

‘A Flag For All Republicans’: The Legislative History And Parliamentary Debates on the French Law on Religious Signs At School

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In March 2004, the French Parliament passed Statute 228 and prohibited ‘the wearing of clothes or symbols through which pupils conspicuously manifest a religious affiliation’. Although much has been written about this piece of legislation, no comprehensive review of its legislative history has been carried out and its parliamentary debates have never been translated into English. This article will review the work of the French Parliament in 2004 and will argue that Statute 228 is the result of a strong political consensus that was widely supported by the French public. Yet the piece will also show that secularism (‘laïcité’) was by no means the only reason prompting the French political elite to rally behind a common statute. Public hostility to the Islamic veil and its (real or perceived) meanings; political irritation towards judges and their accommodating approach; feminist opposition to the Muslim headscarf; anxiety over the spread of Islamic extremism; and plain ‘Islamophobia’ were equally strong in sealing the passage of Statute 228. Only an in-depth review of the statute’s legislative history and of its parliamentary debates can bring these underlying rationales to the surface. This review also suggests that while French MPs agreed that a piece of legislation was necessary, they disagreed over its language and over the reasons for its adoption.

En mars 2004, le Parlement français a adopté la Loi 228 qui interdisait ‘le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics’. Bien que beaucoup d’encre ait coulé au sujet de cette loi, il n’existe aucune analyse complète de son histoire législative et les débats parlementaires portant sur la Loi n’ont jamais été traduits en anglais.

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Le présent article analyse le travail du Parlement français en 2004 et soutient que la Loi 228 est le résultat d'un consensus politique largement appuyé par le peuple français. Par contre, cet article démontrera aussi que la laïcité n'était pas la seule raison motivant l'élite politique française à se rallier derrière cette loi. L'hostilité publique envers le voile islamique et la signifiante (réelle ou perçue) de celui-ci; l'irritation publique envers les juges et leur approche accommodante; l'opposition féministe au voile musulman; l'anxiété ressentie face à la montée de l'extrémisme islamique; et l'islamophobie ont aussi joué un rôle important dans l'adoption de la Loi 228. Seule une analyse approfondie de l'histoire législative de cette loi et de ses débats parlementaires peut révéler les raisons sous-jacentes. Cette analyse suggère aussi que bien que les membres du Parlement français étaient d'accord quant à la nécessité de cette loi, ils ne s'entendaient pas sur le texte de la loi et les raisons pour lesquelles elle devait être adoptée.

I. INTRODUCING THE CONCERT OF 2004: SYMPHONY OR CACOPHONY?

"[A]fter this debate, after a vote of this magnitude, the Republic and *laïcité* are strengthened".¹ So said the French Prime Minister, Jean-Pierre Raffarin, after the Lower House passed a bill that came to be known as the "anti-veil legislation" in March 2004.² "In elementary, intermediate and high schools", the statute reads, "the wearing of clothes or symbols through which pupils conspicuously manifest a religious affiliation is prohibited".³

There can be no doubt that this law was strongly supported by French Members of Parliament (MPs): in the *Assemblée Nationale* (Lower House) 494 MPs voted in favour and only 36 opposed it, while in the *Sénat* (Upper House) the majority was 276 in favour to 20 opposed.⁴ These numbers also convey the considerable bi-partisan consensus behind the text: "The law proposed here has become a necessary one",⁵ the leader of the centre-left *Parti Socialiste* (PS) declared in explaining his group's vote. "[And] it is precisely because this is a necessary law that the Socialists have approached the debate with a responsible and constructive spirit".⁶ Out of the 142 votes cast by the PS, 140 were in favour and only 2 opposed the legislation.⁷ As for the ruling party, the centre-right *Union pour un Mouvement Populaire* (UMP) had fathered the project and was strongly supportive: "Thanks to this law", the UMP leader in the Lower House stated, "school principals and teachers will ... be more effectively protected against the pressures of certain activist minorities".⁸ Of the 360 votes expressed by the UMP, 330 were in favour, 12 were against and 18 were abstentions.⁹

It is a measure of the consensual character of this statute that the strongest objections came from the smallest parties. The small *Union pour la Démocratie Française* (UDF) was divided (13 votes in favour, 4 against and 12 abstentions),¹⁰ while only the far-left *Communistes et Républicains* voted against

¹ France, JO, Assemblée nationale, Débats parlementaires, *Laïcité: Le Débat à l'Assemblée nationale* [Laicism: The Debate at the National Assembly], Compte rendu intégral, 2nd session of 10 February 2004, at 316 (Jean-Pierre Raffarin) [Débats]. All translations are my own. For the sake of readability – but with regret – I translated all French passages into English.

² *Loi n. 2004-228 du 15 Mars 2004*, JO, 17 March 2004, (65), 5190.

³ *Ibid* at (2), art 1.

⁴ Débats, *supra* note 1 at 325-327.

⁵ *Ibid* at 313.

⁶ *Ibid*.

⁷ *Ibid* at 326-7.

⁸ *Ibid* at 2nd session of 5 February 2004, at 263 (J Barrot).

⁹ *Ibid* at 325.

¹⁰ *Ibid* at 327.

the bill with a majority of 14 to 7.¹¹ Apart from these limited exceptions, the French Parliament seemed to be engaged in a veritable concert performed in honour of the very French idea of *laïcité*.¹²

Playing in a concert, however, requires plenty of rehearsal before the show and French MPs certainly cannot be accused of improvisation in the spring of 2004, as Statute 228 was the culmination of a lengthy process that had occupied politicians for years. Since 1989 several bills were introduced by the UMP, UDF and PS parties.¹³ While they differed in their approach, they each agreed on the defence of *laïcité* and on limiting the expression of symbolism at school. After a veritable media tsunami flooded the country in 2003, influencing public opinion—and thus MPs—to legislate against the veil,¹⁴ several parliamentary bodies were formed¹⁵ and by January 2004 this consensus had translated into a bill that was eventually adopted in March.¹⁶ Thus, the statute was no accident, and if one is to judge from appearances, the consensus among MPs and Senators was genuine.

Yet the parliamentary history of this statute suggests that MPs only partly followed the orchestral score. The law, to be sure, was passed with an overwhelmingly majority and both of the dominant parties concurred that the veil issue demanded a political answer. But the language of Statute 228 is nebulous and its parliamentary genesis casts doubts about the underlying reasons for its adoption. Behind the dry formula of the law there is a universe of definitions, justifications, interpretations, arguments and doubts opening up—both *between* and *within* France's major political parties—and it is this world that this article seeks to uncover.

After summarizing the legal controversy as it evolved, the article will examine the work of the French Parliament in passing Statute 228 and will suggest that the law was the fruit of a real political consensus that was largely supported by French public opinion. However, it will also highlight that there were a plethora of reasons that prompted the French political elite to rally

¹¹ *Ibid.*

¹² The word *laïcité* refers to the evolution of Church-State relations in France but it cannot easily be translated as “secularism” or “neutrality” without losing much of its meaning (see Jean Cornec, *Laïcité* [Laicism] (Paris: Societe Universitaire d’edition et de librairie, 1965) at 494). I will therefore leave it in its original French form throughout this article.

¹³ See Fawzia Zouari, *Ce voile qui déchire la France* [The Veil That Is Tearing Apart France] (France: Ramsay, 2004) at 175.

¹⁴ For French statistics on popular opposition to the veil, see *Application du Principe de Laïcité dans les Écoles, Collèges et Lycées Publics* [Application of the Principle of Laicism in Schools, Colleges and Public Schools] (Paris: Editions des Journaux Officiels, 2005), at 32 and 51 [Application du Principe].

¹⁵ More on this below.

¹⁶ Works on the French law include Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Portland, OR: Hart, 2006); Joan Wallach Scott, *The Politics of the Veil* (Princeton, NJ: Princeton University Press, 2007).

behind a common statute. Far from being limited to the much-trumpeted concept of *laïcité*, these reasons included public hostility to the Islamic veil and its (real or perceived) meanings; political irritation towards judges and their accommodating approach; feminist opposition to the Muslim headscarf; anxiety over the spread of Islamic extremism; and plain ‘Islamophobia’. Only an in-depth review of the statute’s legislative history and of its parliamentary debates can bring these underlying rationales to the surface.

As we shall see, the French statute on religious signs at school is, in itself, a symbol: it is a symbol of contempt for Anglo-Saxon multiculturalism and of confidence in the French idea of egalitarianism; it is a symbol of defiance against Muslim extremists and of encouragement for the creation of an ‘*Islam de France*’; and it is a symbol of the politicians’ supremacy over, and lack of confidence in, judges and the judiciary in general. In this last respect it represents a highly political icon, for as one MP put it during the debates, “[p]oliticians are the ones who must...defend the public services—schools, universities and hospitals—and redefine the rights and obligations of a person within our polity”¹⁷. This article seeks to analyse this anomalous concert played before the French Parliament and to distinguish the symphony from the cacophony.

II. VEIL AFFAIRS, 1989-2003: LEGAL CONFUSION OR POLITICAL FRUSTRATION?

The origins of the French veil controversy go back to the end of the 1980s, when a number of young girls decided to go to class with a veil (or *hijab*) on their head as a sign of their faith in Islam.¹⁸ Although numerically marginal,¹⁹ these episodes created a sense of unease among teachers and principals, a feeling that reached its pinnacle in 1989 when the head of a school in Creteil decided to forbid the veil and exclude three recalcitrant girls from class. Because of the inherent symbolism of the Muslim veil, and because Islam, with its five million adherents, is France’s second largest religion, this episode gained national prominence and generated longstanding media attention.²⁰

¹⁷ Débats, *supra* note 1, 2nd session of 5 February 2004, at 263 (Michel Charzat).

¹⁸ See Zouari, *supra* note 13 at 174.

¹⁹ According to one report, the 1989 incidents “never threatened public order and involved no more than 200 out of 300,000 Muslim girls at school”. M. Laroque, *Le Principe de Laïcité et les Signes d’Appartenance à Une Communauté Religieuse* [The Principle of Laicism and Symbols of Belonging to a Religious Community], (20 Jan 1990) *Juridique Droit Administratif* (AJDA) at 42. Note the similarities with the 2009 burqa controversy, when TV crews were unable to find women wearing face coverings.

²⁰ For an analysis of the mediatization of the veil in France, see Thomas Deltombe, *L’islam imaginaire: La construction médiatique de l’islamophobie en France, 1975-2005* [Imaginary Islam: Construction of Islamophobia in France, 1975-2005] (Paris: La Découverte, 2005) at 98-121.

The problems that emerged at the time, however, were more legal than they were political and they can be summarized in the following question: did the protection of freedom of conscience under French law include the right of students to wear a veil in class?

A. FRANCE BETWEEN RELIGIOUS FREEDOM AND LAÏCITÉ

Since the beginning of its modern history, France has regarded freedom of conscience as a pivotal constitutional right, which is why, in French law, this freedom can be limited normally only if there is a threat to public order. “None should be disturbed in his or her opinions, even religious ones, as long as their manifestation does not trouble public order”,²¹ the 1789 Declaration of the Rights of Man and Citizen reads. Although still applicable, this text was further confirmed by the 1958 Constitution which states, “[France] ensures the equality of all citizens before the law, without distinction of origins, race or religion. She respects all faiths”.²² Given the strength of this constitutional protection, it is no wonder that freedom of belief is also forcefully defended at the level of ordinary laws: “The Republic guarantees freedom of conscience”, the 1905 Law on Separation between Church and State reads. “She guarantees the free exercise of religions with the only exceptions provided for in the interest of public order”.²³ The Education Code of 1989 points out that “students enjoy freedom of information and freedom of expression, in respect of pluralism and the neutrality principle. The exercise of these freedoms cannot endanger teaching activities”.²⁴

In addition to these domestic provisions, a number of international documents ratified by France also guarantee freedom of belief, the most important being the International Covenant for Civil and Political Rights (ICCPR)²⁵ and the European Convention for Human Rights (ECHR).²⁶ The latter, in particular, is an integral part of French constitutional law and reads: “Everyone has the right to freedom of thought, conscience and religion. This right includes the freedom to change his religion or belief and the freedom,

²¹ Ferdinand Mélin-Soucramanien, *Constitution de la République française* [Constitution of the French Republic] (Paris: Dalloz, 2005) at 7.

²² *Ibid* at 28.

²³ Y. Bruley, *La Séparation des Églises et de l'État: Les Textes Fondateurs* [The Separation of Church and State: The Fundamental Texts] (France: Perrin, 2004) at 435.

²⁴ See especially Conseil d'État, *Un Siècle de Laïcité: Rapport Public* [A Century of Laicism: Public Report] (Paris: Documentation Française 2004) at 337.

²⁵ See in particular Article 2 (prohibition of discrimination on the basis of religion) and Article 18 (freedom of religion only subject to limitations “prescribed by law and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”) in P.R. Gandhi, *International Human Rights Documents* (Chicago: Blackstone, 2000) at 63-76.

²⁶ In addition to Article 9, see Article 14 (guarantee of freedom of conscience regardless of sex or religion).

either alone or in community with others and either in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance".²⁷ The constraints placed upon this freedom are, for the most part, associated with the interests of public order – just as in French domestic law. "Freedom to manifest one's religion or beliefs", Article 9 continues, "shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health and morals, or for the protection of the rights and freedoms of others".²⁸

Yet France is not only a country of rights and freedoms, it is also the '*nation laïque par excellence*', a place where, historically speaking, the union between République and *laïcité* was arguably congenial.²⁹ For centuries France was considered to be the "eldest daughter of the Church"³⁰ because of the spiritual fervour of its people and the determination of its governments to act as the secular arm of Catholicism. However, France also witnessed some of the most virulent anti-Catholic and anti-religious episodes in Europe; these conflicts frequently led to civil war and brought the nation perilously close to self-destruction. Conceived during the Enlightenment, attempted but immediately aborted in the Revolution, and fully realized only at the beginning of the 20th century, the divorce of Church and State in France took fifteen centuries to materialize—fifteen centuries of ruthless competition between spiritual and temporal power that only came to an end, unilaterally and with great acrimony, in 1905.³¹

Considering this historical legacy, and given the fact that *laïcité* was first implemented in schools through a series of educational measures that were fiercely opposed by the Church,³² it is not surprising that the French education system is regarded as a veritable symbol of the State's emancipation from religion; indeed, the country's legal framework is particularly attached to the concept. As early as in 1882 a statute established that "in primary schools,

²⁷ P.R. Gandhi, *supra* note 25 at 195.

²⁸ *Ibid.*

²⁹ See e.g. Pierre Goubert, *Initiation à l'Histoire de la France* [Initiation to the History of France] (Paris: Tallandier, 1984) at 13-37; Pierre Miquel, *Les Guerres de Religion* [The Wars of Religion] (Paris: Fayard, 1980) at 7-29; Michel Vovelle, *La révolution contre l'Église : De la raison à l'Être Suprême* [The Revolution Against the Church: From Reason to the Supreme Being] (Brussels: Éditions Complexe, 1988) at 7-131.

³⁰ See Bruley *supra* note 23 ("[l]a fille aînée de l'église" at 162).

³¹ The papal bulla *Vehementer Nos*, for example, strongly condemned the separation as "a very clear negation of the supernatural order" and directly attacked the French law of separation of Church and State (Pius X, *Vehementer Nos* [We Strongly] (Rome, 11 February 1906)). See also Jean-Paul Scot, *L'État Chez Lui, l'Église Chez Elle : Comprendre la loi de 1905* [The State to Himself, the Church to Herself: Understanding the Law of 1905] (Paris: Éditions du Seuil, 2005) at 275; Henry Pena-Ruiz, *Dieu et Marianne : Philosophie de la laïcité* [God and Marianne: The Philosophy of Laicism] (Paris: Presses Universitaires de France, 2005) at 181.

³² See Bruley, *supra* note 23 at 382-83.

religious teaching is given outside school buildings and programs”,³³ and in the same year another piece of legislation emphasized that “in public schools of all degrees, teaching activities are exclusively assigned to non-religious [*laïque*] personnel”.³⁴ This line of reasoning was also confirmed at the constitutional level; the 1946 Constitution, for example, proclaims: “The organization of a public, free and *laïque* education system at all stages is the duty of the State”.³⁵ Furthermore, the very first article of the 1958 Charter emphasizes that “France is an indivisible, *laïque*, democratic and social Republic”.³⁶ As one author observed, the latter text represented a momentous passage for French constitutional law, because “*laïcité*, object of all passions, obsession of the Republic, [was] elevated to the highest level among the sources of law. This is certainly peculiar to France [as] the very word *laïcité*, which is often impossible to translate into foreign languages, is absent from other European constitutions”.³⁷ It is because of this strong emphasis on the neutrality of public schools that French civil servants—and public schools teachers in particular—are not allowed to wear religious symbols at work.³⁸

i. The Conseil d'État and the Muslim Veil

But what about students, one may wonder? Does *laïcité* require them to renounce religious symbols in class as well?³⁹ It was in response to this question—and as a means of resolving the Créteil case—that Education Minister Lionel Jospin requested a legal opinion (*avis*) from the *Conseil d'État*, France's highest administrative court in 1989. He wanted to know “[w]hether, considering the Constitution and republican laws and taking into account the rules of the public school [system], wearing signs of allegiance to a religious community is or is not compatible with the principle of *laïcité*”.⁴⁰

In what is commonly regarded as the landmark decision on the matter, the *Conseil d'État* gave a qualified, yet positive response on 27 November 1989.⁴¹

³³ *Avis 346.893 du 27 Novembre 1989*, in CE, *Jurisprudence du Conseil d'État sur le Port du 'Foulard Islamique'* [The Council of State Jurisprudence on the Wearing of the 'Islamic Headscarf'] (Centre de Documentation du CE, Unpublished, 1997) at § 1.

³⁴ *Ibid.*

³⁵ Mélin-Soucramanien, *supra* note 21 at 16.

³⁶ *Ibid.* at 27.

³⁷ D. Kessler, *La Laïcité* (France: Pouvoir, 2002) at 20.

³⁸ See CE, 2 November 1992, *Kherouaa*, (1992) at 20; and CE, 2 May 2000, *Marteaux*, (2000).

³⁹ See Zouari, *supra* note 13 at 137.

⁴⁰ Francis Messner et al, *Traité de droit français des religions* [Treatise of French Law of Religion] (Paris: Litec, 2003) at 1134.

⁴¹ For an analysis of the 1989 *avis*, see J. Rivero, “L’Avis de l’Assemblée Générale du Conseil d’État en date du 27 Novembre 1989” [Notice of the General Assembly of the Council of State of November 27, 1989], (Jan-Feb 1990) 6:1 *Revue Française de Droit Administratif* 1-6.

The judges wrote that “Student freedom implies the right for students to express and manifest their religious beliefs within school buildings in respect of the principle of pluralism and freedom of others, unless this threatens teaching activities, the content of programs and the duty to attend classes”.⁴² As a result of this legal principle, the *Conseil* concluded that “the wearing of signs through which students intend to manifest their religious allegiance is not incompatible with the principle of *laïcité* per se, since it is representative of the right to freedom of expression and freedom to manifest religious allegiance”.⁴³ However, the administrative court limited this provision by mentioning a number of cases where the Islamic veil – like any other religious symbol – could legitimately be forbidden: “This freedom”, it wrote in what can only be described as an infelicitous passage, “does not allow students to wear religious signs that, because of their nature, because of the conditions in which they are worn, or because of their ostentatious [*ostentatoire*] or defiant [*revendicatif*] character, constitute an act of pressure, provocation, proselytism, propaganda, or threaten the dignity or liberty of the student or other members of the educational community, or compromise their health or security, or perturb the normal functioning of school activities and their educational role, or trouble the school’s order and the day-to-day functioning of the education service”.⁴⁴ In accordance with the aim of the French education system, the *Conseil* also noted that religious signs “should not be an obstacle to the accomplishment of those responsibilities which Parliament conferred upon public education, namely, the cultural development of children into responsible human beings and citizens, as well as their personal development. [The education system] must also inculcate in them the respect for others and the principle of gender equality”.⁴⁵

Like any other religious sign, the judges argued, the Muslim veil was not incompatible with *laïcité* per se and had to be allowed in the classroom, unless it met one of the above-mentioned conditions.⁴⁶ In any event, it was the responsibility of school principals and disciplinary commissions across the country to assess each case individually, thus implying that any general ban was contrary to the law.⁴⁷ “The issue of the Islamic veil is not one of principle but a case-by-case matter”, the *Commissaire du Gouvernement*⁴⁸ wrote, “and no

⁴² See CE, *Avis 346.893 du 27 Novembre 1989*, *supra* note 33.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ See Conseil d’État, *Un Siècle de Laïcité*, *supra* note 24 at 338.

⁴⁶ See A. Ferrari, “La Lutte des Symboles et l’Espoir du Droit” [The Struggle of Symbols and the Hope of Rights], (2004) 16:96 *Migrations Sociétés* 86.

⁴⁷ CE, *Avis 346.893 du 27 Novembre 1989*, *supra* note 33 at §3.

⁴⁸ *The Commissaire du Gouvernement* (or Commissioner-in-Council) advises the government in cases heard by administrative courts and regional audit courts.

general interdiction can accordingly be accepted".⁴⁹ Tolerance became the rule, indeed four fifths of the exclusions of veiled schoolgirls that occurred during the 1990s were deemed to be illegal by the *Conseil*.⁵⁰ Prohibitions were usually based on a disturbance to public order, in accordance with national and international law,⁵¹ and were thus regarded by the supreme administrative judge as exceptions to the general permissiveness of religious signs worn by students.⁵² The problem is not the symbol, the *Conseil* repeatedly emphasized, but rather whether the behaviour of the student wearing it conflicts with the aims of the French education system.

ii. French Politicians and the Muslim Veil

The 1989 ruling was not appreciated by French politicians, who viewed the Muslim veil with increasing suspicion. With the aim of clarifying the *Conseil* decision and for the benefit of those school principals confronted with veil incidents, on 12 December 1989 – two weeks after the ruling was delivered – the Ministry of Education issued a Circular⁵³ that took a far more restrictive approach to the matter. After acknowledging that “the *Conseil* established that there cannot be a general and absolute interdiction of the veil or any other religious sign”,⁵⁴ the document went on to state that “[w]hen a conflict emerges with reference to a religious symbol, a dialogue must immediately be initiated with the student and her parents so that, for her own good and for the good of the school, the wearing of such a sign can be renounced”.⁵⁵ According to the minister, therefore, the desirable outcome was the withdrawal of the veil; this is a rather curious way of interpreting a judgment that had been inspired by tolerance rather than prohibition.

Notwithstanding this restrictive political stance, in the following years the jurisprudence of the *Conseil d'État* systematically confirmed its 1989 position: although there were limitations – particularly for those behaviours that

⁴⁹ In C. Hafiz and G. Devers, *Droit et Religion Musulmane* [Muslim Laws and Religion] (France: Dalloz, 2005) at 197.

⁵⁰ See Haut Conseil à l'Intégration, *L'Islam dans la République* [Islam in the Republic] (Documentation Française, 2001) at 240.

⁵¹ See Hafiz-Devers, *supra* note 49 at 195.

⁵² Laroque, *supra* note 19 at 45. See also Ferrari, *supra* note 47 at 85.

⁵³ A *circulaire* is a document that sits uneasily among French legal sources. Theoretically, it is an administrative document issued by a minister and addressed to civil servants with the purpose of clarifying a point of law. As such, it formally binds public officials only. Yet *circulaires* inevitably affect the general public – in this case, students – especially when, as in the veil issue, their interpretation of the existing legislation and of the established case law is questionable.

⁵⁴ Ministère de l'Éducation Nationale, *Circulaire du 12 Décembre 1989*, in *Application du Principe*, *supra* note 14 at 329.

⁵⁵ *Ibid* at 330.

threatened public order⁵⁶ and the security of children, or that translated into a refusal to attend classes⁵⁷—any general prohibition was considered illegal and was thus annulled.⁵⁸ Yet the *Conseil d'État* went further and in *Kherouaa*⁵⁹ underlined that teachers and pupils are burdened by considerably different duties: “The distinction between the obligations of students and those of teachers has not sufficiently been made”, it stated. “Since teaching must be secular, the obligation of neutrality is absolute for teachers who cannot express a religious faith in their activities. In contrast, since freedom of conscience is the rule, the principle of neutrality cannot be imposed upon students who are free to manifest their faith, the only limit being other people’s rights”.⁶⁰ As a testimony to this tolerant approach, the *Conseil d'État* confirmed only eight out of the forty-nine expulsions of veiled schoolgirls that had been enacted by French schools between 1992 and 1999.⁶¹

However, when a number of school principals expressed their unhappiness with this situation, politicians quickly reacted. On 20 September 1994 Education Minister François Bayrou issued a Circular that once again appeared to restrict the liberal character of the 1989 ruling by adopting a threefold approach.⁶² Firstly—and for the first time—the veil was linked to the issue of immigration: “The French idea of *République* rejects the fragmentation of the Nation into separate communities that are indifferent to each other, attached only to their own rules and laws, and engaged in simple coexistence”, Mr Bayrou wrote. “The Nation is not only a group of citizens with individual rights—it is a community with a common destiny [*une communauté de destin*]”.⁶³ In this way, the debate on religious signs at school was no longer a matter of religious freedom, but it was also an issue that concerned the integration of minorities more broadly; what had been regarded primarily as a legal problem became eminently political. Secondly, this document did not target *religious* signs but signs in general. It was no longer the religious character of the object that was contested but its very nature as a distinctive mark, as a symbol of allegiance,

⁵⁶ See R. Schwartz, *La Jurisprudence de la Loi de 1905* [The Jurisprudence of the Law of 1905], (Unpublished paper, 22 September, 2005).

⁵⁷ CE, 10 July 1995, *Un Sysiphe*, (1995) ADJA at 644, concl. R Schwartz.

⁵⁸ See CE, 2 November 1992, *Note sur les Décisions Relatives au ‘Foulard Islamique’ Rendues par le Conseil d’État Statuant aux Contentieux* [Notes on the Decisions Related to the “Islamic Scarf” by the Council of the State’s Rulings in Litigation] (1993) ADJA at 2. See also CE, 2 November 1992, *Kherouaa et Autres*, (1993) AJDA at 833; CE, 14 March 1994, *Dilles Yilmaz*, (1994) JCP G.

⁵⁹ CE, 2 November 1992, *Kherouaa et Autres*, (1993) AJDA at 833. See also R. Cabrillac, M. Frison-Roche & T. Revet, eds, *Libertés et Droits Fondamentaux* [Fundamental Rights and Liberties] (France: Dalloz 2005) at 361.

⁶⁰ See CE, 2 November 1992, *Kherouaa et Autres*, (1993) AJDA at 833.

⁶¹ Haut Conseil à l’Intégration, *supra* note 50 at 240.

⁶² *Circulaire 1649 du 20 Septembre 1994*, in *Application du Principe*, *supra* note 14 at 337-8.

⁶³ Messner et al, *supra* note 40 at 1136.

as a stamp of sectarian membership.⁶⁴ Finally, the Bayrou Circular created a distinction between *ostentatious* symbols (which were prohibited per se) and *discreet* ones (which were allowed):⁶⁵ “It is not possible to accept...the presence and multiplication of signs that are so ostentatious [*ostentatoires*] that they separate some students from the rules of the school”, Mr Bayrou wrote, adding that “[t]hese signs are in themselves signs of proselytism”⁶⁶ and were thus forbidden. Although the Circular made no mention of the Muslim veil explicitly, and it made no attempt to define the expression ‘ostentatious symbols’, it nevertheless referred to discreet symbols as those “manifesting a personal attachment to beliefs, especially religious ones”.⁶⁷ As one author observed, “[i]t implicitly follows [from this Circular] that certain religious signs, first and foremost the veil, are automatically ostentatious and are prohibited per se because they imply an attachment to a certain community”.⁶⁸ Again, this is a peculiar interpretation and arguably it is a far cry from the liberal spirit of the *Conseil d’État*’s case law. The fact that the Bayrou Circular indirectly targeted the Muslim veil was so clear that even the *Commissaire du Gouvernement* acknowledged it: “The Minister has taken care not to define in the Circular what he regarded as ostentatious signs”, the *Commissaire* wrote. “Saying that a Muslim veil is ostentatious per se would have been contrary to [the *Conseil*’s] case law...[and while] there can be no doubt that the Minister has this understanding of the Muslim veil... he has been very careful in the Circular not to spell out his personal view”.⁶⁹

iii. *The Conseil d’État Reasserts its Jurisprudence*

The *Conseil* did not appreciate Mr Bayrou’s Circular and it made its displeasure clear a few months later. The Education Minister was only giving “his interpretation of the *laïcité* principle”,⁷⁰ the judges wrote, and his document “[did] not contain any rule directly applicable to students”.⁷¹

⁶⁴ See Ministère de l’Éducation Nationale, *Annexe: Proposition d’Article à Insérer dans le Règlement Intérieur des Établissements* [Appendix: Proposed Rule to Insert into the Internal Regulations of Establishments], in *Application du Principe*, *supra* note 14 at 337.

⁶⁵ See *Circulaire n. 1649 du 20 Septembre 1994*, *supra* note 62 (the *Circulaire* concluded with the following invitation to teachers and principals: “[I] thus ask you to please propose...the interdiction of these ostentatious signs (“signes ostentatoires”), bearing in mind that the presence of more discreet signs merely expressing the attachment to a personal conviction cannot be prohibited, as the *Conseil d’État* has made it clear” at 337.)

⁶⁶ *Ibid.*

⁶⁷ *Ibid* at 337-8.

⁶⁸ Messner et al, *supra* note 40 at 1136.

⁶⁹ In CE, 20 September 1995, *Un Sysiphe*, (1995) AJDA at 647.

⁷⁰ *Ibid* at 127. See also Rapport Clément in *Conseil d’État, Un Siècle de Laïcité*, *supra* note 24 at 25.

⁷¹ CE, *Un Sysiphe*, *supra* note 70 at 128. See *Conseil d’État, Un Siècle de Laïcité*, *supra* note 24 at 339.

Moreover, the Court's subsequent case law confirmed this distancing from any political interpretation of religious signs at school: the prohibition of ostentatious symbols without an accurate definition of what 'ostentatious' means "cannot but involve a case-by-case approach",⁷² the judges ruled. As for the Muslim veil, they confirmed that it "cannot be regarded as a sign having an ostentatious or subversive character per se [*caractère revendicatif*] nor [should it be seen] as an act of proselytism that necessarily puts pressure on others".⁷³ In subsequent years, adhering to this interpretation, the *Conseil* annulled a number of exclusions of veiled schoolgirls for various reasons, including where there was little evidence that their veil represented an act of proselytism or propaganda;⁷⁴ where the garment had automatically been regarded as incompatible with *laïcité*;⁷⁵ where such expulsions had been based simply on the substantial number of veiled students at school or on organizational difficulties;⁷⁶ and where the alleged disturbance to public order had remained unsubstantiated.⁷⁷ Moreover, when a lower court described the veil as "ostentatious per se, and linked with an obedience to foreign-based religious extremism",⁷⁸ the *Commissaire* censored this interpretation on the grounds that "such an approach is not based on the sign itself but on its perception. At issue here is obviously not the veil but the interpretation given to this symbol, some people seeing it, rightly or wrongly, as an instrument of proselytism. Yet neither the school nor the judge can adopt this kind of logic without violating the principle of *laïcité* as well as those of freedom of religion and belief".⁷⁹ In so writing – and in only upholding those sanctions pronounced against schoolgirls who had participated in "protests that threatened the public order of the school"⁸⁰ – the *Conseil* effectively "neutralized" the Bayrou Circular.

⁷² Zouari, *supra* note 13 at 211.

⁷³ CE, 27 November 1996, *Ligue Islamique du Nord, Wissaadane et Jeouit*, (1997) JCP G- II 22808, note by B. Seiller, "Le Port des Signes Extérieurs de Conviction Religieuses à l'École. Une Jurisprudence Affirmée, une Jurisprudence Contestée" [The Wearing of Symbols of Religion Conviction at School. An Asserted Jurisprudence, A Contested Jurisprudence] (Jan-Feb 1997) 13:1 *Revue Française Droit Administratif* at 151-72.

⁷⁴ CE, 27 November 1996, *Naderan* (1996) ADJA; CE, 2 November 1992, *Kerhouaa* (1992) ADJA; CE, 14 March 1994, *Yilmaz* (1994) ADJA; CE, 20 May 1996, *Ali* (1996) ADJA.

⁷⁵ CE, 20 May 1996, *Ali* (1996) *Revue Française Droit Administratif* 169, note C. Durand-Prinborgne. See also: CE, *Note sur les Décisions Relatives au 'Foulard Islamique'*, *supra* note 58 op. cit. at 1.

⁷⁶ CE, *Outamghart* (1997) *Revue Française Droit Administratif* 151-72, note C. Durand-Prinborgne.

⁷⁷ CE, 10 March 1995, *Aoukili* (1995) JCP G 1995, II, 33431, note by Nguyen Van Tuong; CE, 27 November 1996, *Ligue Islamique du Nord, Wissaadane et Jeouit*, (1997) JCP G II 22808, note by Seiller; CE, 27 November 1996, *Université de Lille II*, (1997) *Revue Française de Droit Administratif* 170.

⁷⁸ "Naderan c/ Recteur de l'Académie de Clermont-Ferrand" [Naderan c/ Rector of the Academy of Clermont-Ferrand], (18 August 1995) 99 *Petites Affiches*.

⁷⁹ *Ibid.*

⁸⁰ CE, 27 November 1996, *Chabou* (1996).

Thus, although the language of the 1989 judicial opinion was vague and ambiguous, the *Conseil's* post-1989 case law was clear and adopted a consistently liberal approach to the issue. The latter was also in line with the seminal *Benjamin* decision of 1933,⁸¹ where the *Conseil* had pointed out that it is only through a case-by-case approach that the exercise of fundamental freedoms and the exigencies of public order can be adequately balanced.⁸² “[L]ocal authorities have tended to sanction the very act of wearing the veil”, the judges wrote, “and this would have certainly incurred our censorship”.⁸³ Thus, for the *Conseil*, only *behaviours* could be ostentatious, never *signs* alone: “The wearing of sign that is ostentatious per se is impossible”, one author commented, “and [t]he ban pronounced for this reason will not pass judicial scrutiny [since] it will always be necessary to rely on other factors – independent of the religious sign – to prove the ostentatious character of the sign”.⁸⁴

As subsequent events indicate, however, this approach was soon despised by school principals and politicians alike, and they increasingly demanded a more resolute political answer to what they perceived as legal stagnation. The best solution, they soon agreed, was to establish a new statute.

III. BUILDING THE CASE FOR STATUTE 228: THE POLITICIANS TAKE OVER

Criticisms of the *Conseil d'État's* case-by-case approach – and popular opposition to the Islamic veil – soon became so strong that it permeated the entirety of the French political spectrum (the Socialists, who had previously been supportive of the *Conseil*, soon came to rally behind the ruling UMP party in calling for legislation on the matter).⁸⁵ Moreover, despite the actual *diminution* in the number of veiled schoolgirls in France,⁸⁶ the *Conseil* was

⁸¹ See CE, 19 May 1933, *Benjamin*, (1933) Rec 541 (“[t]he Benjamin jurisprudence, bearing in mind the circumstances of each case, strives to conciliate the exigencies of public order and the exercise of fundamental freedoms in that any restriction imposed to the said liberties must be justified by the legitimate purposes pursued”).

⁸² See in this sense D. Kessler, “Neutralité de l’Enseignement Public et Liberté d’Opinion des Elèves” [The Neutrality of Public Education and the Freedom of Student’s Opinions] (2 November 1992) 9:1 *Revue Française de Droit Administratif* at 112-8.

⁸³ CE, *Note sur les Décisions Relatives au ‘Foulard Islamique’*, *supra* note 58 at 2.

⁸⁴ B. Seiller, note to CE, *Ligue Islamique du Nord, Wissaadane et Jeouit*, *supra* note 77.

⁸⁵ Zouari, *supra* note 14 (as one Socialist leader put it, “[a]t the time, we were not aware of the danger of ‘Islamisation’. We were perhaps a bit naïve” at 180). See also F. Lorcerie, *La Politisation du Voile* [The Politicization of the Veil] (L’Harmattan, 2005) at 65.

⁸⁶ *Ibid* at 20. According to the Interior Minister, in 2002 there were 1500 veil-related cases, 100 mediations and 10 lawsuits, while in 2003 there were 1256 cases, 20 unresolved cases and only 4 exclusions. According to the Education Ministry mediator, “the situation in schools has somewhat calmed down”.

openly accused of timidity and of leaving the responsibility of decisions on the veil to teachers and school principals.⁸⁷ “After consulting the judges”, one author observed with reference to the Jospin government of 1989, “the executive power was visibly embarrassed by their response”.⁸⁸ With September 11 having considerably reinforced the country’s alertness to Islamic extremism and its opposition to the veil,⁸⁹ the dance of political propositions against school signs began, and what had originated in 1989 as a legal issue turned into a political matter that would eventually result in the statute of 2004.⁹⁰ This section considers the parliamentary genesis of this piece of legislation, first with reference to its drafting and then to its evaluation by several legislative bodies. Doing so offers important insights into the context in which the statute emerged and the reasons for its adoption.

A. PARLIAMENTARY GENESIS OF STATUTE 228/2004

i. *Early Bills on School Apparel*

At the beginning of the new millennium, the French parliament was confronted with a number of bills aimed at regulating a situation that some school exclusions,⁹¹ unprecedented media frenzy⁹² and widespread political opportunism⁹³ had depicted as explosive. While these proposals differed in breadth as well as scope, they agreed that a general rule concerning religious signs was necessary and that the *ad hoc* approach of administrative judges was inadequate.

The bill introduced to Parliament in August 2002 by a ruling UMP politician is emblematic of this ‘tough’ approach which was aimed not only at religious insignia but at other ‘sensitive’ symbols as well. “The wearing of all ostentatious signs [*signes ostentatoires*] expressing a religious, philosophical or political allegiance or proselytism at school” is forbidden, this proposal read, and any violation should be sanctioned as a criminal offence.⁹⁴ The

⁸⁷ “The *Conseil d’État* Veils Its Own Face”, titled the daily *Le Figaro* after the *Kherouaa* decision of 1992.

⁸⁸ A. Ferrari, *supra* note 46 at 93.

⁸⁹ According to several surveys on the issue, 75% of French people were in favour of a law against religious signs at school. Lorcerie, *supra* note 85 at 20.

⁹⁰ See Laroque, *supra* note 19 at 44. (As one observer wrote, “[i]t would be unjust to reprimand the *Conseil d’État* for having provided a legal answer, because this is precisely its role (even if parts of the public perhaps expected something else from the institution)”).

⁹¹ Important was the exclusion of two schoolgirls from Aubervilliers, in 2004. See their book L. Lévy et A. Lévy, *Des Filles Comme Des Autres* [Like the Other Girls] (France: La Découverte, 2004).

⁹² On the place of the veil in French media see “2003-2004: Foulards et Intégration” [2003-2004: Headscarves and Integration], in Deltombe, *supra* note 20.

⁹³ On the ‘politicization’ of the veil issue in France, see Lorcerie *supra* note 85 at 65-71.

⁹⁴ See Bill 172 introduced by Jacques Myard MP (UMP).

reason for this toughness had little to do with religion; rather, the author of the bill argued, in schools distinctive signs are divisive and can cause disciplinary problems.

A few months later, an MP from the UDF party took an even more draconian approach to the issue, proposing the “prohibition of every manifestation of political or religious allegiance in school buildings”,⁹⁵ while in May 2003 a group of Communist senators introduced a bill that was somewhere between the interdiction of ‘ostentatious’ symbols and total prohibition: “All visible signs [*signes visibles*] expressing a political or religious allegiance”⁹⁶ must be forbidden, it read. The concept of ‘visibility’ – a word to which many MPs were partial, but which failed to make it into the new statute – thus entered into the political discussion.

The real breakthrough in terms of parliamentary numbers, however, came in mid-2003 and concerned the Socialists. Although the party had long supported the case-by-case position of the *Conseil d'Etat*, in May 2003 its leadership made a dramatic U-turn and called for a statute prohibiting “every apparent political, trade union, association or religious sign of whatever nature”⁹⁷ on the grounds that such signs threatened the school environment and adversely affected teaching. A few days later, another bill – this time from a majority MP – indirectly targeted the Islamic veil by recommending the adoption of criminal sanctions for those parents who “force or allow [a pupil] to wear any form of ostentatious [*ostentatoire*] religious sign that prevents [him or her] from accessing school activities”.⁹⁸

The following months saw a multiplication of similar initiatives. In November 2003, for instance, a more comprehensive bill with both positive and negative components was introduced to the *Sénat* by the Socialist group. It supported the introduction of *laïcité* and religious history modules at school, but it also advocated the prohibition of “all religious, political or philosophical signs...within public school buildings and during any external activity organized by the school”.⁹⁹ Finally, in December 2003 another bill suggested that students make “behavioural and clothing choices respectful of the principle of *laïcité* during teaching activities and in places of public teaching”¹⁰⁰ and advocated a ban on “the ostentatious wearing of signs of

⁹⁵ See Bill 500 introduced by Maurice Leroy MP (UDF).

⁹⁶ See Bill 288 annexed to the 13 May 2003 session and introduced by François Autain, Jean-Yves Autexier and Paul Loridant, MPs (Communistes, Républicains et Citoyens).

⁹⁷ See Bill 432 introduced by Michel Charasse, Jean Louis Carrère, Alain Journet, Jean-Marc Pastor, Guy Penne and Josette Durrieu MPs (PS).

⁹⁸ See Bill 1076, XII legislature, introduced by Didier Julia MP (UMP).

⁹⁹ See Bill 68 introduced on 14 November 2003 by Serge Lagache (PS). This Bill was also introduced to the Lower House. See Bill 1227 introduced on 18 November 2003 by Jack Lang (PS).

¹⁰⁰ See Bill 1302 introduced on 17 December 2003 by Laurent Hénart (UMP).

religious, political or philosophical allegiance".¹⁰¹

Although all of these bills actually targeted different things (I shall return to their specific vocabularies below) and none became law due to the lack of a parliamentary majority, a comprehensive approach in favour of a ban started to emerge and had, by mid-2003, taken the institutional shape of a Parliamentary Commission.

ii. *Debré Commission on Religious Signs at School*

On 27 May 2003, the Commission on Religious Signs at School was established under the chairmanship of the President of the Lower House, Jean-Luis Debré.¹⁰² It was composed of 31 MPs (18 from the ruling UMP, 8 from the PS, 2 from the UDF, 2 from the Communists and 1 Non-Registered)¹⁰³ and over six months it consulted with 120 people during 26 sessions and 37 interviews. Its final report makes a passionate defence of *laïcité*, expresses some harsh criticisms of the *Conseil d'État* and openly disapproves of the Muslim headscarf.

The Commission began by paying tribute to *laïcité*, "one of the founding principles of the Republic"¹⁰⁴ which "is part of our [French] heritage".¹⁰⁵ The originality of the French model, it explained, rests with the historical developments that caused *laïcité* to acquire "an important symbolic value which is inseparable from the existence of the Republic"¹⁰⁶ – and, as a result, "*République* and *laïcité* are the same".¹⁰⁷ While political or religious allegiances have historically divided the French, *laïcité* has united them into a Nation by rescuing them from their separate communities and bringing them together in a space of common rights and obligations.¹⁰⁸ Because of this historical coincidence between Church and State and because *laïcité* was born at school, the Commission found it unsurprising that the veil controversy emerged there.¹⁰⁹

Mindful of the centrality of the education system for *laïcité*, the Debré

¹⁰¹ *Ibid.*

¹⁰² Assemblée Nationale, *Rapport Fait par M. Jean-Louis Debré, Président de l'Assemblée Nationale, au Nom de la Mission d'Information sur la Question du Port de Signes Religieux à l'École* [Report of Jean-Louis Debré, President of the National Assembly, Made on Behalf of the Mission for Information on the Question of Wearing Religious Symbols in Schools] In *Application du Principe*, *supra* note 14 at 131.

¹⁰³ See on the point A. Ferrari, *supra* note 46 at 152.

¹⁰⁴ *Rapport Debré* in *Application du Principe*, *supra* note 14 at 131.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.* at 144.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.* at 133.

¹⁰⁹ At the beginning of the 19th century, the Education Minister was also the Religion Minister and was a bishop.

Commission also strongly criticized the *Conseil d'État* and made it clear that the question of religious signs at school required a political solution. "Confronted with an increasing number of students willing to manifest their religious convictions", it wrote, "school principals must apply a case law... that no longer permits them to balance freedom of religion with *laïcité* and which results in a weakening of the latter at school".¹¹⁰ Moreover, by differentiating between teachers and students, the *Conseil* had come to a "regrettable distinction"¹¹¹; "...students are also part of the 'educational community' and go to school to learn the ideas of citizenship and of living together"¹¹². "They are not simply users of the public service", the Commission emphasized, "but people growing up within an institution that must shape them".¹¹³

Far from confining its work to *laïcité* in general, the Commission also noted that few objects are as antithetical to the French idea of *laïcité* as the Muslim headscarf. "The veil...cannot be reduced to a simple sign of religious allegiance [because] it often – if not always – conveys the political aim of affirming an identity and perhaps even a certain idea of the place of women in society, for rare are those girls who wear it spontaneously, free of pressure from their family or social milieus".¹¹⁴ With a stance that was to prove contentious given the available government statistics on the prevalence of the Muslim veil in French schools,¹¹⁵ the Commission also emphasized that France was going through a veritable 'veil emergency' which politicians had a duty to resolve. "We deem it imperative to act immediately in order to prevent the current situation from degenerating to the point of becoming unmanageable", the Report concluded. "We [thus] propose the introduction of a short, simple, clear statute, which must not be open to interpretation, prohibiting any visible religious and political sign in public schools".¹¹⁶ The criterion adopted by the Debré Commission was thus one of visibility, and the prohibition was meant to affect *both* religious *and* political signs. As we shall see, however, the final text of the legislation was to depart considerably from this, being at the same time more nebulous and far narrower in its phrasing.

iii. Stasi Commission, Presidential Speech and Bill 1378

The Debré Commission completed its work on 4 December 2003, barely a week before another body – presided by National Ombudsman Bernard Stasi

¹¹⁰ *Rapport Debré in Application du Principe*, *supra* note 14 at 157.

¹¹¹ *Ibid* at 174.

¹¹² *Ibid*.

¹¹³ *Ibid*.

¹¹⁴ *Ibid* at "Introduction".

¹¹⁵ For statistics on the veil in France, see Lorcerie, *supra* note 86 at 65.

¹¹⁶ *Rapport Debré in Application du Principe*, *supra* note 14 at "Introduction".

and composed of nineteen sages with expertise in immigration matters—delivered its own conclusions.¹¹⁷ The Stasi Commission recommended a long series of ‘affirmative’ measures, including the adoption of a *Laïcité* charter;¹¹⁸ the fight against racism and anti-Semitism;¹¹⁹ the creation of a national day dedicated to *laïcité*;¹²⁰ a better integration of minorities;¹²¹ and the establishment of Islamic and Jewish festivities.¹²² These were in addition to a more ‘negative’ measure which legislated against ‘conspicuous’ religious and political signs at school.¹²³ “While respecting the freedom of conscience and the special character of private schools under contract with the State”, the Stasi sages recommended that “those clothes or signs manifesting a religious or political allegiance [should be] prohibited in public schools...The clothes or signs that [should be] forbidden are only the conspicuous ones [*signes ostensibles*], such as a big cross, veil or kippa. Discreet signs, for example medals, small crosses, David stars, Fatima’s hands or small Korans are not regarded as signs manifesting a religious allegiance”.¹²⁴

To the surprise of some of the members of this Commission,¹²⁵ however, it was only this negative proposition that President Chirac retained when he delivered a televised speech on 17 December 2003, calling for a statute against “the wearing of signs that conspicuously manifest [*manifestent ostensiblement*] a religious allegiance”¹²⁶ in public schools. The speech was widely applauded across the political spectrum. In a move that would cause confusion when it came to interpreting Statute 228, Chirac defined ‘conspicuous signs’ as those when “the wearing of which leads someone to be immediately recognized for his religious allegiance”¹²⁷. He emphasized that “...a law is evidently necessary. I hope that it will be swiftly adopted by Parliament and that it will be applied from the next school year”.¹²⁸ A few days later, the process of assessing Statute 228 began in the French parliament. It would take less than

¹¹⁷ See B. Stasi, *Rapport de la Commission de Réflexion sur l’Application du Principe de Laïcité dans la République* [The Report of the Commission Focused on the Application of the Principle of Laicism in the Republic] (Paris: Documentation Française, 2004).

¹¹⁸ *Ibid* at 111, 122 and 137.

¹¹⁹ *Ibid* at 111 and 135.

¹²⁰ *Ibid* at 112.

¹²¹ *Ibid* at 115.

¹²² *Ibid* at 142.

¹²³ *Ibid* at 149.

¹²⁴ *Ibid* at 149-150.

¹²⁵ More on this below.

¹²⁶ J. Chirac, *Discours Relatif au Respect de la Laïcité dans la République* [Address on the Respect of Laicism in the Republic], in *Application du Principe*, *supra* note 14 at 7.

¹²⁷ *Ibid*.

¹²⁸ *Ibid*.

two months to complete.

iv. Parliamentary Assessment of Statute 228

a. Clément Commission

Bill 1378¹²⁹ was registered at the *Assemblée Nationale* in January 2004 and it adopted the language of President Chirac's speech, which had in turn been partially inspired by the Stasi Commission: "In elementary, intermediate and high schools, the wearing of signs or symbols through which students conspicuously manifest a religious allegiance is prohibited".¹³⁰ The bill was then sent for approval to the Commission for Constitutional Affairs, chaired by Mr Pascal Clément. This Commission endorsed the bill in record time with only a minor amendment relating to the need to open a dialogue with offending students before any sanction could be imposed.¹³¹ Given this widespread consensus and acceptance, it is important to assess the motivations behind the statute and to explore the circumstances underlying its adoption.

According to Mr Clément a new piece of legislation was necessary, first of all, as a symbolic response to the 'multicultural threat': "The fundamental objective of this bill...is to vigorously reaffirm our desire to retain the French model of integration",¹³² he wrote on behalf of his colleagues. "Other systems exist...but France will not accept the Anglo-Saxon model of multiculturalism, for this would be contrary to our tradition, our historical heritage and our culture".¹³³ The Commission also stressed that a statute was necessary because the existing legal framework was "confusing"¹³⁴ and the case law was inadequate in the face of new threats. Students, too, should be submitted to the duty of neutrality because "[they] are not simply users of the public service — they are also part of the 'educational community' and should learn, at school, the [rules of] citizenship and of living together".¹³⁵

However, the overlying rationale for the law was the belief that *laïcité* was threatened by "certain religious communities that endanger the

¹²⁹ See Bill 1378 of 28 January 2004, in *Application du Principe*, *supra* note 14 at 17-19.

¹³⁰ *Loi 2004-228*, *supra* note 2 article 1.

¹³¹ *Assemblée Nationale, Rapport de M. Pascal Clément Fait au Nom de la Commission des Lois Constitutionnelles, de la Législation et de l'Administration Générale de la République sur le Projet de Loi (n. 1378) Relatif à l'Application du Principe de Laïcité dans les Écoles, 28 January 2004*, [The Report of Mr. pascal Clement on Behalf of the Commissions of Constitutional Law, Legislation and General Administration for the Law Project (n. 1378) Relating to the Application of the Principle of Laicism in Schools, January 28, 2004] in *Application du Principe*, *supra* note 14 at 47-8.

¹³² *Ibid* at 31.

¹³³ *Ibid*. See also, in the same sense at 21.

¹³⁴ *Ibid* at 21.

¹³⁵ *Ibid* at 28.

school's mission of teaching French values"¹³⁶ and that it was endangered by a particular object—the Muslim headscarf. Indeed, the hijab was seen to represent “a regression of women's rights in certain neighbourhoods” and was regarded as a sign of the “strong pressures on these women to wear it”.¹³⁷ The report did acknowledge the government's statistics—that only 1,500 schoolgirls in France wore the veil in 2003, and that there were only ten lawsuits and 100 mediations concerning the issue in that year¹³⁸—but Mr Clément wrote that “these numbers do not reflect the reality of a mounting ‘sectarianism’ at school”.¹³⁹ The Commission was nevertheless more inclined to trust non-governmental statistics reflecting *opposition* to the veil: “A BVA survey...shows that 72% of people are favourable to a law prohibiting all visible religious or political signs in public schools”,¹⁴⁰ the Report pointed out, so “[t]his bill answers a strong expectation by the population”.¹⁴¹

As for the criticism that a new statute was superfluous because the word ‘conspicuous’ was as open to interpretation as the word ‘ostentatious’, the Commission disagreed: “The signs to be prohibited are those which allow students to be immediately recognized for their religious allegiance. Unlike today, therefore, it will no longer be the *behaviour* that matters but certain religious signs *in themselves*”.¹⁴² While this was indeed a departure from the existing law, it was the *Conseil's* perceived generosity that the French MPs seemed to dislike rather than the presumed ambiguity of its case law.

b. Dubernard Commission

The Parliamentary Commission for Cultural, Familial and Social Affairs was also asked to assess Bill 1378 through a report that was delivered on 28 January 2004 by its chairman Jean-Michel Dubernard; the commission was entirely positive and supportive of the project, suggesting that no amendments were required.¹⁴³ But in this case, too, the ease with which the bill cruised through Parliament should be viewed with caution, as there were important indications about the reasons underlying the law that were given by MPs.

¹³⁶ *Ibid* at 29.

¹³⁷ *Ibid*.

¹³⁸ *Ibid*. For other statistics, see also, *supra* note 1, 1st session of 4 February 2004, at 138 (Georges Hage) (“[o]ut of 2 million girls at school, it is calculated that 1,000 to 2,000 of them wear the veil, that is to say a percentage of, roughly, 1 out of 1,000); *Débats, ibid, supra* note 1, 1st session of 5 February 2004, at 208 (Armand Jung) (“91% of teachers do not have veiled girls in their class. Does that mean that this law is being created for only 9% of French schools?”).

¹³⁹ *Ibid*.

¹⁴⁰ *Ibid* at 32.

¹⁴¹ *Ibid*.

¹⁴² *Ibid* at 35.

¹⁴³ *Avis Dubernard* in *Application du Principe, supra* note 14 at 74.

Like its predecessors, the Dubernard Commission emphasized the peculiarity of France when it comes to *laïcité* and the danger posed to it by religious signs. “*Laïcité* is much more than a simple principle organizing the relationship between Church and State”, the Rapporteur wrote. “It defines a certain way of living that refuses to retreat to one’s own community [and] that gives paramount importance to national cohesion”.¹⁴⁴ But this heritage was being threatened by the “nefarious effects”¹⁴⁵ of “a number of religious symbols that imperil the only community that should be able to express itself at school, i.e. the educational community”.¹⁴⁶ These symbols also put significant pressure on teachers, the Commission emphasized, in that they “force them to take into account the religious allegiance of their students, something that in turn undermines pluralism”.¹⁴⁷ Moreover, the Dubernard Commission, like the previous bodies, identified the Muslim veil specifically as the main threat to *laïcité*: “Wearing the veil is rarely a free choice for young girls”, it wrote. “It is more often the result of family and peer pressure, or a protection mechanism from male aggression. It is also used to coerce those who do not want to wear it and who are actually the great majority”.¹⁴⁸ Interestingly, however, the Commission did not substantiate these claims.

As for the wording of the bill, the adverb ‘conspicuously’ (*ostensiblement*) was preferred to the adjectives ‘ostentatious’ (*ostentatoire*) or ‘visible’ (*visible*). ‘Ostentatious’, in particular—a word that was first employed by the *Conseil d’État*—had two disadvantages: the supreme administrative judge “never precisely defined what it meant”¹⁴⁹ and it was not comprehensive enough as, for the *Conseil*, “a symbol of religious allegiance...cannot by itself be considered ostentatious. Only the way it is worn—and thus the behaviour it results in—can be regarded as such”.¹⁵⁰ As for the Debré Commission’s preferred term—‘visible’—“it would be too threatening to freedom of religion and conscience”.¹⁵¹ The wording adopted was thus the most appropriate, the Dubernard Commission concluded, since it struck a compromise between the lax approach of the *Conseil d’État* and the draconian attitude of the Debré Commission.¹⁵²

c. Valade Commission

¹⁴⁴ Débats, *supra* note 1 at 53.

¹⁴⁵ *Ibid* at 54.

¹⁴⁶ *Ibid* at 53.

¹⁴⁷ *Ibid* at 57.

¹⁴⁸ *Ibid* at 55.

¹⁴⁹ *Ibid* at 62.

¹⁵⁰ *Ibid*.

¹⁵¹ *Ibid*.

¹⁵² *Ibid* at 63.

The Senate Commission for Cultural Affairs chaired by Jacques Valade was the last parliamentary body to assess the Bill, delivering its report on 25 February 2004.¹⁵³ The senators, like the MPs, gave a green light to the bill and required no changes to be made. The text was adopted on 3 March 2004 when its legislative voyage ended and Bill 1378 became Statute 228.

The *Sénat* Commission broadened the path laid down by the previous parliamentary bodies, reemphasizing that French schools should remain a “neutral space”¹⁵⁴ and should be “protected and preserved”¹⁵⁵ from any form of “sectarian resurgence and conspicuous manifestation of religious signs”.¹⁵⁶ Although MPs were referring to religious symbols in general, the incidents involving the Muslim headscarf were particularly dangerous, it pointed out: these cases were “certainly few but they have a strong symbolic meaning.... This sectarian resurgence imperils the republican model with a public display of religious opinions and a request for specific rights”.¹⁵⁷ This was all the more serious, the Commission wrote, because “[t]he veil conveys a certain image of women in society that directly contradicts the principle of equality—a principle that, although of recent conquest, is by now a key component of the ‘republican contract’”.¹⁵⁸

The Commission also noted the symbolic dimension of this statute; a message needed to be sent, both nationally and internationally, in defence of *laïcité*. “By adopting a firm stance against a certain kind of extremism which pretends to be talking in the name of religion”, the senators wrote, “France will convey a message of hope to those who fight for more freedom and tolerance in their own countries ... while also sending our support to the great majority of our fellow citizens who migrated [here] and who wish to abide by the laws of the Republic”.¹⁵⁹ The senators also made it clear that the proposed law should be accompanied by a stronger integration of minorities so that its repressive elements could be countered by a more positive component.¹⁶⁰ It was important to reiterate the country’s rejection of the Anglo-Saxon model of multiculturalism – as Statute 228 did: “What we need to reaffirm is that France is not an amalgam of opposed, fragmented and secluded communities

¹⁵³ Assemblée Nationale, *Rapport de M Jacques Valade Fait à Nom de la Commission des Affaires Culturelles* [The Report of Mr. Jacques Valade Made on Behalf of the Commission of Cultural Affairs], in Application du Principe, *supra* note 14 at 95.

¹⁵⁴ *Ibid* at 78.

¹⁵⁵ *Ibid*.

¹⁵⁶ *Ibid*.

¹⁵⁷ *Ibid*.

¹⁵⁸ *Ibid* at 92.

¹⁵⁹ *Ibid* at 92.

¹⁶⁰ *Ibid* at 102.

[but on the contrary] a national polity".¹⁶¹

IV. SYMPHONY OR CACOPHONY? THE PARLIAMENTARY DEBATES ON STATUTE 228

The strong consensus among these various commissions ensured that there were minimal adjustments to the bill and the spirit of the legislation remained unaltered. "[V]ery few bills discussed by parliament produced such a limited number of amendments ...", one MP observed, "something that shows ... that a statute is needed".¹⁶² Yet a number of MPs whose proposals for change failed at the commission level expressed their intention to reiterate their doubts during the debates. They asserted that they wanted to gauge the extent to which the government was ready to meet their demands, implying that the outcome of their vote depended upon goodwill. The importance of the parliamentary debates is thus twofold: on the one hand they allow us to discern the public position of French MPs on the matter of religious signs at school; on the other, they tell us the extent to which the agreement on the final text was genuine. This section highlights both aspects by considering first the points of agreement among MPs (A) and then the areas of either divergence or unenthusiastic concurrence (B).

A. SYMPHONY

Opened by Prime Minister Jean-Pierre Raffarin on 3 February 2004, the parliamentary debates on Statute 228 continued for about a week and, according to the President of the Lower House, they took place in a "climate of freedom, attention and tolerance".¹⁶³ They also attracted unprecedented media attention and the record intervention of 120 MPs. Mr Raffarin's speech set the tone for such debates, reiterating some of the points made by President Chirac and the commissions, but also adding spice to the institutional soup so as to make it palatable to as wide a parliamentary spectrum as possible.

After pointing out that *laïcité* is "at the heart of our Republic" and embodies "a tradition, a way of life [and] ... a promise of freedom",¹⁶⁴ Mr Raffarin noted the importance of the bill before Parliament. "At stake here is [nothing less than] the permanence of our values, our ability to share them with newly arrived immigrants ... and the ability of the Republic to uphold

¹⁶¹ *Ibid.*

¹⁶² Débats, *supra* note 1, 1st session of 5 February 2004, at 240 (Jacques-Alain Bénisti).

¹⁶³ *Ibid* at 5 (Jean-Louis Debré).

¹⁶⁴ *Ibid*, 2nd session of 3 February 2004, at 13 (Jean-Pierre Raffarin).

her convictions without weakness”, he said.¹⁶⁵ The purpose of this project, then, went beyond religious signs at school and, in fact, served as a warning to “those who put their sectarian allegiance before the laws of the Republic”.¹⁶⁶

Like the commissions, however, Mr Raffarin recognized that the bill was conceived with the Muslim headscarf in mind: “We must recognize that today certain religious signs – such as the Islamic veil – are multiplying in our schools”, he said before being interrupted by applauding MPs. “They acquire a political meaning and can no longer be seen as a private sign of religious allegiance”.¹⁶⁷ To solve this problem the government was proposing a bill that was “short, simple and balanced”¹⁶⁸, and that prohibited those signs which clashed with *laïcité* whilst still allowing the discreet display of religious belief. “[A] student will [still] be able to wear ... a discreet piece of garment that shows his or her religious allegiance”,¹⁶⁹ the Prime Minister noted, adding that “‘conspicuous manifestation’ should be interpreted as the willingness to exteriorize and claim a religious allegiance”.¹⁷⁰

i. The Muslim Veil as the Target of Statute 228

The debate that followed the Prime Minister’s speech confirmed a number of important points about Statute 228, the first of which being that while the bill mentioned “religious symbols” in general, its real target was the Muslim headscarf: “The Islamic veil is the primary cause of our debate”,¹⁷¹ one MP – who voted in favour of the project – acknowledged. Another similarly recognized that “[i]t is a law on the veil on which we are going to vote, and no one could think otherwise”.¹⁷² This perspective was shared widely across the political spectrum. Almost every MP from both the majority and the opposition acknowledged that the Muslim veil was the real problem while also recognizing that behind this symbol lay a much more difficult issue.¹⁷³ “[I]t is the place of Islam in today’s France that is in question”,¹⁷⁴ one politician who supported the statute declared, while another MP who opposed it noted that “[i]t is not ‘religious signs’ that you are targeting here: this law concerns

¹⁶⁵ *Ibid* at 9.

¹⁶⁶ *Ibid* at 10.

¹⁶⁷ *Ibid*.

¹⁶⁸ *Ibid*.

¹⁶⁹ *Ibid* at 11.

¹⁷⁰ *Ibid*.

¹⁷¹ *Ibid*, 2nd session of 3 February 2004, at 159-60 (Hervé Mariton) (UMP, in favour).

¹⁷² *Ibid*, 1st session of 5 February 2004, at 219 (Bruno Le Roux) (NR, against).

¹⁷³ See *ibid*, 3rd session of 3 February 2004, at 93 (Martine Billard) (NR, abstained); *ibid*, 1st session of 5 February 2004, at 217 (Jean-Pierre Grand) (UMP, in favour); *ibid*, 2nd session of 4 February 2004, at 149 (Danielle Bousquet) (PS, in favour).

¹⁷⁴ *Ibid*, 1st session of 4 February 2004, at 133 (René Dosièrè) (PS, in favour).

the veil and Islam".¹⁷⁵

ii. Criticism of the Conseil d'État

A second ground for agreement lay with the perceived generosity of the *Conseil*, an institution towards which most MPs showed contempt. "This statute is indispensable ...", the Rapporteur on Statute 228 said, "because the current case law [is] contradictory [and] the administrative court judge is relying not on the religious sign ... but on public order".¹⁷⁶ His colleagues in the majority proved even less charitable: "The decision of the Government to rely on an opinion of the *Conseil d'État* for this matter has solved nothing",¹⁷⁷ one declared, while another dismissed it as "ambiguous and does not deal with identity claims".¹⁷⁸ Interestingly, the Left proved equally abrasive: Jean-Pierre Brard, speaking for the *Communistes et Republicains*, stated that "[t]-he jurisprudence developed based on the Circular of December 1989 has progressively betrayed the spirit of the Law of 1905 [separating Church and State] ... The norm today is the acceptance of signs of religious allegiance, their prohibition being reserved for exceptional cases".¹⁷⁹ Such case law was characterized by "worrying contents and effects",¹⁸⁰ Mr Brard continued, before delivering the final blow: "I know it is politically incorrect to criticize the *Conseil d'État*. However, we must acknowledge that over the course of time, it has made the Law of 1905 mean the contrary of what it originally said".¹⁸¹ The consensus on this was so strong that even the few MPs who opposed the statute agreed: "It is", one said, "the government of judges – and specifically the jurisprudence of the *Conseil d'État* – that has brought us [into this mess]".¹⁸²

iii. The Muslim Veil as a Political Symbol

It was because of this legal imprecision, MPs argued, that a strong signal was needed to counter the political message conveyed by the Muslim

¹⁷⁵ *Ibid*, 1st session of 5 February 2004, at 229 (Noël Mamère) (NR, against). See also *ibid*, 2nd session of 5 February 2004, at 254 (Jean-Jacques Descamps) (UMP, abstained).

¹⁷⁶ *Ibid*, 2nd session of 10 February 2004, at 309 (Pascal Clément) (UMP, in favour). See also *ibid*, 1st session of 5 February 2004, at 221 (Philippe Auberger) (UMP, in favour).

¹⁷⁷ *Ibid*, 2nd session of 5 February 2004, at 258 (Marie-Hélène des Esgaulx) (UMP, in favour).

¹⁷⁸ *Ibid*, 1st session of 4 February 2004, at 131 (Eric Raoult) (UMP, in favour). See also *ibid*, 2nd session of 4 February 2004, at 154 (Claude Goasguen) (UMP, in favour).

¹⁷⁹ *Ibid*, 2nd session of 5 February 2004, 277 (Jean-Pierre Brard) (Communists, in favour).

¹⁸⁰ *Ibid*.

¹⁸¹ *Ibid* at 278. See also *ibid*, 3rd session of 3 February 2004, at 69 (Jacques Bruhnes) (Communists, in favour); *ibid*, 2nd session of 4 February 2004, at 162 (Jean-Christophe Cambadélis) (PS, in favour).

¹⁸² *Ibid*, 2nd session of 4 February 2004, at 165 (Christian Vanneste) (UMP, against). See also *ibid*, 1st session of 5 February 2004, at 230 (Noël Mamère) (NR, against).

headscarf. As one politician stated:

It [is] essential to legislate [on this issue] because for far too many years politicians have pretended that this is a legal issue only, and that it [is] limited to a few isolated cases.

Like all republican principles, however, *laïcité* is very much a political issue, in the noble sense. That is why today we need to send a political message, a conspicuous message, I dare to say, specifically a statute.¹⁸³

An overwhelming majority of French MPs agreed with this assessment and regarded the Islamic headscarf as a dangerous political statement that should be restricted in public schools: “To see the veil purely as a religious sign would be a mistake”,¹⁸⁴ one Socialist politician stated. “The wearing of the veil at school by some girls of Muslim faith and culture consciously or unconsciously goes well beyond the mere desire to respect religious precepts”, another agreed.¹⁸⁵ Again, this position was so common that even those opposed to the statute concurred: “I consider [the veil] above all to be a sign of political allegiance”, one MP declared, “for religion in this affair [is] only a pretext”.¹⁸⁶

iv. The Muslim Veil as a Symbol of Sexism and Fundamentalism

These generic statements aside, precisely what kind of political message did the Muslim veil convey? French MPs seemed to attach two meanings to it, both of which were highly negative: they perceived a serious departure from France’s Republican values of secularism, on the one hand, and a threat to gender equality, on the other. As one centre-right MP said, “[t]he veil ... is an attack on the neutrality of the public space, on the equality of men and women and on the French model at large”.¹⁸⁷ Socialist MPs concurred: “[The veil] ... is an epiphenomenon”, one stated. “By of a perverse move from the religious sphere to the political, it conveys – not always, but often – Islamic fanaticism and extremism, and aims at destabilizing the Republican contract by opening up the floodgates of sectarianism and thus threatening the very identity of France, which is based on universalism, equality and humanism”.¹⁸⁸

v. Statute 228 as a Message to Islam and the World

¹⁸³ *Ibid*, 1st session of 5 February 2004, at 201 (Xavier Bertrand) (UMP, in favour).

¹⁸⁴ *Ibid*, 3rd session of 3 February 2004, at 102 (Conchita Lacuey) (PS, in favour).

¹⁸⁵ *Ibid*, 2nd session of 4 February 2004, at 168 (René Couanau) (UMP, in favour).

¹⁸⁶ *Ibid*, 1st session of 4 February 2004, at 92 (Marc Le Fur) (UMP, against). See also *ibid*, 2nd session of 5 February 2004, at 291 (Hervé Mariton) (UMP, in favour).

¹⁸⁷ *Ibid*, 2nd session of 4 February 2004, at 159-60 (Hervé Mariton) (UMP, in favour).

¹⁸⁸ *Ibid*, 1st session of 4 February 2004, at 136 (René Dosière) (PS, in favour). See also *ibid*, 2nd session of 4 February 2004, at 149 (Danielle Bousquet) (PS, in favour).

MPs from all parties were also keen to emphasize the highly symbolic nature of the bill. It was a momentous piece of legislation, they agreed, as it conveyed a message both to the nation and to the larger world. “We have to respond to a symbol with a symbol”, one MP put it during the discussion. “The veil has become the symbol of a radical Islam brandished by a minority of Muslims. The law must position itself as a counter-symbol”.¹⁸⁹

But what exactly did this legislative icon stand for, one may wonder? For a majority of MPs, it embodied the triumph of freedom against the oppression of religious fanaticism, and of republicanism over sectarianism.¹⁹⁰ “This law is important because of its message”, one MP noted, “a message from the Republic, a message from all Republicans, a nation-wide message...of support to all those who live in fear of having to wear the veil one day”.¹⁹¹ The debates also bespoke the high media focus on the veil affair – “[w]e are going to act in order to reassure the French”,¹⁹² one MP said – and they highlighted the unifying purpose of a legislative project that was meant to send “a strong signal, a signal that rallies all French people behind those essential values, symbols and behaviours that we affirm as necessary to the Republican ideal”.¹⁹³

The new statute also possessed a strong international dimension. As one MP noted, “[this message] is also addressed to the world, this globalized world that mixes together peoples and ideas, to inform everyone that, where the tricolour flag flies, that is where the laws of the French Republic apply”.¹⁹⁴ Importantly, MPs also stressed their rejection of Anglo-Saxon multiculturalism: “[O]ther democracies have ... gambled on the juxtaposition of ethnic and religious communities ... that ignore each other and are content to simply coexist”, one MP observed. “France’s choice, on the contrary, is to make all citizens live together, in the full meaning of the word, irrespective of their religious or ethnic allegiance”.¹⁹⁵ This implied the creation of a neutral space where limits to public displays of religious signs were necessary, even if they resulted in another French exception.

vi. Statute 228 as a Response to International Criticism

French MPs were also aware of the strong international criticism that the

¹⁸⁹ *Ibid*, 2nd session of 4 February 2004, at 187 (Jacques Domergue) (UMP, in favour).

¹⁹⁰ See especially *ibid*, 2nd session of 4 February 2004, at 191 (Gabriel Biancheri) (UMP in favour); *ibid*, 2nd session of 5 February 2004, at 244 (Jean-Yves Le Déaut) (PS, in favour).

¹⁹¹ *Ibid*, 2nd session of 4 February 2004, at 191 Gabriel Biancheri (UMP in favour). See also *ibid*, 2nd session of 5 February 2004, at 293 (Pascal Clément) (UMP, in favour).

¹⁹² *Ibid*, 1st session of 5 February 2004, at 206 (Chantal Brunel) (UMP in favour).

¹⁹³ *Ibid*, 1st session of 5 February 2004, at 210 (Alex Poniatoski) (UMP, favour).

¹⁹⁴ *Ibid*, 2nd session of 5 February 2004, at 276 (Antoine Herth) (UMP, in favour).

¹⁹⁵ *Ibid*, 2nd session of 10 February 2004, at 312 (Jacques Barrot) (UMP, in favour).

bill attracted.¹⁹⁶ “Our attitude intrigues foreigners”, one observed, “[and] our *laïcité* surprises them. They also question us on [a demographic level]. In a word: can sectarianism be avoided?”¹⁹⁷ The answer parliamentarians gave was a powerful yes. But they went even further and specifically criticized “the Anglo-Saxons” for lecturing France on an issue which they had hardly mastered themselves. “It is paradoxical ... that our current debate is criticized by some Western leaders”, one MP complained, “like certain public officials of the UK, that has [long] failed to resolve the violence of the religious communities in Northern Ireland, or even the US, where a number of decisions by the Bush administration [were] made in the name of God”.¹⁹⁸ Criticism from the Muslim world was met with an even stronger response: “Some people would like to suggest that this text betrays the Islamophobia and the intolerance of French society”, one MP observed. “This is all the more unacceptable since these are the same people who, from Tehran to Cairo, justify hate, anti-Semitism or the most barbaric practices of sharia”.¹⁹⁹ An overwhelming majority of MPs also agreed that this statute “made considerable progress”²⁰⁰ and possessed “historical significance”.²⁰¹ “Beyond [France], this [law] will have universal scope”, another MP commented. “It will bring hope to all those who, across the world, are trapped under the veil and who are fighting, sometimes at the cost of their lives, to remove it”.²⁰² As a result, France should not be apologetic for upholding its founding principles, the Education Minister emphasized, for “[i]n this struggle between a *laïque* democracy and a theocracy, France is not behind but ahead”.²⁰³

vii. Statute 228 as Respectful of Religious Freedom

The last point of convergence concerned the supposedly liberal character of the new statute; it was a bill that was meant to guarantee—not trample upon—religious rights. “[T]he law will not limit the fundamental right to religious expression and freedom of conscience”, one MP belonging to the majority stated. He further noted that, “[i]t is precisely in order to reinforce this right that [the statute] will prohibit extremist and sectarian expressions

¹⁹⁶ See *ibid*, 1st session, 4 February 2004, at 111 (Alain Juppé) (UMP, in favour).

¹⁹⁷ *Ibid*, 2nd session of 4 February 2004, at 161 (Hervé Mariton) (UMP, in favour).

¹⁹⁸ *Ibid*, 3rd session of 3 February 2004, at 107 (Henri Nayrou) (PS, in favour).

¹⁹⁹ *Ibid*, 2nd session of 4 February 2004, at 173 (Bernard Carayon) (UMP-in favour). See also *ibid*, 3rd session of 3 February 2004, at 90 (David Habib) (PS-favour).

²⁰⁰ *Ibid*, 2nd session of 4 February 2004, at 159 (Hervé Mariton) (UMP, in favour).

²⁰¹ *Ibid*, 2nd session of 5 February 2004, at 264 (Gilles Cocquempot) (PS, in favour).

²⁰² *Ibid*, 2nd session of 4 February 2004, at 191 (Gabriel Biancheri) (UMP, in favour). See also *ibid*, 1st session of 5 February 2004, at 236 (Christian Decocq) (UMP-in favour).

²⁰³ *Ibid*, 2nd session of 5 February 2004, at 262 (Michel Charzat) (PS, in favour).

at school"²⁰⁴ while simultaneously allowing for discreet signs of faith. "Let us be clear", one Socialist MP observed: "[I]t is first and foremost in the name of human rights ... and gender equality that we have the duty to oppose the wearing of the veil at school".²⁰⁵ For this reason, this was not a statute of "division"²⁰⁶ but of "tolerance"²⁰⁷ and "respect".²⁰⁸

B. CACOPHONY

Although the parliamentary debates on Bill 1378 revealed an exceptionally broad consensus among French politicians, friction emerged over some subtle but significant details of the legislation. These divergences concerned three aspects: the long-term purpose of the bill, the terminology adopted in the text, and the opposition to the statute by a small minority of MPs. This section deals with the 'cacophonous' aspects of the otherwise harmonious veil concert.

a. Disagreement over the Long-Term Purpose of Statute 228

Almost without exception, French politicians emphasized that the Bill before them was not a panacea and that further measures were necessary in order to solve the broader problems raised by the veil controversy. In other words, they asserted that this law was the beginning, not the end, of the matter.²⁰⁹ But the beginning of what exactly?

Socialist MPs claimed that the legislation was not directed against Islam but was rather aimed at the preservation of *laïcité*. In order to avoid the impression of a 'repressive' law targeted against the Islamic faith, the inclusion of a series of long-term 'positive' measures that were aimed at the social, economic and cultural integration of France's minorities was vital. "[W]e ... must solve the fundamental problems so as to avoid this law being taken as a law against Islam", one MP said. "That is why [this] is merely the first step towards a process of integration of all those immigrants who chose France".²¹⁰ "Until we give our citizens equality of opportunity", another Socialist MP emphasized, "until we fight discrimination—every kind of discrimination—that prevents access to knowledge and culture, to [proper] housing, to training

²⁰⁴ *Ibid*, 2nd session of 4 February 2004, at 150-51 (Pierre-André Périssol) (UMP, in favour).

²⁰⁵ *Ibid*, 2nd session of 5 February 2004, at 257 (Germinal Peiro) (PS, in favour). See also *ibid*, 1st session of 5 February 2004, at 223 (Jean-Pierre Blazy) (PS, in favour); *ibid*, 2nd session of 5 February 2004, at 262 (Michel Charzat) (PS, in favour).

²⁰⁶ *Ibid*, 1st session of 4 February 2004, at 111 (Alain Juppé) (UMP, in favour).

²⁰⁷ *Ibid*, 2nd session of 5 February 2004, at 267 (Jean-Pierre Decool) (UMP, in favour).

²⁰⁸ *Ibid*, 1st session of 4 February 2004, at 111 (Alain Juppé) (UMP, in favour). See also *ibid*, 2nd session of 10 February 2004, at 312 (Jacques Barrot) (UMP, in favour).

²⁰⁹ See e.g. *ibid*, 3rd session of 3 February 2004, at 46, 48, 52, 55, 61-62, 68-69, 77.

²¹⁰ *Ibid*, 2nd session of 4 February 2004, 150 (Danielle Bousquet) (PS in favour).

and employment, and until we re-conquer those neighbourhoods ruled by despair and poverty, we will not have done our job. We will have voted for a law that goes in the right direction but that is still uncertain in its application".²¹¹ Thus, the compromise reached by the *Parti Socialiste* is clear: support for the bill in exchange for a broader legislative framework which tackles France's most serious problem – the integration of minorities. But a number of Socialist MPs were not convinced that the complexity of the integration problem could be addressed through such a short piece of legislation. "[T]his legislative bill is largely insufficient", one parliamentarian declared. "It lacks breadth because it does not deal with one of the most important problems of our society, a veritable cancer that gnaws our polity: discrimination".²¹² This position was also expressed by another Socialist MP: "I really have the feeling—a bad one—that we should never have started with this law which is only going to affect a few thousand people", he declared, "and that it would have been better to occupy ourselves with the millions of people who live in a condition of exclusion at the fringes of society—a condition that generates sectarian behaviour, which is problematic but also understandable".²¹³

While MPs from the ruling centre-right coalition agreed with their Socialist colleagues that the legislation needed to be expanded, they had substantially different ideas over the direction that this should take. Although discrimination was an issue, the problem for them was that France was confronted with the growing and imminent threat of Islamic extremism. "As everyone knows", one MP put it, "this bill will solve nothing but has the value of raising the issue that we have all observed. How, in our society and by respecting our republican rules, can we ... put an end to the joining of Islam and Islamism?".²¹⁴ "I am dismayed to find myself with the Left", another politician confessed, "but...it is clear that I will not vote for the law with the same spirit as the opposition. ... I am going to vote for it because the Republic is confronted by a real challenge launched by Islamism and fundamentalism [and this] is an arrogant challenge".²¹⁵ According to the centre-right, forbidding religious symbols at school (and first and foremost the Muslim veil) was thus considered to be an effective way of curbing Islamic fundamentalism. But

²¹¹ *Ibid*, 2nd session of 4 February 2004, at 172 (Serge Janquin) (PS, in favour).

²¹² *Ibid*, 2nd session of 4 February 2004, at 186 (Philippe Vuilque) (PS, in favour). See also *ibid*, 1st session of 5 February 2004, at 211 (Manuel Valls) (PS, in favour); *ibid*, 2nd session of 4 February 2004, at 158 (Élisabeth Guigou) (PS in favour) ("[b]ut this law alone is not enough to solve the problem *laïcité* poses today. We should extend it by a series of greater initiatives in favour of *laïcité*").

²¹³ *Ibid*, 2nd session of 4 February 2004, at 189 (Jérôme Lambert) (PS, in favour).

²¹⁴ *Ibid*, 2nd session of 5 February 2004, at 264 (Gilles Coquempot) (PS, in favour).

²¹⁵ *Ibid*, 2nd session of 4 February 2004, at 155-56 (Claude Gaoasguen) (UMP in favour). UMP politicians were not alone, see *ibid*, 1st session of 4 February 2004, at 122 (Jean Glavany) (PS, in favour) ("[y]es, the Socialists want a law for a simple reason: the Republic is being violated and she must defend herself").

other measures were needed and UMP politicians emphasized the necessity to create a “culturally French Islam”.²¹⁶ “[A]s it took a long fight with the Catholic Church to establish *laïcité* when that institution did not recognize either freedom of thought or human rights”, one UMP MP observed, “we cannot today avoid this rendezvous with France’s Islam. The latter must conform to our habits, values and human rights ... [and] the Republic must invite it [to do so] clearly and firmly”.²¹⁷

b. Disagreement Over Vocabulary and Scope of Statute 228

An even more important discrepancy among MPs concerned the phrasing of the new legislation. The reader will recall that most politicians, in the conclusions of the Debré Commission, had initially expressed their preference for a ban against “all visible religious and political signs within public school buildings”.²¹⁸ Yet the Stasi Commission recommended the more limited prohibition of “conspicuous [religious and political] signs”²¹⁹ while permitting “discreet”²²⁰ symbols such as medals, small crosses, Stars of David, Fatima’s hands or small Korans. The latter solution was adopted by President Chirac in his December 2003 speech and it quickly translated into Bill 1378 in January 2004 and then into Statute 228, with the exception of two important details. First, the presidential version targeted only *religious* signs and not political ones. Second, the adjective ‘conspicuous’ (*ostensible*) was substituted for the adverb ‘conspicuously’ (*ostensiblement*), and consequently it was “the wearing of signs through which students conspicuously manifest a religious allegiance”²²¹ that was prohibited in the end, and not “conspicuous signs” as in the Stasi proposal. This was a small but significant difference that seemingly (and confusingly) had the effect of emphasizing the wearer’s *behaviour* rather than the *symbol* per se—something that the case law of the *Conseil d’État* had already done.

Following this presidential stance, the great majority of MPs from

²¹⁶ “A new step will be taken when the formation of French imams will be achieved, since this will allow the affirmation of a culturally-French Islam”. J. Chirac, *Discours Relatif au Respect de la Laïcité dans la République* [Address on the Respect of Laicism in the Republic], in, *Application du Principe*, *supra* note 14 at 6.

²¹⁷ *Débats*, *supra* note 1, 3rd session of 3 February 2004, at 81 (Alain Madelin) (UMP, against). See also *ibid.*, 1st session of 4 February 2004, at 114 (Luc Ferry) (Minister of Education—UMP, in favour) (“the inevitable problems in the application of the law will be solved if we invite [all] faiths to pass from conspicuous signs to discreet ones and to leave the sphere of sectarian signs and enter that of personal ones, to leave the public space and to enter the private one”).

²¹⁸ *Rapport Debré* in *Application du Principe*, *supra* note 14 at “Introduction”.

²¹⁹ *Stasi*, *supra* note 117 *op. cit.* at 149-150.

²²⁰ *Ibid.*

²²¹ J. Chirac, *Discours Relatif au Respect de la Laïcité dans la République* [Address on the Respect of Laicism in the Republic], in *Application du Principe*, *supra* note 14 at *op. cit.* 7.

the ruling party rallied behind Mr Chirac's choice and abandoned the word 'visible'. "'Conspicuous', 'visible', 'ostentatious': these were the possible terms in the debate", one UMP politician summarized. "[Yet] the term 'conspicuous' – something 'that manifests the intention to be seen' – appears to be the wisest and most appropriate [choice]. The term 'visible' would have certainly led to a condemnation of France by the European Court of Human Rights because it would be restrictive of freedom [while] the term 'ostentatious', which introduces an intention to provoke, is ... too imprecise and could be the source of problems of interpretation".²²² But what does 'conspicuous' mean exactly? "What is conspicuous is [something that] can clearly be seen, [and that is displayed] in an intentional and deliberate way, with the desire to convey a message, sometimes aggressively",²²³ one MP commented. The 'intentional' element of the religious sign was thus important in determining French MPs' votes; the President's preference for the adverbial form only reinforced this impression. As for the adjective 'visible', "[it] would theoretically be simpler but would cross a red line. We would no longer be defending *laïcité* but legislating with hostility against religious beliefs as well as intruding into an intimate sphere from which the State should steer clear"²²⁴, one MP underlined.

But not all UMP politicians agreed with this conclusion and some openly called for a return to the visibility criterion. "[T]he vocabulary chosen in the text ... only reinforces the subjectivity of the evaluation of the forbidden behaviour", one majority MP commented. "The adverbial form 'conspicuously' clearly indicates that it is indeed the intention which will be targeted and not the sign itself".²²⁵ Another MP wrote, "I, too, would have preferred a stronger, clearer text, keeping the adjective 'visible', as suggested by the Debré Mission, rather than the adverb 'conspicuously', which is subject to a myriad of interpretations".²²⁶ At the end of the day, former Prime Minister Balladur added, it would be the judge who would decide what 'conspicuously' meant. Intriguingly, this was precisely what MPs had long since criticized in the *Conseil d'État* jurisprudence, and precisely what they had wished to avoid in the new legislation. "[A]s soon as a reference is made to the 'conspicuous manifestation of a religious sign", Balladur noted, "it will need to be assessed by the [school] principal ... And as soon as the [matter] involves the decision

²²² *Débats*, *supra* note 1, 3rd session of 3 February 2004, at 72 (Bernard Accoyer) (UMP, in favour).

²²³ *Ibid*, 2nd session of 4 February 2004, 188 (Jacques Domergue) (UMP in favour).

²²⁴ *Ibid*.

²²⁵ *Ibid*, 2nd session of 4 February 2004, at 165 (Christian Vanneste) (UMP, against).

²²⁶ *Ibid*, 2nd session of 4 February 2004, at 176 (Pierre Lellouche) (UMP, in favour). See also *ibid*, 2nd session of 5 February 2004, at 260 (Jean-Marc Nesme) (UMP, abstained). ("The observers disagree both on the adjectives - visible, conspicuous, ostentatious - and on the categorization (religious or political sign)").

of a principal, it will be up to the judge to assess its validity. Yet the judge will need to do so by applying the principles of freedom of conscience, which are superior to the statute".²²⁷ For Mr Balladur, then, Statute 228 was essentially useless.

The Socialists tried long and hard to convince their majority colleagues to adopt the adjective 'visible', which they considered to be more objective and less vulnerable to interpretation.²²⁸ "We are aware that, by proposing the prohibition of 'visible' signs, we are being stricter than the government", one MP declared, "[and] without a doubt discrete religious signs would no longer be permitted. But ... we think that the term 'visible' is clearer and puts all faiths on the same level", rather than "targeting those signs belonging to the Muslim religion".²²⁹ A second problem with the government's choice, Socialist MPs emphasized, was that "[t]he adverb 'conspicuously' will require a subjective interpretation of the intentions of the person wearing a religious symbol", with the result that "it will lead to the same problems [as the approach taken by the *Conseil d'État*] and will result in the same lawsuits".²³⁰

In this respect, the debates also highlighted a contradiction in the government's position. While Statute 228 refers to students who "conspicuously manifest a religious allegiance", the government indicated that, "conspicuous – and therefore prohibited – signs are those 'the wearing of which leads someone to be immediately recognized for his religious allegiance'",²³¹ adding that discreet signs would be allowed. The problem is that discreet signs are also "immediately recognizable"; consequently, "the government fixes one criterion – the intention of the student – in the text of the law, it fixes another criterion – immediate recognition – in the explications of the law, and it then adds an example ['discreet signs'] which contradicts

²²⁷ *Ibid*, 2nd session of 5 February 2004, at 294-95 (Edouard Balladur) (UMP, abstained).

²²⁸ *Ibid*, 2nd session of 4 February 2004, at 164 (Jean-Christophe Cambadélis) (PS, in favour) ("[t]he word 'visible' is not a semantic elegance to us. We want to vote with you for a statute that is simple, clear, applicable and, if possible, effective").

²²⁹ *Ibid*, 2nd session of 5 February 2004, at 283 (René Dosière) (PS, in favour). See also *ibid*, 2nd session of 5 February 2004, at 258 (Germinal Peiro) (PS, in favour) ("[i]f you don't write 'visible' in the law, the text will have the effect of forbidding the veil while authorizing, as a matter of fact, the more discreet religious signs of other religions. You would be taking the risk of stigmatizing the Muslim population and you would betray honest Republicans because you would not be applying the principle of *laïcité* strictly").

²³⁰ *Ibid*, 2nd session of 4 February 2004, at 152 (Jacques Bascou) (PS, in favour). See also *ibid*, 2nd session of 4 February 2004, 182 (Marc Dolez) (PS, in favour) "[t]he text proposed by the government does not meet the requirements of clarity. By making reference to those signs or clothes that conspicuously manifest religious allegiance, the bill adopts a formula that is too fluid and will give birth to significant lawsuits. The explanation of the reasons indicates that discreet signs will be allowed. Where is the difference between a conspicuous cross and a discreet one?").

²³¹ *Ibid*, 1st session of 4 February 2004, at 116-17 (Laurent Fabius) (PS, in favour).

what has just been stated".²³² Despite the efforts of the Socialists and a small number of 'rebellious' UMP politicians,²³³ however, the government did not waver and the adverb 'conspicuously' was retained. Unwilling to sacrifice the whole statute because of a single word, the PS eventually rallied behind the majority.

c. *Outright Opposition to Statute 228*

Although criticism of the new statute did emerge during the debates, upfront opposition was limited to only 36 MPs out of 543,²³⁴ the majority of whom expressed their concerns over the statute's conceptual confusion, its problematic application to French overseas territories and its impact on 'unconventional' symbols such as tattoos and bandanas.

With regards to the first point, some MPs highlighted an inconsistency in the government's stance, because while the Muslim veil was prohibited for its "political"²³⁵ dimension, wholly political signs were not affected: "Prime Minister ... Raffarin declared ... that 'certain religious signs – among them the Islamic veil – are multiplying in our schools. They take on a political significance and can no longer be regarded merely as personal signs of religious allegiance'", one MP reminded the Assembly. "[Yet] one needs to be coherent. If the Prime Minister wants to prohibit religious signs that 'actually have a political significance', [then] we should prohibit political signs at school".²³⁶

The new statute was also bound to create problems in overseas French territories (TOM/DOM)²³⁷ where the population is strongly multicultural and Islam is sometimes the dominant religion. "We will see what happens in the Mayotte [Islands] where the population is 90% Muslim",²³⁸ one MP commented. Furthermore, in some French Caribbean islands, girls often alternate between European clothes and colourful ethnic garments (including head covers): will this kind of clothing be regarded as religious (and thus

²³² *Ibid.*

²³³ "Minister", one Socialist MP pleaded, "do not hold on to your stance, show us your capacity to listen by replacing 'conspicuous' with 'visible'. It is a matter of good sense. We would then avoid incomprehension and this law, which is a symbol, would be easily understood by all citizens" (*Ibid.*, 1st session of 5 February 2004, at 205 (Alain Néri) (PS, in favour).

²³⁴ 12 negative UMP votes out of 330 (17 abstained); 2 negative Socialist votes out of 149 (no abstention); 4 negative UDF votes out of 30 (12 abstained); 14 negative Communist votes out of 22; and 4 negative votes by non-registered MPs out of 12 (*Débats, ibid* at 325-27).

²³⁵ See next quote.

²³⁶ *Débats, supra* note 1, 2nd session of 5 February 2004, at 274 (Roger-Gérald Schwardenberger) (PS, in favour).

²³⁷ The DOM ('*Domaines d'Outre Mer*') include Guadelupe, French Guyana, Martinique, Réunion, St.Pierre/Miquelon, Mayotte. The TOM ('*Territoires d'Outre-Mer*') include New Caledonia, French Polynesia, Wallis/Fortuna and the Austral/Antarctic French Territories.

²³⁸ *Débats, supra* note 2, 2nd session of 4 February 2004, at 180 (Christiane Taubira) (UMP, against).

prohibited) or traditional (and thus permitted)? “And how about the *tika*, ... the red dot that young girls, according to the Hindu tradition, wear on their forehead”, another MP from an Overseas Department asked. “[W]ould these girls have to remove it before entering class? ... You are putting us in an absurd situation”.²³⁹ Rather than exporting its veil obsession to distant lands, some MPs observed, France had better learn from her territories:²⁴⁰

In the Overseas Departments and particularly on the Réunion Island, ... France has succeeded in uniting children with Hindu, Muslim, European, African or Asian faces on the same soil. There, the minaret stands beside the bells of the church, and the Tamil *koïlou* is not marred by the closeness of a synagogue or a Buddhist temple.

... In the schools, the faces of the children reflect China, Africa, India or Europe, but the veil has never been an issue. Some girls wear it [but] it has never shocked anybody...²⁴¹

Another possible problem of interpretation was raised regarding those signs which, although ‘conspicuously manifesting’ a religious allegiance, are nevertheless unconventional in shape and placement. “What will we say to those who have conspicuously religious tattoos on their hands, their forearms or their legs?”²⁴² one MP asked. Not to mention the difficulty of permitting ‘conspicuously manifested’ *non-religious* signs: “How could we accept a student wearing tattoos or piercings – signs that can certainly be provocative – while at the same time refusing the cross, the kippa or the veil?”²⁴³ another politician emphasized. And what about beards? How can we tell, first, whether they are ‘religious’ or not, and second, whether they are ‘conspicuously worn’ or not? “What is really conspicuous today, Minister, is the ... absurd character of your bill”.²⁴⁴

V. CONCLUSION: THE SYMBOLISM OF STATUTE 228

“Let me ask you a simple question”, Socialist MP Alain Néri told the

²³⁹ *Ibid*, 3rd session of 3 February 2004, at 50 (Huguette Bello) (NR, against).

²⁴⁰ See also *ibid*, 2nd session of 5 February 2004, at 253 (Victorin Lurel) (PS, in favour) (“[i]n the Antilles like on Réunion Island, *laïcité* is lived in a sober, tempered way, without real problems. We should reflect on this”); *ibid*, at 250 (Mansour Kamardine) (UMP in favour) (“Mayotte is ... a laboratory of what we aim for at the national level”).

²⁴¹ *Ibid*, 3rd session of 3 February 2004, at 100 (René-Paul Victoria) (UMP, in favour).

²⁴² *Ibid*, 1st session of 5 February 2004, at 231 (Jérôme Rivière) (UMP, in favour).

²⁴³ *Ibid*, 2nd session of 5 February 2004, 262 (Jean-Marc Nesme) (UMP, abstained). See also *ibid*, 2nd session of 4 February 2004, at 181 (Étienne Pinte) (UMP, against) (“[i]s it ... normal, Minister, that in certain schools, professors and schools administrators have been tolerating caps worn by boys in class for many years or any other ill-mannered or disrespectful behaviour?”).

²⁴⁴ *Ibid*, 1st session of 5 February 2004, at 209 (Armand Jung) (NR, against). For similar positions, see *ibid*, 2nd session of 5 February 2004, at 261 (Jean-Marc Nesme) (UMP, abstained); *ibid*, 1st session of 5 February 2004, at 229 (Noël Mamère) (NR, against).

Education Minister during the debates. “You’re wearing a tie today ... but are you wearing it in a conspicuous or ostentatious way?” “Conspicuous!”, the Minister replied. “You just let it lie on your shirt, so I could think it is not really conspicuous. Others would say it stands out a bit and that it is ostentatious. As you see, we enter into Byzantine discussions that no longer make sense when a simple word would solve the problem: your tie, Minister, is ‘visible’ – and by the way very lovely”.²⁴⁵

This parliamentary exchange is emblematic of the interpretative doubts surrounding Statute 228. Did French MPs ban behaviours (as the adverb ‘conspicuously’ implies) or signs (as the legislative history suggests)? Perhaps the most surprising aspect of this controversial piece of legislation is that, at the end of the parliamentary debates, even those MPs who voted for the new law did not know how to answer that question: “Like many among us”, one admitted, “I impatiently await the Circular that is being drafted and that will specify ... the obligations fixed by the statute”.²⁴⁶

Yet rather than clarifying the situation, this document arguably complicated it further. Issued by Education Minister Fillon in May 2004,²⁴⁷ the Circular explained that “[t]he signs and clothes that are prohibited are those that lead someone to be immediately recognized for his or her religious allegiance, such as the Islamic veil (whatever its name), the kippa or a cross of manifestly excessive dimension”.²⁴⁸ However, it also emphasized that “[t]he statute does not restrict the right of students to wear discreet religious signs [and] it does not prohibit those accessories which are commonly worn by students without religious significance”.²⁴⁹ What ‘discreet’ meant, however, the Minister failed to explain. By adopting a solution that was halfway between ‘visibility’ and ‘conspicuousness’, moreover, he arguably compromised the advantages of the former – clarity and even-handedness towards religions – without attaining that of the second – moderation. So much for the law “fix[ing] some clear, simple principles [that are] easy to understand for everyone and on which school officials can rely”.²⁵⁰

How are French judges interpreting Statute 228? Although this article focuses on the genesis of Statute 228 rather than on its application by the

²⁴⁵ *Ibid*, 1st session of 5 February 2004, at 205 (Alain Néri) (PS, in favour).

²⁴⁶ *Ibid*, 2nd session of 5 February 2004, at 244 (Jacques Remiller) (UMP, in favour).

²⁴⁷ See O. Dord, “Laïcité à l’École: L’Obscure Clarté de la Circulaire ‘Fillon’ du 18 Mai 2004” [Laicism in Schools: The Obscure Clarity of the ‘Fillon’ Circular of May 18, 2004] (26 July 2004) ADJA at 1523-1529.

²⁴⁸ *Circulaire Relative à la Mise en Œuvre de la Loi n.2004-228 du 15 Mars 2004* [Circular Relating to the Implementation of Law n.2004-228 of March 15, 2004], JO, in Application du Principe, *supra* note 14 at 324-5.

²⁴⁹ *Ibid* at 325. See also Débats, *supra* note 1, 2nd session of 3 February 2004, at 18 (Luc Ferry).

²⁵⁰ Débats, *ibid* at 5 (Jean-Louis Debré). See also *ibid*, 1st session of 4 February 2004, at 143 (Yves Durand) (PS, in favour); *ibid*, 2nd session of 5 February 2004, at 243 (Jacques Remiller) (UMP, in favour).

courts, the concerns expressed by French politicians in 2004 have only partly been solved by the judiciary. In one of its first decisions after the passage of the new legislation, for instance, the *Conseil d'Etat* appeared to adopt a 'visibility' criterion and prohibited those religious signs that are immediately recognizable as such. Ruling that a Sikh boy wearing a turban had been legally expelled from school, France's highest administrative court wrote in 2009 that Statute 228 had introduced a "new phenomenon" of "negative *laïcité*"²⁵¹ which no longer allows students to manifest their religious convictions in class, even if those convictions respect the religious beliefs of others. Yet in subsequent rulings, the *Conseil* appeared to widen the scope of Statute 228 and argued that the law prohibits both signs *and* behaviours: it targets "...those symbols or clothes which conspicuously manifests a religious allegiance", the *Conseil* wrote, "as well as those that do so *merely as a result of the student's behaviour*".²⁵² Since the student of this case – a girl wearing a Muslim veil – had "steadfastly refused to withdraw the veil despite repeated requests by school authorities to do so",²⁵³ the *Conseil* concluded that she could legally be expelled. This position was also upheld in subsequent rulings,²⁵⁴ where the *Conseil* confirmed that French judges can legitimately assess whether a certain symbol is religious or not (a Sikh turban, for instance, was ruled to be religious despite the plaintiff's claims that it was cultural).²⁵⁵

If the legal interpretation of Statute 228 has been tortuous, its political reading is more straightforward. Despite its reference to 'religious symbols', this piece of legislation clearly passed as a response to the perceived problems posed by the Muslim veil in French schools. The genuine issue has always been the headscarf – certainly not kippas or large crosses – and the parliamentary debates confirm that French MPs regarded this garment as a political sign of sexual oppression. So, the target of Statute 228 was never religious signs in general but the Islamic veil in particular, and the verbal acrobatics used in justifying its nebulous vocabulary reflect this bias. Had Islam not been France's second religion and had it not been seen as a mounting threat, Jewish kippas and Christian crosses would still be allowed in French classrooms. Like other religious signs, they were the collateral damage of French politicians' allergic reaction to the Islamic headscarf, a situation that even some members of the Stasi Mission regretted. "We in the Stasi Commission had a far wider aim than simply banning the Muslim veil at school", the prominent historian René Rémond told me in an interview, "in that we wanted to adapt *laïcité* to Modern

²⁵¹ *Ibid.*

²⁵² CE, 6 March 2009, *Mlle Myriam A*, (2009) (emphasis added).

²⁵³ *Ibid.*

²⁵⁴ CE, 10 June 2009, *M. et Mlle A*, (2009).

²⁵⁵ CE, 5 December 2007, *M Singh et Mme Gazal*, (2007).

France. The new statute does not do this in the least. It deals with a marginal issue while ignoring the fundamental problems, and offers a solution that is not nearly as serious as the issues at stake".²⁵⁶

Where does this allergy come from? The history of Statute 228 suggests that it is partly the result of the country's turbulent religious past and the centuries-long contraposition between the *République* and the Catholic Church, which resulted in a certain disillusion—if not hostility—towards religion.²⁵⁷ However, it is also to some extent a product of the psychological effect of events linked to France's overseas experiences, such as the colonization of Algeria, as well as of Islamophobia, of the Muslim population's growth and of the anti-Muslim tidal wave in the wake of September 11. "Islam frightens", a prominent member of the *Conseil d'État* told me, "and this law is the expression of that fright".²⁵⁸ In other words, France is going through an identity crisis and the law on religious signs at school is only a symptom of this.²⁵⁹

A final lesson can be drawn from the legislative history of Statute 228. It is an eminently political enterprise—French politicians' proud answer to what they regarded as a legal deadlock—and it embodies the triumph of politics over the law. "The [pre-2004] case law of the *Conseil d'État*...had the effect of authorizing certain religious signs as such", the Education Minister said during the debates, "[but] from now on [doing so] will no longer be possible".²⁶⁰ After ten years of effort and discussion—and after fifteen years of conflict with the administrative judges—the political choice finally became law and the Muslim veil, together with any other 'non-discreet' religious signs, is now officially 'conspicuous' and thus prohibited. "*J'ai pris ma décision*", a French

²⁵⁶ Herman Salton, Interview with R. Remond, (29 September 2005) at Question 6. See also (*ibid* at Question 7) ("[t]he media and the politicians entirely ignored this crucial issue [of integrating France's minorities] and exclusively concentrated their attention on the veil. That was a mistake. Although the Stasi Commission gave plenty of indications and suggestions, only one repressive aspect was retained. Politicians think in the short-term—they worry about the next elections—while the Stasi Commission tried to think in the long term. That our proposals were not retained is a pity because we missed an important chance and we risk creating a confrontational situation").

²⁵⁷ See e.g. J.-L. Ormières, *Politique et Religion en France* [Religion and Politics in France] (Bruxelles: Éditions Complexe, 2002) at 216.

²⁵⁸ Herman Salton, Interview with R. Errera, (30 September 2005) at 27.

²⁵⁹ A further indication was the approval of another controversial statute in 2005 that required school programs "[to] acknowledge...the positive role of the French presence in her overseas territories, especially in Northern Africa..." ("Colonisation: Les Aléas d'un Alinéa" [Colonization: The Hazards of a Paragraph], *Le Monde* (29 Jan 2006)). Although this law was precipitously repealed due to strong criticism from the former colonies and President Chirac's embarrassed change of heart, it is emblematic of the country's anxiety over its past and its future ("Colonisation: Chirac Evite un Débat au Parlement" [Colonization: Chirac Avoids a Parliamentary Debate], *Le Monde*, (27 Jan 2006)). Indeed, as suggested by one author, Statute 228 can be seen as the by-product of a fear that pervades French society (C. Lambert, *La Société de la Peur* [A Society of Fear] (France: Plon Parution, 2005)).

²⁶⁰ *Débats*, *supra* note 1, 1st session of 4 February 2004, at 113 (Luc Ferry).

minister stated in the 19th century. “*Faites entrer les juristes*”.²⁶¹ A hundred years later, the approach adopted by his colleagues does not seem to be substantially different.

²⁶¹ In O. Pfersmann, G. Timsit (eds), *Raisonnement Juridique et Interprétation* [Legal Reasoning and Interpretation] (France: Sorbonne, 2001) at 7 (“I’ve taken my decision. Let the lawyers in”).