

*Legislative note*

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UNVEILING THE HEADSCARF DEBATE

French Law no. 2004-228 of 15 March 2004, concerning, through the application of the principle of *laïcité*, the wearing of symbols or clothing demonstrating religious affiliation in state primary and secondary schools<sup>2</sup>

**ABSTRACT.** In March 2004 the French parliament controversially adopted legislation regulating the wearing of symbols indicating religious affiliation in public educational establishments. This note discusses several features of the new law indicating its origins, its rationale and its position within French constitutional discourse on religious freedom and secularity. It is based on a panel discussion held in April 2004 within the Gender Studies Programme at the Robert Schuman Centre for Advanced Studies, European University Institute, Florence. Placing the French legislative initiative in the context of recent developments in national and European case law (suggesting clear limitations to freedom of religion), the note explores the complexity of issues of gender, identity and difference in the present debate, especially when considered in the light of reactions to the law in Islamic countries.

**KEY WORDS:** constitutional law, cultural diversity, European Convention on Human Rights, feminism, French law, gender, headscarf, identity, Islam, religious freedom, veil

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<sup>1</sup> This note was primarily compiled from the texts of the panel presenters, and the comments of other participants in a discussion held at the European University Institute, Florence, in April 2004. The first section on the regulation of religious freedom draws most strongly on the contribution of Channa Samkalden (E.U.I.), the second section on the European Convention of Human Rights relies on Mark Bell's (University of Leicester) presentation, the third section on gender, identity and difference is largely based on the presentation of Elena Pulcini (Università di Firenze & Istituto Gramsci), and the fourth section on the reception of the debate in Islamic countries draws on Geraldine Chatelard's presentation (R.S.C.A.S., E.U.I.). We are grateful to the participants for generously sharing their texts. However, we take responsibility for the overall interpretation of the ideas expressed here and for any mistakes.

<sup>2</sup> *Loi no. 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics: Journal Officiel* no. 65, 17 March 2004, p. 5190.



## INTRODUCTION

On 17 March 2004, Law 2004-228 was published in the Official Journal of France to regulate, in educational establishments, the wearing of symbols that express religious adherence. The law prohibits symbols that “ostensibly” manifest a particular religious belief.<sup>3</sup> This was one recommendation of the report of the Stasi Commission (published in December 2003) after the question of wearing headscarves in French public schools became a site of controversy for the third time in 15 years. The law itself is extremely concise, containing just four short articles, yet it has provoked a vibrant debate within France and in the international media. Whilst the law deals with religious symbols in general, the public debate was mostly concerned with the Islamic headscarf (*foulard*) or veil (*voile*). In present day Europe where we note an apparently increasing xenophobia towards Muslims, the headscarf has a stronger symbolic load than a kippah or a Sikh turban for instance, and it is as a result of this symbolic overload that the debate has touched questions of identity, community, cultural diversity, religious freedom and tolerance, Islam in Europe, and, not least, gender relations.

## LEGAL REGULATION OF RELIGIOUS FREEDOM AT THE NATIONAL LEVEL

Case law in France (beginning in 1989) has brought into focus a latent conflict between the individual expression of religious belief (through symbols) – which rests on the principles of freedom of expression and freedom of religion – and the collective value placed on the principle of *laïcité*, that is, the clear separation of religion and the state (Dubourg-Lavroff 1999). What this means in practice is, amongst other things, that state-provided education is secular, and it

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<sup>3</sup> Article 1 of Law 2004-228 inserts a new Article L. 141-5-1 into the Code on Education to this effect. “Article 1: Il est inséré, dans le code de l’éducation, après l’article L. 141-5, un article L. 141-5-1 ainsi rédigé: Article L. 141-5-1. – Dans les écoles, les collèges et lycées publics, le port de signes ou tenues par lesquels les élèves manifestant ostensiblement un appartenance religieuse est interdit. . . .” Further to the legislation, a circular was adopted on 18 May 2004 by the Ministry of Education regarding the more detailed terms of application of the Act: *Journal Officiel* no. 118, 22 May 2004, p. 118.

was in this arena that the conflict arose, between schools seeking to maintain a strict absence of religious expression and the individual practices of students wearing the headscarf. The conflict is strongly articulated in terms of the principles of freedom and *laïcité*: whereas proponents of a prohibition often refer back to a separation of state and church, opponents claim that a prohibition of the *foulard* is in fact a breach of the freedom of religion.

The panel<sup>4</sup> discussed the principles of the separation of state and church and religious freedom, what they mean, and how they are mobilised in the case of the *foulard islamique*. The law operates on the basis that to ensure real religious freedom, religious freedom cannot be unlimited. The limit to freedom lies precisely where individual freedom would manifest itself in the identity of the state, in other words, where individual religious beliefs would become the religious convictions of the state as an institution and would be reflected in its organisation and legislation. At this point, the state would no longer be neutral and would not be able to guarantee religious freedom equally to its citizens. So freedom of religion and separation of state and church are interwoven; they both necessitate and limit each other.

*Laïcité* à la française is much more than a system of separation of state and church, it is a fundamental conception of citizens and society, within French Republicanism, in all its ‘indivisibility’. “*Libertés publiques*” are not rights *against* the state, as human rights are often perceived, but are rights *granted by* the state. *Laïcité*, in contrast to systems in some other European countries, is full of values – critical analysis, tolerance, patriotism, neutrality. This was one focal point of the discussion, exposing *laïcité* as a value in itself. The active promotion of the values it rests on is not perceived in France as interference with people’s freedom, but rather as a guarantee of these freedoms. And within the spirit of French Republicanism, it is a central task of French public schools to teach these values to all French children.

Two interpretations of *laïcité* were in conflict in the debate in France (Troper 2000). On the one hand, there was the argument that the *foulard islamique* is a form of religious propaganda, for which there should be no place in public schools, all the more so since the *foulard* can be read as opposing certain values which are protected in French Republicanism, such as tolerance and equality. On the other

<sup>4</sup> *Supra*, n. 2.

hand it was claimed that *laïcité* only requires neutrality from the state – and not from its citizens. By prohibiting the *foulard*, the state would act in breach of this neutrality.

This was not the first time that the issue had become heated. In confronting the question of the headscarf in schools through the 1990s, the *Conseil d'État* (the highest French administrative court) tried to find a way through this impasse by recognising the right of students to manifest their religious beliefs within educational establishments, whilst subjecting this right to constraints in order to retain public order and respect the fundamental rights of others. As a result, restrictions could be placed on the wearing of symbols that amounted to pressure or provocation or interfered with the organisation of school life. However, these rulings which conferred considerable discretion on local schools, inviting them to apply these principles with proportionality, did not succeed in dissipating the issue.

The Stasi Commission's report examined various situations where religious manifestation interacts with public life, for example, in healthcare, employment, and prisons. It proposed a range of measures to strike a new balance between upholding *laïcité* whilst recognising religious diversity. With respect to education, the Commission supported the prohibition of ostensible religious symbols in schools as a means to promote integration, yet simultaneously proposed the introduction of new school holidays based around non-Christian festivals. From within its numerous proposals, the specific recommendation on prohibiting ostensible religious symbols within schools was 'fast-tracked' to become law to enter into force at the beginning of the academic year, 2004/2005.

However, this measure is unlikely to solve the tensions we have noted. In the relationship between religion and politics it rests on a false separation of public and private. If a secular state is to respect all faiths and ensure free practice of spiritual and cultural activities for all communities, this means, the panel argued, that the state must accept publicly visible manifestations of religion, and its ritual expression in public space. Religion cannot be relegated to the private sphere because religious expression is inherently social as well as personal or private. Indeed, we cannot underestimate the fact that today (as Clifford Geertz (1999) for example reminds us), on a global level, religions have taken on a strong *political* meaning, and directly influence political action and decisions, which doubtlessly makes the problem more complex. Whilst advocates of the law in France claim that it *maintains* public order, it seems on the contrary that the

religious conflict which gave rise to the institution of the state at the origins of modernity (Hobbes' model) is in effect being reproduced today on a global scale.

#### THE EUROPEAN CONVENTION ON HUMAN RIGHTS

One strand of the discussions of the Stasi Commission was the potential conflict between the legislation on religious symbols and the European Convention on Human Rights. There is a well-established body of case law from the European Commission and Court of Human Rights governing the freedom of religion and the right to religious manifestation. It is clear from both the text of the Convention, as well as the case law, that these are not absolute rights, but (as with the decisions of the *Conseil d'État*) they can be restricted to protect public order, health, or the rights and freedoms of others, elements which have been evoked in the French proposals. The decisions of the Strasbourg institutions are both legally binding on France and offer a contextual dimension to the French debate.

In the first of two cases we discuss here, an early decision regarding the wearing of the headscarf was issued by the European Commission on Human Rights in *Karaduman v. Turkey*.<sup>5</sup> This concerned a woman who submitted a photograph of herself wearing a headscarf for inclusion on her university degree graduation certificate. The university rejected the photograph on the basis that it was contrary to university regulations prohibiting the wearing of the headscarf and refused to issue the degree certificate. The Commission on Human Rights places considerable emphasis in its decision on the principle of *laïcité* as central to the organisation of the Turkish state and, within the context of education, the protection of the *laïc* character of universities in Turkey. It concluded that wearing the headscarf would challenge this and that the restriction on religious freedom was legitimate in this case.

In a more recent decision from 2001, the Court of Human Rights illuminated the gender dimension more explicitly. *Dahlab v. Switzerland* concerned a teacher working in a state school in Geneva who converted from Catholicism to Islam.<sup>6</sup> Around the same time, she began wearing the headscarf. The educational authorities

<sup>5</sup> *Karaduman v. Turkey*, Application no. 16278/90, 3 May 1993.

<sup>6</sup> *Dahlab v. Switzerland*, Application no. 42393/98, 15 February 2001.

subsequently advised her that this conflicted with the principle of denominational neutrality in the state education system and she would have to refrain from wearing the headscarf. The Swiss Federal Court rejected her challenge to this decision, noting the importance of tolerance – a further element of the principle of denominational neutrality – between members of different religious faiths. Teachers, it was argued, must tolerate proportionate restrictions on their freedom of religion. The European Court of Human Rights reached the same conclusion. It first considered whether the requirement was a legitimate restriction of the freedom of religion. It noted that the Swiss courts had already required the removal of the crucifix from classrooms in order to preserve the principle of denominational neutrality. The headscarf is, according to the Court, “a powerful religious symbol” and “hard to square with gender equality”.<sup>7</sup> “It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.”<sup>8</sup> Both national and European courts in *Dahlab* appear to be swayed by the earlier decision to remove the crucifix from Swiss classrooms. The requirement for the applicant to remove her headscarf is portrayed as the *quid pro quo*.

Significantly, the European Court invokes the principle of equality, and specifically gender equality, as a further justification. However, the analysis remains very superficial, and there is no attempt to engage with the debate on what it means to wear the headscarf. There is a bald assumption that the headscarf is not consistent with gender equality, even though this appeared to be a clear case of an adult woman choosing to wear the headscarf. Moreover, *Dahlab* herself raised a discrimination argument. She contested that the requirement impacted much more heavily on women than men and breached Article 14 on the right to non-discrimination. The Court dismissed this line of reasoning with a relatively thin analysis. It observed that had a man wished to wear a religious symbol, then the rule would have impacted on him in the same way. Yet, this ignores the social reality that the dispute surrounded headscarf wearing by *women* and there was little evidence of equivalent difficulties for men.

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<sup>7</sup> *Ibid.* See also, European Commission of Human Rights, *Karaduman v. Turkey*, *supra* n. 5.

<sup>8</sup> *Dahlab v. Switzerland*, *supra*, n. 6.

In both the E.C.H.R. cases, considerable emphasis was placed on the coherence of the rule within a broader constitutional structure premised on the separation of religion and the state. In other national contexts, such as the UK or Italy, a different conclusion could be expected as these states are not organised around the principle of *laïcité*. Shifting the focus towards a gender equality perspective, the panel argued, could provide a different perspective and a new area for dialogue on these sensitive issues, as well as acknowledging more fully the gendered nature of legal interventions presented as formally neutral.

#### GENDER, IDENTITY AND DIFFERENCE

In all these developments, a gender perspective is often absent or marginalised. Assumptions about why women wear headscarves and how they experience this (often made by male judges) fail to critically confront issues of gender equality. Where gender is raised, it most often takes the form of a distinction and an opposition between ‘the Western/European woman’ and ‘the other Oriental/migrant woman’. Some legal pronouncements for example, implicitly berate Muslim women for failing to conform to a Western image of how women should behave. As a counter to this, an element that emerged in the discussion was to note the continuity of discrimination and oppression of women in different contexts. Furthermore, women’s bodies remain central in the construction of the discourse on the radical difference of the Arab or the Muslim as the Other. At a time where Victorian morals predominated, Arab women were the objects of male erotic fantasies associated with the idea of harem, and the figure of the odalisque; now they are dominated, unequal, inferior and covered.

To think about the production of these distinctions, the panel reflected on the economic, political and cultural processes which have given rise to new forms of identity claims and have simultaneously created new differences as significant in the contemporary world. Whilst globalisation produces standardisation and universalism on the one hand, at the same time it sees the rebirth of difference and localisms on the other, often expressed through claims to religious, ethnic, and cultural belonging. This might be understood as a “resistance identity” (Castells 1996). Religious fundamentalism, territorial communities, nationalist self-assertion, but also women and gay groups etc. are all expressions of what Castells calls “the exclusion of the excluders by the excluded”.

If the need for community is legitimate, providing a sense of identity and meaning that resist global depersonalisation, it also carries its own dangers, precisely that regressive and destructive communities are formed through *making differences absolute*, both legitimising every difference, whatever its values, and risking the creation of 'islands' of communities which are not part of the wider social fabric. As a result, the risk of 'identity conflict' becomes one of the most powerful challenges in the global age, usurping the more traditional 'conflict of interests' peculiar to the first modernity. The very supporters of multiculturalism must reckon with this risk; that is, they must avoid the transformation of "multi-culturalism" into "multi-communitarianism" (to use Touraine's terms, taken from Bauman 1999). Whilst a multicultural society is indeed tolerant towards cultural differences, open to negotiation and capable of favouring exchange between cultures (while also maintaining the right to disassociate from a particular culture), a multi-community society sees cultural difference as a value in itself, denying the possibility of an exchange between cultures. This produces communities as fortresses, not open to negotiation, and closed off from communication.

Global society, the panel argued, must be able to distinguish regressive and destructive forms of difference from legitimate claims to affirm identity. It must be able to *recognise* differences and accept their symbolic visibility, ensuring that this does not harm the freedom and identity of others. In other words, it must recognise the Other in his/her otherness, removing him/her from the unacceptable alternative between exclusion on the one hand, and inclusion through neutralisation of difference on the other. We need to hope for a 'universalism of differences' in which equality – judicial and political – becomes the condition for the assertion of those differences (religious, cultural, etc.) and in which there is the possibility to communicate and negotiate. The various points of view represented in the panel thus agree on the need to overcome the traditional paradigm of tolerance to embrace an approach to difference based on a relationship of mutual recognition.

The *affaire du foulard* teaches us a bitter lesson about the fragility of our democracies. It leads us to question whether our societies are adequately equipped to face the transformation of the very scope of politics brought about by the processes of globalisation. As mentioned above, the kind of conflicts that our public spheres are called to resolve are no longer interest and justice based, but are more and



more often concerned with the affirmation of identities and claims for recognition. The public space is increasingly occupied by debates that have to do with ultimate values and ideals of a 'good life': and liberal neutrality is not a good response to such claims. Many interpreters – such as Giacomo Marramao in Italy – have launched the idea of a 'narrative' rather than an 'argumentative' public sphere (Marramao 2003). Our democracies need public spheres where different groups and individuals may come into contact and 'narrate' themselves to each other, thus 'making themselves accountable' for their values and traditions, and engaging in a kind of public dialogue that is not afraid to touch on values. This could be a strategy to avoid the entrenchment of communities in self-centred models of identity.

Many interpret the wearing of the *foulard* as a symbol of the humiliation and oppression of women by a patriarchal and integralist world; it is therefore the symbol of an age-old and completely negative 'difference'. Hence, banning it can only 'free' Islamic women from an unjust and intolerable violence. Whilst the *foulard* may indeed be seen as a symbol of the oppression of women, in which their dignity as subjects is denied, it is not only that. Muslim women invest a range of meanings in wearing the *foulard* (a point we return to below). However, and crucially, the answer to one constraint (the religious obligation to wear the *foulard*) cannot be another constraint (the obligation not to wear it): *an effective process of liberation cannot be based on a prohibition*. On the contrary, we must dialogue with positions that we do not immediately understand. In the end, this is the profound meaning of tolerance as the capacity not only to accept difference, but also to recognise the dignity in difference, giving it back the possibility to present itself as a value to respect.

So, the problem is not the *foulard* in itself, but the *foulard* as an object of free choice. If it becomes an object of free choice starting from conditions of equality, the *foulard* can take on a non-regressive symbolic meaning which bears witness to the legitimate defence of a particular tradition in a condition of freedom. Banning the *foulard* means denying Muslim women this chance to tie elements of modernity and tradition in new ways which sees them as autonomous subjects in their lives while conserving those differences that they perhaps wish to retain. Things are made even more complicated by concerns relating to the rights of children. The law on religious symbols does not concern any kind of public space, but only schools, thus involving necessarily only very young women and girls. The ban on the headscarf is supposed to 'defend' young women from an

oppressive and family-enforced tradition, and yet at the same time it submits these same women to another form of tutelage. If the life choices of Muslim women are a concern of the French state, it is the background social, economic, legal and political conditions in which they live, including the everyday reality of racism, that need to be the focus of attention, to create conditions in which choice can be real.

#### RECEPTION OF THE DEBATE IN ISLAMIC COUNTRIES

In early 2004, in addition to media coverage and commentary, there were demonstrations against the French law in a number of Islamic countries. The protests came not only from religious leaders but were voiced by modern, urbanised, educated sectors of society. The most vocal critics came from countries where there already exists a large space for public expression, and where women are not constrained by law or social pressure to wear, or not to wear, the *hidjab* (Islamic attire) – Egypt, Lebanon and the most liberal Gulf states (for example, Dubai or Qatar) (and not in Iran, Saudi Arabia, or Turkey).

In Islamic countries, a ban on headscarves is closely associated with the authoritarian regimes which sought, through symbolic and physical violence, to modernise their societies and purge urban public space of signs of ‘backwardness’. In such cases where headscarves were banned, they were sometimes forcefully removed from women’s heads, and veiled women were excluded from schools and public offices. Thus in these contexts the veil has become a symbol of dissent and opposition to authoritarian regimes. What has happened in France, albeit in the name of secularism, is perceived, first and foremost, as authoritarianism. Furthermore, the claim of French secularism to offer the best safeguard for the emancipation of women is equally rejected as Arab women have gained significant autonomy and have found ways to express their claims for greater democracy (for example, in Saudi Arabia, 40 per cent of private property is owned by women, and over 55 per cent of university graduates are women). There are many routes to modernity, as the current debate on ‘Asian values’ reminds us (Sen 1997).

Indeed, widespread literacy has led to a democratisation of the direct access to religious texts. Islamic feminists, who claim justice, equality and social promotion *in the name of Islam*, are currently engaged in rereading Islamic texts, seeking to distinguish between Islamic principles and patriarchal traditions/practices. Through Islam

women claim respect, autonomy, and civil liberties, within the family, the workplace, and in political processes. Arguing that the Koran is polluted by the legacy of pre-Islamic patriarchy is a subversive claim more powerful than any critique that dismisses the Koran as irrelevant or not divinely inspired. And arguing within Islam accords women more legitimacy than a form of feminism more akin to the Western model which is readily criticised as colonial. (Nevertheless, there does exist a western-style feminism which argues for human rights.)

In the panel, we heard how in some perspectives of Islamic feminism there is an emphasis on communal solidarity rather than individualism; in relation to the freedom of the individual woman, Islamic feminists point to the security the Islamic family and community grants women. Instead of equality, they insist on complementarity between men and women based on biological differences, and whilst they accept the principle of segregation between the sexes, they want to be able to exert the same social, professional, leisure, religious and political activities as men. They accept that gendered differences should not be blurred, that they should be inscribed in the public space through women wearing the veil, the segregation of men and women, and the control of sexuality for all. In this thinking, the *hijab* is thus the tangible and visual marker of female identity, not of submission to male domination.

In urban settings in the Islamic world, and even in the very few countries where formal rules make the wearing of the veil compulsory, the veil does not go unquestioned, and women invest it with a variety of contradictory meanings. The basic distinction within veiling is that between the social veil (*khimâr*) which covers the face, and the religious veil (*tarha*) commanded by the Koran. The social veil protects women from social shame. This veil is perceived as traditional (*adat*), and is the object of much criticism from modern women. In contrast, wearing a religious veil is a sign of submission to God and of modesty in behaviour. Both veils relate to two separate orders: one is historical and varies across the Islamic world and elsewhere, the other is theological and applies to all Muslims. The discourse of Islamic feminism aims at distinguishing between the social and the religious veil. This is because states and male-dominated societies have tended to justify the maintenance of the social veil and the segregation that accompanies it using religious arguments (for example, the Taliban), thus blurring the distinction between submission to a masculine order of gender relations, and a divine order that commands modesty and restraint for both men and

women, and can be interpreted to grant more autonomy and socio-economic rights to women.

The 'new veil' is the most conspicuous sign of Islamic feminism. Women choose to wear it, and will not remove it in any circumstance, including in women-only gatherings or in foreign countries. This is a way of freeing themselves from a male-imposed feminine model that *allows* them to remove the veil in private settings, since its main function is to conceal women from men who are not their relatives. By retaining the veil, they show that it is not imposed by men but chosen by them. This religious veil allows a claim for autonomy in matters of marriage and freedom from traditional family choices. Islam serves to articulate claims that are understood by all, that give stronger weight to the arguments of young women, and that do not alienate them from their families.

The veil is not a thing but a sign, and as such it calls neither for blind approval nor condemnation, but for attention to its meanings as women who wear it have something to say. Asking schoolgirls in France to remove their veil inside the classroom or the school is precisely turning their affirmative veil into a traditional/patriarchal veil that can be removed inside the private space. It is forcing them into categories that deny their autonomy.

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