an important role in the judges' final decisions and, in this respect, it is difficult to predict how the Court would rule were it to be confronted with a case set in very different circumstances and geographical context. Furthermore, particularly as regards *Şahin*, it should be noted that while the Turkish *laïcité* seems to share a number of important similarities with the French one—most notably that they are the only two ‘European’ countries whose constitutions include a prominent reference to secularism—the French is legally characterized (as we have seen in Chapter 2.2.) by a more tolerant, less prohibitionist and certainly less confrontational approach to the issue of Church-State separation than Turkey's. And yet, despite all this, *Dahlab* and *Şahin* do appear to send a number of signals that we need to interpret if we are to assess the likelihood of a hypothetical complaint against Statute 228 to the European Court.

<sup>268</sup> This would directly clash with the pre-2004 position of the French Conseil d'État, with the US Supreme Court stance in *Tinker* and, moreover and as Judge Tulkens wrote in her dissenting opinion in *Şahin II*, with the European Court's own case law. For as she observed, “[o]nly indisputable facts and reasons whose legitimacy is beyond doubt—not mere worries or fears—are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention. Moreover, where there has been interference with a fundamental right, the Court's case-law clearly establishes that mere affirmations do not suffice: they must be supported by concrete examples (*Smith and Grady v the United Kingdom*, judgment of 27 September 1999, § 89). Such examples do not appear to have been forthcoming in the present case”. *Şahin II*, Tulkens Dissenting § 5.

<sup>269</sup> M Barbier, « Laïcité: Questions à Propos d'Une Loi Centenaire », in *Débats*, n.127, nov-déc 2003, 169.

<sup>270</sup> *Håkansson v Sweden*, App. 9820/82, 5 Eur HR Rep. 297 (1983).

<sup>271</sup> Evans, above at note 253, 206.

<sup>272</sup> M Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press, Cambridge, 1997) 324.

<sup>273</sup> *Ibid.*

<sup>274</sup> See Evans, above at note 253, 167 & 200-203.

First, the Strasburg Court appeared to attach to the Muslim headscarf a series of negative stereotypes—sexual inequality, proselytism and religious fundamentalism—which are based neither on an in-depth theoretical discussion of this complex and multi-faceted symbol<sup>275</sup> (the inequality charge) nor on the circumstances of the cases at issue (the proselytism and fundamentalism accusations). On the contrary, the Court accepted them uncritically. In this respect, it is difficult to ignore the contradiction between the Court's typecasting and patronising image of a veiled woman who must necessarily be an oppressed individual as well as a victim of sexual discrimination, on the one hand, and that of a dangerous activist (if not fundamentalist) whose public display of the headscarf violates public order in and of itself because it threatens secularism and other peoples' rights, on the other. As the reader will have noticed, this is also the incongruous image that prevailed in France before the passage of the legislation on religious signs at school—and is, according to its legislative history, the portrait upon which Statute 228 is based.

Secondly, both Dahlab and Şahin suggest the adoption, by the European judges, of a heightened level of alertness when it comes to controlling and limiting those religious practices which are regarded as contrary to the values 'shared' by Europe (and which, after 9/11, are symptomatic also of the 'clash of civilizations'). In this respect it is interesting to note that the European Court tried to convey—one is tempted to say impose—a number of principles (sexual equality, secularism, respect for others) which it obviously regards as foundational for the European project and which it seems to consider worthy of protection even at the cost of sacrificing individual freedoms. While this is perfectly acceptable to the extent that it is the very task of a court to apply and interpret the underlying principles of a legal system (in this case, the ECHR) in the way it believes most appropriate, the problem is that in the headscarf matter (i) the Court merely presumed—and never actually demonstrated—the connection between the Islamic practice of veiling and the violation of those foundational principles;<sup>276</sup> and (ii) the imposition of a number of pre-determined values—commendable as these may be in terms of public policy—will likely clash with other constitutional principles (in this case, freedom of religion, equal treatment and non-discrimination) which are, according to the European Convention, equally fundamental, as well as critical for a person's freedom of conscience and right to be left alone.

When the Court justifies the prohibition to wear a symbol on the basis of the fact that such a symbol is incompatible with the principles expressed by the Convention, in other words, fundamental questions of individual freedom arise, particularly when such an incompatibility has never been examined (let alone proved) but is merely presumed through a series of stereotypes and subjective assumptions. As Chauvin wrote, "it is precisely because the Court believes that the veil goes against sexual equality and is proselytic that the prohibition of this sign is judged proportional and admissible"<sup>277</sup>—yet if one is to extend this approach to its logical consequence, the wearing of a religious sign would only be permitted to the extent that it is thought by the Court to comply with the principles identified by the Strasburg judges as worthy of being 'worshipped'—and this would be a significant violation of precisely that freedom of conscience which the European judges claim to be protecting.<sup>278</sup>

Thirdly, the Court seemed to imply that while a Muslim headscarf worn by an individual does benefit from the religious freedom provisions of the ECHR, it must ultimately succumb to secularism and other people's rights and is consequently not very high in the hierarchy of values established by

<sup>275</sup> For a discussion of the multiple meanings of the veil see Shadid & Koningsveld, above at note 211, 36-7.

<sup>276</sup> Ultimately, therefore, the 'originality' of the Court's approach seems to lie in its failure to prove that the veil worn by the appellant created so serious a breach of public order as to warrant an infringement of a private religious right. For as the dissenting judge wrote in Şahin, "what is, in effect, the connection between the ban [on the veil] and sexual equality? ... As the German Constitutional Court noted, wearing the headscarf has no single meaning; it is a practice that is engaged in for a variety of reasons". Şahin II, dissent, § 11.

<sup>277</sup> Chauvin, above at note 225, 537.

<sup>278</sup> "The Court thus incites national judges, but also and perhaps especially states, to engage into assessments of religions, because the contrariety to the Convention becomes a sufficient element upon which to ban the wearing of that sign. The French administrative judge will thus be invited to control this assessment. In the case of the headscarf, the assessment has already been made and it is difficult to see how a state or a national judge would in the future be able to express a different evaluation [of this religious symbol] from the one provided by the Court". Chauvin, above at note 225, 541.

European law. One of the reasons why this conclusion was reached is that the Strasburg judges seemed to misinterpret the meaning of the Muslim veil. Yet as an author wrote, “the headscarf is not a religious sign such as a cross or a David star but rather a religious practice [and] to prohibit it means to render it impossible, for Muslims, to conform to their faith—not only to prevent them from expressing that faith through a sign”.<sup>279</sup> The Court seemed however to trivialize such a distinction when it agreed that “the wearing of a headscarf and loose-fitting clothes remains an outward manifestation which, as such, is not part of the inviolable core of freedom of religion”.<sup>280</sup>

This approach contrasts in some fundamental ways with the one adopted (but later altered) by the French Conseil d'État, according to which “[t]o force a Muslim woman to take off her headscarf, which expresses her religious conscience and her free choice, is to be considered as the severest kind of oppression of women, which is contrary to the French values calling for respect for the dignity of women and their religious, human and personal freedom”.<sup>281</sup> While Palais Royal later changed its mind, it is worth noting that the Strasburg judges never went so far as their French colleagues in trying to understand the importance of the religious practice of veiling.

(b) Statute 228, European Law and International Law

These three messages from the Strasburg jurisprudence seem to suggest that a hypothetical challenge to Statute 228 is currently unlikely to succeed if it is based on religious expression grounds under Article 9 ECHR. Yet what about the anti-discrimination provision of Article 14 ECHR?<sup>282</sup> After all, echoing the US category of ‘suspect classifications’ in anti-discrimination cases,<sup>283</sup> this measure has long been interpreted as suggesting that to make a difference on the basis of certain characteristics (including religion)<sup>284</sup> is a priori suspect under the ECHR and calls for a particularly close scrutiny.<sup>285</sup> Indeed, as an author underlined, “[i]f a distinction is based on suspected grounds it is almost certain that it is not acceptable, notwithstanding any arguments that the respondent government might put forward to justify it”.<sup>286</sup> Because the new French legislation explicitly reserves a different treatment to religious vis-à-vis non religious signs, the question of the discrimination provision is certainly worth raising and would deserve far more space than the peripheral comments that follow.

The volatility of the European Court on the matter makes it difficult to venture a definitive answer, yet if one is to judge by the tenor of *Dahlab* and *Şahin* a future challenge against Statute 228 on the basis of Article 14 does not seem very likely to succeed either. What the European judges condoned in *Şahin*, in effect, was a measure that had been explicitly directed against the adherents of the Muslim faith—the Vice-Chancellor’s order targeted “students whose heads are covered (who wear the Islamic

<sup>279</sup> *Id.* 540. As pointed out in Section 1.3.1., in US law the Muslim veil could be regarded as both a form of religious expression and of religious practice. It might be, in other words, a practice with limited protection under the Free Exercise Clause as interpreted in *Smith* and also expression with protection under the Free Speech Clause. On this distinction, see Section 1.3.1.

<sup>280</sup> *Dahlab*, (4cc).

<sup>281</sup> W Shadid & P S Van Koningsveld, *Religious Freedom and the Position of Islam in Western Europe: Opportunities and Obstacles in the Acquisition of Equal Rights* (Kampen, Kok Pharos, 1995) 229.

<sup>282</sup> “Article 14—Prohibition of Discrimination. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

<sup>283</sup> See for details J Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (Kluwer, The Hague, 1998).

<sup>284</sup> See in particular *Eur Ct HR, Hoffmann v Austria*, Series A 255-C (1993), § 36.

<sup>285</sup> See in this respect V Milasiute, “Formal Criteria and Substantive Issues in Discrimination Cases”, (2005) 23 *Nordic Journal of Human Rights*, n.3, 275.

<sup>286</sup> J Gerards, “The Application of Article 14 ECHR by the European Court of Human Rights”, in J Niessen & I Chopin (eds), *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Martinus Nijhoff, Leiden & Boston, 2004) 37. As the UN Special Rapporteur on Religious Freedom wrote in 2006, in addition, “a prohibition of wearing religious symbols which is based on mere speculation or presumption rather than on demonstrable facts is regarded [by international human rights law] as a violation of the individual’s religious freedom”. United Nations Economic and Social Council, Civil and Political Rights, Including the Question of Religious Intolerance: Report of the Special Rapporteur on Freedom of Religion or Belief, Document n. E/CN.4/2006/5, 9 January 2006, § 53. See also Board of Experts of the International Religious Liberty Association, *Guiding Principles Regarding Student Rights to Wear or Display Religious Symbols*, Principles 6 and 7, 15 November 2005, available at <http://www.irla.org/documents/reports/symbols.html> (at 9 April 2007).

headscarf) and students with beards<sup>287</sup>—and which was conveyed through a legal tool (a simple ordinance) that can hardly be said to rank high in the hierarchy of the Turkish sources of law. This compares rather unfavourably with France’s Statute 228, which (i) does not formally differentiate between Muslim and non-Muslim signs but on the contrary covers the entirety of ‘conspicuous’ religious symbols; and (ii) comes in the form of a statute that undoubtedly benefits from the support of an overwhelming majority of French people.

Statute 228 is therefore unlikely to be regarded by the European Court as more discriminatory than the *Şahin* ordinance, particularly if one considers that this piece of legislation (i) was clothed in an ambiguous language that leaves open a number of interpretative possibilities,<sup>288</sup> and (ii) both the Conseil d’État (directly) and Conseil Constitutionnel (indirectly) have ruled in favour of it, which greatly increases the chances of the European Court regarding the *laïcité* principle as a legitimate basis for the prohibition of religious signs at school. Last but not least, since the European Convention prevails over ordinary French statutes but not over the French Constitution, in the event of a negative assessment of Statute 228 by the European judges, the French national authorities would still be in a position to argue that the new legislation is grounded on a constitutional value (*laïcité*) which is outside the competence of the Strasbourg Court—and given the degree and intensity of ‘institutional’ and popular support for the new legislation in France, such a possibility should not be discarded.

Yet what about substantive equality? As the previous chapters have shown, Statute 228 was adopted primarily (if not solely) with the Muslim headscarf in mind and it is thus possible to argue that while this legislation may not be discriminatory in its face, it is so in its application and consequences. In this respect, this statute’s future seems in many ways to depend on whether the European Court takes a formal or a substantive approach to discrimination, for if the judges were to consider the reasons and history behind the statute, then its French architects would be likely to worry—and for very good reasons—about the fate of their legislative ‘child’ far more than they have so far. This is particularly the case if one considers that, as the UN Special Rapporteur on Religious Freedom wrote in 2006, under well established principles of international law, “restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner”<sup>289</sup> and a purpose ceases to be legitimate when it is pursued in a discriminatory way. Interestingly, the same Rapporteur also established a number of indicators that may help identify an administrative measure as discriminatory under Article 14, among which are the following circumstances:<sup>290</sup>

The restriction is intended to or leads to either overt discrimination or camouflaged differentiation depending on the religion or belief involved;...No due account is taken of specific features of religions or beliefs, e.g. a religion which prescribes wearing religious dress seems to be more deeply affected by a wholesale ban than a different religion or belief which places no particular emphasis on the issue;...The application of the ban...reveals inconsistencies or biases vis-à-vis certain religious or other minorities or vulnerable groups.

As the reader will appreciate, and given that even some members of the Stasi Commission expressed concern about the discriminatory impact of the new legislation,<sup>291</sup> it is doubtful whether Statute 228 would pass these tests, particularly since the Rapporteur also suggested that a number of direct questions should be asked in order to assess whether the measure at issue possesses discriminatory effects:<sup>292</sup>

Is the chosen measure the least restrictive of the right or freedom [of religion]? Was the measure proportionate, i.e. balancing of the competing interests?...Does the outcome of the measure avoid stigmatizing any particular religious community?

<sup>287</sup> *Şahin* II, 16.

<sup>288</sup> “The compatibility between the new legislation and Article 9 ECHR, as interpreted by the Court, does not seem to raise fundamental problems due to the numerous precautions used by the French legislator in drafting the statute”. Fabre-Alibert, above at note 186, 603.

<sup>289</sup> United Nations Economic and Social Council, above at note 284, § 66.

<sup>290</sup> *Id.*, §55.

<sup>291</sup> As one Stasi Commission member declared to the press, “[w]e have legislated in a state of urgency and under the pressure of a fundamentalist approach to *laïcité*”. *Le Monde, Voile: Les Etats d’Âme de Quatre ‘Sages’ de la Commission Stasi*, 3 February 2004.

<sup>292</sup> *Id.*, 58.

Taking into account all this, therefore, there seem to be many good reasons to believe that the European judges will rule Statute 228 in accordance with the ECHR as there are compelling motives to regard this piece of legislation as problematic from the point of view of both the European Convention and international law. This statute's future will thus partly depend on the willingness and ability of the Strasburg Court to move from a formal acknowledgement of the principles of religious freedom (Article 9) and anti-discrimination (Article 14) to a more effective, substantial and indeed meaningful implementation of those principles.<sup>293</sup>



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<sup>293</sup> An interesting discussion of this matter can be found in the following contributions: L Wildhaber, "Protection Against Discrimination under the European Convention on Human Rights: A Second Class Guarantee?" (2002) 2 *Baltic Yearbook of International Law* 71-82; O M Arnadóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (Kluwer, The Hague, 2003) 10; J Schokkenbroek, "The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation" (1998) 19 *Human Rights Journal*, n.1, 20-23.





Conclusion

**Four Myths Surrounding Statute 228/2004**

### Four Myths Surrounding Statute 228/2004

In the heart of Paris's Latin Quarter, on the Sainte-Geneviève hill overlooking the city, lies one of the most emblematic buildings of the French State: the Pantheon. Originally commissioned by King Louis XV, it was completed in 1790 (one year after the Revolution) and is commonly regarded as the epitome of French republicanism. The inscription on the entrance ('Aux Grands Hommes La Patrie Reconnaissante')<sup>1</sup> and the edifice's architectural magnificence convey an aura of solemnity, a feeling reinforced by the fact that the building serves as burial place for France's national (read *laïques*)<sup>2</sup> 'heroes'. Voltaire, Rousseau, Marat, Hugo, Zola, Moulin and Jaurès are among those buried in the necropolis, the highest honour the French nation can bestow upon its citizens. Indoors, prominently displayed on a pedestal, is Marianne,<sup>3</sup> France's national emblem and the personification of Liberty, Reason and the "Triumph of the Republic".<sup>4</sup>

Yet the Pantheon is much more than a national icon. Despite its current importance as secular graveyard, the building's history and iconography unmistakably betray its religious origins. In 1744, when Louis XV fell ill, he vowed to replace the ruined church of Sainte-Geneviève with an edifice worthy of the patron saint of Paris. He duly placed the first stone, but the structure was only completed at the start of the French Revolution and the new Jacobin government, by no means fond of religious symbolism, imperiously ordered the Pantheon (literally, 'the temple of all the Gods') to be transformed into a secular mausoleum for the interment of great Frenchmen. "The Temple of Religion must become the Temple of the Nation",<sup>5</sup> the Parliament proclaimed in 1791, mirroring the fiercely anti-religious character of the revolutionaries.

This was only the first of a long list of authoritarian changes in the Pantheon's history. At the beginning of the 19<sup>th</sup> century, Napoleon added a religious dimension to its burial function, and in line with the Restoration sentiment, in 1816 the building was given back to the Catholic Church and served exclusively as a place of worship. This situation was short-lived, however, for in 1830 the Pantheon again 'became', by official decree, a *laïque* necropolis ('Le Temple de la Gloire'). Indicative of this turbulent past, the inscription dedicated to the nation's fathers first appeared on the entrance in 1791, disappeared in 1814 and reappeared in 1830—only to vanish again in 1851, when the building was once more transformed into a house of worship. This precarious condition came to a definite end in 1883, when the Sainte-Geneviève Basilica was permanently converted into the nation's sanctuary. Unsurprisingly, however, it still displays religiously-inspired mosaics, sculptures and pictures. A large Christian cross, visible from afar, majestically graces its top.<sup>6</sup>

<sup>1</sup> 'To its illustrious men, the Nation is grateful'.

<sup>2</sup> The only churchman buried in the Pantheon, the Abbé Grégoire, was a fervent believer in French Gallicanism and had a very turbulent relationship with the Catholic Church. See e.g. R Hermon-Belot, *L'Abbé Grégoire, la Politique et la Vérité* (Éditions du Seuil, Paris, 2000); A Goldstein Sepinwall, *The Abbé Grégoire and the French Revolution: The Making of Modern Universalism* (University of California Press, Berkeley, 2005).

<sup>3</sup> M Agulhon, *Marianne Into Battle: Republican Imagery and Symbolism in France, 1789–1880* (Cambridge University Press, Cambridge, 1981).

<sup>4</sup> "A secular necropolis that symbolically embodies the idea of République" is how one author defined this extraordinary building. See J P Willaime, *Europe et Religions: Les Enjeux du XXI<sup>e</sup> Siècle* (Fayard, Paris, 2004) 291. As it has been observed, "[i]n the Pantheon, Marianne, with her head covered, stands where an altar used to stand. On the cupola above her head lies a cross. French freedoms have thus symbolically replaced the Catholic religion. Like an amazon, Marianne possesses the attributes of her vanquished enemy". B Chélini-Pont & T J Gunn, *Dieu en France et Aux États-Unis* (Berg International, Paris, 2005) 9.

<sup>5</sup> « Que le temple de la religion devienne le temple de la patrie, que la tombe d'un grand homme devienne l'autel de la liberté ».

<sup>6</sup> Indeed, the Pantheon's shape is that of a Greek cross.

That France's 'Temple of Reason' was forcibly converted from a Catholic place of worship into a secular one<sup>7</sup> says a great deal about the ambiguities of the country's Church-State separation—and it has been one of the purposes of this thesis to highlight them. As one author observed, "Marianne, symbol of 'Frenchness' and *laïcité*, is [in the Pantheon] surrounded by Catholic references that are at the same time omnipresent and consciously denied".<sup>8</sup> Very much the same, I suggest, can be said for *laïcité* and French religious law, both of which have been strongly influenced by the historically prominent role of Catholicism. A comparison with the United States is in this respect illuminating, particularly with reference to Statute 228/2004, and since this piece of legislation is what separates the French and American legal systems on the matter of the Muslim veil, it is appropriate to briefly recall here some of this thesis's findings. I will do so by outlining four myths surrounding the new statute, for the rectification of these popular assumptions, I suggest, will help the reader clarify the degree of the Franco-American divide and will also confirm the validity of the three hypotheses (importance of history; role of Islamophobia; and pre-2004 legal affinities between France and America) outlined at the outset of this work.

FIRST MYTH: STATUTE 228 IS JUSTIFIABLE ON THE BASIS OF THE  
PUBLIC ORDER INCIDENTS CAUSED BY FRENCH VEILED SCHOOLGIRLS

As we have seen throughout this thesis, public order is one of the few cases where religious practices (including veiling) can be limited under both French, European Union and international law. The question of whether the preservation of school order required the French state to actively intervene and legislate against conspicuous religious symbols at school is therefore an important one to consider. It is also, as we shall see in a minute, an interesting indicator of how the French authorities approached the veil issue. While the legal implications of the public order matter have already been dealt with, it is important to recall here some factual circumstances concerning the 'troubles' caused by French veiled schoolgirls, for this will help expose the legend according to which France was, in the run up to the passage of Statute 228, confronted with a 'veil emergency'.

In 2004, French authorities based their legislative intervention upon two factual grounds: (i) that there was a significant increase in the number of veiled schoolgirls in the months and years preceding the passage of Statute 228; and (ii) that this increase was followed by a parallel intensification of veil incidents and resulting disruptions to school order. These two circumstances were mentioned across virtually the entire French political spectrum, but it is perhaps the Stasi Commission that conveyed them most effectively. Describing a sombre and alarming picture, the Commissioners wrote of an "explosive situation"<sup>9</sup> in French schools that resulted in "a permanent guerrilla war against *laïcité*".<sup>10</sup> "After having heard a number of testimonies", they concluded, "[we] believe that today what is at stake is ... public order"<sup>11</sup> and that "a strong signal needs to be sent by public authorities...".<sup>12</sup> Yet it should be noted that neither the Stasi Commission, nor the Parliamentary Mission nor any other institutional body that contributed to the national debate on the veil, grounded their analyses on quantitative data. This, I suggest, is extraordinary—for two reasons.

First, while Statute 228 was justified on the basis of an alleged increase in the number of veiled schoolgirls, the official statistics available at the time do not bear this out. Indeed, they showed the opposite and suggested a substantial reduction in such cases. From the initial figures of 10.000 to 15.000 girls wearing headscarves, the numbers drastically dropped to 2.000 in September 1994 and

<sup>7</sup> Marianne, the symbol of France, is the visual representation of freedom in opposition to the religious chains imposed by the Catholic Church. Her bronze sculpture overlooking the Place de la Nation in Paris symbolizes the Triumph of Liberty and her profile stands out on the official seal of the country, is engraved on national coins and appears on France's postage stamps. She represents the Nation and her ideals, and at the base of the Pantheon pedestal an inscription reads, "Vivre Libre Ou Mourir" ('Live free or die').

<sup>8</sup> Chélini-Pont & Gunn, above at note 4, 9.

<sup>9</sup> B Stasi, *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* (Documentation Française, Paris, 2004) 69 (hereinafter, 'Stasi Report').

<sup>10</sup> *Id.* 96.

<sup>11</sup> *Id.* 128.

<sup>12</sup> *Ibid.* "At school", they added, "the wearing of a conspicuous religious sign—large cross, kippa or veil—is already enough to disturb school peace". *Id.* 90.

600 in November that same year, apparently the effect of the distribution of the Bayrou Circular. Of these 600 veiled girls, only 52 were eventually excluded from school, while the other cases were successfully settled by mediation.<sup>13</sup> The statistics monitoring the more recent veil trends show a similar picture: in April 2003 Hanifa Chérifi, coordinator of the veil issue at the Education Ministry, acknowledged a reduction from 300 problematic cases to 150,<sup>14</sup> while later in the year French Interior Minister (and now President) Nicolas Sarkozy mentioned 20 cases of veiled students, 4 of whom were eventually expelled.<sup>15</sup> The French primary and secondary schooling system, it should be remembered, is made up of 10 million students,<sup>16</sup> so these numbers would suggest that the problem affected a numerically insignificant minority.<sup>17</sup>

Second, the Stasi Commission dismissed these and any other official statistics by saying that they tended to “minimize the difficulties encountered on the ground”.<sup>18</sup> As the Rapporteur Général Rémy Schwartz told me:<sup>19</sup>

[t]he official statistics were not reliable: where the [Education] Minister counted, from its Paris headquarters, a few Islamic veils, the Mayor of the town counted tens or even hundreds of them at the school gates. The heads of schools and the national education community did not transmit the data to the Ministry because they were afraid of a negative impact on the reputation of their schools. The politics of burying one’s head in the sand was preferred to the one of confronting reality.

This may very well have been the case, although it is curious that among the statistics the Stasi Commission dismissed out of hand were those of Hanifa Chérifi, a well-respected official from the Education Ministry who was also a Stasi member. Be that as it may, this situation of alleged numerical uncertainty renders the Commission’s refusal to engage in any quantitative enquiry more rather than less peculiar.<sup>20</sup> For one cannot ignore that in a country of sixty million people a highly visible and symbolic law was passed with great fanfare and huge media coverage in order to solve a problem that (i) either had not been properly analyzed or (ii) according to official statistics, involved less than 1% of the population. As one author pointed out, “91 percent of all teachers in France had never even encountered a student in a headscarf at their current school”,<sup>21</sup> let alone had any veil problem in class. Also, if school order was really under such an intense pressure due to the presence of veiled girls, it is difficult to understand why the Islamic headscarf would be allowed—as Statute 228 explicitly provides—in France’s private establishments.

Previous chapters have shown that, under both French, European human rights and international law, any restriction on religious freedom is justifiable only if it is demonstrated that such limitation is necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others. Ultimately, the peculiarity of the French authorities’ approach to the Muslim headscarf is not that they failed to prove this necessity but that they did not attempt to assess the extent of the threat in the first instance—a surprising and, in my opinion, fatal methodological flaw that undermines the ‘integrity’ of the reasons behind the adoption of Statute 228/2004.

<sup>13</sup> Chélini-Pont & Gunn, above at note 4, 49 (note 1).

<sup>14</sup> L’Humanité, Polémique: Sous le Voile Islamique, l’Oppression des Femmes, 30 April 2003.

<sup>15</sup> B Chélini-Pont, « Commentaire Sous Décret n.2003-607 du 3 Juillet 2003 et Loi n. 2004-228 du 15 Mars 2004 », in *Annuaire Droit et Religions* (PUAM, Aix-Marseille, 2005) 328. See also Chélini-Pont & Gunn, above at note 4, 60.

<sup>16</sup> H Salton, “France and the Veil: An Interview with Rémy Schwartz, Rapporteur Général of the Stasi Commission for the Application of the Laïcité Principle in France”, (2006) *New Zealand Postgraduate Law e-Journal*, n.3, 6. See also *Id.* 14.

<sup>17</sup> See also D McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing, Oxford, 2006) 256.

<sup>18</sup> See Stasi, above at note 9, 127.

<sup>19</sup> See Salton, above at note 16, 3.

<sup>20</sup> As one author observed, “[o]bviously the Commission did not have at its disposal any reliable study on the veil numbers”. See Chélini-Pont & Gunn, above at note 4, 61.

<sup>21</sup> J R Bowen, *Why The French Don’t Like Headscarves: Islam, the State and the Public Square* (Princeton University Press, Princeton, 2006) 121.

SECOND MYTH: STATUTE 228 IS JUSTIFIABLE ON THE BASIS OF FRANCE'S  
RIGID SEPARATION OF CHURCH AND STATE ('LAÏCITÉ STRICTE')

No doubt because of historical reasons, France's conception of *laïcité* has a reputation for toughness and has been repeatedly brought to justify the rigours of Statute 228/2004, irrespectively of the public order criterion. As we have seen in Chapters 2.2. and 2.3., however, when it comes to the law this perception seems to be largely misplaced. At the formal level, America and France have very similar provisions: where Article 2 of the 1905 statute posits that "France does not recognize any religion",<sup>22</sup> the US Establishment Clause prohibits the government from "respecting an establishment of religion";<sup>23</sup> and where Article 1 emphasizes that "France respects all religious beliefs",<sup>24</sup> the US Free Exercise Clause warns Congress against making any law "prohibiting the free exercise of religion".<sup>25</sup> Indeed, the point was made that France and America may be the only truly secular nations of the Western world.<sup>26</sup>

It is therefore, I have suggested, at the practical level that the two legal systems differ—and the tougher of the two seems US law, not the French one. American law rigidly prohibits the government from helping one or all religions in whatever form—and this includes a far-reaching ban on financial benefits;<sup>27</sup> the impossibility to officially recognize religious representatives and engage into discussions with religions; and a condition of complete indifference when it comes to the ownership of worship places or the performance of religious rituals. As we have seen in Chapter 2.2., the French system goes in a very different direction: with its official *aumônerie* (or religious counseling) scheme, its recognition of religious hierarchies, its faith-based radio and TV programmes on national public networks, its plethora of financial exceptions for religious activities and its geographical and historical exemptions to *laïcité*, France adopts a far less uncompromising approach than its American counterpart and does so specifically in order to favour (as well as control) religion. As one author underlined, the result is that, "[u]nderstood as the principle of the separation of church and state, *laïcité* operates in the United States in an infinitely harder and more rigid manner than in France".<sup>28</sup>

A strict separation of Church and State, therefore, cannot justify the enactment of Statute 228/2004, because the French system is far less separatist than the US.<sup>29</sup> In this respect, the Alsace-Moselle case is the most visible example: if France happily allows an exception—grounded on the historically strong religious feelings of this region's population—for her 2.5 million people (or less than 5% of the population) living in the East, perhaps it should also cater for the needs of its 5 million plus Muslim minority (or more than 10% of the population) that seems equally attached to religion in the form of the Muslim veil. It is difficult to ignore this inconsistency, for while Muslim schoolgirls in Alsace-Moselle are required to take off their (private) hijab on the ground that the *laïcité* principle

<sup>22</sup> Loi de Séparation des Églises et de l'État, Article 2.

<sup>23</sup> First Amendment of the US Constitution (Establishment Clause).

<sup>24</sup> Loi de Séparation des Églises et de l'État, Article 1.

<sup>25</sup> First Amendment of the US Constitution (Free Exercise Clause).

<sup>26</sup> See E Zoller, "Laïcité in the United States or the Separation of Church and State in a Pluralist Society", (2006) 13 Indiana Journal of Global Legal Issues, n.2, 562 (note 3).

<sup>27</sup> As Jefferson wrote, "Almighty God hath created the mind free [and] to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical". See T Jefferson, "A Bill Establishing Religious Freedom, 12 June 1779", in P B Kurland & R Lerner, *The Founders' Constitution* (Chicago University Press, Chicago, 1987) 77.

<sup>28</sup> Zoller, above at note 26, 592.

<sup>29</sup> Indeed, if there is something that French *laïcité* can be blamed for, it is not that its idea of separation goes too far but rather that it does not go far enough. Given that the French state has for centuries adopted a Gallican view according to which religion should be kept under a watchful eye so as to avoid the resurgence of a monopolistic power external from—and possibly confrontational towards—the state, this should not come as a surprise. As it was observed, "[i]t would seem that most political regimes in France since the Revolution have upheld the principle of the subjection of religions to the State. In some situations, it has been necessary to reaffirm this principle. For example, in connection with the Gallicans...it was stated that even if one did not wish the Church to be subject to the State, the Church was indeed required to be subject to the State". (See A Garay, B Chélini-Pont, E Tawil & Z Anseur, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in France", (2005) 2 Emory International Law Review, vol.19, 804, 814). As one member of the 1789 Constitutive Assembly affirmed during the debates, "we certainly have the power to change religion, but we won't do it...We wish to keep the Catholic religion, we want to have bishops, we want to have priests". (Id. 813). The French state's pivotal role in the creation of the Conseil Français du Culte Musulman (CFCM) may be seen as an example of this tendency.

forbids conspicuous religious signs at school, an even more conspicuous symbol—the Christian crucifix—is publicly displayed in that region’s classrooms. This situation is all the more peculiar if one considers that, at least before its 2004 revirement, the Conseil d’État had clearly accepted the American position according to which “the ‘secular’ character of the state ... neither constitutes a fundamental right itself that could potentially collide with another fundamental right, nor does it justify a restriction on a constitutionally protected aspect of religious freedom”.<sup>30</sup> French authorities’ refusal to recognize the Alsace-Moselle inconsistency—and their position according to which this is a ‘special’ case<sup>31</sup>—is perhaps an indication that France may not have a problem with ‘communalism’ in general (‘tendances communautaires’) but only with those forms of communalism that are not based on the mainstream creed and culture.

When it comes to religious law, therefore, the real difference between the French and US systems seems to lie in the fact America has adopted a method of uncompromising neutrality and equality for all faiths,<sup>32</sup> while France provides a number of exceptions that are supposed to benefit religion in general<sup>33</sup> but that very often result in a situation of disparity between the historically dominant (Catholic) creed and other ‘newcomers’ (especially Islam). Like Paris’s Pantheon, in other words, the French state is indeed *laïque*, but it is a *laïcité* that, as the Conseil d’État observed in 2004, must be seen “against a background of Catholicism” (“sur fond de Catholicisme”).<sup>34</sup> As one author underlined, the inevitable result is that “[i]n the French religious law, religions are in a situation akin to the animals on Orwell’s farm: some are more equal than others”.<sup>35</sup>

#### THIRD MYTH: STATUTE 228 IS JUSTIFIABLE ON THE GROUND THAT IT TREATS THE MUSLIM VEIL AS ANY OTHER RELIGIOUS SYMBOL

As we have seen throughout this thesis, the legislative history and parliamentary debates of Statute 228 suggest that, contrary to any other religious insignia, the Islamic veil was not regarded, like in America, as a private symbol of faith but as a dangerous political emblem that perceptibly illustrated the ‘Islamization’ of France. Indeed, one of the reasons behind the above-mentioned methodological refusal to provide any meaningful data about the extent of the ‘veil threat’ is the fact that French leaders did not need those figures to be convinced that the headscarf was dangerous. They knew it already, and it was precisely because of this strong presumption that no French institutional body ever bothered to properly substantiate its alarming claims.<sup>36</sup>

This situation of ‘veilophobia’ was not novel. France had already reacted in a similar way in colonial times. In Imperial Algeria, for example, abandonment of the practice of veiling by the local population was perceived by the French colonizers as a positive symbol of ‘Westernness’ and progress. The most visible example of this attitude emerged during a public ceremony on 16 May 1958, when the French forcibly unveiled a number of Algerian women in an attempt to show them the way to modernity.<sup>37</sup> This French proclivity to see the Muslim headscarf as a political statement rather than a private religious symbol has been strongly reinforced by the fact that, in post-colonial times, several

<sup>30</sup> See Garay, Chélini-Pont, Tawil & Anseur, above at note 29, 804. See also Conseil d’État, Dlle Marteaux, R.R.J. 2001, p.2108-31, note Gilles Armand.

<sup>31</sup> “This Commission”, Mr Stasi wrote in his Report, “believes that the reaffirmation of the *laïcité* principle should not lead to a revision of the special legal regime of Alsace-Moselle, a regime to which the local population is particularly attached”. Stasi, above at note 9, 113.

<sup>32</sup> As the US Supreme Court wrote in 1982, “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another”. See *Larson v Valente*, 456 US 228, 244 (1982).

<sup>33</sup> As it was observed, “*laïcité* [implies] the absolute neutrality of the State and the public powers when it comes to religions”. See A Boyer, *Le Droit des Religions en France* (PUF, Paris, 1993) 12. See also Conseil d’État, *Rapport Public 2004: Un Siècle de Laïcité* (Documentation Française, Paris, 2004), 272-4.

<sup>34</sup> See Conseil d’État, *Rapport Public 2004*, above at note 33.

<sup>35</sup> See Zoller, above at note 26, 571. The same author added that “[r]eligions, churches or sects in the United States are all on an equal footing with the others, none is privileged. The downside of the situation is that freedom of religion is in no way helped or assisted as is often the case in France and Europe more generally”. Id. 561.

<sup>36</sup> For interesting comments on the point, see e.g. F Lorcerie, *La Politisation du Voile: L’Affaire en France, en Europe et dans le Monde Arabe* (L’Harmattan, Paris, 2005) (esp. 11-36).

<sup>37</sup> F El Gundi, *Modesty, Privacy and Resistance* (Berg, Oxford, 1999) 169-173.

Muslim countries (including Algeria, Iran, Egypt and Afghanistan) reintroduced the practice of veiling as an explicit anti-colonial and anti-imperialist symbol.<sup>38</sup> In 1935, for instance, King Reza Shah of Iran banned the Muslim headscarf in an attempt to promote modernity and improve Iranian women's conditions, but his efforts were so radical that they soon aroused anger among the population.<sup>39</sup> Conversely, since the Islamic Revolution of 1979, the veil has been imposed in Iran by terror and harsh policing, and still today Iranian law makes it compulsory for every woman, native or foreigner,<sup>40</sup> to wear a headscarf in public. The conclusion is that, as one author underlined, "veiled women have become the symbol of the success of Islamification".<sup>41</sup>

These and other international events had a major impact on France's public perception of the veil and reinforced the already ingrained colonial image of the Muslim headscarf as a synonym for repression and religious fundamentalism, a situation inflamed by the extremely negative media coverage that the veil attracted in France. The mantra that the Islamic headscarf was a visible attack on women's rights had long been a feature of French TV<sup>42</sup> and the francophone press,<sup>43</sup> but this presumption dramatically intensified in the months leading up to the passage of Statute 228.<sup>44</sup> From September 2003 to February 2004, for instance, 1,284 articles, reportages, editorials and comments appeared on the French national media,<sup>45</sup> an average of two per day over six months and three times more than those aroused by the social security reform—in normal circumstances, an all-important issue in France.

Without apparent reason, therefore, French viewers were led to think that the nation was confronted with a veritable headscarf emergency—and the effect on the population soon became evident. At the same time when (largely ignored) official statistics indicated that the veil problem was being resolved through mediation, other statistics (copiously quoted by French media) showed a dramatic increase in popular support for a veil ban: from a minority of 49% in favour of the proposed statute in April 2003, the figures climbed to 57% in October, 65% in November and 72% in December,<sup>46</sup> while even stronger support was registered a month later, in the wake of the passage of Statute 228/2004.<sup>47</sup>

This exceptional media frenzy, it should be noted, not only drove public opinion but heavily affected the work of French institutions. "As a consequence of the political and television pressure", one of the members of the Stasi Commission, Professor Jean Baubérot, commented, "the Commission had a feeling that if it was going to take a stand against this announced statute, it would give the impression of surrendering to the 'Islamic threat' ... and [thus concluded] that it was necessary to take a firm stance".<sup>48</sup> To mention another example, one of the most popular books available on the subject was a slim 46-page anti-veil pamphlet written by Chahdortt Djavann, an Iranian woman living in

<sup>38</sup> See e.g. H Hoodfar, "The Veil in Their Minds and on Our Heads: The Persistence of Colonial Images of Muslim Women", (1993) 22 *Resources for Feminist Research*, n.3/4, 5-18. See also F Fanon, *A Dying Colonialism* (Penguin, Harmondsworth, 1970) 21-52.

<sup>39</sup> As one author observed, "[v]eiled women were harassed by police, forcing many women into virtual exile as they refused to appear in public unveiled". M Milani, *The Making of Iran's Islamic Revolution* (Westview, Boulder, 1988) 62.

<sup>40</sup> See e.g. McGoldrick, above at note 17, 235. See also J L Esposito, *The Iranian Revolution: Its Global Impact* (International University Press, Miami, 1990).

<sup>41</sup> H Omid, *Islam and the Post-Revolutionary State* (Macmillan, London, 1994) 182. Similarly, a French veiled girl said, "I function as the barometer of the popularity of Muslims". See Bowen, above at note 21, 79-80.

<sup>42</sup> See e.g. T Deltombe, *L'Islam Imaginaire: La Construction Médiatique de l'Islamophobie en France 1975-2005* (La Découverte, Paris, 2005) 98-121.

<sup>43</sup> *Ibid.*

<sup>44</sup> On 5 October 2003, for instance, under the image of a girl in Islamic clothing, the weekly magazine *Le Nouvel Observateur* ran the following title: "Fanaticism, the Religious Menace". On 26 October, it was the turn of another well-known publication, *L'Express*, to open with a cover page entitled "The Secular School in Danger: The Strategy of Fundamentalists", while a few days later, one of France's most popular weeklies, *Le Point*, joined the bandwagon and portrayed a veiled woman under the words "Fundamentalists: the Limits of Tolerance". See Bowen, above at note 21, 84.

<sup>45</sup> Deltombe, above at note 42, 344.

<sup>46</sup> *Id.* 124-5.

<sup>47</sup> A detailed and remarkable analysis of the media frenzy accompanying the veil affair—and its deleterious impact on the decision-making process of French politicians—is provided by Deltombe, above at note 42.

<sup>48</sup> J Baubérot, *La Commission Stasi Vue par l'Un de Ses Membres*, (2004) 3 *French Politics, Culture and Society* 135, 137.

France. It is an angry book—Down with the veils!, the title goes<sup>49</sup>—that does not make any distinction between the situation in Iran and France, does not consider the possibility that a woman could wear the headscarf out of sincere religious reasons and aggressively supports a veil ban not only in French schools but everywhere in France.<sup>50</sup> What made this book stand out and guaranteed its author a regular spot as a commentator in peak-time talk-shows was the impact it had on French leaders. President Chirac and several other politicians publicly recommended it, while the Stasi Commission seemed especially fascinated by it—and so much so that Ms Djavann was hurriedly interviewed by the Commission, a circumstance that incidentally infringed Mr Stasi's own rule that no book author should be consulted and prompted an immediate complaint by one of the Stasi Members.<sup>51</sup> "I must say that one of the interviews that touched us most was that of the person sitting next to me [Ms Djavann]", Mr Stasi told the audience of a popular French programme on the very evening he delivered his Report to President Chirac. "Her testimony strongly influenced the whole Commission."<sup>52</sup> Clearly, the Muslim veil has never been treated in France like other religious signs.

FOURTH MYTH: STATUTE 228 IS JUSTIFIABLE ON THE GROUND THAT  
FRANCE ADOPTS AN UNCOMPROMISING APPROACH TO PUBLIC RELIGIOUS SYMBOLISM

France in 2004 did not appear to have a generic problem with religious symbolism but rather a more specific one with the Islamic headscarf, and not only in the classroom but anywhere the veil happened to be found.

Just to mention the most visible example, Christian crosses are ubiquitous in French towns, where a majority of Catholic churches still belong to the state (a circumstance that never troubled the supporters of a strict *laïcité*). Another interesting illustration that *laïcité* may work differently according to the religion in question emerged in April 2005, when Pope John Paul II passed away. During the days leading up to the funeral (which, incidentally, was attended by President Chirac), all French public buildings were ordered to fly the national flag at half-mast as a sign of respect, and while this decision was criticized for being in conflict with *laïcité*, French authorities remained adamant that the lowering of the flag was "merely a mark of respect and homage".<sup>53</sup>

These double standards seemed to also affect the issue of the Islamic headscarf. While President Chirac argued, in a speech delivered in Tunisia on 5 December 2003, that "for French people the fact of wearing the veil is a kind of aggression difficult for them to accept"<sup>54</sup> (insofar insultingly suggesting that France-born and bred veiled women are not French), it soon turned out that some veils are more 'aggressive' than others. In the midst of the media furore against the Islamic headscarf—and at the very moment when a number of polls conveyed the extent of popular aversion to this symbol—one survey indicated that the country's most admired TV celebrity was a Catholic nun (Sœur Emmanuelle),<sup>55</sup> whose headscarf the French obviously do not regard as "aggressive".<sup>56</sup> Likewise, in the Spring of 2003, the fashion brand L'Oréal introduced a veil to its high street collection, while shortly afterward another designer, Calvin Klein (CK), launched a headgear that covered the hair while allowing ears and necks to be shown. Both turned out to be hot-selling items.

<sup>49</sup> The book begins with the following sentence: "I have worn the veil ten years. It was either the veil or death. I know what I am talking about". C Djavann, *Bas Les Voiles!* (Gallimard, Paris, 2003) 7.

<sup>50</sup> "[The problem] is not the veil at school, but the veil tout court", the author wrote. "The veil is in no way simply a religious sign". See *Ibid.* "A Healthy and inspiring little book" is how the magazine *L'Express* defined Ms Djavann's volume. See E Conan, *Le Foulard Islamique à l'École: Le Combat de Chahdortt Djavann*, *L'Express*, 30 October 2003. Despite its modest cost, Ms Djavann's contribution is possibly the only book I have ever regretted buying.

<sup>51</sup> J Baubérot, « Voile, École, Femmes, Laïcité », in J Baubérot, D Bouzat, J Costa-Lascoux & A Hounziaux, *Le Voile, Que Cache-t-il?* (Éditions de l'Atelier, Paris, 2004) 58.

<sup>52</sup> Canal Plus, *Que Dira La Loi?*, in « Merci Pour l'Info », 11 December 2003. Quoted in Deltombe, above at note 42, 354. It should be mentioned here that, out of almost a hundred people, the Stasi Commission only interviewed one veiled schoolgirl.

<sup>53</sup> McGoldrick, above at note 17, 91.

<sup>54</sup> See Bowen, above at note 21, 213.

<sup>55</sup> See Baubérot, above at note 51, 58.

<sup>56</sup> See *The Times*, *Chirac Has Lost His Political Head Over Schoolgirls in Scarves*, 3 February 2004. See also McGoldrick, above at note 17, 94.



Conversely, it should also be noted that opposition to the Islamic veil was, in 2004 France, far from limited to a classroom situation—and to such an extent that an even more encompassing headscarf ban in France cannot be entirely ruled out in the future. In 2005, for instance, an Education Ministry Report warned that “[i]t is better not to consider the issue of religious signs at school—and particularly that of the Islamic veil—as closed, [for] certain students have indeed abandoned their veil according to the instructions of the new statute, but others continue to wear it as soon as they get out of school”.<sup>57</sup> Given that the headscarf is currently allowed outside the classroom, this passage may sound overconfident,<sup>58</sup> but a series of events seem to confirm that the hostility of French authorities for the Muslim veil goes far deeper than the education setting.

After seeing a TV programme where a veiled woman was discussing sexuality issues, for instance, Interior Minister Jean-Pierre Chevènement officially complained to the public TV broadcasting director—not because of the topic but because the woman was wearing a veil. From then on, the programme *Vivre l’Islam* carefully avoided Islamic insignia altogether, something that led the producer to bitterly comment: “We are the only programme that deals with Islam that is forbidden to show women in headscarves!”<sup>59</sup> In another, more recent example of state-enforced veilophobia, furthermore, a Muslim woman was refused entry to the Senate while it was holding a debate on Islam and *laïcité* on the ground that, as the President explained, the building is “a secular space and religious signs [are] forbidden”.<sup>60</sup> A similar episode emerged one month later at the *Assemblée Nationale*, where a French MP, having spotted a veiled woman in the visitor’s gallery, sent a note to the President asking for her to be thrown out on the ground that he wished to “defend the Republic and [does] not allow this sort of behaviour”.<sup>61</sup> Similar anti-veil episodes by public officials regularly surfaced after the passage of Statute 228,<sup>62</sup> a piece of legislation that can hardly be credited with increasing France’s social and racial harmony.

#### EPILOGUE: FRENCH ‘ÉGALITÉ’, THEORY AND PRACTICE

“Since the basic principles of public law prohibit distinctions between citizens on grounds of origin, race or religion, France is a country where there are no minorities”.<sup>63</sup> So wrote, in 1997, the French Government in an attempt to justify its reservation,<sup>64</sup> filed on Article 27 of the United Nations International Covenant for Civil and Political Rights (ICCPR), concerning minority rights. Article 27 provides that

[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Because the French model of citizenship is based, as we have seen in Chapter 3.1., on the principles of egalitarianism and individualism, according to the French State only individual human beings matter

<sup>57</sup> *Le Monde*, *Un Rapport Dresse un Bilan Positif de la Loi sur le Voile à l’École*, 28 October 2005. This journalist observed that this is “an astonishing commentary given that the law on religious signs at school does not apply out of the schools”.

<sup>58</sup> See the following reactions to the new law gathered at the entrance of a French school in September 2005: “I am Muslim, but the French Republic asks me to take it off”; “I have no choice, I have to continue my studies”; “I don’t think this law is fair. I never talk about religion with my colleagues. It is a personal thing and I cannot see what is dangerous about it”; “I would need some time to adapt. But I have no choice. If I want to become someone in this society, I must continue my studies”. As for teachers, the following reaction seemed emblematic of their support for the law: “Today, all pupils are equal. It is much clearer, for everybody”. *Le Monde*, *Voiles: Elèves et Proviseurs Ont Cherché à Dédratiser la Rentrée*, 3 September 2005.

<sup>59</sup> *Id.* 206. As *Le Monde* newspaper wrote “the irrational is at work here” and warned that Muslim women soon would no longer be allowed to wear their scarves on the street. See Bowen, above at note 21, 128.

<sup>60</sup> *Id.* 109.

<sup>61</sup> *Ibid.*

<sup>62</sup> In March 2004, for example, the mayor of a small town ordered a Muslim man to shave because “a religious sign could not be tolerated in a place open to the public”, while in September 2004 a university canteen in Paris refused to serve a student because she wore a veil. See Bowen, above at note 21, 149.

<sup>63</sup> Third Periodic Report of France under the ICCPR, 15 May 1997, UN Doc CCPR/C/76/Add 7, Para 394.

<sup>64</sup> “In the light of Article 2 [of the 1958 Constitution]”, Paris added, “the French Government declares that Article 27 is not applicable so far as the Republic is concerned”. See McGoldrick, above at note 17, 46.

and this leads it to deny the existence of minorities in general and ethnic minorities in particular.<sup>65</sup> It is because of this philosophical stance that France has also proudly refused to become a party to the Convention concerning Indigenous and Tribal Peoples in Independent Countries (1989); the European Charter on Regional and Minority Languages (1992); and the Council of Europe's Framework Convention on National Minorities (1994).

In several respects, this posture is exactly the point where France's greatness and, at the same time, hypocrisy, emerges in all its depth. Most national governments would agree that formal equality and de facto inequality do not coincide, but not the French one. On the basis of her grand revolutionary principles, therefore, France has consistently denied the existence of minorities with the consequence that, in her idealistic commitment to give every citizen the same rights and opportunities, she seems particularly ill-equipped to tackle day-to-day discrimination. As one author put it,<sup>66</sup>

France's refusal to see the ethnicity of some of its people as relevant translates into de facto racism. If human beings were free of prejudice, the French republican ideal would work beautifully. Because they are not, it allows racism a free hand.

This situation directly impacts on the issue of the Muslim veil, for if it is true that Statute 228 is perfectly democratic and does not formally differentiate among religious symbols, what the French system rejected in 2004 were not exceptions founded on religion (particularly, we have seen, if the religion in question is Catholicism) but rather one specific creed. As one author observed,<sup>67</sup>

[t]he ban on crosses and yarmulkes is meant only to disguise the singling out of Islam by distributing restrictions evenly across the religions, as if the religions themselves were different 'styles' of the same thing. Clearly laïcité is not the principle that is being defended here—it is being defended, yes, but only incidentally, as a means of curbing Islam while allowing the French state to appear politically correct.

This conscious failure to distinguish the theory from the practice is the point of fundamental difference between France and America, a divide that runs considerably deeper than the simple secular versus religious dichotomy so familiar to the US debate because it involves deep-seated anti-Muslim prejudices that go back to colonial times.

It is precisely this fascination with formal egalitarianism, for instance, that allowed (i) colonial France to establish in Algeria a system whereby less electoral power was held by Muslims than Christians and Jews;<sup>68</sup> (ii) post-colonial France to issue an official directive limiting the free movement of French Northern Africans by introducing ID cards that explicitly marked the bearer as "Muslim";<sup>69</sup> and (iii) contemporary France to consciously ignore the fact that Muslims make up 10% of the Nation's population but 40% of prison inmates; that unemployment figures are more than three times those of the so-called Français de Souche' ('Ethnic French'); that parts of French cities and towns are being turned into Muslim ghettos; and that this sizeable minority—Europe's largest—suffers from a complete lack of parliamentary representation.<sup>70</sup> The riots that erupted in France in October

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<sup>65</sup> As one author observed, "[t]he central 'Jacobin' impulse of the Revolution insisted on the primacy of the political domain as the space where citizens experienced their common values and interests. Legislators abolished intermediate corporate bodies, such as guilds and religious groups, which had regulated much of social life under the old order. These bodies had stood between the state and citizens. As the architect of a 1791 law, Isaac-René-Guy Le Chapelier, proclaimed: 'None is allowed to inspire in citizens an intermediate interest, to separate them from common elements through a spirit of corporations'". See Bowen, above at note 21, 160.

<sup>66</sup> See The Guardian, *France is Clinging to an Ideal That Has Been Pickled Into a Dogma*, 9 November 2005. See also Le Monde, *France, États-Unis, Modèles Contestés*, 8 November 2005.

<sup>67</sup> The Weekly Standard, *Veiled Threat: Can French Secularism Survive Islam?*, 19 January 2004.

<sup>68</sup> See Bowen, above at note 21, 36. As the author further observed, "France established in Algeria a social and interethnic organization based on communalism and discrimination, ignoring its own republican principles".

<sup>69</sup> "In October 1961, the Paris prefect of police, Maurice Papon...ordered young men whose identity cards indicated that they were Muslims to be brought to the police station if they were out after 8:30 in the evening or if they were driving. Stops were made on the basis of skin color (as, indeed, they are today in Paris), but the identity card sealed one's fate. Muslim men routinely were beaten and some killed—about two hundred were killed on one day by the police". Ibid.

<sup>70</sup> See e.g. Bowen, above at note 21

and November 2005 were the most visible indication of how deep the French divide between formal equality and de facto inequality runs.<sup>71</sup>

Yet it is doubtful whether French politicians have got the message. In February 2005, one year after the approval of Statute 228, the French Parliament passed another controversial piece of legislation that required school programmes “[to] acknowledge...the positive role of the French presence in her overseas territories, especially in Northern Africa...”.<sup>72</sup> Although this Act was repealed in February 2006 due to strong criticism in the former colonies and the (belated) change of mind of President Chirac,<sup>73</sup> it is emblematic of the country’s anxiety over her own future—and past—and the title of a recent book, *The Fear Society*,<sup>74</sup> aptly illustrates this situation. “Islam frightens”, one prominent Member of the Conseil d’État told me, “and the 2004 [and 2005] law[s are] the expression of that fright”.<sup>75</sup> France is, in other words, going through an identity crisis and the statute on religious signs at school is only one symptom of this situation. As one author commented,<sup>76</sup>

...the willingness to exclude conspicuous signs reflects a desire of self-reassurance about our own image [that leads us to] evacuate from our vision span everything that is foreign to us. It bespeaks the refusal to include Islam within our social and cultural proximity because [this religion] is perceived as the culturally visible enemy by definition.

A few decades after Sophocles composed *Antigone*, his countryman Aristotle wrote that equality does not only mean treating equally demands that are equal, but also treating unequally situations that are unequal—in proportion to the difference between them.<sup>77</sup> This seems precisely the problem with Statute 228: while this piece of legislation is entirely legitimate to the extent that it expressed the will of the French people, by insisting on a criterion of formal equality without considering the practical implications that this law creates, French politicians have produced a situation of de facto inequality that bodes ill for the country’s future and for her ability to apply in practice the lofty and admirable principles that the French state worships in theory. “By pretending to fight against communalism”, one of the veiled students who was expelled from school wrote, “France is in the process of augmenting it. I am not sure whether French leaders realize the consequences that their [legislative] enterprise risks producing”.<sup>78</sup> If the decision-making process surrounding Statute 228 is any guide, the future of France’s social, religious and ethnic harmony does not appear particularly bright to me.



<sup>71</sup> See e.g. *The Guardian*, *Worlds Apart: Paris Suburb on the Divide Between Hope and Dispair*, 7 November 2005; *The Independent*, *France is Burning Because Politicians Ignored the Problems of Its Immigrants*, 7 November 2005; *The Guardian*, *Urban Unrest Spreads in France*, 7 November 2005.

<sup>72</sup> *Le Monde*, *Colonisation: Les Aléas d’un Alinéa*, 29 January 2006. See also *Le Monde*, *Globalement Négatif*, 20 December 2005.

<sup>73</sup> After considerable media furor—especially in the former colonies—over this portion of the legislation, in February 2006 President Chirac asked Prime Minister Dominique de Villepin to refer the case to the Constitutional Council. The latter concluded that this part of the legislation was not within the competence of a statute but of an inferior administrative act (*réglement*). The contentious sentence was thus effectively ‘demoted’ so as to make it possible, for the Government, to abrogate it through a legislative decree. See *Le Monde*, *Colonisation: Chirac Evite un Débat au Parlement*, 27 January 2006.

<sup>74</sup> C Lambert, *La Société de la Peur* (Plon, Paris, 2005).

<sup>75</sup> Notes from my interview, 27 September 2005.

<sup>76</sup> F Zouari, *Ce Voile qui Déchire la France* (Ramsay, Paris, 2004) 128.

<sup>77</sup> Otherwise put, “treat like cases as like”. See Aristotle, *Nicomachean Ethics*, V.3. 1131a10-b15; and *Politics*, III.9.1280 a8-15, III. 12. 1282b18-23; both in J Barnes (ed) *The Complete Works of Aristotle* (Princeton University Press, Princeton, 1984). See also A Richard, “Equality”, in R Goodin & P Pettit (eds), *A Companion to Contemporary Political Philosophy* (Blackwell, Oxford, 1993) 489-507; H A Bedau, “Egalitarianism and the Idea of Equality”, in J Pennock & J Chapman (eds), *Equality* (Atherton, New York, 1967) 3-27.

<sup>78</sup> L Lévy & A Lévy, *Des Filles Comme Des Autres: Au Délà du Foulard* (La Découverte, Paris, 2004) 193.

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