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Is French *laïcité* Still Liberal? The Republican Project under Pressure (2004–15)

Stéphanie Hennette Vauchez

1. INTRODUCTION

Controversies over the scope and meaning of *laïcité* [secularism]¹ in France abound. Politically, the theme has become a rallying point for a number of forces who wish to turn it into a purportedly ‘anti-communitarian’ device and a yardstick for forms of ‘republican integration’ that ought to govern access to a number of public services (schools, hospitals and so on), employment and, ultimately, citizenship and nationality.² On 20 March 2016, a new political movement was launched—*le printemps républicain*—whose aim, with the prospect of the 2017 presidential election, is to reaffirm the centrality of *laïcité* in the very definition of the French political

1 The term ‘secularism’ is an acceptable translation for ‘*laïcité*’ in lay parlance; however, because the present article deals with the redefinition of the *legal regime* of *laïcité*, I will use the French word throughout.

2 Mullally, ‘Gender Equality, Citizenship Status and the Politics of Belonging’ in Fineman (ed.), *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory* (2011) 192.

community. Over the past years, governments on the right and on the left have expressed their support for a ‘demanding’ view of *laïcité*. After the 2010 Government of François Fillon passed the *burqa* ban,³ the 2014 Government led by Manuel Valls regularly opposed liberal understandings of *laïcité*—including in terms that trigger much concern and unrest.⁴ To be sure, the relationships between the state and religions are a vexed theme in many contemporary societies; there are, however, at least two features of the contemporary shaping of the debate in France that make it quite unique. First, tensions around *laïcité* have been ever increasing for the past decade or so, currently reaching a dramatic intensity that is only mildly illustrated by the controversy over the 30 or so *burkini* bans that spread over France’s beach towns over the summer of 2016.⁵ Secondly, these tensions are not solely or even essentially political in nature. Quite to the contrary, much of what has happened on the issue of *laïcité* since the mid-2000s has taken the form of *legal* evolutions: since the middle of the 2000s, it is *laïcité’s* legal regime that has undergone sweeping evolution.

For most of the twentieth century, *laïcité* as a legal principle had essentially been understood to generate obligations for public authorities only—and, conversely, rights for private individuals.⁶ This understanding translated into legal rules requiring public authorities to stick to strict religious neutrality, whereas private individuals were guaranteed freedom of conscience as well as freedom of religion. In 2009, historian Patrick Weil published an influential paper entitled: ‘Why the French *laïcité* is liberal.’⁷ A much-respected scholar of nationality and immigration, Weil had also been a member of the 2003 Stasi Commission that recommended, among other things, that ostentatious religious symbols be banned in public schools. Among the arguments that were put forth by Weil in his 2009 paper were the fact that the French law of 1905 on the separation between churches and the state is not hostile to religion, and that the French regime of *laïcité* did include and indeed protect the right to practice one’s religion (since the obligation on religious neutrality only weighed on the state and its representatives). Therefore, even the 2004 ban on religious symbols in public schools could be read through a liberal lens since, in his view, it was not premised on an understanding of the veil as a symbol of women’s oppression but rather on documented instances of pressure on women that came along with violence and trouble for public peace and tranquility. Nor did the 2004 ban endow the state with the right to interpret religious symbols or threaten the existence of different spheres governed by different principles—and notably, that of the existence of a public sphere in which all kinds of beliefs can be expressed.

3 Law 2010-1192 of 11 October 2010.

4 See, among many of these contested proposals, his insistence on a ban on the veil for university students: ‘Manual Valls: La bataille de l’égalité ne se règle pas à coups de milliards seulement’, *Liberation*, 12 April 2016. See also his public attacks on the *Observatoire de la laïcité*, an independent body created by President Hollande in 2012 that publishes memos and position papers on *laïcité*, available at: www.gouvernement.fr/observatoire-de-la-laicite (in French only) [last accessed 2 March 2017].

5 Rubin, ‘From Bikinis to Burkinis: Regulating What Women Wear’, *The New York Times*, 27 August 2016.

6 See, the classic: Rivero, ‘La laïcité’ (1949) *Recueil Dalloz* 33.

7 (2009) 30 *Cardozo Law Review* 2699.

To be sure, many of the more recent developments of the French legal regime of *laïcité* have outdated Weil's 2009 assessment. For at least a decade, the legal principle of *laïcité* has increasingly been interpreted as generating obligations of religious neutrality for *individuals* and, whereas it once encompassed religious freedom, it now increasingly serves as a legal ground for curtailing it. In fact, developments have been so sweeping that one might describe the current state of the law as *new laïcité*, so as to underline the actual subversion of the original meaning of the principle.⁸ In fact, all these elements, and others, have pushed authors such as Weil⁹ to intervene and express their criticism of the undue restrictions on freedom of religion that recent reinterpretations of the principle of *laïcité* have brought about. Addressing the question of whether French *laïcité* can still be coined 'liberal', the present article answers that question negatively: contemporary French *laïcité* has illiberal dimensions, as it is increasingly defined as the antonym of religious freedom—as a potentially valid legal ground for various restrictions to religious freedom. Additionally, as the detail of many of the developments that have extended the scope of *laïcité* as a legal principle over the course of the last decade demonstrates, they are tightly tied to increasing anxieties *vis-à-vis* Islam. Unsurprisingly then, there is an arguably discriminatory impact of *new Laïcité*. This however raises a question that is particularly important to lawyers and others who are committed to human rights: where have the judges gone (or more generally for that matter, legal checks and balances)? If rule of law democracies are political regimes in which fundamental rights are guaranteed against political/majoritarian encroachment, one then wonders how, if at all, these processes have constrained and limited the shift to *new laïcité* in France.

This article first reflects in Part 1 on one particular judicial saga—the *Baby Loup* case—that caused much turmoil in France from 2010 to 2014 as it raised the question of whether a woman employed in a day-care facility could be dismissed because of her refusal to comply with the internal staff policy of religious neutrality. Indeed, the *Baby Loup* case encapsulates most of the dimensions of the current legal debates around *laïcité*. The litigation needs, however, to be read against a wider context that turned it into a nationwide and tense debate. In that respect, the article also aims in Part 2 at analysing the broader developments in the legal regime of *laïcité* over the past decade. Providing the bigger picture of the shift from *laïcité* to *new laïcité* allows one to question its illiberal and discriminatory dimensions—an agenda that is all the more pressing given that neither the national nor European courts seem, so far, to have chosen a very incisive route as they sit on the deferent side of judicial review.

2. PART 1: THE BABY LOUP AFFAIR

The *Baby Loup* litigation unfolded as a five-year long judicial saga that has attracted considerable media attention in France and beyond. Between the first decisions on the discriminatory nature of the dismissal of Ms Afif from her employment in 2010 to the final ruling by the Cour de Cassation in June 2014, numerous social and political actors took sides in this case, debating the admissibility of employers' policies of religious neutrality as well as, more generally, the scope of the principle of *laïcité* and its role in the preservation and affirmation of the French republican project. In fact,

8 Hennette Vauchez and Valentin, *L'affaire Baby Loup, ou la Nouvelle Laïcité* (2014).

9 See, for example, Weil, 'Qu'on laisse en paix les femmes voilées', *L'Opinion*, 11 August 2013.

laïcité as a pillar of the French republican project was constantly pitted against the evils of multiculturalism and the atomization of society.

A. The *Baby Loup* Judicial Saga

- **HALDE**, Délibération No 2010-82, 1 March 2010: the termination of Fatima Afif's contract of employment is discriminatory on grounds of religion.
- **Conseil des prud'hommes [Labour Court]**, 14 December 2010: the *crèche* has a 'mission of public service' and therefore, the constitutional principle of *laïcité* applies to employment contracts between the *crèche* and its employees. Accordingly, religious neutrality can be imposed on non-government employees.
- **Appellate Court**, 27 October 2011: the argument of the *crèche's* 'mission of service public' is abandoned, but the internal policy subjecting employees to religious neutrality is upheld (and so is the decision to dismiss Ms Afif).
- **Cour de Cassation**, 19 March 2013: the appellate judgment is quashed, for the constitutional principle of *laïcité* does not apply to employment contracts in the private sector that are governed by the Labour Code [*Code du travail*]. Furthermore, a general internal policy [*règlement intérieur*] imposing religious neutrality on all personnel is too wide a restriction on religious freedom and cannot ground an individual decision to dismiss an employee. The case is remitted to the appellate court.
- **Appellate Court**, 27 November 2013: The Court finds that the *crèche's* commitment to religious neutrality is akin to a religious belief and thus grants it's an exemption from anti-discrimination law: as the *crèche* believes that neutrality will allow it to 'transcend multiculturalism', the *crèche* can require it from its employees. The decision to dismiss Ms Afif is upheld.
- **Cour de Cassation**, 25 June 2014: the *crèche's* internal policy of religious neutrality is legal to the extent that, although it rests on a general internal rule [*règlement intérieur*], it only applies to a small number of people given the organization's small size and because childcare is at stake.

Before turning to the legal analysis of these developments, a number of wider elements of the socio-political context in which the case unfolded need to be addressed in order to account for the extraordinary importance that the case has come to have.

B. Placing the *Baby Loup* Saga in its Wider Socio-political Context

To be sure, the *crèche* Baby Loup was not *any* childcare facility; to the contrary, it had a very particular identity and project and these played a crucial role in turning what could have remained a rather ordinary employment law dispute into a true *affair*,¹⁰ epitomizing much of the French anxieties *vis-à-vis* issues of multiculturalism and secularism.¹¹ The Baby Loup *crèche* was founded with the aim of playing a role

10 French sociologists Luc Boltanski and Elisabeth Claverie have identified a number of criteria that characterize the specific form of the '*affair*', the ultimate emblem of which is the Dreyfus Affair (1894/1906): see Boltanski and Claverie, 'Du monde social en tant que scène d'un process' in Offenstadt *et al.* (eds), *Affaires, scandales et grandes causes. De Socrate à Pinochet* (2007) 395.

11 On which, among many references, see Scott, *The Politics of the Veil* (2010); Scott, 'Sexualism', RSCAS *Distinguished Lectures*, RSCAS 2009/01 (European University Institute, 2009), available at: cadmus.eui.eu/ [last accessed 2 March 2017]; Bowen, 'The Republic and the Veil' in Berenson, Duclert and

in the community well beyond childcare. Its goal was to help local populations (and especially women) to access education, language, training and employment. It was purposefully located in a tense neighbourhood—Chanteloup-les-Vignes, a socially and ethnically very mixed, as well as an economically deprived, town some 20 miles outside Paris. In fact, Chanteloup-les-Vignes has been described as ‘one of the most sensitive’ urban areas of the Paris region, where the average yearly income is 11.195 euros (approximately \$12,200) and roughly 25 per cent of the population is unemployed.¹² Emblematically, it had served as one of the locations for the film *La Haine* in 1995—a cult movie by Mathieu Kassowitz that narrates 19 consecutive hours in the lives of three friends in their early 20s, who come from immigrant families and live in an impoverished multi-ethnic French housing project, in the aftermath of a riot.¹³ In this context, the *crèche* purported to be not only a day-care facility for children but also a place where women could meet up and experience solidarity beyond their differences. Accordingly, the *crèche* organized a number of events, meetings, discussions, courses (French reading and writing) and tried to play an active part in the life of the community. Baby Loup also aimed at providing the most extensive and comprehensive forms of assistance to mothers and families and especially *working* mothers: in a context where unemployment is much of a local plague, it aimed at accompanying and encouraging parents’ access to employment by operating 24 hours a day during which children could be dropped off and picked up at any time of day and night.

Furthermore, the dismissed childcare worker was not any employee of the *crèche*; rather, she was the emblem of the success of the *crèche*’s wider social project. By the end of the 1990s, Ms Afif started benefiting from the actions and support provided by the *crèche*: she attended courses and training at the *crèche*, and was encouraged to sit a professional exam to become an accredited childcare provider. She passed the exam and by 1997 became the *crèche*’s deputy director.¹⁴ In 2003, she left her position in order to take parental leave. As she gave birth to several children, she renewed her leave and returned to the *crèche* in 2008, wearing a headscarf. In the meantime, the *crèche* had adopted a policy of religious neutrality with which she refused to comply. It is around this contentious issue that she was eventually dismissed from her employment a couple of months later.

All these elements of context illuminate the importance of the *Baby Loup* case. Because of what it stood for in twenty-first century France, the *crèche* Baby Loup was a very good candidate for the kind of political cause it was turned into serving: affirming the generosity of the French Republic (the director of the *crèche*, Ms Baleato, was a naturalized French citizen and a political refugee who had fled Chile), the importance of common goods (education, childcare) and common spaces (the *crèche*), but also the notion that all of these come along with rules (here, *laïcité*)—elements that were pitted against a tale of Ms Afif’s ingratitude and

Prochasson (eds), *The French Republic: A Transatlantic History* (2011) 272; Bowen, *Why the French Don't Like Headscarves: Islam, the State and Public Space* (2007).

12 Observatoire de la Laïcité, *Rapport Annuel 2013-2014* at 15.

13 All the more so that the movie also stages riots and conflict between ‘*banlieues*’ youth and the police, thus bringing to the fore conditions that eventually unfolded as real events in the 2005 French riots.

14 Observatoire de la Laïcité, *supra* n 12 at 14.

contempt. Consequently, the *Baby Loup* case provided a number of social and political actors with an opportunity to advance a wider political agenda of redefining *laïcité* altogether. All these elements help explain the transformation of the litigation into an *affaire*.

The first feature of the *Baby Loup affaire* was that it was replete with unusual moves by the key actors, many of whom gathered into a wide and relatively heterogeneous coalition in support of the *crèche*. Some of these actors were institutional, such as Jeannette Bougrab, the then head of the HALDE¹⁵ (the French Equality Body). Some were political, such as Manuel Valls, the current Prime Minister of France who was then the Minister of the Interior, and some were intellectuals, such as, prominently, philosopher Elisabeth Badinter. Interestingly, the mobilization of this coalition was *not* one that reflected the somewhat classic pattern of intellectuals mobilizing against the state. In fact, the Government itself was at least indirectly involved in the coalition, through the leading role of Bougrab as well as through the multiples commentaries and interventions of members of the Government. Nor did this coalition's mobilization espouse the existing pattern of defending the weak party against the powerful one; quite to the contrary, it took sides with the employer *against* the dismissed employee. Furthermore, many of these prominent actors dramatized their involvement. Bougrab certainly labelled her involvement in a 'battle' justified by what she described were 'mortal threats' against the Republic.¹⁶ As such, her 'battle' seemingly justified infringements of legal forms and procedures. For instance, the fact that Bougrab chose to personally intervene in the hearings at the *Conseil des prud'hommes*,¹⁷ was itself quite problematic. As the head of the HALDE, her mission was, in the terms of the law of 2004 that created the Equality Body, to 'help the victims to identify the relevant procedures' with respect to alleged instances of discrimination.¹⁸ Obviously, having the HALDE President testify *against* an individual's claim to discrimination does not fall under that description. Not to mention the fact that the alleged victim, Ms Afif, had initially filed a complaint to the HALDE, which had found that her firing was discriminatory as based on her religion in a decision of 1 March 2010.¹⁹ It was only after Bougrab was nominated as President of the HALDE a couple of weeks later (23 March 2010) that she decided to re-open the case on the basis of her dissatisfaction with the previous findings—thus causing internal conflict within the HALDE.²⁰ The intervention of Manuel Valls immediately after the Cour de Cassation (France's highest court) delivered its first ruling in the

15 The HALDE (Haute autorité de lutte contre les discriminations et pour l'égalité) was created by law no 2004-1486 of 30 December 2004. It has been replaced, pursuant to constitutional amendments in 2008, by the Défenseur des droits: see Article 71-1 of the French Constitution.

16 See the title of her 2013 book: *Ma République se meurt* [My Republic is dying] (2013).

17 In France, employment law disputes are generally examined in the first instance by specialized (and specially composed) labour tribunals.

18 Article 7 Law No 2004-1486 of 31 December 2004 creating the HALDE.

19 HALDE Deliberation 2010-82 of 1 March 2010, available at: www.defenseurdesdroits.fr/decisions/cnds/CNDS_AVIS_20101025_2010-82.pdf (in French only) [last accessed 2 March 2017].

20 In fact, despite the re-opening of the case, a second decision was never delivered, and Bougrab's mandate at the HALDE was terminated in May of 2011 as the HALDE merged with other administrative institutions into the new constitutional authority Défenseur des droits.

case, on 19 March 2013, also counts among the many unusual moves triggered by the case.

In its first decision in this case, the Cour de Cassation ruled that the principle of *laïcité* did not apply to employment relations in the private sector (that are regulated by the Labour Code) and that the firing of Ms Afif was illegal as it rested on an internal rule prescribing religious neutrality that was too broad and imprecise. Informed of the content of the decision while he was attending a session at the National Assembly in his capacity of Minister of the Interior, Mr Valls chose to publically intervene and made a speech in which he expressed his wish to ‘temporarily step out of his gubernatorial functions’²¹ in order to call for caution as the supreme court had, in his view, ‘called *laïcité* into question’. This gravity and dramatization that underpinned Mr Vall’s intervention also resonated with the particular shaping of the case that was being put forth by the intellectual side of the petition claiming that ‘the application of *laïcité*, a constitutional principle of our Republic, was seriously threatened, thus endangering our very ability to live together [*le vivre ensemble*]’.²²

The saliency and social impact of the *Baby Loop* affair are also exemplified by the frenzy of opinions, memos and reports it triggered. Seemingly, all institutions of the Republic have felt the urge to speak their word on *laïcité*. The Social, Economic and Environmental Council published an opinion on freedom of religion in the workplace in November 2013,²³ only a couple of months after the National Consultative Commission on Human Rights²⁴ also had done so. Meanwhile, as it was receiving a number of complaints by which private individuals (often Muslim and, for the most part, Muslim women) alleged situations of discrimination as a number of public institutions (such as schools) denied them access, the new Equality body (*Défenseur des droits*) felt there was a need for the law of *laïcité* to be ‘clarified’, and asked the Conseil d’Etat to precisely describe the extent to which ‘public services’ can impose religious neutrality on those it deals or works with. The Conseil d’Etat thus published a study in December 2013.²⁵ Probably feeling that more expertise was needed, newly elected President, François Hollande, decided to create a new advisory body on *laïcité*—the *Observatoire de la laïcité*, which delivered an opinion on the *Baby Loup* case²⁶ as well as on other issues related to *laïcité*.²⁷

21 In French, Valls expressed his wish to ‘*sortir de ses fonctions de ministre*’ because the Cour de Cassation had ‘*mis en cause la laïcité*’.

22 See <https://www.change.org/p/crèche-baby-loup-appel-à-toutes-les-sciences-républicaines> (in French only) [last accessed 2 March 2017].

23 CESE, *Avis sur le fait religieux en entreprise*, 26 November 2013: available at: www.lecese.fr/sites/default/files/pdf/Avis/2013/2013_25_fait_religieux_entreprise.pdf (in French only) [last accessed 2 March 2017].

24 CNCDH, *Avis sur la laïcité*, 26 September 2013, available at: www.cncdh.fr/sites/default/files/avis_lai_cite-ap-26_09_2013.pdf (in French only) [last accessed 2 March 2017].

25 Conseil d’Etat, *Etude demandée par le Défenseur des droits*, December 2013, available at: www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd_avis_20130909_laicite.pdf (in French only) [last accessed 2 March 2017]. The content of this report is discussed below.

26 *Avis sur la définition et l’encadrement du fait religieux dans les structures privées qui assurent une mission d’accueil des enfants*, 15 October 2013: available at: www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2014/07/avis_odl_accueil_petite_enfance_-_structures_privées.pdf (in French only) [last accessed 2 March 2017].

27 See www.gouvernement.fr/observatoire-de-la-laicite (in French only) [last accessed 2 March 2017].

This frenzy of opinions and positions testifies to the notion that the topic of *laïcité* in contemporary France is in a quasi-permanent state of crisis. Moreover, this frenzy was not confined to expert or advisory modes of intervention: in Parliament too, a record number of legislative proposals²⁸ were drafted during the timespan of the *affair*, aiming either at legalizing outright bans on all forms of expression of religious beliefs in the workplace²⁹ or at restricting the admissibility of such bans to specific economic sectors such as childcare.³⁰

C. The Legal Meaning of the *Baby Loup* Saga

From a legal standpoint, the *Baby Loup* case is very interesting indeed. Prior to the final ruling, it was understood under French labour law that employees retain their fundamental rights, including the right to freedom of religion, in the workplace.³¹ A specific provision of the Labour Code explicitly prohibits all decisions concerning an employee (decisions to hire, to fire, to promote, to reclassify, etc.) from being based on their religion (among a series of no less than 19 other prohibited grounds)³²—and several provisions of European Union (EU) law similarly regulate the matter.³³ The only legally admissible exception to that general rule of non-discrimination on the basis of religion relates to situations in which a particular job position can be said to require a restriction³⁴ (what EU law labels as ‘genuine and determining occupational requirement[s]’).³⁵ On that basis, it was judicially admitted in the past that, for instance, a butcher who claims that his Muslim faith prevents him from handling pork meat may see his contract terminated for that reason,³⁶ or

28 Lemaire, ‘La laïcité répressive: l’exemple du traitement de l’affaire Baby Loup au Parlement’ in Giraudeau, Guérin-Bargues and Haupais (eds), *Le fait religieux dans la construction de l’Etat* (2016).

29 See, for instance, Assemblée nationale, *Proposition de loi no 864 présentée par Ph. Houillon*; Assemblée nationale, *Proposition de loi no 865 présentée par E. Ciotti*. This was discussed by the National Assembly on 6 June 2013 and was rejected after the vote: see Assemblée nationale, *Proposition de loi no 1027 présentée par J. Myard*.

30 Sénat, *Proposition de loi no 56 presented by Françoise Laborde*, 25 November 2011, *visant à étendre l’obligation de neutralité à certaines personnes ou structures privées accueillant des mineurs et à assurer le respect du principe de laïcité*. This proposal led to a first vote in the Senate in January 2012 and was then delayed for three years until it was revived in 2015 and voted on, after amendments, by the National Assembly on 13 May 2015. The text has thus been resent to the Senate where it should be scheduled for a new vote. Other similar proposals have been registered in Parliament although never scheduled for actual discussion, such as Assemblée nationale, *Proposition de loi n° 593 presented by Roger-Gérard Schwartzberg*, 16 January 2013.

31 See, for instance, Peskine and Wolmark, *Droit du travail*, 10th edn (2016).

32 Article L1132-1 Labour Code provides:

No person can be denied recruitment or access to an internship or to a session of vocational training, no employee can be sanctioned, fired or discriminated against (directly or indirectly), particularly as far as remuneration, reclassification, affectation, promotion, transfer or renewal of contract . . . go, on the basis of his/her origin, sex, mores, sexual orientation or identity, age, familial situation or state of pregnancy, genetic characteristics, membership or non (real or presumed) to an ethnic group, a nation or a race, political opinions, union or mutualist activities, religious beliefs, physical appearance, surname, place of residence, health or handicap.

33 See in particular Directive 2000/78/EC establishing a general framework for Equal treatment in Employment and Occupation [2000] OJ L 303 at 0016.

34 Article L1321-3 Labour Code.

35 Directive 78/2000/EC, *supra* n 33.

36 Cass. Soc., No 95-44738, 24 October 1998.

that a salesperson in a fashion retail business cannot wear a *niqab* at work.³⁷ These are cases, however, in which decisions relating to particular individual employment positions were being challenged. By contrast, it had always been held/considered that an employer was not allowed to have a general internal rule [*règlement intérieur*] opposing the expression of employees' religious beliefs.³⁸ In the *Baby Loup* case, however, it is precisely the adoption by the *crèche* of such an internal policy prescribing religious neutrality to all personnel that triggered the lawsuit.³⁹

The legal issues at stake in the *Baby Loup* litigation evolved overtime. Initially, the crux of the matter had to do with a purported 'mission of public service' of the *crèche*.⁴⁰ The reason the *crèche* was pleading that it was endowed with such a mission had to do with the very different ways in which the principle of *laïcité* plays out in the public and private sectors. In the public sector, the consequences of the regime of *laïcité* are very important. It entails a requirement of religious neutrality for all public buildings and personnel: there can be no religious symbols on display in public buildings (schools, city halls, parliamentary assemblies),⁴¹ and it is forbidden for all civil servants and public agents⁴² to wear any

37 CA, *St Denis de la Réunion*, 9 September 1997, No 97/703306.

38 See Article L1321-3 Labour Code.

39 The contentious general rule [*règlement intérieur*] of the *crèche* had entered into force on 15 July 2003. It read: '[P]ersonnel's freedom of conscience and religion may not hinder the respect of principles of *laïcité* and neutrality that apply in the exercise of all the activities developed by Baby Loup, on the *crèche's* premises and in its annexes as well as during exterior activities of the children entrusted to the *crèche*' [*le principe de la liberté de conscience et de religion de chacun des membres du personnel ne peut faire obstacle au respect des principes de laïcité et de neutralité qui s'appliquent dans l'exercice de l'ensemble des activités développées par Baby Loup, tant dans les locaux de la crèche ou ses annexes qu'en accompagnement extérieur des enfants confiés à la crèche*].

40 In France, public service missions (state schools, municipal services, public health facilities, etc.) are undertaken by public law entities that are governed by administrative law regulations. It has been settled since the 1930s that private law entities, however, may be associated to the public service, in which case they can also be subject to administrative law. For instance, some of their legal acts may be categorised as being of an administrative nature (thus calling for administrative courts' competence should they be legally challenged). In principle, however, employment contract issues involving private legal entities associated with the public service remain private in nature (that is, governed by the Labour Code and challenged, be it the case, before judicial courts rather than administrative tribunals).

41 This particular derivation of the principle of *laïcité* was traditionally only seldom put to the test (for the expression of an obligation of political neutrality in a case where the pinning of a separatist flag on a municipal building in Martinique was deemed illegal, see Conseil d'Etat, Case No 259806, *Commune de St Anne*, 27 July 2005). However, recent tensions around *laïcité* have increased the momentum around this notion of religious neutrality of public buildings, especially after the decision during the winter of 2014 of several municipalities governed by the National Front to install nativity scenes in the halls of municipal and departmental buildings. As their decision was challenged before the courts, they claimed that nativities were a part of local traditions and were thus not to be construed as religious expression contrary to *laïcité*. Some administrative courts have upheld this view: see TA Montpellier, No 1405626, *Ligue des droits de l'Homme*, 19 December 2014. Others have not and adhered instead to a narrow literal reading of Article 28 of the Law of 1905 ('It is forbidden . . . to elevate or pin religious signs or emblems on public monuments or in any public place [emplacement public], save for edifices devoted to cults, burial places in cemeteries, funeral monuments or museums and exhibitions': see TA Nantes, 14 November 2014, No 1211647). The issue is yet to be settled by higher judicial deliberation.

42 The category of public agents includes people who, although they are not civil servants, work for public institutions and have a work contract that is not regulated by the Labour Code but, rather, by administrative law.

religious garb⁴³ while on professional duty—regardless of the nature of their actual position.⁴⁴ In fact, the *crèche*'s argument initially relied in part on the reasoning that because of both its *raison d'être* (favouring social integration throughout a childcare service that targeted mostly women from poor socio-economic and migratory backgrounds) and the support it received from the local government, the *crèche* ought to be considered to be a public service—and accordingly allowed to require religious neutrality from its employees. This, however, was a legally weak argument. Although it is possible under French administrative law for private entities to be endowed with a 'mission of public service' and therefore to be attracted, to a certain extent, into the ambit of administrative law,⁴⁵ several of the conditions for this specific legal regime to apply were not met. In particular, one of these conditions is for a public authority to be in a position to exert some control over the said mission. Such control can take the form of financial support but also entails some oversight of the organizational structure; for instance, public authorities are generally represented on boards and governance councils of private entities who are endowed with a 'mission of public service'.⁴⁶ None of this was present in the case of the Baby Loup *crèche*. Like a vast majority of private childcare facilities in France, it did benefit from public subsidies; but apart from that indecisive criterion, the *crèche* was an organization that was private in nature,⁴⁷ regulated by common (private) law, and the employment contract it had offered Ms Afif (like all other employees) was clearly governed by the Labour Code—and was thus well beyond the reach of the principle of *laïcité* in so far as that principle subjects only civil servants and public agents to religious neutrality. On the basis of these elements, in its first ruling of 19 March 2013 the Cour de Cassation

43 The European Court of Human Rights ('European Court') has recently upheld this imposition on all civil servants and public agents of an obligation of religious neutrality in a case where a social worker employed by a public hospital failed to have her employment contract renewed because of her refusal to comply with this obligation (she wore a headscarf): see *Ebrahimiyan v France* Application No 64846/11, Merits, 26 November 2015. Prior to this important ruling, the famous *Lautsi* case had already established that the European Court was ready to take national understandings of and approaches towards secularism and religion into account. Famously in 2011, the Court's Grand Chamber, reversing a prior 2004 Chamber ruling, held that the presence of Catholic crucifixes displayed in Italian public school classrooms was not a violation of the ECHR: see *Lautsi v Italy* Application No 30814/06, Merits and Just Satisfaction, 18 March 2011 particularly at para 67 and following; and *Lautsi v Italy* Application No 30814/06, Merits and Just Satisfaction, 3 November 2009). On this much-commented case, see Temperman, *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (2012).

44 In particular, the fact of being in contact with the public or not (front office/back office) is irrelevant. See in particular, Conseil d'Etat, Case No 217017, *Demoiselle Marteaux* Advisory Opinion, 3 May 2000, concerning a Muslim woman who worked as a monitor in a public school ('[I]f agents of the public service of education enjoy, like all other public agents, freedom of conscience and a protection against all forms of religious-based discrimination in their access to public careers and the unfolding thereof, the principle of *laïcité* obstructs their right to express their religious beliefs within the public service; to that extent, there are no reasons to distinguish between several categories of agents on the basis of whether they are or are not in charge of teaching responsibilities; it thus follows that a public agent who expresses his/her religious beliefs within the public service, throughout the wearing of a sign that marks his religious affiliation, is a breach of his/her obligations').

45 Conseil d'Etat, Case No 43,548, *Magnier*, 13 January 1961; Conseil d'Etat, Case No 43834, *Narcy*, 28 June 1963.

46 Conseil d'Etat, Case No 284736, *Commune d'Aix en Provence*, 6 April 2007.

47 It was an 'association' constituted under the legal regime of the law of 1 July 1901.

firmly clarified that the constitutional principle of *laïcité* did not apply to (employment) contracts between private persons.⁴⁸

The *crèche* then claimed that its commitment to religious neutrality was so instrumental to its *raison d'être* that it ought to be granted an exemption from anti-discrimination law akin to that which can be awarded to religious, political or philosophical organizations and associations. In many national legal orders as well as under European law,⁴⁹ there exists a special legal status for 'conviction-based entities' such as political parties, religious organizations or companies committed to a particular set of values. It is unclear, however, which organizations premised on *neutrality* can claim such exemptions, for they have been crafted in order to accommodate *positive, substantial beliefs*. Arguably, there is something self-contradictory in the argument that neutrality could be protected under legal regimes that are made for actual adherence to any given set of values.⁵⁰ However, the Appellate Court of Paris granted this exemption to the *crèche*, arguing that its commitment to 'transcend[ing] multiculturalism' was genuine and compelling enough that it could ground a policy of religious neutrality for all employees.⁵¹ This line of reasoning was, however,

48 Cass. Soc., 19 March 2013, 11-28845: 'The principle of *laïcité* elevated by Article 1 of the Constitution does not apply to employees of private law employers [*employeurs de droit privé*] who are not in charge of a public service' (author's translation).

49 Under ECHR law, see, for instance, *Obst v Germany* Application No 425/03, Merits and Just Satisfaction, 23 September 2010, at para 44, upholding a decision by the Church of Mormons to fire an employee who had committed adultery, contrary to religious commandments of absolute fidelity under marriage, on the basis of a principle of autonomy of religious communities. EU law similarly refers to 'public or private organizations the ethos of which is based on religion or belief, and grants them some exemptions from anti-discrimination law: see in particular Article 4(1) of EU Directive 2000/78 establishing a general framework for Equal treatment in Employment and Occupation:

Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

See also Article 4(2):

Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organizations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organization's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground. Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organizations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organization's ethos.

50 This is an argument that was made, for instance, by Jean-Guy Huglo who was the rapporteur in the case at the Cour de Cassation in 2013: see, for example, the interview he gave in *Lamy Social* shortly after the March 2013 ruling: available at: actualitesdudroit.lamy.fr (in French only) [last accessed 2 March 2017].

51 CA de Paris, Case No 13/02981, 27 November 2013. The decision describes the *crèche* Baby Loup as 'a company who imposes a principle of neutrality to its personnel in order to transcend the multiculturalism

rejected by the Cour de Cassation in the final ruling on the case of 25 June 2014, for the *crèche* ‘was not promoting or defending religious, political or philosophical beliefs but rather, it was developing an action targeted to early childhood in unflavored contexts and aiming at social and profession integration of women’.⁵²

In its final intervention, the Cour de Cassation was thus faced with one remaining facet of the case: was the *crèche*’s internal rule of 15 July 2003 [*règlement intérieur*] a legally valid basis for the decision to fire Ms Afif—given that the *crèche* was neither a public service nor conviction-based? Contrary to what it had ruled one year earlier, the Court decided that the *crèche*’s internal rule was admissible. It reached that decision by insisting on two main factors: the *crèche*’s small size and its childcare mission.⁵³ Despite much sound and fury, it is difficult to see this final ruling as more than a very casuistic decision: because of the Court’s insistence on the *crèche*’s small size (‘only 18 employees’) and its reference to potential contact between the employees and children and their parents, its reach beyond the particulars of the case is uncertain. In fact, politicians seem conscious of the risks associated with any extension of the solution reached in the *Baby Loup* litigation beyond the particulars of that case, since they soon enough engaged in confirming its substance by means of legislative action. In fact, a draft legislative proposal is currently pending in Parliament that would, should it be passed into law, allow all childcare facilities in the country to require religious neutrality from employees—lest they identify themselves as religious facilities.⁵⁴

The *Baby Loup* case was thus extraordinary in its social and political saliency; legally, its complex and multi-faceted legal dimensions result in much uncertainty as to its actual law-making authority. Much ado about nothing? Probably not. First, because Ms Afif’s dismissal was confirmed as legal and non-discriminatory—an epilogue that mattered deeply for the claimant. Secondly, because the case was the emerged part of a deeper iceberg—the salient point of a wider and very powerful movement that has been reshaping *laïcité* not only politically but also legally over the past decade. In that sense, the extensions of the scope of *laïcité* that the *Baby Loup* case eventually confirmed are only some of many more that have been legally endorsed since the mid-2000s.

of the people to whom it targets its actions’ and goes on to determine that ‘to that extent, the Baby Loup association can be qualified as a “conviction-based company” [*une entreprise de conviction*] in a position to require its employees’ neutrality’.

52 Cass, Assemblée plénière, Case No 13-28369, 25 June 2014.

53 The ruling reads: ‘[T]he appellate court did not err in finding that, on the basis of the concrete modes of operation of small-sized association of only 18 employees who were or could be in direct relation with children and their parents, the restriction of the right to express one’s religious beliefs that resulted from the internal rule [*règlement intérieur*] was not of general nature but rather was sufficiently precise, justified by the nature of the tasks accomplished by the employees and proportionate to the end goal.’ See *ibid*.

54 See Proposition de loi no 452 *visant à étendre l’obligation de neutralité a* registered at the Senate *ux structures privées en charge de la petite enfance et à assurer le respect du principe de laïcité bureau* on 13 May 2015. It reads: ‘§1 Facilities and services welcoming children under the age of 6 that are managed by public law entities or by private law entities in charge of a mission of public service are subjected to an obligation of religious neutrality. Facilities and services welcoming children under the age of 6 years that do not fall under §1 [note by author: that is, facilities that are managed by private law entities who are not in charge of a mission of public service, which was the case of the Baby Loup *crèche*] may, according to the conditions laid out in Articles L.1121-1 and L.1312-3 of the Labour Code, restrict their employees’ freedom to express their religious beliefs. Such restrictions are to be laid out in the internal rules [*règlement intérieur*].’

3. PART 2: 2004 TO 2015: REDEFINING LAÏCITÉ

This article does not claim that there once was an original meaning of *laïcité* under French law—one that would be altered or falsified by contemporary redefinitions. Rather it insists that a relatively stable interpretation of *laïcité* as a legal principle has prevailed throughout most of the twentieth century and that this interpretation is being increasingly challenged. The *modus operandi* is the following: whereas *laïcité* has always generated obligations of religious neutrality, those were long understood to weigh on public authorities only. The 2004 law prohibiting religious symbols in public schools represents a rupture in that perspective, as it is the first legal formalization of obligations of neutrality weighing on private individuals. This breakthrough is all the more important in that it has encouraged many actors to promote extensive interpretations of the 2004 regime—not only inside schools but around schools as well, thus nurturing the idea that *laïcité* entails religious neutrality in a variety of social settings. To the extent that the past decade can be read as having witnessed a genuine reversal of the meaning of *laïcité* with respect to private individuals, it no longer serves as a guarantee of religious freedom but as its antonym. Highly significant, from that standpoint, are the ways in which these developments have, so far, gone undisturbed by counter powers: if anything, national judges (including the Conseil constitutionnel) as well as European judges (in particular, those presiding in the European Court of Human Rights) have neither stopped nor mitigated the transformation of France's *laïcité* regime.

A. *Laïcité* as an Obligation of Religious Neutrality for Public Authorities

Laïcité is a constitutional principle in France: it is proclaimed in Article 1 of the Constitution of 1958 together with other principles such as the democratic and social nature of the French Republic and the principle of equality before the law. It is not, however, defined by the text of the Constitution; one thus needs to study judicial interpretation thereof to grasp its substantive meaning. The *Conseil constitutionnel* (CC) for instance has determined that Article 1's reference to *laïcité* encompasses respect for all beliefs, equality of all citizens before the law as well as a guarantee of the free exercise of religion offered by the Republic.⁵⁵ But *laïcité* also predates the Constitution of the Fifth Republic; and, although it makes no explicit reference to the word, the law of 9 December 1905 on the separation of church and state is generally associated with the elevation of a legal regime of *laïcité* in France. As it breaks with the former Napoleonic Concordat (1802-1905)—by which the French State had given special recognition to Catholicism, Judaism and Protestantism⁵⁶—the law

55 CC, 2012-297QPC, *Traitement des pasteurs des Eglises consistoriales du Bas Rhin, du Haut Rhin et de Moselle*, 21 March 2013.

56 The Concordat is still into force in three French metropolitan departments (Haut Rhin, Bas Rhin and Moselle) which were under German rule when the 1905 law was passed. This situation has been deemed constitutional: see CC, *Interdiction du travail du dimanche en Alsace Moselle*, 5 August 2011, 2011-157QPC). The law of 1905 does not apply either to French Guyana or New Caledonia and, historically, its application was either much delayed or never extended to former colonies (on which see Achi, 'La séparation des Églises et de l'État à l'épreuve de la situation coloniale. Les usages de la dérogation dans l'administration du culte musulman en Algérie (1905-1959)' (2004) 66 *Politix* 84, and 'Laïcité d'empire. Les débats sur l'application du régime de séparation à l'islam impérial' in Weil (ed.), *Politiques de la laïcité au 20e siècle* (2007) 237.

of 1905 is essentially technical in nature. It opens, however, with two relatively substantial or principled provisions:

Article 1

The Republic ensures freedom of conscience. It guarantees the free exercise of religion subject to the sole restrictions enacted hereafter in the interest of public order.

Article 2

The Republic does not recognize, remunerate or subsidize any religion. In consequence, starting on the 1st of January which follows the publication of this Law, all expenses concerning the practice of religion shall be abolished from the budgets of the state, departments and municipal councils.⁵⁷

In other words, while it recognizes the right to freedom of religion for individuals (Article 1), the law of 1905 subjects all public authorities to an obligation of neutrality (Article 2).⁵⁸ Until recently, this obligation of (religious) neutrality did not extend to private individuals. In a 2004 study entitled *One Century of laïcité* [*Un siècle de laïcité*], the Council of State explained that the requirement of neutrality that weighed on public authorities was justified by the fact that it guaranteed the right to freedom of conscience for private individuals who interact with those authorities.⁵⁹ It insisted, nevertheless, that private individuals retained the freedom to express their religious beliefs, including in their interactions with public services and authorities.⁶⁰ Significantly, at the time this study was published, a rich and consistent body of case law⁶¹ rested on the clear distinction in the legal regimes applicable to students and teachers of state schools: while obligations of strict neutrality weighed on the latter, the formers' freedom to express their faith could not be subjected to limitations other than those commanded by the safeguard of other individuals' freedom.⁶²

57 Article 2(2) states further: 'However, expenses related to the services of the chaplaincy and intended to ensure the free exercise of religion in public establishments such as secondary schools (*lycées* and *collèges*), and primary schools, hospitals, asylums and prisons, may be included in these budgets. The public establishments of religion are abolished, subject to the conditions stipulated in Article 3.'

58 Rather, this is the interpretation that has prevailed of Article 2, which could have been construed to have a solely financial meaning. In 1950, the Supreme Administrative Court delivered a landmark ruling clarifying that all public agents are under 'a duty of strict neutrality': see Conseil d'Etat, Case No 98284, *Jamet*, 3 May 1950; and the same holds for public buildings.

59 This of course is in itself a particular understanding of State neutrality—one that strongly contrasts, for instance, with the alternative understanding that prevails in Canada where State neutrality is not deemed to be violated by the wearing of religious symbols by agents of the State, even in the highest positions. The appointment of a Sikh Minister of Defence (Harjit Sajjan) by Prime Minister Justin Trudeau in 2015 is emblematic in that respect.

60 Conseil d'Etat, *Un siècle de laïcité* (2004) at 394.

61 For the most important references, see: Conseil d'Etat, Case No 346893, *Avis*, 27 November 1989; Conseil d'Etat, Case No 130394, *Kherouaa*, 2 November 1992.

62 See the opinion of David Kessler, who was the equivalent of an Advocate General before the Council of State [*commissaire de gouvernement*] in the *Kherouaa* case: 'The distinction has not been sufficiently underlined between students' and teachers' obligations. Because education is *laïque*, the obligation of neutrality is comprehensively imposed on teachers who may not express their religious faith while teaching. However, because freedom of conscience is the rule, such a principle cannot be imposed on students who are free to manifest their faith, the sole limit to that freedom being others' freedom.'

However, during the 1990s, a twofold movement developed that shortly after led to legislative intervention.

(i) *The prohibition of ostentatious religious symbols inside public schools*

By the end of the 1980s, the wearing of the *hijab* by young Muslim girls started to be successfully turned into a salient and pressing social problem by a number of social, political and legal actors.⁶³ This was further compounded by the unfurling of a strong republican discourse insisting on the particular role of public schools in shaping the minds of future citizens, and on the importance of the preservation of the neutrality of educational settings in that perspective.⁶⁴ By the time a committee of experts was convened in order to reflect on the appropriate legal answers to a number of conflicts that had been generated between Muslim families and school authorities in several parts of France, it was likely that a ban on wearing the *hijab* would be proposed. It must be noted, however, that the 2003 Final Report of the Stasi Commission⁶⁵ made many recommendations besides the ban on religious symbols in public schools, several of which testified to the notion that the traditional doctrine of state neutrality ought to be revisited in order to be more inclusive. For instance, the Report suggested that the calendar of holidays be amended so as to include holidays from other religious traditions (for instance, *Kippour* and *Aid el Kebir*) in order to distance itself from the Catholic tradition. These proposals, however, were eventually ignored by Parliament.

The passing of the law of 15 March 2004 constitutes a radical reversal of prior law as it commands that ‘the wearing of symbols or garb by which students [of public elementary, middle and high schools] ostentatiously manifest a religious belonging is prohibited’.⁶⁶ In legal terms, the 2004 law subjects state school students⁶⁷ to a new legal regime—a regime of religious neutrality. A little over ten years on, the assessment of the 2004 law’s impact features two main elements. The first one is the disproportionate impact it has on Muslim women. The second, correlatively, has to do with the particular issues at stake when deciding what counts as ‘religious’ garb under the 2004 law.

Although it is difficult to access centralized statistics on the actual application of the law (that is, the number of cases in which school authorities invoke the law in order to ask a student to remove religious symbols),⁶⁸ the cases that are litigated

63 Amiraux, ‘L’affaire du foulard’ en France: retour sur une affaire qui n’en est pas encore une’ (2009) 2 *Sociologie et Sociétés* 273.

64 See, for instance, Kintzler, ‘Laïcité et philosophie’ (2004) 48 *Archives de philosophie du droit* 43.

65 Commission Stasi, *Rapport sur l’application du principe de laïcité dans la République*, December 2003, available at: www.ladocumentationfrancaise.fr/var/storage/rapports-publics/034000725.pdf (in French only) [last accessed 2 March 2017].

66 Law 2004-228 of 15 March 2004.

67 Estimates indicate that approximately 80 per cent of school age children in France attend State schools.

68 In May 2014, the Observatoire de la laïcité asked the Head of the Department of Legal Affairs of the Ministry of Education, Catherine Moreau, to write an assessment of the application of the law. Moreau indicated in her report that during the academic year 2004–05 (the first year of the application of the law) 639 cases of conflict over the wearing of religious symbols had been reported, of which a little less than 30 were litigated. In the academic year 2005–06, according to her statistics, the figure dropped to three and has remained incidental ever since. Her report draws the conclusion that the law is extremely efficient: see Moreau, ‘Bilan de l’application de la loi du 15 mars 2004’ in *Observatoire de la laïcité, Rapport annuel 2013-2014* (2014) 62.

reveal a disproportionate impact on Muslim women.⁶⁹ To be sure, the rigours of the law are also applied, occasionally, to non-Muslim students—sikh students, for instance;⁷⁰ but these are only an exception to the general rule. Counting the total number of cases that have led to judicial rulings, legal scholar Olivia Bui Xuan claims that, while four of them were brought by sikh male students, 37 had been initiated by Muslim female students—and one of these cases comprised 17 complainants.⁷¹

Another contentious issue related to the application of the 2004 legal regime relates to the definition of what constitutes a ‘religious symbol’ under the law. In a 2007 ruling, the Council of State upheld an expulsion decision that had been taken against a female student wearing a bandana.⁷² In 2013, a similar decision was upheld in a case brought by another student who was reproached for wearing a woollen hat;⁷³ and in 2013, another case concerned an expulsion decision concerning a skirt that was too long⁷⁴—a skirt recalling the traditional *abaya* piece of clothing. Anthropologist Talal Asad, in his study of the Report of the Stasi Commission that preceded the adoption of the 2004 law, had underlined the high stakes that would be associated with the determination of ‘religious’ symbols—and, even more so, ostentatious religious symbols.⁷⁵ Subsequent developments have proved how warranted his word of caution was. In fact, it is interesting to underline that although the law, at face value, seems to be based on ‘symbols’ that are supposed to have a somewhat objective existence, it is increasingly the much more abstract and immaterial behaviour (and interpretations thereof) of Muslim female students to whom the rigours of the law are being opposed. In the bandana case, for instance, the Advocate General acknowledged that it was not a religious symbol; however, he insisted that the intransigence of the student in her refusal to remove it justified it being subsumed under the category of ‘ostentatious religious symbols’. Similarly, in cases where long skirts have been at the heart of the conflict, school authorities have based their judgments on the fact that the students were Muslim girls who wore headscarves on their way to school, and only removed them when entering school premises. This behaviour, they felt, allowed them to interpret other parts of the girls’ clothing as necessarily similarly endowed with religious meaning—and thus apply the 2004 law to their skirts or gloves. This *modus operandi* in the application of the law does however place the concerned students in a catch-22 situation: although they make an effort to

69 Bui Xuan, ‘Regard généré sur les dispositions juridiques relatives à la neutralité religieuse’ in Hennette-Vauchez, Pichard and Roman (eds), *Ce que le genre fait au droit* (2013) 25.

70 In fact, it is a sikh organization that successfully obtained a decision by the UN Human Rights Committee found that the 2004 law was a disproportionate restriction on religious freedom: see *Bikramjit Singh v France* (1852/2008) Views, 4 February 2013, CCPR/C/106/D/1852/2008 (2013) on which see Bribosia, Caceres and Rorive, ‘Les signes religieux au cœur d’un bras de fer entre Genève et Paris: la saga Singh’ (2014) 98 *Revue Trimestrielle des Droits de l’Homme* 495.

71 Bui Xuan, *supra* n 69.

72 Conseil d’Etat, Case No 295671, *M. et Mme A.*, 5 December 2007.

73 Conseil d’Etat, Case No 306833, 10 June 2009.

74 Conseil d’Etat, Case No 366749, 19 March 2013. See also a 2015 expulsion decision decided on the ground that a skirt was ‘too long’, see: www.liberation.fr/societe/2015/04/28/une-jupe-pas-tres-laique-provoque-l-exclusion-d-une-collegienne_1274196 (in French only) [last accessed 2 March 2017].

75 Asad, ‘Trying to Understand French Secularism’ in de Vries and Sullivan, *Political Theologies. Public Religions in a Post Secular World* (2006).

comply with the law by removing their headscarf before entering their schools, they still face expulsion and other disciplinary measures because of extensive, judicially upheld, interpretations of the law.

Additionally, it is worth noting that the 2004 law was upheld by a number of judicial interventions both at the national and European levels. To be sure, enacting the law constrained administrative courts in France: even though administrative case law had consistently affirmed the existence of pupils' right to express their religious faith at school throughout the 1980s and 1990s, this was no longer an option for administrative courts who are to enforce legality once a new law enters into force.⁷⁶ The only possibility of ignoring the new legislative provisions would have entailed administrative courts' ruling that the provisions were contrary to the state's obligations under the European Convention on Human Rights (ECHR). To the contrary, the administrative courts determined that expulsion decisions based on the new legislative understanding of *laïcité* did not amount to an excessive interference with the right to freedom to manifest one's religion in breach of Article 9 of the ECHR. As for the compatibility of the 2004 law with the French constitution, it was never put to the test, neither before it was promulgated nor since then. In its 2004 ruling pertaining to the compatibility with the French Constitution of the proposed constitutional treaty for the EU, the *Conseil* did however insist that 'the provisions of Article 1 of the Constitution whereby "France is a secular republic" which forbid persons to profess religious beliefs for the purpose of non-compliance with the common rules governing the relations between public communities and private individuals are thus respected'.⁷⁷ Based on the provisions of Article 9 of the ECHR, one would have expected the position of the ECtHR to be more demanding. Article 9 does indeed define religious freedom as encompassing one's freedom to manifest religion both in public and in private. The European Court, however, chose to defer to national traditions and interpretations, especially whenever domestic law subjects particular groups of people to restrictions on religious freedom. School teachers,⁷⁸ hospital personnel,⁷⁹ pupils⁸⁰ and students⁸¹ all fall under possible limitations on their right to express their religious beliefs; and claims of gender-based discrimination have, so far, been rejected.⁸² To be sure, the much-noted *Eweida and Others* ruling of January

76 Conseil d'Etat, Cases Nos 285394, 285395, 295671 and 285396, 5 December 2007.

77 Conseil d'Etat, 2004-505DC *Traité constitutionnel pour l'Europe*, 19 November 2004, at para 18.

78 See *Dahlab v Switzerland* Application No 42393/98, Admissibility, 15 February 2001; *Kurtulmuş v Turkey* Application No 65500/01, Admissibility, 24 January 2006.

79 See *Ebrahimian v France* Application No 64846/11, Merits and Just Satisfaction, 26 November 2015.

80 *Dogru v France* Application No 27058/05, Merits, 4 December 2008; and on the same day, *Kervanci v France* Application No 31645/04, Merits, 4 December 2008. See also decisions of admissibility in *Aktas v France* Application No 43563/08, Admissibility, 30 June 2009; *Bayrak v France* Application No 14308/08, Admissibility, 30 June 2009; *Gamaleddyn v France* Application No 18527/08, Admissibility, 30 June 2009; *Ghazal v France* Application No 29134/08, Admissibility, 30 June 2009; *Ranjit Singh v France* Application No 27561/08, Admissibility, 30 June 2009; *Jasvir Singh v France* Application No 25463/08, Admissibility, 30 June 2009.

81 *Leyla Şahin v Turkey* Application No 44774/98, Merits and Just Satisfaction, 10 November 2005.

82 The claim was present in various cases, see recently *Dahlab v Switzerland*, supra n 78; *Leila Şahin v Turkey*, *ibid.*; *Dogru v France*, supra n 80. On the topic, see Radacic, 'Gender Equality Jurisprudence of the European Court of Human Rights' (2004) 19 *European Journal of International Law* 841. See also

2013⁸³ marks an important shift in the European Court's approach to Article 9 claims as it clearly abandons the position that employees retain the possibility of freeing themselves from undue restrictions to their freedom of religion by leaving their positions of employment and newly requires private parties to balance all interests and seek to minimize infringements. It would however be mistaken to characterize the ECtHR's approach as one guided by the concept of reasonable accommodation; rather, the national margin of appreciation seems to be the Court's guiding principle. As far as the French 2004 ban on religious symbols in public schools is concerned, it is interesting to note that, even before it entered into force, the Court had found no violation of the Convention in cases where pupils wearing headscarves had been excluded from school because of their refusal to remove them during gymnastics classes. The cases dated back to the late 1990s, and the expulsion decisions were based on the administrative doctrine that, despite the fact that pupils retained the right to express their religious beliefs, punctual and temporary restrictions were legitimate as long as they pursued goals of safety and public order.⁸⁴ Requirements to remove veils during physical education or chemistry classes were generally found to fall under those qualifications. On that basis, it was hardly surprising that the Court found no violation of the Convention in similar cases *posterior* to the entry into force of the 2004 law: if anything, the position of national authorities was only strengthened by the new legislative provisions as eviction decisions were no longer exceptions to a rule but the application thereof. Thus, the series of 2009 inadmissibility decisions on applications lodged by claimants who alleged that exclusions from school based on the 2004 law violated the Convention.

As it largely shied away and chose to take a position of deference, the European Court's position on this matter is only highlighted by the very different approach taken under the International Covenant on Civil and Political Rights 1966 (ICCPR) by the United Nation's Human Rights Committee (UNHRC), which has found the 2004 law to constitute a disproportionate restriction of religious freedom⁸⁵—and has reached that decision, remarkably, in cases exactly similar to some that had been declared inadmissible in Strasbourg.⁸⁶ In fact, several authors have expressed the

Levy, 'Women's Rights and Religion: The Missing Element in the European Court of Human Rights' Jurisprudence' (2014) 35 *University of Pennsylvania Journal of International Law* 1175.

83 *Eweida and Chaplin v United Kingdom* Application No 48420/10 *et al.*, Merits and Just Satisfaction, 15 January 2013.

84 *Dogru v France*, supra n 80 at para 68: 'The Court observes that the domestic authorities justified the ban on wearing the headscarf during physical education classes on grounds of compliance with the school rules on health, safety and assiduity which were applicable to all pupils without distinction. The courts also observed that, by refusing to remove her headscarf, the applicant had overstepped the limits on the right to express and manifest religious beliefs on the school premises.'

85 *Bikramjit Singh v France*, supra n70.

86 In fact, the organization *Singhs United* has engaged in strategic litigation against various aspects of French law that they claim constitute undue restrictions on religious freedom (including the obligation to provide bareheaded photographs in order to be issued with French passports, another case which the ECtHR has ruled inadmissible whereas the UNHRC found French law to be in violation of the ICCPR). As for the challenge to the 2004 law, the case in which the UNHRC found France to be in violation of the ICCPR concerned a pupil, *Bikramjit Singh*, who had been expelled from the exact same high school for the exact same reason (wearing a *sikh keski*) and during the very same academic school year as another pupil, *Ranjit Singh*, whose application to the ECtHR was declared inadmissible: see *Bikramjit Singh v France*, *ibid*. On the parallel readings of the *Singh* saga, see *Bribosia*, *Caceres* and *Rorive*, supra n 70.

view that not only is the ECtHR's approach particularly deferential to national appreciations of matters, it is also inconsistently so. In particular, scholars have noted that the Court's interpretation of religious freedom varied greatly depending on whether dominant or minority religious views and beliefs were at stake (Islam, in particular).⁸⁷ Samuel Moyn for example has written that the Court's approach amounted to 'Christian Islamophobia' dressed in the 'principled garb of secularism'.⁸⁸ The criticism is a serious one indeed. It not only challenges the epistemological possibility of a sustainable notion of neutrality (and secularism)⁸⁹ but also the capacity of bodies, such as the European Court, to be equal to their adjudicatory office.

B. Extending the Interpretation of the Prohibition around Schools

Extensive applications of the 2004 law also occur in several other instances. The growing controversy over the possibility of subjecting parents of state school pupils to an obligation of religious neutrality when they collaborate with school activities is a case in point. Shortly after the 2004 law was passed, some schools undertook to amend their internal rules so as to insert requirements of neutrality applicable to what soon became the category of 'accompanying parents', that is, parents when/if they accompany students on trips and activities outside the school (museum, cinema, sports day and so on). In 2011, a Muslim mother brought a legal challenge against the new rule in her child's school. In the first judicial ruling on the issue, her claim was rejected. The Court reasoned that 'accompanying parents' were 'participants' in the public service of education and could, therefore, be subjected to the realm of *laïcité*, that is, the obligation of religious neutrality in public services.⁹⁰ Soon after the ruling, all schools adopting similar policies received express support from the Minister of Education, who recommended in a nationwide general ministerial instruction that accompanying parents themselves respect in their dress a principle of religious neutrality.⁹¹

It is very doubtful that there is a valid legal ground for subjecting parents to any form of religious neutrality. To be sure, the law of 2004 does not apply to parents, as it is expressly stated as only applying to 'pupils of elementary, middle and high schools'. As to the Montreuil court's reasoning that these parents are 'participants' in the public service of education, it is observed that, not only is that category essentially unheard of in general administrative law, the only other instance in which it

87 Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights' (2011) 32 *Michigan Journal of International Law* 663.

88 Moyn, 'From Communist to Muslim: European Human Rights, the Cold War, and Religious Liberty' (2014) 113 *South Atlantic Quarterly* 63.

89 See also Habermas, *Time of Transitions* (2006) at 150-1: 'Christianity has functioned for the normative self-understanding of modernity as more than a mere precursor or a catalyst. Egalitarian universalism, from which sprang the ideas of freedom and social solidarity, of an autonomous conduct of life and emancipation, of the individual morality and conscience, human rights, and democracy, is the direct heir to the Judaic ethic of justice and the Christian ethic of love. This legacy, substantially unchallenged, had been the object of continual critical appropriation and reinterpretation. To this day, there is not alternative to it. And in the light of the current challenges of a post-national constellation, we continue to draw on the substance of this heritage. Everything else is just idle postmodern talk.'

90 TA Montreuil, Case No 1012015, 22 November 2011. Sadly, the claimant was distraught enough by the ruling that she did not appeal it.

91 Circulaire Chatel, 27 March 2012.

was referenced led to exactly the opposite results. In 2001, the Conseil d'Etat did indeed rule that the intervention of Congregationalist sisters wearing a coif inside penitentiary institutions made them 'participants' in the public service; however, their intervention could not be construed as a violation of *laïcité*, for it was 'exclusive of all proselytism'.⁹² By the middle of 2013, the confusion on this issue was such that the French Equality Body (Défenseur des droits) asked the Council of State, in its advisory capacity, to 'clarify' the law. In a study that was released in December of 2013, the Council of State determined that there were no legal grounds for subjecting accompanying parents to a general obligation of religious neutrality when they accompanied school activities, unless there was a particular threat to the public order.⁹³ By 2014, the new Minister of Education in the Socialist Government, Ms Najat Vallaud Belkacem, made public her position that she opposed her predecessor's policy; Ms Vallaud has not, however, repealed his general instruction. To this day, the situation thus remains uncertain. Nevertheless, the policy is not without social effect. Among many others that are also addressed in this article, this particular policy contributes to the dissemination in the public at large of negative perceptions of religion in general, and Islam in particular. It also encourages the diffusion of the legally ungrounded and politically problematic assumption that all forms of religious expression should be limited to the private sphere.⁹⁴

Another issue has emerged following extensive of interpretation of the 2004 law: that of its application to young adults enrolled in vocational training programmes. The structure of vocational training in France rests on programmes organized by public institutions called GRETAs.⁹⁵ The programmes they organize often take place inside public high schools. By the mid-2000s, several high school principals took the stand that the people enrolled in GRETA programmes could not wear religious symbols or garb while attending training sessions, thus interpreting the 2004 law as applicable to public school buildings rather than to public school students. The matter was referred to the Legal Affairs Department of the Ministry of Education, which wrote a memorandum in 2009 expressing the view that, although the people involved in vocational training programmes could not be considered to be 'students of elementary, middle or high schools' under the law of 2004, it would be a violation of the constitutional equality clause to tolerate the coexistence within public high schools of differently treated groups of users: pupils subjected to the neutrality requirement, and young adults not subject to the neutrality

92 Conseil d'Etat, Case No 215550, *Syndicat pénitentiaire FO*, 27 January 2001.

93 This notion of 'threat to the public order' is very commonplace in the administrative law approach to measures that might affect individual liberties. The general doctrine is that such threats may justify restrictions to individual liberties; however, the administrative courts usually require that these threats be substantially documented.

94 The dissemination of such an assumption is not particular to France. Similar cases that are pending at the ECtHR include a case against Spain concerning a lawyer wearing the hijab who was barred from accessing the tribunal where she was to plead (*Barik Edidi v Spain* Application No 21780/13, Admissibility, 26 April 2016) and another directed at the Belgian burqa ban (*Belkacemi and Oussar v Belgium* Application No 37798/13, Communicated, 9 June 2015).

95 The acronym GRETA stands for GRoupement d'ETablisements; a GRETA is a network of teaching institutions and operates in the field of vocational training.

requirement. This violation of the principle of equality would then in turn justify subjecting everyone to the rule, lest there be a threat to the public order inside schools.⁹⁶ Here again, the proposed interpretation of the law was a broad one that amounted to subjecting groups of individuals that clearly fell outside of its scope to the legal regime it created. Courts have essentially ruled in a direction opposite to that of the Ministry of Education when confronted with the issue;⁹⁷ as has the Equality Body.⁹⁸ A recent appellate judgment, however, echoes the Ministry's views. In October 2015, the Paris administrative appellate court determined that because of the fact that specific GRETA training sessions took place inside a public high school, GRETA trainees were bound to 'come across' [*rencontrer*] high school students, and the simultaneous presence, within a single building, of students subjected to the rule of religious neutrality and of a trainee wearing a headscarf, was capable of causing a threat to the school's public order.⁹⁹ This also is an important development, in that such a broad interpretation of the 2004 law creates another category of private individuals who are subjected to the requirement of religious neutrality.

C. Extending the Prohibition of Religious Symbols Beyond Schools: The Public Space

Such extensions have also occurred in situations where there is no connection whatsoever to the 2004 law on public schools. The most obvious example is the 2010 ban on the concealment of the face—the official title of the 'burqa ban'.¹⁰⁰ This ban originated in the successful construction of the 'integral veil' as an important issue of public policy in the mid-2000s. By 2008, a parliamentary Commission convened to

96 Ministry of Education, Department of Legal Affairs, Memorandum of 10 March 2009 (on file with author).

97 TA Paris, Case No 0905232, 5 November 2010. See also TA Caen, Case No 1200934, 5 April 2013.

98 HALDE, Decision No 2009-235 of 8 June 2009; Défenseur des Droits, Decision No LCD-2013-7 of 5 March 2013.

99 Cour administrative d'appel de Paris, Case No 14PA00582, 12 October 2015: 'qu'ainsi, dans les conditions dans lesquelles se déroulaient cet enseignement, les stagiaires du GRETA étaient amenés à *rencontrer* les élèves du lycée ; que la présence simultanée, dans l'enceinte d'un même établissement, de ces élèves qui sont soumis, en application de l'article L 141-5-1 du Code de l'éducation à l'interdiction de port de signes manifestant ostensiblement une appartenance religieuse et d'une stagiaire d'un GRETA portant un tel signe était dès lors, dans les circonstances de l'espèce, de nature à troubler l'ordre dans l'établissement' (emphasis added).

100 Law No 2010-1192 of 11 October 2010. The very fact that public and parliamentary debates that led to the passing of the law consistently referred to the *burqa* is in itself very interesting. For indeed it is the *niqab* (in which the face is covered by a veil, but the eyes are seen) and not the *burqa* (which covers the whole body and face, with the eyes being seen only through a mesh) that has allegedly grown in numbers in contemporary France. Referring to the *burqa*, however, allows for connotations associated with Taliban extremism in Afghanistan to be imported into the debate. The problem was thus constructed and presented as a problem of foreign origin, not one relating to *hic et nunc* France, although the Ministry of Interior's statistics acknowledged that of the 1,900 women wearing the *burqa* on French soil, 75 per cent were of French nationality: see Hennette Vauchez, 'La burqa, la femme et l'État. Réflexions inquiètes sur un débat actuel' in *Raison Publique* (2010), available at: www.raison-publique.fr/article317.html (in French only) [last accessed 2 March 2017]. See also, more generally, Brems, 'Face-Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings' (2014) 22 *Journal of Law and Policy* 517.

discuss the issue.¹⁰¹ At the time, official statistics by the Ministry of Interior documented that approximately 1,900 women in France wore the ‘integral veil’ (compared to a global population in France of 66 million). The Commission heard many experts and some testimonies as well,¹⁰² and by the time it released its final report in January 2010, several groups of politicians had been convinced that this was a relevant issue. As a forerunner of legislative action that was yet to come, a parliamentary resolution¹⁰³ was voted on reaffirming the importance of respecting ‘republican values’ that were allegedly threatened by the development of ‘radical practices’.¹⁰⁴ In parallel, the Government asked the Council of State to determine possible legal grounds for a ban on the integral veil—a ban, in the Prime Minister’s words, that ought to be ‘as comprehensive and effective as possible’.¹⁰⁵ Interestingly, however, the Council of State’s study argued that there were no legal grounds for such a ban: *laïcité*, security, equality, dignity—all these potential legal grounds examined by the study were found to fall short of legitimizing a total ban on the *niqab*. The Council of State also expressed doubts regarding the compatibility of such a ban with national and international anti-discrimination norms, as well as with constitutional law standards applicable to restrictions on individual freedoms.¹⁰⁶ The Government decided to move forward nonetheless, thus marking the first of a significant series of measures that disregard the forms and procedures which uphold the rule of law.¹⁰⁷ A governmental legislative project was thus initiated and after the Parliamentary debates took place during the months of June and September 2010, the bill was enacted into law. Its main provision is Article 1, which simply provides: ‘No one shall, in the public space, wear an outfit destined to conceal one’s face’. The scope of the text is thus very wide, for it amounts to prohibiting the *niqab* in the public

101 See Gérin and Raoult, *Final Report to the National Assembly: Mission d’information parlementaire sur le port du voile intégral sur le territoire national*, No 2262, 26 January 2010: www.assemblee-nationale.fr/13/rap-info/i2262.asp (in French only) [last accessed 2 March 2017].

102 Rather, they *listened* to such testimonies; it is unclear whether they really *heard* what these women had to say as they systematically referred to their interviews in modes that were degrading of the women’s credibility: see Hennette Vauchez, *supra* n 100.

103 Article 34(1) of the Constitution allows Parliamentary resolutions to express their views in non-binding declarations on topics of their choice.

104 Résolution of 11 May 2010 réaffirmant l’attachement au respect des valeurs républicaines face au développement de pratiques radicales qui y portent atteinte.

105 See the official letter of the Prime Minister to the Council of State in which he calls for a prohibition ‘that I wish to be as comprehensive as possible’ (*‘une interdiction que je souhaite la plus large et la plus effective possible’*).

106 Conseil d’État, *Étude relative aux possibilités juridiques d’interdiction du voile intégral*, 30 March 2010, available at: www.conseil-etat.fr/Decisions-Avis-Publications/Etudes-Publications/Rapports-Etudes/Etude-relative-aux-possibilites-juridiques-d-interdiction-du-port-du-voile-integral (in French only) [last accessed 2 March 2017].

107 Another interesting action from that perspective was the Prime Minister’s threat to activate the expedited legislative procedure for reasons of emergency, in order to reduce the discussion and debates around the proposed legislation. Although he eventually did not do so, the bill was adopted by both assemblies after only one reading in each. On these aspects, see Hennette Vauchez, ‘Derrière la burqa, les rapports entre droit et laïcité: la subversion de l’Etat de droit?’ in Koussens and Roy (eds), *Quand la burqa passe à l’Ouest* (2013) 159.

space at large, which includes the streets, public accommodation and transport and so on.¹⁰⁸

Before it was promulgated on 11 October 2010, the bill was referred to the Constitutional Council, which upheld it, but delivered a troubling ruling.¹⁰⁹ In a remarkably short decision, the Constitutional Council ruled that the law prohibiting face covering struck a reasonable balance between the public interest in safeguarding public order on the one hand, and the guarantee of constitutionally protected rights on the other hand.¹¹⁰ Ironically, it also revealed the legislator's subterfuge in enacting the law in general terms, rather than in the specific terms that it was undoubtedly pursuing (a *burqa* ban). Indeed, whereas neither the law's official title¹¹¹ nor either of its provisions make any reference to religion, religious garb or the veil, the Council deemed it necessary to underline that it should not have the effect of restricting the freedom to exercise one's religion in barring access to and from places of worship.¹¹² Finally, the decision also contains a sentence that is particularly troubling from the perspective of human rights theory, on at least two counts. First, the Council ruled that individual voluntary behaviour was capable of constituting, in and of itself, violations of the constitutional principles of liberty and equality. Secondly, this particular consideration applies specifically to women—women are, in the Council's words, the individuals whose voluntary decisions are capable of violating constitutional principles.¹¹³

The law of 2010 has also been upheld by the ECtHR.¹¹⁴ The ruling testifies to the fact that this was a hard case for the Court, and that some of the arguments in favour of the law's incompatibility with European human rights standards were well received at the Court. In particular, the Court's decision conveys the notion that the

108 Article 2 of Law No 2010-1192 establishes that 'l'espace public est constitué des voies publiques ainsi que des lieux ouverts au public ou affectés à un service public. Reprendre définition législative'. On the elevation of this new legal category, see Bui Xuan (ed.), *Droit et Espace(s) Public(s)* (2013).

109 CC, 2010-613 DC, *Dissimulation du visage dans l'espace public*, 7 October 2010.

110 *Ibid.* at para 4.

111 Law relative to the prohibition of the concealment of the face in the public space.

112 In fact, this is but one of the many concrete difficulties in the enforcement of the law. Another one was soon revealed in the administrative instruction by the Minister of March 2011 to law enforcement authorities: the circular insists that law enforcement officials should never endeavour to forcefully obtain the removal of a woman's integral veil, for that would amount to assault and thus possibly to criminal charge: see *Circulaire relative à la mise en œuvre de la loi no 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public*, 2 March 2011, available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023654701> (in French only) [last accessed 2 March 2017].

113 See *supra* n 109 at para 4:

Sections 1 and 2 of the statute referred for review are intended to respond to practices, which until recently were of an exceptional nature, consisting in concealing the face in the public space. Parliament has felt that such practices are dangerous for public safety and security and fail to comply with the minimum requirements of life in society. *It also felt that those women who conceal their face, voluntarily or otherwise, are placed in a situation of exclusion and inferiority patently incompatible with constitutional principles of liberty and equality.* When enacting the provisions referred for review, Parliament has completed and generalized rules which previously were reserved for *ad hoc* situations for the purpose of protecting public order. (emphasis added)

114 *S.A.S. v France* Application No 43835/11, Merits and Just Satisfaction, 1 July 2014. For discussion, see Millet, 'When the European Court of Human Rights Encounters the Face: A case note on the burqa ban in France' (2015) 11 *European Constitutional Law Review* 408; Marshall, 'S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities' (2015) 15 *Human Rights Law Review* 377.

Government's arguments that the law was justified by public safety concerns were considered by it to be unconvincing and even irritating.¹¹⁵ Nonetheless, the Court upheld the law by finding there had been no violation of the ECHR in that the French authorities may under European standards consider that 'minimal requirements of social life' and the sheer possibility of a 'shared life' in the community justified the prohibition on concealment of one's face in public.¹¹⁶ These notions, and their introduction into European human rights law, have and will trigger many questions and criticisms. Within the European Court itself, this particular part of the ruling led to vigorous dissent. In their dissent opinion, Judges Nussberger and Jäderblom strongly criticized the Court's reliance on the abstract notion of 'living together'. These Judges explained that they 'cannot share the opinion of the majority as, in our view, it sacrifices concrete individual rights guaranteed by the Convention to abstract principles'.¹¹⁷ Although many considerations relating to the particular position of the ECtHR—both from a structural¹¹⁸ and a conjectural standpoint¹¹⁹—help to explain this particular form of deference to the legislative choices of the French State, its reasoning regarding the alleged indirect discrimination that ensues from the 2010 law is strikingly poor. The complaint is very briefly dismissed as the Court determines that the law rests on 'objective justifications'.¹²⁰ This strongly

115 *S.A.S. v France*, *ibid.* in particular at para 115.

116 *Ibid.* in particular at paras 140–142.

117 *Ibid.* at Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom, para 2.

118 As a supranational court, the ECtHR has consistently put forward the doctrine of subsidiarity, according to which national authorities are, in principle, better positioned to assess the adequate means for the implementation of the Convention and adjust the ensuing requirements to the particulars of any given context. This, however, has not prevented it from delivering a number of bold decisions, many of which have actually contributed to the Court's affirmation as a key player in European multilevel governance in the field of human rights.

119 The ECtHR has been under increasing pressure recently, as several States (among which, notably, the UK) have openly questioned the legitimacy of several of its judgments. While the tension politically culminated in the 2012 Brighton Declaration, it found some legal expression in the amendment to the Convention's preamble that was decided with the signing of Protocol 15 in 2013. The new text insists on the States' margin of appreciation and reaffirms subsidiarity as a foundational principle to the operation of the ECHR as a whole. Some actors from inside the Court have argued that even though Protocol 15 has not yet entered into force, the message has been heard by the Court, which has started to recalibrate aspects of its case law and take a more deferential position *vis-à-vis* Contracting Parties: see, for instance, Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 *Human Rights Law Review* 487.

120 *S.A.S. v France*, *supra* n 114 at para 161: 'In the present case, while it may be considered that the ban imposed by the Law of 11 October 2010 has specific negative effects on the situation of Muslim women who, for religious reasons, wish to wear the full-face veil in public, this measure has an objective and reasonable justification for the reasons indicated previously.' The said reasons are developed throughout paras 144–159 but not always convincingly. For instance, as the Court acknowledges (at para 151) the fact that 'the impugned ban mainly affects Muslim women who wish to wear the full-face veil . . . it nevertheless finds it to be of some significance that the ban is not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face'. Similarly, the Court reasons that while 'it is certainly understandable that the idea of being prosecuted for concealing one's face in a public place is traumatizing for women who have chosen to wear the full-face veil for reasons related to their beliefs . . . it should nevertheless be taken into account that the sanctions provided for by the Law's drafters are among the lightest that could be envisaged, because they consist of a fine at the rate applying to second-class petty offences (currently 150 euros maximum), with the possibility for the Court to impose, in addition to or instead of the fine, an obligation to follow a citizenship course.' For

contrasts with a number of facts. The 2010 law has been in force since April 2011 and available statistics¹²¹ disclose that, between its entry into force and February 2014, a little over 1,000 fully veiled women have been fined and approximately 20 have been subjected to the alternative sentence of ‘citizenship training sessions’.¹²² It is difficult, however, to assess what impact it has had on the actual practice of the wearing of the *niqab* in France.¹²³ Obviously, the law disproportionately impacts upon Muslim women—to an extent that it is arguable that the law is hardly an instance of *indirect* discrimination for, despite the apparent neutrality of the legal formulation (‘no one shall’), its intent was clearly targeted at this particular group within the population. In any event, the prohibition does constitute an unprecedented blanket restriction on a particular manifestation of religious belief.

D. Extending the Prohibition of Religious Symbols Beyond Schools: At Work

Besides the definition of ‘the public space’ as a space in which individuals (women) can be prohibited from wearing a *niqab* (not from wearing religious garb in general), the workplace is another space in which the requirements of religious neutrality have made unprecedented inroads over the past few years. The description of the details of the *Baby Loup* case (see above, Part 1) sketched the general framework of the articulation of religious freedom and employment law, and the extent to which the conflict between the *crèche* and Ms Afif brought change: although under current law, this solution cannot be said to hold true *in general*, the case has established that firms and organizations of small size who operate in the field of childcare may adopt internal rules prescribing religious neutrality for all personnel. However, other developments have also been taking place.

In April 2015, the Cour de Cassation referred a case for a preliminary ruling to the Court of Justice of the European Union (CJEU) that might well lead to the first judicial interpretation by it of the provisions of Article 4(1) of Directive 2000/78 prohibiting religious discrimination in the workplace.¹²⁴ The case originated with the dismissal of a Muslim woman by the company that had employed her for a little under a year as

another critique of the relatively weak standards applied by the Court as far as indirect discrimination goes under the ECHR, see *Francesco Sessa v Italy* Application No 28790/08, Merits, 3 April 2012 (also relative to religious freedom), on which see Bribosia and Rorive, ‘Les droits fondamentaux, gardiens et garde-fous de la diversité religieuse en Europe’ in Bribosia and Rorive, *L’accomodement de la diversité religieuse. Regards croisés Canada, Europe, Belgique* (2015) 171.

121 Observatoire de la Laïcité, *Rapport Annuel 2013-2014* at 80sq.

122 The penalties for not complying with the prohibition of the concealment of the face are very interesting indeed. Women can be fined, but they can also, alternatively, be forced to attend ‘citizenship training sessions’, as if they either were not to be considered as citizens, or (at best) as ‘bad’ citizens in need of rehabilitation. On this, see Hennette Vauchez, ‘L’Altra, la Straniera: Figura retorica centrale delle «guerre giuridiche» nel dibattito francese sulla laicità (2004-2013)’ (2013) 41 *Ragion Pratica* 471.

123 For a critical report on the detrimental impact the ban has had on the targeted women’s mobility, health and autonomy, see Open Society Justice Initiative, *After the Ban: The Experiences of 35 Women of the Full-Face Veil in France* (Research Report, September 2013), available at: <https://www.opensocietyfoundations.org/sites/default/files/after-the-ban-experience-full-face-veil-france-2014-0210.pdf> [last accessed 2 March 2017].

124 It is striking that the CJEU has not been called upon to interpret the prohibition of religious discrimination pursuant to the Directive in its 15 years of existence. Almost as surprising is the fact that there have been only two cases where race discrimination was at stake. In fact, the prohibition on age discrimination seems to be the one ground of the new set of directives that has triggered most judicial intervention.

a computer engineer. Her job entailed being sent for several months at a time on house missions in companies (her employer's clients) to help them install or manage their information technology systems. She wore the veil when she was hired and her employer reports that they had mutually agreed that, should this become an issue at any given point in time, she could be asked to unveil. In May 2009, an important client for whom she had been working onsite reported that her wearing of the veil in the workplace had made several collaborators uncomfortable and asked that no more veiled woman be sent in the future. She was subsequently called for an interview with her supervisors who asked her if she would now agree to cease wearing her veil during assignments. When she refused, her employment was terminated. She took her case to the domestic courts, but both in first instance and on appeal the courts found that the dismissal rested on valid legal grounds and upheld it. When it reached the Cour de Cassation, however, the issue arose whether it was possible to construe customer preference not to be served by persons wearing an Islamic veil as a 'determining occupational requirement' under EU law. The Court decided to refer the question to the CJEU. The question referred is phrased as follows:

Must Article 4(1) of Council Directive 78/2000/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?¹²⁵

The CJEU's answer will be of utmost importance, not only as the first one concerning religious discrimination in the workplace under the authority of the 2000/78 Directive,¹²⁶ but also because of the particular nature of the headscarf issue that

125 See C-188/15, *Request for a preliminary ruling from the Cour de cassation (France) lodged on 24 April 2015, Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v Micropole Univers SA*, available at: curia.europa.eu [last accessed 2 March 2017].

126 See also a comparable pending case, C-157/15 *Request for a preliminary ruling from the Hof van Cassatie (Belgium) lodged on 3 April 2015, Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*:

Should Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?

In June 2016 Advocate General Kokott delivered an opinion in this Belgian case: see C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* 31 May 2016, at Opinion of Advocate General Kokott, in which she argues that the company's internal rule requiring absolute neutrality (religious, political and so on) from all employees is *not* discriminatory. The Grand Chamber of the CJEU gave judgment on 14 March 2017, in respect of which see the postscript to this article.

could encourage the Court to adopt an intersectional approach by addressing the correlated sex and, potentially, race-based dimensions of discrimination.¹²⁷

Also of interest is the judicial ruling by the Cour de Cassation of 19 March 2013 that dramatically extended the legally admissible scope of obligations of religious neutrality under employment law.¹²⁸ Interestingly, because it was delivered the very same day as the first *Baby Loup* ruling, this judicial *fiat* has been somewhat obscured and underestimated. The facts of the case were the following: a private organization working for the distribution of social security benefits (and therefore, endowed with a ‘mission of public service’) decided to fire an employee who was wearing a headscarf. Although the employment contract between the employer and the employee is a contract between two private legal persons normally regulated by the Labour Code, the Court decided to craft an innovative solution according to which the employer’s mission of public service cautioned the applicability of the principles of *laïcité*—and thus, of religious neutrality. Consequently, the decision to fire the employee was upheld. This is a further extension of the scope of religious neutrality of employees under employment law, and a quantitatively important one indeed. Thus far, obligations of religious neutrality in employment law depended essentially on legal status: civil servants and public agents were subjected to neutrality because of the public law nature of their employment positions; whereas employees under private law contracts regulated by the Labour Code, in principle, were not. What the Cour de Cassation 2013 ruling changes is that employees under private law contracts may well be subjected to obligations of neutrality if/when their employers are in charge of a ‘mission of public service’. Depending on how strictly or widely this notion will be interpreted in the future, its potential scope is enormous as numerous private companies and organizations employing very large numbers of people are currently associated with the public service—all the more so given that privatization has been the dominant reformatory paradigm public policy over the past decades. Therefore, sanitization companies, waste management companies, school canteens and so on in most municipalities today are likely to be construed as ‘private companies endowed with a mission of public service’. Subsequent to the Cour de Cassation’s 2013 ruling, all the employees could thus become subjected to an obligation of religious neutrality.

Inside and around schools, but also in the public space at large as well as in an increasing number of cases in the workplace, legally admissible or mandated obligations of religious neutrality have multiplied over the past decade. Indeed, the movement is ongoing: additional draft legislative proposals are regularly registered, including the extension of the prohibition on religious symbols and garb to

127 See Speekenbrink, *European Non-discrimination Law. A comparison of EU law and the ECHR in the field of non-discrimination and freedom of religion in public employment with an emphasis on the Islamic headscarf issue* (2012) at 90.

128 Case No 12-11690, Cass. Soc., 19 March 2013.

universities¹²⁹ or during official sporting competitions.¹³⁰ More than ever the compatibility of the seemingly ever-increasing transformation of *laïcité* into a general obligation of religious neutrality with basic liberal principles appears problematic.

4. CONCLUSION

The regime of *new Laïcité* that has been consolidating in France since the mid-2000s may well be read as a threat to human rights. This is so because it corrupts much of the liberal premises with which polities committed to the human rights paradigm are traditionally associated, rather it imposes a particular view of ‘national’ or ‘Républican’ identity, it rests on a uniform reading of the Islamic veil that erases all forms of agency for women who wear it, it upholds the ever-expanding reach of regulations and, indeed, restrictions on the expression of religious beliefs and so on—and it decidedly discriminates against Muslim women in its actual operation. In fact, human rights are not at all the grammar in which *new laïcité* expresses itself. As French historian Jean Baubérot has recalled: François Baroin¹³¹ expressed the antagonism between *laïcité* and human rights quite clearly as he predicted many of the legal and policy developments that have indeed taken place (and have been analysed here), he insisted that *laïcité* was, ‘to a certain extent, incompatible with human rights’.¹³² This encapsulates the shift that has occurred from a human rights-compatible *laïcité* regime, in which all individuals are on a *par* irrespective of their religion when it comes to religious belief and expression,¹³³ to a regime in which *laïcité* becomes the defence of a particular cultural and political identity.

POSTSCRIPT

On 14 March 2017 the CJEU ruled in the *Achbita* case¹³⁴ that subjective customer preferences could not qualify as ‘determining occupational requirements’ as defined by Article 4 of the 2000/78 Directive. However, the Court also ruled that a general policy of neutrality of all convictions (religious, political, philosophical) could be imposed by employers without constituting discrimination. The contours and limits to such possible neutrality policies remain somewhat imprecise. For instance, the Court does mention conditions of proportionality and coherence but does not define them strictly; it also indicates that neutrality requirements should only weigh on those employees who convey the company’s image throughout contact with customers. But it is unclear how EU anti-discrimination law thus defined will prevent employers from turning customer preferences into general neutrality policies.

129 Draft legislative proposal, April 2015. See also the strongly argued opinion of the *Observatoire de la laïcité* opposing such projects: Observatoire de la Laïcité, 15 December 2015: ‘Avis sur la laïcité et la gestion du fait religieux dans les établissements d’enseignement supérieur’, available at: www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2015/12/avis_laicite_et_gestion_du_fait_religieux_dans_lenseignement_superieur_public_definitif.pdf (in French only) [last accessed 2 March 2017].

130 Salen, Draft legislative proposal No 155 aiming at prohibiting the using or wearing of ostentatious religious signs during sports events, 12 September 2012.

131 A right-wing politician who had been asked in 2003 by then Prime Minister Jean-Pierre Raffarin to write a report on French *laïcité*.

132 Cited by Baubérot, *La laïcité falsifiée* (2012) at 40.

133 An affirmation that should be read alongside an important *caveat* relating to the impact of historical inheritance and structural forms of what commentators have called ‘*catho-laïcité*’.

134 *Supra* n 126.