

RELIGIOUS FREEDOM IN A SECULAR SOCIETY: THE CASE OF THE ISLAMIC HEADSCARF IN FRANCE

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I INTRODUCTION

One of the most interesting examples in recent years of a confrontation between secular and religious values occurred in France in the so-called ‘affair of the headscarf’. The affair can be traced back to events in 1989, which were followed by a further series of events during the 1990s. It started when three Muslim schoolgirls were expelled from their public school in Creil, a town in northern France, for refusing to remove the Islamic headscarves they wore to school. The expulsions were widely reported in French and international media and were followed by further expulsions of other Muslim schoolgirls in towns and cities across the country, accompanied by growing community protests.

The affair was controversial for a variety of reasons. For one thing, it revolved around the headscarf, an item of clothing which has historically had strong and sometimes conflicting political, religious, cultural and social connotations. During the events of the affair, the headscarf sent a range of messages which were ‘heavy with symbolism,’¹ a symbolism which could be powerful, complex and indeed contradictory.

Another important set of reasons for the controversy surrounding the affair was that it struck a social, political and cultural ‘nerve’: the principal parties in the affair were Muslim schoolgirls, many of whom were the children of immigrant families already likely to experience high unemployment and religious or racial discrimination and to live in poor housing conditions. In addition, the headscarf became associated with social policies of integration and assimilation, despite the fact that many of the Muslim girls concerned had been born or had grown up in France. The events also served as a powerful catalyst for conservative political parties and groups who became involved in the public debates to promote an anti-Muslim or anti-immigration agenda and to criticise the apparent failure or unwillingness of the schoolgirls to integrate into mainstream French culture.

However, one of the key issues was the fundamental role of secularism in France. The principle of secularism is a central tenet of French public policy, particularly where public education is concerned. In addition, secularism represents a set of social and cultural values which have profound historical resonances for many French people. The events also revived historical debate over the role of religion and the operation of secularism and secular institutions in public life in France.

This paper will discuss some of the significant events in the affair of the headscarf, including the 1989 legal opinion delivered by France’s highest administrative court, the Conseil d’État, which stated the legal principles to be followed in resolving the disputes, as well as key ministerial circulars issued to explain how the legal opinion was to be applied and the case law from the appeals brought by many of the expelled schoolgirls. The paper will also

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¹ Françoise Gaspard and Farhad Khosrokhavar, *Le foulard et la République* (1995) 19.

consider the development of secularism in France and the notion of rights and duties which was integral to the doctrine of secularism, as emphasised in the 1989 legal opinion and then applied in the ‘headscarf’ case law.

Finally, this paper will consider some lessons which can be learned from the affair of the headscarf in France: should a government legislate against clothing and what issues arise in relation to such legislation? How might religious freedoms be best protected: should religious protections (or indeed secularism itself) be narrowly or broadly defined? A broadly-defined protection might in practice afford a degree of flexibility which results in greater application and better outcomes for those whom it protects. It also notes some events which have occurred in Australia in recent years and which raise similar questions to those considered in relation to the affair of the headscarf: what does secularism mean in Australia and what might be its implications for cultural and religious freedom and restrictions on such freedom?

II THE AFFAIR OF THE HEADSCARF IN FRANCE

A Affair of the headscarf in 1989

The first incidents in the affair took place on 18 September 1989, at the start of the new school year. Three Muslim schoolgirls, 14-year-old Fatima, her 15-year-old sister Leila and their 14-year-old friend Samira, came to their lower secondary school in Creil wearing their headscarves. The girls refused to remove the headscarves when asked to do so by the school principal and teachers, who interpreted their refusal as a breach of secularism in public education, and immediately suspended them from the school.

The girls’ suspension attracted considerable media attention. Over the following weeks, national newspapers featured front page stories describing similar incidents taking place in other cities across France, in which other Muslim schoolgirls were also expelled for wearing their headscarves to school.² There was heated debate in the media over the principle of secularism and the girls’ rights to equality, education and freedom of religious belief.

On 9 October, following departmental intervention, meetings with the parents and mediation on the part of local cultural associations, the three Creil girls returned to school. The negotiations had identified a compromise: the girls could wear their headscarves anywhere they wished within school grounds but would lower the scarves to their shoulders while in classes.

However, 10 days after they had agreed to the compromise, the three schoolgirls breached the agreement by refusing to lower their headscarves in class. It was noted in the media that their actions followed meetings which had taken place between the girls’ fathers and a representative of the Fédération Nationale des Musulmans de France, a Muslim association which was setting itself up in opposition to the more moderate Paris Mosque.³ The girls were again suspended, removed from their classes and taken to the school library. Their suspension resulted in a five-hour meeting between their teachers and parents, the education authorities and representatives from cultural associations in a vain attempt to reach a new

² Ibid 14-5.

³ Ibid 15-6.

agreement.⁴ According to one analysis, this was the point at which ‘the dimension of this problem changed’ and ‘the affair exploded, particularly in relation to the media’.⁵

Clearly, there was considerable confusion over whose responsibility it was to negotiate and resolve the various cases. The father of one schoolgirl in Lille called for clarification of the legal principles underpinning the affair: ‘If the State decides that the headscarf is prohibited at school, I will agree. It is the State. But the teachers cannot decide that it is forbidden.’ His appeal was supported by Abdsamad Aïfoute, president of the Montpellier section of the Association of Islamic Students in France:

The government must decide its position very soon. This problem concerns all school-age children. It’s ridiculous to prevent them from attending school when nothing in the [school rules] forbids them to wear the Islamic headscarf.⁶

On 23 October, the teaching and administrative staff of the Creil school wrote to the Minister for National Education, Lionel Jospin, asking him to ‘express a clear opinion on a question which has gone national in order to restore calm to the school.’⁷

On 4 November, Jospin sought the opinion of the Conseil d’État, France’s highest administrative court, whose function is to advise the government on legislative and administrative matters,⁸ on whether ‘the wearing of signs of affiliation to a religious community is or is not compatible with the principle of secularism.’⁹

B Legal opinion of the Conseil d’État

After three weeks of deliberations, the Conseil d’État delivered its opinion on 27 November 1989, entitled ‘The wearing of signs showing affiliation to a religious community (Islamic headscarf)’. In summary, the Conseil d’État ruled that wearing religious signs such as the Islamic headscarf was ‘not by itself incompatible with the principle of secularism, insofar as it constitutes the exercise of freedom of expression and freedom of manifestation of religious beliefs’. Accordingly, students could wear ‘signs of religious affiliation’ in public schools without compromising the principles of secularism or secular public education and wearing the headscarf could not, in isolation, lead to a student’s suspension or expulsion.

However, the Conseil d’État noted certain restrictions on the exercise of the students’ freedoms. The freedoms could be limited if the signs of religious affiliation, by their ‘ostentatious or protesting’ character or by the conditions in which they were worn,

⁴ Élisabeth Chikha, ‘Chronologie’ (1990) 1129 *Hommes et Migrations* 1, 2.

⁵ Fabien Collet, *La Laïcité, une doctrine de l’Éducation nationale* (Diplôme d’Études Approfondies (Administration publique) thesis, Université des Sciences sociales de Grenoble, 1995) 17.

⁶ Monique Glasberg, Vincent Albinet and François Wenz-Dumas, ‘Le choc de l’Islam sur l’école de la République’, *Libération* (France), 21 October 1989.

⁷ Chikha, above n 4, 3.

⁸ The Conseil d’État has both a compulsory and an optional consultative function. In accordance with its optional consultative function, the government may seek the Conseil d’État’s opinion on a legal problem which it wishes to have clarified, as occurred in relation to the affair of the headscarf: Conseil d’État, ‘Conseiller le gouvernement’. Conseil d’État website <www.conseil-etat.fr/cde/fr/conseiller> at 29 June 2009.

⁹ Conseil d’État Assemblée Générale (Section de l’intérieur), *Port de signes d’appartenance à une communauté religieuse (foulard islamique)*, Avis No 346893, 27 November 1989, 1. Conseil d’État website <www.conseil-etat.fr/cde/media/document//avis/346893.pdf> at 27 June 2009.

constituted an act of pressure, provocation, proselytism or propaganda, jeopardised the dignity or freedom of the students wearing the signs or of other students or staff, compromised health or safety, disrupted teaching activities or disturbed order and the normal operation of the school.¹⁰ The list of limitations to the students' freedom of expression and freedom of religious belief established that secularism was to be understood in conjunction with these freedoms. In practice, respect for both secularism and freedom of religion was to be a balancing act and establishing the balance would be one of the most difficult and contentious issues in the affair of the headscarf.

The legal opinion gave no indication of how schools should identify religious signs which might be considered 'by their nature [...] ostentatious' or the circumstances in which these signs might constitute 'an act of pressure, provocation, proselytism or propaganda'. However, it noted that the attitudes and behaviour of students wearing the religious signs to school were to be important issues in deciding these questions.

The legal opinion also stated that these matters were to be negotiated by schools on a case-by-case basis, rather than decided at a national level. In this way, the Conseil d'État clearly indicated its preference for each incident to be resolved at a local level, rather than in accordance with a strict set of national guidelines.

The Conseil d'État's legal opinion was greeted with mixed responses. It was criticised for appearing to support teachers and students alike by affirming the respective positions taken by Education Minister Jospin, the students, school principals and teachers, or at least not contradicting the public position of either side.¹¹ This, as one article observed, relaunched the 'soap opera' in Creil.¹² There was also some concern that the Conseil d'État had not defined either secularism or terms such as 'ostentatious', 'pressure', 'provocation', 'proselytism' or 'propaganda', despite their importance as criteria by which a religious sign could be assessed.

Not all of the responses to the opinion were negative. English legal academic Sebastian Poulter observed approvingly that the Conseil d'État achieved '[a] balanced and sensible compromise [...] in a tense and complex situation through the application of legal principles relating to human rights'.¹³

Meanwhile, the three Creil schoolgirls were still isolated in their school library.¹⁴ On 2 December, sisters Leila and Fatima returned to school without their headscarves and without offering any explanation for the reversal of their position. It soon became public knowledge that King Hassan of Morocco had approached the girls' family and on the previous evening had summoned the two sisters and their father (who was of Moroccan origin) to the consulate in Paris to request that the girls stop wearing their headscarves.¹⁵ The third girl, Samira, whose family was Tunisian, eventually returned to school without her headscarf on 26

¹⁰ Ibid 5.

¹¹ Bronwyn Winter, 'Learning the Hard Way: the debate on women, cultural difference and secular schooling in France' in John Perkins and Jürgen Tampke (eds), *Europe: Retrospects and Prospects* (1995) 203, 204.

¹² 'Le foulard à la carte', *L'Humanité* (France), 29 November 1989.

¹³ Sebastian Poulter, 'Muslim Headscarves in School: Contrasting Legal Approaches in England and France' (1997) 17 *Oxford Journal of Legal Studies* 43, 59.

¹⁴ Chikha, above n 4, 9.

¹⁵ Ibid 11.

January 1990.¹⁶ The first series of events in the affair of the headscarf, at least as far as these three students were concerned, had lasted just four months.¹⁷

Over the following weeks, the media and public interest in the affair began to subside. In the majority of cases, schools appeared to be dealing with matters on an individual basis and ‘a process of dialogue and a spirit of tolerance resulted in agreements which were acceptable to all parties.’¹⁸ It was these sorts of local resolutions which the Conseil d’État had indicated should be the desired outcome of the process of dialogue to be undertaken in each case.

C Affair of the headscarf in the 1990s

Following parliamentary elections in March 1993, a conservative coalition government assumed office in the wake of the former Socialist-led government. As one article noted, this electoral victory marked the point at which ‘the official attitude toward Muslims [...] changed.’ Illegal immigrants increasingly became targeted in police ‘round-ups’ and Algerians and other North Africans suspected of being or sympathising with fundamentalist militants were detained, sometimes without charge.¹⁹

In September 1994, the new conservative Education Minister François Bayrou ‘[reignited] the controversy’ by announcing in a magazine interview that he intended to ban the wearing of headscarves in public schools.²⁰ On 29 September 1994, he issued a ministerial circular²¹ which bore the unambiguous title of ‘Wearing of ostentatious signs in schools.’ The circular recommended that schools take a firm stand, warning that the ‘secular and national ideal [which] is the very essence of the Republican school’ and the foundation of its duty to provide civic education was under threat from

the presence and the proliferation of signs so ostentatious that their signification is precisely to separate certain students from the common rules of the school. These signs are, in themselves, elements of proselytism, particularly when they accompany challenges to certain classes or certain subjects, when they involve the safety of students or when they lead to disruptions to the collective life of the school.²²

Bayrou’s circular urged school principals to redraft their schools’ internal regulations to include a ‘prohibition on these ostentatious signs’ and provided draft wording to serve as a model for the amended internal regulations. The suggested wording noted that although students were permitted to wear ‘discreet signs manifesting their personal commitment to beliefs, notably religious beliefs’, they were forbidden to wear ‘ostentatious signs, which

¹⁶ Luis Cardoso, ‘Au Coeur de “l’Affaire”’: Un Professeur de Creil témoigne’ (Paper presented at the ‘The Veil’ conference, University of North Carolina, USA, 2000). Conference website <www.unc.edu/depts/europe/conferences/Veil2000/articles/coeur1.htm> at 26 June 2009.

¹⁷ According to Bloul, this first controversy continued for three months: Rachel Bloul, ‘From Moral Protest to Religious Politics: Ethical Demands and Beur Political Action in France’ (1998) 9 *The Australian Journal of Anthropology* 11, 15.

¹⁸ Poulter, above n 13, 60.

¹⁹ ‘Ban on Islamic scarves renews debate’, *The Tennessean* (Nashville, USA), 15 September 1994, 3A.

²⁰ *Ibid.*

²¹ Ministerial circulars are issued to explain and clarify the application of legislation or jurisprudence in the relevant portfolio area.

²² ‘Port de signes ostentatoires dans les établissements scolaires’ (1994) 35 *Bulletin officiel de l’Éducation nationale* 2528, 2528-9.

constitute in themselves elements of proselytism or discrimination'. In addition, certain behaviours were prohibited:

provocative attitudes, failure to comply with the obligations of participation and safety, and behaviours likely to constitute pressure on other students, disrupt the progress of teaching activities or disturb order in the school.²³

Although the circular did not refer to specific religious signs, it was widely understood to refer to the Islamic headscarf. Its effect was to 'rebrand' the headscarf, confirming that it could now be regarded as an ostentatious and divisive sign which constituted in itself an element of proselytism and discrimination. In so doing, the circular broadened the potential application of the Conseil d'État's 1989 legal opinion, which had stated that 'the wearing by students of [religious signs] is not by itself incompatible with the principle of secularism'. However, once the signs could be identified as 'ostentatious' or as constituting an act of pressure, provocation, proselytism or propaganda, they could be prohibited.

Bayrou's circular also afforded support for those schools still wishing to ban the headscarf. As became clear from the subsequent legal decisions, a number of schools immediately incorporated the circular's draft wording into their internal regulations and then applied the regulations to expel students wearing the headscarf. So, for example, in late 1994, two Strasbourg secondary schools amended their internal regulations to incorporate the wording suggested by Bayrou's circular. The schools then requested that all Muslim girls wearing headscarves to school remove them or risk expulsion. Dozens refused and the schools suspended at least 38 girls, many of whom had been wearing the headscarves to school for many months, if not years. After their expulsions had been confirmed, 18 of these students commenced appeals against the expulsion decisions in Strasbourg's administrative tribunal.²⁴

D The 'headscarf' legal cases

During the 1990s, other appeals brought by expelled schoolgirls were starting to be heard in France's administrative courts. Around half a dozen 'headscarf cases' were heard each year between 1992 and 1995, although by the end of the 1995 school year the controversy 'appeared to have died down and the tide had turned in favour of the Muslim girls.'²⁵ However, the number of legal proceedings surged in 1996 and 1997, with administrative courts across the country hearing 38 and 21 cases respectively.²⁶

The case law shows that the courts consistently ruled that wearing the headscarf was not inconsistent with secularism. More often than not, the cases were decided in the schoolgirls' favour, although for the girls themselves this was sometimes a case of 'winning a battle but losing the war'. The outcomes of the cases heard in the busiest years of 1996 and 1997 are worth noting: in the overwhelming majority (around 83%) of these cases the schoolgirls' expulsions were overturned by the courts, while in the remaining cases (approximately 15%)

²³ Ibid 2529.

²⁴ Michel Soussé, 'Le tribunal de Strasbourg annule l'exclusion de 18 lycéennes qui portaient le foulard', *Libération* (France), 21 April 1995.

²⁵ Cynthia DeBula Baines, 'L'Affaire des Foulards – Discrimination or the Price of a Secular Public Education System?' (1996) 29 *Vanderbilt Journal of Transnational Law* 303, 307.

²⁶ The cases can be obtained from legal archives on Legifrance, a French government website providing access to legislation and case law. Legifrance website <www.legifrance.gouv.fr> at 14 June 2009.

the expulsions were upheld. However, it should be noted that most of the cases in which expulsion decisions were overturned tended to involve a single student, while those cases in which the expulsions were upheld often involved groups of students. Taking this factor into account, around 60% of the students had their expulsions overturned and were entitled to return to school, while a sizeable minority of the students – 40% – were unsuccessful in their appeals.

The case law provides some examples of judicial reasoning in relation to the wearing of the headscarf in public schools. On the whole, the courts considered and attempted to balance the various competing priorities. A relatively consistent set of principles emerged from the body of case law, based on the Conseil d'État's legal opinion. In the most straightforward of cases, a student was not to be expelled from school simply for wearing the headscarf. So, for example, in one 1996 case, a school principal had expelled a student whose return to school he had opposed while she was wearing the headscarf on the sole basis that 'the wearing of this headscarf is by its nature incompatible with the principle of secularism.' The Conseil d'État ruled that this reason was incorrect in law and overturned the girl's expulsion.²⁷

However, an expulsion could be justified if, in addition to wearing the headscarf, a student had engaged in political acts or activism, disturbed public order or teaching activities in the school by, for example, distributing brochures,²⁸ circulating petitions or participating in public protests,²⁹ or had breached her obligations to attend all classes or obey a teacher's instructions.³⁰ Such acts were considered to have introduced religious or political influences into the school or disturbed public order in the school and accordingly were found incompatible with secularism in public education. The Conseil d'État was particularly likely to uphold the expulsions of students who had attempted to proselytise to other students or who had actively participated in public protests against school prohibitions.

The number of cases heard by the administrative courts dwindled to a handful in the years between 1999 and 2003. No 'headscarf' cases were decided in 2004 or 2005, although the period from 2006–08 saw a moderate surge of 17 cases appear before the courts.

III THE DOCTRINE OF SECULARISM IN FRANCE

A Historical development of secularism

Contrary to some views, the position taken by the French government and public schools was not simply a reflection of anti-Muslim sentiment nor even a recently-devised attempt to target the Islamic headscarf. Rather, it represents a contemporary manifestation of an historical policy of secularism whose original purpose was to prevent religious and political ideologies and activities from influencing public school students and curricula.

Indeed, from an historical perspective, secularism in France was developed to counter the formidable power of the established Catholic Church and to free the State's public services, particularly its public schools, from the involvement and influence of the Church and clergy.

²⁷ Conseil d'État, No 170343, 20 May 1996.

²⁸ Cour administrative d'appel de Lyon, No 96LY02608, 19 December 1997.

²⁹ Conseil d'État, No 170207 170208, 27 November 1996.

³⁰ Conseil d'État, No 159981, 10 March 1995.

Over many centuries, the Catholic Church had traditionally been responsible for education and had played an important role in administering schooling and maintaining public order in France. The Church and political institutions maintained close relations, as part of which Church officials were paid public functionaries, and the institutions of each power supported the other in a liaison of mutual advantage.³¹

In 1789, the events of the Revolution led to the *Declaration of the Rights of Man and the Citizen*, which weakened the power of the Catholic Church as much as other institutions of the Ancien Régime by promoting the sovereignty and equality of the French people. In line with Enlightenment philosophy, the Declaration listed ‘inalienable rights’ held by citizens by virtue of their being human, including freedom of religious belief, protected by article 10 which states: ‘No-one may be disturbed on the basis of his or her beliefs, even religious beliefs, as long as their manifestation does not interfere with the public order established by the law.’³²

Although relations between the Catholic Church and the State were fraught with conflict over the course of the 19th century, the Church continued to play a key role in maintaining social stability and national loyalty in France. Religious education still had a place in the school curriculum under Napoléon and the clergy were salaried employees of the State. Indeed, the move towards secularism in education was prompted by the increasing numbers of clergy teaching in public schools. In 1879, ‘on the eve of the great secular laws, out of the 37,000 clerical teachers, half worked in the public primary schools.’³³

The principal initiator of these secular laws was Jules Ferry, Minister for Public Instruction from 1879-83. His public education reforms, which were carried out in stages to facilitate their acceptance, implemented three main ideals: the equality of all children through the provision of free education; the right of all children to receive an education, which became a compulsory obligation for the students and a corresponding duty imposed on the State; and finally, secularism in public education, replacing ‘religious and moral instruction’ in the public school curriculum with ‘civic and moral instruction’.³⁴

Increasingly hostile, Church-State relations in France were brought to a head by the Law of 9 December 1905.³⁵ This law, which became known as the Separation Law, abrogated the 1801 Concordat negotiated between Napoléon and the papacy which had regulated Church-State relations and the status of religious orders in France for more than a century, and introduced a range of administrative and procedural measures which effectively entrenched Church-State separation.³⁶ The 1905 Separation Law has become incontrovertibly linked

³¹ Carlton J H Hayes, *France: a Nation of Patriots* (1974) 32.

³² Article 10, *La Déclaration des Droits de l'Homme et du Citoyen*, 26 August 1789. French President's website <www.elysee.fr/download/index.php?mode=lapresidence&filename=Declaration_droits_de_lhomme.pdf> at 7 July 2009.

³³ Louis Caperan, quoted in Collet, above n 5, 9.

³⁴ W D Halls, *Education, Culture and Politics in Modern France* (1976) 7.

³⁵ Law of 9 December 1905 relating to the Separation of Churches and State. Ironically, since he is forever associated with French secularism in public education, the 1905 Separation Law was not passed by Jules Ferry, who died in 1893, but by Bienvenu Martin, then-Minister for Public Instruction. His full title at the time was Minister for Public Instruction, the Arts and Religions (my emphasis): ‘Documents Parlementaires – Chambre’, 136. Assemblée Nationale website <www.assemblee-nat.fr/histoire/eglise-etat/sommaire.asp> at 20 February 2004.

³⁶ Hayes, above n 31, 99-100.

with secularism in France, although the word ‘secularism’ appears nowhere in its provisions. Nonetheless, the law realised Jules Ferry’s desire for ‘the separation of these two worlds, the civil world and the religious world.’³⁷

B *Rights and duties in secularism*

At the time it was adopted, the Separation Law reflected the view of its legislators that the doctrine of secularism entailed more than administrative, financial or political separation from the Church: it was also bound up with rights and duties. Transcripts of parliamentary debates at the time of its adoption reveal heated disagreements dividing the ranks of parliamentarians.³⁸ It is clear from the debates that concern for fundamental rights and freedoms played an important part in the arguments presented by both sides of Parliament,³⁹ accompanied by concern for public order and the social unrest which opponents of secularism believed would follow Church-State separation and its ‘violent rupture with all [...] traditional French politics’.⁴⁰

Although it is associated with secularism, the Separation Law also enshrined guarantees of freedom of conscience and belief and freedom of religious expression. However, the law provided that the State could restrict these freedoms in the interests of public order, as is evident from article 1 of the Separation Law: ‘The Republic guarantees freedom of conscience. It guarantees the free exercise of religion under the sole restrictions decreed hereafter in the interests of public order.’⁴¹ Thus, from its earliest days, the doctrine of secularism has represented more than the separation of Churches and State – according to one of its foundation documents, it has also expressly upheld the right to religious freedom.

The principle of secularism in education was reaffirmed in the preamble to the 1946 *French Constitution* (incorporated into the current 1958 *Constitution*): ‘The provision of free, public and secular education at all levels is a duty of the State.’⁴² The 1958 *Constitution* later entwined rights and duties, stating in article 1: ‘France is an indivisible, secular, democratic and social Republic. It shall guarantee equality before the law of all citizens without distinction according to origin, race or religion. It shall respect all beliefs.’⁴³

In 1989, the Conseil d’État stated in its legal opinion that ‘the principle of secularism necessarily implies respect for all beliefs’, basing this claim on article 10 of the *Declaration of the Rights of Man and the Citizen*. The Conseil d’État also quoted from the Separation Law which states that ‘the Republic guarantees freedom of conscience.’ The Conseil d’État further emphasised that freedom of belief ‘must be regarded as one of the fundamental

³⁷ Speech given by Jules Ferry, Saint-Quentin, 16 November 1871, quoted in Collet, above n 5, 11.

³⁸ ‘Annales de la Chambre des Députés’, 21 March 1905, 1244; also ‘Annales de la Chambre des Députés’, 3 April 1905, 1494.

³⁹ Georges Berry in ‘Annales de la Chambre des Députés’, 21 March 1905, 1238; also Gabriel Deville in ‘Annales de la Chambre des Députés’, 23 March 1905, 1296.

⁴⁰ M. Ribot in ‘Annales de la Chambre des Députés’, 3 April 1905, 1494.

⁴¹ Article 1, Law of 9 December 1905 relating to the Separation of Churches and State.

⁴² *Le Préambule de la Constitution du 27 octobre 1946*. French President’s website <www.elysee.fr/download/index.php?mode=lapresidence&filename=Preambule_de_la_constitution.pdf> at 27 July 2009.

⁴³ Article 1, *La Constitution de 1958*. French President’s website <www.elysee.fr/download/index.php?mode=lapresidence&filename=Constitution_1958.pdf> at 27 July 2009.

principles recognised by the laws of the Republic.’ This freedom was to be interpreted and exercised alongside other rights and obligations which were also to be respected. According to the Conseil d’État, these rights and obligations included secularism.

More recently, French Parliaments have legislated to enshrine rights and duties of the State and students respectively in relation to public education.⁴⁴ So, for example, article L141-1 of the 2000 *Code of Education* specifically incorporates and reaffirms the following constitutional principles:

The State shall guarantee equal access for children and adults to teaching, training and the acquisition of cultural knowledge and skills; the organisation of free, public and secular education at all levels is a duty of the State.

In addition, the *Code* sets out certain rights and responsibilities which attach to public school students. Article L141-2 of the *Code* goes some way towards protecting freedom of religion, although it also provides for the possibility of State limitations to this freedom: ‘The State shall make all necessary arrangements to guarantee freedom of religion and religious instruction to public school students.’

Student obligations are stated in article L511-1 as follows: ‘The obligations of students consist of carrying out the tasks inherent to their studies; these include participation and respect for the rules regarding the operation and the collective life of schools’, while article L511-2 sets out the students’ rights:

In lower secondary and secondary schools, pupils are acknowledged to have, while respecting pluralism and the principle of neutrality, freedom of information and freedom of expression. The exercise of these freedoms must not interfere with teaching activities.

These constitutional and legislative guarantees of freedom of conscience and freedom of religious expression can tend to be overlooked in debates over the interpretation of secularism in the affair of the headscarf. Yet it should not be overlooked that the Conseil d’État acknowledged these guarantees in its 1989 legal opinion and that even according to its foundation texts, the principle of secularism was intended to encompass respect for freedom of belief.

C The 2004 law on secularism

In 2004, the legal regime governing the wearing of the headscarf changed significantly when the French Parliament enacted legislation formally prohibiting the wearing of any religious signs in public schools. The legislation was based on recommendations presented to the government by the Commission to Consider the Application of the Principle of Secularism in the Republic, headed by Bernard Stasi, a former French and European parliamentarian and then-Ombudsman for the Republic. Over six months, the Commission interviewed members of the community during more than 100 public hearings and stimulated widespread debate on ‘the question of secularism’, before handing down its report in December 2003.

⁴⁴ See Law No 89-486 of 10 July 1989 on Direction in Education and Decree No 2000-549 of 15 June 2000 which substantially amended the 1989 law.

In the report's preamble, the Commission emphasised the fundamental importance of secularism, calling it a 'founding value and essential principle' upon which the Republic was constructed. One recommendation which attracted considerable publicity called for a new law on secularism to be drafted to include the following provision:

In respect for freedom of belief and for the particular nature of private schools, clothing and signs manifesting a political or religious affiliation shall be prohibited in primary and secondary public schools. Any penalty must be proportionate and applied after the student has been invited to comply with his or her obligations.⁴⁵

The Commission explained that the provision would apply to 'visible signs, such as large crosses, headscarves, or [Jewish skullcaps]' but would not extend to smaller 'discreet signs' such as medallions or pendants consisting of small crosses, stars of David, Hands of Fatima or miniature Qur'ans.⁴⁶ The examples of religious signs drawn from the three major religions practised in France – Roman Catholicism, Judaism and Islam – were a clear indication that the law was intended to apply to followers of all religions.

The draft legislation, entitled 'Bill concerning the application of the principle of secularism, the wearing of signs or clothing manifesting a religious affiliation in public schools, lower secondary and secondary schools', was passed with overwhelming bipartisan support and greeted with applause across the benches. However, extensive protests were held in France and other countries across Europe to mark the concerns of many in the community about the enactment of the new law.⁴⁷

The new law inserted the following provision into the *Code of Education*:

Art. L. 141-5-1 – In primary, lower secondary and secondary public schools, the wearing of signs or clothing by which students visibly manifest a religious affiliation is forbidden. The internal regulations note that the commencement of disciplinary proceedings shall be preceded by dialogue with the student.⁴⁸

The prohibition applies to all visible signs which make the wearer's religious affiliation immediately identifiable, meaning that the wearing of Islamic headscarves, Jewish skullcaps and oversized Christian crosses is now forbidden in public schools. Students wearing those signs are liable to be suspended or expelled.

⁴⁵ Commission de réflexion sur l'application du principe de laïcité dans la République, *Rapport au Président de la République* (2003) 58. Documentation française website <www.ladocumentationfrancaise.fr/brp/notices/034000725.shtml> at 27 July 2009.

⁴⁶ Ibid 58-9.

⁴⁷ In January 2004, tens of thousands of Muslims marched in protest against the proposed law on secularism in Paris, Marseille, Lille and other cities across France, while other protests were held in London, Berlin, Stockholm, Brussels, Cairo and Bethlehem: 'Mobilisation contre le projet de loi sur la laïcité', *Le Monde* (France), 17 January 2004; Jean-Paul Dufour, 'Forte mobilisation à Lille', *Le Monde*, 19 January 2004; Jon Henley, 'French MPs reappraise plan to outlaw veils', *The Guardian* (UK), 20 January 2004; and 'France steps closer to Muslim headscarf ban', *The Guardian*, 30 January 2004.

⁴⁸ Article 1, Law No 2004-228 of 15 March 2004 applying the principle of secularism to regulate the wearing of signs or clothing manifesting a religious affiliation in public schools, lower secondary and secondary schools.

D French secularism in the European Court of Human Rights

In its report, the Stasi Commission had also considered the possibility that the law on secularism would conflict with article 9 of the Council of Europe's *Convention for the Protection of Human Rights and Fundamental Freedoms* ('the European Convention'),⁴⁹ which protects the right to freedom of religion and freedom of religious manifestation. However, it recognised that the European Court of Human Rights tends to acknowledge 'the traditions of each country, without seeking to impose a uniform model for relations between Church and State', and leaves each State a 'margin of appreciation' with regard to Church-State relations. According to the Commission, '[t]he European Court in Strasbourg will protect secularism if it is a fundamental value of the State' and, in addition, 'permits limitations to freedom of expression in the public services, particularly if it is a question of protecting minors from external pressures.'⁵⁰

At this stage, the European Court of Human Rights has not been required to consider whether the 2004 law on secularism might be contrary to the article 9 right to freedom of religion.

However, on 4 December 2008, the court delivered its decisions in relation to two French 'headscarf cases',⁵¹ both arising from events which took place before the entry into force of the 2004 law on secularism. In both cases, the court found in favour of the French government and school authorities, confirming the expulsions of the two Muslim schoolgirl applicants as a result of wearing the headscarf.

The two cases arose from similar events which occurred at around the same time and in the same school: two Muslim schoolgirls, aged 11 and 12 years old, wore their headscarves to physical education classes, were asked on a number of occasions to remove them, refused to do so and were expelled from the school. The girls' families appealed against the expulsion until they had exhausted all available domestic legal options. Both girls then complained to the European Court of Human Rights that their expulsions violated article 9 of the European Convention protecting their right to freedom of religious expression and article 2 of Protocol No 1 to the European Convention protecting their right to education.

The court considered the two complaints together. It found that the school's ban on wearing the headscarf during physical education and sports classes and the girls' subsequent expulsions constituted a restriction on the exercise of their right to freedom of religion. However, it noted that article 9(2) of the European Convention provided that a person's freedom to manifest his or her religion might be subject to certain limitations that are 'prescribed by law and are necessary in a democratic society in the interests of public safety, [to protect] public order, health or morals, or for the protection of the rights and freedoms of others.'

After considering the Conseil d'État's 1989 legal opinion, ministerial circulars and the relevant case law, the court accepted that the restriction had a sufficient legal basis in

⁴⁹ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS No 005 (entered into force 3 September 1953).

⁵⁰ Commission de réflexion sur l'application du principe de laïcité dans la République, above n 45, 20-1 and 59.

⁵¹ *Kervanci v France*, No 31645/04, ECHR, 4 December 2008 (volume still unallocated) and *Dogru v France*, No 27058/05, ECHR, 4 December 2008 (volume still unallocated).

domestic law and so could be regarded as having been ‘prescribed by law’. Furthermore, the restriction mainly pursued the legitimate aims of protecting the rights and freedoms of others and protecting public order.⁵² The court noted that article 9 of the European Convention did not protect every act motivated or inspired by a religion or belief. In a democratic society in which several religions co-existed in the same population, it might be necessary to restrict religious freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.⁵³

In the circumstances, the court considered that it was not unreasonable to conclude that wearing the headscarf was incompatible with sports classes for reasons of health or safety. Moreover, the various disciplinary proceedings against the schoolgirls fully satisfied the duty to undertake a balancing exercise of the various interests at stake. Finally, the penalty of expulsion from school did not appear disproportionate. The court found that the question of whether the schoolgirls had overstepped the limits of their right to express and manifest their religious beliefs on the school premises ‘falls squarely within the margin of appreciation of the State.’

The court further noted that secularism was a constitutional principle and a founding principle of the French Republic, the protection of which appeared to be of primary importance, particularly in schools. An attitude which failed to respect that principle would not necessarily be covered by the freedom of religious manifestation and would not be protected by article 9 of the European Convention.⁵⁴

Accordingly, having regard to the circumstances of the cases and to ‘the margin of appreciation that should be left to the States in this domain’, the court concluded that the restriction in question was justified as a matter of principle and proportionate to the aim pursued. As a result, it ruled that there had been no violation of article 9 of the European Convention.⁵⁵

IV CONCLUSIONS

A Legislating against clothing

One issue that arises in the context of a ban on wearing the headscarf is the practical difficulty of legislating against everyday items such as clothing or jewellery. For example, it is arguably difficult to determine when a headscarf might be a religious or cultural sign, as opposed to an item of clothing with no particular significance.

The question of distinguishing between an Islamic headscarf and a headscarf with no religious characteristics, or indeed between an Islamic headscarf and other religious items of clothing, was raised on a number of occasions in France. For example, one Muslim girl suspended from her school in Avignon for wearing the headscarf noted that she had worn it to school since 1982 and that this was the first time she had been penalised for doing so. Her father commented: ‘If she had been preaching Islam I would understand, but this, it’s just a

⁵² *Kervanci v France and Dogru v France*, [48], [59]-[60].

⁵³ *Ibid* [61]-[62].

⁵⁴ *Ibid* [72].

⁵⁵ *Ibid* [73]-[78].

scarf...⁵⁶ Some Muslims also pointed out that devout Jewish and Christian women wear the headscarf as well, and that the Virgin Mary herself is rarely portrayed without one.⁵⁷

Clearly, in the context of the affair of the headscarf, the headscarf itself functioned as something more than an item of clothing. Its symbolic nature was evident in the compromise solution proposed to the schoolgirls in Creil: their headscarves would be accepted in the school courtyard and corridors on condition that they were lowered to the girls' shoulders during classes.⁵⁸ In other words, the powerful symbolism of the headscarf could be countered with a symbolic gesture of equal or greater power.

Sometimes it appeared to depend on what the headscarf looked like. In one school, the principal persuaded a schoolgirl to wear a headscarf 'à la provençale'. According to one of the girl's teachers, she used to wear 'one [headscarf] with little ducks on it and another with flowers. It was pretty.'⁵⁹ Clearly, the schoolgirl's headscarf could be more easily accepted (or overlooked) when it appeared to be a rural-style or fashionable headscarf displaying flowers or animals, rather than a black headscarf which might be construed as consistent with religious and political fundamentalism.

Moreover, how did the headscarf compare with other religious signs or clothing such as the cross or the Jewish kippa, or skullcap? In 1994, Education Minister François Bayrou's circular distinguished between 'discreet signs' worn by students which manifested 'their personal commitment to [religious] beliefs.' It was generally assumed that jewellery displaying a Christian cross or crucifix was likely to be considered discreet and therefore acceptable. Similarly, there was nothing to indicate that other religious clothing such as the kippa would be affected by the 1994 prohibitions. The Jewish community had been concerned since the early days of the affair that the kippa might constitute an 'ostentatious' sign.⁶⁰ They were reassured in 1989 by Education Minister Lionel Jospin, and again in 1994 when Prime Minister Édouard Balladur expressly assured Jewish leaders at a community dinner that the kippa did not have an 'ostentatious character.'⁶¹ Yet as Marceau Long, Vice-President of the Conseil d'État, asked in 1994: 'How can one say that the headscarf is ostentatious but that the kippa [or] the huge crosses or crucifixes which appear to be fashionable once again are not?'⁶²

Such contradictions highlight the difficulty of legislating against the wearing of items of clothing: where are the limits of such legislation and how are they to be monitored or enforced? These questions arose in France when the Stasi Commission handed down its report and recommendations on secularism in 2004. Commenting on the proposed law, Education Minister Luc Ferry speculated that in addition to religious signs, beards or

⁵⁶ Chantal Seignoret, "'C'est juste un foulard'", *La Croix* (France), 25 October 1989.

⁵⁷ 'À bas Rushdie, vive le foulard!' *L'Événement du Jeudi* (France), 19 November 1989.

⁵⁸ 'Quand l'islam fait école', *Le Quotidien de Paris* (France), 21 October 1989.

⁵⁹ Anne Fohr, 'École: la déchirure', *Le Nouvel Observateur* (France), 6-12 October 1994, 46.

⁶⁰ 'Le couvre-chef dans le judaïsme', *Les nouveaux Cahiers*, 1994, at 37, quoted in Dominique Le Tourneau, 'La laïcité à l'épreuve de l'Islam: le cas du port du "foulard islamique" dans l'école publique en France' (1997) 28 *Revue générale de Droit* 275, 294.

⁶¹ Philippe Bernard, 'Marceau Long s'interroge sur la validité de la circulaire Bayrou à propos du foulard islamique', *Le Monde* (France), 20 September 1994; also Henri Tincq, 'De l'autre côté du voile', *Le Monde*, 30 November 1994.

⁶² Bernard, above n 61.

bandanas worn by students might also be prohibited if they appeared to be ‘religious’: ‘As soon as anything becomes a religious sign, it will fall under this law.’⁶³ The Minister failed to speculate on the practical difficulties of identifying a beard or a bandana that might be a religious sign and of distinguishing them from ones that were not. Moreover, the debate has recently resumed in France over the question of whether to ban Muslim women from wearing the burqa or niqab in public places and whether Muslim women who cover themselves completely in public constitute an assault on secularism and women’s rights.⁶⁴

Similar issues have arisen in Australia. In November 2002, New South Wales member of parliament Fred Nile called for a ban on Muslim women wearing the chador (which consists of the headscarf and a long cloak covering the body) in public places in Australia for fear that they might be concealing weapons beneath their clothing. His call ignored the fact that in practice a range of other everyday clothing including trench coats and ponchos can also conceal weapons. More recently, in July 2009, a Muslim woman wearing a face-veil on a Sydney bus was approached by the bus driver and told to ‘remove her mask’. The woman accused the driver of discrimination and asked him what the difference was between what she was wearing and the swine flu masks that many people are currently choosing to wear.⁶⁵

B *Limiting judicial discretion*

Another issue is the question of how to construct a legal regime that protects rights and responds to a variety of needs and circumstances. Before 2004, the legal regime in France governing the wearing of the headscarf was based on the Conseil d’État’s 1989 legal opinion and its application by the administrative courts in each ‘headscarf’ case. In its opinion, the Conseil d’État had not ruled definitively either for or against wearing the headscarf. Rather, it had identified relevant constitutional and legislative provisions and extrapolated a set of guiding principles relating to secular public education, freedom of religion and the rights and obligations of students. When the courts applied these principles to the different circumstances of each case, a pattern of judicial responses and indeed protection emerged.

Overall, the ‘headscarf’ cases reflected an inclination on the part of the courts – and the law which they applied – to protect the education and religious freedom of Muslim schoolgirls wearing the headscarf, while also upholding principles of secularism by protecting the ‘public order’ which marked the limits of the students’ rights.

The courts ruled consistently that a student could not be expelled simply for wearing the headscarf or in the absence of a lawful ground. At the same time, they also applied the obligations which had been imposed on students to respect public order and observe their responsibilities to attend and participate in school classes and activities, and penalised students if these obligations were breached. As a result, as noted earlier in the paper, in those cases where expulsions were upheld, for the most part the students had at least participated actively in the events which led to their expulsion. By incrementally negotiating judicial responses to particular circumstances arising in the affair of the headscarf, the courts were

⁶³ Jon Henley, ‘Veil ban may extend to “religious” beards’, *The Guardian* (UK), 21 January 2004.

⁶⁴ ‘Port de la burka en France: des députés réclament une commission d’enquête parlementaire’, *Le Point* (France), 17 June 2009.

⁶⁵ Simon Santow, ‘Muslim woman “culturally raped” in veil bus row’, ABC News, 30 July 2009. ABC News website <www.abc.net.au/news/stories/2009/07/30/2641498.htm> at 31 July 2009.

contributing to the construction of a working definition of secularism which encompassed both rights and duties and adapting secularism to the specific challenges posed by significant numbers of the population who, while they were French, were also insisting on their right to be recognised as Muslims.

In practice, the legal cases appeared to function as a practical vindication of the key principles and indeed the flexibility advocated by the Conseil d'État in its 1989 legal opinion. The Conseil d'État had sought to balance a number of priorities, including freedom of religion and secularism, while also providing principles to guide the application of the law in accordance with the circumstances of each case. Its caution and apparent imprecision enabled restrictions to the wearing of religious signs such as the headscarf to be interpreted broadly and applied flexibly. The outcomes of the cases, in which the majority of the students' expulsions were overturned, reflected the equitable nature of the Conseil d'État's legal opinion. A more narrowly-defined definition of secularism prohibiting the display of all religious symbols, such as that proposed by Education Minister Bayrou in 1994, would have fettered the courts' attempts to respect the complex mesh of principles articulated in the Conseil d'État's 1989 legal opinion.

Yet in 2004 the law on secularism effectively redefined secularism in a narrower sense, restricting and penalising students' choices in relation to clothing or signs which might be both visible and religious, with potentially serious consequences for the students' right to freedom of religious expression. In doing so, the law radically changed the previous legal regime, imposing an outright ban on the wearing of visible religious signs and eliminating the degree of judicial discretion and flexibility which administrative courts could exercise in assessing the circumstances of each case and reaching their decisions. Under the new legislation, Muslim girls wearing the headscarf may be expelled from school whether or not they have engaged in political or proselytising activities, disrupted teaching or disturbed public order.

In this way, the 2004 law on secularism has changed the delicate judicial balance which French administrative courts, particularly the Conseil d'État, had worked to achieve throughout the 1990s. Furthermore, the law compromises rights which secularism and the Republic are supposed to uphold. As a result, it has significant implications for the doctrine of secularism itself in France.

C Forms of secularism

Finally, this paper returns to the issue of secularism as a formal policy and cultural and community value. Clearly, the affair of the headscarf in France was an opportunity to consider very carefully the operation and institutions of secularism in a modern context. There was broad general agreement that secularism was an important principle in contemporary France, although many people were nonetheless unsure of how to interpret and apply secularism and secular values to the circumstances of the affair of the headscarf.

There was also considerable disagreement over how the doctrine of secularism should be understood and its implications: was it 'hardline' secularism or a flexible variety? 'Hardline' secularism would require that strict neutrality of the public service be respected by prohibiting all public school students from manifesting any religious beliefs and limiting all manifestations of religion to those displays or practices which could take place in the

students' private lives or on weekends. In contrast, a more flexible interpretation of secularism would provide a forum in which all religious beliefs could be acknowledged and expressed equally. This variety of secularism would accept all beliefs, recognising that their expression in the form of an outward religious sign – such as the headscarf – was a matter of individual right.⁶⁶

Certainly, there were other factors at play in the affair of the headscarf which meant that it was not simply a conflict between secular values and freedom of religious expression. In 1989, Jospin noted some of these factors: the emergence of 'a powerful anti-Arab feeling' stemming from the Algerian war of independence; the controversial issue of immigration; socio-economic problems such as unemployment and inadequate housing for many Muslim people; and, finally, 'the question of French national identity and the place that foreigners can have in it'. According to Jospin, the fact that the French community 'could become so inflamed about [the affair of the headscarf was] most certainly a sign of unease' about issues such as these.⁶⁷

It is worth noting that in 1905, the heated parliamentary debates which took place when the Separation Law was passed were also based on deep concern that Church-State separation would weaken or even destroy the Republic. Perhaps the unease arising from the affair of the headscarf reflected a more contemporary concern that aspects of modern secularism were proving inadequate to the challenges of a modern French Republic.

What does the affair of the headscarf mean for Australia? In many ways, the situation in Australia is very different from that in France: we have no formal legislative or constitutional separation of Church and State, nor is secularism an important social, cultural and community value in the way that it is in France. Moreover, legislation such as the 2004 law on secularism could not be passed in Australia, since s 116 of the *Constitution* prohibits our Commonwealth Parliament from legislating on matters of religion.

However, like France, we have no established or State religion. In the 2006 Census, although the most common religious affiliations reported were Catholic (26%) and Anglican (19%), 19% of the population also stated that they had no religion, an increase from 16% in 2001.⁶⁸ Many Australians would feel comfortable with a claim that we are a secular State. Indeed, in 2007, a booklet published by the Australian government to inform aspiring citizens about Australian culture stated that this country has a secular government and that freedom of religion and secular government are values which are important in modern Australia.⁶⁹

If this is so, how important is the doctrine of secularism to Australian culture and the Australian community? Do we believe that secular values should be protected? If so, how and what would be the extent of any such protection? What form of secularism do we want in Australia? Should it be clearly articulated and understood? Perhaps in practice a complex and abstract principle such as secularism works best when it remains undefined and when it is not restricted by concrete examples of what it is or is not, the circumstances in which it

⁶⁶ Le Tourneau, above n 60, 289.

⁶⁷ Lionel Jospin, 'Now or Never' in Anne Corbett and Bob Moon (eds), *Education in France: Continuity and Change in the Mitterand Years, 1981-1995* (1996) 76-7.

⁶⁸ Australian Bureau of Statistics, 'Religious Affiliation: Main responses for Australia', *2006 Census QuickStats: Australia*.

⁶⁹ Commonwealth of Australia, *Becoming an Australian citizen* (2007) 5-6.

should or should not apply or, as in the affair of the headscarf in France, the particular religious signs with which it is or is not compatible.

Similarly, how can we best enshrine freedom of religion in a way that provides meaningful protections to those practising a wide variety of religions and beliefs in the community? What restrictions would we impose on the rights to freedom of religion and freedom of religious expression? Should we allow a ‘margin of appreciation’ to apply to certain manifestations of religious freedom, or to any restrictions on such freedom?

In considering these questions, it may be helpful to look to and learn from the events of the affair of the headscarf in France. Should the affair be regarded negatively, as a suppression of the schoolgirls’ right to manifest their religious beliefs by wearing the headscarf, or positively, as a protection of pluralism and secular cultural values? In France, these events constituted a modern challenge for secularism, signalling that there were still important questions to be asked about the nature and role of contemporary secularism in society. In Australia, just as in France, these are also questions to which the government and the people must respond and the response must not divide people along lines of religion, ethnicity, socio-economic status or politics in the name of ‘social peace and national cohesion.’⁷⁰ In Australia and in France, the face of secularism – and religious freedom – must reflect the changing face of the community.

⁷⁰ ‘Dossier d’actualité: Réaffirmer le principe de laïcité’, 10 February 2004. French Prime Minister’s website <www.premier-ministre.gouv.fr> at 20 February 2004.