

Contribution of secularism and discrimination law to the protection of religious pluralism: the French experience

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Abstract

In public debate and in the media, French secularism is often understood as a straightforward principle that not only prescribes the separation of Church and State and the neutrality of the State but also, by extension, a ban on all religious expression within the State institutions or more generally in public. This ideological point of view is nonetheless without any legal foundation in France. This paper aims at demonstrating that the genuine rationale and objective of French secularism consist for the State to treat all religions equally. It may even lead, to a certain extent, to the funding and the accommodation of religious needs, in order to guarantee individual and collective expression of religious beliefs. Moreover, non-discrimination law has also become a suitable legal tool to fostering religious pluralism in France.

Key words: Secularism, accommodation, non-discrimination, religious pluralism.

Resumen

En el debate público y en los medios de comunicación, el laicismo francés a menudo se contempla como un principio sencillo que no sólo establece la separación de Iglesia y Estado y la neutralidad del Estado, sino también, por extensión, la prohibición de toda expresión religiosa dentro de las instituciones del Estado o, en general, en público. Este punto de vista ideológico carece, sin embargo, de todo fundamento jurídico en Francia. El presente estudio tiene por objeto demostrar que la verdadera razón y objetivo de la laicidad francesa consiste en que el Estado trate todas las religiones por igual. Incluso puede llevar, en cierta medida, a la financiación y el acomodamiento de las necesidades religiosas, con el fin de garantizar la expresión individual y colectiva de las creencias religiosas. Por otra parte, la ley contra la discriminación se ha convertido en una herramienta jurídica adecuada para fomentar el pluralismo religioso en Francia.

Palabras clave: Laicismo, acomodo, no discriminación, pluralismo religioso.

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Introduction

For the European Court of Human Rights (ECHR), a democratic society is one “*in which diversity is not perceived as a threat but as a source of enrichment*”¹. Pluralism, although dearly won over the centuries, now seems a precious asset in great danger, especially when talking about religious pluralism², i.e. a system or philosophy, which, in the name of respect for diversity, acknowledges the existence of different opinions, moral and religious beliefs, as well as of cultural and social behaviour³.

Many official observers, including the Human Rights Committee, the European Commission against Racism and Intolerance or the Fundamental Rights Agency of the EU, have sounded the alarm about the rise in religious intolerance, in our deconfessionalized Western countries, in particular in the aftermath of 9/11. In its report dated April 2011, the French National Consultative Commission on Human Rights denounced an alarming “anti-Muslim sentiment” coming to the fore in France. It thus seems that we are losing, in the 21st century, what was previously taken for granted and yet is one of the fundamental values of our modern societies. Even if this issue seems to affect all democratic countries, the French context is unique in that it combines three very specific features.

First of all, the French Republic is founded on secularism, which has constitutional status in France. The exercise of religious freedom in the public space is directly linked to it. For over a century, secularism has been enshrined as a fundamental value of the French Republic, conciliating freedom of conscience, religious pluralism and the neutrality of the State. The 1905 French Law on the separation of Church and State guarantees freedom of religion, as it ensures freedom of conscience, and guarantees free exercise. Nevertheless, French secularism developed, historically, as a reaction against the influence of the Catholic Church in public affairs such as the education of children. It is therefore

closely linked to hostility or suspicion towards religion since a religiously based political order would, in its view, be unfair, oppressive, and anti-progressive, and might jeopardize enlightened policy decisions⁴.

Secondly, the French Republic is historically based on a model of formal equality. According to a universalistic idea of humankind, based on Enlightenment philosophy, the French model of the Nation-State puts forward the notion of an “abstract” citizen. The consequence of this tradition is two-fold. It enshrines the principle of equality before the law, without regard to differences in identity based on factors such as religion and beliefs. Without denying religious or cultural identities, it does not take such specificities into account when equality is concerned. Moreover, the French Republic is “one and indivisible”, which is interpreted as meaning that it is made up of equal citizens and not of separate communities. Accordingly, France does not officially recognize minority groups within its territory and does not provide for minority rights.

Last but not least, despite the lack of official statistics, the Muslim population in France is evaluated as the largest in Western Europe (5-6 million). It also bears mentioning that France is the European country with the largest Buddhist, Jewish, Muslim and atheist and agnostic communities. This is rather new, since a century ago, when the Law separating Church and State was enacted, France was predominantly Catholic, with very small Protestant (1%) and Jewish (0.2%) “minority” populations. There is nowadays significant tension between the French secular State, historically and socially rooted in Catholicism, and Islam. The ban on religious symbols in State schools, for example, is widely regarded as being, for all intents and purposes, a ban on the *hijab*, the headscarf worn by certain Muslim women. Recently, the French legislature has forbidden the dissimulation of the face in the public space, a ban which, in practice, concerns exclusively radical Muslims. French media often present a distorted image of Islam as the enemy of the modernised

¹ ECHR 6 July 2005 *Nachova and al v. Bulgaria*, no. 43577/98 and 43579/98, para. 145.

² ECHR 25 May 1993 *Kokkinakis c/ Grèce*, no. 14307/88.

³ This definition of pluralism comes partially from that given by the Canadian Commission on Accommodation Practices Related to Cultural Differences. See the glossary attached to the Consultation paper, www.accommodements.qc.ca/documentation/glossaire-en.html

⁴ Kuru, A.T. (2009): *Secularism and State Policies towards Religion: The United States, France, and Turkey*, Cambridge University Press, 334 p. To the contrary, for Americans, secularism is based on the fact that religion is so important for people that the State should be prevented from having any say about it.

and progressive West. In some ways, the importance and size of the Muslim population in France is perceived as challenging the French ideal of strict separation of religious and public life. This focus does not mean that there are no tensions with other religious communities but they are less visible.

In this very specific context, the protection of religious pluralism has become crucial. As the religious composition of the population has dramatically changed in France over the last decades, new issues and new balances have emerged. Moreover, there is currently a propensity for damaging misuse of the legal concept of secularism. For some French politicians, administrative bodies, private employers, and even the French public at large, secularism means prohibiting any manifestation of religion, including display of religious signs or symbols in the public sphere.

This paper attempts to demonstrate, first, that the rationale and the objective of secularism is for the State to treat all religions equally. It may even lead, to a certain extent, to the funding and the accommodation of religious needs, in order to guarantee individual and collective expression of religious beliefs. Second, discrimination law has become a suitable legal tool for fostering this goal. Though this right to non-discrimination was largely ignored until recently by civil justice in France⁵, the situation has changed in part due to the influence of EU Law and in particular Directives 2000/43 and 2002/73, but also due to the creation of the HALDE (*Haute autorité contre les discriminations et pour l'égalité*), the independent French Equality Body. The HALDE is competent to deal with all forms of direct and indirect discrimination prohibited by law or by duly ratified international conventions, including discrimination on the basis of religion or belief⁶. A claim may be filed with the HALDE by any person who considers himself or herself to be a victim of discrimination. It helps victims of discrimination put together their case files and

informs them about the appropriate procedure for their cases. After investigation, the HALDE Council decides what further action is to be taken. For instance, it may suggest that a dispute be settled out of court through mediation, or present observations during judicial proceedings when the matter is brought before a court. HALDE may also make non binding general or individual recommendations.

1. Contribution of the French model of secularism to the protection of religious pluralism

The principle of religious neutrality is an essential part of the French legal tradition. As the Council of State, the highest administrative court in France⁷, pointed out in its 2004 report entitled “*A Century of Secularism*”, secularism should “*express itself in three principles: state neutrality, religious freedom and respect for pluralism*”⁸.

The concept of secularism is embodied in the French Declaration of the Rights of Man and of the Citizen of 1789, of which Article 10 provides that “*no one shall be disturbed on account of his opinions, including his religious opinions, provided their expression does not disturb public order as established by law.*” Furthermore, Article 1 of the Law on the Separation of Church and State of 9 December 1905, which intended to mark the end of the conflict between French Republicans and the Catholic Church, clearly states that: “*The Republic ensures freedom of conscience. It guarantees the freedom of religious worship, subject only to restrictions laid down (...) in the interest of public order*”. Article 2 of the same law provides that: “*The Republic may not recognise, pay stipends to or subsidise any religious denomination.*” These principles were later enshrined in the Preamble to the Constitution of 27 October 1946 as well

⁵ See Stasi, B. (2004): “Vers la haute autorité de lutte contre les discriminations et pour l'égalité”, Rapport au Premier Ministre, *La Documentation française*, Collection des rapports officiels, février 2004, 131 p.

⁶ For a complete overview of the HALDE's powers, see Law no. 2004-1486 of 30 December 2004 creating the High Authority against Discrimination and for Equality as amended by Law no 2006-396 on Equal Opportunities of 31st March, 2006.

⁷ In France, as in most civil law countries, civil and administrative courts are separated. There are two completely separate orders of jurisdictions,

having each its own supreme court at its head: the “Cour de cassation”, or Court of Cassation, for the ordinary courts, and the “Conseil d'Etat”, or Council of State, for the administrative courts. The administrative courts have jurisdiction over all disputes related to decisions or actions of public authorities.

⁸ Council of State (2004): “A Century of Secularism”, Report, *La Documentation française*, Paris, p. 326; <http://lesrapports.ladocumentationfrancaise.fr/BRP/044000121/0000.pdf>

as in Article 1 of the Constitution of 4 October 1958, which affirms that “*France is an indivisible, secular, democratic and social Republic. It ensures the equality of all citizens before the law, without any distinction founded on origin, race, or religion. It respects all beliefs.*”

The principle of secularism requires a strictly neutral attitude on the part of the State and public authorities towards the practitioners of a religion. The State must protect each citizen’s freedom of opinion and conscience, a principle whose corollary is the complete neutrality of civil servants. Since civil servants represent the State, their conduct must not suggest that the State identifies itself with a particular religion. That is true, for example, when allegiance to a particular religion is expressed by displaying a religious sign or symbol. According to a settled administrative case law, public employees are thus not allowed to display their religious beliefs on-the-job, such as by wearing a headscarf⁹. For example, the Conseil d’Etat, has held that a civil servant violated this duty of neutrality when his professional e-mail address appeared on the website of an association related to the Unification Church (founded by the Korean Sun Myung Moon), even in the absence of proselytising behaviour¹⁰. It also upheld the decision to suspend a postal worker for six months because he had given out religious leaflets to the public at the counter¹¹.

This prohibition concerns all civil servants, even if they have no direct contact with users of public services¹². Moreover, if they are civil servants, all nursery assistants, not only those work in municipal nurseries but also home childcare providers¹³, must comply with requirement of State neutrality.

Although this concept may be criticised, it complies with European law. For the European Court of Human Rights, it is legitimate for a State to impose on public servants, given their status, a duty to refrain from any ostentatious expression of their religious beliefs in public, since “*a fair balance has been struck between the fundamental right of the individual to freedom of religion and the legitimate interest of a democratic State in ensuring that its public service properly furthers purposes*” such as public safety, public order, health or morals, or the protection of the rights and freedoms of others¹⁴. The ECHR acknowledges the constitutional status of secularism as a founding principle of the French Republic, to which the entire population adheres. According to this European analysis, religious freedom may be restricted by the requirements of secularism in a democratic society¹⁵.

However, in French constitutional rhetoric, secularism is not presented as a principle authorising limited exceptions to religious freedom, but as a legal and political system counteracting religious intolerance and favouring an equal respect of all beliefs. “*Indeed, the secular nature of France is founded on the principle of equality of religions in law, meaning that the State does not give any religion its preference*”¹⁶. In French public law, secularism is inseparable from freedom of conscience and religion and also from the universal freedom to proclaim one’s religion or convictions. Secularism is “*a doctrine of separation between the political and the religious spheres provided an early, paradigmatic articulation of the liberal ambition to combine the protection of individual freedoms and the diversity of conceptions of the good in society with shared norms of political membership as equal status*”¹⁷. It implies an acknowledgement both of religious plural-

⁹ Council of State 3 May 2000, *Marteaux*, no. 217017

¹⁰ Council of State 15 October 2003 *Jean-Philippe M.*, no. 246215

¹¹ Council of State 19 February 2009 *Christophe A.*, no. 311633

¹² See for example, Toulouse Administrative Tribunal (interim order) 17 April 2009 *Sabrina Trojet*, no. 0901424 dealing with the case of a veiled student who, at the same time, was also considered as being a public agent since her Ph.D. research was funded by the State. Nevertheless, when the neutrality principle has been violated, the absence of contact with the public is taken into consideration in appreciating the proportionality of the sanction.

¹³ Versailles Administrative Court of Appeal 23 February 2006 *E.*, no. 04VE03227; Paris Administrative Tribunal 22 February 2007 *Ms B.*, no. 0415268/5-2; See also HALDE Decision no. 2011-70 of 21 March 2011

¹⁴ ECHR 24 January 2006 *Kurtulmus v. Turkey*, no. 65500/01, see also ECHR 26 September 1995, *Vogt v. Germany*, no.17851/91, para. 53; ECHR [GC] 5 May 1999 *Rekvenyi v. Hungary*, no. 25390/94, para. 43

¹⁵ ECHR 4 December 2008 *Dogru and Kervanci v. France*, no. 27058/05 and 31645/04

¹⁶ Garay, A., Chelini-Pont, B., Tawil, E. & Anseur, Z. (2005): “The permissible scope of legal limitations on the freedom of religion or belief in France”, *Emory International Law Review*, Vol. 19, pp. 785-840

¹⁷ Laborde, Cécile (2005): “Secular Philosophy and Muslim Headscarves in Schools”, *The Journal of Political Philosophy*, Vol. 13, no. 3, pp. 305-329; <http://centauro.cmq.edu.mx/dav/libela/paginas/infoEspecial/pdfArticulosLaicidad/100101169.pdf>

ism and of State neutrality towards the various religions. In this sense, the neutrality of the State is by no means in contradiction with freedom of religion. The secular State not only supports but also accommodates religious needs in the public sphere.

Many religious needs and constraints are taken into consideration and, to a certain extent, “accommodated” in France through the general French framework concerning the organisation of freedom of religion. In order to be real and effective, this fundamental freedom requires that individuals be able to behave individually and collectively in conformity with their own religious beliefs. Therefore, even if secular, the French Republic must ensure freedom of conscience and guarantee the free exercise of religion to all “citizens” in the broad meaning of the term. It must not only refrain from interfering with religion, but must take positive measures to guarantee the individual and collective expression of religious beliefs. These positive measures indirectly give rights to believers.

1.1. Public funding of religious needs

Although Article 2 of the Law on the Separation of Church and State provides that the Republic does not “recognize” any religion, the French State has had fruitful, long-lasting relationships with all the major religions present in France¹⁸. In addition to the French Bishops’ Conference (which speaks for French Catholics) or the Consistory (which speaks for French Jews), the French Council of the Muslim Faith was created in 2003 in order officially to represent practising Muslims in their relations with French political institutions. This Council performs a number of duties of common interest, dealing with issues such as places of worship, the pilgrimage, specific areas in public cemeteries for Muslim burials, chaplains, the training of imams, and the organisation of ritual slaughter¹⁹.

¹⁸ Note also that the President of the French Republic is co-prince, with a Spanish bishop, of the Kingdom of Kingdom (where Catholicism is still the official religion) and honorary canon (*Chanoine honoraire*) of the Lateran basilica in Rome.

¹⁹ For more information, see Laurence, J. & Vaisse, J. (2006): *Integrating Islam: Political and Religious Challenges in Contemporary France*, pp. 135-62. It should be noted that this organisation has not really overcome the divisions within the Muslim community itself. Its action is criticised as being more political than religious.

In addition to the exception of the regions still under the Concordat regime²⁰, there are, moreover, many exceptions to the prohibition subsidising religious needs provided for in the Law of 1905. The following paragraphs give a brief description of the measures related to the respect of religion in the public sphere.

A) INDIRECT FINANCIAL SUPPORT FOR ALL RELIGIOUS BUILDINGS

The Council of State has held that the right to build religious buildings is a corollary of free exercise²¹, a fundamental freedom. Moreover, in a judgement dated 10 March 2005, the highest administrative Court ruled that “*the constitutional principle of secularity, which implies the neutrality of the State and of the local authorities and the equal treatment of the different religions, does not in itself prohibit the award of grants for religious activities or facilities which are in the public interest and respect the limitations provided for by law*”²². Although the Court does not define precisely which religious activities or facilities are in the public interest, it seems clear that the principle that no financial aid shall be given to any religious project is not absolute and is not of constitutional status.

Despite the importance of this critical issue, this paper will not focus on the scope and therefore the limits of the prohibition on the grant of public subsidies for places of worship²³. It is just to show that notwithstanding the apparently strict position of the Law of 1905, the State subsidizes places of worship to a certain extent, even if very indirectly and implicitly. In fact, the prohibition set forth in the Law of 1905 has been mitigated by the legislature on numerous occasions.

First of all, in accordance with the Law of 1905 itself, the French State remains the formal owner of a very substantial number of places of worship, principally Catholic churches, built

²⁰ The Concordat was abrogated by the Law of 1905 on the separation between Church and State. However, some terms of the Concordat are still in effect in the Alsace-Lorraine region under the local law of Alsace-Moselle, as the region was controlled by the German Empire at the time of the law’s passage.

²¹ Council of State (interim order) 5 August 2005 *Commune de Massat*, no 284307, *A.J.D.A.* 16 January 2006, p. 91.

²² Council of State 16 March 2005, *Minister for Overseas/ President of French Polynesia*, no. 265560.

before the 20th century. According to the Laws of 13 April 1908 and of 25 December 1942, which amended the original text, local authorities may allot funds to ensure the conservation and the maintenance of State-owned buildings of worship, and also of buildings belonging to religious associations²⁴. For example, between 2001 and 2007, EUR 80 million were allotted for the maintenance of these buildings in Paris alone²⁵. If such buildings are officially classified as “historical monuments”, the State is also responsible of their maintenance. For example, the city of Paris, which is the owner of the building, and the French State have agreed to share the costs of restoring the Catholic Church of Saint-Sulpice in Paris. The cost of the project is estimated at EUR 28 million.

Secondly, a Law dated 19 July 1909 also exempts religious buildings from property tax obligations. Religious associations also exempted from the VAT for all their activities²⁶.

A Law of 25 December 1942 also permits the State to fund cultural activities, including those performed by religious authorities, as well as commemorative activities²⁷. In practice, therefore, public authorities can often fund the building of religious buildings —churches, synagogues, and mosques— since they commonly incorporate facilities for cultural and religious activities. They may include, for example, a conference room, or a museum, or a cultural centre.

The first and best known exception to the ban on public funding of places of worship was the Great Mosque of Paris. It was built in the 1920's with substantial State financial aid, voted by the parliament. This gesture was however made, in part, in recog-

nition of the contribution of North African Muslims who fought and died for France during the First World War. This motivation did not exist, however, in the case of a new mosque built in Paris (Barbès-Rochechouart), which recently received public subsidies of up to EUR 20 million. This recently-built mosque contains prayer rooms facilities for cultural activities and for Islamic institutes. Public funding also exists for synagogues and other places of worship. For example, the synagogue of Puteaux, a Paris suburb, was built in the middle of the last decade with the help of EUR 8 million in subsidies from the municipal government.

Finally, local authorities also indirectly subsidise the building of places of worship by conveying land to religious groups at extremely low prices or by allocating funds for cultural purposes which are then in fact used for religious purposes. In such situations, public funding lacks transparency. As the former President of the French Council of Muslim Worship and current Rector of the Great Paris Mosque explained²⁸, local authorities often “play a cat and mouse game” with administrative law and the administrative courts. Local elected representatives are torn between their desire to avoid their fellow-citizens having to pray in the streets and their fear of upsetting a segment of their electorate.

There are also many other exceptions to the principle of non-subsidization of religious practices, organisations and personnel as set forth in the Law of 1905.

B) THE FUNDING OF RELIGIOUS EDUCATION

In France the freedom to teach (and therefore the freedom to impart and receive private, including religious, education) has

²³ For a complete overview, please refer to the report of the Council of State, “One Century of Secularism”, Report, *op. cit.*; <http://lesrapports.ladocumentationfrancaise.fr/BRP/044000121/0000.pdf>; See also Machelon, J.-P. (2006): “Les relations des cultes avec les pouvoirs publics”, *La Documentation française*, Paris; <http://www.ladocumentationfrancaise.fr/rapports-publics/064000727/index.shtml>

²⁴ Council of State 10 June 1921, *Commune de Monségur, Rec. Lebon* p. 573; Council of State 20 April 1966 *Ville de Marseille, Rec. Lebon*, p. 266.

²⁵ “Paris débordé par l’entretien de ses églises”, *La Croix*, 11 January 2011, <http://www.la-croix.com/Paris-deborde-par-l-entretien-de-ses-eglises/article/2452255/4078>

²⁶ See Article 1382-4 of the General Tax Code; Salton, H. (2007): *Veiled Threats. Islam, Headscarves and Religious Freedom in America and*

France, PhD Thesis, University of Auckland, 2007; <https://researchspace.auckland.ac.nz/bitstream/handle/2292/2317/02whole.pdf;jsessionid=8304F2883E088A0211C3207ED3B75C95?sequence=14>; See also Charlier-Dagras, M D. (2002): *La Laïcité Française à l’Epreuve de l’Intégration Européenne*, L’Harmattan, Paris.

²⁷ Council of State 1st June 1956 *Canivez, Rec. Lebon*, p. 220, concerning the public funding of the Catholic University of Lille and an association aiding students. See also Council of State 25 November 1988 *Dubois, Rec. Lebon*, p. 422 concerning the funding of a statue in memory of an archbishop.

²⁸ “The number of Mosques must be doubled”, *France Soir*, 28 June 2010, <http://www.francesoir.fr/actualite/societe/dalil-boubakeur-%E2%80%9Cil-faut-doubler-nombremosquees-en-france%E2%80%9D-54083.html>

constitutional status²⁹. Since the end of the 19th century, public education in France, including the personnel and the teaching programmes, have been secular³⁰. But this does not preclude private religious education. In fact, since the *Debré Law* of 31st December 1959, private schools as well as State schools can be financially supported by the State.

Such public funding is not considered incompatible with the principle of secularity, since secularism does not require a system of strict separation and takes into account the religious freedom of citizens. The French Constitutional Council has frankly acknowledged that “*the legislature can give financial aid to private teaching in light of the nature and importance of their contribution to the accomplishment of the educational mission*” entrusted to schools³¹. Private schools which have signed a contract with the State benefit from a number of financial advantages. In return, pursuant to Article L-442-1 of the Education Code, they must respect the religious freedom of their pupils and are required to admit pupils without regard to their religious beliefs.

Furthermore, Article L. 141-3 of the Education Code provides that State schools must close one day a week in addition to Sunday, to allow for optional religious teaching outside State school facilities³². According to a State regulation dated 2 May 1972, this day off is scheduled on Wednesdays³³.

²⁹ See Constitutional Council Decision no. 77-87 DC of 23 November 1977 *Complementary Law to the Law no. 59-1557 of 31st December 1959 amended by Law no. 71-400 of 1st June 1971 relating to the freedom of teaching*, *Official Journal of the French Republic* 25 November 1977, p. 5530.

³⁰ See the so-called *Ferry Laws* of 28 March 1882 and 30 October 1886.

³¹ Constitutional Council Decision no. 93-15 DC of 13 January 1994 *Law relating to the financial aid to private educational institutions by the local authorities*, *Official Journal of the French Republic* 15 January 1994, p. 832.

³² See Article 56 of the law of September 30, 1986, *Official Journal*, 1st October 1986, 11760. See also *Official Journal*, 24 April 1991, 5408-9 and Sitruk, J. (2003): *L'État et les Religions en France: Réflexions et Perspectives*, Grand Rabbinat de France, Paris.

³³ Debray, R. (2002): “L’enseignement du fait religieux dans l’École laïque”, Report to the Minister of Education, *La Documentation Française*, February 32 p., <http://lesrapports.ladocumentationfrancaise.fr/BRP/024000544/0000.pdf>

Moreover, on 5 February 2010, a Bill of Rights proposed to complement civic curricula with courses relating to religion. Such courses would

C) THE ORGANISATION OF STATE-FUNDED CHAPLAIN SERVICES

The Law of 1905 does not prohibit State-funded chaplain services in public institutions such as schools, jails, and hospitals or in the armed forces. However, the Law does not expressly oblige the State create such services. Their creation resulted initially from a constructive approach to the 1905 Act by the administrative courts, which held that the prohibition of religious ceremonies in these public institutions would illegitimately hinder freedom of worship³⁴. Currently, the State finances the presence of priests, imams, rabbis etc engaged in spiritual counselling in prisons, schools³⁵, and the armed forces, and also for religious funerals of soldiers. The Council of States explicitly defines this funding as “*a legitimate remuneration for a given service*”³⁶.

In public hospitals, according to Article R. 1112-46 of the Public Health Code, patients may receive visits from the religious minister of their choice³⁷. Hospital chaplains of the different faiths are hired, or simply authorized to enter hospitals, by the head of hospital services. They are named on the basis of propositions made by religious authorities (the Catholic dioceses, the Jewish consistories, the French Council of the Muslim Faith, the French Protestant Federation, etc.). If, for a particular faith, these authorities cannot be identified clearly, no chaplain service is organised³⁸. Moreover, new hospital buildings must be

aim to provide an understanding of religious culture to French children. However, no legislation of this sort has yet been adopted; Parliamentary Bill of Law, no. 2287, <http://www.assemblee-nationale.fr/13/pdf/propositions/pion2287.pdf>

³⁴ Council of State (ass.) 6 June 1947, *Union catholique des hommes du diocèse de Versailles*, *Rec. Lebon*, p. 250, quoted in the Report of the Council of State entitled “A Century of Secularism”, *op. cit.*

³⁵ For an overview, Texier, A. (1984): “Les aumôneries de l’enseignement secondaire, incertitudes d’une institution”, *Revue de Droit Public*, p. 105.

³⁶ Council of State 6 January 1922 *Commune de Perquié*, no. 74289, *Rec. Lebon*, p. 14.

³⁷ See Decree no. 2003-462 of 23 May 2003. This right must also be reconciled with the requirements of hospital services (Council of State 28 January 1955, *Aubrun et Villechenoux*).

³⁸ Ministerial Circular DHOS/P1 no. 2006-538 of 20 December 2006 concerning the chaplains in public entities defined in article 2 of Act no. 86-33 du 9 January 1986 on hospital public service. For a general overview, see Ouchia, N. (2010): “Les aumôneries musulmanes dans les établissements de santé en France”, *Droit, déontologie et soin*, March, 2010, Vol. 10, no. 1, pp. 32-40.

built with a specific room for religious services, and this room must be made available to the various faiths.

The situation of chaplains **in the armed forces** is dealt with by Decree no. 2005-247 of 16 March 2005³⁹. Armed forces chaplains may be military personnel or civilians. In some cases, the role of chaplain is played by simple volunteers drawn from the ranks of the armed services. Military chaplains are appointed by the Ministry of Defence on the basis of propositions made by religious authorities. They are responsible for providing religious counselling to any member of the armed forces who requests it⁴⁰. Muslim chaplains in the armed services were authorized only recently, by a regulation dated 16 March 2005. Previously, only Christian, Protestant and Jewish chaplains were appointed.

In prisons, Articles D. 432 et seq. of the Criminal Procedure Code provide that any persons who are incarcerated may participate in the religious services or meetings organised by accredited chaplains. These chaplains are appointed by the regional director of the prison service after consultation of the Prefect. They may be assisted by volunteers, who must also be accredited. The main tasks of prison chaplains consist in celebrating religious services, in carrying out religious rites and in providing spiritual and pastoral counselling. They are entitled to meet with the prisoners as often as they like, and their meetings take place without the presence of a prison officer. No disciplinary sanction can suspend this right and likewise, even when collective prayer in prison is not authorized, its practice cannot justify confinement in a punishment cell⁴¹. Article 26 of the Prison Regulation Act (law no. 2009-1436 of 24 November 2009) also provides that all prisoners shall be able to practise the religion of their choice, without any limit other than those required by security or public order, as the conditions and organisation of the prison must also be taken into account.

³⁹ *Official Journal of the French Republic* no. 65 of 18 March 2005 p. 4599. See also Decree no. 2005-248 of 16 March 2005 amending Decree no. 64-498 of 1st June 1964 relating to religious ministers within the security forces. See also Law of 8 July 1880 and Decree of 1st June 1964 recognizing the fundamental right for each member of the Armed Forces to practice his or her religion and defining the responsibilities of the military command in this respect.

⁴⁰ See also Decree no. 2008-1524 of 30 December 2008, defining the status of military chaplains.

Examples of the financial intervention of the public authorities could be multiplied. They concern for example the programming of religious and spiritual broadcasts on national public radio and television channels⁴². Under the *Léotard* Law (as modified on 5 March 2009), public television must ensure a place for religion: «*France Télévisions shall schedule religious television broadcasts on Sundays, dedicated to the principal religious faiths present in France. These broadcasts are the responsibility of each of the different religious faiths*»⁴³. On Sunday mornings, there is a programme entitled «The Paths of Faith» on France Television. It is a multi-faith broadcast dealing with Buddhism, Islam, Christianity and Judaism. Catholics co-produce the Sunday Mass, which is the oldest programme on television (since 1948). The same obligations exist for public radio, pursuant to the Decree of 13 November 1987 concerning Radio France and its specification requirements.

This brief overview, though not exhaustive, demonstrates that the ban on the State funding of religion is subject to many exceptions. Going beyond this financial intervention, religion is also taken into consideration within the public sphere through the accommodation of religious needs or constraints.

1.2. *The accommodation of religious needs within the public sphere*

Some accommodating measures are regulated, while others consist in social practices or initiatives which fit into an overall “living together” approach. For example, the question of the ritual slaughter of animals for kosher or halal food is regulated by the Decree no. 2003-768 of 1st August 2003⁴⁴. Only individuals accredited by approved religious organisations can ritually slaughter animals, and it is required the animals be killed in a slaughterhouse.

⁴¹ See Administrative Tribunal of Versailles 24 march 2005 *M. B.*, no. 0406598, which invalidates the sanction of placement in a punishment cell for 8 days.

⁴² Article 56 of Law no. 86-1067 of 30 September 1986 (so-called *Léotard* Law) on the freedom of communication and Decree no. 92-280 of 27 March 1992 as modified most recently by Decree no. 2010-1379 of 12 November 2010; Decree 13 November 1987 on Radio France.

⁴³ This mission is assigned to France 2 (Decree of 23 June 2009).

⁴⁴ This Decree repealed Decree no. 97-903 of 1st October 1997.

In connection with dietary requirements, the catering services of State schools, the armed forces and the prisons adapt their menus to a certain extent to meet the needs of students, military personnel and prisoners. Other examples refer to adaptation of work or school schedules to accommodate religious constraints.

An interesting legal issue is determining whether such administrative practices result from a right, under French law, to reasonable accommodation of religious requirements.

A) ACCOMMODATION OF RELIGIOUS CONSTRAINTS RELATED TO DIETARY REQUIREMENTS AND HOLY DAYS

• The accommodation of dietary constraints

In some cases, the French public authorities facilitate compliance by believers with the dietary requirements and restrictions that their religion imposes on them. Even if the secular principle does not prohibit any replacement menu, the Stasi Commission, set up in 2003 to rethink the application of the principle of secularity in France, favoured the promotion of practices to “accommodate” religious constraints while reconciling them with the proper functioning of the institutional catering sector⁴⁵. As a consequence, insofar as public service recognises the exercise of all faiths, local authorities are entitled to propose specific menus taking into account religious requirements⁴⁶.

In practice, many **State school cafeterias** offer an alternative when pork is on the menu. However, there has not yet been an official decision by school authorities concerning the serving of halal or kosher meat. Some municipalities such as Lyon and

Aulnay-sous-Bois have taken successful and innovative initiatives in order to provide two menus, one with meat, the other meat-free. Not only does this solution accommodate Muslims, Jews, Buddhists, Hindus and vegetarians but it also provides a way not to segregate the school pupils at lunchtime on the basis of their religion.

The changeover in Lyon occurred in 2008. One reason for it was the fact that, in previous years, some 30% of pupils refused to eat the meals served in the 130 school cafeterias (i.e. approximately 16,400 meals are served every day)⁴⁷. Today, the municipality of Reims is confronted with equally dramatic figures: in early 2011, 1165 children were refusing to eat pork (6,350 meals are served daily). Even when pork is replaced by some other meat, 550 children refuse to eat meat of any sort. In this context, the municipality is trying to find an adequate solution, since providing nourishment for children attending school is one of its principal missions⁴⁸. Reims may learn from Lyon’s experience.

In any case, there is no legal obligation for municipal, departmental and regional councils to take religious dietary restrictions into consideration in deciding on the functioning of school cafeterias. In fact, under French law, school cafeterias are considered an “optional” public service. The Ministry of Education also considers that refusing to modify menus in school cafeterias in order to accommodate religious requests does not undermine freedom of religion⁴⁹. At present, the administrative courts do not consider that such a refusal violates freedom of religion⁵⁰. In 2002, the Council of State was asked to decide if providing meat-free menus every Friday, and only on Friday, constituted illegal discrimination between Christians and Muslims. The Coun-

⁴⁵ Stasi, B. (2004): “Laïcité et République”, Report to the President of the Republic, *La documentation française*, Paris, 166 p., p. 66; <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf>

⁴⁶ The Law of 13 August 2004 transferred from the State to local authorities all issues related to school catering, including the composition of meals proposed to school pupils. See also the Ministerial Instruction of the Ministry of Education no. 2001-118 of 25 June 2001 (which recommends providing a variety of dishes) and the Ministerial Instruction no. 82-598 of 21st December 1982 (which recommends taking into account familial food habits and customs, including those of children of foreign origin); For an overview, Ramel, A. (2010): “Les collectivités seules face aux choix des menus”, *La Gazette*, 25 October, pp. 54-56. http://www.seban-associes.avocat.fr/fichiers/pub_gaz40_analyse_laicite_cantines.pdf

⁴⁷ Lapoix, S. (2007): “Lyon négocie la laïcité dans les cantines scolaires”, *Marianne* 2, 10 Octobre, http://www.marianne2.fr/Lyon-negocie-la-laicite-dans-les-cantines-scolaires_a78923.html

⁴⁸ “Une enquête sur les ‘menus spéciaux’ dans les cantines”; 10 February 2011, <http://www.lunion.presse.fr/article/marne/une-enquete-sur-les-%C2%AB-menus-speciaux-%C2%BB-dans-les-cantines>

⁴⁹ See the answer of the Ministry of Education to a written parliamentary question published in the *Official Journal of the French Republic* of 29 January 2010, p. 619, <http://questions.assemblee-nationale.fr/q13/13-906QOSD.htm>

⁵⁰ Marseille Administrative Tribunal 26 November 1996 *Ms Zitoussi, Ghribi et al v. Municipalité de Marignane*, *Dalloz* 1997, IR, p. 30.

cil of State ruled that such menus were not explicitly founded on dietary requirements based on religion, and therefore concluded that the situation was not discriminatory⁵¹.

If providing replacement meals only to pupils belonging to a specific religion would obviously be discriminatory, the HALDE's approach seems to go a step further: it seems to attempt to unmask religious discrimination behind apparently neutral practices. In its decision no. 2006-203 of 2nd October 2006⁵², an individual claim was lodged with the French Equality Body concerning provisions accommodating Muslim schoolchildren's dietary requirements, while not providing a similar accommodation for Hindu school children. After noting that such a situation *"would constitute a discriminatory practice"*, HALDE decided to organise a mediation procedure, which it considered as the *"most appropriate"*. Four months later, the municipality decided to provide Hindus with another kind of meal substitute for animal proteins, similar in effect to the provision which already existed for Muslims.

Halal and kosher menus are also offered to military personnel⁵³. To our knowledge, equivalent accommodations do not exist in prisons, except in certain regions placed under the Concordat regime⁵⁴. This is so despite the fact that Article D 354 of the Criminal Procedure Code provides that prisoners should receive *"a varied diet (...) that meets the requirements of nutritional science and food safety (...) and as far as possible, their philosophical or religious beliefs"*. An administrative regulatory note, issued in 1994, encouraged prison authorities to provide kosher or halal food, but this does not seem to have been put into effect. Pork, however, is excluded from the menus of Muslim prisoners, and kosher food is available but at the prisoners' own expense⁵⁵.

As for **the practice of Ramadan**, in 2010 a municipality requested the HALDE's opinion about the legal framework applicable to Muslim children and educators. It should be recalled

that Ramadan fell during the summer in 2010. The issue was therefore raised of the compatibility of fasting with the normal activities and proper functioning of public "leisure centres" (a public service providing activities for children during the summertime, during other school holidays, and after school).

In its Decision no. 2011-69 of 21 March 2011, the HALDE considered that fasting for Ramadan cannot necessarily be considered risky. It affirmed that the systematic exclusion of fasting children from activities provided by public leisure centres seemed disproportionate to the legitimate aim of security. A concrete analysis of the real risks for the children's safety was necessary, taking into account the specific context, and particularly the sport or recreational activities in question. The Equality Body recommended further that, in case of a real safety risk, alternative activities compatible with respect for the obligation to fast should be proposed to the children. Moreover, except for exceptional circumstances, when the children are present at a public leisure centre for several days, meals should be provided to the children outside of fasting periods. As for the public agents supervising the children, the HALDE considered that fasting should be viewed as an aspect of their private lives which could result from reasons other than religious belief (health, personal choice...). It could not therefore be considered as ostentatious or proselytising behaviour which would be in conflict with their civil servant's duty of neutrality. However, given the existence of this duty, the personnel could be required to continue supervising the children during lunchtime even if they themselves were fasting.

- **The accommodation of work schedules**

In field of public employment, although civil servants are prohibited from expressing their religious beliefs during work time, the French public administration may legally adjust working schedules in order to facilitate the free exercise of religion. It

are still in effect in the Alsace-Lorraine region under the local law of Alsace-Moselle, as the region was controlled by the German Empire at the time of the law's passage.

⁵⁵ Council of State, "A Century of Secularism", Report, *op. cit.*

⁵¹ Council of State 25 October 2002 *Ms Renault*, no. 251161.

⁵² <http://www.halde.fr/IMG/alexandrie/2363.PDF>

⁵³ See the answer of the Ministry of Defence to parliamentary question no. 61152, *Official Journal of the French Republic*, 29 December 2009, p. 12492.

⁵⁴ The Concordat was abrogated by the Law of 1905 on the separation between Church and State. However, some terms of the Concordat

is not illegal to request or authorize absences, or to reschedule work time, for this purpose, provided that the continuity and proper functioning of public service can be guaranteed⁵⁶. Restrictions to religious freedom must thus to be motivated by the needs of public service, and the heads of public services must rule individually on each request they receive⁵⁷.

Since Ministerial instruction no. 901 of 23 September 1967, civil servants can be authorised by their superiors to absent themselves in order to celebrate the holy days of their religious denomination. However, their absence can only be authorised if it is compatible with the normal operation of their department. This possibility, to which the superior must give “sympathic consideration”⁵⁸, is not to be understood as an absolute right⁵⁹. It depends primarily on the individual assessment that the head of the department makes regarding the normal operations required to maintain public service. Each year, a ministerial instruction specifies the dates of the main religious ceremonies to be taken into account. For example, for 2011, about fifteen Orthodox, Armenian, Muslim, Jewish and Buddhist holy days are listed⁶⁰. Catholic celebrations are not mentioned, since most of them already correspond to public holidays. However, the list is not closed. Catholics, for example, can receive an authorisation to be absent for holy days that are not public holidays⁶¹. Believers of other faiths, such as Raelians, can also obtain time off⁶². Although this document is not legally binding⁶³, systematically turning down requests corresponding to days that are not listed in the ministerial instruction is sanctioned⁶⁴.

These rules are quite similar to those applicable to private employment. Article L. 1131-1 of the Labour Code prohibits religious discrimination in the field of employment. Article L. 1121-1 of the same code provides that “No one may restrict individual rights, or individual or collective liberties, in a way which is not justified by the nature of the work to be performed, or which is not proportionate to the objective to be reached.” Private must therefore consider any request for time off for religious reasons in good faith. They must normally accede to it, if it is possible to do so and would not be contrary to the needs of the business⁶⁵.

In its decision no. 2007-301 of 13 November 2007, the HALDE dealt with the refusal of an employer to authorize the absence of his employees for the Aid el-Kébir, a one-day Muslim holiday, despite the fact that he authorized the absence of his Jewish employees on Yom Kippur. The Equality Body held that the Labour Code provides for a subtle balance between the freedom of religion and the interests of the company. If discrimination based on religious grounds is prohibited during the employment contract, restrictions can be authorised only if they are justified and proportionate in light of the organisation of work within the company. Therefore, the employer must justify, by reference to factors unrelated to any discrimination, the refusal to authorise the absence of an employee on a holy day. The HALDE thus implicitly acknowledged that any worker should normally benefit from days off in order to fulfil religious requirements, the only limit being the proper organisation of the service in which he or she works.

⁵⁶ Council of State 16 December 1992 *Ms G*, about a 7th Day Adventist working in a hospital and who request to absent herself Saturdays was rejected because she could not be replaced. See also Council of State (interim order) 16 February 2004 *OPHLM Saint-Dizier*, no. 264314 and Fort-de-France Administrative Tribunal 19 June 1976 *C.*, *Rec. Lebon*, p. 653; Paris Administrative Court of Appeal 31 March 2009 *Ms Marie-Henriette X*, no. 08PA01648.

⁵⁷ Council of State 12 February 1997 *Ms Henry*, no. 125893, *Droit Administratif*, 1998 no. 248; Melun Administrative Tribunal 8 July 2003 *Ms C.*, no. 01-2769; For a complete overview, Vasseur, J.-L. & Seban, D. (2010): “Liberté religieuse et service public”, *La Gazette*, 11 October, p. 52.

⁵⁸ Ministerial answer to a parliamentary question, no. 32539, *Official Journal of the French Republic*, 20 October 1999, p. 5514.

⁵⁹ Council of State 3 June 1988 *Barsacq-Adde*, no. 67791.

⁶⁰ For example, see the indicative calendar of holy days for the year 2011, for which authorization of absences can be granted: Ministerial In-

struction no. 2010-250 of 20 December 2010; <http://www.education.gouv.fr/cid54294/menh1032539c.html>

⁶¹ Council of State 12 February 1997 *Ms Henry*, *op. cit.* about Good Friday, the Miraculous Medal Day or Corpus Christi.

⁶² Paris Administrative Court of Appeal 22 March 2001, *Crouzat*, no. 99PA02621; <http://www.droitdesreligions.net/juris/caa/20012203.htm>.

⁶³ Council of State 8 April 2010, *Mr Christian A.* no. 326609.

⁶⁴ Council of State 12 February 1997 *Ms Henry*, *op. cit.*

⁶⁵ Savatier, J. (2001): “Liberté religieuse et relations de travail”, in *Mélanges Verdier, Droit syndical et droit de l'homme à l'aube du XXIème siècle*, Dalloz, Paris, 529 p., p. 455; See also Gaudu, F. (2008): “Droit du travail et religion”, *Droit social*, September-October, no. 9/10, pp. 959-968, spec. p. 967.

It seems, at first sight, that French labour courts accept the employees of workers considered as having “deserted” their posts because they refused to work at certain times for religious reasons. In fact, however, the judgements in question stress the particular circumstances of each case, and particularly the good faith of the employers who had proposed different but reasonable accommodation and/or who could not propose such an accommodation because of legitimate business needs⁶⁶.

For example, the Paris Court of Appeal found against a Jewish salaried worker in charge of data capture and processing who had requested a specific work schedule accommodation to comply with his religious constraints. The judgement explained that such an accommodation was not possible given the organisation of the business and the plaintiff’s specific job. The plaintiff had also refused another work schedule which would have permitted him to comply with his religious obligations for the Shabbat every Friday evening⁶⁷. In another case, the same Court reasoned that the refusal of an employer to grant a five-week leave-of-absence to an employee who wished to celebrate his wedding religiously in Portugal was justified, both because of the need to deal with an urgent and important order and because this leave, one month before the wedding, was not really essential⁶⁸.

Within the State schools, pupils, despite their obligation to attend courses, are excused from school for the most important holy days of their religion when they do not coincide with public holidays⁶⁹. The abovementioned ministerial instruction, used for authorization of civil servants’ absence, is also pertinent for the school authorities in making these decisions,

as indicated by Ministerial instruction no. 2004-84 of 18 May 2004⁷⁰.

Time off from school for religious reasons can thus be granted to pupils individually and for specific reasons, in a way similar to the system for civil servants. Absences must be compatible both with the pupil’s duties required by his or her course of study and with public order. Therefore, “any requests for systematic or prolonged absences should be refused insofar as they are incompatible with the organisation of schooling”⁷¹. Neither school pupils nor university-level students may be allowed to absent themselves systematically from a mathematics class on Saturday mornings⁷², or from physical education classes, or even from sex education programmes⁷³.

In 2008, a religious association and the Jewish Central Consistory lodged a claim with the HALDE based on the difficulties encountered by practising Jewish students when examinations in public higher education took place on Saturdays and on Jewish religious holidays. In fact, the Jewish religion prohibits taking examinations during these periods. The HALDE found that Jewish students had no absolute right to the rescheduling of classes or examinations to accommodate their religious practices⁷⁴. However, the French Equality Body also reaffirmed the obligation of the heads of academic establishments, whose decisions are subject to review by the courts, to each case individually, and to reconcile as far as possible religious freedom and the obligations inherent in school life. This position is similar that taken by the Council of State⁷⁵ and with the position taken in abovementioned Ministerial instruction of 2004 indicating that “school and university services should take all necessary measures in order not to organize examinations or

⁶⁶ *Contra*, Brisseau, C. (2008): “La religion du salarié”, *Droit social*, September-October, no. 9/10, pp. 969-980, spec. p. 979.

⁶⁷ Paris Court of Appeal 10 January 1989 *Eric Hassoun c/ SA Luc Durand*, no. 35228/87 et 35180/87.

⁶⁸ Paris Court of Appeal 25 January 1995 *Luis Rodruigues c/ Eduardo Simoes*, no. 31766/94.

⁶⁹ Article L. 511-1 of the Education Code requires pupils to attend all mandatory and optional courses; Council of State 10 March 1995 *Aoukili, A.J.D.A.*, 1995, p. 332.

⁷⁰ *Official Journal of French Republic* 22 May 2004; <http://www.education.gouv.fr/bo/2004/21/MENG0401138C.htm>

⁷¹ Article 2-4 of the Ministerial instruction of 2004.

⁷² Council of State, April 14, 1995, *Consistoire central des Israélites de France*, no. 125148 ; Council of State (Grand Chamber) April 14, 1995, *M. Koen*, no. 157653.

⁷³ Council of State 18 October 2000 *Association Promouvoir*, no. 213303. See also Ministerial Instruction of 19 November 1998, requiring courses on sexuality and AIDS in schools.

⁷⁴ HALDE Decision no. 2008-33 of 18 February 2008. See also HALDE Decision no. 2009-151 of 27 April 2009.

⁷⁵ Council of State 14 April 1995, *Consistoire central des Israélites de France* and *Koen*, *op. cit.* commented on in *Revue Française de Droit Administratif*, 1995, p. 58.

important tests during religious holidays”. It also seems to be in line with ECHR and ECJ case law⁷⁶.

Two months after the HALDE decision, the Ministry of Education issued a note calling educational authorities to find solutions, such as a non failing grade or the organisation of special sessions of an examination, for those who cannot take an examination due to religious constraints.

These decisions do not however systemize in what way, or even whether, the refusal to take into account religious needs is discriminatory. Even if they can be interpreted as founded on discrimination, the requirement to reach a balanced and mutually satisfactory solution is not described as a procedure to vindicate a subjective right to differential treatment. The phrasing chosen by the Council of State seems more to rely on deontological rules.

The abovementioned examples are not exhaustive. Many others related to the accommodation of religious needs in the public sphere could be given. To name just two: the controversial creation of specific time periods reserved for women at the public swimming pools in Lille, Strasburg and Sarcelles⁷⁷; and the recommendation addressed by the Ministry of the Interior to the municipalities, suggesting that they reserve specific areas in public cemeteries for faith-related (particularly Muslim and Jewish) burials⁷⁸. All these measures appear as concrete actions intended fully to respect religious beliefs and the right to engage in worship. Even if some of them have been taken to compensate specific religious communities faced with a particular problem because of their beliefs or practices, they do not result from discrimination law, or only very implicitly and in a very elusive way.

⁷⁶ See ECHR 27 April 1999 *Martins Casimiro et Cerveira Pereira v. Luxemburg*, no. 44888/98, concerning the refusal to give Seventh-Day Adventists a general exemption on religious grounds from attending school on Saturdays, justified by the need to protect the rights and freedoms of others, notably the right to education; E.J.C. 27 October 1976 *Vivian Prais*, aff. 130/75 ruling that “*if it is desirable that an appointing authority informs itself in a general way of dates which might be unsuitable for religious reasons, and seeks to avoid fixing such dates for tests*” and “*if informed of the difficulty in good time, [the defendant] would have been obliged to take reasonable steps to avoid fixing for a test a date which would make it impossible for a person of a particular religious persuasion to undergo the test (...)*”.

B) TOWARDS THE RECOGNITION OF A RIGHT TO REASONABLE ACCOMMODATION?

In its decision in *O'Malley v. Simpson-Sears*⁷⁹, the Supreme Court of Canada recognized a legal obligation, in order to avoid a situation of discrimination, to reasonably limit a generally applicable standard or practice by granting differential treatment to an individual who would otherwise be penalised by such standard or practice. It conceives this right to “accommodation” as a corollary to the right to equality. Therefore, for example, when an employment rule has a discriminatory effect, an employer has a duty to take reasonable steps to accommodate the employee, except in case of undue hardship for the business. In the *O'Malley* case, the duty to work occasionally on Friday evenings and on Saturdays, which resulted from a “neutral” rotating work schedule, was considered as discriminatory toward the claimant, a 7th Day Adventist, since the employer could not prove that accommodating her work schedule would have created undue hardship for the business. The right to reasonable accommodation was later expressly enshrined in the Canadian Human Rights Act of 1998.

In contrast, the French Constitutional Council seems to link the principle of secularity with a refusal to recognize exceptions, on religious grounds, to generally applicable legal rules. In fact, it interprets the principle of secularity as prohibiting anyone from refusing to respect a generally applicable rule on the basis of his or her religious beliefs. In its Decision no. 2004-505 DC of 19 November 2004, it stated that “*the provisions of Article 1 of the Constitution whereby 'France is a secular republic' which forbids persons to profess religious beliefs for the purpose of non compliance with the common rules governing the relations*

⁷⁷ Simon, C. (2003): “Swimming-pools for women”, *Le Monde*, 23 September.

⁷⁸ Ministerial Instruction of 19 February 2008, Cemetery regulations, NOR: INTA0800038C, <http://www.decisionlocale.com/circulaire-inta0800038c-police-des-lieux-de-sepulture.pdf>; Vasseur, J.-L. & Seban, D. (2010): “Carrés confessionnels, la quadrature du cercle”, *La Gazette*, 8 November, pp. 54-56; http://www.seban-associés.avocat.fr/fichiers/pub_laiciteetcollectivitescarresconfessionnelslaquadratureducercle.pdf

⁷⁹ Canadian Supreme Court, *Ontario (Human Rights Comm.) and O'Malley v. Simpsons-Sears Ltd.*(1985), 7 C.H.R.R. D/3102 (S.C.C.).

between public communities and private individuals are thus respected”⁸⁰.

- The accommodation of religious constraints through other legal tools than the right to reasonable accommodation

Despite the Constitutional Council’s very general language, French courts, in particular lower courts, do take into consideration the litigants’ religious constraints, even if they usually leave this practice unspoken. The following cases demonstrate that the judicial system does in fact take into account the consequences of religious requirements, at least to a certain extent.

For example, the Paris Court of Appeal did not draw any legal consequences from certified reports demonstrating that a restaurant managed by a Muslim did not operate during Ramadan⁸¹. However, although it is quite clear that the cultural and social reality of religious requirements is the principal explanation for this “accommodation”, the court leaves it unsaid. Another example of this kind of “taboo” can be found in the interim order of the presiding judge of a Court of Assizes, postponing a trial until after Ramadan⁸². In doing so, he granted a request of the defendant, a Muslim who was fasting, and who argued that he would not, as a consequence, be “*in fully able to defend himself*”. This differential treatment was not considered the direct result of religious accommodation, as it would have been in Canada. The judge explained his decision merely as a way to “*meet the needs of a sound administration of justice*”.

This decision upset many people, and was the focus of a wide public debate⁸³. Nonetheless, it is not surprising in France to see judges in most courts postpone hearings so that they do not fall on a holy day observed by one of the parties.

Furthermore, French courts permit ritual practices like circumcision, practised by Jews and Muslims, to be carried out in public hospitals⁸⁴. Hence, no doctor or accredited *mohel* has ever been convicted on the basis of Article 222-1 of the Penal Code which prohibits inflicting physical harm on individuals for performing ritual circumcision, contrary to cases of excision⁸⁵. However, since Article 16-3 of the Civil Code requires the prior consent of the concerned person to infringe the integrity of his or her body (when medically necessary), those performing circumcisions are sanctioned if they have not obtained the consent of both parents⁸⁶.

In fact, when courts adjust legal rules in order to take into account religious beliefs, they are generally silent about the impact of religious considerations on their decisions. For the time being, therefore, in France, unlike Canada, neither statute nor case law has explicitly acknowledged a right to reasonable accommodation on the grounds of religion or belief.

This does not imply that nothing is done to reach this goal. France in fact accommodates certain religious needs. It simply uses other legal tools to do so. Legislative and regulatory measures appear the most appropriate. Where they do not exist, solutions are often found at the local level, and mediation is frequently used.

⁸⁰ Constitutional Council Decision no. 2004-505 DC of 19 November 2004 *The Treaty establishing a Constitution for Europe*, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2004-505DC-en2004_505dc.pdf

⁸¹ Paris Court of Appeal 20 December 2007 *Ghoufali c/ SCI Immobess*, no. 07/00211.

⁸² “Un procès renvoyé pour cause de ramadan”, *Le Figaro*, 4 septembre 2008; *Le Monde*, 5 September 2008.

⁸³ For another case which attracted enormous interest in the media, concerning the attempt to obtain the annulment his marriage by a Muslim who discovered that his wife was not virgin, see Lille County Court 1st April 2008, no. 07-08458 and Douai Court of Appeal (interim order) 19 June 2008 no. 95/8; Malaurie, Ph. (2008): “Mensonge sur la virginité et nullité de mariage”, *JCP Edition Générale*, no. 26, 25 Juin, act. 440; Terre, F. (2008): “Le libre choix du conjoint”, *JCP Edition Générale*, no. 26, 25 juin, actualité 439; *JCP G* 2008, II, 10122, note G. Raoul-Cormeil.

⁸⁴ Council of State 3 November 1997 *Hopital Joseph-Imbert d’Arles*, *Revue Française de Droit Administratif*, Jan-Feb. 1998, p. 90.

⁸⁵ In a case related to an ill-fated circumcision performed on a baby by a person without French medical qualifications, the prosecutor of Lille noted that such a customary practice could not be assimilated to a surgical act and that he could not prosecute the person who had performed the circumcision for negligence, since the law does not require the hospitalisation of children for circumcision, and the United Nations does not consider circumcision to be genital mutilation. The Court of Appeal of Douai upheld the decision to acquit the accused on June 15, 2010 (Mazen M. Case).

⁸⁶ Rennes Court of Appeal 4 April 2005, no. 04/04000; Lyon Court of Appeal 25 July 2007, *L. v. M.*; However, it is only reimbursed under French health insurance plan when it is performed for medical reasons. See the answer given by Ms Roselyne Bachelot to the MP Valérie Boyer in 2009, *Official journal*, 30 June 2009. See contra, County Court 20 March 1986 *Mutuelle d’assurances du corps sanitaire français v. Benzaid*.

What is striking is thus the excessive caution of French courts in recognizing the possibility for certain persons or groups to obtain new rights on the basis of discrimination law. The public outcry inspired by any decision which can be interpreted as affording unjustifiable preferential treatment seems to restrain judicial initiative in this field. However, although the reasoning of French courts is sometimes less convincing than it might be, since the judges censure the real motives underlying their decisions, their solutions are fully as pragmatic as those of the Canadian Supreme Court.

In addition to the sensitive nature of the subject, several other aspects of the French context contribute to the judicial results. France has a civil law system and French judges seem not to be very familiar with discrimination law: the notion of indirect discrimination, in particular, seems virtually unknown, and is occasionally misused⁸⁷. Moreover, it is not certain that discrimination issues are raised by the litigants. The abovementioned decision of the Constitutional Council gives an idea of the weight in French tradition of the concept of formal equality. Even the French Equality Body seems reluctant to enshrine a right to reasonable accommodation, since there is so far no supporting case law at the European level.

- An approach in line with the current state of European law

The European Court of Human Rights seems reluctant to recognize the existence of a positive obligation to implement reasonable accommodation when religion or culture is involved⁸⁸. Even if the Court did recognize, in its recent *Munoz Diaz* decision⁸⁹ relating to a marriage performed in accordance with the rites of the Roma community, that belonging to a minority may

influence the manner in which the law is applied, it did not take the plunge. Nor did it do so in the *Jakobski* case⁹⁰, involving the request for dietary accommodation of a Buddhist detainee, even if the Court emphasised the recommendation of the Committee of Ministers of the Council of Europe, in the European Prison Rules, indicating that prisoners' religion should be taken into account when providing them with food. The litigants won their case on different grounds, directly related to the behaviour of the national authorities and/or the good faith of the claimant, and not on the basis of a right to reasonable accommodation⁹¹.

Moreover, these cases are much more progressive than others which the Court simply dismissed without consideration of the issue of religious accommodation. This may be seen, for example, in *Dogru and Kervanci v. France*⁹². These cases concerned the applicants' expulsion from school because of their refusal to remove their Muslim headscarves during physical education classes. Although both girls had offered to replace their headscarf by a hat, the Court did not find it opportune to deal with the question of "accommodation", holding that this sort of issue fell squarely within the margin of appreciation of the State. These two cases arose before the enactment of the 2004 French law banning ostentatious religious signs in State schools. The ECHR found no reason to alter its point of view in more recent cases decided after the passage of that law⁹³. The Court thus agreed with French authorities that the wearing of other head coverings, without ever removing them, also constituted a manifestation of religious affiliation. It pointed out that the 2004 law had also to apply to the new religious symbols which might appear, and had to deal with potential attempts to circumvent the law.

⁸⁷ We develop these questions in more detail in Ast, F. (2002): *Les droits sociaux fondamentaux dans l'Union européenne*, Ph.D. Thesis, Paris, 625 p. See also Cluzel-Metayer, L. & Mercat-Bruno, M. (2011): "Discriminations dans l'emploi, Analyse comparative de la jurisprudence du Conseil d'Etat et de la Cour de cassation", *La Documentation française*, Paris, 115 p., spec. p. 33 and seq.

⁸⁸ See, contra, ECHR 30 April 2009 *Glor v. Switzerland* no. 13444/04 relating to discrimination on grounds of disability. For further details, see Ast, F. (2009): "Indirect Discrimination as a Means of Protecting Pluralism: Challenges and Limits", in *Institutional Accommodation and the Citizen: Legal and Political Interaction in a Pluralist Society, Trends in Social Cohesion*, no. 21, Council of Europe Publishing, Dec. 2009, 325 p., pp. 85-109, spec. p. 98.

⁸⁹ ECHR 8 December 2009 *Munoz Diaz v. Spain*, no. 49151/07.

⁹⁰ ECHR 7 December 2010 *Jakobski v. Poland*, no. 18429/06.

⁹¹ Nevertheless, in *Munoz Diaz* case, the applicant believed in good faith that the marriage performed according to Roma rites and traditions had produced all the effects inherent to the institution of marriage, especially as official documents indicated that she was indeed a "wife". She thus had legitimate expectation that she would be entitled to a survivor's pension.

⁹² ECHR 4 December 2004 *Dogru v. France*, no. 27058/05 and *Kervanci v. France*, no. 31645/04.

⁹³ ECHR 30 June 2009 *Aktas v. France*, no. 43563/08; *Bayrak v. France*, no. 14308/08; *Gamaledyn v. France*, no. 18527/08; *Ghazal v. France*, no.29134/08; *J. Singh v. France*, no. 25463/08; *R. Singh v. France*, no. 27561/08.

It is not predictable how the ECHR's case law will evolve. In *Arslan v. Turkey*⁹⁴, the Court seemed to narrow the margin of appreciation of States with regard to the proportionality of measures prohibiting religious signs outside public establishments. Within such establishments, religious neutrality could take precedence over the right to manifest one's religion. This margin of appreciation thus seemed to be understood in a much broader sense by the Grand Chamber in *Lautsi v. Italy*⁹⁵, which dealt with the presence of crucifixes in State school classrooms: the decision held that it was not the Court's role to take a position in domestic debate concerning the religious meaning of crucifixes or the lack of such religious meaning.

Whatever happens at the European level, the current political atmosphere in France is not at all conducive to legal recognition of reasonable accommodation for religious practices. On the contrary, during this pre-electoral period (French presidential elections will be held in spring 2012), certain politicians intentionally distort the meaning of secularism, in order to justify restricting the display of religious signs and to delegitimize any demands based on religious grounds. Most of the time, political figures and the media present these demands as a form of self-imposed cultural and religious isolation which flouts the principle of harmonious "living together"⁹⁶.

Such a context doubtlessly weighs on the courts. For example, even if civil law recognizes only the civil wedding ceremony, the courts traditionally consider religion to be a decisive factor for spousal consent for annulment of the civil marriage, or when one spouse wants to raise the child in his or her own religion. In 2008, a Lille civil court thus decided to annul the marriage of a Muslim man who had discovered, after the marriage, that his wife was not a virgin. This decision led to such a public outcry that the Public Prosecutor unexpectedly filed an appeal. The lower court's judgment was then reversed by the

Court of Appeal, which was subjected to intense political and media pressure⁹⁷.

At present, reasonable accommodation has become so sensitive a subject in public opinion that the courts could not legitimately apply the principle in question unless it were first enacted into law by the National Assembly. Nonetheless, as we demonstrated in the first part of this paper, many legal texts and local initiatives already make room for religious accommodation.

Despite the richness of the French principle of secularism, its contribution to the protection of religious pluralism is however not above criticism. One point meriting such criticism could be the lack of real substantive neutrality at the State level. Historically, France has been a dominantly a Catholic country. Even though the State is now formally secular, there are still traces of the former establishment of the Catholic religion. This situation indirectly favours a secularized Christian culture and tradition.

Because of the anteriority of Catholicism in French society, the distribution of official holidays is non-egalitarian: fifty-two Sundays where most businesses and public institutions are closed favour religions that recognize Sunday as their day of rest. Among eleven other holidays in France, six are of Catholic origin and only five are secular.

Another example concerns the number of places of worship. An Evangelical prayer room opens every week and a Muslim place of worship opens every ten days. Nevertheless, their number is still insufficient compared to the demand, and the nature of the buildings used to house them is frequently detrimental to these religions, which have taken root only recently in France. There are about 45,000 Catholic churches in France, whose maintenance depends largely on the local authorities, but there are only some 2,100 mosques⁹⁸. According to Muslim authorities, this figure should be doubled to satisfy

⁹⁴ ECHR 23 February 2010 *Ahmet Arslan and others v. Turkey*, no. 41135/98.

⁹⁵ ECHR 18 March 2011 *Lautsi v. Italy*, no. 30814/06.

⁹⁶ "Ni voile, ni menu spécial", *Libération*, 31 March 2011; "Voyage au pays des nouveaux islamophobes", *Le Point*, 31 March 2011; Fassin, E. (2011): "L'Islam, vous dis-je ou Sarkozy le malade imaginaire ?", *Libération*, 31 March.

⁹⁷ Lille County Court 1st April 2008, no. 07-08458 and Douai Court of Appeal Douai (interim order) 19 June 2008 no. 95/8; Malaurie, Ph.

(2008): "Mensonge sur la virginité et nullité de mariage", *JCP Edition Générale*, no. 26, 25 Juin, act. 440; Terre, F. (2008): "Le libre choix du conjoint", *JCP Edition Générale*, no. 26, 25 juin, actualité 439; *JCP G* 2008, II, 10122, note G. Raoul-Cormeil.

⁹⁸ Leschi, D. (2008): "Les lieux de culte et le bureau central des cultes", in Lalouette, J. & Sorrel, Ch. (eds): *Les lieux de culte en France, 1905-2008*, Letouzey & Ané, Paris.

the practicing Muslims, who make up 20% of the total Muslim population in France of about 5 million⁹⁹. Lately, political debate has focused on the presence of Muslims praying illegally in the streets of French cities and towns. In December 2010, the new leader of the far-right Front National even made a shameful comparison between a so-called “occupation” by Muslims of French streets, and the Nazi occupation of France during the Second World War. However, all proposals to reform the 1905 Law in order to permit the funding of new mosques have been rejected¹⁰⁰. The mosques which are built frequently depend on foreign funding, such as the mosque of Clermont-Ferrand payed for in great part by King Mohammed VI of Morocco.

What is more, the number of Muslim prison chaplains is still completely insufficient given the prison population¹⁰¹. Although the number of Muslim prison chaplains has doubled since 2006, there are still only 142, compared to 600 Catholics and 265 Protestants¹⁰². According to the General Inspector of Places involving the Deprivation of Liberty, this situation hinders the practice of their religion by Muslim prisoners¹⁰³.

In this context, discrimination law seems best placed to increase the protection of religious pluralism. Even if there is conscious and unconscious resistance to recognising a specific right to reasonable accommodation (frequently understood by the public as simply granting special privileges), the prohibition of discrimination may, at this stage, help widen the impact

of measures provided to certain religious groups in the past through other means.

Discrimination law has, for example, already helped counteract the illegal use, by certain mayors, of their power of eminent domain to prevent religious associations from acquiring land or buildings for places of worship¹⁰⁴. It has also helped counteract the refusal of prison authorities to provide spiritual assistance to an imprisoned Jehovah’s Witness. In a case dealt by the HALDE, a Jehovah’s Witness minister had been denied access to the prison, and prison authorities refused to accredit a Jehovah’s Witnesses chaplain. The prison authorities argued during the HALDE’s investigation that the very low demand for a Jehovah’s Witnesses chaplain justified their failure to hire one. In fact, the authorities’ refusal seems to have been based principally on the absence of any mention of the Jehovah’s Witnesses in the Ministerial instruction of 18 December 1997 which mentions the appointment of chaplains of only six faiths. However, in its 2007 decision, the Administrative Tribunal of Paris insisted on the fact that this list is not closed. The court therefore ordered the re-examination by prison authorities of the requests of the five Jehovah Witnesses’ plaintiffs¹⁰⁵. It should be recalled that, in France, the Jehovah’s Witnesses are not considered a religious group which violates French public order¹⁰⁶.

In its decision no. 2010-44 of 22 February 2010, the HALDE decided another case of religious discrimination against impris-

⁹⁹ “Aider à construire. Des mosquées”, *Libération*, 31 March 2011.

¹⁰⁰ Machelon, J.-P. (2006): “Les relations des cultes avec les pouvoirs publics”, *La Documentation française*, Paris, <http://www.ladocumentationfrancaise.fr/rapports-publics/064000727/index.shtml>. See also parliamentary proposal no. 3215 of Mr. Grosdidier on 28 June 2006, <http://www.assemblee-nationale.fr/12/propositions/pion3215.asp>. See also the recent debate within the governing party and the assertions of the Under-Secretary of State for Housing in favour of a public funding of mosques: “Le débat sur l’Islam a déjà eu lieu au sein de l’UMP”, *Le Monde*, 24 février 2011, http://www.lemonde.fr/politique/article/2011/02/24/le-debat-sur-l-islam-a-deja-lieu-au-sein-de-l-ump_1481979_823448.html

¹⁰¹ Khosrokhavar, F. (2004): *L’Islam dans les prisons*, Éd. Baland, Paris. According to this sociologist, the majority of the prison population is Muslim (50-80% in average).

¹⁰² There are also 54 Jews, 7 Orthodox Christians, and 1 Buddhist. See Ministry of Justice, The key figures of the prison administration, 2006 et 2010, http://www.justice.gouv.fr/art_pix/Chiffresclesjanv2010_opt.pdf; http://www.justice.gouv.fr/art_pix/1_chiffrescles2006.pdf.

¹⁰³ “Prison. L’Islam en pénitence”, *L’Express*, 13 April 2011. See also his opinion dated 24 March 2001 and issued in the *Official Journal* of 17 April 2011.

¹⁰⁴ See HALDE Decision no. 2009-398 of 14 December 2009 proposing a mediation which was eventually successful in 2010: the Muslim association was authorized by the mayor to occupy the site without payment. See also Bordeaux Administrative Tribunal 12 April 2007 *Local Association of Jehovah of Agen*, no. 0503070; For another recent condemnation by the Administrative Tribunal of Bordeaux on 28 March 2011, see *La Croix*, 8 April 2011.

¹⁰⁵ See in particular, Paris Administrative Tribunal 6 July 2007, *M. Alfred B.*, no. 0613450/7, http://www.droitdesreligions.net/pdf_tta20070607.pdf.

¹⁰⁶ However, this religious group was described as a sect in a parliamentary report in 1995. In 2001, the predecessor of Miviludes, the Inter-Ministerial Mission of Vigilance and Combat against Sectarian Aberrations, qualified it not as a full sect but as a religious movement which, on specific issues, defends positions contrary to fundamental rights and freedoms.

oned Jehovah's Witnesses on the basis of articles 9 and 14 of the European Convention of Human Rights. The HALDE then presented its observations in the case before the Administrative Tribunal of Lille. By a judgement dated 4 February 2011¹⁰⁷, the court overturned the decision of the head of the prison in Lille on the grounds that neither legislative nor regulatory provisions provide that the appointment of a chaplain should depend on the number of prisoners of a certain faith who request spiritual assistance. On the contrary, the second paragraph of article D. 433 of the Criminal Procedure Code expressly provides that "*chaplains devote all or part of their time to this mission, according to the number of prisoners of the same faith who are detained in the establishment*".

As shown below, discrimination law also efficiently contributes to religious pluralism.

2. Contribution of discrimination law to religious pluralism

Secularism is inseparable from freedom of conscience and religion as well as from the universal freedom to proclaim one's religion or convictions. However, it is often misinterpreted as imposing neutrality in spheres other than the public one, or on individuals who do not represent the State. In public debate and in the media, secularism is often understood as a straightforward principle that not only prescribes the separation of Church and State and the neutrality of the State but also, by extension, a ban on all religious expression within the State institutions or more generally in public. This conception would confine religious practice entirely to the private sphere, and embodies what the Canadian Bouchard-Taylor Commission calls a kind of

"*radical secularism*"¹⁰⁸. This ideological point of view is nonetheless without any legal foundation in France.

According to a survey of the French National Advisory Commission on Human Rights (*Commission nationale consultative des droits de l'homme*)¹⁰⁹, while anti-Semitism seems to be declining, Muslims often bear the brunt of a certain public wariness, which constitutes a new form of "McCarthyism" or "cultural racism"¹¹⁰. This assumes the form of doubts about their real willingness and even capacity to "integrate" and to respect "French values". According to a recent study¹¹¹, 68% of the French believe that Muslims are not well integrated into French society and 61% consider that Muslim themselves do not want to integrate. The ideas most frequently connected with Islam are a rejection of Western values (31%), fanaticism (18%) and subservience (17%). The ideas least frequently associated with Islam are democracy (1%), protection of women (2%), and freedom (2%). Two-thirds of the French oppose the wearing of Muslim headscarves in public. In twenty years' time, this figure has almost doubled.

The results of this survey are striking. If human rights are indeed universal, that universality cannot be achieved without taking into account a religious and cultural dimension¹¹². The idea of universal human rights would be inconsistent if it did not take Islam into consideration, especially since Muslims constitute a fifth of the world's population and live in every continent and region¹¹³. It is extremely dubious to consider that simply being a Muslim is relevant in assessing a particular individual's compliance with human rights or his/her attachment to human rights values. In this respect, the wearing of the headscarf and more recently the burqa or niqab has become a crucial issue in

¹⁰⁷ Lille Administrative Tribunal 4 February 2011 *Leprevost*, no. 0803808.

¹⁰⁸ Bouchard, G. & Taylor, Ch. (2008): *Building the future: A Time for Reconciliation*, Report, 10 p., <http://www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-en.pdf>.

The Consultation Commission on Accommodation Practices Related to Cultural Differences was established in Quebec in response to public discontent over reasonable accommodation.

¹⁰⁹ Commission nationale consultative des droits de l'homme, La lutte contre le racisme, l'antisémitisme et la xénophobie, 2009 Report, Paris, *La Documentation française*, May 2010, 310 p., pp. 86-87 <http://lesrapports.ladocumentationfrancaise.fr/BRP/104000267/0000.pdf>.

¹¹⁰ Shooman, Y. & Spielhaus, R. (2010): "The concept of Muslim enemy in the public discourse", in Cesar, J.: *Muslims in the West after 9/11, Religion, Politics, and Law*, Routledge, New York, pp. 198-228.

¹¹¹ IFOP, Regards croisés France/Allemagne sur l'Islam, 13 décembre 2010.

¹¹² Lochak, D. (2010): *Le droit et les paradoxes de l'universalité*, PUF, Paris, Nov., 254 p.

¹¹³ An-Na'im, A.A. (2007): "Global citizenship and human rights: from Muslims in Europe to European Muslims", in Loenen, M.L.P. & Goldschmidt, J.E. (eds): *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?*, Intersentia, Antwerpen, Oxford, 336 p., pp.13-55, spec.19.

France. *"The Muslim woman, veiled or not, incarnates in the eyes of a relatively homogeneous public opinion (...) the irreducible incompatibility between Islam and modern democratic values."*¹¹⁴

For some, the headscarf promotes gender inequality and backwardness, and is also a sign of fundamentalism and extremism. This vision perpetuates the stereotype that the headscarf is oppressive and sexist. For others, the headscarf is an expression of personal religious conviction, freedom of religion, the individual woman's choice and her religious/cultural identity, etc¹¹⁵. In reality, any particular veiled woman has various reasons for wearing the veil, and these reasons may change over time. In any case, numerous Muslim women have obviously chosen to wear the headscarf despite societal disapproval. A survey found that while younger girls may feel family pressure to wear the headscarf, young women, between the ages of 18 and 22, often decide to adopt the headscarf out of personal religious conviction or pride¹¹⁶.

Various misconceptions of the secular principle lead to genuinely discriminatory practices on the basis of religion and belief. This paper attempts to demonstrate how discrimination law can help put an end to these situations and can constitute an effective guarantee of religious pluralism. It also addresses the question of the headscarf's compatibility with gender equality. More recently, a related issue has also arisen in Europe, and especially in France, concerning the wearing of the niqab or the burqa: the wearing of such garments is now totally banned in France by a law which entered into effect on 11 April 2011.

2.1. A legal tool to combat misconceptions of French secularism

In practice, in everyday life situations Muslim women in France are often pressured or required to remove their headscarves either by public employees or private individuals. These

pressures or demands are generally against French law. They lead to increased feelings of victimisation and stigmatisation amongst Muslims, and especially among Muslim women.

Religious discrimination often occurs because of a mistaken understanding of the scope and the limits of the principle of secularity and/or of the legislation banning the wearing of religious signs in State schools. In this context, one of the HALDE's and courts' main challenges has been to clear up misunderstandings related to the scope of secularism and to warn against misleading conceptions of this principle which give rise to religious discrimination.

Preliminarily, it should be stressed that apart from a restriction on the public expression of their religion while on the job, public servants, like the users of public services, enjoy complete protection of freedom of thought, conscience, and religion. Any discrimination against a public servant against on this basis is absolutely prohibited by article 6 of the Law no. 83-634 of 13 July 1983 (called *Le Pors Law*), which sets out the rights and duties of public servants.

For example, the HALDE and the Council of State both found that asking a police officer, candidate for a promotion, invasive questions about his ethnic origins and religion of a police was discriminatory. Such promotions are granted only after a series of competitive examinations. During the last, oral examination, the candidate, Mr. El Haddioui, was asked such questions as: *"Does your wife wear a headscarf?" "Do you observe Ramadan?" "Don't you find it strange that there are Arab ministers in the government?" "What's your view on corruption in the Moroccan police force?"* After this interview, Mr. El Haddioui was refused promotion, although he had previously ranked among the top 20 candidates out of 479. He was the only one whose name clearly marked him out as of North African origin. The HALDE investigated this case. The jury of examiners admitted asking the questions noted, but argued that they were asked only in order to check on elements of dissimulation, ma-

¹¹⁴ Amiraux, V. (2003): "Discours voilés sur les musulmanes en Europe: comment les musulmans sont-ils devenus des musulmanes?", *Social Compass*, March, Vol. 50, pp. 85-96, p. 86.

¹¹⁵ For a complete overview, Wing, A.K. & Smith, M.N. (2005-2006): "Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban", *UC Davis Law Review*, Vol. 39, no. 3, pp. 743-790.

¹¹⁶ Quoted in Killian, C. (2003): "The Other Side of the Veil: North African Women in France Respond to the Headscarf Affair", *Gender & Society*, Vol. 17, pp. 567-69.

nipulation, or over sensitivity that appeared in the psychological tests of the candidate. The HALDE nonetheless concluded that *“the jury based its questions on his ethnic origins and his religion in order to eliminate him as a candidate”*¹¹⁷.

The HALDE presented its observations in this case to the Conseil d’Etat, which decided to invalidate the results of the 2007 competitive examination for senior police officers, since it had been tainted by racial and religious discrimination¹¹⁸. The State was condemned to pay EUR 3,000 in damages to the victim.

Many misunderstandings and subsequent discriminatory practices have derived from the adoption of legislation in 2004 prohibiting the wearing of conspicuous religious signs or dress in State schools. In fact, the educational sphere, and more generally all relationships with children, constitute a zone of growing tension within civil society.

A) AN EFFECTIVE TOOL FOR COMBATING THE THREAT OF RADICAL SECULARISM TO RELIGIOUS PLURALISM

In its decisions, the HALDE has consistently recalled that, although public servants are forbidden to wear of religious signs on the job, this legal prohibition does not apply in the private sphere, public or academic beliefs to the contrary notwithstanding. Three main categories of litigation concerning the public sphere can be distinguished: cases concerning users of French public services; cases concerning specifically the field of public education; and cases concerning political actors. The private sector has also adopted certain illegal practices based on radical secularism. Since HALDE has already delivered some 80 decisions in the field of religious discrimination, the cases cited in this part are simply illustrative.

- Within French public institutions

Traditionally, the prefectures which are established in every French *département* organise an official ceremony for the presentation to newly naturalised French citizens of their citizenship

decrees. A complaint was lodged with the HALDE by a woman excluded from this event because she wore a headscarf. In its decision no. 2006-131 of 5 June 2006, the HALDE held that such a practice was discriminatory and recommended measures to put an end to the misapplication of the principles of secularism and neutrality.

In August 2006, the Minister for the Interior, then Mr Nicolas Sarkozy, issued specific instructions to all prefects indicating that there was no justification for excluding a newly naturalised citizen from taking part in this sort of welcoming ceremony on the sole grounds that the person was wearing a veil (or some other religious symbol). He also stressed that wearing the veil does not, in and of itself, signify a lack of integration into the French community.

The HALDE issued a similar legal interpretation of the scope of neutrality in a case concerning the right of individuals wearing religious headgear to have access to courtrooms. In its decision no. 2006-132 dated 5 June 2006, the HALDE decided that refusing access to a courtroom of a Sikh wearing a turban constituted religious discrimination. The claimant had been denied access to the courtroom solely and only because he was wearing a turban. He had not been disrespectful or engaged in disruptive behaviour and had in no way troubled the fair administration of justice. Adopting the HALDE’s recommendation, the Minister of Justice issued a note to the presidents of all French judicial courts restating the principle that neutrality applies to public agents and not to the users of public services such as the courts.

Nonetheless, the day after the decision of the Constitutional Council “validating” the law banning full-face veils, a woman wearing a niqab was excluded from a courtroom in Bobigny (contrary to women wearing the headscarf, whose faces were visible)¹¹⁹. The presiding judge took this decision despite the fact that, at the time, the law in question had not yet come into effect, and the fact that the Prosecutor considered that the woman’s presence was not detrimental to the hearing going forward smoothly. But even this recent decision does not un-

¹¹⁷ HALDE Decision no. 2008-163 of July 7, 2008; http://www.halde.fr/IMG/pdf/Deliberation_2008-163.pdf

¹¹⁸ Council of State 10 April 2009 *M. El Haddioui*, no. 311888. <http://www.conseil-etat.fr/cde/node.php?articleid=388>

¹¹⁹ Konczaty, J. (2010): “Femme voilée au tribunal: la loi n’est pas encore applicable”, *L’Express*, 8 October, http://www.lexpress.fr/actualite/societe/femme-voilee-au-tribunal-la-loi-n-est-pas-encore-applicable_926242.html

dermine the principle that secularism is inapplicable to a person subject to trial¹²⁰.

- **Within the public and private educational institutions providing vocational training for adults**

Another situation where tension arises in the public sphere was dealt with by the HALDE in its decisions no. 2008-121 of 2 June 2008, no. 2008-167 and 168 of 1st Sept. 2008, no. 2009-234, 235, 236 and 238 of 8 June 2009, no. 2009-402 of 14 December 2009, and more recently no. 2011-36 of 21 March 2011. All these cases concern the denial to veiled women of access to **vocational training programs for adults administered in public high schools**. The HALDE held that the 2004 law prohibiting public high school students from wearing religious signs did not apply to adults attending vocational training programmes simply because these programmes take place in State school buildings, since such adults cannot be assimilated to public high school students. The HALDE also held that neither the simple proximity of these adults to State school students, nor the respect of the public status of establishments administering vocational training nor the internal rules of the high schools where the training took place, could justify a general and absolute ban on the wearing of a headscarf by the trainees. The Ministry of Education has now conceded that the 2004 law does not apply to these adult trainees, but still insists that a general ban of religious symbols can be justified by the need to maintain public order and to guarantee the normal functioning of public service.

In fact, some training organisations have complied with the HALDE's recommendations but others have not. On 5 November 2010¹²¹, the Administrative Tribunal of Paris adopted the HALDE's reasoning in invalidating the exclusion of a veiled woman from a traineeship programme for adults administered in a State high school. The court held that the 2004 legislation

must be construed restrictively and did not apply to a woman who was not a high school student. On 27 April 2009, a judge of the same court had already issued a preliminary injunction ordering the readmission of the trainee in question, noting furthermore that the exclusion of the claimant was not founded on her personal behaviour, since there was no evidence that she had done anything contrary to public order. Since the Ministry of Education did not appeal, this judgement constitutes a clear precedent.

The same kind of litigation arises **in the private sector**. For example, in its decision no. 2009-339 of 28 September 2009, the HALDE had to deal with the exclusion of a veiled woman from a private training centre. The complainant was a public university student (veils are in fact permitted in public universities) but her courses, in the field of finance and accounting, were administered for the university by a private institution. As part of the programme, she had simultaneously to work, several days a week, in a private business, which dismissed her after her exclusion from the training programme. The director of the centre justified her decision excluding the student on the basis of an internal rule prohibiting the wearing of all religious signs.

In this case, the HALDE found that the student's exclusion constituted discrimination on the basis of religion, in violation of articles 225-1 and 225-2 of the French Penal Code: these articles prohibit discrimination consisting in subjecting the provision of goods or services to a condition based on membership or non-membership, real or presumed, in a given religion group. The maximum sentence authorised is three years' imprisonment and a fine of EUR 45,000.

Adopting the observations of the HALDE in this case, the Paris Court of Appeal, in 2010, convicted of discrimination both the association administering the training programme and its director. The association was fined EUR 3,775 and the director EUR 1,250¹²². They were in addition held jointly liable to pay a

¹²⁰ Less than a week later, the Ontario Court of Appeal accepted that a claimant wearing a niqab who had filed a complaint for sexual assault could, on the contrary, wear this religious dress while testifying. Banning the niqab could be permitted only if a witness' exercise of her religious freedom truly impaired an accused's right to defend himself or herself. See the judgement of Ontario Court of Justice dated 13 October 2008 *R v. N.S.* <http://www.ontariocourts.on.ca/decisions/2010/october/2010ONCA0670.pdf>

¹²¹ Paris Administrative Tribunal 5 November 2010 *Said*, no. 0905232.

¹²² Paris Court of Appeal 8 June 2010 *Benkirane*, no. 08/08286; For a comment, Pradelle, S. (2011): "L'interdiction du port du voile dans l'enseignement supérieur peut être le signe d'une discrimination", *A.J. P.*, no. 2, p. 79 and seq.

total of EUR 10,500 in damages and legal costs to the victim. The court specifically held that the 2004 law was inapplicable in this case which involved adults studying in a private institute. It also noted that there was no evidence that the victim had engaged in proselytising behaviour or in any way disrupted public order.

In a similar case concerning the refusal to permit a veiled woman to enter a vocational training programme to become a childminder, the HALDE proposed, in its Decision no. 2008-176 of 1st September 2008, a criminal "settlement" involving a EUR 1,000 fine and the payment of EUR 500 in damages to the victim. This settlement was approved by the State prosecutor in 2009.

Recently, the HALDE delivered two new decisions in cases with similar facts. Though these two decisions also found the existence of religious discrimination, the remedy proposed seems more lenient than in previous cases: in its Decisions no. 2011-34 and 35 of 21 March 2011, the HALDE simply recommended that the private training centres in question remove the discriminatory clause from their in-house rules. This shift may perhaps be explained by the changes which had intervened in the Chairmanship of the HALDE and half of its Board in mid-2010.

In another decision on the same day, Decision no. 2011-33, the HALDE had to deal with the case of a woman who had received a failing grade on her final examination to become a nursing assistant. During her oral examination, she wore a headscarf. The panel examining her explicitly warned her that she would be failed if she wore her headscarf, and also asked her questions relating to the compatibility of her religious convictions with her future duties in caring for male patients. The HALDE, extending the application of its prior decision concerning a police officer, reminded the examining institution that the asking of invasive questions about ethnic origin and religion, during a competitive examination in the field of vocational training, was discriminatory. But again, the new HALDE Board did not decide to severely sanction such behaviour. Its action was limited to reminding the training centre involved of law, and

informing the competent Ministry. The training center would have to review the situation of the victim only in the case of a possible new application.

- Within the political arena

The Criminal Chamber of the Court of Cassation has recently approved the conviction for discrimination of a mayor who forbid a town councillor from speaking during a town council meeting because she was wearing a Christian cross¹²³. The highest judicial Court noted that there was no evidence that such a cross had in any way disturbed public order, and that there was therefore no justification for depriving her of her right to express herself as a town councillor. The Court recalled, furthermore, that no legislative provision exists, as would be required by the article 9 of the ECHR, prohibiting an elected representative from manifesting his/her religion or beliefs.

Similarly, on 23 December 2010, the Council of State held that the manifestation of her religious beliefs by a candidate in a regional election has no influence on the freedom of choice of the electorate and it does not raise questions about the independence of the candidate¹²⁴. The highest administrative Court noted that no constitutional norm, and in particular secularism and gender equality, requires the exclusion from an election of candidates choosing to disclose their religious beliefs.

This case concerned the 2010 regional elections, where the New Anti-Capitalist Party (NPA) ran a veiled Muslim candidate, Ms. Moussaid, on one of its lists. The feminist organization *Ni Putes ni soumises (Neither Whores Nor Submissive)* and the Arab Women's Solidarity Organization filed suit to prevent the prefect from registering the NPA list. Their complaint was based principally on the grounds of secularism. On 23 February 2010, the Marseille administrative tribunal dismissed the action, since "*such a decision did not seriously and obviously conflict with fundamental freedom, since these principles [secularism, gender equality, security and indivisibility of the Republic] must be reconciled with the individual freedom of the candidate and her right to stand for election*"¹²⁵.

¹²³ Court of Cassation, Criminal Chamber, 1st September 2010, no. 10-80.584.

¹²⁴ Council of State 23 December 2010 2010 *Association AWSA France*, no. 337899.

¹²⁵ Marseille Administrative Tribunal 23 February 2010 *Association AWSA France*, no. 1001134.

- **Within the private sector**

Within the private sector, there are a large number of cases of religious discrimination which arise in very different contexts. They frequently concern questions of employment, which will be discussed in later section of this paper, but also frequently involve different kinds of private services. In addition to the field vocational training, already discussed, religious discrimination manifests itself, for example, in the refusal to provide driving lessons¹²⁶, in the refusal of access to sports centres¹²⁷ or even in the refusal to rent because of the wearing of a headscarf. For example, the HALDE, in its Decision no. 2006-133 of 5 June 2006, held that the refusal of a hotel to rent a room to a veiled customer, on the basis of a rule (displayed in every room) prohibiting ostentatious religious and political signs, constituted illegal religious discrimination. In a similar case, decided on 8 October 2008, the Nancy Criminal Court of Appeal came to a similar conclusion, and sentenced the owner of a rural bed-and-breakfast to a two-month suspended prison sentence. The Court also awarded EUR 500 in damages to each victim.

More surprisingly, religious discrimination also occurs in the context of acts of charity¹²⁸. In its Decision no. 2010-232 of 18 October 2010, the HALDE dealt with the complaint a veiled woman filed after a private association refused to give her food aid. The association argued that its decision was based on the basis of secularism and that a “moral contract” with the association required its members not to wear any religious signs. The HALDE solemnly reminded the association that “*no legislative, regulatory or judicial rule enshrines the necessity of neutrality of private places open to the public*”, and found that such a prohibition was unjustified and discriminatory. It has presented its observations before the State prosecutor who is in charge of prosecuting the case before the criminal courts.

¹²⁶ See HALDE Decisions no. 2005-25 of 19 May 2005 and 2010-75 of 1st March 2010; See, contra, Nîmes Court of Appeal 8 November 2007 *Sibari v. Mr Didier Jouanne*. See also Nantes County Court 13 December 2010, which quashed the fine of EUR 22 imposed on a woman wearing the burqa while driving, on the grounds that wearing a burqa is not incompatible with security requirements.

¹²⁷ HALDE Decision no. 2009-298 of 14 September 2009.

¹²⁸ HALDE Decisions no. 2006-25 of 6 February 2006 and no. 2007-80 of 12 March 2007 concerning private charities which distributed soup with pork in it to the homeless, which was considered discrimi-

These various cases of religious discrimination derive from a complete misunderstanding of the scope of secularism, but it should also be recalled that freedom of religion and discrimination law have their limits.

B) LIMITS

In 2004, by legislative action, the concept of secularism was extended to prohibit the wearing of “conspicuous” religious signs and dress in State schools. The European Court of Human Rights has accepted this legislative expansion of the notion of secularism, holding that it is not invalidate by the general prohibition of discrimination on the grounds of religion and conviction. More generally, for the ECHR, the principle of non-discrimination does not exclude the banning of religious signs if such a ban is justified by a legitimate aim and proportionate to it.

- **Legislative expansion of secularism in 2004 : the compatibility of the ban on conspicuous religious signs in primary and secondary State schools with discrimination law**

The school is, above all, a space offering education and promoting integration, where children and adolescents learn to live together and respect each other. In France, the educational sphere is controlled and regulated by the secular principle, but also by the 1989 Law on Orientation in Education guaranteeing the individual’s right to freedom of conscience. Starting in the late 1980s, these two principles appear to come into conflict when three young girls were expelled from their school in Creil, a suburb of Paris, for wearing headscarves. Over the years, the problem took on considerable proportions: 3,000 cases were registered in 2004¹²⁹. In some French schools, certain pupils, for religious reasons, refused to abide by the general rules

natory on the basis of religion. In the same sense, see Council of State 5 January 2007, no. 300311 *Ministre d’Etat, Ministre de l’intérieur et de l’aménagement du territoire v. Association « Solidarité des français »* and ECHR 16 June 2009 *Association « Solidarité des français » v. France*, no. 26787/07 (inadmissibility). For a comment, “Victory for Pigs: France Prohibits Soup”, *The Brussels Journal*, 8 January 2008, <http://www.brusselsjournal.com/node/1819>

¹²⁹ Report of the National Education Inspectorate, submitted to the Minister in July 2005: “Application of the Act of 15 March 2004”.

governing school life, or to attend the same courses as the other pupils. Some considered that this behaviour constituted “proselytizing”, in contradiction with the need to insulate the ‘educational community’ from any kind of ideological or religious pressure¹³⁰.

In a famous 1989 opinion, the General Assembly of the Council of State nonetheless indicated: *“That pupils wear signs in school by which they manifest their affiliation to a particular religion is not in itself incompatible with the principle of secularism, insofar as it constitutes the exercise of the freedom of expression and manifestation of religious beliefs. However, this freedom should not allow pupils to display signs of religious affiliation, which, inherently, given the circumstances in which they are worn, individually or collectively, or conspicuously or as a means of protest, might constitute a form of pressure, provocation, proselytising or propaganda, undermining the dignity or freedom of the pupil or other members of the educational community, or might compromise their health or safety, disrupt teaching activities and the educational role of the teachers, or, lastly, interfere with order in the school or the normal functioning of public service”*¹³¹.

After problems in French high schools increased, the President of the Republic set up a special commission (known as the “Stasi Commission”) to study the application of the principle of secularism in the Republic. According to this Commission, *“the visibility of a religious sign [is] perceived by many as contrary to the role of a school, which should remain a neutral forum and a place where the development of critical faculties is encouraged. It also infringes on the principles and values that schools are to teach, in particular, equality between men and women”*¹³².

As a consequence of the multiplication in schools of conspicuous religious signs, such signs were prohibited by Law no. 2004-228, voted by the French parliament in March 15th, 2004. The law is frequently referred to as “the Law on secularism”, and regulates, in accordance with the principle of secularism, the

wearing of signs or attire manifesting a religious affiliation in primary and secondary State schools. The law inserted a new Article L. 141-5-1 in the Code of Education, providing that: *“In State primary and secondary schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited. The school rules shall provide that the institution of disciplinary proceedings shall be preceded by dialogue with the pupil.”*

Therefore, although wearing a headscarf was at first not, in itself, incompatible with secularism, it has become so by law. State educational institutions became *“the apogee of a religion-free zone”*¹³³. However, this law does not cover university students, pursuant to article 811-1 of the Code of Education.

The United Nations considers that the French ban is incompatible with United Nations legal instruments. Its Human Rights Committee has declared that *“respect for a public culture of ‘laïcité’ would not seem to require forbidding wearing such common religious symbols”*, and noted that such a prohibition may lead observant Jewish, Muslim, and Sikh pupils to be excluded from State schools. The Committee thus asked the French authorities to re-examine the 2004 legislation *“in light of the guarantees of article 18 of the Covenant concerning freedom of conscience and religion, including the right to manifest one’s religion in public as well as in private, as well as the guarantee of equality under article 26”*¹³⁴. In 2004, the Committee on the Rights of the Child indicated its fear that the prohibition *“may be counterproductive, by neglecting the principle of the best interests of the child and the right of the child to access education, and [may] not achieve the expected results”*¹³⁵.

However, according to statistics of the Ministry of the Interior¹³⁶, the actual disparate impact of the ban on these pupils appears to be very limited. Shortly after the entry into force of the 2004 legislation, 90% of the 639 pupils wearing conspicuous religious symbols made the decision to conform to the legislation after mediation (this out-of-court procedure being provided for by

¹³⁰ See in this sense, Ministerial Instruction Bayrou, 20 September 1994, *Bulletin officiel de l’Éducation nationale*, no 35, 29 September 1994.

¹³¹ Council of State, 27 November 1989, Opinion, no. 346 893, <http://www.conseil-etat.fr/cde/media/document/avis/346893.pdf>.

¹³² Stasi, B.: “Laïcité et République”, Report to the President of the Republic, *op. cit.*

¹³³ Wing, A.K. & Smith, M.N.: “Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban”, *op. cit.*, spec. p. 755.

¹³⁴ UN Human Rights Committee, Concluding observations on France, CCPR/C/FRA/CO/4, 31 July 2008, <http://www.unhcr.org/refworld/publisher,HRC,,FRA,48c50ebe2,0.html>

¹³⁵ UN Committee on the Rights of the Child, Concluding Observations on France, CRC/C/15/Add.240, 30 June 2004; [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/f77a0c288462b9efc1256f33003c8c0a?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/f77a0c288462b9efc1256f33003c8c0a?Opendocument)

¹³⁶ Written answer of the Minister of the Interior to a parliamentary question, *Official Journal*, 21 December 2010, p. 13791

law). No claims were lodged with the Office of the Education Ombudsman. For the academic year 2004-2005, only 47 pupils (3 of whom were Sikhs) were excluded from State schools for breach of the law. A total of some 96 pupils decided to leave the State schools. Fifty of them chose to study through correspondence courses. Since 2008-2009, there have been no disciplinary procedures, and no new proceeding has been initiated. Registration in the National Centre for Distance Learning, which administers correspondence courses, has remained stable since 2005.

Even if the implementation of the 2004 Law has not caused major problems, the European Commission against Racism and Intolerance regularly calls for its re-evaluation and stresses that the effects of the ban should be examined from the point of view of indirect discrimination and the possible stigmatisation of those concerned, especially young Muslim females¹³⁷.

Since the entry into force of the legislation, 33 proceedings have been unsuccessfully initiated before the administrative tribunals, including complaints arguing that the 2004 Law was indirectly discriminatory. The Council of State, the HALDE and eventually the ECHR¹³⁸ have all held that the ban of conspicuous religious symbols at State primary and secondary schools is not discriminatory as it can reasonably be justified by the secular principle. Since the ECHR's judgement that the 2004 Law conforms to the European Convention of Human Rights, which provides the law with a European "umbrella", the debate seems definitely closed. There is almost certainly no way to call back into question the Law on secularism by arguing that it is discriminatory.

- **The requirements of security and the prohibition of proselytising behaviour**

Both the Stasi Commission in its Report in 2003 and the High Council for Integration in 2010, have recommended amending the Labour Code so as to permit private companies to insert in their staff rules provisions restricting the wearing of religious garments and symbols if these restrictions are based

on requirements related to security, to contact with customers, or to maintaining social peace within the business enterprise. These proposals have, for the moment, gone unheeded.

At present, therefore, freedom of religion and belief are limited in the private business sector only when there is abuse of the freedom of expression, notably in case of proselytizing or pressure on other employees. Article L. 1121-1 of the Labour Code allows employers, as part of their management powers, to establish restrictions on individual and collective freedoms in a company if they are justified by the nature of the work to be done and are proportional to their purpose. The Labour Code also specifies that "*staff rules cannot include provisions establishing restrictions on the rights of persons and on individual and collective freedoms that are not justified by the nature of the work to be done or are not proportional to the goal to be achieved*" (article L. 1321-3 parag. 2).

Two kinds of concerns can justify the restriction of freedom of religion and belief: on the one hand, health and work safety requirements, and on the other hand, requirements related to the nature of the work to be done by the employee. When a restriction on freedom is justified by the specific nature of the work to be done, the way in which the restriction is applied and its consequences should be discussed with the employees so that, insofar as it is possible, their beliefs and the company's interest can be reconciled. The relevance and the proportionality of the decisions must be justified on a case-by-case basis, taking into account the employee's job and its context so that any restriction will be based on objective, non-discriminatory elements.

In a decision dated 25 January 1989, the Council of State invalidated the staff rules of a private company which prohibited "*political or religious discussions, and more generally, any conversation that is not job-related*"¹³⁹. The highest administrative Court held that such a provision exceeded the scope of the employer's power "*given the infringement of individual rights*". The Directorate for Industrial Relations, a division of the Labour

¹³⁷ Lastly, see ECRI Report on France, 15 June 2010, CRI(2010) 16 <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/France/FRA-CbC-IV-2010-016-ENG.pdf>

¹³⁸ Council of State 8 October 2004 *Union française pour la cohésion nationale*, no. 269077; HALDE Decision no. 2008-181 of 1st September 2008; ECHR 30 June 2009, *Aktas v. France*, no. 43563/08 and others

(6 decisions of inadmissibility); For a comment, Decaux, E. (2010): "Chronique d'une jurisprudence annoncée : laïcité française et liberté religieuse devant la Cour européenne des droits de l'homme", *Revue Trimestrielle des Droits de l'Homme*, April, no. 82, pp. 251-268.

¹³⁹ Council of State 25 January 1989 *Société industrielle Teinture et apprêts*, no. 64296.

Ministry, explained in a decision dated 1st October 2004 that any overall prohibition, in a private company's staff rules, of all overt religious or political signs shown or worn by employees would violate article L. 1321-1 of the Labour Code, due to its general and absolute nature.

In its decisions no. 2009-117 of 6 April 2009 and no. 2008-32 of 3 March 2008, the HALDE stated that a private employer's overall ban on wearing any symbol manifesting one's opinions or beliefs would be contrary to Articles 9 and 14 of the ECHR, which protects the freedom of religion from discriminatory practices. In the absence of any proselytising behaviour, pressure, or aggressiveness, wearing a religious symbol cannot be construed, in and of itself, as an infringement of the rights and freedoms of the other employees.

The HALDE, applying the "test" set forth in the Labour Code, has made several decisions related to the balance between the freedom of religion and safety requirements¹⁴⁰. In this field, two cases dealt with by the HALDE can best be considered together, as they both relate to the sensitive issue of work performed in close contact with young children.

In its decision no. 2006-242 of 6 November 2006, the HALDE decided that there had been no discrimination in a case involving the termination of the contract of a youth leader for sporting and leisure activities who was dismissed by an organisation charged with the social integration of autistic children. At preparatory meetings, the claimant had attended veiled, and indicated that she would refuse to go swimming with the children. The HALDE held that, although the secularism principle could not found the decision to terminate the employment contract, the termination could legitimately be justified by the specific requirements of swimming pool safety for autistic children. This position is perfectly consistent with the Court of Cassation's case law¹⁴¹.

Nevertheless, in its decision no. 2010-82 of 1st March 2010, while Mr Louis Schweitzer was still its chairman, the HALDE reached a different conclusion concerning the application of a private entity's staff rules, allegedly founded on the principles of neutrality and secularity. The case involved the dismissal for

serious misconduct of a veiled woman working as an assistant director in a private day-nursery called *Baby-Loup*. After her return from parental leave, she refused to remove the headscarf that she had started to wear on a permanent basis, despite a new staff rule imposing respect for the principles of secularity and neutrality, and requiring the protection of young children. According to the HALDE, her dismissal constituted discrimination on the basis of religion. The HALDE held, first, that the principles of secularism and neutrality were not applicable in the private sector. The French Equality Body also held that the free exercise of religion, as long as there was no proselytising, could not in itself be considered a threat to children's well-being.

However, on 8 November 2010, when the case was heard by the labour court, the new chairwoman of the HALDE, Ms. Jeanette Bougrab, appointed by the President of the Republic, intervened personally before the judges to disown the HALDE's early decision, asserting that secularity was relevant and could justify the employee's dismissal. Two weeks earlier, Ms. Nadine Morano, Secretary of State for the Family, had already made the following public statement: *«In nurseries and schools, we do not want to see conspicuous religious signs. The government is concerned about this.»* However, by 13 December 2010, the day the judgement in the case was handed down, Ms. Bougrab, after being appointed a member of the government, had resigned from her position at the HALDE, where she was replaced by Mr. Eric Molinié.

The Mantes-la-Jolie labour court upheld the dismissal of the veiled employee, arguing that the staff rule did in fact comply with the Labour Code and noting that the labour inspector had indeed approved it. The court noted, in addition, that although *Baby-Loup* was legally a private body, it had a public service mission and 80% of its funding came from public subsidies¹⁴².

However, despite receiving such substantial subsidies from local authorities, *Baby-Loup* could not prove that it had received a delegation to perform a public. In absence of such a special delegation, French administrative courts, in order to determine whether a private entity in fact carries out a mission of public service, usually consider cumulatively several factual

¹⁴⁰ See for example, HALDE Decisions no. 2009-311 of 14 September 2009 and 2010-166 of 18 October 2010 concerning the incompatibility of the wearing of a headscarf with the observance of rules of hygiene, to be applied at all levels of the food production chain.

¹⁴¹ Court of Cassation Social Chamber 24 March 1998 *Azad*, no. 95-44.738.

¹⁴² Mantes-la-Jolie Labour Tribunal 13 December 2010 *Fatima Llaouej épouse Afif v. Association Baby-Loup*, RG no. F 10/00587.

elements: whether the activity engaged in is of public interest; the conditions of the entity's creation, organisation and functioning; the obligations imposed on it and the measures taken to ascertain whether assigned objectives are reached¹⁴³. In the case of *Baby-Loup*, the private entity could demonstrate neither a real partnership with public authorities nor the participation of any town councillor on its management board. Moreover, it exercised no aspect of "public power", and its employees are not legally considered as being "public agents".

The reasoning underlying this judgement therefore seems quite fragile¹⁴⁴. It holds that the principle of secularism is applicable to a private body, but does so without any real legal ground in private labour law. It validates the staff rule on the sole basis that it was registered without objection by the Labour inspectorate, but legally such registration does not imply approval of the contents of the document which is registered. In any case, it is settled case law that the courts retain the power to decide on the legality of staff rules' provisions when the question is raised in case brought before them¹⁴⁵. Furthermore, the labour court implicitly justifies the application of secularism on the basis of the alleged "public mission" of *Baby-Loup*. But if the nursery were in fact a "public" body, the question posed would be the neutrality of a public service and of public agents. In that case, the labour tribunal itself would be incompetent, and the case should have been brought before an administrative court.

The judgement in this well-publicised case is now on appeal before the Versailles Court of Appeal, which will hear the parties on 13 September 2011. Whether or not the HALDE will maintain its initial position is, at the moment, unclear. In fact, in May 2011 the HALDE merged into a new structure called the Defender of Rights, and its chairmanship may change again. Before the merger went into effect, its last director, Mr. Molinié, organised an in-depth reflection on this complex

issue. He carried out hearings with employers from the private sector, diversity consultants and human resources officers, as well as with managers in the health care sector. He explained to the media that: "*The problem concerns not only childcare but also other situations where the public is vulnerable, such as patients in private hospitals to which a public service is delegated, or the elderly confined in nursing homes*"¹⁴⁶.

Certain politicians consider that the *Baby-Loup* case exposed a legal loophole. They have requested new legislation covering this specific situation. In the same line, on 28 March 2011, the HALDE requested a clarification of the legal framework guaranteeing a fair balance, within a democratic society, between the prohibition of discrimination on religious grounds, the freedom of religion and the restrictions on religious practice provided for by law¹⁴⁷. On March 5, 2011, the current governing party decided to examine the opportunity to extend the duty of neutrality in order to cover specific private entities entrusted with missions of public service in the social field and the ones concerning health care and childcare. The government may soon introduce a new bill in parliament concerning these matters¹⁴⁸.

This paper has shown how discrimination law may act as a barrier to the misuse or the abuse of secularism, but has also shown its limits. Another question concerns its impact on issues that are not directly connected to secularism.

2.2. THE SCOPE OF PROTECTION BEYOND THE MISUNDERSTANDING OF SECULARISM

Although the European Court of Human Rights has held that "*an attitude which fails to respect that principle [of secularism] will not necessarily be accepted as being covered by the freedom to manifest one's religion*"¹⁴⁹, and has in fact already

¹⁴³ Council of State 22 February 2007 *APREI*, no. 264541.

¹⁴⁴ For a critical analysis of this decision, see also Adam, P. (2011): "L'entrepreneur, sans foi... ni voile?", *Revue de Droit du Travail*, March, pp. 182-185.

¹⁴⁵ Court of Cassation, Social Chamber 16 December 1992, *Société CEGELEC v. Union nationale des syndicats CGT-CGEE Alstom et autre*, no. 90-14.337.

¹⁴⁶ "Secularism shall better protect vulnerable people", *La Croix*, 26 January 2011; <http://www.la-croix.com/Eric-Molinie---La-laicite-duit-davantage-protoger-les-person/article/2453250/4076>

¹⁴⁷ See also written question no. 17860 addressed by Senator Jean-Pierre Placade to the Ministry of the Interior, *Official Journal of the French Republic*, 31 March 2011, p. 768.

¹⁴⁸ "The UMP propositions to protect secularism", *Le Figaro*, 5 April 2011.

¹⁴⁹ ECHR 13 February 2003 *Refah Partisi (the Welfare Party) and Others v. Turkey* ([GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98).

accepted the banning of the headscarf in certain cases, French substantive law is more restrictive. In French law, except for public servants and State school pupils, wearing the headscarf is not necessarily seen as being a provocation. The HALDE has repeatedly affirmed, in accordance with the Council of State's case law, that «wearing the veil is not, in itself, an act of pressure or proselytism»¹⁵⁰. The highest administrative court has also held that the veil is not, without more, incompatible with the principle of secularism, and that the questions raised by wearing the veil must be decided case-by-case, in accordance with the circumstances¹⁵¹.

Although the secularist tradition in France is very strong, the legal scope of secularism is not as wide, for example, as in Turkey. In France, the 2004 law concerns only primary and secondary education. The wearing of religious symbols such as the headscarf is perfectly legal in French institutions of public higher education. Even during the parliamentary debates leading to the 2004 ban, “there was no question of forbidding religious signs in universities or elsewhere in the world of adults”¹⁵². The HALDE recalled this principle in its decision no. 2008-194 of 29 September 2008, which was handed down after the filing of a complaint by two veiled university students who had been excluded from their Spanish course. Following the HALDE's intervention, the president of the university committed herself to taking disciplinary action against the accused professor if she continued to discriminate against female Muslim students.

Beyond the questions of secularism and religious pluralism, there is an ongoing debate concerning the compatibility of the headscarf with gender equality. The European Court of Human Rights, as well as the Swiss and Turkish Constitutional Courts, have held that the headscarf may not be compatible with the principle of gender equality, or with a message of tolerance and respect for others. The ECHR has thus validated the exclusion of

adult Muslim women wearing headscarves from certain parts of the labour market and from higher education: in *Dahlab v. Switzerland* the ECHR considered justified banning the wearing of the headscarf by a teacher of young children; and in *Sahin v. Turkey*¹⁵³ it considered justified banning the wearing of the headscarf by a university student in her 5th year of medical school. The reasoning in both decisions was based in large part on questions of gender equality.

French case law, on the contrary, has never found any contradiction between the wearing of a headscarf and the right of women not to be discriminated against. There are however many associations, including a large part of those in the feminist movement, who challenge this aspect of the current French legal framework. More recently, another debate has also emerged in France concerning the compatibility of the burqa or the niqab with the French Republic's underlying values, including non-discrimination.

Muslims and particularly Muslim women wearing the *hidjab* have faced increased discrimination in Europe, especially in the aftermath of 9/11. National debates related to the banning of conspicuous religious signs at State schools, or of the burqa in the public space, have reinforced the stigmatization of Muslim women, and in some cases has led to their discriminatory exclusion in everyday life. This has been reported particularly with reference to France but exists as well in other Western European countries¹⁵⁴. This paper attempts to show how discrimination law may help resolve these problems.

A) THE COMPATIBILITY OF THE HEADSCARF WITH GENDER EQUALITY

• European mistrust...

As we have seen, in *Dahlab v. Switzerland* and *Sahin v. Turkey*, the European Court of Human Rights validated a ban on the headscarf concerning a teacher of young children and a student

publications/muslims-europe-20091215/a-muslims-europe-20110214.pdf; EUMC, Muslims in the EU: Discrimination and Islamophobia, Vienna, 2006, http://www.fra.europa.eu/fraWebsite/attachments/Manifestations_EN.pdf; EU Fundamental Rights Agency, Data in Focus Report Muslims, 2009, http://fra.europa.eu/fraWebsite/attachments/EU-MIDIS_MUSLIMS_EN.pdf.

¹⁵⁰ Council of State 27 November 1996 *Mr and Ms Jeouit*, no. 172.686.

¹⁵¹ Council of State, Opinion, 27 November 1989, no. 346 893, <http://www.conseil-etat.fr/cde/media/document/avis/346893.pdf>

¹⁵² WEIL (P), Why the French Laïcité is liberal?”, *Cardozo Law Review*, 2009, Vol. 30, no. 6, pp. 2699-2714.

¹⁵³ ECHR 15 February 2001 *Dahlab v. Switzerland*, no. 42393/98 and ECHR 10 November 2005 *Sahin v. Turkey* (GC), no. 44774/98.

¹⁵⁴ See Open Society Institute (2009): *Muslims in Europe: A Report on 11 EU Cities*, http://www.soros.org/initiatives/home/articles_publications/

in her 5th year of medical school, in two secular States. These decisions were based on various grounds, among which gender equality played an important role. However, Carolyn Evans has argued convincingly that the “*Court uses both stereotypes of Muslim women without any recognition of the inherent contradiction between the two and with minimal evidence to demonstrate that either stereotype is accurate with respect either to the applicants or to Muslim women more generally*”¹⁵⁵. On the one hand, each Muslim woman is presented as “*the victim of a gender oppressive religion, needing protection from abusive, violent male relatives, and passive, unable to help herself in the face of a culture of male dominance*”. On the other hand, each Muslim woman is also presented as an aggressor, as she is “*inherently and unavoidably engaged in ruthlessly propagating her views*”.

Referring to Frances Raday’s research¹⁵⁶, Professors Isabelle Rorive and Emmanuelle Bribosia point out that “*the vast majority of traditional religions and cultures are founded on social norms and practices that were developed in a patriarchal context at a time when there was no protection systematically accorded to individual human rights in general, and to women’s right to equality or to the freedoms of any individual in particular*”¹⁵⁷. Consequently, finding a balance between the principle of equal treatment on the basis of religion, on the one hand, and on gender, on the other hand, may somewhat become difficult in certain cases.

Dominant strands among feminists do not support Muslim women’s religious freedom and seem to favor the solution

that compels them to take off their headscarves. Veiled Muslim women are thus categorised and treated as “second-class women” compared to Western-style and so-called “emancipated” women. As Ms. Vakulenko, an expert on gender, Islamic dress and human rights notes, “*there is (...) a noticeable tendency to overlook or underestimate the gender dimension of the hijab controversy. In particular, the intersection of gender and religion inherent in the ‘Islamic headscarf’ (...) has not been adequately considered or analysed*”¹⁵⁸. As a whole, the current European approach, including that in France, ignores the multi-layered identity of Muslim women in a social and historical context of wariness towards religion that increases their social vulnerability in our modern and deconfessionalized societies¹⁵⁹.

To our knowledge, the Norwegian Ombudsperson is the sole European institution that addressed the ban of the headscarf as indirect discrimination on the grounds of gender¹⁶⁰. It thus treated the headscarf as a part of the physical integrity of Muslim women. However, even in this case, this approach used did not seem entirely satisfactory, since the standard of protection under gender equality and its remedy did not address an aggravated form of intersectional discrimination. In two more recent decisions, the Ombud has upheld this general line of reasoning. A hijab ban was tried both according to the gender equality act and the act against ethnic and religious discrimination. The Ombud held that such a ban was in violation on both prohibition grounds¹⁶¹. This approach is nevertheless unique in Europe.

¹⁵⁵ Evans, C. (2006): “The ‘Islamic Scarf’ in the European Court of Human Rights”, *Melbourne Journal of International Law*, no. 7, pp. 52.

¹⁵⁶ “Culture, Religion and Gender”, *International Journal of Constitutional Law*, 2003, Vol. 4, pp. 663–715, pp. 664–665. See also, “Secular Constitutionalism Vindicated”, *Cardozo Law Review*, 2009, Vol. 30, no. 6, pp. 2769–2798.

¹⁵⁷ Bribosia, E. & Rorive, I. (2010): *In search of a balance between the right to equality and other fundamental rights*, Luxembourg, Publications Office of the European Union, 88 p., spec. p. 67, ec.europa.eu/social/BlobServlet?docId=6264&langId=en

¹⁵⁸ Vakulenko, A. (2007): “‘Islamic Headscarves’ and the European Convention on Human Rights: an Intersectional Perspective”, *Social & Legal Studies* 16, pp. 183–199. See also Fournier, P. and Yurdakul, G. (2006): “Unveiling Distribution: Muslim Women with Headscarves in France and Germany”, in Bodemann, M. and Yurdakul, G. (eds.): *Migration, Citizenship, Ethnos*, pp. 167–184

¹⁵⁹ This language is taken from the decision of the Supreme Court of Canada in *Egan v. Canada*, (1995) 2, R.C.S. 513, pp. 551–552.

¹⁶⁰ Craig, R.: “The Religious Headscarf (hijab) and Access to Employment under Norwegian Antidiscrimination Laws”, in Durham, W.C. & Lindholm, T.: *Islam in Europe: Emerging Legal Issues*; See also Loenen, M.L.P. & Goldschmidt, G.E. (ed.) (2007): *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?*, p. 219–237, Intersentia, Antwerpen, Oxford, 336 p.

¹⁶¹ Siim, B. & Skjeie, H. (2008): “Tracks, intersections and dead ends. Multicultural challenges to state feminism in Denmark and Norway”, in Phillips, A. & Saharso, S.: *The Rights of Women and the Crisis of Multiculturalism*, special issue of *Ethnicities*, <http://org.uib.no/imer/14Nordic/Papers%20fra%2014.%20Migrasjonsforskerkonferanse/Siim%20and%20Skjeie.pdf>

- ... versus the French legal framework

In France, there is no “*mistrust*” of the headscarf comparable to that which seems to exist at the ECHR¹⁶². For the time being, neither the French courts nor the HALDE have ever held that the headscarf was hard to square with the principle of gender equality or with a message of tolerance and respect for others, as the ECHR did in the *Dahlab* and *Sahin* cases. From a strictly legal point of view, the headscarf is not understood by French courts as a sign of the alienation of women¹⁶³. Implicitly at least, French judges take into consideration the fact, highlighted by sociological studies, that women’s reasons for wearing the *headscarf* are various and ambiguous. The headscarf in itself cannot therefore simply be assumed to be a sign of Islamic fundamentalism or obscurantism which oppresses women. The HALDE is generally very suspicious about such stereotypical proxies, and not only in the field of religious discrimination. For example, age is often used as a proxy for health, and on a number of occasions, the HALDE has seen through this pretext.

The so-called «veiled mothers» case, which provoked a public outcry amongst French feminists, provides an excellent illustration of the difficulty encountered in balancing non-discrimination on the basis of religion and non-discrimination on the basis gender. The case concerned eight Muslim women who wore the headscarf. They lodged a complaint with HALDE after the heads of the State schools which their children attended refused to let them accompany schoolchildren on State school outings and/or supervise educational activities, while other mothers were permitted to do so. In its decision no. 2007-117 of 14 May 2007, the HALDE found that, as simple volunteers, parents accompanying school children could not be considered civil servants and were thus not subject to the obligations of civil servants. The HALDE further pointed out that ministerial instruction issued in 2004, after passage of the 2004 Law regarding the display of religious signs in schools, expressly state that the 2004 Law does not apply to parents. The HALDE therefore held that in the absence of legislation, veiled mothers could not automatically be refused the possibility of

accompanying children. Such a refusal could only be justified by particular circumstances which could be construed as acts of pressure or proselytism. The HALDE noted that legal status as a “volunteer” afforded only coverage for damages suffered by such a person who, without being a civil servant, takes part in a public service mission. This decision is in line with the case law of the Council of State. The HALDE in fact drew upon the case law of the Council of State holding that neither the principle of Church-State separation, nor that of the neutrality of public service, precluded the voluntary action, within prisons, of Congregationalists, as long as their activities were unrelated to the surveillance of inmates.

In its Annual Report for 2007, the HALDE responded as follows to the criticism of certain elements of the feminist movement: «*The HALDE’s decision is not intended to take a stance on the reasoning behind the wearing of the veil, or on an interpretation of the veil as such; that does not fall within the scope of its powers. (...) The HALDE refuses any indoctrination of children, just as it refuses any form of incentive for women, veiled or not, to refrain from taking action in the public arena. It works to ensure that all women benefit from the same rights, without discrimination. The HALDE has adopted the same approach when it was faced with other cases of discrimination founded on gender.*».

Despite the negative public reaction to the HALDE’s decision, which was nonetheless based on settled law, the Minister of Education stated publicly in mid 2008 that all parents should have the possibility of accompanying State school outings, and that no form of discrimination should be exercised against them. The heads of the school districts were asked to ensure that department-wide regulations and internal rules and regulations in schools did not include discriminatory clauses¹⁶⁴. However, very recently, the new Minister of Education has reversed this decision. On January 29, 2011, a parents’ association denounced new cases of discrimination against veiled mothers in the suburbs of Paris and asked the Ministry to intervene. Contrary to all expectations, the minister, Mr Luc Châtel, announced on March 3, 2011 that secularism required preventing women from

¹⁶² Rorive, I. (2009): “Religious symbols in the public spaces: in search of a European answer”, *Cardozo Law Review*, Vol. 30, pp. 2279-2698, <http://www.cardozolawreview.com/content/30-6/RORIVE.30-6.pdf>

¹⁶³ Weil, P.: “Why the French Laïcité is liberal”, *op. cit.*

¹⁶⁴ See the written answer of the Minister, Mr Xavier Darcos, to parliamentary question no. 28396; *Official Journal*, 26 August 2008 p. 7378

wearing headscarves from participating in public services. This statement was clearly politically motivated. Under current law, such an exclusion is clearly illegal and discriminatory¹⁶⁵.

The minister's position must be understood in conjunction with other initiatives of the current government with regard to Islam and secularism. For example, this ministerial decision can be linked with that of the Minister of immigration, integration and national identity in October 2010 awarding a grant of EUR 80,000 to the association *Ni Putes Ni Soumises* in order to promote secularism and gender equality, particularly vis-à-vis immigrants and immigrants' descendants living in "difficult" neighbourhoods.

In making his statement, the Minister of Education effectively put into application, without waiting for the necessary legislation, a proposal to Prime Minister of the High Council for Integration. This body, composed of 16 independent members drawn from various backgrounds, professions and generations, was created in 1989 to advise and make proposals on all issues related to the integration of foreign residents or residents of foreign origin. In March 2010, it requested a reassessment of the principle of secularism in public services. The High Council suggested the passage of a law requiring that this principle be respected by all persons who, without being public servants, contributed to a public service, including specifically veiled mothers who, in its view, should be prohibited from accompanying children during school outings¹⁶⁶.

As the law stands, secularism does not apply to this category of users of public services, but the government by its statements itself provokes confusion. Not surprisingly, this change in position occurred shortly before important local elections in which secularism and Islam were at the heart of public debate. In this context, the recent ban on the full veil in the public sphere, and the legality of the ban, are also an issue.

¹⁶⁵ Le Bars, S. (2011): "Luc Châtel interdit aux femmes voilées d'accompagner des sorties scolaires", *Le Monde*, 4 March.

¹⁶⁶ High Council for Integration, Recommendations to the Prime Minister relating to religious expression in public places, March 2010, http://www.hci.gouv.fr/article.php3?id_article=126

¹⁶⁷ The full speech is available at <http://www.elysee.fr/president/les-dossiers/etat/institutions/discours-devant-le-parlement-reuni-en-congres/discours-devant-le-parlement-reuni-encongres.8463.html>

¹⁶⁸ Gerin, A., Schwartz, R., Lamine, A.-S., Portier, Ph. (2010): "La laïcité à l'épreuve du voile intégral", *Regards sur l'actualité*, October, 65 p.

B) THE COMPATIBILITY WITH DISCRIMINATION LAW OF THE BAN ON THE FULL VEIL

• The rationale of the Law of 2010 prohibiting covering one's face in a public space

Addressing the assembled members of the two chambers of Parliament at the Palace of Versailles, President Sarkozy stated in mid 2009: "*The problem of the burqa is not religious. It is an issue of women's freedom and dignity. The burqa is not a religious sign; it is a sign of subservience, a sign of debasement. I want to solemnly say it is not welcome on the territory of the French Republic! [...] ... I say to you; let us not be ashamed of our values, let us not be afraid of defending them*"¹⁶⁷.

Following this speech, the governing party launched a debate on the compatibility of the burqa with French values¹⁶⁸.

On 26 January 2010, a French parliamentary commission (including members of the governing party and of the opposition) having found that the burqa constituted a «*symbol of subservience to men*» and posed an "unacceptable" challenge to French values, issued a report recommending that the burqa be banned in certain public places such as schools, hospitals, public transport and government offices. However, it did not propose prohibiting the full face veil in the streets, or in shopping centres or other public venues¹⁶⁹.

The French Prime Minister, Mr. François Fillon, then asked the Council of State to study the legal solutions for prohibiting the wearing of the full veil. He indicated that he wanted the ban «*to be as wide and effective as possible*», which meant going beyond the recommendation of the parliamentary commission. The Council of State submitted its findings in a report dated 25 March 2010¹⁷⁰, expressing legal reservations about the possibility of a complete ban. It considered such a ban "*fragile in light of the principle of non-discrimination*" and felt that it

¹⁶⁹ Gerin, A. & Raoult, E. (2010): *Rapport d'information sur la pratique du voile intégral sur le territoire national*, 26 January, 644 p. See also the opinion of the National Advisory Council of Human Rights dated 21 January 2010 which was not in favour of the legal banning of the burqa; <http://sancerre/GEIDFile/5107.PDF?Archive=194149191232&xml=http://192.168.200.17/hPDF.xml?Record=365031318321&idlist=19>

¹⁷⁰ Council of State, Study of possible legal grounds for banning the full veil, 25 March 2010 http://www.conseil-etat.fr/cde/media/document/RAPPORT%20ETUDES/etude_voile_integral_anglais.pdf

could not be based on “any indisputable legal foundation.” Secularism could not provide the basis for a general restriction on the expression of religious convictions in the public space, as the European Court of Human Rights had just ruled in the case *Arslan and others v Turkey*¹⁷¹. The Council of State recalled that the secular principle concerns relations between public authorities and the various religions or persons who subscribe to them. It is only “directly binding on society or individuals in the case of specific demands made on certain public services (as in the case of educational institutions)”¹⁷².

Despite this unfavourable opinion of the Council of State, Parliament adopted Law no. 2010-1192 dated October 11, 2010 that completely prohibits the covering of one’s face in a public space¹⁷³. Its rationale is principally based on the protection of public security and gender equality. As noted by the Constitutional Council, “Parliament felt that such practices are dangerous for public safety and security, and fail to comply with the minimum requirements for life in society. It also felt that those women who conceal their face, voluntarily or otherwise, are placed in a situation of exclusion and inferiority patently incompatible with constitutional principles of liberty and equality. In enacting the provisions we are asked to review, Parliament has completed and generalized rules which previously were reserved for ad hoc situations for the purpose of protecting public order”¹⁷⁴.

The Constitutional Council declared the first¹⁷⁵ legislation in Europe banning the burqa compatible with the French Constitution of 1958. It refused the application of this legislation only

in the case of places of worship open to the public. With its decision, the Constitutional Council seems to have validated an unprecedented interpretation of the concept of public order¹⁷⁶. Traditionally, public order had been held to rest on three pillars: public security, public peace, and public health. The criterion of public security permits the State to combat fraud. Its can legitimately be used to prevent people from concealing their appearance, or even authorise demands that they reveal their identity. However, for this principle to apply, it would traditionally, have had to be shown, *in concreto*, that a particular security problem is associated with the full veil as such. However no such security problem has ever arisen in relation with the 1,900 women who, according to statistics of the Ministry of the Interior, wear the burqa or the niqab in France¹⁷⁷. Moreover, when the criterion of public security is to be applied, the risk of a disturbance to public order normally shall be found to limited specific areas and/or to a specific period of time. In its ruling, the Constitutional Council referred for the first time to a “non-substantive” dimension of public security, referring to public decency, public order or dignity.

- The relevance of the Law of 2010 for gender equality

In regard to the question of gender equality, it should be recalled that “but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs are legitimate or the means used to express such beliefs are legitimate (...)”¹⁷⁸. However, the European Court of Human Rights does take into consideration the implications

¹⁷¹ ECHR 23 February 2010 *Arslan and others v Turkey*, no. 41135/98

¹⁷² Council of State, Study of possible legal grounds for banning the full veil, Report adopted by the Plenary General Assembly 25 March 2010, 50 p.; http://www.conseiletat.fr/cde/media/document/RAPPORT%20ETUDES/etude_voile_integral_anglais.pdf

¹⁷³ *Official Journal*, no. 237, 12 October 2010 p.18344.

¹⁷⁴ Constitutional Council 7 October 2010, DC no. 2010-613, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2010-613DC-en2010_613dc.pdf

¹⁷⁵ Technically speaking, Belgium was the first European State to adopt such a legislation on 29 April 2010, but it never came into force, due to a long political crisis. For a complete overview of the situation in Europe, see Dord, O. (2010): “Should the full Islamic veil be banned? European States respond in various ways according to their own national rationale”, *European Issue*, 18 October, no.183.

¹⁷⁶ Verpeaux, M. (2010): “Dissimulation du visage, la délicate conciliation entre la liberté et un nouvel ordre public”, *Actualité Juridique de Droit Administratif*, 13 December, no. 42; McBroom, K. & Jomier, S. (2010): “Synthèse et commentaires sur la loi no. 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l’espace public”, *Droits-libertés.org*, 29 October; Gonzalez, G. (2010): “L’inconventionnalité des sanctions pour port de tenues à caractère religieux dans les lieux publics ouverts à tous”, *Semaine juridique Edition générale*, no. 18, 3 May.

¹⁷⁷ This official figure is reported by the Parliamentary Mission on the full veil in France: Information report, no. 2262, 26 January 2010, http://www.assemblee-nationale.fr/13/dossiers/voile_integral.asp.

¹⁷⁸ ECHR 26 October 2000 *Hasan and Chaush v. Bulgaria*, no. 30985/96.

of wearing certain garments, especially insofar as they relate to gender equality. That was so in its *Leyla Sahin* decision but, above all, in the *Refah Partisi* case, where the Court validated the dissolution of a political organisation calling for the introduction of the *sharia*, which is incompatible with the objectives of the European Convention, "particularly with regard to (...) its rules on the legal status of women (...)"¹⁷⁹.

Without legitimizing a total ban on the wearing of the full veil, both the Council of State and the HALDE had held that, in specific circumstances, certain unfavourable conclusions can be drawn from a woman's wearing the burqa, and certain restrictions on wearing the burqa are permissible, in both cases on the ground of sex equality. For example, in 2008 the Council of State ruled that the denial of French citizenship to a burqa-clad woman was justified, since she had "adopted a radical practice of her religion that [was] incompatible with the essential values of the French community, in particular with the principle of gender equality"¹⁸⁰.

The HALDE, for its part, received a request from the National Agency for the Reception of Foreigners and Migration for its opinion on the legality of the prohibition of the burqa during compulsory language training courses for foreigners immigrating to France. In response, the HALDE indicated that the requirements of public safety, and the protection of the rights and freedoms of others, were legitimate aims recognized by law, which could justify the prohibition of the full-face veil in the specific situation concerned. Given the fact that the language training courses are free, and that attendance is compulsory for newcomers who do not have a sufficient knowledge of the French language, the beneficiaries of these courses could legitimately be required to identify themselves. Furthermore, the HALDE indicated that «*the burqa, beyond its religious scope, may be considered as conveying an idea of female submission and as violating the national values that govern France's integra-*

tion process, in particular the principle of equality between men and women»¹⁸¹.

The question raised now is whether the overall prohibition provided for in the 2011 law, sanctioned by fines of EUR 150 or citizenship classes, or both, for any woman caught covering her face, can be considered as adequate and proportionate to properly safeguard protection of women's rights. Fortunately, a recent ministerial instruction, issued on March 2, 2011¹⁸², notes that the law on the burqa does not authorize public agents to compel a person to unveil or to leave public facilities.

With regard to women who are subjected to undue pressure to wear the burqa or the niqab, there is no evidence that a blanket ban and their conviction of a criminal offense is the best way to stop this practice. However, the women who have been interviewed in the media or by research institutes¹⁸³ have offered very diverse religious, political and personal arguments for their decision to dress as they do. Indeed, the parliamentary mission on the full veil found that most women wearing a full veil in France do so on a voluntary basis. Furthermore, considering the extremely small number of women wearing such garments, it is difficult to prove that, generally speaking, they are victims of greater gender repression than other women.

According to the European Commissioner of Human Rights, "prohibition of the burqa and the niqab would not liberate oppressed women, but might instead lead to their further alienation in European societies"¹⁸⁴. Mr Thomas Hammerberg has thus called for an assessment of the genuine consequences of banning the burqa or the niqab in public institutions like hospitals or government offices. He feared that such a decision may only result in these women avoiding such places entirely. Along these same lines, on January 28, 2011, the Brussels magistrates' court quashed a EUR 200 fine imposed on a woman wearing a niqab, on the grounds that such a restriction, provided for by

¹⁷⁹ ECHR 13 February 2003 *Refah Partisi v. Turkey*, no. 41340/98.

¹⁸⁰ Council of State 27 June 2008, *Ms Mabchour*, no. 286798. See also the Versailles Court of Appeal, 27 June 2006, relating to a divorce case and taking into account excesses stemming from the practice of a religion, such as the obligation to wear the Islamic veil. Such excesses, if they make married life unendurable, may be grounds for divorce, the blame being ascribed to the person responsible for them, pursuant to Article 242 of the Civil Code.

¹⁸¹ HALDE decision no. 2008-193, 15 September 2008.

¹⁸² *Official Journal of the French Republic* no. 52, 3 March 2011, p. 4128.

¹⁸³ Open Society Institute, *Unveiling the Truth: Why 32 Women Wear the Full-Face Veil in France*, April 2011, 178 p. http://www.soros.org/initiatives/home/articles_publications/publications/unveiling-the-truth-20110411/unveiling-truth-20110411.pdf.

¹⁸⁴ See his declaration dated 8 March 2010, http://www.coe.int/t/commissioner/Viewpoints/100308_en.asp.

a municipal police regulation on individual freedom, was not proportionate to the legitimate goal of furthering public security.

Much more could be said about this legislation and its compatibility with European standards of fundamental rights, including the justifications for a State to interfere so broadly in the right to personal autonomy¹⁸⁵. However, as this is not the goal of this article, I will briefly conclude by saying that, in my view, even a secular State should refrain from legislating on how individuals dress themselves in public spaces, except in very limited cases and/or specific circumstances, especially when such a limitation targets a specific religion and exclusively concerns women. There is a high risk that this kind of legislation will be stigmatizing and discriminatory.

3. Final considerations

This paper has attempted to give a comprehensive view of the French model of secularism. After recalling the legal meaning of secularism, it describes the practical consequences of this concept for the funding and the accommodation of religious needs. It is our hope that this paper will help eliminate preconceived notions concerning the alleged lack of protection of religious pluralism in our secular country. Quite to the contrary, it is a misconception of the legal notion of secularism that jeopardizes religious pluralism. In this respect, even if the case law relating to discrimination illustrates the tensions existing within the civil society, it also shows that the legal framework is clear and that existing law clearly prohibits illegitimate practices of religious discrimination.

Nevertheless, despite its liberal foundations, the French model is not immune to criticism. This paper mentioned the recent law providing for an complete ban on wearing the burqa in public, which may well be considered as violating fundamental

freedoms, notably the right to privacy, and because it stigmatizes Muslim women. A future challenge to the French model would probably consist principally in rethinking the concept of State neutrality. For the time being, and despite the efforts already made, religious “minority” groups, especially Muslims still suffer from the disparate impact of supposedly culture-blind normative prescriptions and a bias in favour of the status quo¹⁸⁶. In early April 2011, just as this paper was being finished, the ruling conservative party announced 26 propositions covering such areas as the funding of religious activities and the relationship between religion, the State, the public and the workplace. This document suggests the drafting of a specific legal code incorporating all the rules concerning religious freedom and the State, as well as rules covering more specific areas such as the workplace, public spaces, the home etc. It also proposes the drafting of a guide to good practices for religious freedom and living together at the workplace. Without amending the 1905 Law, the governing party would nonetheless like to provide a clear legal basis for certain current practices, such as the financial aid in fact provided to religious organisations for the construction of places of worship (for example, through the granting of inexpensive long term leases on public land with an option to buy; or various devices making it easier to loan money at low interest rates to religious groups). Proposals of this kind are welcome, since they will make the legal framework more transparent. Certain other proposals however are much more controversial, such as a suggested ban on wearing religious symbols in the private sector or by day-care personnel, and forbidding veiled Muslim women volunteers from accompanying their children’s classes on school outings. All these proposals will doubtless give rise to an intense debate which will help redefine the challenges and limits of religious pluralism in our modern pluralist society. One thing is certain: the concept of “living together” is constantly evolving, and at every moment needs to be reassessed and rethought.

¹⁸⁵ This right is understood as the possibility to conduct one’s life in a manner of one’s own choosing. Such “an important principle underlying the interpretation of the Convention guarantees” includes the possibility to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned and/or for others (ECHR 29 April 2002, *Pretty v. United Kingdom*, no. 2346/02). For a complete overview, N.R. Koffeman, (The right to) personal autonomy in the case law of the European Court of Human Rights, Leiden, 2010; [http://www.staatscommissiegrondwet.nl/userfiles/files/\(The%20right%20to\)%20personal%20autonomy%20in%20the%20case%20law%20of%20the%20EC%20of%20Human%20Rights.pdf](http://www.staatscommissiegrondwet.nl/userfiles/files/(The%20right%20to)%20personal%20autonomy%20in%20the%20case%20law%20of%20the%20EC%20of%20Human%20Rights.pdf)

¹⁸⁶ Laborde, C. (2008): *Critical Republicanism: The Hijab Controversy and Political Philosophy*, Oxford University Press, 312 p. See also, Jennings, J.: “Citizenship, Republicanism and Multiculturalism in Contemporary France”, *British Journal of Political Science*, Vol. 30, pp. 575–598.

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