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Analysis of the 27 June 2008 Decision of the French Supreme Administrative Court Regarding Wearing of the Muslim Veil

Executive Summary

On 27th June 2008, the Council of State (Conseil d'Etat), the French Supreme Administrative Court, upheld a Prime Minister's decree refusing citizenship to a Moroccan woman who was married to a French national and had two French children. The Council's decision was based on the grounds that the woman failed to assimilate to French society due to her radical practice of religion, which the Council deemed incompatible with the essential values of the French nation, in particular equality of the genders. These findings were supported by the fact that the Moroccan woman was a Salafist Muslim and wore the Burqa.

Citizenship is not a right for foreign spouses under French law and the authorities can deny it for reasons of lack of assimilation under the control of administrative courts. However, this does not mean that the State can discriminate and deny citizenship because of the practice of a religion. In the present case, the Council of State did not base its decision on motives of public order, such as adherence to extremist groups like it has done in the past or problems of identification because the Burqa covered the woman's whole face just allowing her to see through a slant. Rather, for the first time, it ruled on the basis of the domestic practice of a religion, thereby entering the sphere of private life and beliefs. Such a decision contravenes international human rights standards.

This is a dangerous trend which could lead to further discriminatory evaluations in the area of private religious practice. However, the case law of the Council of State has not in the past followed such a trend. On the contrary, it has played a neutral role for years concerning the wearing of the Muslim veil.

This decision must be understood in the context of French history. It is crucial to understand the longstanding conflicts between the partisans of moderate secularism and those who wanted to eradicate the manifestation of religious beliefs from the public place under a radical interpretation – or extrapolation - of secularism.

The same argument of prevention of proselytizing that was used by these radicals to claim the prohibition of the clerical robe during the debates for the vote of the 1905 law on separation of Churches and State has been used to enact the 2004 law prohibiting wearing conspicuous religious signs in public schools. This latter law was passed in order to turn the jurisprudence of the Council of State, which used to be neutral and respectful of international human

rights norms by defining secularism as neutrality of teachers and programs along with freedom of conscience of the pupils including their right to express their religious beliefs.

After the vote on the 2004 law, the Council of State's case law has been totally re-oriented, considering prohibitions against "*the insignias and attire, including the Islamic veil, the kippa or big crosses, the wearing of which by itself expresses conspicuously a religious adherence*". With this grounds, it has upheld expulsions from public schools sanctioning the wearing of the Islamic veil, which just covers the hair whatever its size and even with colors, such as a square of fabric bandanna-type-tied over a pupil's hair and the Sikh Keshi (under turban, smaller that the turban).

The law on religious insignias violates international human rights norms. The United Nations Human Rights Committee, as part of its periodic review of the Member States compliance with the International Covenant on Civil and Political Rights has excoriated the law in its Concluding Observations of 22 July 2008 by finding that "*respect for a public culture of laïcité [secularism] would not seem to require forbidding wearing such common religious symbols*" as "*a skullcap (or kippah)*" or "*a headscarf (or hijab)*". The Human Rights Committee recommended that France review its law which infringes Article 18 of the Covenant.

The Council of State's jurisprudence has followed a similar trend concerning the accession to citizenship. Under laws passed in 2003 and 2006 promoting "selected immigration", the construction of "lack of assimilation" has extended to now include, with the 27 June 2008 decision, the assessment by the authorities – and the Courts- of religious practices to determine if they conflict with French Republic values. Not to mention the fact that the finding by the Council of State that Salafism is a "radical practice" of Islam amounts to deciding an internal conflict within Islamology.

Such an evaluation contravenes the European Court of Human Rights case law as well as international human rights standards. The European Human Rights Court has consistently ruled that the States have a duty of neutrality and impartiality and that "*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 or the means used to express such beliefs are legitimate*".

It will be interesting to see if an application is filed with the Human Rights Court to challenge the decision of the Council of State and what the outcome will be.

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Introduction

On 27th June 2008, the Council of State (Conseil d'Etat), the French Supreme Administrative Court, upheld a Prime Minister's decree refusing citizenship to a Moroccan woman who was married to a French national and had two French children. The Council's decision was based on the grounds that the woman failed to assimilate to French society due to her radical practice of religion, which the Council deemed incompatible with the essential values of the French community, in particular equality of the genders.

Citizenship is not a right for foreign spouses under French law and the authorities can deny it for reasons of lack of assimilation under the control of administrative courts.

There are precedents of the Council of State where citizenship has been refused to people close to certain extremist fundamentalist movements or having held extremist or discriminatory positions deemed incompatible with the basic values of the French Republic. Similar jurisprudence found practices of excision[1] or polygamy to constitute a lack of assimilation, practices which are also actionable under the criminal code. In the past, the lack of assimilation finding was always connected with public order to a greater or lesser degree.

Yet, in the present case, the Council of State has ruled for the first time on the basis of the practice of a religion, thereby entering the sphere of private life and beliefs when no issue of public order was at stake.

A determining factor was that the Moroccan woman was wearing the Burqa and not the Hijab, that is to say that she had a headscarf covering her whole head and leaving only a slant for the eyes. She went to the interviews with the social services and the police with it on. This kind of attire, contrary to the simple Muslim veil which just covers the hair (Hijab or Tchador), can pose problems of identification or communication which could in turn form the premise for state decisions based on public order grounds.

[1] Female circumcision

However, the Council of State founded its decision on different grounds, that of the woman's radical practice of religion. By relying on such grounds, the Council has gone beyond its usual case law seeing lack of assimilation on infringement or threatening of the values of the French Republic. It has started to evaluate the lack of assimilation in the private sphere and in particular that of practice of a religion.

This is a dangerous trend which could lead to further evaluations in the area of private religious practice and to discrimination. However, the case law of the Council of State has not in the past followed such a trend. On the contrary, it has played a neutral role for years concerning the wearing of the Muslim veil.

This decision must be understood in the context of French history. It is crucial to understand the longstanding conflicts between the partisans of moderate secularism and those who wanted to eradicate the manifestation of religious beliefs from the public place under a radical interpretation – or extrapolation - of secularism.

Background

The secularism of the French institutions has been achieved through a long process starting with the French Revolution of 1789 and continuing through the enactment of the 1905 law consecrating the separation of Church and State. This transitional and confrontational period eventually resulted in the 1905 law, which has ensured secularity and neutrality of the French institutions and equality of all religions before the law.

The 1905 law, which has guaranteed freedom of conscience and freedom of cult, has been the end of a process designed to extract the Catholic Church from the State institutions. Throughout these years, the anti-clerical sentiments of the Republicans, due to the Church's cooperative relationship with the former Monarchy and its abuses, as well as its omnipresence in the French institutions, has often been confused with a fight against the religious beliefs themselves, as the Catholic conception of God was seen as a means of subjection of man.

On 8 November 1906, socialist Member of Parliament René Viviani gave a speech which remains famous: "*We have dragged human conscience away from belief. When a pauper, weighed down by day's burden, was kneeling down, we put him back up, we told him that behind the clouds there were only illusions. Together, and in a magnificent gesture, we have turned off the lights in the sky that will never be lit again! Here is our achievement, our revolutionary achievement*."

Jean Jaurès, a progressive socialist Member of Parliament who stood up against the condition of miners and championed Captain Dreyfus by publishing "Proofs of His Innocence", and who has remained an emblematic figure of French Socialism, stated in 1903 in his speech to youth:

> "*If the concept of God was taking a tangible form, if God himself was standing visible above the crowds, the first duty of man would be to refuse obedience and to treat him as an equal with whom one can talk, not as a master one is submissive to*".

However, in 1789, the French Revolution, although very anti-clerical, had kept the concept of "Superior Being" which appears in the Declaration of Human Rights and Rights of Citizens of 26 August 1789: "*the National Assembly recognizes and declares, in presence and under the auspices of the Supreme Being, the following Human Rights and Rights of Citizens*". [2]

Napoleon Bonaparte, elected Prime Consul of France, made it his state policy to tolerate religions while placing them under state control. He signed a Concordat with Pope Pius VII in 1801. The Concordat represented a compromise where the Church was recognized by the State and the Pope recognized an elected French government to replace the former Monarchy while conceding that Catholicism was not the religion of all the French population ("*The Government of the French Republic recognizes that the Catholic Religion, apostolic and Roman, is the religion of the majority of French citizens*" was the first sentence of the Preamble).

Under this Concordat and the Organic Articles enacted for its application[3], the Prime Consul exerted a tight control on the Catholic religion in France: he was entitled to appoint bishops and archbishops who would then receive canonical instruction by the Pope. The bishops and priests had to take an oath of loyalty before taking up their duties: "*I swear and promise to God, on the Holy Gospels, to remain obedient and loyal to the Government established by the Constitution of the French Republic*". No Papal bull nor other writings or decisions could be received from Rome, or could be published or complied without the government's consent. The priests, at sermons of parish masses, had to pray for the prosperity of the French Republic and for the Consuls.

In the following years and especially during the XIXth century, supporters of the Catholic Church, in particular the legitimist Catholics[4] who supported the return to Monarchy and Ultramontanists[5], opposed the ideas stemming from the Age of

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2 The Declaration also stated in its Article 10: "*No one can be troubled for one's opinions, even religious, as long as their manifestation does not breach public peace and order established by Law*".

3 Similar Organic Articles of the Protestant movements were enacted at the same time.

4 Partisans of the legitimate King.

5 Supporters of the Pope – "ultra montes" in Latin means "over the mountains", designing Rome.

Enlightenment (XVIIIth century) and the rising Socialism. This opposition materialized in the conflict concerning education, especially regarding the Catholic Church's omnipresence in the education system. Different measures were enacted in favor or against it according to the governments then in power: the Restoration (of Monarchy), the second Revolution of 1848 (revolution of "romantic socialism") and the second Republic, the Second Empire or the third Republic.

Finally, in 1881-1882, Jules Ferry, then Minister of Public Education, enacted laws ensuring free, mandatory and secular education. Religious teachings at school – which had been reintroduced under the Restoration of Monarchy[6] - were then replaced by civic teachings and teachers would not teach Catholic precepts and take pupils to mass anymore. The clergy were evicted from the higher levels of the public education system and teachers of primary schools were not under the authority of the local priest anymore. Ferry also wanted and ensured free and secular teachings for young girls.

The Ferry laws prohibited clerics from teaching if they did not have the same degrees as those required for lay teachers, whereas a mere accreditation from the bishop used to be sufficient. They also prohibited unauthorized congregations from teaching: this concerned around 500 congregations, including Marists, Jesuits and Dominicans. The Jesuits were in particular targeted by the Republicans; Jules Ferry stated that he wanted to "*drag the soul of the French youth away*" from them.

This secularization of education, which should have stuck to enabling freedom of conscience and belief, later turned into retaliation against Catholic congregations.

While certain measures were designed at implementing secularization of the French institutions, such as the crucifix being taken out of the courts and schools, suppression of religious teachings in public schools, secularization of hospitals, funerals and cemeteries, passage of the law allowing divorce, suppression of public prayers in Parliament, prohibition for monks and nuns to teach in public schools (in 1886, 3,403 monks and 14,958 nuns were concerned), and the reduction of 11 million francs in the budget of cults, other measures that followed aimed at hindering the very existence of Catholic congregations and the practice of religion.

In 1893, religious processions were prohibited in numerous cities. In 1899, the police raided the Assumption congregation in Paris. The Augustinians were sued in criminal court for violation of the prohibition of unauthorized associations and their Order was dissolved.

[6] By the Falloux Law in 1850

In 1901, the law on Associations (Waldeck-Rousseau law) was enacted which enabled associations to form freely without prior authorization except for religious congregations which were required to obtain official authorization to exist. Article 16 of the law stated: "*Any congregation formed without authorization will be declared illegal*" and that the participants would be liable for criminal sanctions. Article 18 provided: "*The existing congregations at the time of publication of this Law, which have not been previously authorized or recognized, must, within a three month period, give evidence that they made the necessary applications to apply these provisions. Lacking such evidence, they will be deemed dissolved automatically. The same will happen with congregations to which authorization will be denied. The liquidation of the property owned by them will be done by courts*."

160,000 religious servants were threatened by these provisions. Waldeck-Rousseau's idea was not to eradicate all congregations, but rather to prohibit the ones most unwanted by the Republicans and to put the other ones under control. However, he was succeeded as President of Council[7] by Emile Combes, a former Doctor in Theology and apostate, who was a radical anti-clerical.

Under the direction of Emile Combes, all applications to create new congregations (hundreds of them) were rejected as a whole by the Chamber and the unauthorized congregations were closed down and their properties confiscated. In 1902, Combes took action to ensure the closure of religious schools which were not granted authorizations under the 1901 law; about 120 schools created after the law and 2,800 founded before were shut down. This resulted in numerous demonstrations in Paris and in Brittany.

In 1904, a law was enacted to prohibit teaching to all congregations, authorized or not, even those which had existed for over a century. A total of around 15,000 charities of congregations – schools, community clinics or charity homes – had been closed down since 1901, and around 30,000 clerics forced to exile. The Chartreuse Order of cloistered monks (The Carthusians), founded in 1084, was evacuated by the army. In May 1904, diplomatic relationships with the Vatican were broken off.

Combes was applauded for his extreme measures by the Republican partisans of what they called "Total Secularism" ("Laïcité intégrale") and who nicknamed him "Little Father".

It must be stressed here that all this was happening at the time of the Dreyfus Affair, which contributed to the very passionate climate. In 1894, Captain Alfred Dreyfus was arrested under the erroneous suspicion of sharing intelligence with the enemy and sentenced for high treason, a crime he had not committed. He was degraded and deported to Guyana. Against the background of the defeat against Prussia in 1870, preparation for a revenge war, glorification of the army

[7] Equivalent to Prime Minister

and militarism, the Dreyfus Affair rapidly became emotional and violent. Supported by the Catholic press in favor of the restoration of Monarchy (newspapers La Croix and Le Pèlerin), the right wing launched a violent anti-Republican and anti-Semitic campaign.

Some Catholics stood up for Dreyfus,[8] like Priest Pichot who published in November 1898 a pamphlet on "Christian Conscience and the Dreyfus Affair" in a letter to newspaper La Croix where he condemned anti-Semitism as a violation of the Gospel; like also Paul Viollet, a committed Catholic intellectual who gathered pro-Dreyfus Catholics around him. But Priest Pichot had to leave the diocese after the intervention of the Bishop of Limoges and the position taken by Archbishop of Paris, that of the respect of the sentences of courts, remained the position of the Catholic Church during all the years of unbridled anti-Semitism in the media, until Dreyfus was finally rehabilitated by the Cassation Court in 1906, due to the struggle of dedicated Republicans like Emile Zola[9] and Jean Jaurès.

In January 1905, Combes had to resign together with his ministers due to the scandal of the undisclosed keeping of files on the political and religious opinions of army officers, which were suspected to have also been kept on all administration personnel. The scandal involved the Grand Orient of France Mason lodge to which Combes belonged and which created and kept the files. Combes was then criticized and rejected by his own followers.

In December 1905, the bill of separation of Churches and State, initially proposed by Combes in a version that was very severe for all denominations, even minorities, but modified under the influence of the more moderate President of the Commission, Aristide Briand, was enacted[10]. It is due to Aristide Briand's understanding that a law voted by the Republicans but opposed by the Catholics would never have a chance to be applied and to his talents as an orator and a negotiator, that a consensus was finally reached by all sides on this law of separation of Churches and State, a principle which had finally been accepted by all.[11]

The law repealed the 1801 Concordat. It guaranteed freedom of conscience and the free exercise of cults, under the only limits of public order set forth in the law. The budget of cults was cancelled. The public cult institutions were abolished

[8] A majority of Protestants were pro-Dreyfus and they were even accused of collusion with the Jews and of traitors to the motherland. The Free Masons were also in majority pro-Dreyfus.
[9] Author of the famous article entitled "I Accuse", for which he was sentenced in criminal court.
[10] Aristide Briand was a French political figure and diplomat who held high functions in French government: he was 11 times President of the Council and 20 times Minister. He was awarded the Nobel Peace Price in 1926 for his constant work for reconciliation with Germany.
[11] The Commission in charge of reviewing the draft bill and several propositions of law concerning the separation of Churches and State was appointed on 11 June 1903. The young Socialist Member of Parliament Aristide Briand soon played a major role in it. On March 1905 he filed his report in the name of the Commission and during the following debates he explained his positions.

and the Catholic Church had to form, within one year, new cult associations under the procedure of the 1901 law but governed by the special provisions of the 1905 law. These cult associations would, after the one year period, be the only entities entitled to claim and receive the properties of parishes, dioceses and other clerical institutions. These properties would be transferred to the associations after inventory.

In spite of the turbulences created by its application[12], the 1905 law that Aristide Briand was responsible for enacting represented the end of a violent confrontation which lasted for nearly 25 years and which polarized two visions of France: a Catholic royalist France and a Republican secular France. The partisans of secularism were themselves divided into two camps: the followers of Emile Combes, who aimed at eradicating Religion and others, like Aristide Briand, who wanted to declare the neutrality of State towards all creeds and to guarantee freedom of conscience pursuant to the Declaration of Human Rights and Rights of the Citizens enacted in 1789.[13]

Thereafter, after the common hardship of the First World War, French society started to reconcile and the religious congregations which had been closed down started to form again. In 1920, France restored its diplomatic relationships with the Holy See[14].

It should be noted that during this whole evolution, the excesses committed against religious communities included restrictions of religious expression, including the eradication of religious symbols from public places with the systematic destruction of way-side crosses in the countryside, prohibition of religious processions and prohibition of clerical robes.

The followers of such radical secularism seemed to have forgotten the ideas of the Age of Enlightenment which they claimed adherence to, in particular the principle set forth by Voltaire " *I do not share your ideas but I will fight until death*

[12] In 1906, Pope Pius X refused the organization of cult associations (due to the fear that laymen would take them over), bishops and priests were expelled, the inventories of Church property created incidents where believers physically affronted the police who tried to open tabernacles pursuant to a government instruction. Inventories went on with the intervention of the army; some officers resigned or refused to execute the orders and were tried in military courts. A law was enacted in 1907 to maintain the religious destination of places of worship.

[13] Briand's report in the name of the Commission, started with those words: "By presenting this report, we intend to prove that the only possible solution to the internal difficulties which stem in France from the present Concordat regime is the complete and loyal separation of Churches and State. We will develop a legal argument proving that this regime is the only one which, in a country like France where co-exist different faiths, preserves and protects the rights of everyone."

[14] Through exchanges of mails in 1923-1924, an agreement was reached between the French Republic and the Roman Catholic Church to establish "diocesan associations" in France, placed under the control of the Bishops. This is still to date the way the Catholic cult is organized in France. This agreement between the Republic and the Holy See was considered as a binding "International Agreement" by the then Ministry of Foreign Affairs.

for you to be allowed to express them ". They chose rather to apply the formulas of Saint Just, one of the most extreme figures of the reign of Terror[15] that followed the 1789 Revolution, nicknamed the Archangel of Terror: "*No liberty for the enemies of liberty*" or "*What constitutes a Republic is the total destruction of what is opposite to it*".

Clerical robes had been abolished after the French Revolution in 1792, but the 1801 Concordat re-established them partly by stating that "*The clerics will use, during religious ceremonies, clothes and ornaments suitable to their titles*" and "*All clerics will be dressed the French way and in black*". This latter provision was designed at preventing them to wear the Roman attire.

Later on, the Council of State ruled in 1854 that this measure was only transitory due to "*the exceptional circumstances the clergy was still in*" and that this attire "*was soon replaced by the ancient robe of Catholic clergy*". As part of the State control, Article 259 of the Penal Code sanctioned the illegal wearing of clerical robes by non-clerics.

During the vote of the 1905 law, Charles Chabert, Member of Parliament, proposed an amendment which read: "*The Ministers of the various cults will be allowed to wear a clerical robe only during the exercise of their functions*".

During the debates that followed, he gave a speech to explain his position in detail. First he reminded two articles of the draft law, which were eventually modified and remained as Article 28 in the 1905 law: "*It is prohibited, from now on, to erect or affix any religious insignia or symbol on public monuments or in any public place, except for places of worship, cemeteries, gravestones and museums and exhibitions*". Under this provision, the erection of wayside crosses for example has been prohibited since then in France.

Based on this, Chabert explained that the robe could favor the authority of priests over part of the population and that was precisely why the Church attached to it so much importance. He added:

> "*Isn't the clerical robe essentially a symbol? Isn't its wearing primarily a confessional manifestation? The Catholics themselves admit that the robe is a lively preaching, a permanent act of proselytizing. Matters of conscience stay in the conscience: this is the spirit of the law we are drawing up. But the robe in public, this is matters of conscience in the street! And this is why it is our duty to prohibit it if we want to be consistent with ourselves*."[16]

[15] The Terror is the period of Revolutionary Dictatorship which followed the French Revolution and which is known for the systematic decapitation of its opponents.
[16] Debates on the bill, 43rd session of 26 June 1905, p. 15

This desire to eradicate any religious expression from any public place was also allegedly justified by the protection of the rights and dignity of priests. Charles Chabert explained it in the following way:

> "*Sirs, the robe not only makes the priest a captive of his Bishop: it makes him a captive of his long clerical teachings, a captive of his narrow environment, a captive of his own ignorance, I would nearly say of his own stupidity. It is obvious – and I would offend you by insisting – that it is because of the robe that there is such a distance, such an antinomy between laymen and clerics*."

He went on before the Chamber of Deputies[17]:

> "*See this young priest passing by in the street, his has a shy look, nearly shifty, his walk is low and stuffy, his head leaned on his shoulder, his hands floating in large sleeves are crossed on his chest, is he a man? (…) Yes maybe, as any rule has its exceptions, but in most cases, one can answer promptly: No!*
>
> *So! To this intelligent man, I admit, but quasi morally distorted, take his robe away! Mix him to the crowd which bustles around him, make him breathe, lift up his head, talk to anybody without rounding off his words and striking extraordinary poses. This is how you will make him take a huge step, how you will free his brain. I am not speaking here as a tyrant, once again, but as a man caring about human freedom and dignity. (…)*
>
> *The life of a priest must not continue to be what it is. (…) From this serf, from this slave, let's make a man*."

Finally, Aristide Briand, rapporteur for the law, spoke up, stating that the Commission had decided, after thorough deliberations, not to include any provision in the bill concerning clerical robes. He explained that it seemed to the Commission that the law would be exposed to critics of intolerance and even to ridicule by imposing such restrictions on clerical robes while its purpose was to install confessional freedom. Briand also noted that it would be rash to attribute the prestige of religion in the French countryside to the mere cut of the clerical robe and that the influence of the Church had other reasons, less easy to destroy. Otherwise, freethinkers would have already won. He concluded:

> "*The Commission has estimated that, under a regime of separation, the issue of the clerical robe cannot be raised. This robe does not exist for us anymore with its official character, that is to say as a uniform protected by Article 259 of the Penal Code. Cassock becomes, as soon as the separation, a garment like any other, accessible to all citizens, priests or*

[17] Equivalent to National Assembly

not. This is the only solution which seemed to us conform to the very principle of separation, and it is the one I beg the Chamber to adopt." [18]

Chabert's amendment was finally rejected and no provision was included in the 1905 law concerning clerical robes.

Prohibition of Conspicuous Religious Insignias in Today's France

It should be noted here that nearly a century later, the same kind of arguments have been used to ban wearing of conspicuous religious insignias and attire in public schools. The same specter of proselytizing through the wearing of a garment that was deemed ridiculous by Aristide Briand, has been used with the Muslim veil. Who can reasonably believe that the sight of a Muslim veil would make non-Muslim girls convert to Islam? Like Briand stated, there has to be deeper reasons to conversion. Yet, this argument has been admitted as valid in all the debates and by all the French institutions to a lesser or greater degree.

The controversy on the Muslim veil arose in September and October 1989 with several incidents of veiled Muslim girls being denied access to their schools. Largely echoed by the media, it led to conflict between the girls' parents and the teachers and directors of the schools.

On 27 November 1989, the Council of State, seized by Lionel Jospin, then Minister of Education, issued an Opinion adopted in General Assembly.

In this Opinion, the Council of State referred to legislation and provisions in the Constitution guaranteeing freedom of conscience and the international human rights instruments signed by France, and restated what Secularism consists of:

"*It results from the above mentioned constitutional and legislative instruments as well as international commitments of France that the principle of Secularism of the public educative system, which is a key element of the State Secularism and of the neutrality of all the public services, imposes that education be dispensed in the respect on the one hand of this neutrality by the programs and the teachers and on the other hand of the freedom of conscience of the pupils. It prohibits pursuant to the principles stated in the same instruments and international commitments of France any discrimination in the access to education which would be founded on religious convictions or beliefs of the pupils.*

The freedom thereby recognized to the pupils includes their right to express and manifest their religious beliefs inside public schools, in the respect of pluralism and freedom of others, and without undermining the educational activities, the content of the programs and the obligation of attendance."

[18] Debates on the bill, 43rd session of 26 June 1905, p. 21

The Council then pronounced the following principle:

> "*Therefore, in schools, the wearing by pupils of symbols by which they intend to express their adherence to a religion is not in itself incompatible with the principle of secularism, in so far as it represents the exercise of freedom of expression and the manifestation of religious beliefs, but this liberty should not allow pupils to wear religious symbols which, by their nature, by the conditions in which they are born individually or collectively, or by their conspicuous or claiming character, would constitute an act of pressure, provocation, proselytizing or propaganda, would violate the dignity or the freedom of the pupil or of other members of the educational community, would compromise their health or security, would disrupt the teaching activities and the educational role of teachers, finally would break the peace in the school or the normal functioning of public service*."

The Council of State left it up to the authorities with disciplinary power to appreciate, in each specific case and under the control of the administrative courts, if wearing of a religious symbol would violate such requirements and constitute a fault susceptible to justify disciplinary action. Minister Jospin issued a Circular in that sense to all school Directors.

In 1990, further exclusion from schools took place. Parents filed a complaint and teachers started a strike against the Islamic veil at school. On 20 September 1994 another Circular was issued, this time by Minister of Education François Bayrou:

> "*It is therefore impossible to accept at school the presence and proliferation of insignias so conspicuous that their meaning is precisely to separate some pupils from the common rules of the school. Those insignias are, in themselves, elements of proselytizing, even more so when they are accompanied by a call into question of certain lessons or certain subjects, when they jeopardize the security of pupils or they disturb the common life in the school*."

A demonstration was organized by some pupils in favor of the freedom to wear the veil in class. Some more exclusion from schools followed. In spite of the Bayrou Circular stating that religious insignias were in themselves elements of proselytizing, the Council of State's jurisprudence followed its 1989 opinion. On 2 November 1992 and 14 March 1994, it cancelled the internal regulations of two high schools for setting a broad and general prohibition to wear any religious insignias. The decisions of expulsion taken on their grounds were therefore quashed.

As the Commissaire du Gouvernement[19], David Kessler, stated in his pleadings during the 1992 case, "*Secularism does not appear anymore like a principle which justifies the prohibition of any religious expression. Education is secular, not because it prohibits expression of the different faiths, but on the contrary because it tolerates all of them*".

On the contrary, on 10 March 1995, the Council of State upheld a decision of definitive exclusion of two girls based on their refusal to remove the veil they were wearing for sports lessons. It found that such veiling was incompatible with sports lessons and that their refusal created disturbance in the school, aggravated by demonstrations with their father in front of the school.

At the same time, the Council of State had to decide different issues which raised the same difficulty of conciliating the religious freedom of pupils and the contingencies of schooling. Two appeals had been filed concerning a case of non-attendance at college on Saturdays by a Jewish student. These were addressing the problem of authorizing regular non-attendance by Jewish pupils wanting to observe the Shabbat prescription.

On 14 April 1995, by a judgment of its Grand Chamber ("Assemblée"), the Council of State ruled:

> "*The pupils of public schools are entitled to obtain authorizations of non-attendance for religious motives, providing that these exemptions of regular attendance are necessary for the exercise of a cult and are not incompatible either with the normal course of the schooling nor with the observance of public order in the school*."[20]

Such requests were not new but they previously had been solved through compromise and had never triggered litigation. However, in the general context of the Islamic veil, requests became more pressing and school directors were more reluctant to grant them.

In this specific case, the Council of State rejected the appeals as it found that the Saturday attendance was indispensable for that student's schooling as special mock exams were organized every Saturday to evaluate the students' work and to decide their passing to the superior class at the end of the year. This decision implied that, under other circumstances, a school director could be bound to grant the requested authorization if the conditions set by the Council of State

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[19] The "Commissaires du Gouvernement", in the French administrative trials, develop oral pleadings, giving their conclusions and opinions about the cases heard. Their pleadings play a non-negligible part in the outcome of the cases as their opinions are most of the time followed by the Council of State.

20 Council of State, Assembly, 14 April 1995, *Consistoire central des israélites de France et autres* (Central Consistory of French Jews and others); 14 April 1995, *M. Koen*

were fulfilled. The principle of exemption of regular attendance one day per week was therefore not excluded.

These two decisions followed the reasoning of those adopted concerning the Islamic veil and the opinion given by the General Assembly in 1989. They are mentioned here to illustrate the Council of State's intent to ease tensions and search for solutions adapted to the specific circumstances in each case.

Then on 20 May 1996, the Council of State adopted four memorable decisions in which it adopted a Whereas of principle:[21]

> "*Whereas the scarf through which Miss Hanane X intended to express her religious convictions cannot be considered as a sign presenting in itself a conspicuous or claiming character or constituting, by its wearing alone, an act of proselytizing or pressure;*"

And it found that in these instances, the scarf was not worn in conditions that would give it a character of proselytizing or propaganda.

It also found that:

> "*Whereas the circumstance that the number of girls wearing the scarf has increased at the beginning of the school year 1994-1995 was not, by itself, susceptible to justify the prohibition of the wearing of the scarf in Molière high school; whereas the circumstance that unrest followed the application of the instructions of the Minister of Education regarding the wearing of conspicuous signs in schools, if it could found disciplinary measures against the authors of such unrest, could not however legally justify a general prohibition of the wearing of the scarf in the school;*"

On 27 November 1996, the Council of State issued 7 decisions on the veil upholding its principle:[22]

> "*Whereas the scarf through which Misses Y and X intended to express their religious beliefs cannot be considered as a sign presenting by nature a conspicuous or claiming character, and the wearing of which would constitute in all instances an act of pressure or proselytizing;*"

It ruled however that the recurrent non-attendance to sports lessons, as well as the wearing of a scarf during sports lessons which jeopardized the security of the pupil, were valid motives of exclusion.

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[21] Council of State, 20 May 1996, N° 170398, 170343, 172717 and 172718

[22] Council of State, 27 November 1996, N° 170209, 170210, 172663, 172719, 172723, 172724 and 172726

Under this state of law, principals of high schools had to make decisions in each specific case, under the control of administrative courts. This jurisprudence of the Council of State was criticized by the partisans of banning all religious symbols from the public schools. Some politicians demanded that a new law be voted to bypass and modify this case law.

The report made in the name of the Commission of Cultural Affairs of the Senate[23] explained the following:

> "*Whereas the Bayrou Circular referred explicitly to "conspicuous religious insignias", that is to say by themselves, and not due to a certain behavior, case law has rejected afterwards this shift from the notion of "conspicuous wearing" to "conspicuous insignia". If the Council of State has not cancelled this Circular, it is because it considered it as being purely interpretative, and not creating rights.*[24] *Thereafter the judge reminded that the scarf "cannot be considered as an insignia presenting by nature a conspicuous or claiming character or constituting, through its wearing alone, an act of proselytizing or pressure. (…) Actually, this Circular, sent to school directors in the context of upsurge of the number of veiled girls in schools, has had the only result to stir up the tensions and to start a great number of litigation cases, by putting itself at odds with the position of principle of the Council of State. Indeed, it opened, for the girls and people around them, the hope to win in courts, which is actually, according to Mrs Hanifa Chérifi,*[25] *what happens the most frequently*."

The number of veiled girls in schools was estimated at 2,000 in September 1994, when the Circular was issued, and the Mediator Hanifa Chérifi had to deal with 300 cases for the months of November-December 1994 alone, at the beginning of her mission.

Principals and teachers complained of being in a situation of legal fragility. The Circulars they received from the Ministry led them to agree that no veil would be worn in their schools through mediation or dialogue without allowing them to prohibit the wearing of religious signs.

The above quoted report read:

> "*Thus the Circular sent in 1994 to the school directors by the Minister of Education Mr François Bayrou has shown to be inapplicable, contributing to worsen the difficulties met by the school teachers and directors trying to*

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23 Report N° 219 (2003-2004) of 25 February 2004

24 Council of State decision on appeal against the Circular, 10 July 1995, N° 162718 – The Commission actually meant "not creating grievance"; the Council of State found that the Circular was merely interpretative and could not be demurred to the applicant, and was thus not susceptible to be cancelled by administrative courts.

25 Then Mediator for the resolution of conflicts linked to the Islamic veil at the National Education

> *use it as a legal basis. Their authority was then weakened by the solution of the case law, well known by the pupils themselves, who wield it to contest the legality of the sanctions. As Mrs Hanifa Chérifi revealed to us, the conflicts have sometimes reached a disproportionate dimension, some veiled pupils coming to the disciplinary committee with their attorney*."

Some officials like Hanifa Chérifi, Mediator at the Ministry of Education, stated bluntly to the Commission of Cultural Affairs of the Senate that "*the position of principle of the Council of State, which by proscribing a general and absolute prohibition of the veil has implicitly allowed its wearing, has resulted in an increase of the number of veiled girls in schools*".[26]

Some also regretted that the Council of State did not proceed to an interpretation of the meaning of the religious signs, so as to prevent the discrimination between men and women underlying the wearing of the veil.[27]

Mrs Hanifa Chérifi, who was claiming both her Republican commitment and attachment to her Muslim traditions and Berber culture, supported the idea of a new law banning any conspicuous wearing of religious signs at school because, she stated, "*the veil is the prohibition of the mixing of sexes*". She maintained it would be "*Not a law of exclusion or sanction, but a law which protects girls from external pressures from groups we have identified*".

It is interesting to make a parallel here between the arguments put forward against the wearing of the veil during the vote of the 2004 law and those maintained during the vote of the 1905 law, when Charles Chabert was claiming that clerical robes were violating the dignity of priests:

> "*Sirs, the robe not only makes the priest a captive of his Bishop: it makes him a captive of his long clerical teachings, a captive of his narrow environment, a captive of his own ignorance, I would nearly say of his own stupidity. (…) So! To this intelligent man, I admit, but quasi morally distorted, take his robe away! (…) This is how you will make him take a huge step, how you will free his brain. I am not speaking here as a tyrant, once again, but as a man caring about human freedom and dignity. (…) The life of a priest must not continue to be what it is. (…) From this serf, from this slave, let's make a man*."

Under the pressure of Unions of public school teachers supporting a radical construction of secularism and defenders of women's rights, the Government had to make a decision. As the report of the Commission of Cultural Affairs of the Senate stated:

[26] In above mentioned report
[27] Idem

> "*Secularism cannot be assessed uniquely from a legal viewpoint (…) If, in 1989, the Government has hidden behind the judge, today, the legislator has to intervene. The time of Circulars, which have shown their inadequacy or their poor legal value, is now over. The Parliament must reaffirm a founding principle, which engages the future of the Nation*."

In December 2003, President Jacques Chirac decided that a new law had to regulate the subject, and more generally the wearing of religious insignias or attire in public schools. He appointed a Commission headed by Bernard Stasi to prepare it. The report of the Stasi Commission reveals the political and legislative intention. It explicitly mentions that the State, as part as its duty of neutrality, has an obligation of defense against proselytizing:

> "*[The State] ensures that no group, no community can impose to anyone confessional adherence or identity, especially because of his/her origins. It protects everyone against any pressure, physical or moral, exerted under this or that spiritual or religious instruction. Defense of individual freedom of conscience against any proselytizing is today completing the notions of separation and neutrality which are fundamental in the 1905 law*."[28]

This was designed at protecting the Muslim girls from the influence of their community, including their parents who were deemed responsible for their wearing of the veil. The report went on:

> "*This necessity applies primarily to school. Pupils must be able in a serene environment to learn and structure themselves in order to acquire autonomy of judgment. The State must prevent their mind from being harassed by violence and fury of society: without being a sterile chamber, school should not become an echoing room of the world's passions, or it will fail to its educational mission. (…)*
>
> *Secularism creates a duty for the State: to favor the enriching of critical knowledge of religions at school in order to endow the future citizens with an intellectual and critical background. This way they can exert their freedom of thought and choice in the area of beliefs*."

This conception of secularism comes in straight opposition to Protocol N° 1 Article 2 of the European Convention of Human Rights, which sets forth:

> "*No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions*."

[28] Report, 11 December 2003, page 13

The teachers of public schools were the first to consider that veiled girls had to be shielded from the influence of their families. A survey done by the CSA Institute for newspapers *Le Monde* and *La Vie*, published on 5 February 2004, during the debates on the draft law at the National Assembly, revealed that a large majority of teachers were in favor of the law: 76% were favorable to a law banning conspicuous religious insignias or attire (57% preferring even the term "visible" than "conspicuous"), and 79% thought that the wearing of the veil was incompatible with the public service of education, estimating that the veiled girls were under the influence of their families (84%) or of Islamic groups (73%).

The State can impose limitations to the right of parents to bring up their children in their own religion for compelling reasons of public order as would be the case of excisions committed on girls in the name of religion, which is a criminal act under the French Penal Code. Yet, wearing a veil or a turban to cover one's hair does not constitute in itself a matter of public order. And the authorities, by fear of propagation of radical Islam, cannot be a rampart against the influence of parents on their children regarding their religious beliefs.

The law which was finally enacted on 15 March 2004[29] provides in its Article 1 (which has been included in the Education Code as Article L. 141-5-1):

> "*In schools and high schools, wearing of insignias or attire by which pupils express conspicuously a religious adherence is prohibited. The internal regulations shall mention that the initiating of disciplinary action is preceded by a dialog with the pupil*."

Since this law has been enacted, the jurisprudence of the Council of State has been considerably reoriented. In the decisions taken since the enactment of the law, it has constantly adopted the following grounds:

> "*Whereas it results from those provisions that, if pupils in schools and high schools are allowed to wear discrete religious symbols, on the contrary are prohibited, on one hand, the insignias and attire, including the Islamic veil, the kippa or big crosses, the wearing of which by itself expresses conspicuously a religious adherence, and on another hand, those which express conspicuously a religious adherence only due to the pupil's behaviour;*"

With these grounds, it has upheld expulsions sanctioning the wearing of the Islamic veil, which just covers the hair (contrary to the Burqa which only leaves a slant for the eyes) whatever its size and even with colours, such as a square of fabric bandanna type tied over a pupil's hair[30] and the Sikh Keshi[31].

[29] Law 2004-228 setting a frame, in application of the principle of secularism, for the wearing of insignias or attire expressing religious adherence in public schools and high schools
[30] Council of State 5 December 2007, N° 295671

On 20 January 2005, 48 pupils had been expelled from schools since the vote of the law in September 2004, including 3 Sikh boys because they did not want to take off their under turban, known as a Keshi.

By 3 decisions of 5 December 2007[32], the Council of State rejected the appeals filed by the parents of the three Sikh boys on the following grounds:

> "*By finding that the Sikh Keshi (under turban), worn by M. A. inside the school, though it is of a more modest dimension than the traditional turban and of a dark colour, cannot be characterized as a discrete insignia and that M. A. solely by wearing this insignia has manifested conspicuously his adherence to the Sikh religion, the administrative court of Paris has not made an erroneous application of the provisions of Article L. 141-5-1 of the Education Code; (…)*
>
> *Taking into account the importance of the enforcement of the principle of secularism in public schools, the sanction of definitive exclusion taken against a pupil who does not comply with the legal prohibition of wearing external signs of religious adherence does not imply an excessive restriction of freedom of thought, conscience and religion guaranteed by the above mentioned Article 9;*"

Thus, the Council of State, applying the 2004 law, now upholds the prohibition of wearing external signs of religious adherence.

These developments call for one conclusion: the fight for secular education in France has not ended with the Ferry laws, or the 1901 and 1905 laws. The French legislator, followed by the Council of State, has finally opted for a more radical construction of secularism. The concept of neutrality of the State under French secularism which used to entail neutrality of civil servants while performing public service, in particular teachers in public schools, has now been extended as to encompass the neutrality of the users of public service, that is to say the pupils, who are not supposed to express their religious beliefs in a public space.

This constitutes an obvious interference with their right to freedom of belief under Article 9 of the European Convention of Human Rights. And it is less than clear that this interference would be allowed by the Human Rights Court as a restriction on religious freedom under Article 9.2. Although it is provided by law, the European Court of Human Rights would have to deem these restrictions on religious freedom to be necessary in a democratic society.

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[31] The Keshi is a piece of cloth about one meter long that Sikh men wear underneath their turban or worn by kids or women under their Chuni.

[32] Decisions N° 285394, 285395 and 285396

In its decision *Leyla Sahin v. Turkey* of 10 November 2005, the European Court found no violation of Article 9 by the Turkish authorities who upheld a decision of expulsion of a student at University due to her wearing of the Muslim veil, on the basis of the principles of secularism and equality of man and woman which are laid down in the Turkish Constitution. Yet, this ruling was taken in a context specific to Turkey as the Court explained. The Court first reminded:

> "*Pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position*".

And, as regards regulating the wearing of religious symbols in educational institutions, it found that "*Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order*". Accordingly, the extent and form such regulations should take will inevitably depend on the specific domestic context.

In the Turkish context, the Court ruled:

> "*In addition, like the Constitutional Court ..., the Court considers that, when examining the question of the Islamic headscarf in the Turkish context, it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it. As has already been noted (see Karaduman, decision cited above, and Refah Partisi (the Welfare Party) and Others, cited above, § 95), the issues at stake include the protection of the 'rights and freedoms of others' and the 'maintenance of public order' in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated ..., this religious symbol has taken on political significance in Turkey in recent years*."

Therefore, the rights of others that needed protection under Article 9.2 of the Convention were the rights of Muslim student women to not wear the veil, as there was pressure by the fundamentalist majority party Refah Partisi to impose such veils on all women in Turkey. Secularism was jeopardized as this party constituted the majority and wanted to turn the country into a Muslim State, as the Court explained further:

> "*The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts ... It has previously said that each Contracting State may, in accordance with the Convention provisions, take a stance against such political movements, based on its historical experience (see Refah Partisi (the Welfare Party) and Others, cited above, § 124). The regulations concerned have to be viewed in that context and constitute a measure intended to achieve the legitimate aims referred to above and thereby to preserve pluralism in the university*."

The French context is very different: the concerned people wearing religious signs constitute minorities and do not exert pressure on others. There is no threat of a majority fundamentalist party coming into power and the rights to be protected are the rights of minorities such as the Sikh children wearing a Keshi. And the ruling of the Court would be different in the case of expulsion of Sikh boys from French public schools, as no issue of equality of genders is at stake, and no issue of public order.

This issue also contravenes other international human rights norms.

The United Nations Human Rights Committee, as part of its periodic review of the Member States compliance with the International Covenant on Civil and Political Rights, in particular its Article 18 on freedom of religion and conscience and Article 26 on prohibition of discrimination[33], considered the fourth periodic

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[33] Article 18: 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

report of France at its meetings held on 9 and 10 July 2008 and adopted the following concluding observation on 22 July 2008: [34]

> "*23. The Committee is concerned that both elementary and high school students are barred by Act No. 2004/228 of 15 March 2004 from attending the public schools if they are wearing so- called "conspicuous" religious symbols. The State party has made only limited provisions – through distance or computer-based learning – for students who feel that, as a matter of conscience and faith, they must wear a head covering such as a skullcap (or kippah), a headscarf (or hijab), or a turban. Thus, observant Jewish, Muslim, and Sikh students may be excluded from attending school in company with other French children. The Committee notes that respect for a public culture of laïcité [secularism] would not seem to require forbidding wearing such common religious symbols. (articles 18 and 26)*
> *The State party should re-examine Act No. 2004/228 of 15 March 2004 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 private, as well as the guarantee of equality under article 26*."

The French authorities will therefore have to reconsider their policy on the wearing of religious symbols in public schools and thereby re-adjust their construction of secularism.

Evolution of the Concept of "Lack of Assimilation"

The French law and jurisprudence on the granting of citizenship and the concept of "lack of assimilation" have followed a separate but similar evolution.

Following the government's politics of control of immigration, laws were enacted in 2003 and 2006 to set some rules restricting the possibilities of illegal immigration, including stricter requirements for the acquisition of citizenship by spouses of French nationals in order to fight sham marriages. The 2006 law on "immigration and integration" was especially designed at setting in place "selected immigration" by facilitating the immigration of qualified foreigners and making requirements stricter for others.

Under French law, a foreigner who is married to a French citizen can obtain French citizenship. But this doesn't happen automatically. Article 21-1 of the Civil Code reads: "*Marriage doesn't have any automatic effect on nationality*".

[34] CCPR/C/FRA/CO/4, 31 July 2008

There is a time requirement, which has varied over the years and is now of 4 to 5 years of uninterrupted marriage, and also a language requirement: the applicant must have a sufficient master of the French language (Article 21-2 of the Civil Code). When these requirements are fulfilled, the foreign spouse makes a declaration in order to get citizenship, which comes into force at the date of such declaration (Article 21-3 of the Code). However, the government can oppose, within two years, the granting of citizenship by issuing a decree ("Decret en Conseil d'Etat"), for either lack of assimilation or unworthiness (Article 21-4 of the Code). A "Décret en Conseil d'Etat" is a legal act issued and signed by the Prime Minister after having gotten the Council of State's opinion (the advising formation of the Council of State, not its judicatory one).

The 2003 and 2006 laws have enacted stricter requirements within the aforementioned procedure. The 2003 law reinforced the obligation of speaking the French language and the 2006 law has added two justifications for the opposition of the government: polygamy and the practice of mutilations on children under fifteen years old. This latter provision is aimed at the practice of excision. These modifications transcribed the Council of State's case law.

For the enactment of the law on "the control of immigration, the stay of foreigners in France and the citizenship" of 26 November 2003, the report made in the name of the Law Commission of the Senate described the then state of case law:

> "*Unworthiness can result from the morals of the applicant (pimping)*[35]*, his/her criminal convictions*[36] *or his/her political activities which constitute a risk for the internal security or the external relations of France*[37]*.*
>
> *Lack of assimilation can result from a poor knowledge of the French language*[38]*, a way of life incompatible with the adherence to French society*[39] *or the spreading of extremist thesis reflecting a denial of the essential values of French society*[40]*.*"

For the enactment of the law of 25 July 2006, the report of the Law Commission of the National Assembly contained also a description of the case law on governmental opposition to citizenship:

> "*According to the information provided to the rapporteur by the Ministries of Internal and Social Affairs, these rare decisions are generally motivated:*

[35] Council of State, 31 October 1979
[36] Council of State, 20 November 1991
[37] Past participation in a terrorist group, Council of State, 19 November 1993
[38] Council of State, 21 February 1996
[39] Bigamy, Council of State, 28 July 1989
[40] Council of State, 14 October 1998

- *in case of unworthiness, by acts of terrorism[41] or pimping, repeated criminal acts or serious criminal convictions[42];*
- *in case of lack of assimilation, by the fact that the person has a way of life incompatible with his/her adherence to the French society[43], a behaviour of anti-Republican proselytizing or revealing the adherence to extremist religious groups. Will constitute motives of opposition as lack of assimilation, for example, serious infringement of the values of the Republic, including, in particular, the equality of genders, such as the prohibition made to a woman to participate to any social life or her confinement at home, or even the obligation for a woman to wear permanently a traditional garment. Also, jurisprudence usually admits that the prohibition for children to do studies, the practice of forced marriages, polygamy[44] or else the act of proceeding to (or have someone else proceed to) customary mutilations such as excision, indicate a lack of assimilation*."

It is particularly noteworthy here that the concerned Ministries indicated that "*the prohibition made to a woman to participate to any social life or her confinement at home, or even the obligation for a woman to wear permanently a traditional garment*" would be considered in the future as a serious infringement of the values of the Republic, in particular of equality of the genders.

This is even more interesting since the Council of State had ruled differently in the past. On 23 March 1994, the Council of State ruled[45]:

> "*Whereas it appears from the elements in the file that the applicant had, at the time of the contested decree, and contrary to what the Minister maintains, a good knowledge of the French language; whereas the circumstance, supposing it is established, that his spouse would wear the "Islamic veil" cannot, in any case, constitute a lack of assimilation of the applicant; therefore M. X is founded to request the cancellation of the contested decree;*"

On 19 November 1997, it ruled again[46]:

> "*Whereas M. X, a Tunisian national, affirms himself as a believing Muslim of strict obedience and whereas he married in 1990 a French woman who is herself a Muslim and wears the Islamic veil, it does not appear from the elements in the file that these facts and circumstances, nor any other element invoked by the Administrative Authorities and relating to the*

[41] Council of State, 19 November 1993
[42] Council of State, 20 November 1991 and 13 May 1996
[43] Above mentioned Council of State, 28 July 1989
[44] Council of State, 24 January 1994
[45] Council of State decision N° 116144
[46] Council of State decision N° 169368

behaviour of the applicant, are susceptible to reveal a lack of assimilation; it follows that the government could not legally found on this motive an opposition to the acquisition of French citizenship by M. X;"

And on 3 February 1999, the Council of State decided[47]:

"*Whereas Mrs X, a Moroccan national, affirms herself as a Muslim of strict obedience and whereas she wears the Islamic veil, it does not appear from the elements in the file that these facts and circumstances, nor any other element invoked by the Administrative Authorities and relating to the behaviour of the applicant, are susceptible to reveal a lack of assimilation; it follows that the government could not legally found on this motive an opposition to the acquisition by Mrs X of the French citizenship; therefore Mrs X is well founded to request the cancellation of the decree of 17 March 1993 denying her the acquisition of the French citizenship;*"

The Commissaire du Gouvernement in the case of the 27 June 2008 decision, contested that there was a constant jurisprudence in that sense, by stating that the 1994 and 1997 decisions were only applying the "principle of personality" of citizenship – meaning that the applicants to citizenship did not wear the veil themselves, but their French wives did. This argument cannot withstand scrutiny; the person supposed to be dominating and demanding the wearing of the veil is the husband in their reasoning. Therefore, the foreign husbands should have been found to infringe the values of French society and deemed to lack assimilation.

It can therefore be asserted that the jurisprudence used to be opposite to the 27 June 2008 decision. The question is then why the Council of State overturned its case law. Undoubtedly, part of the answer is the political context and the more restrictive laws on immigration. The 2006 law on "immigration and integration" setting in place "selected immigration" and more restrictive requirements for the acquisition of citizenship has been paralleled by a more extensive construction of "lack of assimilation".

Citizenship is not a right under French law and the 2006 legislation intended to make it understood that it is a privilege. For this reason, welcome ceremonies have been instituted by the new law in order to acknowledge the efforts of assimilation of the newly accepted French citizens. In the report of the Law Commission of the National Assembly, the Rapporteur explained:

"*Actually, such a solemn event would play an essential symbolic and educational role in the assimilation process of these foreigners. It is advisable to acknowledge the efforts of assimilation of all the people who acquired French citizenship (through naturalization, marriage, adoption or*

[47] Council of State decision N° 161251

> *birth on the French territory) and have therefore accomplished the administrative requirements, by an event which symbolic impact must be strong*."

He wished that those ceremonies be held under the French flag, with the French national anthem being played and the main constitutional principles explained. Ceremonies already exist in other countries such as the United States, Canada or United Kingdom, he explained, so they would not be special to France but they would be helpful in "*reinforcing the feeling of national adherence which is so often jeopardized by individualism and communitarianism*[48] *in our western countries*".

The decision of 27 June 2008 of the Council of State must be viewed within the whole evolution on the Muslim veil and the assimilation concept entailed in the immigration laws.

Yet, if the authorities are entitled to have "selected immigration" and stricter requirements of assimilation for the granting of citizenship, this does not mean that the way of practicing one's religion can be a criterion of non-assimilation under international human rights standards.

Decision of the Council of State of 27 June 2008

The Council of State decision read:

> "*Whereas it results from the elements in the file that, if Mrs A has a good master of the French language, she however has adopted a radical practice of her religion, incompatible with the essential values of the French community, in particular the principle of equality of the genders; therefore, she does not fulfil the requirement of assimilation provided at the above mentioned Article 21-4 of the Civil Code;*"

The pleadings of the Commissaire du Gouvernement (CG) are more explicit on what "radical practice" refers to. CG stated that Mrs and Mr A presented themselves as Salafists and claimed adherence to this movement which, according to the police had spread amongst the youth in their area after the stay of a vehement imam. According to the pleadings, Mrs A met several times with the administrative authorities, each time she came all covered with a dark long dress and Niqab, which is a headscarf and veil leaving just a slant for the eyes. She kept on the Niqab (or Burqa) during the meetings with civil servants who

[48] The term Communitarianism is used in French to design the cultural or political claims of minority groups and is used generally by opponents who see it as a tendency to divide the French society.

were all women, until she was asked to take it off for identification. She put it back on when she left.

CG noted that Mrs A told the agents that she puts it on when she goes out and wears it at home when men who are not part of the family come. The CG reports information that raises some preliminary questions:

> "*It appears from the statements made by Mrs M that when she used to live in Morocco, she did not wear the veil. She clearly indicates that she adopted this attire after her arrival in France at her husband's request. She says she wears it more as a habit than by conviction*."

This, logically, would call for the following inferences.

First, Mrs. A did not use to wear the veil and it is her French husband who asked her to do so. How can she then be deemed not assimilated to French society if it is a French citizen who prescribed that attire? Second, how can she be deemed to have a radical practice of her religion if she is found to wear the Burqa more as a habit than by personal conviction? The findings of the Council of State, based on the report of CG, are inconsistent in this regard.

Subsequent questions then follow: how could Mrs. A be considered dangerous to the French Republican values if she wears this attire just as a habit and does not preach anything in this regard? And, assimilation entails the concept of being similar to something or someone. In the present case, what type of French citizen is Mrs A supposed to be similar to?

Certainly not her Salafist husband, nor French nuns or monks who live precluded from society. Does this mean, as a reminiscence of French history, that the clerical robes and religious orders like the cloistered monks of the Grande Chartreuse, who were once exiled, are excluded from French values once again?

CG noted that Mrs. A speaks good French, has two children at the public school and was followed by a male gynecologist during her pregnancies. However, CG reported that Mrs. A lives nearly secluded from French society: she does the cleaning at home in the morning, walks her baby or children, goes to her father's or step father's in the afternoon. As regards shopping, Mrs. A stated that she can do it on her own, but admitted that she more often goes to the supermarket with her husband.

From these findings alone - which describe no more than a day to day life of many French women - CG drew the conclusion that:

> "*Mrs. A has not made hers the values of the Republic, in particular equality of the genders. She lives in total submissiveness to the men of her family, which reveals both through the wearing of her garment and in the*

> *organization of her day to day life, as well as the words she had with the social services which show that she finds this normal and the idea of objecting to that submissiveness has not even come to her mind*."

There is no question that the key element underlying the submissiveness issue here was the wearing of the Burqa. All the other elements could have applied to other women but what really tinted the opinion of the social services and the CG was the wearing of a headscarf that would allow only for the woman to see through an eye slant.

It is natural in our western culture that some may be taken aback by such a garment. And it may be understandable that the wearing of the Burqa could pose a public order problem of identification and that this issue would be taken up with Mrs. A during her interviews at the social services. The Council of State could have founded its decision of lack of assimilation on this ground if an accommodation on the identification issue was not forthcoming.

But the grounds relied upon by the Council of State in its 27 June 2008 decision were Mrs. A's radical practice of religion which would infringe the values of the Republic, without even mentioning the wearing of the Burqa. This ruling sets a dangerous precedent which opens the door to further evaluation of religious practices.

What was really decisive here was the fact that the couple presented themselves as Salafists. Salafist is a movement of Muslims who preach a return to the traditions and roots of Islam. There are several tendencies amongst this movement. The first tendency is that of fundamentalists who have been Djihadists, and whom certain Islamologists consider as being a sectarian deviation of Islam. The other tendencies are more moderate, as explained in *Le Monde Diplomatique* in its February 2008 investigation on Salafism:[49]

> "*In parallel, an increasing number of Salafists affirm a moderate and pacifist orientation, avoiding the political ground and thriving to lead a pure life under Muslim criteria. Those gained influence in the West, Middle-East and Maghreb amongst youth who feared to loose their traditions and roots. They can be recognized by their appearance: for men, long bushy beards and tunics worn over short trousers, for women a long tunic, a headscarf and a Niqab hiding their faces, which sometimes go along with jeans and sneakers*...
>
> *In the United Kingdom, a third tendency has appeared: the reformist Salafists come into the political arena accusing Djihadist Salafists to take the movement hostage and participating to the fight against its radicalization*."

[49] Le Monde Diplomatique, February 2008, « What is Salafism », available at http://www.monde-diplomatique.fr/2008/02/KRISTIANASEN/15574

The fact that the Council of State decided that Salafism was a "radical practice" of Islam amounts to deciding an internal conflict within Islamology.

As the Catholic newspaper *La Croix* commented on 14 July 2008: "*Whereas the 2004 law on religious symbols concerned the school, which is a public space and a Republican sanctuary, domestic practices of religion are now called into question, in this case Islam*".

The assessment of religious practices when no public order issue is at stake poses essential human rights problems. The shift of French jurisprudence following the legislator's interventions has now allowed secularism to enter the private sphere and to assess domestic religious practices.

This contravenes international human rights standards.

In furtherance of the policy of "true religious pluralism", the European Court of Human Rights has instructed governments "*to remain neutral and impartial" and has been loathe to accept any restrictions on religion, viewing any contested measures with "strict scrutiny*".[50] The Court has also criticized and struck down measures that vest officials with "*very wide discretion" on matters relating to religion*."[51] In criticizing broad discretion in one case, the Court held that:

> "*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 or the means used to express such beliefs are legitimate*."[52]

Instead, the Court has emphasized:

> "*in exercising its regulatory power in this sphere and in its relations with various religions, denominations and beliefs, the State has a duty to remain neutral and impartial*"; this duty of neutrality "*excludes assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed*."[53]

Even if some religious practices may seem odd to the authorities in a given cultural environment, it is not up to the State or State Institutions to assess their validity.

[50] Manoussakis v. Greece, § 44.
[51] Manoussakis, § 45.
[52] Manoussakis, § 47; Metropolitan Church of Bessarabia v. Moldova, § 117.
[53] Metropolitan Church, § 116-117.

The United Nations Human Rights Committee articulated in its Comment n° 22 on Article 18 of the International Covenant on Civil and Political Rights: [54]

> "*Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.*"

The 27 June 2008 decision of the Supreme Administrative Court places the courts as final assessors of whether religious practices conform to the French values in contravention of international human rights standards on the subject.

As with the debate on the clerical robe and dignity of priests, will tomorrow's jurisprudence evaluate if the Muslim veil or turbans purportedly imposed on young Sikh boys violate their dignity?

The lack of neutrality in religious matters goes together here with cultural intolerance. The fact that the construction of the concept of assimilation has now come close to deculturation (loss of culture) is particularly evidenced in the procedure followed by the French authorities in the instant case.

Mrs. A. was informed by the government on March 10th, 2005 – pursuant to the mandatory contradictory procedure - of its intention to oppose her accession to French citizenship and of the legal and factual reasons of its opposition. The government gave two motives: first, that she had kept very strong ties with her original culture, and second, that she had adopted a behaviour belonging to a radical practice of religion incompatible with the essential values of the French society.

Mrs. M. gave her comments on these two points: first she submitted that the fact of keeping ties with her original culture was not incompatible with French citizenship; second she contended that religious freedom is guaranteed in France and that she never tried to challenge the fundamental values of the French Republic, in particular secularism which according to her was an opportunity for her religion.

Finally, the "Décret" of opposition enacted was based on only the second motive, i.e. the radical practice of her religion manifested by a behaviour in society incompatible with the essential values of the French community, in particular equality of genders.

France has consistently refused to officially recognize ethnic or religious minorities. This attitude of the French authorities has been excoriated by the

[54] CCPR/C/21/Rev.1/Add.4, General Comment No. 22. 30/07/93

United Nations Human Rights Committee in its concluding observation of 22 July 2008:

> "*11. The Committee, while welcoming the statement by the State party that the lack of official recognition of minorities within the territory of the State party does not prevent the adoption of appropriate policies aimed at preserving and promoting cultural diversity, remains unable to share the view of the State party that the abstract principle of equality before the law and the prohibition of discrimination represent sufficient guarantees for the equal and effective enjoyment by persons belonging to ethnic, religious or linguistic minorities of the rights set out in the Covenant. (articles 26 and 27)* [55]
> *The State party should review its position concerning the formal recognition of ethnic, religious or linguistic minorities, in accordance with the provisions of article 27 of the Covenant*."

Commenting Mrs. A's case, the French Secretary of State for Policy in the Cities, Fadela Amara, herself a practicing Muslim, former President of an association of women called "Nor prostitutes, nor submissive" and a fierce opponent to the veil, stated that Mrs A had to resume to the way she used to be in Morocco when she was not wearing the veil nor the Burqa. She added: "*Love makes people blind. She must have been under the spell of an Islamist. She is actually a victim*".

Even if we followed this reasoning, further questions would then arise: is the solution to sanction and punish the victims by not granting them the same rights as others? Does punishment result in comprehension or in reaction? Is not the best response to ignorance education rather than sanction?

Conclusion

The decision of 27 June 2008 of the Council of State sets a dangerous precedent assessing domestic practices of religion in France.

This decision is the outcome of a long evolution during which the Council of State adopted neutral case law which was finally turned around and re-orientated by the legislature to adopt a more radical construction of secularism.

Today's jurisprudence of the Council of State conforms to the law on wearing of religious conspicuous insignias in public schools and the new laws on "selected immigration". The law on religious insignias violates international human rights norms; it has been excoriated by the United Nations Human Rights Committee

[55] Article 27 : "*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language*."

on 22 July 2008 which found that "*respect for a public culture of laïcité [secularism] would not seem to require forbidding wearing such common religious symbols*" as "*a skullcap (or kippah)*" or "*a headscarf (or hijab)*", and recommended that France review its law which infringes Article 18 of the International Covenant on Civil and Political Rights.

Under the 27 June 2008 case law of the Council of State, assimilation to French society referred to in the immigration law is evaluated to date through the assessment by the authorities and the courts of religious practices as to their conformity to the French Republic values.

Such an evaluation contravenes the European Court of Human Rights' case law as well as international human rights standards. The European Human Rights Court has consistently ruled that "*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 or the means used to express such beliefs are legitimate*".

It will be interesting to see if an application is filed with the Human Rights Court to challenge the decision of the Council of State and what the outcome will be.