

Laïcité and the banning of the 'hijab' in France

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In Spring 2004 the French Parliament agreed to the passing of a Bill named 'Application of the Principle of Secularity'. The new law was brought into effect on 2 September 2004, banning all 'ostentatious' religious symbols in state schools and the enactment denies Muslim schoolgirls the right to wear the 'hijab' (or the traditional Muslim headscarf) in French public schools.¹ The new enactment has stirred controversy within the Islamic world where many have considered the law to be an example of 'Islamophobia' and the West's intolerance towards the religion of Islam.² This article aims to understand the historical background and the rationale of the ban on religious symbols in French state schools and seeks to examine some of the main criticisms of the new law.

LAÏCITÉ (SECULARISM) AND THE FRENCH REPUBLIC

Before one can grasp an understanding behind the ban on religious symbols in French state schools, an explanation must first be provided about the meaning of laïcité in the context of the French Republic. Laïcité may be generally described as the principle of secularity applied in France and is a notion

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1. The words 'foulard' (scarf/headscarf) and 'voile' (veil) are commonly used in France to describe the types of covering worn by Muslim women. See P Siblot 'Ah! Qu'en Termes Voilés ces Choses-la Sont Mises' (1992) 30 Mots: Les Langages du Politique (March) 5 for a discussion of the different meanings attached to these words. In this article, I have used the Arabic word 'hijab' because it is a term widely used in English and recognises the particular scarf in question, namely the scarf that covers the hair and neck.

2. See F Bodi 'Islamophobia is the Main Weapon of Europe's Resurgent Far Right' (2002) Guardian, 14 May, p 16; V Dodd 'Muslims Face More Suspicion' (2002) Guardian, 5 November, p 8; F Ali 'A Nasty Outbreak of Islamophobia' (2003) Sunday Telegraph, 21 December, p 18; B Lewis *Cultures in Conflict: Christians, Muslims and Jews in the Age of Discovery* (Oxford: Oxford University Press, 1995); J L Esposito *The Islamic Threat: Myth or Reality* (New York: Oxford University Press, 1999); W W Montgomery *Muslim-Christian Encounters: Perceptions and Misperceptions* (London: Routledge, 1991); C Peach and G Glebe 'Muslim Minorities in Western Europe' (1995) 18(1) Ethnic and Racial Studies 26.

associated with the French Republican ideals of liberty, equality and fraternity.³ Unfortunately, there is no single definition behind the concept of laïcité because its meaning holds various interpretations amongst academic commentators, although in a very broad sense, the concept can be understood as symbolising the non-religious nature of the state where the state neither recognises nor subsidises a particular religion. In the French Republic, the church and the state are actually separated from each other, though one should not immediately equate French secularism with agnosticism because the two concepts do not necessarily have the same meaning. Behind the French secular system is the principle that no one religious code should be imposed by the state upon its citizens, and references to religious beliefs in order to justify public policies are considered politically wrong. The French system holds that religious beliefs should remain outside the public sphere, although the observance of religion is permissible in private. However, the:

‘... practical application and exploitation [of laïcité] over the years reveal that it is limiting, inaccurate even, to define it purely in terms of the clear-cut separation of churches and state. Indeed, an analysis of the aims and impact of laïcité identifies it as an elastic rather than immutable concept which has undergone a series of evolutionary stages, each of which may be linked to the prevailing socio-political context.’⁴

The concept of laïcité is currently facing new challenges in France and according to one interpretation, laïcité ‘... can be viewed as a passive neutrality on non-intervention by the state in the private religious domain, coupled with a principle of non-discrimination in the public sphere’.⁵ This identifies that the exercise of religion is permissible in private but that the French state will not openly support a particular religion within the public sphere, in the interests of non-discrimination. However, under another interpretation (and one which seems to prevail in most governmental and educational organisations), laïcité may be interpreted ‘... as a more active secularism, in terms of which the nation is promoted as a fundamentally political society fiercely independent of any religious authority, and one in which the values of the state can be defended through the concept of *l’ordre public* in order to justify interference where necessary with some religious organisations’.⁶ This interpretation suggests that the application of laïcité is far more aggressive, where the state will strive hard

3. For in-depth discussion on the principle of laïcité, see J Boussinescq *La Laïcité Française* (Paris: Le Seuil, 1994); M Barbier *La Laïcité* (Paris: L’Harmattan, 1995); A G Hargreaves *Immigration, ‘Race’ and Ethnicity in Contemporary France* (London: Routledge, 1995); A G Hargreaves and M McKinney (eds) *Post-Colonial Cultures in France* (London: Routledge, 1997); J Baubérot (ed) *La Laïcité, Évolution Et Enjeux* (Paris: La Documentation Française, 1996); J Costa-Lascoux *Les Trois Âges De La Laïcité* (Paris: Hachette Livre, 1996); C Durand-Prinborgne *La Laïcité* (Paris: Dalloz, 1996); G Haarscher *La Laïcité* (Paris: PUF, 1996); J Baubérot *Histoire De La Laïcité Française* (Paris: PUF, 2000).

4. K Chadwick ‘Education in Secular France: (Re)defining Laïcité’ (1997) 5(1) *Modern and Contemporary France* 47 at 48.

5. S Poulter ‘Muslim Headscarves in School: Contrasting Legal Approaches in England and France’ (1997) 17(1) *OJLS* 43 at 50.

6. Poulter, above n 5, at 50.

to maintain its religious neutrality by curtailing religious freedom, in the interests of public order. This interpretation of *laïcité* allows the government justifiably to control religious expression in governmental institutions, including schools, on the part of schoolteachers and school pupils.

However, while the term is habitually translated into English as secularism, the English noun does not fully capture the true (and French) meaning of *laïcité* and in order to obtain a better understanding of its true meaning, one need not look any further than the explanation provided by France's highest administrative court, the Conseil d'État. In 2004 the Conseil d'État published a report assessing the application of *laïcité* in France over a period of 100 years,⁷ and explained the very complex nature in defining the principle. As a consequence, the Conseil d'État chose not to provide a strict definition of the concept, but explained further that the principle of *laïcité* should generally be understood as the state's refusal to be governed by the policies of religious clerics, and as such, implies the neutrality of the state with respect to the church. However, the Conseil considered that the contents of *laïcité* could fall under three main aspects and the first described by the Conseil was that the principle of *laïcité* imposes obligations upon public authorities to remain neutral with regard to all opinions and beliefs. 'Neutrality' is a general principle that operates in the French public service and is the fundamental common law of all public agents in the exercise of their duties, as indeed confirmed by the jurisprudence of the Conseil itself.⁸ Second, the Conseil d'État explained that the principle of *laïcité* should not be summarised only as the religious neutrality of the state for the concept cannot ignore the role that religion plays in the daily lives of people, and that *laïcité* allows individuals to worship in private and provides equality between all religions. The Conseil also explained that one of the assets of *laïcité* is that it affirms that all religions have the right to express their beliefs. The Conseil concluded that the state must not monopolise the principle of religious freedom because *laïcité* not only signifies the neutrality of state institutions, it also guarantees religious freedom in privacy.

The term *laïcité* also possesses a juridical meaning that has been developed through legislation and therefore the concept should not be solely interpreted as simply meaning secularism. *Laïcité* was officially recognised by the 1905 Law on the Separation of the Church from the State and was later defined as a concept of constitutional value with its inclusion in the preamble to the Fourth Republic Constitution,⁹ and is now included within Articles 1 and 2 of the French Republic's current constitution, the Fifth Republic Constitution.¹⁰ The

7. Conseil d'État *Un Siècle De Laïcité – Jurisprudence Et Avis Du 2003*, Rapport Public 2004.

8. See the Conseil d'État case of Julie Marteaux, *DlIs Marteaux*, CE, No 217-017, 3 May 2000, below n 72.

9. The preamble to the Fourth Republic Constitution of 27 October 1946 proclaimed that: '... every human being, without distinction of race, religion or creed, possesses inalienable and sacred rights.' However, one might argue that this principle is not directly *laïcité*, but merely neutrality in relation to the religion held by the citizen (as opposed to the creation of a positive liberty).

10. The Fifth Republic Constitution of 4 October 1958. Article 1 explains that: 'France is an indivisible Republic, secular and socially democratic. It ensures the equality of the law of all citizens without any distinction towards national origin, race or religion. It

legal development of laïcité directly corresponds to the period between 1789 and 1880 following the French Revolution that led to the secularisation of France, and the law of 1905 was founded upon two very important constitutional principles, that of freedom of conscience and religion and the separation of the church from the state. Article 1 of the 1905 law ensured that freedom of religion was guaranteed under French legislation and that religion, therefore, was not a totally deprived matter for the citizen because the freedom to worship could take place in one's private domain. However, many Catholic religious orders were expelled during this time and so it was not exactly freedom of religion for all of those concerned – it was rather freedom of religion within a state framework of neutrality under the control and watchful eye of the French public authorities. Article 2 of the 1905 law also provided that the state could not recognise, pay or subsidise any particular religion. This marked the end of a state religion because the church was considered a matter of private law for the private individual and for this reason religious institutions today have to provide for their own financial needs. However, the 1905 law was not the *first* statute officially to affirm the neutrality of the state; in fact, most laicisations took place well before 1905. The obsession with anti-clericalism dominated French political life throughout the nineteenth and twentieth centuries and popular schooling was the sphere where activists most strongly voiced their opposition to the Catholic Church. Anti-clericals assumed that the education received in Catholic schools would make their pupils unfit to be citizens and in 1822 General Foy once bemoaned that '... they [schoolchildren] will have received in these establishments, which are not national, an instruction which is not national, and thus these establishments will have the effect of dividing France into two youths'.¹¹ However, Charles Montalembert also described '... two armies face to face, each of about thirty-to-forty thousand men: the army of teachers and the army of priests. The demoralising and anarchical army of teachers must be countered by the army of priests'.¹² It was during this period that the term laïcité was applied to recognise the opposition to clerical influence on social institutions and the term laïcité has been traced back to 1871 in relation to the debate about the neutrality of public schools.¹³

A particular legislation that began the laicisation process of French public schools was the Law of 28 June 1833, which concerned religious instruction in primary schools. This statute declared that the French education system was fundamental and primarily independent of any religious instruction, although practically, the education system was not totally liberated from religious

respects all beliefs.' Article 2 states that: 'The language of the Republic shall be French. The national emblem shall be the blue, white and red tricolour flag. The national anthem shall be La Marseillaise. The motto of the Republic shall be "Liberty, Equality, Fraternity". Its principle shall be: government of the people, by the people and for the people.'

11. R Rémond *L'Anticléricalisme en France – De 1815 à Nos Jours* (Bruxelles, Collection Complexes: Seuil, 1985) p 114.

12. F Ponteil *Histoire de L'Enseignement en France, 1789–1965* (Paris: Sirey, 1966) pp 230–231, 235.

13. C L Glenn 'Historical Background to Conflicts over Religion in Public Schools' (2004) 33 Pro Rege (September) 1 at 4. For response papers, see L Den Boer 'Historical Background to Conflicts over Religion in Public Schools: A Response' (2004) 33 Pro Rege (September) 20; P Fessler 'A Response to Dr. Charles Glenn' (2004) 33 Pro Rege (September) 23.

influence at this time. This was because religious and moral instruction still figured prominently in educational matters within communal primary schools and was subjected to consistent monitoring by local committees, chaired by the mayor and composing of representatives of Catholic associations. By the 1850s, private schools were also formed and were free from religious instruction and control because these schools were granted independence from religion in both the administration and in the organisation of education. Conversely, these privately established schools began to flourish as religious educational institutions outside the state system during the following century, precisely because *laïcité* became a principle so strongly applied by the state system and this provided an early illustration of the Republican values taking shape that lead to the separation of the church and the state in 1905. Schools were further separated from the influences of the Catholic Church when Jules Ferry, the Minister of Public Instruction between 1879 and 1883, introduced a Republican system of education to enhance the government's objectives of forming a democracy through *laïcité*. In 1879, religious education was removed from the teaching curriculum during school hours and this marked a breakthrough in the laicisation of the education system, although religious education was permissible through the optional teaching of the subject outside the classroom (but within the interior of the establishment). The approach adopted by Jules Ferry combined a determination towards secularism with a degree of conciliation that appeased those who wanted the Catholic Church to retain some control over the national education system. This form of conciliation was considered to be the most suitable method to advance the Republican values of the government: no conciliation would have been perceived as excessively unsympathetic to the religious needs of individuals and any attempt of laicisation may have been opposed altogether.

Under the Law of 28 March 1882, education was not only made compulsory for schoolchildren between the ages six and 13, but the law also contained three very important provisions that enhanced the laicisation of education in state schools. Article 1 stated that moral instruction was to replace all religious education at the head of matters to be taught in state schools, furthering the government's objective towards secularising the French Republic; Article 2 provided that educational establishments had to provide a day in the week to allow children to pursue religious education *outside* of the school enclosure; and finally Ministers of Religion were repealed under Article 3 of the 1882 law. None the less, new school programmes on moral instruction did preserve a level of spiritualism with regard to the presence of the crucifixes in classrooms: crucifixes were removed when hostilities were not raised; where hostilities were raised, crucifixes remained in place. Some public schools even continued to display the crucifix on classroom walls as late as 1906.¹⁴ This demonstrated, to a certain degree, a flexible government in communities where parents were strongly insistent upon maintaining elements of a religious nature in schools. And after the abolition of Ministers of Religion and in areas of strong religious practice, many new religious schools were created and established. However,

14. S A Curtis *Educating the Faithful: Religion, Schooling and Society in Nineteenth Century France* (Delkalb: Northern Illinois University Press, 2000) p 142.

15. T Zeldin *Politics and Anger* (London: Oxford University Press, 1979) p 262.

'... far from establishing unity, the insistence on lay education and the elimination of God from the [schooling] manuals, divided the country profoundly and exacerbated the clash of Church and Republic'.¹⁵ For those faithful to the principle of neutrality, there was '... no freedom in the presence of clericalism'.¹⁶

Article 17 of the Law of 30 October 1886 also exclusively entrusted primary education to lay personnel in public schools rather than figureheads from the Catholic Church. This law paved the way towards the laicisation process of the French Republic, representing a firm commitment towards achieving laïcité through legislation and together with the earlier laws, the law of 1905 officially separated the church and the state at a time when the Third Republic was progressing towards mass primary education and training teachers to become advocates of science in order to counterbalance the teachings of village priests. To this very day there is no teaching of religion in French state schools and there are no faculties of theology in French universities. However, supporters of subsidies for private schools were able to achieve the passage of the law proposed by Prime Minister Michel Debré adopted on 31 December 1959. This law, which is still in effect, asserts under Article 1 that '... the State proclaims and respects educational freedom' and establishes a system under which non-state schools enter into contracts with the state for the provision of educational services, while maintaining some measure of autonomy.¹⁷ In 1996–97, there were almost 25,000 pupils attending un-subsidised private schools, in contrast with more than 1.1 million in subsidised private secondary schools under contract with the state.¹⁸ Almost all non-public schools are Catholic and some statistics suggest that Catholic schools serve nearly two million pupils.¹⁹ The real uniqueness of funded Catholic schools is sometimes called into question because those that receive state funding are required to adhere themselves to the ideals of public schools. In a highly secularised society, it is to be expected that the religious individuality of Catholic schools is sometimes difficult to uncover.

ASSIMILATION IN FRANCE

The demographic background of Europe has changed since the Second World War and ethnic immigrants have entered into European waters in record numbers, with many of the newcomers in France having arrived from North Africa and the Middle East.²⁰ Islam is now the second largest religion in the French Republic, after Catholicism, and this slow transformation has contributed to the current debate over the hijab: immigrants from the Maghreb have migrated to Western Europe, forming a part of Western society, and have

16. J Lalouette *La Libre Pensée en France – 1848–1940* (Paris: Albin Michel, 1997) p 292.

17. See also C L Glenn and J De Groof *Finding the Right Balance: Freedom, Autonomy and Accountability in Education, 1 and II* (Utrecht: Lemma, 2002) pp 252–266.

18. See C Durand-Prinborgne *Le Droit de L'Éducation* (Paris: Hachette, 2nd edn, 1998) p 67.

19. Glenn, above n 13, at 5–6.

20. A generic term used for former French colonies in North Africa, like Algeria, is the 'Maghreb'.

brought their own customs, traditions, values and religion.²¹ European countries have reacted differently to this influx and it would appear that France has had more difficulties adjusting policies towards cultural diversity. The French approach towards integration has been crudely described as ‘the French Melting pot’ since the French model holds no distinctions between French and non-French citizens – all are classed as one united nation of citizens.²² The French understanding of national unity can be described as assimilationist, following the Jacobin interpretation of civic republicanism,²³ that only regeneration could reform the mode of government as a result of the corrupt Catholic-led social and political system. French society requires individuals to adopt a unified approach and religious traditions are generally consigned to the private domain,²⁴ and it has even been suggested that there is actually no Muslim community living in France – Muslims who class themselves as a minority are best described as ‘casualties of the integration process’.²⁵ Ethnic differences in the public arena are removed in order to promote a spirit of uniform citizenship and to blend immigrants into French society.²⁶ For example, immigrant and foreign workers were once highly desired by French businesses but in exchange for becoming French citizens, they were required to renounce their ethnic culture in order to become French,²⁷ and they had to assimilate completely otherwise they risked being un-welcomed in France.²⁸ The Jews living in France were emancipated as French citizens but not part of a collective Jewish group; French citizens are neither black nor white; and French citizens certainly do not wear the hijab.²⁹ While this article focuses upon the relationship between Muslims and the French government, it should be noted that problems involving assimilation have also occurred in relation

21. See Peach and Glebe, above n 2, at 26; and M D Brown ‘Multiple Meanings of the Hijab in Contemporary France’ in W J F Keenan (ed) *Dressed to Impress: Looking the Part* (Oxford: Berg, 2001) p 109.

22. S Maier ‘Multicultural Jurisprudence: Muslim Immigrants, Culture and the Law in France and Germany’, paper prepared for the Council of European Scholars Conference, Chicago, IL, 11–13 March 2004, p 2.

23. See A Favell *Philosophies of Integration – Immigration and the Idea of Citizenship in France and Britain* (London: Palgrave MacMillan, 2nd edn, 2001); P Higonnet *Goodness by Virtue – Jacobins During the French Revolution* (Cambridge, Mass: Harvard University Press, 1998).

24. S Hazareesingh *Political Traditions of Modern France* (Oxford: Oxford University Press, 1994) chs 3 and 4.

25. O Roy ‘Islam in France: Religion, Ethnic Community or Social Ghetto?’ in B Lewis and D Schnapper (eds) *Muslims in Europe* (London: Pinter Publishers, 1994) p 56.

26. H Entzinger ‘A Future For the Dutch ‘Ethnic Minorities’ Model?’ in Lewis and Schnapper (eds), above n 25, p 20.

27. R Brubaker *Citizenship and Nationhood in France and Germany* (Cambridge, Mass: Harvard University Press, 1992) pp 8 and 47.

28. R Koopmans and P Statham ‘Challenging the Liberal Nation-State? Postnationalism, Multiculturalism and the Collective Claims Making of Migrants and Ethnic Minorities in Britain and Germany’ (1999) 105(3) *Am J Sociology* 652 at 661.

29. D Macey ‘The Hijab and the Republic – Headscarves in France’ (2004) 125 *Radical Philosophy* (May–June) 2 at 4; C L Glenn ‘Hijab and the Limits of Tolerance’ in J De Groof and J Fiers (eds) *The Legal Status of Minorities in Education* (Belgium: Acco Leuven, 1996).

to Jewish men wishing to wear the Kippah and the turban worn by Sikh men, albeit to a lesser extent.

The French model of assimilation requires all immigrants to undergo a personal transformation and assumes that immigrants are willing to undergo this process. It has been argued that assimilation upholds the vital rule of law principle of 'equality before the law', which may be threatened if ethnic minorities are granted individual exemptions as a result of their customary or religious traditions.³⁰ However, immigration has been perceived as a problem with the growth in migration from North Africa and the economic crisis of the 1970s. With regards to migration, the concern is that members of the ethnic minority may be unable to integrate if they preserve their religious or customary traditions and by encouraging distinct ethnic cultures, the French government believes that this will create divisiveness, 'communitarianism' and hinder any chance of national unity. Assimilation requires a republican identity to take precedence over and above other aspects of an individual's persona, whether those characteristics are religious, ethnic or linguistic.³¹ Religious or ethnical characteristics are acceptable per se but they must be consigned to the private domain and as a result, there are no other symbolic acknowledgements of ethnicity or religion in the public arena.³² All Frenchmen are considered equal citizens with an equal commitment to the same values and to ensure that this is achieved, laws and public policies have undergone a process of transformation and now signify a unifying role. Muslims living in France have a number of options when responding to assimilation: first, they can simply assimilate; second, they can withdraw from French society; or third, they can strive to combine a Muslim-Western identity.³³ None of these options are particularly ideal for the purposes of integration because a decision to assimilate may be perceived by Muslims as accepting the superiority of Western (or French) culture and values over and above Islam; a decision by Muslims to withdraw from French society may reinforce French perceptions that Islam is radically incompatible with Western (civilised) values; and a combined identity may be perceived as either contradictory by the West, irrational or a barrier against the West, or even an attempt to infiltrate the West. Any interaction between Muslims and the French Republic therefore appears to push the two further apart, rather than creating a more positive relationship.³⁴ Faced with these choices, some of the working-class immigrants have chosen to adopt the assimilation model of integration, and some Muslims have benefited from this choice in the belief that they are now 'blending into French society'. However, many of the immigrant population living in France have demonstrated little

30. See Articles 1 and 6 of the French Declaration of the Rights of Man and of the Citizen 1789; A V Dicey *Introduction to the Study of the Law of the Constitution* (London: MacMillan, 10th edn, 1959) ch 4.

31. J Hollifield and G Ross (eds) *Searching for the New France* (London: Routledge, 1991) p 114.

32. W Safran 'State, Nation, National Identity and Citizenship: France as a Test Case' (1991) 12(3) *Int Pol Sc Rev* 219 at 221.

33. M D Brown 'Orientalism and Resistance to Orientalism: Muslim Identities in Contemporary Western Europe' in S Roseneil and J Seymour (eds) *Practising Identities: Power and Resistance* (London: Palgrave Macmillan, 1999) p 188.

34. Brown, above n 21, pp 109–110.

enthusiasm towards adopting the model of assimilation. Muslim immigrants, many who have arrived in France without their families, are secluded from French community life; their ability to speak French is poor and shows little sign of improvement in the ghetto areas in which they work; and in resistance against the society that seems to despise them, many of the immigrant population strongly attach themselves to their culture and religion as a form of comfort.³⁵ The refusal to accommodate the assimilation model raises the issue that Muslims have generally demonstrated an unwillingness to integrate into French society, and arguably more so than other religious or ethnic groups. Still, there is not one autonomously state-funded Islamic school in France (and equally, there is not one *autonomously* state-funded Catholic school either, not including those non-state schools that enter into contracts with the state) and some immigrants today even find themselves in a 'cultural limbo', rebelling and detaching themselves from their parents' culture as well as the mainstream culture that is perceived to have rejected them.³⁶ By extension, Muslim women who choose to wear the hijab, either as a token of withdrawal or of a combined Muslim-Western identity, are perceived to have rejected the West, or even attack its values and essence.³⁷

FREEDOM OF CONSCIENCE AND RELIGION

Despite the thorough application of the doctrine of *laïcité* one must not lose sight of the fact that freedom of conscience and religion is guaranteed under French law provided that their exercise in no way impinges upon public life or intervenes in the affairs of the state.³⁸ For example, 'Maghrebian' laws on marriage, based upon Islamic principles, illustrate this principle as a choice of a consular wedding would reflect the desire of the parties to acknowledge the ethical force of Islamic law and Algerian, Moroccan or Tunisian consulates in France would apply Maghrebian law, recognising the payment of the dower (the Islamic *Mahr*) and other important Islamic principles in relation to marriage, such as endogamy.³⁹ This demonstrates that French society does accommodate

35. See Hargreaves, above n 3, ch 3.

36. See W A R Shadid and P S Koningsveld (eds) *The Integration of Islam and Hinduism in Western Europe* (Kampen: Kok Pharos Publishing House, 1991) pp 174–187; W A R Shadid and P S Koningsveld *Islam in Dutch Society: Current Developments and Future Prospects* (Kampen: Kok Pharos Publishing House, 1992) ch 5.

37. Brown, above n 21, p 110.

38. Chadwick, above n 4, at 47; S Pierré-Caps 'Les "Nouveaux Cultes" et Le Droit Public' (1990) RDP 1073; G Koubi 'Droit et Religions: Derives Ou Inconséquences de la Logique de Conciliation' (1992) RDP 725; B Basdevant-Gaudemet 'Le Statut Juridique de l'Islam en France' (1996) RDP 355; J House 'Muslim Communities in France' in G Nonneman, T Niblock and B Szajkowski (eds) *Muslim Communities in the New Europe* (Berkshire: Garnet Publishing, 1996) ch 11; M Feldblum 'Paradoxes of Ethnic Politics: The Case of Franco-Maghrebis in France' (1993) 16 *Ethnic and Racial Studies* 1.

39. E Rude-Antoine 'Muslim Maghrebian Marriage in France: A Problem for Legal Pluralism' (1991) 5 *Int J Law and the Family* 93 at 99–102. For example, the Holy Quran forbids a man from marrying his wet-nurse or any of her daughters, called foster-sisters: Holy Quran, 4:23.

some aspects of Islamic doctrine, but the accommodation of such Islamic values occurs only in the private domain and within the interior of Algerian, Moroccan or Tunisian consulates; French town halls essentially see their role as primarily applying French law and disregard as irrelevant matters like the payment of the dower and the definitions of prohibited kin within endogamy precisely because France is a secular state. Other piecemeal examples of the accommodation of some religious expression include funerals and burials and the creation of some 'denominational squares' found within some cemeteries, but the French approach towards Islam essentially remains assimilationist and in respect to the 1905 law on the separation of church from the state, France still does not permit the establishment of sole Muslim cemeteries. The French government has also recognised comparable religious associations representative of Jews, Catholics and Protestants, and such organisations not only enjoy tax advantages but also fulfil a consultative role between religious communities and the French government, in matters such as the sending of spiritual advisers to hospitals and prisons as well the regulation of commercial activities like the preparation of ritually slaughtered meat for Jews.⁴⁰ This institutional structure was extended to Muslims in 2000 when an official representational body for the French Muslim community was officially registered, called the French Council of the Muslim Religion. These examples illustrate the necessary system of conciliation between laïcité, as a fundamental constitutional principle, and other constitutional principles of the same value, such as freedom of conscience and religion. One may argue that this signals France's acceptance of cultural diversity where French policymakers appear to be committed to incorporating ethnic minorities into French society,⁴¹ but others see such policy initiatives as a matter of non-discrimination and not an attempt to create cultural diversity.⁴² While the creation of an Islamic institutional structure is welcomed, its set up was fraught with difficulties: certain sects are over-represented; it does not include any women; and not all Muslim associations have been enthusiastic about its creation.

CONTEMPORARY EDUCATION IN FRANCE

Education is vital for the development of children because the values of the wider society are introduced to the young and messages about the role of men and women in society and racial and religious differences are also conveyed. Any religious dispute in schools is identified as a breach of the separation values expounded by laïcité, as the Republican belief holds that only secularism can provide peace between various religious groups.⁴³ A 'free,

40. Maier, above n 22, p 8.

41. Hargreaves, above n 3, p 209.

42. X Ternisien 'Seize Représentants de L'Islam Ratifient les Principes de M. Chevènement' (2000) *Le Monde*, 31 January.

43. This belief is further emphasised by the Law of 25 July 1959, which marked a new phase for freedom of education for schoolchildren. Under the terms of its Decision No 77-87 of 23 November 1977, the Conseil d'État also stipulated that freedom of education was amongst one of the most fundamental principles recognised by the laws of the French Republic.

secular, and compulsory' national education system is perceived as one of the key guarantors of Republican values and the French education system prohibits political and religious proselytising, as well as providing a uniform curriculum banning religious content and the use of any language other than French in schools.⁴⁴ The Catholic Church traditionally asserted that it had received the revealed truth but secularists argue that only man's reason can guide his actions, and therefore, secular education provides pupils with an opportunity to make up their own minds about religious and ethical questions. In many ways the secularist approach is the 'civil religion' of the French Republic, where the secular has become the sacred,⁴⁵ and schoolteachers and school buildings are symbols of republican ideology, their purpose being to spread progress, reason, education and the ideals of 1789.⁴⁶ However, French schools have witnessed some of the hottest contestations involving the taxonomy of *laïcité*,⁴⁷ and because secularism has been consolidated through the French national school education system,⁴⁸ conflict has arisen between pupils exercising religious expression, on the one hand, and schools seeking to maintain their religious neutrality, on the other. Though a century has passed since the official separation of the church and the state, the evolution of the French religious landscape has created new and important questions, often relating to the place of Islam in the French education system, and in an age of fear about terrorism, international discourse and suspicion about Islam has progressively emerged in Western politics.⁴⁹

The dismissal of Muslim schoolgirls

'It seems that not since Lady Godiva rode through Coventry *au naturel* has a piece of fabric (or the lack thereof) been the cause of such a tumultuous controversy as the infamous *affaire de foulard* that rocked France in 1989 and 1994 and has simmered since in most neighbouring countries.'⁵⁰ For many Muslim women the hijab involves a very sensitive right to dress according to one's religious beliefs but for many living in France, the headscarf symbolises a breach of the neutrality of space within educational establishments and threatens the very continuation of the French Republic.⁵¹ Mernissi has explained that there are two kinds of separation through the veil that takes place in Islamic law,⁵² and the first pertains to an architectural separation

44. See J Jennings 'Citizenship, Republicanism and Multiculturalism in Contemporary France' (2000) 30(4) Br J Political Sc 575.

45. Chadwick, above n 4, at 50.

46. M Evans 'The Left, Laïcité and Islam' (1991) 45 Modern and Contemporary France 8.

47. See J Windle 'Schooling, Symbolism and Social Power: The Hijab in Republican France' (2004) 31(1) The Australian Educational Researcher 95 at 97.

48. A Corbett 'Secular, Free and Compulsory' in A Corbett and B Moon (eds) *Education in France – Continuity and Change in the Mitterand Years, 1981–1995* (London: Routledge, 1996) p 7.

49. See Windle, above n 47, at 95.

50. Maier, above n 22, p 23.

51. Windle, above n 47, at 97.

52. F Mernissi *The Forgotten Queens of Islam* (Minnesota: University of Minnesota Press, 1997).

referred to in the Holy Quran when a curtain was drawn between the Prophet Muhammad (peace be upon him), his wives and his companions in order to mark out the public and private domain.⁵³ The second refers to dress and modesty and the Holy Quran states:

'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 sons ... their brothers ... or their women.'⁵⁴

Most Islamic scholars believe 'beauty' refers to a woman's hair and is usually the reason why females observe modesty by wearing the hijab.⁵⁵

The hijab controversy began in September 1989 shortly after France had celebrated the bicentenary of the Revolution when three Maghrebian Muslim schoolgirls, Samira Saidani and Leila and Fatima Achaboun, were excluded from their school in Creil, Northern France because they insisted on wearing the hijab in class. Media reports ignited a national furor and right-wing politicians expressed worries that 'Islamic fundamentalism' had spread to the heart of the country.⁵⁶ The school attempted to deal with the crisis through meetings between the pupils, their parents and representatives of the Islamic community and a compromise was initially reached when Samira agreed to lower her scarf to her shoulders in class. However, the sisters, Leila and Fatima, continued to insist on their personal right to wear the hijab and other students began to follow their lead.⁵⁷ Consequently the French found themselves embroiled in a major public debate about the hijab and many condemned the schoolgirls for their divisive and aggressive religious attitude, while others sided with the schoolgirls' right to be different.⁵⁸ Critical questions then began to emerge: 'were the girl's actions and the subsequent support for them indicative of the emergence of ethnic politics in France? Were Franco-Maghrebins a critical challenge to the French republican-assimilationist model

53. The Holy Quran, 33:53–59. See also F Mernissi *Women and Islam: An Historical and Theological Enquiry* (trans Mary Jo Lakeland) (Oxford: Basil Blackwell, 1991). It is to be found in the Sunnah that whenever a Muslim mentions the name of the Prophet Muhammad, peace and salutations are conferred upon him, hence why I have used the words 'peace be upon him'.

54. The Holy Quran, 24:31.

55. See M Franks 'Crossing the Borders of Whiteness? White Muslim Women who Wear the Hijab in Britain Today' (2000) 23(5) *Ethnic and Racial Studies* 917 at 919.

56. See M Halstead 'Educating Muslim Minorities: Some Western European Approaches' in W Tulasiewicz and Ch To (eds) *World Religions and Educational Practices* (London: Cassell, 1993) ch 10; L Limage 'Education and Muslim Identity: The Case of France' (2000) 36(1) *Comparative Education* 73; M Silverman *Deconstructing the Nation: Immigration, Racism, and Citizenship in Modern France* (London: Routledge, 1992).

57. See N C Moruzzi 'A Problem With Headscarves – Contemporary Complexities of Political and Social Identity' (1994) 22 *Political Theory* (November) 653 at 658 for discussion on the hijab and its connection with personal identity; M Humphreys and A D Brown 'Dress and Identity: A Turkish Case Study' (2002) 39(7) *J Management Studies* 927.

58. M Feldblum *Reconstructing Citizenship – The Politics of Nationality, Reform and Immigration in Contemporary France* (Albany, NY: State University of New York Press, 1999) p 129.

of integration?'⁵⁹ Were the girls to be educated in national culture or did their parents have the right to determine the nature of their education?

The two schoolgirls insisted that they wore the headscarf to fulfil their religious duties as observant Muslims and in practical terms, the two schoolgirls sought to reinterpret the concept of *laïcité* to accommodate their religious needs and the wearing of the hijab. However, journalists and politicians argued that no sane woman could ever wear a hijab and that Muslim women had the objective of overthrowing France's republican traditions. It was also argued that Leila and Fatima's conduct was the adverse reaction of impressionable, young Muslim women in need of emancipation (although it is important to emphasise that the wearing of a headscarf in school was not illegal in 1989). Lionel Jospin, the Minister of Education at the time, argued that children should not enter schools wearing religious symbols but underlined that wearing religious symbols should not, in itself, be a ground for expelling a student. Jospin believed that schools were made for receiving children, not for excluding them, and ordered the school principal to reinstate Leila and Fatima on 9 October 1989. Jospin felt that it was only through their admission into state schools could Muslim schoolgirls acquire the opportunity to thwart the isolation and oppression of their families,⁶⁰ but Jospin was criticised for his approach in tolerating the hijab. Shortly after, Jospin sought a legal opinion from the Conseil d'État on the wearing of religious symbols in state schools in order to clarify the state of affairs as a matter of law.⁶¹

The Conseil d'État considered several legal instruments when drawing its conclusion, including the 1905 law on the Separation of the Church from the State, Article 1 of the Fifth Republic Constitution 1958 and Article 9 of the European Convention on Human Rights that guarantees freedom of religion.⁶² The Conseil concluded that any discrimination based upon religion was unconstitutional and that school pupils had a right to express their religious beliefs upon the conditions that: (1) school pupils respected the freedom of others; (2) school pupils did not interfere with teaching activities or the content of programmes of study; and (3) school pupils still attended classes. The Conseil explained that by virtue of Article 1 of the Fifth Constitution of 1958, France must 'respect all beliefs' and the court explicitly mentioned that *laïcité* could not be disassociated from that of the 'respect' for 'all beliefs'. The wearing of headscarves, the Conseil concluded, was not in itself incompatible with the principle of *laïcité* and could not be considered 'ostentatious' the wearing of which would automatically constitute an act of pressure or proselytism. Pupils therefore possessed the freedom to express their religious beliefs within the precincts of state schools. However, freedom of religion was not an absolute right and the Conseil held that religious expression could not permit pupils to

59. Maier, above n 22, p 25.

60. L. Jospin 'Now or Never' in Corbett and Moon (eds), above n 48, p 76.

61. See also L. Brown and J. Bell *French Administrative Law* (Oxford: Oxford University Press, 4th edn, 1993) p 63; S. V. Wayland 'Religious Expression in Public Schools: Kirpans in Canada, Hijab in France' (1997) 20(3) *Ethnic and Racial Studies* 545; J.-P. William 'Le Conseil d'État Et La *Laïcité*: Propos Sur L'Avis Du 27 Novembre 1989' (1991) 41(1) *Revue Française de Science Politique* 28.

62. CE, No 346-893, 27 November 1989.

wear insignia in such a way that constituted an act of pressure, provocation, proselytism or propaganda. Religious clothing that aimed at the dignity or freedom of other pupils, or comprised health or safety or disturbed the good order and peaceful running of schools, could not be tolerated. The effect of this ruling was that religious expression was provided for within a limit and could only be restricted if accompanied by acts of pressure, provocation or proselytism. This ruling was very brave in view of France's republican tradition and demonstrated a positive approach to interpreting laïcité where there was an invitation towards tolerating cultural diversity subject to the prescribed limitations necessary for the protection of public order. However, the ruling was not a firm victory for Muslims because the decision left the responsibility of determining whether a symbol was 'ostentatious', 'political' or 'provocative' to individual schoolteachers and administrators and some believed that this provided authorities with an excessive amount of responsibility and discretion. The ruling failed to provide any clear-cut guidance for school principals, nor did it explain the terms 'proselytism' or 'propaganda' and as a result, many were frustrated by the vague nature of the ruling, accusing the Conseil of simply sitting on the fence. The ruling also risked disparity between various educational establishments: some schools tolerated headscarves in limited circumstances while others challenged the decision to wear it.

Post September 1989

The 1989 headscarf affair was a typical illustration of the French way of dealing with religion and religious symbols in state schools. As a result of the laws passed since the 1880s, the French have become extremely obsessive in relation to maintaining the religious neutrality of schools in the public sphere and of confining religion to the private sphere. However, many predicted that the Conseil would need to revisit the headscarf issue in light of its 1989 ruling and this prediction proved correct because each subsequent school year witnessed the exclusion of more and more Muslim schoolgirls who insisted on wearing their headscarves. The Conseil upheld some expulsions where the headscarf disrupted the school curriculum but in the absence of clear disruption, the Conseil reinstated students and insisted that cases be resolved through mediation. In *Kherouaa et Autres*, the Conseil d'État reversed a decision of a Paris administrative court that upheld a general prohibition on the wearing of distinctive signs, or clothes showing a preference for one religion, on the ground of illegality and abuse of power.⁶³ The Conseil specified that the regulations of the school could not set a general prohibition on religious clothing and that the refusal of admission into school was illegal if taken on that basis alone. In *Mlles Neslinur et Zehranur Yilmaz*, the Conseil also annulled a similar regulation in Angers that prevented Muslim schoolgirls wearing the hijab at school.⁶⁴ However, the religious climate in France remained turbulent

63. CE, No 130-394, 2 November 1992. See also P Sabourin 'Note de Jurisprudence: L'Affaire du Foulard Islamique (CE, 2 Novembre 1992, Kherouaa et Autres)' (1993) 1(1) RDP 220.

64. CE, No 145-656, 14 March 1994. See also A de Lajarte 'Note de Jurisprudence: Le Port de Signes Religieux dans les Établissements Scolaires (CE, 14 March 1994, Yilmaz)' (1995) 1(1) RDP 221.

when in 1994 Francis Bayrou, the Minister of National Education, declared that he would issue a circular that would ban 'ostentatious symbols' in state schools. In his circular, Bayrou explained that the school environment was a place where social integration between students was to be encouraged,⁶⁵ and for this reason it would be impossible to permit the presence of ostentatious religious symbols in state schools that would serve to create further social and cultural division between school pupils. Ironically, however, Bayrou indirectly indicated that small crosses and yarmulkes would be permitted in schools. Immediately after the publication of Bayrou's circular, France was embroiled in yet another national furore with approximately two thousand Muslim schoolgirls challenging the ban by continuing to wear their headscarves at schools,⁶⁶ and after a period of four months, approximately three hundred and seventy Muslim schoolgirls continued to rebel against the circular. At the end of the academic school year in 1995, 100 Muslim schoolgirls were expelled.⁶⁷

In *Mlle Aysel Aksirin c Recteur de l'Académie de Strasbourg* a Muslim schoolgirl had been accused of wearing her headscarf 'ostentatiously' and was expelled from high school after she had refused to remove it,⁶⁸ but the court annulled the expulsion and reinstated the pupil. However, in March 1995 the Conseil for the first time upheld the expulsion of two Muslim schoolgirls who refused to remove their headscarves during PE, ruling that 'the headscarf was incompatible with the nature of courses that involve physical and sporting education' because of safety concerns and the fact that there was serious disruption to the lesson when the girls refused to remove their hijabs.⁶⁹ The Conseil also applied the criteria of 'an act of pressure, provocation, proselytism or propaganda' for the first time in the case of *Ministre de l'Éducation Nationale, c/Époux Méhila et Autres*,⁷⁰ which concerned the expulsion of Muslim pupils who persuaded other students to wear the headscarf within the precincts of the college. Four pupils took part in the making and signing of petitions

65. Reprinted in *Le Monde*, 21 September 1994.

66. See S Barbier 'Affaire du Foulard: La Tension Monte' (1994) *Le Monde*, 5 October.

67. Poulter, above n 5, at 61–62.

68. Decided 3 May 1995. See also 'Conclusions des Commissaires du Gouvernement. Conclusions de M. Martinez (re: Mlle. Aysel Aksirin c. Recteur de l'Académie de Strasbourg)' (1995) 3(5) RDP 1348.

69. *M et Mme Aoukili*, CE, No 159-981, 10 March 1995. See also E Steiner 'The Muslim Scarf and the French Republic' (1995) 6 KCLJ 147. In *Ligue Islamique du Nord et Autres; M et Mme Wissaadane et Autres; M et Mme Jeouit*, CE, No 170-207, No 170-208 and No 170-209, 27 November 1996, the Conseil ruled that demonstrations in favour of the hijab by school pupils disturb the normal operation of schools and could therefore justify disciplinary measures. However, the Conseil was of the view that while demonstrations organised by schoolteachers against the headscarf constitute disorder, it could not be charged against the pupils in question. Furthermore, the Conseil viewed that the expression of religious beliefs should not affect teaching activities, the contents of programmes or the obligation to attend lessons and any unjustified absence (eg Muslim schoolgirls being absent from PE or swimming without a doctor's note) would justify a student being excluded from school. In *Ministre de l'Éducation Nationale, c/M et Mme Has Maskour*, CE, No 172-937, 15 January 1997, two Muslim schoolgirls refused to attend PE but the school doctor declared the pupils were capable of undertaking physical education, except for swimming and high-endurance sports. Not having any justifiable reasons for their absences, the pupils were legally excluded.

70. CE, No 173-103, 2 April 1997.

vehemently declaring that other Muslims should wear the headscarf and the Conseil ruled that this protest seriously disrupted the operation of the college and that the exclusion of those pupils was justified.

The Conseil d'État also offered its judgment on the headscarf issue in 1999, deciding that laïcité was no longer a principle that forbade any religious manifestation, but that the principle tolerates every religious manifestation.⁷¹ However, on 3 May 2000 the Conseil ruled that the contract of a school inspector, Julie Marteaux, was correctly terminated when she refused to remove her hijab during her official functions as a public service employee because the principle of laïcité prohibited the displaying of any religious sign or belief by anyone working within the public sector.⁷² For an agent of the public service (or more specifically, state education) to express religious beliefs and carry a sign intended to mark membership of a particular religious group constituted a failure of one of the obligations that a public agent must fulfil, namely, to appear impartial and neutral in the exercise of public duties.

All of these very high-profile cases concerning the hijab have fuelled a fear that behind the hijab is a very well-organised Islamic fundamentalist network, a new 'Islamic insurgency', that is threatening the French Republic and that is using headscarves as a means of attacking the secularity and the culture and identity of France. Muslim schoolgirls are continually portrayed as victims of violence and suppression, as victims of inequality, and that parents have forcefully imposed headscarves upon them. Muslim men with beards are also consistently ridiculed too,⁷³ and the difficulty between Islam and the principle of laïcité is that both appear to pursue different goals and objectives and will therefore always remain in conflict with one another.⁷⁴

THE NEW FRENCH LAW

The enactment of legislation in France is similar, but not identical to, the way in which legislation is passed in the United Kingdom. A strict hierarchy of norms rules France and these norms are to be found within the 1958 Fifth

71. *Ministre de l'Éducation Nationale, de la Recherche et de la Technologie c M et Mme Aïr Ahmad*, CE, No 181-486, 20 October 1999. See also C Saas 'Muslim Headscarf and Secularism in France' (2001) 3 *European Journal of Migration and Law* 453.

72. *Dlls Marteaux*, CE, No 217-017, 3 May 2000. See also 'Education: Une Surveillante de Établissement Scolaire ne Doit Pas Porter le Foulard Durant l'Éexercice de Ses Fonctions' (2000) *Le Monde*, 9 May.

73. The notion behind young Muslim schoolgirls wearing the hijab is the Muslim 'bearded man', an image spread through a series of political cartoons under the title 'Histories of the Veil' that ran in *Le Monde* during the first week of 2004. See also L M Liederman 'Religious Diversity in Schools: The Muslim Headscarf Controversy and Beyond' (2000) 47(3) *Social Compass* 367 at 370-371; L M Liederman 'Pluralism in Education: The Display of Islamic Affiliation in French and British Schools' (2000) 11(1) *Islam and Christian-Muslim Relations* 105; C El Hamel 'Muslim Diaspora in Western Europe: The Islamic Headscarf (Hijab), the Media and Muslim Integration in France' (2002) 6(3) *Citizenship Studies* 293.

74. See J Bell 'Religious Observance in Secular Schools: A French Solution' (1990) 2 *Education and the Law* 121; F Gaspard and F Khosrokhavar *Le Foulard et La République* (Paris: De la Découverte, 1995) chs 4, 5 and 6.

Republic Constitution. Under this text it is the responsibility of the French Parliament to pass statutes or *Les Lois* under Articles 34 and 39 of the 1958 Constitution. Like the United Kingdom Parliament, the French Parliament is bicameral consisting of the National Assembly and the Senate. It was President Jacques Chirac who proposed the new law banning all 'ostentatious' religious symbols in state schools on 17 December 2003 and it was his Prime Minister, Jean-Pierre Raffarin, who opened the debate in the National Assembly on the subject. The proposal to ban all 'ostentatious' religious symbols in state schools followed the precedent established by earlier legislation that imposed *laïcité* within the education system. The new legislation continues to follow the path of enforcing religious neutrality within the public-educational sphere, whilst confining religious expression to the private domain. One of the major concerns of the French government was the need to suppress 'radical Islam' or 'Islamic fundamentalism' that, it was argued, had spread to the heart of France and was in danger of fuelling violent attacks against non-Muslims. There was a widely held belief in the National Assembly that Islam is an oppressive religion and is politically threatening to France and the government argued that the hijab has now become a threatening symbol representative of extremist Muslims. It was argued that the hijab has now become an item of dress with immense political implications and, therefore, the expression of such a symbol must be restricted in the interest of maintaining public order. The French government argued that a request to wear the hijab is a demand for state recognition of Islam in state schools and it was stated that this demand is unacceptable because the government, under earlier legislation, cannot recognise any religion or act of worship in the public sphere. Thus, the desire of some Muslim schoolgirls to cover their hair with a hijab in state schools was widely interpreted as an impermissible intrusion of religion in state schools. It was insisted by the French government that with the de-laicisation of French state schools through the accommodation of the hijab, this might lead to a de-laicisation of the French Republic, a creation of a new obscurantism and an Islamic invasion of the French body politic, attacking French culture and its institutions.⁷⁵ Furthermore, the image of Islam portrayed by the French government was the inferiority of women in comparison with men; that Muslim women are forced to wear headscarves by their husbands or fathers; and that Muslim women are in need of emancipation because the hijab greatly promotes inequality, contrary to the principle of *laïcité* and contrary to the ideals expounded by Article 1 of the 1958 Constitution. It was also claimed that integration between citizens would be greatly advanced if Muslim schoolgirls were prevented from wearing the hijab because the French Republic cannot tolerate any fragmentation, or the establishment of autonomous communities, that are reluctant to integrate.⁷⁶ Such communities promote

75. Brown, above n 21, p 107.

76. In Windle's article, above n 47, at 106, the author conveniently provides Table 1 establishing the binary oppositions between French Republicanism and Islam. The characteristics and values each promotes can be summarised as follows, demonstrating the *Western view* of Islam. French Republicanism is (and promotes): Secular; Rational; Citizenship; Freedom; Enlightened; Civilised; Equality; Specific to French nation; Inclusive; Universally Tolerant; Open; Host nation to Islam. Islam, on the other hand, is viewed as (and promotes): Religious; Irrational; Group Membership; Submission; Medieval; Barbaric; Inequality; Alien to French nation; Exclusive; Partial; Intolerant; Closed; Guest of France.

intolerance, exclusion, 'ghettoisation' and confrontation, and the French government claimed that only it as an institution (with its proposed legislation) could prevent this.

The other main concern of the French government, when proposing the new law, was the protection of pupils in state schools and that because the hijab has continued to reappear at the school gates in the 15 years following the Conseil d'État's first judgment, the government (as well as the media) has demanded reassurance that the hijab is not becoming 'so acceptable' amongst the current generation of schoolchildren that those who do not wear the hijab will become ostracised. The ban on all 'ostentatious' religious symbols in state schools, the government claimed, would protect school pupils from being 'singled out' and becoming objects of 'religious harassment' for other pupils and that this form of protection not only applied to non-Muslims but also those Muslims who do not wear the hijab. The French government strongly insisted that its aim was to protect all pupils from this type of coercion.

The new law followed the recommendations of the Stasi Commission headed by Bernard Stasi and the Commission's 77-page report traced the history of and present challenges to laïcité, the marked rise of Islam as the second religion of France and fears over the growth of 'Islamic fundamentalism'.⁷⁷ The Stasi Commission reported that hijabs worn in schools were clear markers of 'Islamic fundamentalism' and stated that individuals have both rights and responsibilities to French society and that while an individual is protected and treated equally within the French system, individuals must also actively ensure that the neutrality of public space is also respected in the education system. While one is permitted to identify with a particular religious group in private, the Stasi Commission was of the view that one must also embrace a unified national identity and demonstrate loyalty to French Republican values. The Stasi Commission called for the neutrality of public space allowing individuals to choose (or not) their own spiritual paths, free from any external pressure. However, the Stasi Commission acknowledged that many Muslim schoolgirls wear headscarves out of choice but equally claimed that many Muslim schoolgirls are forced (sometimes by violence) to follow family or community tradition, and that therefore, the law should protect all school children from this type of intimidation. The Stasi Commission recommended a series of measures to enhance freedom of religion, the equality between religious groups and the neutrality of public space and these measures not only included legislation to clarify the position on religious symbols in state schools, but also additional measures, including the incorporation of Yom Kippur and Eid al-Adha as public holidays; the teaching of non-state languages such as Berber and Kurdish; and the rehabilitation of 'urban ghettos' seen as the breeding ground for 'Islamic fundamentalists'. Several of these suggestions were considered but only the proposal against 'ostensible' religious symbols in state schools made its way into the National Assembly's deliberations. The National Assembly also concluded in its report that a ban on all 'ostentatious' religious symbols in state schools was necessary given the current religious climate and the rise of 'Islamic fundamentalism'. The Report concluded that a law

77. Stasi Commission *Commission de Reflexion Sur L'Application du Principe de Laïcité Dans La République*, available at <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf> (last visited 28 February 2005).

promoting secularity in state schools would be more protective and would emancipate school pupils, more so than the prevailing legal position.⁷⁸ The Bill went to the National Assembly who voted overwhelmingly in favour of the ban with 494:36 votes and Jean-Louis Debré, the House Speaker for the National Assembly (and the son of former Prime Minister Michel Debré), stated that the law was a 'clear affirmation that public schools are places for learning and not for militant activity or proselytism'.⁷⁹ On 3 March 2004, the French Senate gave its final approval to the Bill prohibiting the wearing of ostentatious religious symbols in French public schools.

The new law does not ban the wearing of headscarves or any other 'ostentatious' religious symbols in any other public places, universities or private schools, at least in the immediate future. Teachers and school administrators have been very supportive of the new legislation because a statute is a stronger tool to enforce religious neutrality, but the new law has been widely condemned by the Islamic world and by countries such as the United States and the United Kingdom, owing to the fact that English schools generally accept students wearing religious symbols and assume that the wearing of such symbols can be accommodated without violating the principles of neutrality or religious freedom. The prevailing view in the United Kingdom is that tolerating a variety of religious symbols does not mean that the state endorses such symbols as its own. However, French supporters of the ban argue that in the current cultural climate, they cannot accommodate religious symbols in state schools and Article 1 of the new legislation provides that: 'The wearing of symbols or articles of clothing by which students ostensibly display religious affiliations is forbidden in public schools through high school.' Although the new law would appear to prohibit skullcaps and oversized crosses, the new law clearly aims to restrict the wearing of the hijab and school principals will now have the force of law behind them when applying their decisions. 'Ostensibly display' may be understood to mean an outward intention to display and to proclaim a religious affiliation and it will be the task for the French judiciary to ensure that school principals make the correct interpretation of the provisions. Providing a system of dialogue between schools and pupils will also be essential to the spirit of the new law. The proposed wording of the new legislation appears to allow the wearing of discreet objects signifying religious beliefs, like the hand of Fatima, the Star of David and small Christian crosses, respecting Article 10 of the Declaration of the Rights of Man and the Citizen 1789.⁸⁰ To reduce the level of criticism against the ban the French government agreed to two last-minute amendments to obtain the largest possible majority of votes and these amendments certified that mediation between the school and school pupils would first precede any punishment imposed; and, second, that there will also be a review of the new legislation after a period of

78. *Assemblée Nationale Sur La Question Du Port Les Signes Religieux L'École* Rapport No 1275-Tome I 1ère Partie, available at <http://www.assemblee-nat.fr/12/rapports/r1275-t1.asp> (last visited 28 February 2005).

79. J Henley 'French MPs Vote for Veil Ban in State Schools' (2004) *Guardian*, 11 February, p 17.

80. Article 10 states that: 'No one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order.'

one year. The French public provided support for the new law with 69 per cent in favour of the ban and it was suggested in some French polls that 42 per cent of Muslims were in favour of the ban; apparently, so too were 49 per cent of Muslim women who participated in the survey.⁸¹

THE CRITICISMS OF THE BAN

Very few commentators have any doubts about the real target of the French ban on 'ostentatious' religious symbols in state schools. While the French government have claimed that the new legislation will not permit *any* religion to express itself in the public educational sphere (ie the wearing of ostentatious religious dress by Catholics would not be allowed in state schools), there have been few or no reports of Christian or Jewish schoolboys being expelled for wearing crosses or kippahs and it is very difficult to escape the conclusion that the legislative policy pursued by the French government is really directed against only one group of individuals – Muslims. The legislative policy imposed by the French government demonstrates that a modern democracy has, probably for the first time and by legislation, ruled on what certain girls (or more specifically, Muslim schoolgirls) can wear in state schools.⁸² The principal reason put forward by the French government for justifying the new legislation has been the need to suppress 'Islamic fundamentalism' and the government strongly believes that 'radical Islam' now threatens the French Republic and needs to be controlled. One method to control this insurgency is to ban the hijab because it symbolises terrorism, or at the very least, implies that the wearer supports terrorism. However, what is the connection between the hijab and terrorism, and what is really meant by 'fundamentalism'? To what extent is it fair to label a Muslim schoolgirl who wishes to wear the hijab a fundamentalist'? The stereotypical label that all Muslims are terrorists seems to be very fashionable in recent times and media images have not helped in this respect. On 24 November 1994, the cover of the weekly *Express* captured an illustration of a woman wearing a hijab looking directly at the camera, together with a caption stating 'The Headscarf. The Plot. How the Islamists Are Infiltrating France', portraying Muslim women as the concealed vanguard of the Armed Islamic Group, an organisation that was terrorising Algeria, and a group that was responsible for planting further bombs that killed eight people in Paris in August 1995.⁸³ There is now a global suspicion towards Muslims in general and a consistent element within the debates about Muslims is the assertion that Muslims are all collectively responsible for the fanatical and small-minded cultural practices held by a few. The hijab is portrayed as a symbol of death, especially after events such as the Beslan school hostage siege, and Muslims are simply held 'guilty by association'. But such a stereotypical portrayal is extremely unfair because the teachings of mainstream Islam condemn violence and terrorism in all its forms. Muslim women who wear the hijab are labelled 'fundamentalists' or 'supporters of terrorism' but

81. 'The War of the Headscarves' (2004) *The Economist*, 7 February, p 25.

82. Macey, above n 29, at 2.

83. Macey, above n 29, at 3.

unfortunately many have used the term ‘fundamentalist’ very loosely, especially since the original definition of fundamentalism was never even equated with terrorism. David Zeidan has provided a definition of fundamentalism and he explains that it means a:

‘cluster of religious movements, concerned about contemporary marginalization of religion and its public role in society, claiming a divinely revealed inerrant scripture as their sole ultimate authority for all spheres of life, mainly literalist in their handling of the source scriptures, radical and rigorous in terms of contemporary application of these scriptures, extremist (though not necessarily violent) in terms of their methods, and exclusivist in their views and completing ideologies.’⁸⁴

Lloyd Geering has also examined the phenomenon of fundamentalism and explains that it is not actually confined to any one religion or movement and that modern-day usage of the term actually distorts religion to the extent that Islam is given a negative image. Geering explains that the term fundamentalism came into use in the United States in the 1920s and derives from a series of booklets that were published between 1909 and 1915. By courtesy of two oil millionaires in the United States, approximately three million booklets entitled *The Fundamentals* were freely distributed and these booklets intended to counter the spread of liberal religious thought which the publishers believed to be undermining the eternal Christian truths – ‘the fundamentals’ – and reaffirmed what the writers took to be the fundamental and unchangeable doctrines of Christianity: the infallibility of the Bible; the deity of Christ; the Virgin Birth; miracles; and the bodily resurrection of Jesus. Geering states that the booklets gave rise to the term ‘fundamentalist’ which was a term invented by a Baptist journalist in 1920, named Curtis Lee Laws. Laws related the term fundamentalist to those individuals who strongly adhered to the great fundamentals of their faith and that the term was not regarded as at all dangerous. However, it was not long before liberals began to use the word as a term of abuse; it became a synonym for blind ignorance and obscurantism and today the term is linked to events such as 9/11, the Bali massacre and other similar acts of terrorism.⁸⁵ The Western media has often utilised the expression ‘Muslim Fundamentalists’ or ‘Fundamentalist Islam’ to imply terrorism amongst Muslims to the extent that many in the West are under the impression that the adjective ‘fundamentalist’ has an ideological connotation with Islam. This is despite the fact that the term does not exist in Islamic terminology – there is no ‘Fundamentalist Islam’ or ‘Non-Fundamentalist Islam’ but simply Islam. While in religious terms most observant Muslims are fundamentalist in the sense that they take the Holy Quran to be the word of God, this fundamental belief is similar to those fundamentalist Christians who believe in the infallibility of the Bible. The use of the term in this context is not at all

84. D Zeidan ‘The Resurgence of Religion’, Doctoral Thesis, University of London, September 2000, p 45. See also D Zeidan *The Resurgence of Religion – A Comparative Study of Selected Themes in Christian and Islamic Fundamentalist Discourses* (Leiden, Boston: Brill, 2003); and D Zeidan ‘The Islamic Fundamentalist View of Life as a Perennial Battle’ (2001) 5(4) Middle East Review of International Affairs 26.

85. L Geering *Fundamentalism – The Challenge to the Secular World* (Wellington, NZ: St Andrew’s Trust, 2003) ch 1.

dangerous and refers to one's belief and commitment in religion. Those Muslim women who wear the hijab adopt their headscarves as a sign of personal religious observance, fulfilling what they see is a Quranic and religious obligation from Allah that instructs them to dress modestly, and these women see the wearing of the hijab as quite the opposite of terrorism because there is nothing inherently violent about covering up the body. In fact, similar commandments about modest dress can be found in other religious scriptures, like the Bible and the Torah.⁸⁶ It is unfortunate as a result of a few media images that assumptions are made about Muslims who have beards or who wear the hijab, in that they are terrorists or supporters of terrorism. Likewise, it is unfair that French Muslim schoolgirls are considered to be supporters of terrorism if they decide to wear the headscarf. Wearing the hijab is essentially an act of religious commitment and there is nothing inherently wrong about a person wanting to demonstrate their religious commitment by wearing the hijab.

If one is pragmatic, should one be led to believe that by instructing Muslim schoolgirls to remove their hijabs in schools, these schoolgirls will automatically remove themselves from terrorist activity, if indeed, they are involved in terrorist activity? If one is concerned about violence or terrorism then surely criminal measures should be formulated to tackle the problem, not through a ban on religious clothing in state schools. While the French government claims that its objective is to control terrorist activity, it is submitted that the connection between terrorism and the removal of the hijab in state schools is far too remote to justify its legal prohibition. A disturbing consequence of the ban on religious symbols could be the fuelling of further extremism on the part of some small groups, rather than its suppression. The ban on headscarves could ignite further passions held within some sections of the Muslim community and this may incite further extremist actions, which is quite ironic considering that the new law was introduced initially on the pretext of tackling terrorism. The ban in state schools may strengthen the Muslim identity and may exacerbate the polarisation that already exists between Islam and the West, causing yet further conflict and misunderstanding between the two ideologies.

The new legislation will disappoint many Muslim worshippers who wish only to perform their religious duties in peace, and many may feel that the legislation introduced in France is racist, anti-religious and Islamophobic.⁸⁷

86. A similar commandment can be found in the Bible, 1 Corinthians, 11:3–10: 'But I would have you know that the head of every man is Christ and the head of the woman is the man, and the head of Christ is God. Every man praying or prophesying with his head covered, disgraces his head. But every woman praying or prophesying with her head *uncovered* disgraces her head, for it is the same as if she were shaven. For if a woman is not covered, let her be shaven. But if it is a disgrace for a woman to have her hair cut off or her head shaved, *let her cover her head*. A man indeed ought not to cover his head, because he is the image and glory of God. But woman is the glory of man. For man was not created for woman, but woman for man. This is why the woman ought to have a sign of authority over her head, because of the angels.'

87. L Fekete 'Anti-Muslim Racism and the European Security State' (2004) 46(1) *Race and Class* 3. See also M Michèle, A Morning and M Mooney 'Particular Universalisms: North-African Immigrants Respond to French Racism' (2002) 25(3) *Ethnic and Racial Studies* 390.

The 'war on terror' has had a major impact on race relational policies in the West and the new legislation, coupled with other policing and counter-terrorist measures, stereotypes Muslims as the 'enemy within' because of the perception that Islam is intolerant, anti-Western and slowly establishing itself with an aim of creating an 'Islamic France'.⁸⁸ The integration measures introduced by the French government have now become an adjunct to anti-terrorism law and this represents a global response against the threat of Islam, through the implementation of draconian laws affecting civil rights and the promotion of multiculturalism. This is not just simply Islamophobia but rather a more structured anti-Muslim racism that has been candidly portrayed by Fekete as 'tough on mosques, tough on the causes of mosques'.⁸⁹ The legal policy to ban hijabs in state schools also corresponds to the ambition of Nicholas Sarkozy, the French Interior Minister, who wishes to steer 'Islam in France' towards an 'Islam of France'. By specifically targeting Muslim schoolgirls, the new legislation may not inspire Muslim confidence in the French government and this may lead Muslims to feel further excluded from the French Republic, feeling that the Republican project of integration is meaningless. It should be understandable why so many Muslims are voicing their concerns about the prohibition of religious symbols in state schools and their perception of being undervalued as citizens. However, the charge that the ban verges on the realms of racism has been strongly resented by opponents of the hijab. One academic, Todd, was asked to comment on the reported opposition of the French public towards the hijab, to which he replied:

'It shows, paradoxically and in an unfortunately repressive fashion, what France has always opposed: the lower status of women and endogamy. There's a call there, inept but real, to *mixité* [mixture, integration, co-education]. Looking at it from that angle, opposition to the headscarf is the very opposite of racism.'⁹⁰

Opponents of the hijab consider their opposition not as a sign of racism but rather the maintenance of equality between men and women, which is far removed from racism. On the other hand, the allegation of racism has been lent some credibility by others, such as Bernard Defrance, who cited one particular legal maxim: 'No-one can be implicated in an act for which he or she is not responsible, of which he or she is not personally the author.'⁹¹ The meaning of this maxim is that to punish someone for belonging to a community, or for

88. Evans, above n 46, at 8.

89. For example, local campaigns are often against the building of new mosques and a number of local authorities require the design of mosques to be less Islamic, less 'ostentatious' and more integrated into European architectural practices. It is estimated that there are 1,500 Muslim meeting places and mosques in France but only a small number have domes or minarets because planning permission is denied on the grounds that such identifying details are unnecessarily ostentatious and inflammatory. See Fekete, above n 87, at 25. See also J Freedman 'Secularism as a Barrier to Integration? The French Dilemma' (2004) 42(3) *International Migration* 5.

90. E Todd 'Les Maghrébins S'Intègrent Trop Vite!' (1995) *La Vie*, 19 January, cited in Brown, above n 21, p 112.

91. B Defrance 'L'Apprentissage de la Citoyenneté à l'école' (1995) 8(46-47) *Migrations Société* 59 at 78, cited in Brown, above n 21, p 115.

abiding by the norms of that community, is tantamount to racism. Since the new law targets Muslim schoolgirls who wear the hijab, who belong to the Maghrebian-Muslim community and who abide by Quranic norms, the argument that the ban in state schools holds racist connotations may hold some credibility after all. This is because the policy aggressively to apply secular principles confines real human differences (including racial, ethnic and religious beliefs) to the private sphere and this typically French attitude could itself be viewed as 'French secular fundamentalism', since it fails to take into account the various communities and beliefs by which people (and not just Muslim immigrants) structure their lives. The new legislation on secularism demonstrates a level of intolerance towards multiculturalism because it does not promote integration or acculturation: it simply marginalises immigrant pupils further by accentuating how different they really are.⁹²

There have been a number of high-profile individuals who have been concerned about the recent rise of Islamophobia in France in relation to the hijab.⁹³ British Muslims and members of the British government have all condemned the French government for the ban on religious symbols in state schools and some fear that the headscarf ban may steadily emerge in other European countries and encourage violent attacks upon minority groups who wish to maintain their traditional or religious culture. Others have also indicated that the British government supports the right of all people to display their religious symbols in state schools and that 'integration does not require assimilation'. Though one could argue that the French government is only seeking to impose 'uniformity' within schools by imposing a ban on religious symbols, this argument is not entirely satisfactory because in French schools students are not even required to dress in any particular uniform and it is common for students to wear jeans, jumpers and trainers every day. While it is permissible for schoolchildren to follow the latest trend and wear the latest Nike or Reebok trainers (which arguably is more likely to promote rivalry and competition between students, rather than uniformity), in the interest of 'uniformity' the French government believes that Muslim schoolgirls should not be allowed to wear the hijab. The desire to impose uniformity might have been more satisfactory if France truly was a society where foreign citizens are able to prosper and succeed regardless of colour or creed. However, there is high unemployment amongst ethnic minorities living in France; 78 per cent of Turkish migrants live in public housing estates, where more than one-third of residents are also migrants;⁹⁴ France has no black MPs or Algerian newsreaders; and even the French National Assembly contains no Muslims. In areas with large migrant populations, high unemployment and schools in difficulty, wealthier students are more likely to attend private schools or at least travel a distance to better state schools,⁹⁵ and there is also evidence of

92. Glenn, above n 13, at 4.

93. For example, Dr Rowan Williams, the Archbishop of Canterbury, and Ken Livingstone, the Mayor of London, have both openly criticised the French ban on headscarves. See also R Gledhill 'Terror Curbs Alienating Muslims, Says Williams' (2003) *The Times*, 22 December, p 4.

94. Windle, above n 47, at 100.

95. See G Felouzis 'La Ségrégation Ethnique au Collège et Ses Conséquences' (2003) 44(3) *Revue Française de Sociologie* 413.

discrimination against ethnic minorities in the job market.⁹⁶ It is no surprise that the law banning religious symbols in state schools is perceived as an attack on the religious freedom and on the identities of French Muslims because the current treatment of Muslims in France belies the myth of equal citizenship. The controversy is also symptomatic of the much broader and difficult issues of integration, where social groups are increasingly defining their identities in religious terms.⁹⁷ The ban might have been more easily taken had there been additional measures accompanied to assure Muslims that they were not being singled out or targeted, and the Stasi Commission did suggest in its report that two national holidays should be established during the school term to accommodate the Muslim and Jewish festivals (although one may question whether this recommendation breaches the traditional doctrine of *laïcité* in state schools anyway), and that a National School for Islamic Studies be created specifically for Muslims. However, the sole recommendation expressed in the new legislation was the French ban on religious symbols in state schools and members of the Stasi Commission openly voiced their disappointment that their work had not been interpreted satisfactorily.

The new legislation has also been attacked for being more concerned about appeasing right-wing parties than maintaining a secular society in France. The suggestion is that President Chirac calculated that he could obtain more votes on the secular left and the anti-Muslim right if he introduced a law banning the wearing of headscarves in state schools, implying that the law represents a politically driven strategy to counter Jean-Marie Le Pen's extreme-right Front National Party by taking away his support, rather than any real concern to promote secularism.⁹⁸ Whatever the motivation, the French model of integration is now under serious threat because the new legislation may encourage far-right-wing aggression against those minority immigrants who desire to maintain their 'differences' inside and outside of schools. Furthermore, the French government presupposes that Muslims will want automatically to co-exist with their French counterparts so long as Muslim schoolgirls are instructed to remove their veils, but it seems likely that Muslims will be resentful and unwilling to integrate with mainstream society if Muslim schoolgirls are denied the right to wear the hijab. The fundamental question should be how Muslim groups will become part of French society and not the removal of the headscarf; what is required is a set of laws that can guarantee the integration of Muslims (and other religious groups) into French society.⁹⁹ Until such a time, Muslims may segregate further away from public life, precisely what pro-supporters of the new legislation argue they are trying to prevent.¹⁰⁰ Perhaps

96. See A Frickey and J-L Primon 'Jeunes Issus de l'Immigration: Les Diplômes de l'Enseignement Supérieur ne Garantissent pas un Égal Accès au Marché du Travail' (2002) 79 *Formation Emploi* 31.

97. Macey, above n 29, at 3.

98. See also P Bréchon and S K Mitra 'The Emergence of an Extreme Right Protest Movement' (1992) 25(1) *Comparative Politics* 63; J Lorient, K Citron and S Dumont *Le Système Le Pen* (Antwerp: EPO, 1986); E Plenel and A Rollat *L'Effet Le Pen* (Paris: La Découverte-Le Monde, 1984); D Bell 'Parliamentary Democracy in France' (2004) 57(3) *Parliamentary Affairs* 533.

99. Henley, above n 79.

100. Bell, above n 98, at 546.

one method to improve integration could be for the French government radically to rethink its education policy: should diverse religious education now be compulsorily taught in French schools and would this shift in educational policy compromise the doctrine of laïcité under existing French law? After all, Article 1 of the 1958 Constitution does emphatically stipulate that France must 'respect all beliefs'. This option could prove valuable because schools are places where children can be taught to appreciate the multicultural nature of society and by preventing the teaching of religious education, as well as the opportunity to wear religious symbols in state schools, schoolchildren are denied the opportunity to learn about various religions and cultures. This is to the detriment of integration and the ban will only compound the level of intolerance and ignorance amongst schoolchildren, for tolerance cannot be promoted merely by erasing the cultural practices of others. If a Muslim schoolgirl entered a classroom with a headscarf, that itself could pose an important question for schoolchildren: why does this schoolgirl wish to wear her hijab? The hijab could provide a valuable subject of discussion about all religions, not necessarily focused only upon Islam and if discussion is about all religions, then surely no one could accuse the French government of promoting a particular religion or making a religious symbol of its own. If the French education system exposes children to religious diversity only then can the French Republic hope to create a more free, just and integrated society, like the British tradition of religious diversity, which has (generally) worked reasonably well over the years and has accommodated religious differences in state schools without any real major hostility. What is clear is that assimilation has failed and the French government needs to develop policies that will create a more integrated society, and regrettably, the ban on religious icons is not a step forward in the right direction. The policy and cultural changes enforced by the French government are more likely to arouse conflict rather than a climate of mutual respect.¹⁰¹

A closer inspection of the ban on religious symbols in state schools will also reveal that the new legislation actually contradicts the earlier judgments of the Conseil d'État over the interpretation of laïcité and the wearing of headscarves. It will be recalled that the Conseil concluded that the headscarf was not 'ostentatious', the wearing of which would automatically constitute an act of pressure, nor was it in principle incompatible with laïcité. A schoolgirl could wear the hijab so long as the symbol was not worn in such a way that constituted an act of pressure. However, the French government has introduced the new legislation on the basis that the hijab *is incompatible with laïcité* and is ostentatious. This reveals the contradiction between the French government and the Conseil d'État over the interpretation of laïcité, because the French government strongly believes that headscarves automatically constitute an act of public disorder. However, to what extent is it fair to assume that the hijab automatically breaches public order? For example, a 13-year-old Muslim schoolgirl in a French state school may be an exemplary student in every way – she arrives at school early; she attains high marks for her work; and she enthusiastically listens to her teacher – yet according to the French government, her behaviour threatens public order because she insists on wearing a piece of

101. M Collins 'Headscarf Ban' (2004) Independent, 11 February, p 38.

cloth over her head. The hijab should not be viewed as a sign arousing public disorder because many Muslim women wear the headscarf as a sign of personal religious observance. It is most unfair that while 'a French woman with a scarf is chic ... a Muslim woman with a scarf is [considered] a threat to civilisation'.¹⁰² It will be very interesting to observe how the Conseil reacts to the government's interpretation of the word 'ostentatious' for the purposes of the new legislation, and the possibility is open that the Conseil could still rule that the headscarf should not be considered 'ostentatious' in itself unless accompanied by acts of pressure or proselytism. If so, this could represent a technical legal defeat for the French government. It was also suggested by the French government that not all religious symbols would be banned in state schools. It was claimed that small Christian crosses and Stars of David would be permitted because such objects are discreet in nature. Given the fact that the new law is remarkably short in length this difference in interpretation is understandable, but this still raises the question that the legal policy pursued by the government is unfair and discriminatory since it targets Muslim schoolgirls whose religious symbol happens to be more visible than the signs held by other religions.

Attention must also be drawn to para 18 of Decision No 2004-505 DC, 19 November 2004, of the Conseil Constitutionnel. The Fifth Republic Constitution of 1958 created the Conseil Constitutionnel and one of its principal functions is to strike down (before promulgation) any parliamentary statute on the grounds of unconstitutionality.¹⁰³ In addition, once an international treaty has been signed the issue of ratification arises and although this is a matter for the President, the ratification of a wide range of important treaties and agreements must be authorised by the French Parliament under Article 53 of the 1958 Constitution. Where there is doubt as to whether or not a Treaty is contrary to the French Constitution, then (before its ratification) the Conseil Constitutionnel may be seized under Article 54 to determine the issue of constitutionality. If it holds the Treaty to be contrary to the Constitution, then the latter must be amended before ratification takes place, and once a Treaty has been duly ratified, Article 55 accords it authority superior to that of any parliamentary statute. On 29 October 2004 the French President approached the Conseil Constitutionnel with the question whether the 1958 Constitution had to be revised first before the official ratification of the Treaty Establishing a Constitution for Europe. The Conseil Constitutionnel concluded on 19 November 2004 that the 1958 Constitution had to be revised before ratification of the Treaty, under para 43 of its decision. However, para 18 is worthy of particular note and is translated in full:

102. S Abedin and Z Sardar (eds) *Muslim Minorities in the West* (London: Grey Seal Publications, 1995) p 5.

103. A West et al *The French Legal System* (London: Butterworths, 2nd edn, 1998) p 43. Note that the Conseil Constitutionnel can be seized only before a bill has been promulgated, and only then by the President, the Prime Minister, and the Presidents of either Houses or by a group of 60 members of the French Senate or the National Assembly. An individual or a group of individuals cannot approach the Conseil Constitutionnel. The significance of this is that Muslim individuals were therefore unable to lodge an application against the new law on the grounds of unconstitutionality to the Conseil Constitutionnel based upon possible human rights infringements.

'In particular, the first paragraph of Article II-70 recognises the right of everyone, whether individually or collectively in community with others, to manifest its religious convictions in public, the explanations of the Praesidium specify that the right guaranteed by this article has the same meaning and the same scope as that right guaranteed by Article 9 of the European Convention for the protection of Human Rights and Fundamental Freedoms; that this right is subject to the same limitations, in particular those involving public safety, the protection of public order, health and public morals and the protection of the rights and freedoms of others; that Article 9 of the Convention has been constantly applied by the European Court of Human Rights, the latest occasion being the decision [*Leyla Sahin v Turkey* (App 44774/98) [2004] ELR 520], in harmony with the constitutional traditions of each Member State; that the Court has thus given official recognition to the principle of secularism recognized by various national constitutional traditions and leaves States a broad margin of appreciation to define the most suitable measures, taking into account their national traditions, to reconcile the principle of freedom of religion and that of secularism; and the provisions of Article 1 of the 1958 Constitution whereby "France is a Secular Republic" forbids persons to profess religious beliefs for the purpose of non-compliance with the common rules governing the relations between public communities and private individuals, are thus respected.'

It is clear under para 18 that the Conseil Constitutionnel relied heavily upon the judgment of the European Court of Human Rights in the case of *Leyla Sahin v Turkey*.¹⁰⁴ This was a case where the court decided in favour of the prohibition of hijabs in higher educational institutions. The University of Istanbul introduced a circular declaring that students were not permitted to wear headscarves whilst attending university courses and Leyla Sahin was denied entry into a written examination because she wore a headscarf. She argued that her rights under Article 9 of the Convention had been infringed but the European Court decided against her, opining that Turkish law had clearly prescribed the restriction and that such a restriction pursued a legitimate aim. These aims included maintaining public order within the university and protecting the 'rights and freedoms of others' (ie those who did not wear the headscarf). The European Court explained the importance of secularism in Turkey and of maintaining gender equality under Turkish law,¹⁰⁵ and the court concluded by repeating previous rulings of *Karaduman v Turkey*¹⁰⁶ and *Dahlab v Switzerland*,¹⁰⁷ that the hijab was 'hard to reconcile with the principle of gender equality'.¹⁰⁸ Many Muslim women will feel very indignant by the recent ruling by the European Court that their value as women is in some way reduced because they have taken the personal decision to wear a headscarf. Many may feel that the hijab is not at all 'hard to reconcile' with the notion of gender

104. (*App No 44774/98*) [2004] ELR 520, 29 June 2004. See also [2004] 5 EHRLR 590 and (2004) 133(3) EOR 27.

105. [2004] ELR 520 at [107]–[110].

106. (*App 16278/90*) 74 DR 93. See also, *Bulut v Turkey* (*App 18783/91*) unreported.

107. (*App 42393/98*) unreported.

108. [2004] ELR 520 at [98].

equality (for reasons that will be explained very shortly). The recent decision leaves a margin of appreciation to Member States over the manifestation of religious symbols in the public sphere, in the interest of maintaining public order, and it seems that French Muslim schoolgirls will be unable to rely on Article 9 and the argument that their human rights have been infringed in light of the Leyla Sahin case. However, Decker and Lloyd have criticised the court's decision because Article 9(1) has created a narrow interpretation of religious freedom, and one would have hoped that the margin of appreciation granted in Article 9(2) would have been interpreted narrowly so that the right was not unduly impinged. This has led the authors to criticise the decision in that the court failed to test thoroughly the Turkish state's reasoning for the ban.¹⁰⁹ On a more positive note, the authors also argued that the court's decision might be narrow in its application because the court stated that its analysis of the headscarf question was in the 'Turkish context'. This may imply that the court might not have similar findings in France and a future challenge to French law 'may not yield the same outcome because the Court rested its judgment thoroughly on the peculiarity of Turkish history'.¹¹⁰

It is apparent within the current debate that the hijab means different things to different people on all sides. There are many reasons why Muslim women wear the hijab, including fulfilling an act of religious piety; mounting an Islamic (and feminist) protest against the West's obsession with sex and external beauty; a positive affirmation of one's Islamic culture and identity; a means of protecting the wearer against the elements; as well as being a fashion accessory. Christian nuns wear headaddresses as an act of piety and modesty, similar to Muslim women, and hijabs should not therefore be viewed as a threat to social order. The need to wear head coverings can be found within the Jewish religion and Jewish people wear head coverings as a sign of respect, as a way of humbling themselves before God, and this equally applies to Muslims. An Islamic headscarf is a continual reminder that one should be a dignified and humble human being and Muslim women see it as part of their religious practice and as a symbol of their Islamic identity. The homogeneous assumptions about Islam are extremely unfair and need to be broken down in order to understand the hijab debate in a more sophisticated and less Euro-centric way.¹¹¹

A problem that plagues the new legislation is the fact that only state schools will enforce secular principles and private schools will be exempted from the new legislation. This is because the French government does not fund private schools,¹¹² and this is why private schools have flourished as religious educational institutions outside the state system during the past century. Consequently, richer Muslim parents may decide to send their daughters in headscarves to private schools and if so, this may lead Muslim pupils to segregate themselves further away from mainstream society. The new law may also be difficult to apply in practice because what constitutes 'ostensible' can

109. D C Decker and M Lloyd 'Case Comment – Leyla Sahin v Turkey [2004] 6 EHRLR 672 at 677.

110. Decker and Lloyd, above n 109, at 677.

111. Brown, above n 21, at 106.

112. Unless such schools, of course, are under contract with the state. See also R de Winter and A W Heringa 'Private Schools and State Intervention' (1994) 1(3) Maastricht Journal of European and Comparative Law 316.

be open to interpretation and the legislation does not define this crucial term. The sole exceptions envisaged under the Act include 'discreet' signs of the cross, the hand of Fatima and the Star of David, but an interesting question would be whether a Muslim schoolgirl could wear a 'David Beckham-like bandana' because such an item of clothing is not necessarily associated with religious expression. The French government did issue a circular shortly before the new legislation came into force explaining the parameters of the ban, but this guidance proved far from satisfactory because the circular advised that religious bandanas were to be banned, but 'non-religious' bandanas would be permitted.¹¹³ How one can tell the difference between a 'religious' and 'non-religious' bandana remains unclear, and the obvious choice would be for Muslim schoolgirls to wear a bandana and 'claim' that it is for 'non-religious' purposes. Even so, two Muslim schoolgirls were recently excluded from school for swapping their hijabs for bandanas – the head teacher deeming this action to breach the law presumably because he believed the bandanas had 'religious' connotations.¹¹⁴ There have even been some reports that teenagers have worn wigs at school (of straight medium-length dark brown hair) and have had their headscarves tied in a knot around their necks so that they could put it on when leaving school. This obviously demonstrates a lack of respect for the new law, but by individuals who feel that their religious rights have been infringed. Furthermore, teachers have described the French circular as 'unworkable' and 'hypocritical' because it purported to exempt Sikh turbans and other 'traditional' forms of dress from the new law. Many have argued that this invites Muslim schoolgirls to claim that their headscarves are also 'traditional' in their communities or families. But despite the circular and the purported exemption of Sikh turbans from the new legislation, several Sikhs have found themselves excluded for wearing the under-turban. In October 2004, three Sikh schoolboys brought an appeal against their exclusion to a French administrative court arguing that an agreement had been reached with the French authorities, and that the turban is not a religious symbol, but a cultural one, because the rule contained in Sikh scriptures is for men not to cut their hair.¹¹⁵ The schoolboys argued that their turbans are a way of containing the growth of their hair, but representatives of the Louise Michel School argued that different rules could not apply to different religions and that the law had to be applied equally. The court referred the matter back to the school, declaring that the issue had to be resolved by further mediation, but the referral has been interpreted negatively with the court being accused of failing to set a legal precedent that might give Muslim schoolgirls their own grounds for an appeal. It is also unclear whether or not the ban will apply to Muslim or Sikh schoolboys with beards. In January

113. *Port de Signes ou de Tenues Manifestant une Appartenance Religieuse dans les Écoles, Collèges et Lycées Publics* Circulaire No 2004-084 Du 18-5-2004 JO du 22-5-2004, <http://www.education.gouv.fr/bo/2004/21/MENGO401138C.htm#top> (last visited 28 February 2005). See also J Lichfield 'Teachers Say Headscarf Ban Will be Unworkable' (2004) *Independent*, 23 April, p 24.

114. See C Bremner 'First Girls Expelled Over Headscarf Ban' (2004) *The Times*, 21 October, p 45.

115. (22 October 2004, unreported). See the BBC's report on its website <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/3943733.stm> (last visited 28 February 2005).

2004 the Education Minister, Luc Ferry, remarked that if beards were to be interpreted as 'religious signs' then beards too would be banned from state schools. Not only does this raise a complex question about the difference between 'Islamic' and 'non-Islamic' beards but Luc Ferry overlooked the point that his namesake, Jules Ferry, responsible for the laicisation process in the late nineteenth century, also had a very fine beard as did most politicians of his day. This has led commentators sarcastically to remark that Jules Ferry's beard was presumably a Republican beard!¹¹⁶

It will be recalled that an argument in favour of banning headscarves in state schools relates to feminism, that the new law seeks to liberate and protect the rights of Muslim schoolgirls from being forced into wearing the headscarf and that the hijab promotes inequality, since it demonstrates a woman's submission to man. Many feminists are very critical of the hijab and argue that the veil has no justification in the Holy Quran whatsoever,¹¹⁷ while others point to the meaning of the hijab as 'the sum total of practices connected with the seclusion of women' which identifies the woman as 'trespassing beyond her assigned private space' if she does not seclude herself.¹¹⁸ The French strongly maintain that the rights of Muslim women will be promoted if they are 'emancipated' from the headscarf but these arguments are not satisfactory if one considers that in order to liberate Muslim women and supposedly protect their human rights, the French government is willing to restrict the freedom of those Muslim women who willingly and voluntarily wear the headscarf. A law banning the hijab should not automatically be viewed as a law that promotes feminism because the ban fails to appreciate that Muslim women have the right personally to decide what they want to wear. French public opinion focuses upon scarf-wearing women as victims of violence, or girls under the domination of their fathers and brothers, but this assumption is misleading because many Muslim women who wear the hijab in the Western world command important roles in society: many are doctors, lawyers, accountants, and others hold employment in other significant areas. Far from being under the domination of Muslim men, the French government seems to be unaware that many young Algerian Muslim women have, and are increasingly, arrived in France alone without their fathers or brothers.¹¹⁹

116. Macey, above n 29, at 6.

117. See A Wadud-Muhsin *Qur'an and Woman: Re-Reading the Sacred Text from a Woman's Perspective* (Kuala Lumpur: Penerbit Fajar Bakti Sdn Bhd, 1992) p 10; M A Karam *Women, Islamisms and the State: Contemporary Feminisms in Egypt* (Basingstoke: Macmillan Press Ltd, 1998) p 134, although the vast majority of Islamic scholars believe that evidence in the Holy Quran and the Sunnah show that the veil is an integral part of Islamic law.

118. B F Stowasser *Women in the Qur'an, Traditions and Interpretations* (New York: Oxford University Press, 1994) p 32; F Mernissi 'Arab Women's Rights and the Muslim State in the Twenty-first Century: Reflections on Islam as Religion and State' in M Afkhami (ed) *Faith and Freedom: Women's Human Rights in the Muslim World* (Syracuse: Syracuse University Press, 1995) p 42.

119. See C Wihtol de Wenden 'Young Women in France: Cultural and Psychological Adjustments' (1998) 19(1) *Political Psychology* 133 at 135; Institut National de Statistiques et d'Etudes Economiques (INSEE) *Recensement de la Population de 1990: nationaux, résultats No 197* (Institut National de Statistiques et d'Etudes Economiques, 1990) Table 10.

Little statistical evidence was provided either by the Stasi Commission or by the French government to prove that Muslim women living in France are actually 'forced' to wear a headscarf by their parents or older brothers. In fact there is a limited amount of research in relation to Muslim women and headscarves and, to date, there appears to be only three empirical research projects on this issue. At the very least the French government should have taken note of the findings of those studies. Gaspard and Khosrokhavar undertook the first study concerning veiled Muslim women living in France, and the authors discovered that while 'some' young Muslim schoolgirls were made to wear the headscarf by their families, this was not necessarily a result of 'coercion'. The authors revealed that women who were older and between the ages of 18 and 22 adopted the hijab out of personal religious conviction and as a symbol of their ethnic identity, as opposed to any form of force or intimidation by their families.¹²⁰ The authors argued that those Muslim women were 'more French' than most French people recognised them to be and the Muslim women surveyed also rejected what they viewed as 'a devaluation of their parent's culture' and wished to be recognised as 'French Muslims'.

Killian undertook the second empirical study on veiled Muslim women, interviewing 41 North African women in Paris and she concluded that younger, well-educated Muslim women strongly defended the headscarf as a matter of personal liberty and cultural expression.¹²¹ Killian discovered that out of the 41 North African women interviewed, only 12 were against wearing the hijab themselves (or some 29 per cent of those interviewed) but while those 12 women were against wearing the hijab, not all expressed the desire to prevent others from wearing the headscarf; the central issue for those Muslim women surveyed was freedom of choice – if a Muslim woman does not want to wear a hijab, she should not be forced to wear one, but if she chooses to wear a headscarf then she should not be prevented from wearing one. However, more interesting was the discovery that out of the 41 North African women surveyed, only three (or some 7 per cent of those interviewed) believed that some Muslim girls 'might possibly' be forced into wearing the headscarf.¹²² This demonstrates that in the absence of firm and compelling evidence to support the claim that many Muslim women are forced into wearing a headscarf in France, there is little justification for such a draconian measure banning all religious symbols in state schools and that the law is as an overreaction on the part of the French government. Not all Muslim women are forced to wear the headscarf and this is evident by the number of Muslim women in France (and around the world) who voluntarily took to the streets and fiercely protested against the French ban in state schools. Franks, in the third of the empirical studies, cited an example of a Muslim woman named Miriam who, unlike the 'subdued' stereotype often portrayed, chose to wear the hijab against the wishes of her husband; she confounded the stereotype by wearing the scarf against her husband's wishes. Miriam, an educated woman, decided herself that she wanted to wear the hijab in response to witnessing the plight of other Muslims during

120. Gaspard and Khosrokhavar, above n 74, ch 3.

121. C Killian 'The Other Side of the Veil: North African Women in France Respond to the Headscarf Affair' (2003) 17(4) *Gender and Society* 567.

122. Killian, above n 121, at 576.

the Bosnian war who were persecuted for their Muslim identity and Miriam felt that she had to assert herself by 'standing up and being counted' as a Muslim. Miriam's choice demonstrated that she was either braver or more 'Islamic' than her husband, or both.¹²³ Miriam's choice also confounds the belief of the European Court of Human Rights in its recent decision that the headscarf is 'hard to reconcile' with notions of gender equality.

There are many factors that highlight the positive elements of wearing the hijab, including providing the wearer with a sense of security, a sense of space and being able to claim the right of scrutiny. Haleh Afshar has explained a notion of 'gaze reversal' implied in the practice of observing the hijab where the Muslim woman, in covering herself, avoids being the 'object of the gaze' and instead becomes the spectator with free access to gaze upon men, providing a secure social space for women which, at least symbolically, is free from 'male invasion' and allows women to enter the public domain.¹²⁴ By narrowing the area of the body open to exchange in the public arena to the 'face and brain', the body is no longer viewed as a series of 'sexual sights' and provides Muslim women with greater control over how they are perceived by men – not as sexual objects but as women, valued more for their intellect rather than their looks.¹²⁵ Franks, in the third empirical study, revealed that 11 of his 30 respondents felt that they gained more respect through wearing Islamic dress,¹²⁶ but Muslim women are still perceived as falling into one of two categories: either as the 'oppressed' woman or the 'aggressive terrorist' by the media.¹²⁷ The hijab is never portrayed positively as embodying Islamic values and principles, nor is it ever depicted as promoting 'Islamic feminism' in its quest to liberate Muslim women. Strange as it may appear, Western-liberal feminism and 'Islamic feminism' are very similar for both are about emancipation. Many Muslim women have embraced 'Islamic feminism' through the hijab as an affirmation of their cultural identity as well as an expression of their liberation from colonial legacies, and many recent works have reframed the hijab as a sign of 'resistance',¹²⁸ through events like the historic drive towards wearing the veil in Algeria's fight for independence when the French invaded Algeria in 1830.¹²⁹ The violent and

123. Franks, above n 55, pp 925–926.

124. H Afshar *Women's Hour*, BBC Radio 4, 20 August 1998. The same applies to architectural spaces in buildings. See C Makhoul *Changing Veils: Women and Modernisation in North Yemen* (London: Croom Helm, 1979) pp 28–19; A Oakley *Subject women* (UK: Fontana Paperbacks, 1982) p 332; A L Odeh 'Post-Colonial Feminism and the Veil: Thinking the Difference' (1993) 43 *Feminist Review* 26 (Spring) at 32; Karam, above n 117, p 12.

125. However, Egyptian novelist Naguib Mahfouz would appear to disagree, portraying a number of veiled female characters in his books as 'oppressed'. His main work is the Cairo Trilogy, finished in 1952, but first published in 1956 and 1957. This trilogy has been compared with Dickens in relation to the way Mahfouz depicts the city where the stories take place, Cairo. See N T Mahfouz *The Cairo Trilogy: Palace Walk, Palace of Desire, Sugar Street* (New York: Everyman's Library, 2001).

126. Franks, above n 55, at 921.

127. JL Esposito *Islam: The Straight Path* (Oxford: Oxford University Press, 1991) p 156.

128. For an interesting account of the French invasion of Algeria, see F El-Guindi *Veil – Modesty, Privacy and Resistance* (Oxford: Berg, 1999). See also A Salvatore and S Amir-Moazami 'Religiöse Diskurstraditionen: Zur Transformation des Islam in Kolonialen, Postkolonialen und Europäischen Öffentlichkeiten' (2002) 12(3) *Berliner Journal Fur Soziologie* 309.

brutal 'battle of the hijab' lasted many decades and is a symbol of Muslim women's resistance against the legacy of foreign occupation and of the inhumane and degrading treatment that they endured (including rape), while reaffirming their Algerian and Islamic tradition and identity.¹³⁰ In Algeria, the French colonialists, modernisers and secularists repeatedly attempted forcibly to remove the hijab from Muslim women, leading to the unavoidable emblematic status of the hijab as a signifier that Muslim women will not lose their Islamic identities, and contrary to the stereotypical view many Muslim women had to be bold and courageous to wear the hijab, in light of the criticism, degrading treatment and ridicule. While the removal of the veil in Algeria during the nineteenth century involved the emancipation of Muslim women from exclusion under Western-liberal feminism, the voluntary wearing of the hijab during the nineteenth, twentieth and twenty-first centuries has been about liberation and emancipation from imposed and imported colonial identities and the voluntary observance of religion under 'Islamic feminism'.¹³¹ Many Muslim women who wear the hijab function as 'mediators' between traditional family cultures of the sending country and the modern host country and view themselves as 'tradition-bearers' and 'integration proponents', making day-to-day adjustments and seeking to mediate their 'private' and 'public' behaviours.¹³² Many misunderstand the significance of 'mediation' governing the private and public lives of Muslim women but this form of private/public mediation provides Muslim women with more control and opportunity because not only do they satisfy their personal ambitions of fulfilling religious obligations by wearing the hijab, they also receive the support of their families who visibly recognise that their children still have a connection with their religious and cultural traditions, and this in turn enables many Muslim women to enter the outside world in search of education and employment. Too many assumptions are easily read into the wearing of headscarves, to the detriment of the true religious and cultural meaning of the veil, although the interpretation of the veil as a means of entering the public domain, rather than as an exclusion from it, is still unpopular in some secular and Western feminist circles. However, Leila Ahmed is a firm believer that Islamic dress has actually helped Muslim women to establish 'legitimate public space' within society with the result that the headscarf, far from being some kind of set-back, has actually become a symbol of Muslim women's possible entrance into modernity.¹³³

129. D C Gordon *Women of Algeria: An Essay on Change* (Cambridge, MA: Harvard University Press, 1968) ch 4, in particular pp 37–45.

130. J Mincec 'Women in Algeria' in L Beck and N Keddie (eds) *Women in the Muslim World* (Cambridge, MA: Harvard University Press, 1978) p 160; F Fanon *A Dying Colonialism* (trans H Chevalier) (New York: Grove Press, 1967) pp 35–67.

131. El-Guindi, above n 128, p 184.

132. Wihtol de Wenden, above n 119, at 135.

133. See L Ahmed *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven, CT: Yale University Press, 1992) pp 11–30 and chs 8 and 9; A S Ahmed *Discovering Islam: Making Sense of Muslim History and Society* (London: Routledge and Kegan Paul, 1988); F Mernissi *Beyond the Veil: Male-Female Dynamics in Modern Muslim Society* (London: Saqi Books, 2003); N Afza and K Ahmad *The Position of Women in Islam* (London: Islamic Book Publishers, 1993); H Turabi *Women in Islam and Muslim Society* (London: Milestone, 1991); F Esack *Quran, Liberation and Pluralism: An Islamic Perspective on Interreligious Solidarity Against Oppression* (Oxford: Oneworld Publications, 1997) pp 239–251; F Shirazi *The Veil Unveiled – The Hijab in Modern Culture* (Gainesville: University Press of Florida, 2003).

These points all demonstrate that the hijab involves many complex issues and that one should not belittle the hijab as 'oppression' for that does not present a very sophisticated account of the debate.¹³⁴

Finally, it will be recalled that the Stasi Commission acknowledged that many Muslim women are not forced into wearing a headscarf, but this then begs the question why recommend a law that penalises so many Muslim women who wear the hijab out of personal choice and identity? It seems obvious that the French government and the Stasi Commission have both drawn unfair and preconceived conclusions over the hijab and this is further emphasised by the fact that it took the Stasi Commission a while to hear any forthright female Muslim voices on the subject. In December 2003, Saïda Kada spoke out on French television against the French ban and challenged conservative and feminist opponents.¹³⁵ The Commission interviewed Kada during its discussions but it was subsequently discovered that Kada was the only veiled Muslim woman out of 150 people invited to testify to the Commission, though other reports suggest there were two veiled Muslim women interviewed and a third who did not wear the hijab.¹³⁶ The Stasi Commission should have laid greater emphasis upon the views of many more Muslim women when deciding to recommend the ban on hijabs in the form of legislation.

CONCLUSION

Natasha Walter has written that if one truly believes in tolerance, then one must tolerate practices or behaviour that is considered somewhat strange by others, and if proponents of feminism truly believe in a woman's right of self-determination, then feminists must also respect those choices by women that appear to run counter to their own values. Feminism provides women with the freedom of choice in their personal lives and if feminism is truly to grasp that moral value, ironic as it may seem, feminism should adopt a position against those who force women to wear a headscarf, as well as those who force women not to wear a headscarf.¹³⁷ My own view on the subject is that the hijab should be permitted because the ban may have the effect of fulfilling the racist agenda

134. However, Franks argues that the headscarf is neither liberating nor oppressive. He concluded that the adoption of Islamic dress was a personal choice for his respondents, and not enforced by family, state or local culture. For him, the situation was far too complex to make a permanent statement about the relative oppression/liberation in the practice of wearing a veil, for the hijab may be experienced as liberating or oppressive by different women, depending on religious belief, class, income and everyday practicalities of 'living a life'. But for many women living in the West, Franks concluded that they wear the hijab through choice, as an expression of their religious faith, commitment and for the benefits they perceive it to confer. See above n 55, at 918 and 927.

135. A writer on Islamic issues and co-author of a book concerning veiled Muslim women in France and laïcité: D Bouzar and S Kada *L'Une Violée, L'Autre Pas* (Paris: Albin Michel, 2003).

136. S Bell 'France Finds its Cover Girl for Veil Battle' (2004) *The Sunday Times*, 25 January, p 25.

137. N Walter 'When the Veil Means Freedom: Respect Women's Choices that are Not Our Own, Even if they Include Wearing the Hijab' (2004) *Guardian*, 20 January, p 21.

of the extreme right in France. The ban appears to apply to all religious symbols, but the measure is discriminatory mainly against Muslims, which is paradoxical really considering that the concept itself seeks to prevent discrimination in the public sphere. The impression portrayed is that France is not overly concerned with protecting the rights of ethnic minorities because the enactment demonstrates a level of intolerance against Muslims and, symbolically, of their rejection by France. This is by no means the end of the controversy for further laws to protect laïcité in public hospitals and public offices are expected in the near future. The new legislation refers to 'ostentatious' religious symbols in state schools but a ban on all 'religious symbols' per se might have been legally easier to interpret and apply. However, with a country with a large majority of Roman Catholic citizens, such a ban would undoubtedly have attracted more opponents than the current ban. My own opinion is that French and Islamic values can actually co-exist if Muslim schoolgirls are allowed to wear their headscarves; only when Muslim schoolgirls begin openly to pressurise or preach in school should their actions be restricted; after all, parents send their children to school to receive an education, not for their children to be converted to another religion. This compromise would be more consistent with the Conseil d'État's previous decisions that the headscarf, in itself, is not incompatible with laïcité. If today, 200 years after the French Revolution, laïcité cannot welcome all religions and all forms of expression in France as the concept claims to, then surely there has been some step backwards in the process of integration. France must begin to accept all traditions and truly 'respect all beliefs', whatever they are. However, my vision of tolerance is not an explicitly recognised French constitutional value. The French version of secularism drives religion from the public sphere into the private sphere and so does not allow any form of religious expression in public services. Tolerance and secularism are not the same value in France and it is extremely difficult to see the French government ever accommodating the hijab.