CONSEIL D'ÉTAT

Study of possible legal grounds for banning the full veil

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Conseil d'Etat
Reports and Studies Section

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GLOSSARY

CA: Court of appeal

CAA: Administrative Court of Appeal

Cass. crim.: Criminal Division of the Court of Cassation

Cass. X civ.: 10th civil chamber of the Court of Cassation

Cass. soc.: Labour Division of the Court of Cassation

CC: Constitutional Council

CE: Conseil d'Etat

ECHR: European Court of Human Rights

CJEU: Court of Justice of the European Union

ECommHR: European Commission on Human Rights

TA: Administrative Court

TC: Court in charge of settling competence issues between civil and administrative jurisdictions

INTRODUCTION

In a mission letter dated 29 January 2010, the Prime Minister asked the Conseil d'Etat to study "legal grounds for a ban on the full veil", which should be "as wide and effective as possible", so that the government could "submit a bill on the subject to parliament". At the same time he emphasised the importance of "not offending our Islamic compatriots". This request falls within the broader context of a public debate on the full veil in France, which among other things has prompted the National Assembly to set up a fact-finding mission, whose report, published on 26 January 2010, provides a wealth of observations and ideas.

The Conseil d'Etat has conducted this study in strict accordance with the terms of the request submitted and without considering the desirability of legislation on this matter.

The legal solutions presented in this study, which takes a closely circumscribed view of **a particular phenomenon completely new to France,** are mainly intended to satisfy a twofold legal requirement:

- **to provide for the greatest possible legal certainty** for a ban, in light of constitutional norms, European Union law and the Convention for the Protection of Human Rights and Fundamental Freedoms, as clarified by the case law of the competent jurisdictions;

- **to ensure that the measures contemplated are intelligible**, both to the persons concerned and to the authorities directly responsible for applying them, which means that they should be fairly **simple**.

The choice of the conditions governing the ban has moreover been guided by a concern to **guarantee effectiveness**, both legal and practical, particularly with respect to control measures and sanctions.

Lastly, the Conseil d'Etat has added two other considerations, which may influence subsequent decisions by the authorities:

- **preventing any possibility of the measures' being interpreted** as an attack on a particular category of person rather than a specific practice;

- **avoiding possible uncontrolled consequences**, whether refusal to comply with the ban, which would paradoxically lead to an extension of the practices in question, or pressure to impose measures that would go beyond the concerns and objectives set forth in the Prime Minister's letter.

In the light of these different imperatives, the question of the meaning and therefore the objective of a possible ban arises. Indeed, there are two ways of

looking at the practice of wearing the full veil and the scope of the measures are likely to differ accordingly. In the first place, the full veil (*burqa* or *niqab*) is a garment whose cultural and religious foundations are disputed but which in any event testifies to a profoundly inegalitarian conception of the relationship between men and women. It is also one of many ways of hiding the face, the effect and (in some cases) the object of which is to prevent anybody from recognising the person. Apart from any meaning that might be attributed to the practice, the latter has practical implications in terms of security and more generally the ability to identify people. In this connection, we cannot ignore the fact that the practice of concealing the face, in various ways, is on the increase in our country.

This being the case, the question put to the Conseil d'Etat is as follows: **can we envisage a legal ban for particular reasons and within prescribed limits on the wearing of the full veil as such, or are we required to address the more general question of concealment of the face, of which wearing this garment is one form?**

The Conseil d'Etat has noted first of all that existing legislation already meets this concern, whether through clauses whose effect is to ban the wearing of the full veil itself by certain persons and in certain circumstances, occasional restrictions on concealment of the face for public policy reasons, or criminal penalties for the instigators of these practices. It has however noted that these provisions are many and varied in nature and it has observed that comparable democracies are like France in not having national legislation imposing a general ban on these practices in public places (I).

In view of this observation, the Conseil d'Etat has wondered about the legal and practical viability of prohibiting the wearing of the full veil in public places in light of the rights and liberties guaranteed by the Constitution, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and European Union law. It has found it impossible to recommend a ban on the full veil alone (as a garment representing values incompatible with those of the Republic), in that such a ban would be legally weak and difficult to apply in practice. It has also taken the view that a less specific ban, based mainly on public policy considerations and interpreted more or less broadly, on the deliberate concealment of the face, could not legally apply to the whole of the public space under prevailing constitutional and conventional case law (II).

On the other hand it seemed to the Conseil d'Etat that in the present state of law it would be possible to adopt more coherent legislation, which would be binding and restrictive and would comprise two types of provision: first it would stipulate that it is forbidden to wear any garment or accessory that hides the face in such a way as to preclude identification, either where there is a need to safeguard law and order, or where identification seems necessary for access to or movement within certain places, or to fulfil certain formalities; second it would

strengthen enforcement measures that target persons who force others to hide their faces and thus conceal their identity in the public space (III).

I- In its present state the law consists of a broad range of prescriptions or prohibitions, just as it does in comparable democracies, where there is no specific national legislation.

Analysis of the current regulatory set up reveals that the wearing of the full veil, whether for its own sake or as a way of concealing the face, is already restricted by a great many provisions, which differ enormously in nature and scope and take account of time, place, wearer and other factors (1.). France is no different from other countries in this respect (2.)

1. Numerous laws, regulations and instructions already exist to prohibit or deter people from wearing the full veil or indeed from concealing the face in particular cases

It is necessary to differentiate between provisions that restrict the wearing of the full veil as such (1.1.), those that deal with the broader problem of concealment of the face (1.2.), and those that target persons who force others to conceal their faces (1.3).

1.1. The wearing of the full veil as such is already prohibited or provided for under certain provisions.

The principles of secularism and neutrality of public services certainly require that **public officials** not manifest their religious beliefs, by wearing religious symbols for example, while exercising their functions. Established case law (judgement of the Conseil d'Etat No 217017 of 3 May 2000, *Marteaux*) does not therefore allow public employees to wear the full veil while they are at work. The European Court of Human Rights has also recognised the principle of the neutrality of public employees, provided that "a fair balance has been struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in Article 10 paragraph 2." (cf. ECHR, 26 September 1995, *Vogt v. Germany*, § 53, Series A No 323).

As to **users of public services**, Article 1 of statute No 2004-228 of 15 March 2004 (consolidated in Article L. 141-5-1 of the Education Code) forbids pupils in public primary, secondary and high schools to wear symbols or clothing that ostentatiously display their religious affiliation. The conformity of this provision with the European Convention for the Protection of Human Rights and Fundamental Freedoms has been recognised both by the Conseil d'Etat (CE, 8 October 2004, Union française pour la cohésion nationale, No 269077) and by the European

Court of Human Rights (cf. ECHR, 30 June 2009, No 43563/08 and others, decisions of inadmissibility). As regards private teaching establishments, it has been ruled that their internal regulations may prohibit the wearing of any religious symbol without violating the provisions of Article 9 of the European Convention (Cass. v Civ., 21 June 2005, Benmehania, No 02-19831). However, no other public service has been subject to a general measure of this kind.

Furthermore, judicial case law loosely recognises that an employer may forbid an employee to wear garments incompatible with the exercise of his/her duties, provided that the principles laid down in L. 1121-1 (relating to fitness for purpose and proportionality) of the Labour Code are observed, without regard to the employee's convictions (Cass. soc., 24 March 1998, No 95-44738; CA Saint-Denis de la Réunion, 9 September 1997: a sales assistant in a women's clothes shop may not adopt "*a garment of a kind that covers her from head to foot, the style of which is totally at variance with the brand image of the shop*"; CA Paris, 16 March 2001, No 99/31302: a sales assistant may be forbidden to wear a "*headscarf totally concealing the neck and part of the face*").

Moreover, without seeking or securing a ban on the wearing of the full veil, the administrative court has recognised that the Minister of the Interior may claim that a certain type of behaviour is incompatible with the fundamental values of the French community, and notably with the principle of sexual equality (which for the purposes of this study is infringed by the wearing of the *burqa*) when ruling that somebody has failed to assimilate and legally justifying a refusal to grant French nationality by marriage, in accordance with Articles 21-24 of the Civil Code (CE, 27 June 2008, *Ms M.*, No 286798). The latter decision was based on repeated behaviour testifying to a radical opposition to the values of the French Republic on the part of the applicant. The question of assimilation would be particularly relevant in the case of a request for naturalisation.

Lastly, when a civil court rules on a divorce case, it will take account of excesses stemming from the practice of a religion (the obligation to wear the Islamic veil being a case in point). Such excesses, if they make continued married life unendurable, may be grounds for divorce, the blame which lies with the person to whom they are ascribable, pursuant to Article 242 of the Civil Code (for example: CA Versailles, 27 June 2006, cited by the parliamentary mission).

1.2. MANY CLAUSES PROVIDE FOR A MORE GENERAL BAN ON THE DELIBERATE CONCEALMENT OF THE FACE IN SPECIFIC CIRCUMSTANCES OR PLACES.

For reasons chiefly relating to public security and the need to be able to identify individuals, the legislator, the regulatory power, and more generally the administrative authorities have chosen to restrict or sometimes even prohibit the

deliberate concealment of the face in the public space[1]. This power is granted for the following purposes:

- **Identity control**: the second paragraph of article 78-1 of the Code of Criminal Procedure stipulates that "*any person on national territory must agree to identity checks conducted in the conditions and by the police authorities referred to in the following articles*". Article 78-2 of the same code allows "judicial police officers" and, at their orders and under their responsibility, "judicial police agents " and "assistant judicial police agents" to carry out such inspections in the specified circumstances. Furthermore, Article 78-6 of the same code authorises "municipal police agents" and "assistant security officers" to establish the identity of those committing offences in order to prepare official reports on breaches of municipal bye-laws, breaches of the Traffic Code, for which the law permits them to issue tickets, or petty offences, which they are authorised to record pursuant to any specific enactment.

- **Obtaining identity documents**: A law or regulation may require that a photograph showing the subject bare headed be affixed to an official document (the national identity card: CE 27 July 2001, *Fonds de défense des musulmans en justice*, No 216903, relating to "*risks of identity theft and falsification*" ; the passport: CE, 2 June 2003, *Ms R. A.*, No 245321 and CE, 24 October 2003, *Ms B.*, No 250084; the driving licence: CE, 15 December 2006, *Association United Sikhs and M. S*, No 289946, relating to the "*occasional nature of the obligation to uncover the head*", confirmed by the ECHR decision on inadmissibility, 13 November 2008, *M. S.*, No 24479/07; and for the award of a university diploma: ECommHR, 3 May 1993, *Karaduman v Turkey*, No 16278/90).

- **Gaining access to certain public places, completing formalities and satisfying authentification requirements:**

- Temporary removal of an accessory or garment concealing the face may be required to enter a consulate, for reasons of security (CE, 7 December 2005, *El M.*, No 264464, confirmed by an inadmissibility decision by the ECHR, 4 March 2008, *El M. v France*, No 15585/06, relating to the limited time for which the face is exposed).
- The same applies to *airport controls* (ECHR, 11 January 2005, *P. v France*, No 35753/03, inadmissibility decision).

[1] On the other hand it must be pointed out that the wearing of a mask or a helmet that hides the face may be compulsory in certain cases. Such a requirement would apply where employees are exposed to professional risks, in accordance with article L. 4122-1 of the Labour Code and corresponding internal regulations adopted by companies (cf. CE, 9 December 1994, *Ministre du travail, de l'emploi et de la formation professionnelle*, No 118107) or, in some cases, decrees that may be issued by the Minister responsible for health in accordance with article L. 3131-1 of the Public Health Code "in the event of a serious health threat calling for urgent measures, particularly where there is the risk of an epidemic".

- The circular letter dated 20 December 2007 on the conduct of operations during elections by direct universal suffrage stipulates that persons wearing a "veil masking the mouth and nose" should not be allowed to vote if they refuse to remove it. This point has not been contested in the courts.
- The note issued by the National Education minister on 24 November 2008 stipulates that a child should not be turned over to a person whose identity cannot be checked.
- A registered letter can only be handed over by the Post Office if it is possible to check the identity of the consignee.
- A registry office official must check the identities and gain the consent of the bride and groom, which means that he must be able to see their faces during a marriage ceremony (reply given on 3 April 2007 to a written question by Mr Marleix, member of Parliament).

▪ All these points seem to show that in principle a person cannot conceal his face when he/she needs to be identified in order to guarantee the safety of goods and persons, prevent or prosecute infringements of the law, and more generally ensure respect for legal and regulatory provisions that make access to goods and services dependant upon personal attributes (identity, age, gender, etc.). It is probable that case law would admit, for example, that a person in charge of a drinking establishment should refuse to serve a person whose face is concealed, thereby preventing him from using the identity card presented to him to make sure that he is not a minor. Similarly it may be supposed that access to public transport might be refused to holders of non-transferable tickets or passes if they refuse to show their faces at the request of the inspection staff[2]. Access to a cinema showing a film not authorised for all age groups might also be refused to persons who refuse to show their faces when buying a ticket.

It should be noted that recently, in the interests of public policy, the legislative and regulatory authorities have each undertaken, within certain limits, to stamp out any deliberate concealment of the face in the public space, even when the person concerned is not seeking to gain access to a facility or service or put a request to a competent authority:

▪ Article 3 of Statute No 2010-201 of 2 March 2010, reinforcing the fight against group violence and the protection of persons performing a public service makes this practice an aggravating circumstance in the case of certain infringements[3];

[2] However, the computerisation of administrative procedures and commercial services shows that it is no longer crucially important to be able to see the user's or client's face for identification purposes.

[3] The wearing of a mask has long been considered an aggravating circumstance in the case of infringement of penal provisions on hunting (article L. 428-5 of the Environment Code).

- Decree No 2009-724 of 19 June 2009, making it an offence to conceal the face at demonstrations on the public highway, punishable by a fine of 1,500 euros "concealment of the face by a person at or in the immediate vicinity of a demonstration on the public highway for the purpose of not being identified in circumstances that raise fears of serious breaches of public policy", except in cases where demonstrations are in line with local practice and there are legitimate reasons for such concealment. This decree is the subject of an action for excessive use of power pending before the Conseil d'Etat.

Furthermore, by virtue of their administrative police powers, the mayor, pursuant to article L. 2212-2 of the *Local and Regional Authorities Code,* and the prefect, pursuant to article L. 2215-1 of the same code, could, where appropriate and under the supervision of the administrative court, be justified in prohibiting the voluntary concealment of the face in certain public places where there is a genuine threat to public safety arising from specific local circumstances, duly substantiated, provided that the measure is proportional to the risk.

1.3. Forcing or asking somebody else to hide his/her face cannot be directy punished but can be dealt with indirectly.

Forcing somebody to conceal his/her face is not in itself an offence under present criminal law. Such actions can only be dealt with indirectly, where appropriate, on the grounds that they constitute the following:

- Violence (article 222-13 of the Penal Code): violent crime may consist of any action or behaviour liable to cause the victim physical or psychological harm, characterised by emotional shock or psychological disturbance, even if there is no physical contact with the victim's body (Cass. crim., 2 September 2005, No 04-87046; Cass. crim., 18 March 2008, No 07-86075). Part I of article 17 of the Statute providing for better protection for victims and increased prevention and prosecution of violence to women, introduced on 27 November 2009 and unanimously adopted by the National Assembly on first reading, seeks to confirm that the violence punishable under these provisions may be psychological.

- A threat made with an order to fulfil a condition (article 222-18 of the Penal Code): a threat to commit an indictable offence against a person (notably an act of violence) is punishable by three years' imprisonment and a fine of €45,000.

- "Psychological violence": in its present form, part II of article 17 of the bill referred to above provides that subjecting one's spouse, civil union partner, concubine or ex-spouse to "repeated actions or words intended to produce or producing a deterioration in his/her quality of life that is liable to affect his/her physical or mental health" is punishable by three years imprisonment and a fine of €75, 000 euros.

Moreover, as far as **minors** in particular are concerned, the act of forcing them to conceal their faces in combination with other offences, has been grounds in judicial case law for:

- Suspension of a parent's visitation rights on account of the moral and psychological pressure he/she is subjecting the children to, notably by demanding that they wear the Islamic veil and observe specific religious practices (Cass. 1st Civil Chamber, 24 October 2000, No 98-14386).

- A measure of educational assistance, in accordance with Article 375 of the Civil Code: judicial case law already provides for this possibility, the purpose being to take a child away from a parent who forces him/her to follow a given religious practice (CA Aix en Provence, 1 July 2008, cited in the report by the parliamentary mission).

In this connection it should be borne in mind that the supervisory bodies of the European Convention give priority to the interests of the child over the right of the parents, protected by article 2 of additional protocol No 1, to give the child an education and teaching in line with their philosophical and religious convictions (V. notably ECommHR, 8 September 1993, *Bernard v Luxembourg*).

Substantive law therefore offers only indirect protection, particularly in cases where the instigators are not members of the immediate family. These features do not however set our country apart from other comparable democracies.

2. WHILE MANY STATES COMPARABLE TO FRANCE HAVE IMPOSED RESTRICTIONS ON THE WEARING OF THE FULL VEIL, NONE HAS OPTED FOR A GENERAL PROHIBITION.

A review of the law applying in countries comparable to France shows that the latter also impose various restrictions on the wearing of the full veil and concealment of the face but that their restrictions are often less stringent than in our country and include no general prohibition in the public space.

2.1. A RANGE OF RESTRICTIONS VARYING IN SCOPE

Several countries have adopted regulations comparable to those already in force in France. However, there is significant variation from one country to another on the scope of the restrictions relating to:

- the wearing of distinctive religious signs in educational establishments: it is subject to a general prohibition in the Netherlands, but left to the discretion of the heads of the establishment in the United Kingdom, Ireland, the United States and the Walloon region of Belgium;

- the wearing of such symbols by any or by some public employees: in some countries the prohibition only applies to certain categories of public employee (such as police officers and magistrates in Denmark, teachers in many German Länder and in Luxembourg); in others, the wearing of the full veil is prohibited for all public employees (certain German Länder such as Berlin and Hesse);
- the wearing of unsuitable clothing in the workplace (as in Denmark).

In the public space, these practices are subject only to occasional or local restrictions.

In many countries, as in France, the face must be shown on official documents and in the event of identity controls and checks (as in the Netherlands, where people who refuse to reveal their identity can be refused access to public transport, and in Italy). In the United Kingdom, police officers can ask a person to remove a hood or mask if they have reasonable grounds for thinking that he/she is wearing it for the purpose of concealing his/her identity. Refusal to remove a mask is an offence punishable by a month's imprisonment or a fine not exceeding £1,000.

Germany and Austria for their part have adopted legislation prohibiting participants at outdoor events from wearing garments that prevent them from being identified, except in the case of open air religious services, religious processions, processions and pilgrimages, ordinary funerals, marriages and traditional festivals. The wearing of masks at political demonstrations or artistic events is only forbidden if the purpose is to conceal a person's identity (German Const. Court, 25 October 2007). This legal system is similar to the one established by the decree of 19 June 2009 referred to above.

In Belgium about twenty communes (including Antwerp and Gand) have amended their police regulations to ban the full veil in public. Any infringement may be punished by a fine or may meet with more "instructive" measures (the person being reminded of the law or accompanied home, for example). In the Netherlands, deliberate concealment of the face is prohibited in certain cities, such as Maastricht, for reasons of public security.

In the United States, the case law of the Supreme Court in principle precludes the imposition of a ban on the overt expression of religious or political convictions, except where a "substantial governmental interest" is at stake. Several states have nevertheless adopted anti-mask laws, proscribing the practice of concealing the face to prevent identification in public places. The law applies in virtually all cases in some states (West Virginia, Virginia and North Carolina, with the sole exception of persons under 16 for whom the wearing of a mask or helmet is justified for personal health or safety reasons) or in particular circumstances in others (at public demonstrations in the State of New York, in the event of violation of the law in California, or of intimidation, threat or harassment in Florida and Washington DC). Many of these laws were adopted in the 19th

century in specific historical contexts (insurrections in the Hudson Valley by farmers disguised as Native Americans in the case of New York, and the fight against the Ku Klux Klan, for example). Even though some of them could be regarded as constitutional (the case of New York), it seems that these laws are under serious attack today.

By these standards, and if we disregard the local initiatives in Belgium and the Netherlands, France is already among the states with the most restrictive approach to these practices.

2.2. ABSENCE OF A GENERAL BAN ON THESE PRACTICES IN THE PUBLIC SPACE

While a small number of countries across the world have actually opted for a general ban on the full veil (including Tunisia and Singapore), no national initiative in a state comparable to France has resulted in binding provisions of a general nature banning the veil in the public space.

In Italy the "Charter of Values for Citizenship and Integration", which is devoid of legislative effect, states that "*garments that cover the face are unacceptable because they make it impossible to recognise the person and prevent him/her from entering into relationship with others*". But the Italian Council of State felt that, as the legislation currently stands, it was not possible to impose a general ban on wearing the *burqa* in public places and that only the refusal to remove the veil for identification purposes was punishable. It has not however ruled out the possibility of rules banning the garment "*provided that these rules have a reasonable and legitimate basis relating to particular needs*"[4].

Apart from these public statements, different bills, which have yet to be examined or adopted, have been introduced in Belgium and Italy with the aim of imposing tighter restrictions on the wearing of the full veil, or indeed to ban people with masked or concealed faces from the public space. In Denmark, where a report published in March 2010 reported only three cases of people wearing the full veil, the government condemned the practice but had reservations over the idea of prohibiting it, notably for legal reasons. The Swiss authorities, for their part said they were not considering the adoption of such a measure. Lastly, in 2005 the Netherlands Parliament adopted a resolution calling upon the government to ban the *burqa* in public places. However, in November 2006, the expert committee it set up recommended that this prohibition be restricted to certain places (notably educational establishments) or situations and that a general ban should only be adopted as an alternative solution should sectorial measures fail.

[4] Source: Les documents de travail du Sénat, *Le port de la burqa dans les lieux publics*. Législation comparée series, No LC 201, October 2009

II- A GENERAL BAN ON WEARING THE FULL VEIL AS SUCH OR ANYTHING THAT CONCEALED THE FACE IN THE PUBLIC SPACE WOULD BE LEGALLY VERY FRAGILE

As has been said, the Conseil d'Etat ruled out any question of the desirability of a ban and examined possible bases for an effective prohibition that would be respected and backed by appropriate sanctions.

The Conseil d'Etat has found that no incontestable legal basis can be relied upon in support of a ban on wearing the full veil as such, the effectiveness of which would be questionable (1.). Consequently, and even though the mission letter does not refer explicitly to such an eventuality, it has examined the possibility of a ban on the deliberate concealment of the face, which would appear to represent less of a head-on clash with constitutionally and conventionally guaranteed rights and freedoms. It would seem that a general ban on the concealment of the face in public places would have to be based on a broader conception of public policy as something that underpins the reciprocal demands and fundamental guarantees arising from life in society. But such a legally unprecedented conception would run a serious risk of constitutional or conventional censure, which is why it cannot be recommended. Nor would public policy, defined in terms of its traditional components alone, offer a firmer basis for a general ban, although it would provide solid grounds for a partial ban (2.).

1. A GENERAL BAN ON THE FULL VEIL ALONE CANNOT BE RECOMMENDED.

1.1. THERE APPEARS TO BE NO LEGAL BASIS FIRM ENOUGH TO JUSTIFY A GENERAL BAN ON THE FULL VEIL AS SUCH.

Prohibition of the full veil would violate various fundamental rights and freedoms: individual freedom, personal freedom, right to privacy, freedom of expression and freedom to manifest ones convictions, notably religious, and prohibition of any discrimination.

1/ In light of these rights and freedoms, prohibition of the full veil alone could not be founded on the principle of religious neutrality.

Even if the full veil is regarded by those who wear it as having a religious connotation or purpose, it has emerged from investigations by the parliamentary mission into the practice of wearing the full veil that there is no consensus on its

religious significance. Given this uncertainty, the idea of invoking the principle of religious neutrality in this instance should be viewed with precaution.

The principle of religious neutrality, which has informed our legal tradition for more than a century, has a solid constitutional basis (article 1 of the Constitution) and has been recognised by the European Court of Human Rights (cf. in particular ECHR, 10 November 2005, *Leyla Şahin v Turkey*, No 44774/98) As the Conseil d'Etat pointed out in the "*General Considerations*" section of its 2004 report "*Un siècle de laïcité*", secularism should "*manifest itself in three principles: state neutrality, religious freedom and respect for pluralism*". In French public law, secularism is inseparable from freedom of conscience and religion and also from the universal freedom to proclaim one's religion or convictions. These freedoms are protected both by the French Constitution and by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The principle of secularism thus requires a strictly neutral attitude on the part of the state and public authorities towards the practitioners of a religion and vice versa. The consequence is twofold. First it implies that the state has a duty to protect each citizen's freedom of opinion and conscience, which underpins the principle of civil-service and civil-servant neutrality, referred to above. Second, as ruled by the Constitutional Council in its decision of 19 November 2004 (CC., No 2004-505 DC *Treaty establishing a Constitution for Europe*), it forbids "*anybody to take advantage of his/her religious beliefs to infringe common rules governing relations between public authorities and individuals*".

But secularism could not provide the basis for a general restriction on the expression of religious convictions in the public space, as indeed the European Court of Human Rights recently ruled (cf. 23 February 2010, *Arslan and others v Turkey*, No 41135/98), and could therefore not be a ground for imposing a total ban on the full veil throughout the public space. It mainly applies in relations between the public authorities and religions or persons who subscribe to them. It is directly binding on public institutions, thereby justifying the neutrality requirement imposed on representatives of public authorities in the exercise of their duties. On the other hand, it can only be directly binding on society or individuals by virtue of the specific demands made on certain public services (as in the case of educational establishments).

Furthermore, a specific ban on the full veil might be interpreted as interference by the public authority in respect of the legitimacy of religious practices. While the European Court of Human Rights may be aware of the implications of such practices, particularly in so far as they relate to sexual equality (see for example § 98 of the *Leyla Sahin* judgement and ECHR, 13 February 2003, *Refah Partisi*, No 41340/98 allowing the dissolution of a political organisation that calls for the introduction of sharia, which is incompatible with the objectives of the European Convention, "*particularly with regard to (…) its rules on the legal status of women (…)"*), it reiterates that "*but for very exceptional cases, the right to freedom of*

religion excludes any discretion on the part of the State to determine whether religious beliefs are legitimate" (ECHR, 26 October 2000, *Hasan and Chaush v Bulgaria*, no 30985/96, § 78).

The principle of secularism alone could not therefore provide a basis for a blanket ban on the full veil.

2/ The fundamental principles of protection of human dignity and equality of men and women, whether taken separately or in combination, are not readily applicable in this area.

The Conseil d'Etat has considered whether these two principles, which may be taken separately or in combination, might provide grounds for banning the full veil. They would certainly justify prosecution on the grounds of violation of the dignity of women, which total concealment in the public space would constitute, and the inegalitarian conception of the relationship between the sexes, of which this garment is an expression.

The principle of protecting the dignity of the human person is firmly grounded in domestic and international case law. The Constitutional Court has made protection of the dignity of the human person a principle of constitutional value, whose basis is to be found in the Preamble of the 1946 Constitution (CC, No 94-343/344 DC of 27 July 1994 and No 94-359 DC of 19 January 1995), while the Conseil d'Etat in its judgement *Commune de Morsang-sur-Orge* of 27 October 1995 (No 136727) made the dignity of the human person a component of public policy.

The same principle has also been enshrined by the European Court of Human Rights, which made protection of human dignity, together with freedom of self determination, a cornerstone of its constitution (ECHR, 22 November 1995, *CR and SW v United Kingdom*, series A Nos 335-B and 335-C). Work by the committee reviewing the Preamble of the Constitution, chaired by Ms Veil, clearly highlighted the extreme importance of this principle, which had been proposed for inclusion in the Constitution in the form of a special additional provision, as well as the range of meanings this juridical concept was inevitably given.

So, in this instance, to invoke the protection of dignity as grounds for banning the full veil – which would then have to be a general ban in the public space – is fraught with very serious uncertainties. Leaving aside the fact that this point is not widely addressed in the case law of national and European courts, the principle of human dignity implies by its nature respect for individual freedom. The upshot is that there are two conceptions of dignity, which may potentially contradict or limit each other: that of the collective moral requirement to protect human dignity, perhaps at the expense of freedom of self-determination (which is interpreted in case law in the decision *Commune de Morsang-sur-Orge*) and that of the protection of freedom of self-determination, as a consubstantial aspect of the human person. The European Court of Human Rights has to a great extent

adopted this second interpretation, by protecting, on the basis of respect for private life, a principle of personal autonomy to the effect that we should all be able to live according to our convictions and personal choices, even if it means putting ourselves at moral or physical risk, provided we do not harm anybody else. This is the thrust of its judgement *KA and AD v Belgium* of 17 February 2005 (No 42758/98), in which the primacy of the principle of self determination over that of the protection of human dignity was clearly asserted.

Similarly, it may be pointed out with respect to domestic law that, even if there is no constitutional case law directly and specifically applicable to this matter, **the Declaration of the Rights of Man and the Citizen states that "Liberty consists in the power to do anything that does not injure others" (Article 4) and that "The law has only the right to forbid such actions that are injurious to society" (Article 5).**

It should also be pointed out that the assessment of what does or does not detract from the dignity of the person is, at least potentially, comparatively subjective, as shown by the fact that the wearing of the full veil is in most cases voluntary, according to information given to the parliamentary mission by the Ministry of the Interior. It would therefore appear to be difficult to base a system of prohibition on grounds that may lend themselves to a range of different interpretations. In practice such interpretations are inevitably subjective, being influenced *inter alia* by circumstances of time and place, as demonstrated by the different perceptions of the image society projects of the (often naked) female body.

The basis of the protection of dignity is therefore legally debatable, given the range of circumstances to be taken into account, and particularly in the event that a person who has reached the age of majority deliberately chooses to wear the full veil.

As to the principle of equality of men and women, it too has a constitutional basis (Article 1 of the Declaration of the Rights of Man and the Citizen and paragraph 2 of Article 1 of the Constitution, which provides for equal access by women and men to elective offices and posts as well as positions of professional and social responsibility). Its importance, which continues to be highlighted in increasingly robust and practical terms, is reflected in our society by active measures intended to match the remaining obstacles and delays. Two constitutional reviews, one on 8 July 1999 on equal access by men and women to electoral mandates and elective offices, and the other on 23 July 2008 on professional and social responsibilities, reflect this fundamental attachment to an essential value at the highest judicial level.

However, it should be pointed out that this principle is invoked either to counter discrimination directly or to ensure that equal salaries are paid to men and to women. While it is applicable to others, it is not intended to be applicable to the individual person, ie to the person's exercise of personal freedom, which may in some cases lead to the adoption of a form of behaviour that could be

interpreted as sanctioning an inferior situation, in the public space like anywhere else, provided there is no violation of physical integrity.

Despite their firm foundation in law, these grounds, whether combined or taken in isolation, do not seem appropriate in this instance since they cannot be applied to persons who have deliberately chosen to wear the full veil. They cannot therefore be recommended as the basis of a general ban.

3/ Public security, which constitutes the main component of substantive public policy, could not provide a basis for a general ban on the full veil alone. Indeed, the full veil as such has yet to give rise to any particular public security problems, public policy problems or violent reactions that would justify a general ban.

4/ Lastly, it should be noted that more generally **a ban on the full veil alone, whatever its scope, would be legally fragile in light of the principle of non-discrimination, laid down notably in European Union law** (cf., inter alia, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation; or the Proposal for a Council Directive of 2 July 2008 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. The entry into force in 1 December 2009 of the Charter of Fundamental Rights of the European Union, which stipulates that "any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited" (Article 21.1), further increases the legal fragility of a ban on the full veil as such.

1.2. THE EFFECTIVENESS OF A GENERAL BAN ON THE FULL VEIL AS SUCH WOULD MOREOVER BE VERY UNCERTAIN.

If a ban on the full veil were to be based on the principle of human dignity, possibly combined with the principle of equality between men and women, it could only apply to minors or to persons forced to wear it, given the legal uncertainties described above. But apart from the doubts we may have about the effectiveness of a penalty that applies to persons forced to disregard a ban, effective monitoring would be a very delicate matter. Identification of minors, for example, would call for inspections that would be difficult to apply in practice and likely to create tensions, in view of the specific features of the garment.

A ban on the full veil as such would also be likely to raise difficulties of interpretation on the part of persons of a Moslem persuasion, both in our country and to an even greater extent abroad, and could paradoxically make the

practice more widespread or exacerbate tensions. Moreover, a limited ban on the full veil would be difficult to interpret legally and could cause people to try to circumvent the law, notably by wearing "substitute" accessories or garments (hoods, masks, etc.), which would greatly reduce the value and effectiveness of the measure in achieving the intended goal.

Given the great uncertainties surrounding the scope of the legal bases that might be envisaged and the legal risks arising from them, together with the risk of stigmatising persons of the Moslem faith in France, we must rule out any ban on the full veil itself and consider the broader question of concealment of the face, as it relates to other garments or accessories.

2. A BAN ON ALL FORMS OF DELIBERATE CONCEALMENT OF THE FACE THROUGHOUT THE ENTIRE PUBLIC SPACE CANNOT ITSELF BE ENVISAGED WITHOUT LEGAL RISK.

The full veil, whatever other significance it may have, constitutes an act of concealment of the face. Regardless of its inherent significance and the values it is supposed to convey, its function as a means of "concealment" and the intentional nature of this concealment raises questions about the legality of wearing any garment or accessory in the public space (helmets, masks, hoods and other garments) with a view to preventing others from seeing one's face.

2.1. A BAN ON CONCEALING THE FACE WOULD REPRESENT A LESS BROAD BUT NEVERTHELESS REAL VIOLATION OF CERTAIN FUNDAMENTAL RIGHTS AND FREEDOMS.

It should be noted at the outset that the restriction on rights and freedoms would be limited to the wearing of a garment or accessory, of any kind, on a part of the body that is not normally covered in our society, in as much as the wearing of such a garment or accessory may in itself, especially when it is imposed on a person, represent a violation of freedoms.

2.1.1. Personal freedom called into question, with possible repercussions for respect for privacy

Without the "freedom to dress as one likes"[5] protected by constitutional or conventional provisions, such a prohibition would be a violation of **personal freedom**, which is protected by Article 4 of the Declaration of 1789, as are other freedoms that have no particular basis in law (freedom of contract: CC., No 2000-437 DC of 19 December 2000; freedom to conduct a business: CC., No 81-132 DC of 16 January 1982, etc.).

[5] Clearly asserted by the Court of Cassation, but in a specific context (Cass. soc., 18 February 1998, No 9543491; Cass. soc., 28 May 2003, No 02-40273: "freedom to dress as one wishes during working time and at the workplace does not fall within the category of fundamental freedoms").

It would also be possible to rely on **the respect of private life**, guaranteed both by article 2 of the 1789 Declaration and by article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. But the right is only called into question to a limited extent, in that the prohibition does not apply to the home or to private places.

2.1.2. Other conventionally and constitutionally guaranteed rights and freedoms called into question

A prohibition applying to any garment or accessory that hid the face would not be immune to criticism based on other rights and freedoms guaranteed by the Constitution, the European Convention and European Union Law.

Rights and freedoms of particular relevance here include the **freedom to come and go**, in so far that the prohibition would limit the travel opportunities of people wishing to remain fully masked, the **freedom of trade and industry**, in that the concealment of the face is necessary for the exercise of a professional activity, and indeed in some cases for the freedom to express opinions on the public highway, the **social rights guaranteed by the 1946 Preamble** and the **principle of universal access to services** guaranteed by European Union law, in that this prohibition could result in people being denied access to certain services. Violation of these rights and freedoms would nevertheless be indirect, being limited to a particular form of transport and access and likely to be greatly mitigated by adequate exceptions.

The **freedom to manifest opinions, including religious views**, protected by Article 10 of the Declaration of 1789 and Article 9 of the European Convention[6], combined as appropriate with Article 14 on discrimination, may also be invoked in an appeal against the prohibition where the concealment of the face constitutes a mode of expression of religious or philosophical convictions (see in conventional law: ECHR, 23 February 2010, *Ahmet Arslan v Turkey*, No 41135/98; the Court concluded that there was no interference with freedom of religion since the applicant did not claim that his "wearing of a beard" was an

[6] In the end, these stipulations are not applicable for the simple reason that the applicant presents the manner of hiding the face he has chosen as the expression of his convictions. The Court excludes from the freedoms protected by these stipulations any acts or actions that are simply inspired by convictions without actually constituting the "manifestation" thereof (ECHR, 1 July 1997, *Kalaç v Turkey*, Rec. 1997-IV). There must therefore be a sufficiently close link between the garment or accessory worn and the philosophical, political or religious convictions in question. Moreover, the "convictions" presuppose the existence of "views that attain a certain level of cogency, seriousness, cohesion and importance", which is not true of every idea or opinion (ECHR, 25 February 1982, *Campbell and Cosans,* Series A No 48, § 36). It follows that it is unlikely that the Court would admit that any mask (satirical or other) or any disguise might constitute a manifestation of convictions.

expression of his religious convictions: ECHR 24 May 2005, *Tig v Turkey*, No 8165/03). Moreover, Article 2 of additional protocol No 1 protects the right of parents to provide for the education and teaching of their children in line with their philosophical or religious convictions, which could in some cases cover dress, even though, as stated above, the best interest of the child can be relied upon if this power is abused.

Here again however the violation would be indirect. Article 9 of the European Convention "*does not always guarantee the right to behave in a manner governed by a religious belief*" (ECHR, 2 October 2001, *Pichon and Sajous v France*, no 49853/99) and does not confer on people who do so the right to disregard rules that have proved to be justified (ECHR, 10 November 2005, *Leyla Sahin*, No 44774/98). The court adopts a more flexible approach when faced with a "facially neutral law" and determines whether there is a proven social need that requires the principle of religious freedom to prevail over the general rule (ECHR, 24 September 2004, *Vergos v Greece*, No 65501/01, § 60). The Court admits that legislations may be impervious to religious considerations (ECHR, 12 December 2002, *Sofianopoulos v Greece*, n° 1977/02: *"an identity card cannot be regarded as a means intended to ensure that the adherents of any religion or faith whatsoever should have the right to exercise or manifest their religion."*). **Moreover, even if it can have repercussions for religious practice, a rule applicable to everybody is less open to criticism prompted by these stipulations**[7].

These indirect violations must be reconciled with the objectives of a ban on the deliberate concealment of the face.

2.1.3. Justifications accepted by constitutional and conventional case law

The Constitutional Council accepts that freedom (in the broad sense) may be subject to limitations for reasons of "public interest" or "general interest" ("it flows from the provisions of Article 4 of the Declaration of 1789 taken with those of Articles 34 and 6 of the Constitution that it is for the legislator to determine the conditions to which the exercise of freedom is subject, taking account of the public interest": CC. No 86-216 DC of 3 September 1986; "the legislator may in the public interest derogate from the principle of freedom of contract which flows from Article 4 of the Declaration of 1789": CC., No 2006-543 DC of 30 November 2006). In the same spirit, whereas Article 5 of the Declaration of 1789 provides that "the law only has the right to prohibit actions harmful to society", the Council was of the opinion that a limitation on holding several offices at the

[7] cf. also in this connection Cass. III civ., 8 June 2006, No 05-14774: "*religious freedom, fundamental though it is, cannot have the effect of legalising violations of the provisions of legislation on co-ownership*".

same time was justified by the simple fact that "the incumbent was prevented from carrying out all his duties satisfactorily" (CC. No 2000-426 of 30 March 2000).

However, with respect to the freedom to manifest ones convictions, Article 10 of the Declaration of 1789 proves to be more rigorous, at least formally. It only allows for impingement upon this freedom in the event that it interferes with "*public policy established by the law*". Moreover, the European Court of Human Rights is particularly cognisant of considerations relating to public policy, as shown by the aforementioned judgement of February 2010 *("It does not appear from the documents before the court that the appellants posed a threat to public policy or that they proselytised by exerting undue pressure on passers-by at the time of their assembly*", where the last-mentioned consideration has to do with public peace).

The only possible basis would therefore be **public policy**, which we may nevertheless define in broader or narrower terms.

Indeed, public policy has a substantive dimension, which has to do with its three traditional components: public security, peace and health. This tripartite notion, enshrined by both the administrative and the constitutional courts (CC. No 2003-467 DC, 13 March 2003, Law on internal security, Cons. 61) on the basis of police powers now set forth in Article L. 2212-2 of the Local and Regional Authorities Code, also flows from the European Convention for the Protection of Human Rights, Articles 8 to 10 of which cite national security, public safety, protection of public policy and the protection of health as possible grounds for impingement upon the rights and freedoms they protect.

By virtue of constitutional case law it also has a specific purpose, namely that of combating fraud, which may involve preventing people from concealing their appearance or indeed demanding that they reveal their identity. (cf. CC. No 2007-557 DC, 15 November 2007).

Public policy also has a "non-substantive" dimension, which mainly has to do with:

- Public morality (sometimes described as "public decency"), which is not addressed in general terms, but according to particular local circumstances[8]; and
- Respect for the dignity of the human person, recognised in its own right in case law.

Lastly, public policy could be seen as something separate from anything else with the specific function of representing the minimum requirement for the reciprocal demands and essential guarantees of life in society.

[8] Cf. CE, section, 18 December 1959, *Société Les films Lutétia*, No 36385.

It is necessary to consider whether the notion of public policy, in each of the senses given, could provide a basis for a ban on concealing the face in the public space.

2.2. NON-SUBSTANTIVE PUBLIC POLICY CANNOT IN ITSELF PROVIDE A SUFFICIENT BASIS FOR A GENERAL BAN.

Non-substantive public policy (public morality and respect for the dignity of the human person), while it is the subject of specific rulings in case law, as mentioned above, does not have the same firm legal basis as substantive public policy and could not justify a measure prohibiting any deliberate concealment of the face, assuming that in principle the act was in no way "immoral" in the sense given to this word in case law. For its part, the hypothesis that such concealment would in itself be an affront to the dignity of the human person is open to debate and raises the difficult question of determining whether a person can legally, of his own free will, behave in a way that violates the dignity of his own person in a society like ours. As has been shown above, this question has prompted a range of responses in case law, which take account of national legal norms and of conventional principles protected by the ECHR.

From this standpoint, the act of concealing is in no way comparable to the sexual exhibitionism punishable under Article 222-32 of the Penal Code[9], which is considered by its very nature to be a form of aggression against the persons exposed to it, particularly minors. All in all administrative case law appears to take a stricter attitude towards police authorities that seek to regulate clothing in the interests of public decency. The decision by the Conseil d'Etat accepting the prohibition of bathing suits in the town centre as being contrary to decency is a longstanding one *(*CE, Sect., 30 May 1930, *Beaugé*) and has not been confirmed recently (for one of the most recent illustrations see CE, 30 September 1960, *Jauffret*, on "*places of debauchery which are an affront to public morality and hence a cause of (…) disruption [of public policy]")*. It has even been explicitly invalidated by a decision (admittedly an isolated one) by an administrative court, which highlights the fact that social mores are changing somewhat (cf. TA Montpellier, 18 December 2007, *Bauer*, No 053863, ruling that "*it does not appear from the documents before the court that wearing a bathing suit or being bare-chested on the public highway is likely to cause any serious substantive problems in the Commune of La Grande Motte; that in the absence of particular local circumstances, which do not emerge from the facts supplied by the commune, the allegedly immoral character of the said way of dressing, if such were even established, cannot provide a legal basis for prohibiting it, notwithstanding its limited duration")*.

[9] Indecent sexual exposure in the view of others in a public place is punishable by one year's imprisonment and a fine of €15,000. It is assumed that the body or part of the body deliberately exposed in the view of others is or appears to be naked (Cass. crim., 4 January 2006, No 05-80960).

On the other hand, non-substantive public policy considerations may reinforce a prohibition that is based mainly on the risk of substantive disruption of public policy (see below). One example is the order for interim measures issued by the Conseil d'Etat on 5 January 2007, *Ministre d'Etat, Ministre de l'intérieur et de l'aménagement du territoire v Association "Solidarité des français"* (No 300311), in what is known as the "pork soup" case *("the contested decree takes account of possible reactions to what was regarded as a demonstration likely to affront the dignity of persons unable to benefit from the aid being offered by the Association and thus pose a threat to public policy")*. The order was confirmed by the European Court of Human Rights (ECHR 16 June 2009, *Association Solidarité des français,* No 26787/07, decision on inadmissibility).

2.3. A GENERAL BAN ON THE CONCEALMENT OF THE FACE IN PUBLIC PLACES COULD NOT BE BASED ON A NEW CONCEPTION OF PUBLIC POLICY, WHICH WOULD BE ALIEN TO THE EXISTING CASE LAW OF THE CONSTITUTIONAL COUNCIL AND THEREFORE LEGALLY FRAGILE.

2.3.1. A conception without precedent in law

- ***A completely new legal definition of public policy***

The traditional aspects of public policy listed above do not necessarily provide an exhaustive description of the legal scope of the concept, for which there has never been an enshrined and generally accepted definition. It has hitherto been defined in the context of a series of concrete laws and obligations and in different ways from one area of the law to another (public law, civil law, social law, international public law, international private law, etc.). It would therefore appear to have a distinct quality of its own, the different aspects of which can only be brought to light and enshrined by the court in the context of specific violations.

From this standpoint, it could be argued that public policy is the **minimum requirement for the reciprocal demands and essential guarantees of life in society.** These demands and guarantees, like respect for pluralism for example, are of such fundamental importance that they determine the way in which other freedoms are exercised and if necessary require the effects of certain acts of the individual will to be prevented. In our Republic, these fundamental requirements of the social contract, which are both implicit and permanent, could have the following implication: when an individual is in the public space and likely to come across another person quite fortuitously, he may neither renounce his membership of society, nor cause it to be denied by concealing his face from the sight of others to the point of being quite **unrecognisable**. Moreover the

same requirements carry the more general implication that marks of distinction betokening inequality, and recognised as such should be prohibited.

While it may have different meanings depending on the branch of law it comes under, it would seem that public policy has to do with fundamental aspects of life in society and is therefore a precondition of its demands and guarantees. This unprecedented conception of public policy may seem to be echoed in Article 10 of the Declaration of the Rights of Man and of the Citizen, which provides that "No man ought to be uneasy about his opinions, even his religious beliefs, provided that their manifestation does not interfere with the public order established by the law", and in the notion of "fraternity", which is part of the Republican motto, although it has never been enshrined in law. A similar echo may be detected in two decisions by the Constitutional Council: No 93-325 DC of 13 August 1993 on the law on the control of immigration and the conditions governing the entry, reception and residence of foreigners in France, and No 99-419 of 9 November 1999 on the law on the civil solidarity pact. In the first decision, having begun by stating that the right of foreigners in stable and regular residence in France to lead a normal family life "*includes inter alia the right of these foreigners to be joined by their spouses and children under the age of 18, subject to restrictions relating to the safeguard of public policy and the protection of public health, which are considered to be objectives of constitutional value*", the Constitutional Council ruled that "*conditions of normal family life are those prevailing in France, the host country, and do not include polygamy*". In the second decision, the Constitutional Council ruled that new Article 515-3 of the Civil Code "*is designed to ensure compliance with public policy regulations governing personal rights, which notably include the prohibition of incest*". It should nevertheless be pointed out that the practices in question are quite different from that of concealing the face in the public space, to the extent that they concern intimate relations between persons, and hence the very order of society.

Moreover, the case law of the Constitutional Council frequently refers to the general interest, an echo of which can be found in the definition of public policy envisaged here. Its case law might therefore be seen to contain an implicit reference to a common, minimum requirement for the demands of life in society.

Such a conception, if formalised, would thus provide an unprecedentedly "positive" definition of public policy: it would no longer be a mere rampart against abuse arising from the unrestrained exercise of freedoms but the basis of the fundamental conditions that guarantee their free exercise. It would therefore reflect a basic right and proceed from the principle of equal membership of society for all. It would thus constitute the one possible ground for justifying a prohibition of concealment of the face for the purpose of preventing personal recognition.

- ***A risky solution in the present state of the law***.

It must nevertheless be emphasised that this conception of public policy, which has attracted the attention of the parliamentary mission, has never been developed in legal doctrine or in case law and there would appear to be nothing comparable in the legal systems of our European neighbours. It would therefore be vulnerable to a serious risk of constitutional censure as well as the hazards of conventional law. Virtually all references to public policy in constitutional case law concern its traditional aspects.

It is particularly worth drawing attention to a recent ruling (25 February 2010) by the Constitutional Council, convened to address the law on group violence. In the decision it expressed its views on the link between public policy and private life, stating that the legislator "*must in particular reconcile respect for privacy with other constitutional requirements, such as the pursuit of offenders and the prevention of breaches of public policy, both of which are required to safeguard rights and principles of constitutional value*". In this instance it ruled that the latter had "*failed to reconcile the aforementioned constitutional requirements as it was required to do*" and had therefore "*failed to appreciate the scope of its jurisdiction*".

The Constitutional Council thereby confirmed, again quite recently, that it subscribed to a traditional conception of public policy.

The Conseil d'Etat cannot therefore recommend such a far reaching change in our normative order, whose outlines are difficult to determine in advance in view of its potential applications.

On the other hand, these fundamental requirements of life in society could, as the parliamentary mission has notably recommended, be proclaimed **in a "solemn resolution", pursuant to Article 34-1 of the Constitution as amended by the constitutional revision of 23 July 2008, which would highlight the constituent elements of the social contract as perceived by the national parliament.**

2.3.2. A wide field of prohibition, numerous exceptions very carefully determined

If such a basis were nevertheless adopted, it **could only lead to a general ban on concealing the face in all public places**, which might be defined in positive terms – all places accessible to the public, in which a person is therefore likely to come across other people quite fortuitously – or in negative terms – everywhere outside the home, in the strict sense of the word. The same basis could be used to criminalise the act of forcing or inciting somebody to conceal his/her face. As to its effectiveness, it would seem **at first sight** that such a prohibition would be easier to enforce than a local or partial one.

But a general prohibition in the public space raises the question of exceptions that would have to be made. It seems that it would be difficult to draw up a list of exceptions that took account of all possible situations in which the concealment of the face could or should be authorised: its scope would be either insufficient or so extensive as to offer ways of circumventing the prohibition.

Exceptions falling into the following broad categories – justified *inter alia* by public policy considerations relating to substantive considerations, including respect for religious freedom – should be contemplated:

- Public health: they would include protective masks (for people suffering from certain conditions or severe burning, paramedic personnel, persons at risk from viral infection, etc.), mufflers and other accessories intended to protect the wearer from the cold.

- Public safety: they would include motor cycle helmets (for as long as the person required them for protection and safety on the roads), full-face protective helmets (for construction workers, riot police, etc.), balaclavas for police and gendarmerie SWAT teams (GIGN, etc.) or equipment needed to practice certain sports.

- Cultural and festive events that are part of local and national tradition: this category would include costumes and accessories worn at carnivals and communal festivities, at certain places (such as theme parks) and at performances of plays, operas, etc.

- Protection of privacy, where such concealment appears to be crucial (in the case of public figures or celebrities pursued by paparazzi, etc.);

- Respect for places of worship: from a legal standpoint a ban on accessories that conceal the face in such places, whatever the religion, would probably amount to interference out of all proportion to the objective; members of the public who enter these places can hardly expect congregations to comply with a measure designed to guarantee social cohesion in the public space. Imposing such a prohibition would also be a very delicate matter and enforcing it might well be impossible without serious disturbance of public order. On the other hand, this exception would not apply to the immediate vicinity of the place of worship, which is part of the public space and may be frequented by anybody, regardless of the presence of the place of worship.

But leaving aside these considerations, it is impossible to recommend the adoption of such a conception of public policy under current constitutional case law, as stated above, because a general ban on concealment of the face in the public space runs a serious risk of censure, which would merely strengthen the position of persons who engage in this practice.

2.4. PUBLIC SAFETY, AN ASPECT OF SUBSTANTIVE PUBLIC POLICY, PROVIDES A VERY SOLID BASIS FOR A BAN ON CONCEALMENT OF THE FACE, BUT ONLY IN PARTICULAR CIRCUMSTANCES.

Two traditional aspects of substantive public policy could obviously not provide a basis for ban: **public hygiene** in general and even **public peace**. The latter may admittedly seem relevant to the extent that concealment of the face may cause a disturbance in society and detract from the serenity of relations between individuals. But in our legal tradition, measures to enforce public peace are aimed at preventing noise pollution and other irritants whose direct, concrete effect is to disturb the tranquillity of the surrounding areas. The wearing of a mask does not have this effect, as long as it is not associated with excessive proselytising and pressure. Recourse to a purely subjective interpretation of the notion of public peace for the purpose of banning the practice of concealing the face is symptomatic of a society racked with uncertainties, which may give cause for concern. In any event it fails to satisfy the need for legal consistency.

Consequently, and in the spirit of existing arrangements (cf. I. 1.2.), only **public security** considerations, including the need to **prosecute offenders** and **combat fraud**, as cited in case law (CC., No 2007-557 DC, 15 November 2007), are likely to provide a basis for such a ban.

2.4.1. The need to reconcile the legal basis with certain legal requirements

Concealment of the face represents a potential risk to security in so far that it makes prevention of substantive disturbance of public policy and immediate repression of the acts responsible for it more difficult, notably when the offenders are caught in *flagrante delicto*.

For all that, the protection of public policy, in a way that also takes account of public security, cannot justify all restrictions on rights and freedoms that are constitutionally and conventionally guaranteed. A balance between these different requirements needs to be struck, under the supervision of the courts that exist to guarantee the constitutionality and conventionality of the legislative acts submitted to them. **Four requirements must be met.**

1/ In the first place, restrictions on rights and liberties must be justified by an actual threat to public policy or the sufficiently strong likelihood of one. There are signs of an unwillingness on the part of the administrative court to accept that a virtual or unproven risk, or indeed the "precautionary principle", might justify a prohibition (see, on the assessment of the legality of the decrees declaring a state of emergency in the light of disruption actually observed, CE, Assembly, 24 March 2006, *Rolin and Boivert*, No 286834; on aerial repeater systems for mobile phones, CE, 29 October 2003, *Commune de Saint-Cyr-L'Ecole*, No 258245: confirmation of an order for interim measures suspending a measure by the municipal police; CE, 2 July 2008, *Société française du radiotéléphone*, No

310548, in short cause: suspension of a municipal decree regulating the installation of aerial repeater systems, where the mayor was unable to invoke either his general police powers, there being no serious and acknowledged public health risk, or the precautionary principle). The Constitutional judge proved to be as much concerned with the reality as with the likelihood of the violation of public policy to be prevented. Ruling on the provisions of Article 78-2 of the Code of Criminal Procedure, which allowed judicial police officers to carry out identity controls to prevent "*any threat to public policy, particularly to the safety of life or property*", however the person in question was behaving, the Constitutional Council accepted that it was compatible with the Constitution, provided that the control was motivated by particular circumstances attesting to a risk of public policy violation (CC., No 93-323 DC of 5 August 1993, Law on identity controls and checks). At the hearing the Council said that "*the practice of widespread, discretionary identity controls would be incompatible with respect for individual freedom*". It also validated the provision allowing the prefect to forbid the wearing or transport of objects that could be used as weapons, pointing out that this power was limited to cases where circumstances prompted fears of severe public policy violation, and interpreting it as being applicable only at demonstrations and in their immediate vicinity, "*except in exceptional circumstances*" (CC. No 94-352 DC of 18 January 1995).

The European Court of Human Rights also attaches great importance to the existence or likelihood of threats to public policy (ECHR, 23 February 2010, *Ahmet Arslan v Turkey*). It is particularly concerned to make sure that intervention of the public authorities is "*necessary in a democratic society*" and "*meets a pressing social need*". Although it says it leaves a wide margin of discretion to the state in this area, the control it exercises is sometimes extremely stringent (see, for example, ECHR, 29 June 2006, *Öllinger v* Austria, No 76900/01, § 49, in which the Court weighs the interests involved most meticulously, before concluding that Article 11 has been violated on account of a ban on a counter-demonstration against a gathering of former SS officers in a cemetery on All Saints' day).

Lastly, the Court of Justice of the European Union also requires that the restrictions imposed on freedoms provided for under the treaty in the name of public policy be justified by "*the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society*" (CJEU, 27 October 1977, *Bouchereau*, No 30/77, pts 33-35, confirmed by the decree *Commission v Germany* of 21 January 2010 C-546/07).

2/ In the second place, the violation of rights and liberties by police measures must be proportional to what is needed to protect public policy, **taking account of local circumstances**. Measures should not be excessive in terms of their geographical, personal and substantive fields of application or in their effects. The Constitutional Council, for its part, makes the traditional point that it "*is up to the legislator to reconcile the exercise of constitutionally guaranteed freedoms*

with the prevention of offences against public policy and particularly against the safety of life and property, which are objectives of constitutional value" (CC, No 94-352 DC, 18 January 1995), with the law having to ensure that the different requirements are not reconciled in a way that is "manifestly unbalanced" (No 2003-467 DC, 13 March 2003, Internal Security Act). The European Court of Human Rights also seeks to determine whether interference by public authorities with conventionally protected rights and freedoms is not disproportionate to the public policy imperatives set forth in the European Convention[10]. The Court has for example asserted that the State may "*limit the freedom to manifest a religion by wearing an Islamic headscarf, for example, if the exercise of that freedom conflicts with the aim of protecting the rights and freedoms of others, public policy and public safety*" (ECHR, 13 February 2003, *Refah Partisi et al. v Turkey*, No 41340/98, § 92).

Public safety cannot therefore be relied upon as a justification for requiring everybody to have their faces uncovered at all times and in all places[11]. The geographical scope of application of the ban on deliberately concealing the face cannot therefore extend to places, such as isolated areas, where public security is not at stake. Apart from these cases, which do not appear to present any difficulty, it is not at first sight easy to identify sectors or circumstances in which the face must, imperatively be uncovered on pain of criminal punishment. The decree of 19 June 2009, which makes it a criminal offence to conceal the face in demonstrations on the public highway and has now been referred to the Conseil d'Etat, reflects these problems.

3/ In the third place, the court – and particularly the constitutional court – consistently attaches importance to the safeguards accompanying bans. The decision of 25 February 2010 on the law to reinforce the struggle against group violence and protect people providing public services is a very recent illustration: the transmission to national police, municipal police and gendarmerie services of images taken by video-monitoring systems in private areas of residential apartment blocks is a violation of the Constitution if it is not subject to the safeguards needed to protect the privacy of the persons in these places and falls outside the legal framework for video-monitoring provided by Article 10 of the law of 21 January 1995.

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[10] Moreover, it flows from Article 52 of the Charter of Fundamental Rights of the European Union, first, that maintenance of public order is among the grounds that might justify limitations on the rights and freedoms it protects (see Decision CC., No 2004-505 DC of 19 November 2004), and second, that rights protected by the Charter and the Convention have the same scope.

[11] Concealment of the face would admittedly rule out the possibility of ocular evidence, which is of value at the time an offence is committed. But that one circumstance would seem to offer insufficient grounds for a general ban in the public space.

4/ Lastly, it is necessary to be mindful of the specific features of the control exercised by the European Court of Human Rights. In addition to having its own independent interpretation of the terms of the European Convention, which may mean that it does not share the analyses of national courts, it routinely enhances its control by resorting to contextual elements that are outside the jurisdiction of the national court. In particular it may rely on an international agreement that provides special protection of a particular right or freedom, even if the state in question has not ratified it, or on a possible "European consensus" on the point put to it.

Furthermore, as shown by the *Leyla Sahin* precedent it attaches particular importance to specific aspects of each state (in terms of traditions, culture and fundamental values on which the society is based, such as secularism in Turkey, which is repeatedly called into question).

2.4.2. Scope of spatial application necessarily restricted

1/ In view of the different requirements listed above, it would seem that a regulation prohibiting the concealment of the face **throughout the public space** would be very fragile.

In the first place, this practice is not generally speaking known to have had any particularly serious effects on public security hitherto, except in the event of armed robbery, for example, when the face is concealed only for a brief period. So while possible outcomes cannot be neglected, there is currently no evidence that concealment of the face leads to disorder. A general prohibition would therefore be based on **artificial preventive considerations**, which have never been accepted as such in case law.

In the second place, it is not easy to identify the **safeguards** that might accompany a ban on the concealment of the face in the public space in order to limit the impingement on personal freedom.

In the third place, with respect to the risk of appeal to European courts, **there is no consensus on this point among member states of the Council of Europe at the present time**, as has been stated above (cf. 1.2.). Moreover, France presents no special characteristics that would justify a more flexible control on the part of the Court.

Lastly, there is the question of possible exceptions to a ban based on public security. Given the importance and restrictive character of public security, such exceptions could only be justified by compelling considerations relating to personal health or professional safety. If the prohibition applied to the whole of the public space, there would be a danger of excessive impingement on freedoms, notably on the freedom of movement of those whose faces were legitimately covered. The Conseil d'Etat consequently believes that, while public security might constitute one of the grounds for a ban, it cannot be used to justify a measure applying to the whole of the public space.

2/ Having ruled out such a broad prohibition, the Conseil d'Etat considered the possibility of relying on the legal framework of **video monitoring** (Articles 10 and 10-1 of the law of 21 January 1995 and their implementing regulations[12]) to institute a ban on concealing the face in areas covered by CCTV cameras.

Indeed CCTV cameras may only be installed if an authorisation has been granted by the prefecture and only in areas where there is a threat to public security. If these systems are to be effective, it must be possible for the authorities implementing them and the officers using them to identify the individuals they show. Technological progress already made in this area (the improvement in the quality of the videos), as well as developments in prospect (the incorporation of biometrics in these devices), make the problem particularly serious. In this instance, the deliberate concealment of the face could be interpreted as a measure intended to thwart the video-monitoring systems. Given that the constitutionality of this legislation has been confirmed (CC., No 94-352 DC, 18 January 1995), we wonder whether it might not extend to a ban on concealing the face in all areas covered by CCTV cameras, which, although it would not cover the entire public space, would provide for a very broad prohibition.

However this approach raises serious problems:

- In the first place, the fact that a practice reduces the effectiveness of a mere instrument of public security policy does not constitute satisfactory grounds for a general ban on it. The scope of the ban would widen as the legal framework of video-monitoring became more flexible (in this connection, see the bill on internal security currently being examined by Parliament) and the competent authorities, whether public or private, decided (or found themselves obliged) to set up new cameras.

- In the second place, video-monitoring arrangements and restrictions on concealing the face are completely different in nature, particularly in terms of their effects, which means that their two fields of application could never coincide. Moreover if the area to which the ban on concealment of the face applied were made to correspond to that covered by video-monitoring systems, which are being deployed more and more extensively, questions might arise about the need for and proportionality of such a ban.

- In the third place, if citizens are notified of the areas monitored in the manner described in Article 13-1 of Decree No 96-926 of 17 October 1996 on video monitoring, the information provided would not be sufficiently precise to ensure that they clearly understood the extent of the obligation to uncover their faces.

12 See *inter alia* Articles 3 and 4 of decree No 97-46 of 15 January 1997 on the surveillance and guarding obligations incumbent on certain owners, operators or users of professional or commercial properties and Article 1 of decree No 97-47 of 15 January 1997 on the surveillance obligation incumbent on certain owners or operators of garages or car parks.

- Lastly, the result would be a kind of **administrative or penal pointillism**, with uncertain consequences. If the large number of areas of prohibition did not induce people who concealed their faces to relinquish the practice of their own accord, it is quite likely that the law would be practically unenforceable on the ground. There is a danger that the existence and extent of the area placed under surveillance would be the subject of serious dispute: it would be difficult even for the officers enforcing the law or regulation to control movement between "secure" zones and others.

It should also be noted that there may be a threat to public security in certain crowded places (markets, busy pavements, some public transport, etc.) where there is no video-monitoring, either because the competent authority has decided not to install CCTV cameras in them, or because they do not fall within the scope of application of Article 10 of the law of 21 January 1995. The authority could of course install cameras in such places if it so wished, provided that it made a declaration to the *Commission nationale de l'informatique et des libertés* and fulfilled the requirements of Article 226-1 of the Penal Code. But in any event it is legally unsound to have the scope of a prohibition depend on somebody's spontaneous decision to install a CCTV camera, especially when the measure might result in penal sanctions.

3/ The Conseil d'Etat has concluded that public security considerations could only be used to authorise a ban on concealing the face in places where a risk to public policy had been assessed at a sufficiently high level. Responsibility for such an assessment should fall to the prefecture, which would be required to take due account of the responsibilities of municipal authorities. The prefect is best placed to assess the risks to public security in places outside the municipal limits, ensure that the conditions governing the ban are consistent and determine the effects of such bans using the appropriate state agencies placed under its authority.

On the other hand, the Conseil d'Etat has ruled out a general, uniform ban, founded on a combination of the different bases we have examined. Indeed any prohibition must have its own specific justification, which means that it is not possible to rely on bases that are supposedly complementary or partly substitutable.

III- IT IS NEVERTHELESS POSSIBLE TO ENVISAGE A NUMBER OF WAYS OF HARMONISING AND, IF NECESSARY, EXTENDING THE SCOPE OF THE BAN ON CONCEALING THE FACE, WHATEVER FORM IT TAKES.

The Conseil d'Etat has considered a number of measures relating to public security or the functioning of certain services that may provide grounds for partial bans on concealing the face. If we take them as the basis for our approach, we must nevertheless ensure, in light of the conditions referred to above, that the combination of these prohibitions does not amount to something bordering on a blanket prohibition, either in terms of the effects of the legal or regulatory provisions that might be adopted or of the way the police powers of the competent authorities are exercised.

1. A LAW MIGHT STIPULATE THAT THE FACE BE UNCOVERED IN CERTAIN PLACES OPEN TO THE PUBLIC IF SUCH A STEP IS WARRANTED BY CIRCUMSTANCES OR THE NATURE OF THE PLACES.

All things considered, the Conseil d'Etat is of the opinion – assuming that the government decides to resort to legislation – that the broadest, most effective and most legally certain approach would consist in adopting a twofold provision.

1/ The first type of prohibition would rely on the need for public security as analysed above.

On the one hand, the police authorities, in exercising their general police duties, would be expressly empowered to require any person to keep his/her face uncovered, in given circumstances, in order to ensure that there is no threat to public policy, and particularly to life and property. These provisions would apply both to the prefect, in the exercise of powers granted to him under article L. 2215-1 of the Local and Regional Authorities Code (notably that of prescribing police action whose scope of application goes beyond the limits of a municipality), and to the mayor, in the exercise of powers granted to him under article L. 2212-2 of the same code. Without adding anything new, such a measure would provide a solid, coherent basis for a ban. However, it should be noted that the mayors' exercise of their general police powers could entail different assessments of similar situations.

On the other hand, given that general police powers are not intended to be exercised in all places open to the public, the text **might make it possible for the prefect, exercising special police powers**, to prohibit concealment of the face in places or circumstances in which he thinks it poses a threat, thus extending the general powers he has under the terms of Article L. 2215-1 of the Local and Regional Authorities Code. These special police powers would supplement his general police prerogatives, and would be acknowledged by the municipal police authorities as a matter of course. The measures would be intended to apply to private places that posed a particular threat to security, such as shops and other establishments (jewellers, banks, etc.) or events where the threat was particularly high (sporting events, international conferences, etc.).

2/ A second possible approach might rely on the need to be able to recognize people in certain places as part of the fight against fraud, which has been granted constitutional status. Such recognition is required *inter alia* for the provision of certain public services and the implementation of regulations involving restrictions or distinctions based on identity or age.

It is therefore necessary to require people to uncover their faces:

1. when entry to or circulation in certain places calls for a check on identity and age, given the nature of the place or the conditions that must be fulfilled for the sound operation of public services. In these places, which shall be defined by legislation or by regulation, as appropriate, the obligation to reveal the face would apply at all times. Such places would obviously include courtrooms, polling stations, town halls for marriage ceremonies and formalities relating to public records, areas outside schools where children are collected at the end of the day, facilities where medical or hospital services are provided, and places where academic or competitive examinations are held, including university precincts.

2. when the provision of goods and services requires individuals to identify themselves and therefore reveal their faces (when purchasing products that may not be sold to people below a certain age or when using a mode of payment involving proof of identity).

A measure of this kind therefore requires the public authorities to engage in a wider review of possible situations in which it would seem appropriate to introduce a legal obligation to uncover the face, with the law referring to other texts for the definition of the places and situations to which it would apply.

This legislation will thus provide a frame of reference, laid down by parliament itself, which will bring clear principles of behaviour to the attention of the many people who run public and private establishments frequented by members of the public (cinemas, nightclubs, bars, tobacconists, etc.), whereas the present situation is governed either by a small number of disconnected regulations, or by standard practices or instructions (cf. I).

On the other hand, it does not seem legally necessary to extend this legal basis to work situations on professional premises, given that the employer already has the legal means to ban concealment of the face if he feels it necessary for his company or establishment to function properly.

3/ The scope of the dispensations will differ depending on the basis of the prohibition.

In all cases there will be a need for carefully defined exceptions, arising from such pressing considerations as health and personal safety (such as the wearing of a mask in the event of an epidemic, or the wearing of a crash helmet), which will be defined by general regulatory provisions.

Moreover, the police orders issued by the prefecture or the town hall could also, in certain circumstances, make special provision for other contingencies, such as cultural events or festivals, particularly traditional local ones.

2. THOSE WHO FORCE OR INCITE OTHERS TO CONCEAL THEIR FACES COULD BE LIABLE TO CRIMINAL SANCTIONS

The prohibition of concealment of the face should be backed by a system of sanctions. These sanctions should be harsher for a person convicted of obliging somebody, perhaps by use of force, to conceal his/her face. Moreover, in the case of the latter, there would be no reason to make distinctions according to the place where the face was concealed, as the offence would be the use of threats, violence or force or the abuse of power of authority rather than the act of concealment.

The sanctions envisaged, like all criminal sanctions, would have to comply with the principle of the legality of indictable offences and penalties (there would therefore have to be a sufficiently clear and precise definition of the infringements), as well as the principles of necessity, proportionality and the individual nature of penalties.

2.1 NON-COMPLIANCE WITH THE BAN ON CONCEALING THE FACE COULD MAKE THE OFFENDER LIABLE TO A NEW TYPE OF PENALTY.

Given the nature of the ban and the objectives of the legislator, the Conseil d'Etat rejects the idea of calling this infringement an indictable offence. In light of the principles of proportionality and necessity, such a description would certainly be excessive and would not be in keeping with the requirement that the ban be accompanied by instruction for the persons it is imposed on.

If it is therefore necessary to establish a **summary offence**, the question of its nature arises. Two possible approaches may be envisaged, the second of which would appear to be preferable:

- The first consists in establishing a standard summary offence (punishable by a fine and, if appropriate, an additional penalty such as a requirement to attend citizenship classes). The amount of the fine imposed might be determined by the regulatory power in light of the extent of the need for identification and the level of the threat posed to security and should not exceed the limits established by the law for summary offences. It must however be emphasized that, despite its apparent simplicity, a penalty of this kind would not necessarily be appropriate to the nature of the infringement or the purpose it is intended to serve. Moreover it would stigmatise some of the people concerned in that the amount would vary with income levels – very high for some and almost negligible for others – and would have only a limited instructive dimension.

- The second would entail the establishment of a new category of summary penalty, which **would involve an injunction to talk with a representative of an accredited mediation body or to participate in the work of this body for a limited period of time**. In other words, there would be an injunction to engage in social mediation. Different mediating bodies would be involved depending on the nature of the offence: associations active in the defence of women's rights (in the case of those penalised for wearing the full veil) or in the prevention of juvenile delinquency (in the case of minors who have concealed their faces for criminal purposes). This sanction would replace or supplement another, which would be determined by the court according to the particular circumstances of the case.

Such a sanction would comply with the principle of proportionality and would also meet the real need to ensure that the specific sanction was appropriate to the offence, given the motive, the context and any coercion that may have been brought to bear. The offender would have to pay a summary fine only if he/she failed to obey the injunction. The amount would increase in the event of a further offence.

2.2. Forcing others to conceal their faces might be punished more severely.

The principle of proportionality would require the sanction to be more severe where minors were involved or in the event of a repeated offence.

The Conseil d'Etat thought it necessary to take account of the possibility that somebody might be coerced into concealing his/her face outside the family circle and to make any such coercion a specific offence. It should be noted in this connection that many specific types of coercion or incitement, in addition to those covered by the general provisions referred to previously, already constitute indictable offences. They include sexual harassment (Article 222-33 of the Penal Code), inciting an armed, unlawful assembly (Article 431-6), Inciting another person to commit suicide (Article 223-13), propaganda or advertising in favour of

products, articles or methods recommended as means to procure one's death (Article 223-14) and inciting to obstruction (Article 433-10).

Whatever the scope of the prohibition of concealment of the face, and even in the absence of such a prohibition, coercing or trying to coerce a person or category of persons into concealing the face in the public space on the grounds that they belong to a category of persons defined *inter alia* by gender, lifestyle, or actual or supposed religious, political or philosophical convictions, whether by threat, violence, force, abuse of power or abuse of authority, would be made a specific punishable offence.

With this new offence it would be possible to impose sanctions on persons, notably those in a position of parental authority over minors, who force family members and others to conceal their faces, but are not themselves directly affected by the penalisation of the practice.

3. IMPLEMENTATION RULES

Recourse to the law would be essential for three reasons:

- First, the establishment of an alternative category of alternative sanctions applicable to summary offences is governed by the law, even if the constitutive parts of a particular summary offence need to be fixed by decree (cf. for example, the decision by the Constitutional Council CC, No 2009-590 DC of 22 October 2009, on the law on criminal protection of literary and artistic property on the Internet).

- On the other hand, supposing that the offence merely calls for the imposition of a summary penalty, which is by nature a regulatory matter, we might wonder whether a ban that is so wide-ranging and covers so many different ways of deliberately concealing the face might not interfere with the rules concerning the fundamental guarantees granted to citizens for the exercise of their civil liberties and, to a lesser extent, the right to property and freedom of trade and industry, within the meaning of Article 34 of the Constitution. Indeed, the Constitutional Council considers that, pursuant to this article "*it is for the legislature to reconcile as necessary the respect for freedom and the preservation of public policy, without which it is not possible to exercise freedom*" (CC., No 85-187 DC of 25 January 1985, Cons. 3; CC., No 2003-467 DC of 13 March 2003).

- Lastly the sanction imposed upon those who force others to conceal their faces is also governed by law given that the offence has been defined as an indictable one.

It follows that it is for the law to lay down the rule governing the ban, and the categories of exceptions thereto, and to establish, where appropriate, a particular category of penalties, a system of alternative penalties and penalties

applicable to “instigators”. It is then up to the regulatory authority to give a precise definition of the type of infringement and the corresponding summary penalty.

Moreover, given the nature of the ban – whether it is based on public security or the need for identification – and the instructional work that must go with it, the law introducing the ban should provide for a staggering of the entry into force, from three to six months, for example.

The prior adoption of a solemn parliamentary resolution, particularly if it were widely disseminated, would serve to prepare the ground for the ban and ensure that it was generally understood.

Lastly, as regards their application on French territory, the provisions set forth below would be intended to apply automatically to overseas departments and to Mayotte.

The Conseil d’Etat considered the legality of making the provisions applicable to French Polynesia and New Caledonia, given the distribution of responsibilities between the state and the local authorities. It concluded that the cross-cutting rules, which, like the ones proposed, impinge upon guarantees of public freedom, safety and order and provide for general penal sanctions, are by their nature the responsibility of the state.

Moreover, for greater safety in law, a specific extension measure might be enacted for French Polynesia, New Caledonia, Wallis and Futuna, where legal provisions cannot be attached to a sovereignty law.

■ ■ ■

As requested in the mission letter from the Prime Minister (Annex 1), the Conseil d’Etat has put forward wording for legislative provisions corresponding to the legal solutions that might be envisaged (Annex 2), with a view to clarifying the foregoing considerations. It would nevertheless point out that, whatever substantive precautions it may have wished to take, it appears to be impossible to avoid all practical problems of application relating to conditions of inspection and probable reactions. It seemed that, at the very least, a clear and generally understood definition of the legal obligations and responsibilities incumbent upon everybody concerned, together with an indication of practical precautions to

be taken by the authorities responsible for these inspections when they are implemented, would serve to reduce these risks.

ANNEXES

ANNEX 1: MISSION LETTER (TRANSLATION)

Mr President,

The wearing of the burqa, niqab and any other kind of full veil has been the subject of public debate for several months.

This practice is at odds with the Republican conception of life in society and the question arises whether there are possible legal grounds for preventing social practices of this kind in a democratic society.

The National Assembly fact-finding mission on the practice of wearing the full veil on national territory, chaired by Mr André Gérin, has been engaged in a process of reflection and discussion of a very high quality based on a great many instructive hearings. Its report enables us to grasp the full extent of the phenomenon and consider its significance, while appreciating the legal complexity of the question.

The government is convinced that the full veil, a sign of communitarist withdrawal, is not acceptable in the French Republic, because it is contrary to the principle of equality of men and women and to our conception of human dignity. This idea might be affirmed through a parliamentary resolution but the government does believe that such a step would not be possible without involving the legislature.

Given the nature and potential repercussions of the debate, it would be as well to achieve a republican consensus on this legal framework. Furthermore, it is essential that the review be conducted in a way that precludes any possible interpretation that would offend our Moslem compatriots.

Various ways and means of incorporating the condemnation in principle of the full veil into substantive law are currently being put forward. These proposals are contained in the recommendations of the report by the parliamentary mission and in a bill that might soon be put to the National Assembly. The National Consultative Commission on Human Rights also gave its view on the matter on 21 January.

I would like the Conseil d'Etat to help the government find a way of giving legal form to the concerns expressed by the Nation's representatives and submit a bill on this matter to parliament as quickly as possible.

You should therefore examine legal grounds for a ban on the full veil, which should be as wide and effective as possible.

I would like you to send me your conclusions before the end of March.

Yours truly,

Signed : François Fillon

ANNEX 2: POSSIBLE LEGAL SOLUTIONS

1/ Provisions on conditions for a ban

"All persons must keep their faces uncovered when required to do so by an order issued by a state representative applying to any open or public space defined therein or, where appropriate, by an order issued by the mayor in accordance with the powers invested in him by Article L. 2212-2 of the Local and Regional Authorities Code, in order to prevent, in light of given circumstances, any threat to public policy or the safety of life or property."

"All persons must uncover their faces:

1°) to enter and circulate in places, defined by legal or regulatory provisions, where checks on age and identity must be made, in accordance *inter alia* of the demands of a public service;

2°) to obtain goods and services, receipt of which requires checks of the same kind, pursuant to legislative or regulatory requirements."

"Derogations from the preceding stipulations may be provided for reasons of heath or personal safety under conditions laid down by decree in the Conseil d'Etat."

"Penalties incurred for violation of these provisions may include the penalty provided for in Article 131-15-2 of the Penal Code."

"The preceding provisions are applicable throughout the territory of the Republic."

2/ Provisions amending the Penal Code

The Penal Code is modified as follows:

1° Article 131-5-1 is followed by a new Article 131-5-2 drafted as follows:

"Article 131-5-2 - Where an offence is punishable by a prison sentence, the court may, instead of or at the same time as imprisonment, enjoin the convicted person to submit to social mediation, if the law so provides. The same applies where the primary punishment for an offence is only a fine.

The injunction to submit to social mediation requires the convicted person to participate in the work of an accredited mediation body for a period not exceeding six months and in accordance with the terms and conditions fixed by

the court. The conditions governing accreditation of mediation bodies are fixed by a decree of the Conseil d'Etat."

When it enjoins the convicted person to submit to social mediation, the court fixes the maximum period of imprisonment, which may not exceed X months, or the maximum amount of the fine, which may not exceed X euros, which the judge responsible for enforcing sentences may order to be imposed in part or in its entirety, subject to the conditions laid down in Article 712-6 of the Code of Criminal Procedure, if the convicted person does not observe the fixed obligation. If the offence is punished only by a fine, the court only fixes the amount of the fine that may be imposed, which may not exceed X euros. The judge informs the convicted person of it after delivery of the decision.

2° Article 131-15-1 is followed by a new Article 131-15-2 drafted as follows:

"Article 131-15-2 - The regulation on the punishment of the offence may provide that the court may, instead of or as well as ordering a fine, enjoin the convicted person to submit to social mediation in accordance with the terms and conditions set forth in Article 131-5-2.

In that case the court fixes the maximum amount of the fine, which may not exceed X euros, which the judge responsible for enforcing sentences may order to be imposed in part or in its entirety, subject to the conditions laid down in Article 712-6 of the Code of Criminal Procedure, if the convicted person does not observe the reparation obligation."

3° A section III (3) is added to Chapter II of section II of book II, as follows:

"Section III (3): Instigating others to conceal their faces in public

Article 222-33-4 - The act of forcing others, by threat, violence or force or by abusing power or authority, to conceal their faces in public on the grounds of their gender, sexual orientation, age, family situation, membership or non-membership, actual or supposed, of an ethnic group, religious, philosophical or political convictions, or physical appearance is punishable by X months imprisonment and a fine of X euros."

When the act is committed against a minor, the penalties provided in the previous paragraph are X months imprisonment and a fine of X euros.

Persons guilty of the offences referred to in this Article also incur the further penalty of being enjoined to submit to social mediation, pursuant to Article 131-5-2. "