



Democracy and Security

ISSN: (Print) (Online) Journal homepage: <https://www.tandfonline.com/loi/fdas20>

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To cite this article: Jasper Doomen (2023) *Laïcité*: Ousting Some Religious Elements while Introducing Others, *Democracy and Security*, 19:3, 274-290, DOI: 10.1080/17419166.2022.2111303

To link to this article: <https://doi.org/10.1080/17419166.2022.2111303>



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Published online: 12 Sep 2022.



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Laïcité: Ousting Some Religious Elements while Introducing Others

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ABSTRACT

The meaning of “*laïcité*” has gradually changed from the principle that the state should abstain from interfering in citizens’ lives with respect to religious matters to the idea that citizens themselves have an obligation to desist from publicly manifesting themselves religiously. French citizens were first forbidden to display religious symbols or apparel in public schools; this restriction was subsequently extended to the public space. Most citizens are not affected by the restrictions, but they are a disproportional burden for Muslim women who consider wearing a full veil a religious obligation. Ironically, the obligation imposed on every citizen to accept the “choice of society” is based on values that may be qualified as religious. *Laïcité* is, then, an inconsistent idea, apparently banning religions from the public space while imposing alternative religious ideas. It cannot serve as the basis for disallowing wearing a full veil in public.

KEYWORDS

Laïcité; secularism; Islam; full veil; constitutional law

Introduction

Secularism is an important principle in several states and arguably part of the idea of a liberal democratic state.¹ France is a paramount example in this respect. The term “*laïcité*” captures the specific idea that has come to serve as a directive there. This paper attempts to demonstrate that *laïcité* as it has evolved is a problematic principle: it imposes the acceptance of certain values on citizens, which is incompatible with the idea of a liberal democratic state.

The inquiry is theoretical, since it focuses on the issue of the meaning of “*laïcité*.” At the same time, its political nature is evident, as will become apparent as the article progresses. Given the object of inquiry, the second perspective complements the first. The article does not limit itself to a conceptual analysis, which may in some cases suffice but would in the present case be too limited to do justice to the issue that is discussed here.

The first section describes the evolution of *laïcité*: while the idea is far from clear, it may be said that it initially expressed the separation of Church and State, ensuring citizens’ religious freedom, but has recently come to signify a radical elimination of religious symbols; the ban on face covering represents a (present) culmination.

Section 2 attempts to provide clarity with respect to the values behind the present conception of *laïcité*, in particular dignity and equality. Such values (equality insofar as more than the duty of equal *treatment* is concerned) evince the existence of a worldview.² This is incompatible with the principle of secularism, at least if “religion” is interpreted broadly, encompassing any worldview that appeals to metaphysical elements on the basis of which a certain creed is expressed. Such a worldview is not explicitly presented as the norm, but that does not make the issue less problematic. Even in the case of equal treatment, incidentally, non-neutrality cannot be realized, for the decision *which* beings must be treated equally (all citizens, all human beings, all (human and nonhuman) animals or a subdivision of these beings) is not made neutrally. That is a separate issue, however, which will not be explored here.

Citizens’ duty to accept these values appears more demanding than necessary, if the goal is to ensure living together safely. Yet “living together,” as is discussed in section 3, has specific consequences in France, given the social norm, which entails that wearing a full veil in public is unacceptable. The extent of the duty to “live together” is not clear, but that given does not detract from its being too great a burden for some citizens.

The chameleonic nature of *laïcité*

The 1905 law on the Separation of the Churches and State³ is the basis of the modern French state, in which *laïcité* is an important principle.⁴ Article 1 reads: “The Republic ensures the freedom of conscience. It guarantees freedom of worship limited only by the following rules in the interest of public order.”⁵ True to that principle, the separation arguably does not place great demands on religious individuals or organizations. For example, article 28 forbids raising or attaching a religious sign or emblem to a public monument, with the exception of buildings used for worship, burial grounds, burial monuments, museums and exhibitions.

Such legislation may be defended by arguing that citizens’ religious freedom should be guaranteed and that they should not have religious ideas imposed on them by the state. Accordingly, the individual enjoys more freedom in such a state than in a state in which a (state) religion has a certain influence or even manifests itself in a domineering way. Recent legislation appears to reflect a further-reaching desire to apply this principle. On the basis of the 2004 law on religious symbols in French public schools,⁶ article L.141-5-1 was created in the Code de l’éducation: “In elementary schools, the first four years of secondary education (les collèges) and the final years of secondary education (les lycées), as far as public education is concerned, wearing symbols or apparel by which students ostensibly manifest a religious association is forbidden.”⁷

It is clear that nonreligious students are optimally protected from religious influences by such a law. On the other hand, the interests of *religious* students must also be taken into consideration. The crucial question is what, if any, negative effects nonreligious students experience if they are confronted with other students who display religious symbols or clothing. Incidentally, the students are not representatives of the state, so that an appeal to the separation of Church and State is misplaced, and “Church” may be said to be a misnomer, since Muslims in particular are affected by the law.⁸

A complicating issue is that the principle of *laïcité* extends beyond what secularism embodies. While secularism means that government actions should not be influenced by religious considerations, not treating religious citizens or organizations differently than nonreligious ones, *laïcité* seeks to protect citizens from religion, so that they are not confronted with it in the public sphere.⁹ This does not mean that the precise meaning of “*laïcité*” is clear: “[...] not until 1946, when it was first included in the French Constitution, did the term “*laïcité*” make an official appearance in a State document, and never has it been officially defined. Over the past Twenty years, its meaning has been in constant evolution, often in direct correlation to the tenor of the debate around the Muslim veil and its place in public space.”¹⁰ The judiciary has played an important role in this evolution: “*Laïcité* [...] is not [...] defined by the text of the Constitution; one thus needs to study judicial interpretation thereof to grasp its substantive meaning.”¹¹

In any event, the intention behind *laïcité* seems to have changed dramatically: the assurance that individuals should be free from state interference insofar as religion is concerned has been supplanted by the assurance that they should be free from religion in certain (public) locations altogether. This means, as has already been observed with respect to the 2004 law, that the religious freedom of citizens who manifest their belief is curtailed. The 2004 law may be said to constitute a legal regime change.¹²

A further step was taken in 2010, with the introduction of the law that bans covering the face in the public space.¹³ This law, true to its name, forbids wearing garments intended to conceal the face (article 1).¹⁴ As Hennette-Vauchez rightly remarks, “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.”¹⁵ It may, accordingly, be said that “[...] in the understanding that has crystallised over the past decade, *laïcité* assumes a direct regulative role for private religious manifestations and it problematises the mere fact of religions’ public visibility (at least in relation to minority religions).”¹⁶

It may be argued that Islam does not impose covering (part of) the face, but that is not the issue. It is not for the state (or any of its representatives) to interpret, acting as a theological authority, religious doctrine.¹⁷ It could only appropriate such a role by – ironically – abandoning the very principle underlying secularism and the original conception of *laïcité*. After all, it would itself have to be involved with religion and, moreover, usurp the domain properly left to the real theological authorities, regardless of the issue of the room the state would leave such authorities in the first place. A (dominant) role for the state in this respect would leave little room to practice one's religion.¹⁸

Nor is an appeal to the issue that this concerns a minor aspect of the religion (in contradistinction to the Five Pillars of Islam, which concern the fundamental obligations) warranted, since this would result in the same outcome. One may pragmatically appeal to the fact that only few women have the wish to fully cover their face when they are in public, but this may – just as pragmatically – be countered by pointing out that this means that the – supposed – problem is apparently not a significant one. The issue may also, alternatively, be approached as a matter of principle. Even if the interests of only few women are involved, that given does not detract from the fact that those interests are still to be taken seriously. *Given*, then, that one or more persons are convinced that the tenets that are principles of their worldview, regardless of whether they are religious, demand that the face be covered, these interests should not be dismissed.

It appears that *laïcité* has developed from the idea to ensure that citizens' religious freedom not be restricted to the restriction of the citizen's right to express him- or herself through religion. In general terms one may say that “[...] French republican universalism has historically oscillated between an abstracted view of citizenship, familiar to political liberalism and focused on legitimation, and a darker universalist project emphasising assimilation and cohesion, and focused on stability.”¹⁹

The position of Muslims, as newcomers, is an issue that may be raised at this point. The hostility of some French citizens toward Muslims, in the wake of the September 11 attacks, was one of the factors that contributed to the form of *laïcité* that culminated in the 2004 law.²⁰ Difficulties with the integration of some Muslims into French society is an important element in this respect, too.²¹ The idea of “living together,” which will be discussed in section 3, is an important aspect of *laïcité* in the shape it has taken.²²

A significant change has occurred with respect to *laïcité*. The original focus was on curtailing the dominant position of Catholicism. This has shifted to a focus on the integration of Muslims.²³ This does not mean, however, that Catholicism is no longer a relevant factor. It is not easy to gauge its significance in present-day France, but it seems clear that its presence (still) affects those who are not themselves Catholics.²⁴ Whether this poses a problem depends on *how* Muslims (and others) are affected.

It is inconsistent, one may argue, to hold that religious elements should not be imposed on individuals while clinging to Christian holidays.²⁵ Still, this need not be an unsurmountable issue, especially if one takes a pragmatic stance. Christian holy days (which, for many people, at present probably have no religious significance) are public holidays; the interests of minorities who wish to celebrate alternative holy days, such as Eid al-Fitr, should be taken into account, for example by demanding that employers allow employees who wish to celebrate it to take an (unpaid) day off, unless this is disproportionately burdensome for employers. Not all issues may be resolved equally (relatively) simply, though, as will readily become apparent.

Laïcité as a worldview

It is important to determine the basis of the form *laïcité* has gradually taken, resulting in an obligation for citizens. Two notions in particular may be mentioned here in particular, namely, “dignity” and “equality.” Both may be part of a worldview, but that does not mean that it is justified to *impose* such a worldview on citizens. With respect to “dignity,” an additional problem presents itself. Even irrespective of the issue of what it may mean, two senses may be distinguished with respect to the position of women who wear a full veil. These issues will be addressed in this section; I will first discuss “dignity” and then “equality.”

Maclure and Taylor maintain: “A liberal and democratic state cannot remain indifferent to certain core principles, such as human dignity, basic human rights, and popular sovereignty. These are the constitutive values of liberal and democratic political systems; they provide these systems with their foundations and aims.”²⁶ Whether human dignity is a decisive principle in a liberal democratic state is debatable,²⁷ but even if this premise is accepted, the notion of “dignity” stands in need of clarification.²⁸ It is not evident that this is possible and thus that “dignity” has a meaning at all.

This is not a merely academic issue, as becomes apparent from the following observation: “At the level of principles, a democratic political system recognizes the equal moral value or dignity of all citizens and therefore seeks to grant them all the same respect. Realizing that aim requires the separation of church and state and the state’s neutrality toward religious and secular movements of thought. On one hand, since the state must be the state for all citizens, and since citizens adopt a plurality of conceptions of the good, the state must not identify itself with one particular religion or worldview. [. . .] On the other hand, the principle of equal respect requires that the state be ‘neutral’ with respect to religions and other deep convictions; it must not be biased for or against any of them. [. . .] The reasons justifying its actions must be ‘secular’ or ‘public,’ that is, they must be derived from what could be called a ‘minimal political morality’ potentially acceptable to all citizens.”²⁹

The authors thus maintain that recognizing “the equal moral value or dignity of all citizens” necessitates the separation of Church and State and that this recognition does not mean that the state identifies itself with a religion or worldview. Yet, apart from the fact that such a principle may not be recognized by some religions, it attests to a worldview, however abstract. After all, the idea that citizens (or, perhaps, more consistently, people) have equal moral value or dignity means, first, that such moral value or dignity exists and, second, that this is true for each individual (and to the same degree), which are both beliefs, the second, incidentally, being predicated on the first. Even a “minimal political morality” cannot, then, be said to be consistent with the principle of secularism (or the *original* conception of *laïcité*).

In the first statement of Resolution “sur l’attachement au respect des valeurs républicaines face au développement de pratiques radicales qui y portent atteinte” (“on the attachment to the respect for the Republic values at a time when they are undermined by the development of radical practices”), which was adopted by the French National Assembly on May 11, 2010, “radical practices” are said to be detrimental to dignity and the equality between men and women. It is also stated that such practices, including wearing a full veil, are contrary to the values of the Republic. Apart from what is said in the fifth statement, namely, that women must be protected from violence and pressure, in particular if they are forced to wear a full veil, it is unclear what dignity would be involved. A situation where a woman wears a full veil because she wants to, without being pressured to do so by anyone, does not compromise her dignity, or that of anyone else.

With respect to “dignity,” it is important to observe, in addition, that even if this notion *were* (*arguendo*) supposed to be a constitutive element for France (or, generally, a liberal democratic state), this would not provide an answer to the question of whether the 2010 law respects (human) dignity or not, since it would still have to be made clear what this might mean in particular, i.e., insofar as the application to specific situations is concerned. “Dignity” may be used to point out that women’s dignity is not respected if they wear a full veil, but also in another sense, with the opposite outcome.

That other sense is the following: the dignity of people who want to wear a full veil is compromised, with the possible effect, moreover, of isolating them from society.³⁰ Importantly, those who seek to protect women from the duty to wear a veil imposed on them by family members or others may not only see their goal thwarted but even be confronted with an outcome that (further) frustrates the emancipation of these women. After all, it is possible that they will no longer be allowed to enter the public space; if they are unwilling or incapable to defy those who force them to wear a veil, it is not unlikely that they are unwilling or incapable to oppose the same people in other respects.³¹

The dignity would then consist in being able to express oneself by means of apparel. Demanding of people that they do not dress, once they are in public, in accordance with their personal convictions on the basis of an alternative conception of “dignity,” from the consideration that they fail to act in accordance with it by wearing a full veil, attests to a paternalistic stance.³² In any event, “dignity” may be invoked from both perspectives, precisely because of the elusiveness of the notion.

“Equality,” by contrast, seems to be an unproblematic idea: people should be treated equally or, rather, as equals.³³ No appeal to comprehensive values seems necessary to realize this goal: “Broadly speaking, a state is neutral when it refrains from appealing to comprehensive values and draws instead on principles which all citizens can endorse, thereby – on a contractualist account of political justification – treating them with equal respect.”³⁴ A similar stance is taken by Maclure and Taylor: “In our view, secularism rests on two major principles, namely, equality of respect and freedom of conscience, and on two operative modes that make the realization of these principles possible: to wit, the separation of church and state and the neutrality of the state toward religions.”³⁵

Such a perspective on equality reaches further than the idea that individuals, recognizing that they are simply not powerful enough, at least for an extended period, to oppress one another or kill those whose continued existence conflicts with their own interests, acknowledge their (approximate) equality, deeming this state of affairs to be the basis for the norm that all citizens should be treated equally. Such an idea is easy to grasp, which cannot be said of the idea of “equal respect” or “equality of respect,” at least insofar as the sense of “respect” that is meant here is concerned.

I will illustrate what I mean by means of the *Déclaration des droits de l’homme et du citoyen*, the foundational document that is still mentioned in the preamble of the French Constitution. Article 1 reads: “Les hommes naissent et demeurent libres et égaux en droits.” (“Men are born and remain free and equal in rights.”)³⁶ This is in fact a conflation of a description (men are born equal in rights) and a prescription (men should remain equal in rights). It is not clear why one statement would follow from the other, a problem that does not appear in the minimalistic account sketched above. If this proclamation is meant to be fully descriptive, no imperative (to anyone) to treat people equally is expressed. If it is meant, conversely, to be fully prescriptive, it is unclear on what *basis* (if any) the imperative rests.

Article 2 of the *Déclaration* may at this point be invoked, which reads: “Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l’Homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l’oppression.” (“The goal of any political association is the conservation of the natural and imprescriptible rights of man. These rights are liberty, property, safety and resistance against oppression.”) People are

supposed to be equally entitled to these rights. This is no more than a specification of what is said in article 1, and the main issue, *on what basis* people are supposedly equal and should be treated as equals, is not resolved. The characteristic that qualifies them as the proper holders of the rights specified (*inter alia*) in art. 2 of the Déclaration is not explicated.

Such “natural and imprescriptible” rights can have a religious basis. This is evidenced, for instance, in the preamble of the U.S. Declaration of Independence, where it is said to be evident “[...] that all men are created equal, that they are endowed by their Creator with certain unalienable Rights [...]” In the *absence* of an (explicit) religious appeal, one may, alternatively, appeal either to reason as a decisive factor or to the notion of “(human) dignity,” which was discussed above. The latter option is no more than a temporary resort, a “stopgap” used by those who have not yet found an *actual* criterion, since it remains in that case to be clarified on what ground someone is considered to have “dignity.”

Of the two options just mentioned, then, only the first one, an appeal to reason, remains. The benefit of reason is that it is not, at least not in the sense intended here, an elusive notion but rather a faculty one may experience to exist in oneself and others: one may observe human beings using their ability to reason. However, the step from that given to the conclusion that it must somehow be acknowledged that they should have certain rights is not evident. To be sure, the fact that they have reason does mean that they can – individually or collectively – *claim* certain rights, and resist rulers that fail to treat them in a way they deem acceptable. It is not possible, however, to conclude on the basis of that given that natural rights exist without committing the fallacy of false equivalence. Reason is, after all, clearly an instrument to claim rights, but this is to be distinguished from its being the *basis* for such a claim. Reason *is* that basis in the sense that only beings endowed with reason can make such a claim in the first place, of course, but that given is insufficient to conclude that natural rights should exist. Such rights would have to be acknowledged even irrespective of whether the beings in question actually claim them. It is not evident or proved that this is the case.

It may be countered that the failure of a ruler to acknowledge these rights (until the time has come that it is no longer possible to do so, the people having become powerful enough to oppose him) is irrelevant. This is only correct if one fully abstracts from the aspect of reason as the ability to claim rights, which means that another aspect or characteristic is needed. Reason may be interpreted as practical reason in the sense espoused by Kant,³⁷ but reason in that sense is, in contradistinction to the sense in which it was used above, elusive, so that the benefit with respect to reason in the first sense is absent here. In addition, it is not clear why this characteristic should be decisive. This issue warrants a more detailed discussion than is possible here.³⁸ I merely

remark here that practical reason needs to *postulate* – since a reasonable being is unable to *prove* – (inter alia) freedom of the will.³⁹ It is not amiss to note the resemblance with a religious stance.

There is no need to find a loftier basis for the rights mentioned in the Déclaration – or other rights – than the self-interest of those who benefit from their existence. Those who do proclaim that such a basis exists by referring to (shared) “values” do not provide a convincing account, but face the same burden of proof as those who claim the rights to have a religious basis. The idea of natural rights itself may, depending on the definition of “religion,” even be said to have a religious character. Religious ideas need not entail the ontological commitment of accepting the existence of one or more deities, and a notion like “dignity” may be considered religious insofar as the (epistemic) justification for accepting it is not stronger than is the case with another religious idea.

The foregoing criticism of the difficulty in finding a foundation for “natural and imprescriptible” rights is not to be identified with the position that such rights should not be granted to every individual (or every citizen). This issue would merit a separate discussion. That discussion would amount to an inquiry of how to deal with a situation in which the majority wants to withhold certain rights from one or more groups of people, on the basis of whatever characteristic(s). That issue *is*, of course, crucial insofar as the matter of curtailing the right to wear a full veil is concerned, but as long as no one is discriminated against,⁴⁰ the specifics of the ban on face covering are irrelevant, at least from the perspective at stake here. The problems with those specifics will be discussed in the next section. What is relevant here is the fact that basing one’s legislation on certain values is no less difficult to justify (epistemologically) than using a specific religious outlook as the basis, even if such values are accepted by every individual.

A state, moreover, in which *laïcité* is a guiding principle faces the additional difficulty that it is inconsistent or, put more discourteously, hypocritical to appeal to certain values. As Leane puts it: “[. . .] one might arguably characterize *laïcité* as constituting a species of civil religion, or at least a legitimizing myth, in that it represents a set of beliefs and values that give French society a transcendent sense of its collective consciousness and destiny. The belief in a set of shared basic values as an organizing principle, with the state as a kind of enforcing deity, might be seen as the equivalent of a religious belief.”⁴¹ This is a clear sign of the transition, pointed out in section 1, of the original conception of *laïcité* to the present one. One may, accordingly, say: “If one wants to impose values on others in the name of *laïcité* one is, in a sense, anti-laïque, insofar as *laïcité* is what is supposed to guarantee the liberty of every individual.”⁴²

The state is a construct and thus does not have a view of its own,⁴³ which means that the “state view” is, in a democratic state, the majority view. Laws are constantly passed that conflict with the views of minorities. Those minorities of course have an obligation to act in accordance with which those laws, but that does not mean that they have to accept the values on which the legislation is based. In the case of the ban on face covering, such an imposition is at issue. In addition, the very fact that a full veil may not be worn in public, so the outward restriction itself, albeit democratically legitimate, is problematic as well, given the reasons for its introduction, which are not unrelated to the first point. These points will be addressed in the next section.

The right to wear a full veil versus the obligation to discard it

In the previous section, the issue of imposing values on individuals was addressed. This section will explore this issue further by discussing some problems associated with the law that bans covering the face in the public space.

Given the goal of women’s emancipation, the ban may seem justifiable: women should not be forced to wear a full veil, so measures to ensure that they do not wear one against their will would be fitting. This does not mean, though, that one may, as Chesler argues, infer from the fact that a woman wears a full veil that she is subordinated.⁴⁴ It is, after all, impossible to determine just by looking at a fully veiled woman what the reason for her wearing it is. The fact that measures may be necessary to ensure that women do not wear a full veil against their will is not a justification for a ban unless it is clear that *every individual* who wears a veil does so against (his or) her will. That this is the case is not evident.

Another issue is public safety. One may demand that the veil be removed temporarily in order to be able to establish the identity of the person in question. Under certain circumstances, in particular in a state of emergency (depending on the type of emergency), a (temporary) ban may even be justifiable. In other situations, however, the main question is whether citizens who are confronted with fellow citizens wearing a full veil are harmed, which does not seem to be the case: “Religion, understood as metaphysics and ceremony, is neither harmful nor dangerous and so should get the same treatment as other inconsequential, harmless practices.”⁴⁵ No special treatment of religion is warranted, then,⁴⁶ and wearing religious attire should be no more problematic than wearing a baseball cap.

To be sure, the ban does not exclusively affect wearing burqas, for wearing a balaclava, for example, is not allowed, either, and formally, nonreligious manifestations are treated equally with religious ones. Yet in practice, burqa wearers are affected in particular (cf. note 40, *supra*). This becomes all the more clear if the notion of “living together” (“vivre ensemble”) is considered.

This notion appears in the “Exposé des motifs” (explanatory memorandum) accompanying the law that bans covering the face in the public space) (see note 13, *supra*): “If the voluntary and systematic concealment is problematic, this is because it is quite simply incompatible with the fundamental requirements of ‘living together’ in French society.” (“Si la dissimulation volontaire et systématique du visage pose problème, c’est parce qu’elle est tout simplement contraire aux exigences fondamentales du “vivre ensemble” dans la société française.”)

It is not clear what “living together” means and why an obligation to act accordingly would exist.⁴⁷ The “Exposé” also indicates that systematically concealing the face in public places is not in accordance with the “minimum requirement of civility that is necessary for social interaction” (“[...] l’exigence minimale de civilité nécessaire à la relation sociale.”), but this only raises an additional question, namely, to what extent such an obligation would exist. (For completeness, I remark that the “Exposé” also mentions the “dignity” of women (even those who wear a full veil willingly) and the danger for public safety as motifs; these issues have already been discussed in section 2.)

*S.A.S. v. France*⁴⁸ provides an illustration of what is at issue. In this case, a French national who wore a full veil appeared before the European Court of Human Rights (ECtHR) to argue that the ban on wearing clothing designed to conceal the face in public places constituted a violation of inter alia articles 8 and 9 of the European Convention on Human Rights.⁴⁹ The applicant has stated that she was not pressured into wearing the full veil⁵⁰ and stressed her willingness to show her face when this was necessary to determine her identity.⁵¹

The relevance of this case becomes apparent from the applicant’s claim that her freedom is unwarrantedly restricted. Wearing the full veil is fundamental for her, as part of her faith, which she considers an essential element of her existence.⁵² She also argues that indirect indiscriminate between Muslim women who think their beliefs require them to wear a full veil and other women (and men).⁵³ (Cf. note 40, *supra*.)

The European Court of Human Rights observes: “It [...] falls within the powers of the State to secure the conditions whereby individuals can live together in their diversity.”⁵⁴ The idea of the “(wide) margin of appreciation,” which the Court often invokes, is important here.⁵⁵ Importantly, the Court observes that France could maintain that the practice of wearing a full veil in public is incompatible with the requirements of “living together” and that the question whether this practice should be allowed depends on the choice of society.⁵⁶

A “choice of society” appears to be a “general will” (“volonté générale”) presumption, since the choice is – implicitly or, rather, fictively – made by the state, such a choice not being part of a legislative process (on the basis of which the majority would have agreed that such a society is desirable).⁵⁷

The obligation to “live together” has at least two aspects. The first aspect concerns the outward actions. There is a duty to leave the full veil off while in public, but the question is pertinent whether the obligation extends further. Do people have an obligation to go out once a day, thus being forbidden to stay at home all day long (in order to counter what a ban on wearing the veil in public may, ironically, result in for some women)? In addition, if a woman acts in accordance with the law and presents herself in public without the veil but subsequently does not act differently (and, specifically, does not interact more intensively with others) than before, no real difference appears to result from a ban, making it clear that its introduction is symbolic. The alternative is that “living together” is interpreted in such a way that it has a specific content, so that one should, for example, be obligated to communicate (unveiled) with at least one stranger every time one enters the public space. Such a demand is as absurd as it is unenforceable, at least as long as a police state is forgone.

The second aspect is the obligation to accept certain values, such as those discussed in the previous section, which is more demanding than the obligation to refrain from actions that would harm others. The latter obligation, unlike the first, is justifiable and compatible with various worldviews and values. As Joppke observes, “[...] all that the liberal state can expect from its members is external conformity with the law; it would violate the principle of liberal neutrality to prescribe peoples’ [sic] inner convictions.”⁵⁸

Even if the “choice of society” is to be taken to reflect the majority opinion,⁵⁹ so that the obligations following from it may be said to be legitimized democratically, it may be questioned whether they are not too demanding for a minority: “Living together [...] has become a code through which religious minorities are expected to comply with ‘our values.’ Narrowly conceptualized, there is little room for negotiation or flexibility, but rather, a rigid portrayal of who ‘we’ are and what ‘our’ values include.”⁶⁰ The fact that the ECtHR grants France ample room to impose duties on individuals with respect to “living together” may be said to be problematic in this regard.⁶¹

In addition, the idea of imposing values from the consideration of the importance of “living together” may be said to attest to a paternalistic stance.⁶² This would, again ironically, mean that the state seeks to realize a goal by acting in the same way as the oppressors from whom it seeks to liberate the women in question.

The obligations imposed on citizens under the banner of *laïcité* are intrusive and unwarranted, given the vague and difficult to enforce goal of “living together,” on the basis of the values that are supposed to be instilled in citizens. A liberal democratic state whose citizens take pride in securing secularism as a guiding precept may benefit from critical reflection on what secularism, and liberal democracy, in fact means.

Conclusion

Secularism does not mean, in a liberal democratic state, that citizens do not have the right to express themselves by means that manifest their religious beliefs. Yet this right has come under pressure in France with the ban on covering one's face in public. It may be justifiable to restrict this right in certain places, such as public schools, but only if this is necessary in the interest of one or more specific goals. In addition, special circumstances, particularly a state of emergency, could – temporarily – warrant such a measure. As long as a state of emergency has not been declared, it may be questioned whether the necessity can be shown in the case of public schools; disallowing a full veil in public raises even more concerns. The notion of “living together,” with a supposedly accompanying duty to act accordingly, cannot be characterized as a relevant goal, and the necessity of the law that bans covering the face in the public space has not been demonstrated to exist.

First, such a measure may result in behavior that runs counter to the intention to emancipate women (or ensure their “dignity”), namely, if women opt, on the basis of the restriction, not to venture into public anymore. Second, principally, the imposition to accept certain values (which underlie the notion of “living together”), regardless of the matter of whether such an undertaking is viable, conflicts with citizens' freedom (religious or otherwise).

Citizens must refrain from harming each other, but it is irrelevant (from a legal point of view) on the basis of which considerations they keep to this duty (so whether they do so because they wish to avoid a penalty or because they consider it wrong to disobey the law). In addition, it is not clear who is harmed, not only because the actual number of people who want to wear a full veil may be slight, but also, principally, because such apparel does not pose a threat. One may argue that this misses the point and that the threat consists in not being able to see another person's face, but the number of people who are able to gather someone's (malicious) intentions by looking at his or her face is, presumably, not large enough to let this consideration be decisive.

The present conception of *laïcité* is more extensive than the original one and, for the same reason, *conflicts with* rather than *supports* the principle of secularism, since it imposes elements that may be considered religious. “Religion” may be given a more limited scope than I have done, but that does not detract from the fact that those elements are problematic from the consideration that a state, at least a liberal democratic one, should not impose a worldview on citizens, while the present conception of *laïcité* entails that certain values must be accepted by every citizen.

Laïcité initially meant the separation of Church and State. It has eventually come to mean the separation of Church and Society; the expression “choice of society” captures this change. Religious elements, in particular full veils, are not just expelled in domains where the state is represented (which might

be justifiable with an appeal to the separation of Church and State), but in other domains as well, culminating in the ban on covering the face in the public space. This curtails some women's freedom to express their religious beliefs, and, on the basis of what has been argued in this paper, excessively so.

Notes

1. I say “arguably” because it depends on the definition of “liberal democratic state” whether secularism must be considered to be a necessary constituent. The idea that secularism is indeed such a constituent may be defended on the basis of some of the considerations that were decisive in the case of *Refah Partisi and others v. Turkey* (ECtHR, February 13, 2003 (Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98)).
2. By a “worldview” I mean an encompassing view with regard to religious, metaphysical and/or “moral” matters. It corresponds with what Rawls calls a “fully comprehensive” conception or doctrine, the latter meaning a doctrine that “[...] covers all recognized values and virtues within one rather precisely articulated scheme of thought [...]”. John Rawls, *Political Liberalism* (New York, NY: Columbia University Press, 2005 [1993]), Lecture V, 175. (In Lecture I, 13, virtually the same formulation (where “system” is substituted for “articulated scheme of thought”) is used for a “fully comprehensive conception”).
3. La loi concernant la séparation des Eglises et de l'Etat.
4. “[...] *laïcité* [...] 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.” Stéphanie Hennette-Vauchez, “Is French *laïcité* Still Liberal? The Republican Project under Pressure (2004–15),” *Human Rights Law* 17, no. 2 (2017): 297.
5. “La République assure la liberté de conscience. Elle garantit le libre exercice des cultes sous les seules restrictions édictées ci-après dans l'intérêt de l'ordre public.”
6. La loi sur les signes religieux dans les écoles publiques françaises.
7. “Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit.”
8. *Historically*, the term does make sense, though (See, e.g., Jean Baubérot, “L'évolution de la laïcité en France: entre deux religions civiles,” *Diversité urbaine* 9, no. 1 (2009): 11, 12).
9. E.g. Raed Abilmouna, “Reconciling the *hijāb* within *laïcité* France,” *Journal of Islamic Law and Culture* 13, no. 2–3 (2011): 124; and Eoin Daly, “Political Liberalism and French National Identity in the Wake of the Face-Veiling Law,” *International Journal of Law in Context* 9, no. 3 (2013): 368, 379.
10. Nancy Honicker, “The ‘Headscarf Affairs’: French Universalism Put to the Test,” *Journal of Research in Gender Studies* 4, no. 1 (2014): 274.
11. Hennette-Vauchez, “Is French *laïcité* Still Liberal?”. Cf. Didier Leschi, “Problèmes contemporains de la laïcité publique,” *Les Nouveaux Cahiers du Conseil constitutionnel* 53, no. 4 (2016): 21: “[...] même si depuis 1946, la laïcité est constitutionnelle, puisque notre ‘République est laïque’, son contenu ne relève d'aucune évidence. Et en pratique il est laissé à l'appréciation des tribunaux, en particulier du Conseil d'État, avec tous les aléas que cela suppose.”

12. Christian Joppke, *Veil: Mirror of Identity* (Cambridge/Malden, MA: Polity Press, 2009), 51; cf. Hennette-Vauchez, “Is French *laïcité* Still Liberal?”: “[...] 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.”
13. La loi interdisant la dissimulation du visage dans l’espace public (loi no. 2010-1192).
14. The law also introduces, amending the penal code, a prison sentence (of a year) and a fine for forcing a woman or women to cover the face (art. 4). This is positive, but it is unrelated to the issue under discussion, which is that the decision whether or not to wear a veil is to be left to individual women themselves.
15. Hennette-Vauchez, “Is French *laïcité* Still Liberal? The Republican Project under Pressure (2004-15),” 287.
16. Daly, “Political Liberalism and French National Identity in the Wake of the Face-Veiling Law,” 380.
17. Cf. Joppke, *Veil: Mirror of Identity*, 14, 15: “[...] to determine the meaning of religion and its behavioral implications falls entirely outside the competence of the liberal state (at least as long as no rights of third parties are impaired). In this sense, the state has to be agnostic as to whether Islam *really* prescribes the veil for women. Accordingly, the veil, through the very fact of being considered a religious symbol by the woman donning it, falls within the ambit of religious liberty rights.”
18. Amélie Barras, “Sacred *Laïcité* and the Politics of Religious Resurgence in France: Whither Religious Pluralism?” *Mediterranean Politics* 18, no. 2 (2013): 285, 287.
19. Daly, “Political Liberalism and French National Identity in the Wake of the Face-Veiling Law,” 373.
20. Baubérot, “L’évolution de la *laïcité* en France: entre deux religions civiles,” 14, 15.
21. Jean Baubérot, “La *Laïcité* en crise? Une conquête toujours en devenir,” *Informations sociales* 8, no. 136 (2006): 51; Michel Troper, “Republicanism and Freedom of Religion in France,” in *Religion, Secularism, and Constitutional Democracy*, ed. Jean Cohen and Cécile Laborde (New York, NY: Columbia University Press, 2016), : 316–37, 321, 322; Renee Buhr, “Mapping the Political Opportunity Space of Secularism: French Republican Appeals to *laïcité*,” *French Politics* 15, no. 4 (2017): 461; and Kay Chadwick, “Education in Secular France: (Re)defining *laïcité*,” *Modern & Contemporary France* 5, no. 1 (1997): 57.
22. Baubérot, “La *Laïcité* en crise? Une conquête toujours en devenir,” 54.
23. Baubérot, “L’évolution de la *laïcité* en France: entre deux religions civiles,” 17.
24. Jean Baubérot, “Existe-t-il une religion Civile?” *French Politics, Culture & Society* 25, no. 2 (2007): 12.
25. Leti Vopp, “The Culture of Citizenship,” *Theoretical Inquiries in Law* 8, no. 2 (2007): 590–92; and Jacques Robert, “Religious Liberty and French Secularism,” *BYU Law Review* 2003, no. 2 (2003): 651, 659.
26. Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience*, trans. J. M. Todd (Cambridge, MA/London, 2011), 11. The original text reads: “Un État libéral et démocratique ne saurait demeurer indifférent à l’égard de certains principes fondamentaux comme la dignité humaine, les droits de la personne ou la souveraineté populaire.” Jocelyn Maclure and Charles Taylor, *Laïcité et Liberté de Conscience* ((Montréal: Boréal, 2010), 19.
27. E.g. Jasper Doomen, *Freedom and Equality in a Liberal Democratic State* (Brussels: Bruylant (Larcier), 2014), Ch. 4 (43–55).

28. Cf., e.g., Henri Féron, “Human Rights and Faith: A ‘World-Wide Secular Religion?’” *Ethics & Global Politics* 7, no. 4 (2014): 191.
29. Maclure and Taylor, *Secularism and Freedom of Conscience*, 20, 21. The original text reads: “Un régime démocratique reconnaît, sur le plan des principes, une valeur morale ou une dignité égale à tous les citoyens et cherche par conséquent à leur accorder le même respect. La réalisation de cette visée exige la séparation de l’Église et de l’État et la neutralité de l’État par rapport aux religions et aux mouvements de pensée séculiers. D’une part, comme l’État doit être l’État de tous les citoyens et que ceux-ci adoptent une pluralité de conceptions du monde et du bien, il ne doit pas s’identifier à une religion ou à une vision du monde particulière. [...] D’autre part, le principe du respect égal exige aussi que l’État soit ‘neutre’ à l’égard des religions et des autres convictions profondes; il ne doit en favoriser ni en défavoriser aucune. [...] Les raisons justifiant son action doivent être ‘laïques’ ou ‘publiques’, c’est-à-dire dérivées de ce que nous pourrions appeler une ‘morale politique minimale’, et potentiellement acceptables par tous les citoyens.” Maclure and Taylor, *Laïcité et Liberté de Conscience*, 30, 31.
30. Cf. Vopp, “The Culture of Citizenship,” 595 and Sally Pei, “Unveiling Inequality: Burqa Bans and Nondiscrimination Jurisprudence at the European Court of Human Rights,” *The Yale Law Journal* 122, no. 4 (2013): 1101.
31. Cf. Geoffrey Leane, “Rights of Ethnic Minorities in Liberal Democracies: Has France Gone Too Far in Banning Muslim Women from Wearing the Burka?” *Human Rights Quarterly* 33, no. 4 (2011): 1053.
32. Ioanna Tourkochoriti, “The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the U.S.A.,” *William & Mary Bill of Rights Journal* 20, no. 3 (2012): 830.
33. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA/London: Harvard University Press, 1978), 227; *A Matter of Principle* (Cambridge, MA/London: Harvard University Press, 1985), 191.
34. Cécile Laborde, “Secular Philosophy and Muslim Headscarves in Schools,” *Journal of Political Philosophy* 13, no. 3 (2005): 305, 306.
35. Maclure and Taylor, *Secularism and Freedom of Conscience*, 20. The original text reads: “La laïcité repose selon nous sur deux grands principes, soit l’égalité de respect et la liberté de conscience, ainsi que sur deux modes opératoires qui permettent la réalisation de ces principes, à savoir la séparation de l’Église et de l’État et la neutralité de l’État à l’égard des religions.” Maclure and Taylor, *Laïcité et Liberté de Conscience*, 30.
36. For the sake of simplicity, I will, admittedly anachronistically, equate “Men” with “People”.
37. Immanuel Kant, *Kritik der praktischen Vernunft* (Kant’s gesammelte Schriften. Erste Abtheilung: Werke, Band 5) (Berlin: Georg Reimer, 1908 [1788]), 15, 16.
38. See Doomen, *Freedom and Equality in a Liberal Democratic State*, Ch. 5 (57–64).
39. E.g. Kant, *Kritik der praktischen Vernunft*, 132.
40. Incidentally, the ban on face covering arguably evidences *indirect* discrimination: it affects those who want to wear a burqa in public in particular (cf. Baubérot, “La Laïcité en crise? Une conquête toujours en devenir,” 57).
41. Leane, “Rights of Ethnic Minorities in Liberal Democracies: Has France Gone Too Far in Banning Muslim Women from Wearing the Burka?” 1045.
42. Cécile Bonneau, “Laïcité: de quoi parle-t-on?” *Regards croisés sur l’économie* 20, no. 1 (2017): 105. The original text reads: “[...] vouloir imposer des valeurs aux autres au nom de la laïcité, c’est dans un sens être anti-laïque, en ce que la laïcité est ce qui est censé garantir la liberté de chacun.”

43. Unless a conception such as Hegel's is accepted (Georg Hegel, *Grundlinien der Philosophie des Rechts* (Berlin: Duncker und Humblot, 1833 [1821]), sections 257, 258 (312–20)), but, apart from the question whether such a conception is even comprehensible, it cannot be reconciled with a secular stance, especially if the stringent standard I use for secularism is accepted.
44. Phyllis Chesler, "Ban the Burqa? The Argument in Favor," *Middle East Quarterly* 17, no. 4 (2010): 44.
45. Harriet Baber, "Religion in the Public Square," *San Diego Law Review* 53, no. 1 (2016): 41.
46. Baber, "Religion in the Public Square," 43.
47. Cf. Leane, "Rights of Ethnic Minorities in Liberal Democracies: Has France Gone Too Far in Banning Muslim Women from Wearing the Burka?," 1051 and Sune Lægaard, "Burqa Ban, Freedom of Religion and 'Living Together'," *Human Rights Review* 16, no. 3 (2015): 207–10.
48. ECtHR, *S.A.S. v. France*, July 1, 2014 (Application no. 43835/11).
49. ECtHR, *S.A.S. v. France*, § 3.
50. ECtHR, *S.A.S. v. France*, § 11.
51. ECtHR, *S.A.S. v. France*, § 13.
52. ECtHR, *S.A.S. v. France*, § 54.
53. ECtHR, *S.A.S. v. France*, § 80.
54. ECtHR, *S.A.S. v. France*, § 141.
55. ECtHR, *S.A.S. v. France*, § 155.
56. ECtHR, *S.A.S. v. France*, § 153.
57. Cf. Jasper Doomen, "A Veiled Threat: Belcacemi and Oussar v. Belgium," *Ecclesiastical Law Journal* 20, no. 2 (2018): 197.
58. Joppke, *Veil: Mirror of Identity*, 114.
59. As I indicated above, the "state view" is in fact the majority view.
60. Lori Beaman, "Living Together v. Living Well Together: A Normative Examination of the SAS Case," *Social Inclusion* 4, no. 2 (2016): 4.
61. Cf. Hilal Elver, *The Headscarf Controversy. Secularism and Freedom of Religion* (Oxford: Oxford University Press, 2012), 73.
62. Beaman, "Living Together v. Living Well Together: A Normative Examination of the SAS Case," 9; Tourkochoriti, "The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the U.S.A.," 851.

Disclosure statement

No potential conflict of interest was reported by the author(s).