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## The Muslim Veil in France: Between Power and Silence, between Visibility and Invisibility

We must try to determine the different ways of not saying such things, how those who can and those who cannot speak of them are distributed, which type of discourse is authorized, or which form of discretion is required in either case (Foucault 1969: 121).

### Abstract

This paper will explore the contingency and fluidity of religious freedom in France and stress the existence of overlapping, competing and coexisting legal discourses in terms of national security and public order. In response to the Muslim veil, changing power structures, changing societal norms and new faces of injustice, established doctrines are reconsidered, reformulated and partly replaced by competing doctrines and hypotheses. Given the relative indeterminacy of law on the concept of secularism and French neutrality, it is no surprise that the problem of interpretation has always been one of the focal points of attention for legal practice and drafting.

### 1. Shaping the ‘Outside’

The French society has always faced new challenges and achieved new goals so that its citizens live in a friendly, secured, communicative and harmonized environment. Society has always been an ‘endless evolving object’ (Wagner 2011), a ‘living reality’ (Gény 1922: 120), ‘a living monster’ (Bentham in Burns/Hart 1977: 195) with variable constraints depending altogether on historical, political and legal aspects.

With a strong anti-discrimination policy and the insertion of people from multiple origins in the workplace, France is now facing a new challenge. The progress towards diversity and openness has resulted in the expansion of religious practices. However, these practices are no longer relegated to the private sphere and now pervade the public space with the use of visible religious signs. In recent years, the right to which an individual can, should, or must not manifest his/her religious practice or worship by wearing particular clothing or religious symbols has become very contentious. With new questions arising from the evolution of society, i.e. the role of Islam, the increase in religious practices arising from socio-economic fears, secularism has to be rethought, revised and reframed.

### 2. Secularism – A French exception

At the period of buoyant religious, political and legal controversies, Napoleon’s Concordat of 1801 was a first step towards the stabilization of such a situation. This complimented the main contributions from the revolutionary period, namely to dissociate the political and religious powers and to bring to the forefront a *cultural* pluralism. This pluralism was dedicated to a system of recognized and commonly agreed sects. Napoleon’s Concordat recognized Catholicism as the most practiced religion by French citizens, but denied the Church the official status of ‘national religion’:

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The Government of the Republic recognizes that the Catholic, Apostolic and Roman religion is the religion of the great majority of the French citizens. (Law of 18 Germinal Year X – 8 April 1802).

Similarly, on 17 March 1808, Napoleon signed a decree whereby the foundation of the French Judaism was established and recognized with a series of regulations. He made it clear that Judaism should not undermine the civic morality and responsibility of any citizen and should not interfere with the obligations and duties of citizens.

The second major change appeared with the Act of 9 December 1905 when the legal regime of the relationship between the state and the sects was established without any explicit reference to secularism, even though it remained the key pillar. The full constitutional acceptance of the principle of secularism was confirmed within the ambit of Article 1 of the Constitution of 1946, and of Article 1 of the Constitution of 4 October 1958 under the following terms:

*France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or **religion**. It shall respect all beliefs. It shall be organised on a decentralised basis.*

French secularism comprises three main principles: state neutrality, religious freedom and respect of *cultural* pluralism. It also leads to the notion of freedom of conscience or of religion which France has ratified in international treaties. Article 27 of *the International Covenant on Civil and Political Rights* provides that:

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 practice their own religion, or to use their own language.

Article 2(2) of *the International Covenant on Economic, Social and Cultural Rights* provides that

The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant shall be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Council of Europe's *European Convention of Human Rights and Fundamental Freedoms (ECHR)*, commenced in 1953, also has a non-discrimination provision in Article 14 stipulating

The enjoyment of the rights and freedoms set forth in this Convention shall be secured **without discrimination on any ground** such as sex, race, colour, language, **religion**, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Secularism bears in itself a web of plural meanings, or as an open texture (Hart 1976). It nurtures itself from the experiences it encounters<sup>1</sup>. Indeed, the State does not prioritize any religion but should also not disregard any of them. With the 1905 Act, the principle is the absence of distinction between formerly recognized sects and others. The state as guarantor of religious freedom, has to protect all minor sects against discrimination. Among all the principles of secularism, it is clearly established that all religions have the freedom of expression and are equally treated under the fundamental principle of the State: its neutrality (Jean Carbonnier 1969).

## 2.1. Legal Contours of the Concept 'Neutrality'

The progress towards diversity has always been very slow, but had a key start after the French Revolution in which the state had to guarantee equality without privilege regarding the practice of religions and had not to privilege a religion over another. In constructing the French identity, religious symbols in the public space were restricted, regulated and led to a series of legal decisions in the courts.

The practice of religion is restricted to the 'inside' as a personal choice and willingness. This principle of neutrality is not new and was already enshrined in earlier French regulations and le-

<sup>1</sup> See Rapport du Haut conseil à l'intégration 2000.

gislations. On 2 November 1882, a circular was issued by the Education Ministry and gave discretionary powers to the Prefects to remove any religious emblem whenever necessary. Public education enforced this principle with both the Ferry Act of 28 March 1882<sup>2</sup> and the Goblet Act of 30 October 1886<sup>3</sup>. Furthermore, Article 28 of the 1905 Act provides that the use of signs or religious emblems on public monuments is strictly forbidden in order to comply with State neutrality<sup>4</sup>.

This principle applies not only to civil servants but also to users in the public sphere. A series of judgments followed this principle. For example, if the religious opinions of civil servants cannot be considered as compatible with their duties of strict neutrality, the manifestation of such opinions can challenge this principle. However, there is a need to distinguish civil activities from private ones. In an administrative case of July 8, 2003<sup>5</sup>, the judge declared that the veil worn by a work controller in the exercise of her tasks was contrary to the principle of State secularism. The Court of Appeal of Lyon followed the same argument, asserting that the principle of secularism was a fundamental pillar of the French Republic. In this case, the showing of her religious beliefs in the exercise of her position was a sign confirming her religious affiliation and therefore constituted a breach to her professional obligations as professional negligence.<sup>6</sup>

As additionally illustrated by a series of similar legal decisions, the exercise of religious freedom finds its limits in a neutral civil service. Neutrality is a core concept for all civil servants in the execution of their duties. All of them must comply with this principle. Even though the modalities of applications are necessarily variable in the tasks civil servants carry out, they all must comply with this obligation of neutrality. The European Court on Human Rights also recognized this principle of neutrality of civil servants ensuring a fair balance between the fundamental rights of an individual to freedom of expression and the legitimate rights of a democratic state to make sure that the civil service complies with Article 10, Paragraph 2<sup>7</sup>.

In a 1989 opinion, the Conseil d'Etat found that secularism and the wearing of religious dress could be compatible under the following terms:

It results from the constitutional and legislative texts and from France's international engagement... that the principle of secularism in public education, which is one of the elements of secularism of the state and of the neutrality of all public services, requires that education be dispensed with respect, on the one hand, for this neutrality by the programs and teachers, and on the other hand, for the students' liberty of conscience ... This freedom on the students' part includes the right to express and to manifest their religious beliefs inside educational establishments (as long as such expression is done) with respect for pluralism and for the freedom of others, and without detracting from the educational activities and the content of its program. (Conseil d'Etat, 27/11/1989)

The education sector has often provided opportunities for the administrative judge to define the precise contours of this obligation of neutrality not only for civil servants but also for pupils in public schools. The European Court on Human Rights has already argued that secularism could justify a limitation of freedom of religious beliefs, but only in a restricted public space – i.e. the public school.<sup>8</sup> In 2004, the Government implemented an act to guarantee and protect secularism within the public schools (Wagner 2005: 182-186). The conformity of this Act was both recognized by the Conseil d'Etat<sup>9</sup> and by the European Court on Human Rights.<sup>10</sup> The prime goal was to regulate the wearing of *conspicuous* religious signs and to preserve schools from any form of violence, pressure, oppression and disturbance (Act of 15 March 2004, article 1).

2 The Ferry Act deals with the free access and the obligation to public education.

3 The Goblet Act relates to the teachers in public primary school and clearly states they should be of no religious persuasion.

4 See also Administrative Tribunal of Besançon, 20 December 2001, M. Guilleminot c./ ville de Besançon.

5 See Tribunal Administratif de Lyon, 8 July 2003, *Melle Nadjet Ben Abdallah*.

6 Cour d'Appel Administrative de Lyon, 27 novembre 2003.

7 CEDH, 26 September 1995, *Vogt c./Allemagne*, § 53, Série A n°323.

8 See Arrêt CEDH, 4 December 2008, *Dogru c./ France*, req. n° 27058/05.

9 Conseil d'Etat, 8 October 2004, Union française pour la cohésion nationale, n°269077.

10 CEDH, 30 June 2009, n°43563/08 et autres.

The principle of neutrality also applies to the French public media as religious pluralism and freedom of beliefs must be respected. The law of 29 July 1881 relative to the freedom of press provides that libel, defamation or any other provocation against an individual or a group of individuals because of their religious affiliations can be brought to court (Art. 24, 32 and 33). It is the role of the regulating body to make sure that the expression of religious pluralism in the public service<sup>11</sup> respects both state neutrality and freedom of religion. For instance, France 2 channel broadcasts every Sunday morning religious emissions dedicated to the main sects practiced in France respecting the decree of 16 September 1994<sup>12</sup>. These broadcasts – under the format of *cultural* ceremonies, or religious comments - are carried out under the responsibility of the representatives designed by their respective hierarchies upon the approval of the Home Ministry.

## 2.2. Current Arsenal against Face Dissimulation

There is a clear correlation between the visible and the expressible in the sense that the practice of one's faith in the public sphere could challenge state neutrality but also national security. Legal drafters, regulatory powers and administrative authorities can limit and even forbid a voluntary face dissimulation within the public sphere under some very specific circumstances:

- In the case of identity controls, the code of penal procedure with Article 78-1 provides that any citizen is compelled to accept a control of his/her identity. Police officers are allowed to identify an offender in order to draw up a report (Article 78-6 of the code of penal procedure).
- For all official documents, citizens must be bareheaded for their photos on their identity cards, passports or driving Licenses. This obligation is in conformity with the European Court on Human Rights.<sup>13</sup>
- Any individual entering a consulate can be required, for security reasons, to temporarily withdraw an item or a cloth dissimulating his/her identity<sup>14</sup>. This rule is also applicable for airports<sup>15</sup>.
- In case of public demonstrations, the new decree n°2009-724 of 19 June 2009<sup>16</sup> stipulates that face dissimulation is unlawful and can lead to a penalty of 1500 Euros.

This decree follows the lines already expressed in the National Security Act of 18 March 2003 (n°2003-239) and adds another element which aims at identifying demonstrators:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

- In the code of traffic road regulations, Article R412-6 and the Decree n°2008-754 of 30 July 2008, Article 15 stipulates that drivers must be in the position to execute any type of operation and that their vision must not be impaired. A woman wearing a burqa was arrested by police officers and was fined because they considered that her vision was impaired and constituted a risk for her safety and for the safety of other drivers.

<sup>11</sup> See Law n°86-1067 of 30 September 1986.

<sup>12</sup> Décret no 94-813 du 16 septembre 1994 portant approbation des cahiers des missions et des charges des sociétés France 2 et France 3, modifié.

<sup>13</sup> See 13 November 2008, M.S., n°24479/07.

<sup>14</sup> See Conseil d'Etat, 7 December 2005, EI M., n°264464; CEDH, 4 March 2008, EI M. c./France, n°15585/06.

<sup>15</sup> CEDH, 11 January 2005, P. c./ France, n°35753/03.

<sup>16</sup> It is commonly known as the anti-hood decree.

### 3. The Body – a Source of Power

Our bodies, as mediums to show religion, are now becoming a major issue. “The body is directly involved in a political field; power relations have an immediate hold upon it; they invest it, mark it, train it, torture it, force it to carry out tasks, to perform ceremonies, to emit signs” (Foucault 1977: 25). Our body can show the uniqueness of an individual, demonstrate a collective religious identity or project the control over a certain category of the French population.

The production of experience is now grounded in a pre-existent matrix of body-world relations of which knowledge and cognitivity are after-effects, disrupted collectively or individually in its terms. (<http://www.bakareweate.com/texts/Merleau-Ponty%27s%20Invisible%20Man.pdf>).

Seen in this way, our bodies may challenge in public the Republic’s values. As a direct consequence, the state tries to control and regulate the body in order to preserve secularism, to guarantee freedom of consciousness and of religion, and also to preserve the right of autonomy of any citizen.

Since 1789, religion has been kept to a private domain and rendered invisible through silence in the public sphere. In churches, mosques, and synagogues people openly express their faith. But the trend is now evolving with citizens in the streets wearing more visible and/or conspicuous signs. These visual signs are elements of their faith, are either an item of their clothes or a veil hiding their bodies. Visual religious signs are not new and have always been instruments to demonstrate a collective religious identity and form part of the visual fabric of the society:

Religious ideas become ways of expressing the body, which can be both a technology of domination and a more positive technology of self, a religious aesthetics, which animates matter. If the soul is ‘around’, ‘within’ and ‘on’ the body, then the implications of a religion on the surface of the body create a completely new understanding of religious discourse” (Carrette 1999: 126).

But since September 11, 2001, mentalities have evolved at the same pace as fears of terrorism and of Islamic fundamentalism particularly in a state where secularism and of freedom of religion are guaranteed rights. Instead, these elements may be viewed as visual interferences or potential threats to national security and public order. As a consequence, the visibility of the Muslim veil (the burqa) in the public space has been questioned.

#### 3.1. Visibility vs. Invisibility

An ambivalence can be shown in the interpretation of the notions of “visibility” and “invisibility” in our visual landscape and territory. There are two “economies of representation” (Keane 2003), two interpretations of these notions depending on the orientation being considered: rejective or projective signs (Leone 2008). The burqa can be a rejective visual sign because it hinders direct contact between the veiled woman and an alien gaze; however, the veil can also be viewed as a projective sign in the sense that the veil materializes her presence in the public sphere. This semiotic interpretation can also be challenged by sociocultural interpretations where visibility and invisibility demonstrate a potential divide between secular and religious understanding of the social order. To be invisible means to be marginalized from the visible and outside world. Badinter (1989) claims the veil is “the symbol of the oppression of a sex... putting a veil on the head, this is an act of submission. It burdens a woman’s whole life”. With the burqa, women are isolated, excluded, silenced, dehumanized and objectified. The burqa is a “tool of oppression” (Jones 2002), a mechanism of coercion leading to a loss in public identity. “My claim is that in sociolinguistic terms, when such groups are oppressed, one of the manifestations of their taboos status is that they become silenced” (Foucault 1963: 196), and so women form part of a “nameless” group (Jaworski 1993: 154). The burqa neutralizes women’s bodies and leads to a gender-blind construction. “In like manner, silence and secrecy are a shelter for power, anchoring its prohibitions; but they also loosen its holds and provide for relatively obscure areas of tolerance” (Foucault 1966: 251). In terms of religious beliefs, the Koran provides another perspective:

And say to the believing women that they should lower their gaze and guard, their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husband's fathers, their sons, their brothers, their brother's sons, or their women (Abdullah 2001: 904-905).

Power is a double-edged sword. Paradoxically, the veil can be an instrument of integration (Tiefenbrun 2007)<sup>17</sup> or a means for invisible women in Islamic countries and part of the Revolutionary Association of Women of Afghanistan (RAWA) to fight back: "The surveyed become the surveyors", and so they challenge Islamic rules (Jones 2002). Even in Western countries women wearing the burqa reveal that it provides them with a sensation of seeing without being seen, of being equal to men on a mental level rather than sexual objects (Wong and Smith 2006). For others, it allows them to escape from a private sphere that may oppress them and so give them a relative freedom of movement (Human Rights Watch). Veiling or masking the face is a common cultural denominator for other communities like the Tuareg, but these masks did not lead to such a controversy (Borneman 2009). In some European countries, such an intense debate did not occur. In 2003 the German Federal Constitutional Court<sup>18</sup> held that Muslims could wear their veils while teaching while eight Ländern legislated to ban headscarves. Contrary to France, Germany does not expressly refer to the principle of secularism in its constitution.

### 3.2. Exploiting the fears of the visible and of the invisible

With an increase in violence, bodily insecurity and trespassing to the person, the French government has deployed a security arsenal to appease the population. After the case of the veils in school that led to the enforcement of a law on religious signs (the Headscarf Ban) (Wagner 2005) and after riots in suburbs which resulted in the enforcement in a 2009 decree against face dissimulation (the anti-hood decree), the government now takes its policy on security to a new level. Attention is now brought to the wearing of the Veil in the public sphere. According to the French Council of the Muslim sect, this garment is not required by the Koran but rather constitutes a "religious practice of a minor category of the population" (Rapport d'information de l'Assemblée nationale, 26 January 2010: 38).

The Muslim veil was part of the political discourse for regional elections but also related to the former debate over French national identity, because

Veiling blocks recognition to a lesser or greater degree, would seem to be in tension with democratic transparency. Accordingly, in the contemporary contexts within which veils signify, visibility has become central to the intelligibility of women – despite the wish of many women to be seen for qualities that are spiritual, non-visible, or just inside their heads (Borneman 2009: 2756).

This new emphasis in political discourse exploits conscious and unconscious fears despite the relative small number of women, French or from foreign origins, wearing the burqa in France.<sup>19</sup>

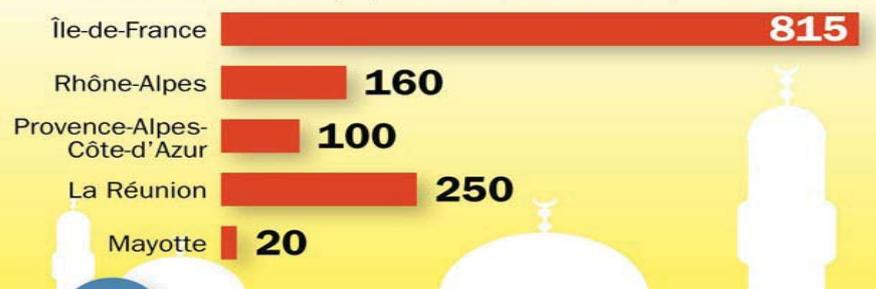
17 "Women in Iran today are no longer excluded from public life and politics, and their participation has in fact increased in some areas due to, and not in spite of, the compulsory wearing of the veil or hijab": 19.

18 Kopftuch-Urteil, Entscheidungen des Bundesverfassungsgerichts (BVerf GE) (Federal Constitutional Court) 108, 282 24/9/03.

19 Only 3 out of 100,000 Muslim women. These figures were released by the Home Ministry.

## Les femmes voilées intégralement en France

Estimation : **1 900** (3 pour 100 000 habitants) dont :



### Qui sont les femmes portant le voile intégral ?



ont moins de 40 ans



sont Françaises



sont converties, nées dans une famille non musulmane

Source : ministère de l'Intérieur

ide

The French government tried to exercise power through the control of bodies in the public sphere under the pretext that this category of the population could be threatened, discriminated and denied an equal status in society, despite the Republic's values of democratic transparency. Politicians argued that the burqa, as a "mobile prison", could not guarantee women's emancipation, integration and agency in the French society and so did not comply with the Republic's values. The extreme right-wing political party "Front National" argued that the burqa had never been part of French history and wanted to "eradicate" it from the French framework. This political party used this argument in the recent regional political campaigns exploiting the fears of people in their political advertising campaign as shown below:



The government carried out several missions with the National Assembly and with international associations, such as Human Rights Watch, in order to discuss the possible imposition of a legislative ban on the wearing of full Muslim veils in public places. In intense discussions, many associations denounced a systematic stigmatization of the Islam and denounced the willingness of the government to control the freedom of expression of part of the population. Even as some of the associations recognized that wearing the veil might be imposed by men, they were convinced that a full ban would be counterproductive and “the result for these women could be confinement in the home and further isolation and vulnerability”.<sup>20</sup>

The bill submitted to the National Assembly was entitled “A bill to prohibit the dissimulation of face in the public space”<sup>21</sup>. Its content was in line with the questions of national security and public order and could be seen as a complement to the anti-hood decree of 2009. The bill provided that “the dissimulation of the face in the public space conveys a symbolic and dehumanized violence” backing national security issues and fears as shown with the public and online debate over French national identity<sup>22</sup>. Within the ambit of this new legislation, people promoting the wearing of the veil could be prosecuted and sentenced up to one year of imprisonment and 15,000 Euros. The bill was voted on in Parliament on 13 July 2010, and on October 2010 the Constitutional Council validated the constitutionality of the legislation. However, this new legislation will not only be difficult to abide by, but will also infringe the European Convention on Human Rights, Article 9:

Freedom of Thought, Conscience and Religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

#### 4. Conclusion

Laws should be voted for as general principles in order to leave open the avenues of interpretation. Portalis observed in his Preliminary Discourse on the Civil Code of 1804 that:

Those changing and petty details with which the legislator ought not be preoccupied and all those matters that it would be futile and even dangerous to attempt to foresee and to define in advance, we leave to the courts. It is for them to fill in the gaps that we may leave. The codes of nations shape up with the passage of time; properly speaking, they are not drawn up by the legislature.”

The function of the law is to determine, by means of basic concepts, the general precepts of the law, and to establish principles fertile in consequence, rather than to go into the details of questions that may arise with regard to each particular matter. It is for the judge and the lawyer, who are imbued with the spirit of a legal system, to attend to its implementation.”

In the context of the free movement of people, concepts of tolerance and diversity have been given significant consideration by international, European and domestic courts within the ambit of the principle of non-discrimination and to respect this *cultural* pluralism. This idea is also a reference from the *Unesco Declaration of Principles of Tolerance* where it states that:

<sup>20</sup> See <http://www.hrw.org/en/news/2009/11/20/human-rights-watch-submission-national-assembly-information-committee-full-muslim-veil>

<sup>21</sup> <http://www.assemblee-nationale.fr/13/projets/pl2520.asp>

<sup>22</sup> <http://www.debatidentitenationale.fr/>

Tolerance is respect, acceptance and appreciation of the rich diversity of our world's cultures, our forms of expression and ways of being human. It is fostered by knowledge, openness, communication, and freedom of thought, conscience and belief. Tolerance is harmony in difference. It is not only a moral duty, it is also a political and legal requirement. Tolerance, the virtue that makes peace possible, contributes to the replacement of the culture of war by a culture of peace.

The role of the state is “not to remove the cause of tension by eliminating pluralism, but to ensure that ... competing groups tolerate each other”.<sup>23</sup>

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23 See European Court of Human Rights, *Sahin v. Turkey*, para.107-108.