
WHY THE FRENCH LAÏCITÉ IS LIBERAL

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On March 15, 2004, after months of harsh public debates, the President of France, Jacques Chirac, promulgated a law that stated: “in public elementary, middle and high schools, the wearing of signs or clothing which conspicuously manifests students’ religious affiliations is prohibited. Disciplinary procedures to implement this rule will be preceded by a discussion with the student.”¹

It put an end to a process that started on July 3, 2003, when President Jacques Chirac installed an Independent Commission to study the implementation of the principle of *laïcité* [French secularism] in a different religious landscape than the one existing when the fundamental law providing for the separation of church and State of December 9, 1905, was passed. At the beginning of the twentieth century metropolitan France was a predominantly Catholic territory with very small protestant (1%) and Jewish (0.2%) “minority” populations. A century later, France is now the European country with the largest Buddhist, Jewish, Muslim and atheist or agnostic communities. Within this newly developed diversity, especially during the last twenty years, the presence of Islam as the second most practiced faith has raised tensions between the free exercise of religion and local or French national institutions. Notably the right of female Muslim students to wear veils in public high schools had already become an issue by the end of the 1980’s, provoking in 1989, at the request of the minister of education Lionel Jospin, an ambiguous and complex legal statement by France’s highest administrative Supreme Court, the *Conseil d’Etat*.²

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¹ Art. 1 of the Law of March 15, 2004 (No. 2004-228) regulating, in application of the principle of laïcité, the wearing of signs or clothing which conspicuously manifest religious affiliations in public elementary, middle, and high schools, JORF (Official Organ of the French Republic) number 65 of March 17, 2004 page 5190.

² Avis du Conseil d’Etat, Nov. 27, 1989, No. 346893, http://www.conseil-etat.fr/ce/missio/index_mi_cg03_01.shtml.

Based on the legal constraints imposed upon the government, by the French Constitution, international conventions and legislative texts, the *Conseil d'Etat* concluded that:

[T]he wearing by students, in the schools, of signs whereby they believe to be manifesting their adherence to one religion is itself not incompatible with the principle of laïcité, since it constitutes the exercise of their liberty of expression and manifestation of their religious beliefs; but this liberty does not permit students to exhibit [*d'arborer*] signs of religious belonging which, by their nature, by the conditions under which they are worn individually and collectively, or by their ostentatious or combative [*revendicatif*] character, would constitute an act of pressure, provocation, proselytizing or propaganda, threatening to the dignity or liberty of the student or to the other members of the educational community, compromising their health or their security, disturbing the continuation of institutional activities or the educational role of the instructors, in short, [that] would disturb proper order in the establishment or the normal functioning of public service.³

As Seyla Benhabib later remarked, “this Solomonic judgment” attempting to balance the principles of laïcité and freedom of religion and conscience, “instead of articulating some clear guidelines . . . left the proper interpretation of the meaning of wearing of these signs up to the judgment of the school authorities.”⁴

On September 10, 1994, the Minister of Education, Francois Bayrou, instructed the French public school system that students had the right to wear discrete religious symbols, but that the veil was not among them. The instruction added to the confusion as it was not legally binding.

At the beginning of 2003, the issue resumed within the political sphere. On April 3, Prime Minister Jean Pierre Raffarin advocated the prohibition of headscarves in public schools. On April 29, he answered a question by François Baroin, a member of parliament concerned that in public schools “haze and ambiguity are actually the loyal allies of fundamentalists.” On April 30, Jack Lang, and on May 17, Laurent Fabius, both former socialist ministers, advocated the ban of headscarves in public schools. The latter did it within the Congress of the Socialist Party, which was met with significant applause. Alerted by school teachers’ depiction of rising tensions in public schools over the hijab issue, the members of the National Assembly from all sides of the aisle created, on May 27, 2003, a Committee of Inquiry on the “question of the wearing of religious signs in schools.”⁵

³ SEYLA BENHABIB, ANOTHER COSMOPOLITANISM: HOSPITALITY, SOVEREIGNTY, AND DEMOCRATIC ITERATIONS 54-55 (2006).

⁴ *Id.*

⁵ For a detailed timeline showing the rise of the issue on the agendas of the main French

The Presidential commission had a wider scope—the *laïcité* not only in public schools but in society as a whole—and its composition was more varied: its 19 members consisted of 2 members of parliament, but also school principals and teachers, academics, civil servants, businesspersons with very diverse origins, religious beliefs and political opinions.

On December 11, 2003, a report recommended twenty-six measures: if implemented, two at least needed a law, the ban on conspicuous religious symbols in public schools and the recognition of the most important religious minority feasts as public holidays.⁶ Other recommendations concerned the full respect of the freedom to build mosques, funerary rituals, and culinary customs; the need to act strongly against the social factors that favor the rise of “fundamentalist influence”: ethnic, racial, and religious discriminations, or the full recognition of slavery or colonization as a full part of French national history.

In the following weeks, the Parliament passed only the ban on conspicuous religious symbols (often nicknamed “loi sur le voile”) with a huge majority (494 votes in favor, 36 against, and 31 abstentions).⁷ Following the passing of this law, numerous scholars wrote articles and books giving pessimistic forecasts and numerous critiques.

After having refuted all possible arguments justifying the law, Joseph Carens emphasized its illiberality.⁸ For him, “the law requires some Muslim children to choose between following their conscience and receiving a free public education” without any “strong justification.” Neither the will of the majority (the law reflects and reinforces a distinctively Christian vision of religion and there is nothing in *laïcité* that requires ordinary Catholics to act contrary to their religious obligations), nor the need to protect Muslim girls not wearing the headscarves could justify an “unjust” law forbidding some people from acting in accordance with their religious duties, especially if one considers the multidimensional meaning of the veil.

Later on two books were dedicated to the issue. In *Why the French Don't Like Headscarves: Islam, the State and Public Space*,⁹ John R. Bowen, an anthropologist interviewing numerous French participants in this drama, seeks to understand how it could have occurred and why a

political parties in April-May 2003, see T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 B.Y.U. L. Rev. 419, 456-59.

⁶ COMM'N DE REFLEXION SUR 'APPLICATION DU PRINCIPE DE LAÏCITE DANS LA REPUBLIQUE, RAPPORT AU PRESIDENT DE LA REPUBLIQUE, available at <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf>.

⁷ First reading of the law by the National Assembly, Feb 10, 2004.

⁸ Joseph H. Carens, *Démocratie, multiculturalisme et hijab*, ESPRIT, Jan. 2005, at 54.

⁹ JOHN R. BOWEN, *WHY THE FRENCH DON'T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE* (2008).

whole nation has fallen into a condemnable illiberal prejudice. In his view, there is no clear definition of laïcité, rather a French political philosophy that citizens must all subscribe to the same values in the public sphere. This law was also passed because of the “particular passion for seeking statutory solutions to social ills” and because it “would send a powerful message to the Islamists.”¹⁰ He emphasizes how the broadcast and print media “played to popular fears” of what the veil represents (such as communalism, sexism, and Islamism) and “the extraordinary symbolic weight given to a scarf worn on the head by a small number of schoolgirls.”¹¹

In what should be called a pamphlet, the historian Joan Wallach Scott considers it to be a French republicanism dominated vision of France that has imposed a ban of headscarves worn by very few girls in public schools.¹² The fear of communalism, the pressure, and the influence or the reaction to Le Pen¹³ played their role, but less than: a) a racist conception of Muslims stuck in colonial history (historically, French conceptions of Islam fit this description—Muslims/Arabs have been marked as a lesser people, incapable of improvement and so impossible to assimilate to French ways of life);¹⁴ b) a tradition of secularism in which “the state becomes modern, in this view, by suppressing or privatizing religion because it is taken to represent the irrationality of tradition, an obstacle to open debate and discussion” and whose “effect can be intolerance and discrimination;”¹⁵ c) a perception of the veil, conceived not in its possible modernity but as a sign of obscurantism or of gender oppression, calling for state action to rescue the oppressed and defend the French identity.

A few months after the passing of the law, in the fall of 2005, massive riots occurred in the French suburbs. The *New York Times* reported on November 5, 2005, that the “majority of the youths committing the acts are Muslim, and of African or North African origin.”¹⁶ The BBC reported that French society’s negative perceptions

¹⁰ *Id.* at 243.

¹¹ *Id.* at 7.

¹² JOAN WALLACH SCOTT, *THE POLITICS OF THE VEIL* (2007). Joan Scott is so stubbornly opposed to alternative perspectives that she makes minor but telling mistakes where she appears afflicted by a form of cognitive blindness. Quoting the Commission Stasi report, she translates the sentence “des substituts au porc et du poisson le vendredi doivent être proposés dans le cadre de la restauration collective (établissements scolaires, pénitentiaires, hospitaliers, d’entreprise) as: “substitute of pork would be offered only on Friday and absolutely not on another day of the week.” *Id.* at 34. The trouble is that the sentence means exactly the opposite, namely that a substitute for pork (every day for Jews or Muslims) and fish (only on Friday for the Catholics) would be offered in schools, prisons, hospitals, or private enterprises’ catering.

¹³ *Id.* at 40.

¹⁴ *Id.* at 45.

¹⁵ *Id.* at 93-95.

¹⁶ Craig S. Smith, *10 Officers Shot as Riots Worsen in French Cities*, N.Y. TIMES, Nov. 7, 2005, at A1.

of Islam and social discrimination of immigrants had alienated some French Muslims and may have been a factor in the causes of the riots; “Islam is seen as the biggest challenge to the country’s secular model in the past 100 years.”¹⁷

Yet, a few months later in the spring of 2006, a Pew Research Center survey conducted across 15 nations showed France as the country of the highest respect of and interaction between different faiths. Seventy-four percent of non-Muslim French feel that there *is not* a conflict between being a devoted Muslim and living in a modern society, whereas 70 percent of Germans, 58 percent of Spaniards, 54 percent of the British, and 40 percent of Americans feel that there *is* such a conflict. It is in France that Christians and Muslims have the highest approval rates of the other religion. And France is the only country where a majority of Muslims (and a very large majority at 74 percent) have a positive opinion of Jews, which is not the case in the United Kingdom, Spain, or Germany.¹⁸ These results were confirmed in August 2007 by a more recent Financial Times poll conducted by Louis Harris in the United States and the five biggest European countries: the French are the only country with a majority (69 percent) of people who say they have one or several Muslim friends (versus 38 percent of the British and 28 percent of Americans). Forty-six percent of the British feel that Muslims have too much power in their country, whereas only nineteen percent of the French say the same thing.¹⁹

How can a system and a law that is so illiberal produce (or at least fail to hamper) the best interaction between people of different faiths and beliefs among western democracies?

I.

The first reason is misinterpretation of the French laïcité and of the 1905 law. Even if religion is taken by French militants of secularism, “to represent the irrationality of tradition” (as argued by Joan Scott), the 1905 law is by no means hostile to religion. It represents a break from

¹⁷ Henri Astier, *Ghettos Shackle French Muslims*, BBC. NEWS, Oct. 30, 2005, <http://news.bbc.co.uk/2/hi/europe/4375910.stm>.

¹⁸ PEW RESEARCH CTR., PEW GLOBAL ATTITUDE PROJECT: 15 NATION SURVEY (Spring 2006).

¹⁹ This Financial Times/Harris Poll was conducted online by Harris Interactive among a total of 6,398 adults (aged 16-64) within France (1,029), Germany (1,086), Great Britain (1,111), Spain (1,061) and the United States (1,055) and adults (aged 18-64) in Italy (1,056) between 1 and 13 August 2007. The poll results are available at http://www.harrisinteractive.com/news/FTHarrisPoll/HI_FinancialTimes_HarrisPoll_Aug2007_Tables_US.pdf and http://www.harrisinteractive.com/news/FTHarrisPoll/HI_FinancialTimes_HarrisPoll_Aug2007_Tables_EU.pdf.

preceding antireligious laws or regulations (e.g., the law of July 1, 1901, which required religious congregations or the schools affiliated with them to be authorized by law or by governmental decree) and not their continuity.²⁰ It was designed by the socialists Aristide Briand, Francis de Pressensé and Jean Jaurès, who were much more open to religious freedom than their radical colleagues in the Parliament, in a negotiating process that involved the right wing minority of the Parliament who did not vote for the law but didn't disapprove it.²¹ It is under that liberal framework that Judaism and Protestantism could develop a new diversity in the first half of the Twentieth century. The French bishops in their majority approved it too. But the new conservative Pope Pius X decided to condemn it hastily,²² forcing the French Catholic Church to fight the law. For the Catholic Church, its acceptance occurred in a few different stages (1924-1945) leaving at stake the issue of the subsidies to private religious schools until the 1980s.

For legal scholars, *laïcité* has a clear definition and the law of 1905 was built around three principles: freedom of conscience, separation of State and Churches and the equal respect of all faiths and beliefs.²³ Yet, these principles have to be understood in its historical context. Like in the U.S. but contrary to the U.K., Germany or Denmark, the new legal order was founded on the refusal of any establishment, a general and neutral rule that welcomes any belief and targets formally no faith. But the different historical context had an impact on the discourses, the representations and the jurisprudential interpretation of the Law. The 1905 law of separation between Church and the State was built against the influence, indeed domination, of the Catholic Church in public affairs. It was a victory for a majority of French citizens educated in the Catholic faith, but who wanted the Catholic Church to be put in its place, out of public education and public influence.

The first principle, freedom of conscience, includes concretely the exercise of free religion like in the U.S. But in the context in which the freedom was built (i.e., against the intrusion of Catholic Church in Public Affairs), it is often perceived as protecting the individual against the intrusion of a religious group. In fact, in the relationship between the individual, the religious group and the State, the latter appears in France

²⁰ This idea of continuity was endorsed by Nicholas Sarkozy in the speech made in Latran, on December 20, 2007, which is available at http://www.elysee.fr/documents/index.php?mode=cvview&cat_id=7&press_id=819. For its critique, see the excellent book of Jean Baubérot. JEAN BAUBÉROT, *LA LAÏCITÉ EXPLIQUÉE À M. SARKOZY...: ET À CEUX QUI ÉCRIVENT SES DISCOURS* (2008).

²¹ Cf. Christophe Bellon, *La séparation des Églises et de l'Etat. De la genèse à l'application de la loi de 1905*, HISTORIENS ET GÉOGRAPHES, July 2005, at 193.

²² See Pope St. Pius X's Encyclicals *Vehementer Nos* (Issued February 11, 1906) and *Gravissimo Officii Munere* (Issued August 10, 1906).

²³ François Méjan, *La laïcité de l'Etat en droit positif et en fait*, in *LA LAÏCITÉ 201-45* (1960) (Université d'Aix-Marseille, Centre de sciences politiques (Nice)).

as protecting the individual against any pressure of the religious group, as opposed to the U.S., where the individual relies more on the religious group as a protector against any intrusion of the State.²⁴

The law was also the recognition of the right of everyone to practice their own beliefs, to the point where the State, in an exception to the general rule of separation, paid the salaries of chaplains of any religion in order to permit all those forced to live in enclosed areas such as asylums, prisons, the army, some schools, and hospitals to pray and practice their faith.²⁵

Separation finally meant a break with a previous system of Concordat in which the pastors, the rabbis, but mainly the Catholic bishops were selected and paid by the government.²⁶ Public subsidizing of religious institutions became henceforth forbidden. Under the regime of *laïcité*, the neutrality towards any religious belief is not imposed upon individuals in the public sphere as it is often and wrongly believed by publicists and academics, but in the State and to its servants, in the political arena.²⁷ Here is how Jean Rivero, a leading legal scholar of the post-war period, expressed it:

[T]here is a refusal, by the State, to endorse one faith, to give to it an official seal of approval by making a religious judgment, or to give it any material aid in whatever form. Religious choice is a private matter; the State presents itself to all, stripped of all metaphysical symbols, distant from any trace of the spiritual. My domain is the earth, it says to all of its citizens. Manager of the temporal world, it refuses to envisage what is beyond this management.²⁸

The wearing of religious signs is therefore forbidden in the State sphere for example for public servants, but not, despite public or academic beliefs, in the public sphere.

II.

The second reason is that it is not only the 1905 law that is liberal, but the 2004 law also can be read in a liberal interpretation. The proposal to ban conspicuous religious signs was not based on the meaning of the veil as a sign of domination of women, an error in factual and legal reasoning made by Scott and Bowen. Even if the

²⁴ This idea was born in a conversation with Peter Skerry on June 3, 2003 in Paris.

²⁵ See Article 2 of *Loi du 9 décembre 1905 concernant la séparation des Églises et de l'État*, the French law on the separation of Church and State.

²⁶ Law of 18 germinal, year X (April 10, 1802).

²⁷ James Q. Whitman, *Separating Church and State: The Atlantic Divide*, 34 HIST. REFLECTIONS 86 (2008).

²⁸ Jean Rivéro, *De l'idéologie à la règle de droit: la notion de laïcité dans la jurisprudence administrative*, in LA LAÏCITÉ 266 (1960).

media was emphasizing this interpretation of the veil, it was not endorsed by the Stasi Commission and could not justify any legal restriction against wearing the headscarf. Wearing the headscarf might be the expression of the domination of women by men, but it can also be the modern expression of a free belief, a means of protection against the pressure of males, an expression of identity and freedom against secular parents or against Western and secular society or a new transcultural way of life.²⁹ The commission recognized that banning headscarves on that basis would have been an intrusive interpretation of a religious symbol which can have different meanings. As Christian Joppke accurately remarks, “the liberal State can expect from its members external conformity with the law; it would violate the principle of liberal neutrality to prescribe [peoples’] inner convictions.”³⁰ The liberal State has no right to interpret religious symbols. Had the headscarf been banned on the basis of discrimination against women, it would have been logical—as equality of men and women has emerged as a human right protected by international and national legal instruments not only in schools, but across the whole of society.

In fact, since 1905, France has been integrated into the European Union, and it signed the European Convention on Human Rights,³¹ which recognizes the right to publicly express one’s religious beliefs, and permits the limitation of the expression of religious faith only in the case of problems of public order or attacks on the rights or on the freedom of conscience of others.³² It was on this basis that in 1989 the French administrative Supreme Court produced its statements and the Commission produced its different proposals.

What happened in 2003 to justify the ban that did not exist in 1989? Mainly, the existence of pressures, including violence in the schools where the wearing the headscarf had become an issue, provoked the shift of position of some of the actors who previously had endorsed the right to wear it.

²⁹ See NILÜFER GÖLE, *THE FORBIDDEN MODERN: CIVILIZATION AND VEILING* (1996).

³⁰ CHRISTIAN JOPPKE, *VEIL: MIRROR OF IDENTITY* 114 (2009).

³¹ The European Convention on Human Rights (ECHR) was signed in Rome on November 4, 1950, and was ratified by France on May 3, 1974. But it was not until October 2, 1981, that France recognized the right of individual appeal.

³² Article 9 of the ECHR states:

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

Quite rapidly, the aggregation of data collected by the Stasi Commission contradicted the assessment of the ministries of Education and of Home Affairs: the number of female students wearing the *hijab* in French high schools was probably 5 to 10 times the number officially released.³³ More importantly, over the last two to three years—perhaps under the influence of the September 11 attacks or of the second intifada,³⁴ yet the cause is not so important—in the schools where some girls were wearing the headscarf, the Muslim girls who did not wear it were subject to strong pressure to do so. The daily pressure could take different forms, ranging from insults to violence.³⁵ In the view of these groups, composed mainly of young males, these girls were called “bad Muslims,” “whores” and told that they should follow the example of their sisters who respect the prescription of the Koran. The Stasi Commission received testimonies from teachers and principals unable to manage the situation or from Muslim parents who had to take their daughters out of public schools, placing them in Catholic private schools where they were not under such pressure to wear the scarf. In these schools, a strong majority of Muslim girls who do not wear the headscarf called for the protection of the law and asked the commission to ban all exterior religious signs.³⁶

Muslims girls who do not want to wear the scarf have a right to freedom of conscience, and they constitute the large majority. Was it possible to go after the authors of the pressures? It is practically speaking very difficult to have minor students aged between thirteen and sixteen years to denounce their peers when they are subjected to pressure, insults or violence. The denouncer is seen as a traitor to his or her school community, and there have been cases where pupils had their arms broken in violent acts and yet lied to their parents so as not to denounce their colleagues.

Would it not have been possible, even preferable, to give school boards or principals more power to ban religious signs in case of attacks on public order or on the freedom of conscience of other students? But dealing with the scarf issue at the local level could have created a permanent tension between local school authorities and some national

³³ The data collected by the commission was sufficient to prove the important underestimation of the phenomenon by official data and statements. Yet, the lack of resources and a short deadline did not permit us to evaluate the exact number of headscarves worn in French public schools. Alain Touraine, a colleague in the Commission, confirms that statement. See ALAIN RENAUT & ALAIN TOURAINE, UN DEBAT SUR LA LAÏCITE 79 (2005).

³⁴ It is the point of view of Alain Touraine and Alain Renaut that the problems were recent and linked to the second intifada. *Id.* at 33.

³⁵ For the context of these pressures, see STEPHANE BEAUD & MICHEL PIALOUX, VIOLENCES URBAINES, VIOLENCES SOCIALES. GENESES DES NOUVELLES CLASSES DANGEREUSES 357-64 (2003).

³⁶ It was the will of the 220 students of eight high schools, representing their class in a public meeting with the Commission on December 4, 2003.

organizations for which wearing the scarf or imposing it upon others has become a national strategy of using public schools as their battleground. Not acting at the national level would have permitted these groups to target schools one after the other in order to attract, every week, the attention of the public and of the national media.

This is why the commission proposed to ban exterior—that is, conspicuous—signs of religious belonging (including Jewish skullcaps and large crosses). For any limitation on the freedom to express one’s religious belief, the Convention requires a law and this is why—and not because of a French passion for laws—a law passed by the Parliament was necessary.³⁷ The Convention also requires that any restriction should be proportionate to its permissible aim.³⁸ This is why the ban concerns conspicuous and not discrete religious signs, and applies only in public schools since the majority of those involved are minors.³⁹ There was no question of forbidding religious signs in universities or elsewhere in the world of adults: adults have means of defense that children do not. They can go to court and claim their right of freedom of conscience more easily.

French citizens were and still are divided on the issue. But they cannot be caricaturely classified into two groups: those who opposed the law and who are the only ones “who believed that Muslims should be considered members of the nation” and the others.⁴⁰ Between 1989 and 2003 some actors have changed their mind. That was the case for Marceau Long who was vice president of the Conseil d’Etat when the administrative Court authorized the wearing of headscarves in public schools in 1989, as well as a member of the Stasi Commission. It is also the case of the Sociologist Alain Touraine. I have tried to distinguish between different ideal types of attitudes toward the issue of the headscarf, which can be found in the political, judicial, intellectual arenas.

The first ones that are quite influential are the *Catholaiques*. Born and raised in the Catholic culture, sometimes in families who oppose the laïcité, they have adopted it as it benefitted more and more the

³⁷ See, e.g., *Sunday Times v. United Kingdom*, 2 Eur. Ct. H.R. 245 (1979); *Larissis v. Greece*, 27 Eur. Ct. H.R. 329 (1998).

³⁸ In a recent unreported judgment, *Sahin v. Turkey*, Application No 44774/98, June 29, 2004, the European Court of Human Rights unanimously rejected the allegation that a ban on wearing the Islamic headscarf in higher-education institutions violated the rights and freedoms of a student, under Articles 8, 9, 10 and 14 of the Convention, and Article 2 of Protocol No. 1. The Court found that the University of Istanbul’s regulations imposing restrictions on the wearing of Islamic headscarves and the measures taken to implement them were justified in principle and proportionate to the aims pursued and, therefore, could be regarded as “necessary in a democratic society.”

³⁹ Marceau Long & Patrick Weil, *Une laïcité en voie d’adaptation*, LIBERATION, Jan. 26, 2004.

⁴⁰ SCOTT, *supra* note 12, at 103.

Catholic Church. Catholics are in favor of a status quo protecting a special and almost exclusive relation of Catholicism to the French state. The second tradition is that of the secularist antireligious often nicknamed “laïcists.” The third are the pro-religion pluralists: close to the different faiths, they want to increase the role of religion in the French society. The fourth are the multiculturalists. The fifth are the individualist liberals: they want each individual to be free of any pressure or influence from any groups or institutions. In 1989, the majority of the Conseil d’Etat was composed of individuals belonging to the third, fourth and fifth types of attitudes. In 2004, the majority of the Stasi Commission, of the Conseil d’Etat (who approved the bill with an eighty percent majority⁴¹) and of the Parliament was composed of the first, second, and fifth types of attitudes. Between 1989 and 2004 the shift of the liberals has been determining the change of the majority who also believe “that Muslims should be considered members of the nation.”

It is not absurd to think that the majority of Muslim families have felt relieved. A minority of Muslims are anti-religious. A small minority is fundamentalist, and some are communalist if they consider religious law to be superior to the law of the land. A large majority does not want to impose the headscarf on their daughters but also feels uncomfortable with being unfaithful in certain ways to their religious tradition. They are submitted to the pressure of friends, neighbors and family members who want to impose the wearing of the scarf. Henceforth, they will be able to reply to them, “I agree with you, I was ready to follow your advice, but now it is impossible: I cannot go against the law!” In some ways, it is the same kind of feeling shared by numerous Algerian immigrants when the French Nationality was imposed through birth in France on their children, so well described by Abdelmalek Sayad. Individually, Algerians could never have applied for it. But when French nationality was ascribed automatically, they were discreetly satisfied:

The beneficiaries of the [French] nationality, acquired without having applied for it, adapt to their situation well, and no circumstantial protests (which may be perfectly sincere, moreover) can convince of the contrary. Those around them, who would not have accepted an act of naturalization according to the ordinary procedure, turn out to be relieved, after the fact, that French nationality (“French papers,” as one says) occurred by itself, like a collectively-imposed constraint: it is the common lot of all and not the result of an individual and voluntary act through which some people would be singled out and separated from the others. . . .

⁴¹ Philippe Bernard, *Le Conseil d’Etat juge le projet de loi sur la laïcité conforme à la Constitution*, LE MONDE, Jan. 27, 2004, at 10.

Despite the protests of all sorts that it is good form to produce, despite the feeling of guilt or simple unease that continues to haunt the naturalized, naturalization that one calls “forced” ends up giving rise to something like a satisfaction that, for a whole series of reasons, seeks to remain secret, and sometimes resigned to.⁴²

With a legal ban, the decision comes from the outside thus allowing for the protection of children from fundamentalist pressure without a break in their religious ties.

Can the ban of headscarves be fairly placed into a continuity of the ruling of Islam in French Algeria? It can be in fact the contrary.

Under the French Colonial Law, not only Algerian Muslims could practice the rituals and commandments of their religion, but they were assigned to it, one could say imprisoned in it. Algerian Muslims could only become subject to the French Civil Code by becoming fully French through “naturalization.”⁴³ They were deterred from doing so and from applying: therefore, between 1865 and 1962 only 7000 Algerian Muslims became fully French. Islamic authorities governed not only the religious but also the social and civil rights of Algerian Muslims, under the guidance of the Koran and the ruling of Shania’s Courts. The 1905 law of separation between Church and the State was formally applicable in Algeria, but essentially became suspended permanently until the independence occurred!⁴⁴ Today in France, a majority of Muslims are fully French and the others can become so. They are subjected to the Civil Code and still can refer to the Koran as a moral and religious code.

The Stasi report and the subsequent laws and regulations that have followed, and might still follow, can even be interpreted as part of the legacy of Napoleon’s action towards the Jews in 1806, and of the 1905 law towards the Catholics:⁴⁵ as a moment of compromise, of interactive adaptation and recognition, which in the case of French Muslims could mean that for the first time in its history the French State and French society have decided to fully integrate an important Muslim minority into its common frame.

The public confrontation that occurred, preceding the passing of

⁴² ABDELMALEK SAYAD, *LA DOUBLE ABSENCE. DES ILLUSIONS DE L’EMIGRE AUX SOUFFRANCES DE L’IMMIGRE* 352 (1999).

⁴³ PATRICK WEIL, *HOW TO BE FRENCH: NATIONALITY IN THE MAKING SINCE 1789*, at 207-25 (2008).

⁴⁴ Raberh Achi, *La séparation des Eglises et de l’Etat à l’épreuve de la situation coloniale. Les usages de la dérogation dans l’administration du culte musulman en Algérie (1905-1959)*, in *POLITIX*, vol. 17, No. 66 (2004).

⁴⁵ Joe Carens is misleading when he states that: “There is nothing in laïcité that requires ordinary Catholics to act contrary to their religious obligations.” When on September 20, 1792, the ‘laïcisation’ of civil status and registration and of marriage was voted, it meant concretely the recognition of the superiority of the civil attitude towards the religious law—contrary to the doctrine and the practice of the Catholic Church, which had to retreat from previous competence and power. Cf. Whitman, *supra* note 27.

the law, might have produced exactly the opposite of “tolerance,” which can be perceived as distant, contemptuous and often camouflaging the building of institutional barriers: respectful inclusion. The harsh public debate that has split families of all beliefs and political opinions, and which raised the Koran to the top of the bestsellers list of the year, has enabled citizens to debate matters of public importance. The process has itself included within the community of citizens all Muslims, whatever their position in the debate in favor or against the law may have been.

More than the ban on religious signs in public schools, it was the feeling of the imbalance in the decisions announced by the government and endorsed by the Parliament after the Stasi report was delivered that provoked the frustration of many Muslims. They had welcomed with praise the proposal to recognize the most important religious feast of minority faiths as public holidays. Approved by Catholic, Protestant, Muslim religious authorities during their hearings, it was backed by forty percent of citizens and provoked a very intense, fruitful and creative debate in almost all families in the country. But it was rejected by the government and was coolly received by the majority of Socialist representatives. Strangely enough, Bowen was “intrigued” by the suggestion made to give a state holiday to all minority faiths.⁴⁶

With that proposal the Stasi commission wanted to accommodate the French tradition and the principle of equality between all faiths included in the 1905 law. Because of the anteriority of Catholicism in the French society the distribution of official holidays is strongly inegalitarian: fifty-two Sundays off favors religions that recognize Sunday as their day off. Among 11 other holidays, six are Catholic and only five are secular.⁴⁷

Today a Jew or a Muslim can stop working for Yom Kippur or Eid ul-Fitr. He or she just needs to apply for the particular holiday with their boss. But, in doing so, they declare themselves as Jews or Muslims. Yet the custom in France since 1905 has been, and still is, to keep religious faith as a private matter. This tradition is again most likely linked to the long battle against the power and public exposure of the Catholic faith. The recognition of Yom Kippur, Eid ul-Fitr or Oriental Christmas as optional national holidays and as an alternative to Pentecost would have been an official recognition and respect of religious diversity. But it would also have been a way to fully respect the privacy of religious beliefs. If these alternative holidays were recognized, one would bet that somebody not working on Yom Kippur would be a Jew, but one wouldn't be sure: it could be an agnostic who has taken summer vacation in June and who had chosen Yom Kippur as a way of having a

⁴⁶ BOWEN, *supra* note 9, at 115.

⁴⁷ See Pierre-Henri Prélôt, *Les religions et l'égalité en droit français*, in *REVUE DE DROIT PUBLIC*, No. 3 (2001).

weekend of vacations before the fall.

Yet since its passing, the law has been smoothly implemented.⁴⁸ The unfortunate consequence of the law passed by the French Parliament was that the right of Muslim girls who want to wear the scarf freely in public schools without pressuring their peers was denied. In the majority of cases, they have been offered the opportunity to attend classes in private religious schools, though generally not Muslim—there are only three in the whole country—but Catholic, Protestant or Jewish. These schools have the obligation, if they are under State contract (97.5 percent of students attending private schools are in schools under contract), to accept applications of pupils of other faiths, and they are welcoming more and more Muslim students.⁴⁹

In the future, Muslim schools, under contract with the State—which entails control of the curriculum—will develop. Whether we like it or not, it is the French tradition to have this parallel sector of the education system strongly subsidized by the State, enabling tuition fees to remain very inexpensive. And it is the right of the Muslim community to have schools for observers who want to respect all the customs, all the holidays of their faith and to have religious instruction in addition to the normal curriculum.

Before the passing of the 2004 law, a French Council of the Muslim Religion was created that permits an official representation of the majority of Muslim practitioners and the fulfillment of some duties of common interest.⁵⁰ After the passing of the law, other proposals of the Stasi Commission in favor of respect of equality between Islam and other religions have been implemented. In 2006, general Muslim chaplains have been named in the French army, in the jail system and in the Hospitals. There are more than 2,100 Muslim prayer spaces and new ones open every week.⁵¹

III.

The third reason why the French do better than expected is not circumstantial, but it is a matter of separation of geographical spaces. In every liberal State, freedom of conscience is guaranteed along with the freedom of free exercise of any faith. Yet, one question is not so easy to

⁴⁸ Stéphanie Bara, *L'école sans voile depuis trois ans*, LA VOIX DU NORD, Mar. 14, 2007.

⁴⁹ See Katrin Bennhold, *French Muslims Find Haven in Catholic Schools*, N.Y. TIMES, Sept. 29, 2008.

⁵⁰ JONATHAN LAURENCE & JUSTIN VAISSE, INTEGRATING ISLAM: POLITICAL AND RELIGIOUS CHALLENGES IN CONTEMPORARY FRANCE 135-62 (2006).

⁵¹ Didier Leschi, *Les lieux de culte et le bureau central des cultes*, in LES LIEUX DE CULTE EN FRANCE, 1905-2008, at 23 (Jacqueline Lalouette & Christian Sorrel eds., 2008).

resolve: how does the government concretely guarantee one the right to exercise in practice, and not just theoretically, the right to freely enter into or leave a religious group? Where is the liberty to leave one's religious group or to practice one's faith with less religiosity when doing so is rarely practiced? This freedom seems to me easier in France than in other countries because of an organization of the geographical space that favors encounters, exits, and therefore the practical exercise of the clause of freedom of conscience.

In the United States, a Catholic can live in the Catholic sphere and custom from his or her baptism to his or her funeral without encountering so much of another sphere. He or she can marry at the Church after a sermon of a priest and exercise privately or publicly his or her faith in any function or position he or she would exercise during his or her social life.

In France, it is impossible. If he or she wants to marry religiously, they are legally obliged to hold first a civil marriage in the city hall. The ceremony is held by the mayor who receives the engagement of the spouses and reads to them the four articles of the French civil code (art. 212 through art. 215) that determine the rights and duties of spouses. The city hall is a common space that all French or foreign residents living in France have to come through, and the civil code is a common and superior legal rule that all French or foreign residents living in France have to respect if they want to marry in France. If they want to become civil servants or politicians, they would have to fulfill a higher degree of duty: not to express publicly their own faith or belief.

As convincingly explained by Michael Walzer,⁵² liberal societies were built through the art of separation, which permits the emergence and guaranty of liberties and independence from political power. In each sphere, religious, economic, academic, and private, "institutions are responsive to their own internal logic even while they are also responsive to systemic determination;⁵³ the liberal achievement has been to protect a number of important institutions and practices from political power, to limit the reach of the government."⁵⁴ But is it not possible to apply this framework to the relations of an individual towards a religious group and power? Is it possible to exercise, not a formal, but a practical freedom of conscience towards religious institutions and norms without an art of separation adapted to this particular individual liberty?

Referring to ancient Greece, Marcel Hénaff and Tracy B. Strong differentiate four kinds of spaces organized by human beings in relation

⁵² Michael Walzer, *Liberalism and the Art of Separation*, 12 *POLITICAL THEORY* 315-30 (1984).

⁵³ *Id.* at 319.

⁵⁴ *Id.* at 321.

to Gods that speak very accurately to the modern situation: private, sacred, common and public:

The space is *private* when a given individual or set of individuals are recognized by others as having the right to establish criteria that must be met for anyone else to enter it. . . . The *sacred* space is the space of the Gods, not under human rules but religious, sacred ones. . . . *Common* space admits of no criteria; it is open to all in the same way. It is not owned or controlled. . . . [A]ll can go there to extract from it what is there. Thus the sea, pastures, forests are (can be) common space. That is not a space to which one goes to speak with others. [*Public* space is open; it is] a *human construct, an artefact*, the result of the attempt by human beings to shape the place and thus the nature of their interaction. [It is also] *theatrical*, in that it is a place which is seen and shows oneself to others.⁵⁵

In contemporary modern France the private and sacred spaces are similar while the Greek common space has become a public space (in which all kinds of beliefs can be expressed), and the Greek public space has become the political one (set as neutral, which means that there is no presence of religion).

But this art of separation applied to religious freedom and organized through centuries of conflicts involving religious powers (mainly the Catholic Church) might explain why France seems to have been more successful in building a liberal interaction between individuals raised in different faiths or beliefs. Separated spaces with different sets of rules are imposed on these individuals, but therefore permit them to experiment with a different kind of relation to their own faith, the faith of others or no faiths at all.

This framework of separation is what has created this religious liberalism in the long run. Jews in 1806, Catholics in 1905, and finally Muslims have learned it in a constraining way. It is not an attack on liberty but, on the contrary, a subtle art not only of proclaiming it but of permitting its concrete practice.

⁵⁵ Marcel Hénaff & Tracy B. Strong, *Introduction: The Conditions of Public Space: Vision, Speech and Theatricality*, in PUBLIC SPACE AND DEMOCRACY 2-8 (Marcel Hénaff & Tracy B. Strong eds., 2001).