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Representation of Muslim Women in French Jurisprudence: Critical Discourse Analysis

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"Here's to strong women. May we know them. May we be them. May we raise them." – Anonymous

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Abstract

The issues of secularism and egalitarianism are at odds with each other in today's French society. Arguably, minorities, including female Muslim immigrants encounter inequality and bigotry – everywhere from public spaces to employment opportunities – particularly social, economic, and religious discrimination. This has disproportionately affected Muslim women who wear religious attire, or the attire which is considered has religious character, such as headscarf or burkini, and has led to a series of legal disputes in the context of secular laws and the French *laïcité.*

The research investigated the discourses within French jurisprudence by looking at the decisions of two national Supreme Courts (*Cour de Cassation and Conseil d'État*) concerning Muslim women. To dissect the problem more closely, the dissertation features two case studies which are commonly called the Baby-Loup case (ruled against a headscarf-wearing Muslim worker) and the burkini case (ruled in favour of Muslim women and lifting the burkini ban).

The main theoretical framework utilised in this study is CDA, with secondary analysis using the social constructionist theory. This is fittingly appropriate within a post-structural framework because of its sensitivity to the discursive processes of different social practices, such as inequalities, religious and gender based [in/direct] discrimination, injustice, and marginalization. Applying CDA to the legal sphere renders valuable insight into legal texts and decisions through sociological lens, taking into consideration that the thesis lies within the sociology of law and representation, overlapping with the dimensions of sociology of gender, sociology of religion, and sociological jurisprudence. The courts formulate their decisions inevitably result in social and legal consequences, wherefore, can lead to an understanding of the macro-discourse social structures, such as power. The analysis supports the conclusion that the jurisprudences raise issues of socio-political nature about the power of dominant ideology present within law institutions, and thus how they influence the representation of Muslim women in France. Despite divergent judgements, the CDA reveals that legal discourses support the notion on unequal treatment of them as non-preferred citizens – a burden within a majoritarian, liberal secular society – thus deepening their vulnerability and exacerbating overall inequality.

Keywords: Muslim women, French jurisprudence, CDA, legal text, Court of Cassation, State Council

Résumé

Les questions du laïcisme et de l'égalitarisme se trouvent être en contradiction dans la société française d'aujourd'hui. On pourrait légitimement avancer que, les minorités, et notamment les immigrées musulmanes, peuvent y être confrontées à des discriminations religieuses, sociales et économiques. Cet état de fait a affecté de façon démesurée les femmes musulmanes qui portent des attributs religieux ou des vêtements à caractère religieux, tels que le foulard ou le burkini, donnant ainsi lieu à une série de litiges juridiques dans le contexte des lois laïques et de la laïcité française.

Cette recherche porte sur les discours de la jurisprudence française à travers l'analyse de décisions juridiques s'appliquant à des femmes musulmanes devant les cours suprêmes nationales (Cour de Cassation et Conseil d'État). Afin de disséquer plus finement le problème, la thèse comporte deux études de cas, communément appelés l'affaire Baby-Loup (décision rendue contre une travailleuse musulmane portant le foulard) et l'affaire du burkini (décision rendue en faveur de femmes musulmanes, et ayant donné lieu à la levée de l'interdiction du burkini).

Cette étude s'inscrit principalement dans le cadre théorique de l'ACD, avec une analyse secondaire reposant sur la théorie du constructionnisme social. Dans un cadre post-structurel, une telle approche est parfaitement adaptée en raison de l'attention qu'elle porte aux processus discursifs de différentes pratiques sociales, telles que l'inégalité, la discrimination religieuse et/ou la discrimination à l'égard des femmes [directe ou indirecte], l'injustice et la marginalisation. L'application de l'ACD à la sphère juridique offre des informations précieuses sur les textes et les décisions juridiques analysés sous un angle sociologique, compte tenu du fait que la présente thèse traite de sociologie du droit et de sociologie des représentations, recoupant les dimensions de la sociologie du genre, de la sociologie des religions et de l'analyse sociologique de jurisprudence. Les cours formulent des décisions qui auront inévitablement des conséquences sociales et juridiques, ce qui peuvent, par conséquent, conduire à une compréhension des structures sociales du macro-discours, comme le pouvoir par exemple. L'analyse corrobore la conclusion selon laquelle les jurisprudences soulèvent des questions de nature sociopolitique sur le pouvoir de l'idéologie dominante présente au sein des institutions juridiques et sur la façon dont elles influencent la représentation des musulmanes en France. En dépit de jugements divergents, l'ACD révèle que les discours juridiques soutiennent également l'idée d'une inégalité de traitement envers elles, en tant que citoyennes « non préférées », constituant, de fait, un fardeau pour une société majoritairement libérale et laïque, renforçant ainsi leur vulnérabilité et exacerbant l'inégalité globale.

Mots clés : femmes musulmanes, jurisprudence française, ACD, textes juridiques, Cour de cassation, Conseil d'État.

Acronyms and Abbreviations

ADDH – *Association de Défense des Droits de l'Homme* (French Association for the Defence of Human Rights)
AFP – Agence France-Press
CA – Court of Appeal (*Cour d'appel*)
CC – Court of Cassation (*Cour de Cassation*)
CCIF – *Collectif Contre l'Islamophobie en France* (Association fighting against Islamophobia in France)
CDA – Critical Discourse Analysis (ACD – *L'Analyse Critique du Discours*)
CLDA – Critical Legal Discourse Analysis (ACJD – *L'Analyse Critique Juridique du Discours*).
CNCDH – *Commission Nationale Consultative des Droits de l'Homme* (National Advisory Commission on Human Rights)
CJEU – Court of Justice of the European Union (CJUE – *Cour de Justice de l'Union Européenne*)
ECHR – European Court of Human Rights (CEDH – *Cour Européenne des Droits de l'Homme*)
EU – European Union (UE – *l'Union Européenne*)
GTM – Grounded Theory Method
ICCPR – International Covenant on Civil and Political Rights
ICESCR – International Covenant on Economic, Social and Cultural Rights
INED – *Institut National d'Études Démographiques* (The French Institute for Demographic Studies is a French research institute specialized in demography and population studies in general)
INSEE – *Institut National de la Statistique et des Études Économiques* (French National Institut for Statistic and Economic Studies)
HALDE – *Haute Autorité de Lutte contre les Discriminations et pour l'Égalité* (High Authority against Discrimination and for Equality)
HCI – *Haut Conseil à l'Integration* (French High Council for Integration)
LDH – *Ligue des Droits de l'Homme* (League of Human Rights)
LégiFrance – *Le Service Public de la Diffusion du Droit* (The Public Service of Law Distribution)
OECD – Organisation for Economic Cooperation and Development
OHCHR – Office of the High Commissioner for Human Rights – United Nations) – a UN body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties
OIC – Organisation of Islamic Cooperation
SC – State Council (*Conseil d'État*)
UMP – *L'Union pour un Mouvement Populaire* (Union for a Popular Movement is a French political party ranked right and center right, created in 2002 and which then become Republicans after a modification of its statutes in 2015)
UN – United Nations (*Les Nations Unies*)

Operational Definition of Several Terms and Concepts

Asylum Seeker
a person who is at risk of being persecuted in his/her home land/country, often for political reasons or because of war, travels to another country and asks for asylum, hoping that the government will protect them and allow them to live there and is waiting for a decision on that claim. The right to claim asylum is protected under international law, and governments are obliged to provide protection to people who meet the criteria for asylum. Granting 'asylum' means giving someone permission to remain in another country because of that risk of persecution or war.

Awrat
derived from Arabic language 'aar', which means shame, disgrace, ignominy. In the context of Islamic law, awrat is understood to be a particular part of the body that cannot be seen, except by certain people (mahram) who are allowed to do so. It also denotes the intimate parts of the body, for both men and women, which must be covered with clothing when in public and also during prayer. However, covering in prayer is different from the basis for covering in front of people/public. The awrat of a man refers to the part of the body between the navel and the knees. Meanwhile the exact definition of awrat of a woman varies between different schools of Islamic thought, but generally, when in public most part of women's body are awrat except face, hands and feet (including the ankles).

Gender
behaviour differences between women and men that are socially constructed – that is, created by men and women themselves; therefore they are matter of culture.

Hadith
denotes the words, actions, and the silent approval (it could also be speeches, reports, accounts, narratives) of prophet Muhammad saw.

Ijtihad
a thorough exertion of making a legal decision by having an independent interpretation from two legal sources, Qur'an and Hadith. It requires expertise in the Arabic language, theology, revealed texts, and principles of jurisprudence (usul al-fiqh). An Islamic scholar who is qualified to perform ijtihad is called a mujtahid.

Immigrant
a person who moves from one country from another and intends to settle in a new country.

Islam
a monotheistic religion with an estimated 1.6 billion observers/adherents with its prophet Muhammad saw, recited guidance directly from Allah (the Arabic word for God) that completed the divine instructions first given to other prophets recognized in Judaism and Christianity.

Islamic
an entity or item related to the religion (Islam).

Islamist
often correlated with negative impression, refers to groups and individuals who support a formal political role for Islam through the implementation of Islamic religious law by the State, political action through a religious party, or the creation of a religious system of governance. It differs in their theological programs and political priorities. It also allows nonviolent or violent tactics in pursuit of local, national, or transnational agendas, that to some extent some Muslims and non-Muslims may regard as extreme. However, some would argue that it is an orientalist term that enables selective defamation.

Justice System
legally established institutions that oversee the interpretation and enforcement of the law in a particular country.

Laïcité
French concept of secularism, forbids religious involvement in State affairs and policies, and vice versa. It also prohibits the wearing of ostentatious religious symbols in public institutions for public officials, including students in primary and secondary schools. Nowadays, the banning extends to several private institutions due to some jurisprudences which strengthen the inhibition.

Litigation
the process of making or defending a claim in a court of law.

Madhhab
is a school of thought within fiqh (Islamic jurisprudence). Prominent Islamic scholars around the world recognized four Sunni schools of thought (Hanafi, Maliki, Shafi'i and Hanbali), two Shia schools (Ja'fari and Zaidi), the Ibadi school and the Zahiri school.

Migrant
a person who moves from one place to another within a country or those who come to another country to work or study for a short period then return home.

Mufassir
an author of a tafsir (exegesis of the Qur'an), attempts to provide elucidation, explanation, interpretation, or commentary for clear understanding of the Qur'an and deals with the issues of linguistics, jurisprudence, and theology.

Muslims
the adherents of Islam which include a variety of distinct sects and spans ethnic, social and culture, linguistic, and geographic boundaries.

Qur'an
the holy book on which the religion of Islam is based, consists of 114 chapters (surah) and 6666 verses (ayath).

Refugee
a person who has received a positive decision on his or her asylum claim may be given refugee status as per criteria of Refugee Convention and Laws, such as the European Convention on Human Rights.

Sex
two core divisions of humans and most other creatures (living things) based on their reproductive functions (male and female).

Usul al-fiqh
methodological principles of Islamic jurisprudence, which elaborating and interpreting Qur'an and hadith from the standpoint of linguistics and rhetoric. The classical theory of Sunni jurisprudence recognizes two other sources of law: juristic consensus (ijmaʿ) and analogical reasoning (qiyas), and finally results in ijtihad from mujtahid. Importantly, Sunni jurisprudence also emphasises on methods for establishing authenticity of hadith, as well as, for determining when the legal force of a scriptural passage is abrogated by a passage revealed at a later date. Meanwhile, principally, the theory of Shia jurisprudence parallels that of Sunni schools, albeit with several differences, for instance, recognition of reason/logic (ʿaql), as an alternative of qiyas, and moreover, extension of the notions of hadith and sunnah in order to include traditions of the imams.

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Chapter 1. Introduction: Perceptions, Realities, and Challenges

The representation of Muslim women today in Europe (including in France) cannot be separated from existing stereotypes. These include being passive, oppressed, low educated/low income, narrow minded, and dependant (especially to their patrilineal relationship). Because of this, Muslim women are often discriminated against and undervalued. This is exacerbated by several complex contextual factors. One of these factors is that a high percentage of refugees and asylum seekers who are Muslim. Historically, French Muslim women came a long time ago as immigrants, refugees or asylum seekers who emigrated from their home countries due to labour shortages, civil strife, conflict or Western invasion and colonialism (Bowen, 2010; 2006; Heckman, 2005; Fetzer, 2004). Currently, the number of immigrants/migrants has been increasing, and they generally choose to settle in France, primarily for economic reasons, with the aim of improving their financial and personal circumstances. Their choices can also be extended to cover academic or professional motivations. They usually value the socio-political and civil rights they acquire and recognise the quality of education system, health system and infrastructures in host countries when compared to those in their motherlands. In a research study conducted by OECD in 2012, immigrants account for 10% of EU (European Union) total population (52 million) – of which 33.5 million come from non-EU countries (OECD, 2015). France is included in the top three countries with the largest number of immigrants, after Germany and the United Kingdom (OECD, 2015).

Social Impact of Neoliberalism

Thus, in order to understand contemporary immigration and migration, one should also consider the concept of neoliberalism. The global movement towards privatization, foreign direct investment and the rise of economic austerity measures have contributed towards the contemporary global (im)migration demographic. According to Stasiluis &

Bakan (2005; 1997), in the context of neoliberal socio-political and socio-economic policies, the topic of (im)migration is paramount because it deputizes "an incendiary mix of economic hyper-liberalism, dedicated to the enthronement of free market solutions, reduced social spending, and social neo-conservatism, with its emphasis on moral regulative and punitive, disciplinary policies". Moreover, neoliberalism also becomes pertinent for considering the construction of citizenship, including the subjectivities of individuals (Stasiluis & Bakan, 2005; 1997). It becomes the case that everyone is assessed according to their 'value' to the global economy and in this sense everyone becomes an entrepreneur of themselves (Foucault, 2004). As a consequence, one could argue that to some extent, neoliberalism contributes as well to the re-formatting of social segregation, discrimination and marginalisation. This phenomenon in fact prompted the EU and its member countries, including France, to institute policies aimed at maintaining social integration, managing cultural diversity and promoting religious tolerance (Azmeh & Fokas, 2007; Gallis, 2005).

Hostile Social Political Context

Currently, the existence of multicultural and multifaith societies in France has brought social, cultural, economic and political issues to the fore. Specifically, the adoption of liberal secular values by the immigrants has often produced disagreements and tensions. The conflict, explicitly or implicitly, between 'native French' and 'Muslims foreigners' becomes wider and more irrational, especially after the emergence of fundamentalism using religion as a vizard. This is further intensified by incidents of recent terrorism in the name of Islam (and Muslims), carried out particularly in France. This includes attacks in Toulouse and Montauban in 2012; the Charlie Hebdo attack in 2015 (the Charlie Hebdo attack came after the newspaper published a series of satirical cartoons of Prophet Muhammad, including nude caricatures); the Normandy Church attack in 2016; a cargo truck driven to a crowd at the Bastille day in Nice in 2016; shooting at Champs-Élysées in 2017; a mass shooting in

the music concert in Bataclan stadium in 2017; and a recent shooting spree and hostage siege in March 2018 by a gunman claiming allegiance to the Islamic State group.

Moreover, such disputes or hostilities seem to be triggered primarily by those who have a particular political agenda, yet they are also reflected at wider social and cultural levels. Additionally, religious and cultural backgrounds are the prime factors which trigger the conflicts and violence between individuals or groups (Poole, 2011; Poynting & Mason, 2007). The position of women within Islam, gender inequality, oppression and violence are issues of interest associated with Muslim women in immigrant communities (or who have immigrant background) in France. Often, topics related to Muslim women also become a part of popular debates within the general society. Extremism, social issues, cultural differences, the 'unacceptable' behaviour of some immigrants or refugees – and sometimes the absurdity of some attitudes and actions – affect the opinions the host community may have about minorities (Koning, 2016; Korteweg & Yurdakul, 2014; Poole, 2011; Bowen, 2010; 2006; Poynting & Mason, 2007).

Religious Context of Islam

Islam and the status of Muslim women in Middle East, Africa, Asia, and Europe might be different in terms of interpretation and implementation, as they are heavily influenced by the values of culture and mores that have existed for a long time in different contexts. Therefore, the situation and rights of women vary across Muslim countries (or countries with predominantly Muslim populations) for political, legal, social and cultural systems are not unified. The *Qur'an* and the *Hadith* are the two fundamental sources of Islam, and in order to comprehensively understand these two principal sources, it is insufficient to just read them directly from a translation. It requires interpretations and more detailed explanations from Islamic scholars which require expertise in the Arabic language, theology, revealed texts, and principles of jurisprudence (*usul al-fiqh*), or commonly called

as *ijtihad*. These interpretations and explanations have always been developed considering various interactions with specific contexts, times, places, and situations which then produced different *ijtihad*. Consequently, Islam, which began in Mecca and Medina, has spread globally through a process of indigenization as well as acculturation with different approaches and interpretations.

Religion, status, and identity are issues of relevance and pride to some Muslim women, yet to some extent, they may also be symbols of inequality and backwardness to others. The latter is hugely misrepresented as a homogeneous entity in the Western image (Mardiasih, 2019; Affiah, 2017; Shihab, 2012; Choudhury, 2009; Saadallah, 2004; Badran, 2002; Yamani, 1996). However, it is not just westerners who see Islam as a homogenous group. There also exists groups of Muslim scholars or even 'regular' (non-scholars) Muslims who believe that Islam (and Muslims) are a monolithic entity, like a nation or a State. As a result, the imprecision how some people or institutions demonstrate its (mis)representations of Islam, and the associated crisis of identity amongst Muslim women, has an unfavourable impact on society at large. Indeed, it is important to note that in reality, the historical journey of Islam per se has always been in contact with different cultures, social groups, political groups, customs and intellects, which finally resulted in models and typologies of diverse Muslim women around the world. Of course, religion itself – revealed by God to the world – did not happen in a vacuum. Nevertheless, there was a social context involved in the development of religious practices. Should one travel around the globe to countries with significant Muslim populations, they will find variations of women wearing headscarf/hijab and/or different interpretations of the restriction of *awrat* [1], which will be further discussed in Chapter 2.

The Dynamics of Discrimination

This research topic was chosen based on a few significant reasons. First, religious inequalities and/or unjust treatment based on religious affiliation still remain in place, whereas freedom of religion and freedom to worship God are intrinsic human rights. In daily life, we often hear from the news or media there are many cases of unfair treatment – in the field of worship, employment (including other economic opportunities), racism and challenges to personal identity – of Muslim women over their civil rights in France, which whether we like it or not, needs to be addressed. Compared with Sikh, Jewish and Christian women who also wear religious symbols, Muslims feel that they are more targeted and harassed (CCIF, 2016; Odoxa, 2015a; 2015b; Perry, 2014; Chakraborti & Zempi, 2012). Second, compared with Muslim men, Muslim women can even be more easily recognised by their religious appearance and symbols such as *hijab*/headscarves or other religious attire, and because of these attributes, they are in fact often underrated or undervalued (CCIF, 2016; Perry, 2014; Chakraborti & Zempi, 2012). For these women, wearing a garb which often associated with Islam such as headscarf or burkini [2] can be an everyday challenge (Odoxa, 2015a; 2015b; Fernando, 2009). Some might even say that the responses of people around, such as wooden expressions, glancing away, avoidance of eye contact, uncertainty, anxiety, etc. – create a sense of being 'different' or a sense of 'the other' or a sense of 'us versus them'.

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[1] *Awrat* derived from Arabic language *'aar'*, which means shame, disgrace, ignominy. In the context of Islamic law, *awrat* is understood to be a particular part of the body that cannot be seen, except by certain people (*mahram*) who are allowed to do so. It also denotes the intimate parts of the body, for both men and women, which must be covered with clothing when in public and also during prayer. However, covering in prayer is different from the basis for covering in front of people/public. The *awrat* of a man refers to the part of the body between the navel and the knees. Meanwhile the exact definition of *awrat* of a woman varies between different schools of Islamic thought, but generally, when in public most part of women's body are *awrat* except face, hands and feet (including the ankles). See Shihab (2012; 2000).

[2] A burkini is a type of bathing suit (swimsuit) which covers the whole body (torso, limbs, head) with the exception of the face, hands, and feet. See the picture and more complete explanation in Chapter 2.

CCIF (*Collectif Contre l'Islamophobie en France* or Association fighting against Islamophobia in France) (2016) reported that in 2015, 74% of Muslim women had been victims of all types of Islamophobia (prejudice; discrimination [3] and segregation in public places such as at workplaces or school and universities, police stations, hospital sectors, markets, government offices or agencies; and violence). Moreover, in 2016, the number slightly increased to 75% of women become victims of anti-Muslim sentiments, whether they are veiled or not (CCIF, 2017). In 2015, women represented more than 80% of victims of Islamophobic violence (verbal and nonverbal), and of 80%, there were 82% of women are victims of physical assault and the percentage of violence rose up to 100% in 2016 (CCIF 2017). In fact, "the aggressors attack both the Islamic symbols (tearing off the veil) and the body of their victim (sexual touching). Many physical assaults target women in vulnerable situations: pregnant or accompanied by their children, alone in an isolated place, etc." (CCIF, 2016, p. 25). In 2017 the proportion of women targeted was reduced to approximately 69%; however, according to CCIF (2018) this was not because of "a regression of the sexist component of Islamophobia, but simply because more men are also targeted by unjustified exclusion measures, particularly in the context of the anti-terrorist" (p.18). The analysis of the statistics above shows that about three quarters of the victims of Islamophobia are women. However, interestingly, during the past three years – among all types of Islamophobia – discrimination (direct or indirect) and exclusion have been the

[3] In the legal sense, according to article 225-1 of the penal code – modified by the law no. 86 of 27th January, 2017 relating to the citizen equality, a person is discriminated against if s/he is subjected to unfavourable or unequal treatment compared to other persons and if this unfavourable treatment is based on one of the 23 criteria prohibited by the law (religion, origin, sex, disability, state health, etc.) (LégiFrance, 2017c).
In addition, based on Articles 1 and 2 of the EU Race Directive distinguish between "direct" and "indirect" discrimination. Direct discrimination happens "where one person has been treated less favourably than another person is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin". Whereas, indirect discrimination occurs "where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage when compared with other persons unless that provision, criterion, or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary" (Tymowski, 2016).

dominant acts of Islamophobia, with nearly 90% in 2015 and 2016, and almost 78% in 2017 (CCIF, 2018; 2017; 2016). The CCIF noted that institutions remain the primary perpetrators of Islamophobia – more than 50% of (in)direct discrimination takes place in the public sphere, including services (CCIF, 2018). Moreover, some research have shown that there is still a high level of discrimination in the French labour market based on religious affiliation (Chambraud, 2018; INSEE, 2014b; Adida, Laitin, & Valfort, 2012; Lorcerie & Geisser, 2011; Adida, Laitin, & Valfort, 2010; INSEE, 2005). For example when Muslim women apply for a job, they would more or less be discriminated and undervalued by what garments they are wearing. Most employers would discriminatively avoid or reject job seekers just because they are Muslims and wear headscarf, rather than their capability or expertise. Adida, Laitin, & Valfort (2010) found that religious identity matters significantly. About 10% of Muslims were contacted by an employer after they applied for a job or provided a CV, compared to 16% of Jews and 21% of Catholics. This provides some evidence that discrimination and segregation in the labour market exist against Jews, but it is more paramount against Muslims (Valfort, 2015). In other words, particularly in the field of employment compared to other women, there is a very low probability that Muslim women will be interviewed by employers, and the chances is further decreased if the woman was veiled (Chambraud, 2018). It may be deduced from this research that veiled women are largely excluded from the professional world, and that they have no chance of competing equitably with others in the labour market when they wear headscarves, regardless of skill level (Chambraud, 2018; Tisserant, 2014; Petit et al., 2013; Adida, Laitin, & Valfort, 2010). Borrowing a term from Patrick Simon, director of research at INED (*Institut National d' Études Démographiques or* The French Institute for Demographic Studies), this phenomenon is a state of "social death in the labour market" (AFP, 2015). This unjust

treatment, exclusion and discrimination has led to a series of litigations at all levels of French courts.

Furthermore, in daily life, Muslim women are particularly vulnerable when facing the most outward expression of dislike and threat from the anti-Muslim prejudice and presumption (Perry, 2014; Chakraborti & Zempi, 2012). Thus, the influence of (mis)representations of Muslim women, both in the media or by demagoguery of certain politicians and/or State elites, are transmitted through specific rhetoric that subtly conveys positions of many communities (Bowen, 2010; 2006). It is pivotal therefore to highlight the importance, power, weight, and subconscious restraints that language and discourse may have upon public audiences. On the other part, it is also common to find religious excuses made to justify an act of extremism or terrorism associated with Muslims as a result of the perceived consent of Islam. These motivations summarise the background behind the research topic choice.

Muslim Women in French Demography

Among female immigrants settling mainly in Europe, Muslim women immigrants (or those who have an immigrant background) in France are the subject of this study. France does not collect census information regarding ethnic and religious affiliation, as the French Constitution regards census data a private matter. However, in 2005, Karoly Lorant, an economist of European Parliament, issued a demographic report stating that "one-tenth of the French population (more than 60 million) is Muslim" (p. 12). On the contrary, French government officials have cited figures between 1.5 and 2.1 million (self-identified Muslims) who are of Algerian descent or origin and of Moroccan descent or origin (Laurence & Vaisse, 2006). Other research institutions, such as the Pew Research Centre's Forum on Religion and Public Life, puts the number of Muslims in France at 4.7 million as of 2011, or 7.5% of the country's population (Pew Research Centre, 2011), and states that they come

largely from North Africa, mainly Algeria, Morocco, and Tunisia (three countries known as the Maghreb), other parts of the Middle East, and former French colonies in sub-Saharan Africa (Laurence & Vaisse, 2006). Although, there are also some Asians and Europeans who have converted to Islam, the total proportion of the Maghreb within the population is significant – indeed, after Catholicism, Islam is now the second-largest religion in the country (Gallis et al., 2011). This estimation of Muslim population is by and large supported by both Michèle Tribalat – a French demographer who published an article in *Atlantico* [4] in 2015 – and INSEE's (2017b; 2014a) article *Démographie des descendants d'immigrés*. Tribalat emphasized that the average rate increase of immigrants grows considerably high in the past two decades, particularly for the population of sub-Saharan origin by looking at two-generations (immigrants and children of immigrants), which most of the population are young generation. In addition, INSEE (2014a) also confirmed that "the Turkish and sub-Saharan African population is growing at an extremely rapid rate (which could lead to a doubling in less than 10 years if this continues). The total fertility rate of women born in Turkey is approximately 3, as it is for women born in sub-Saharan Africa. It is closer to 3.5 for women born in North Africa, while it is only 2 for women born in Europe, especially in France." In other words, this research would lead one to presume that the majority of immigrants born in France have descendants from North African, sub-Saharan African, and Turkish background.

History of Muslim Migration

Migration has affected Muslim populations living in France since the first arrival of the Arab armies due to the rapid expansion of the Arab-Muslim Empire during the Muslim

[4] Atlantico is a French news website, can be found at atlantico.fr. Michèle Tribalat is a demographer specializing in the field of immigration and is interested in Islam and Muslims. She wrote and published a book in 2013 entitled *Assimilation : la fin du modèle français* (Assimilation: the end of the French model). Her latest book was in 2016 *Statistiques ethniques, une querelle bien française* (Statistics Ethnic, a very French quarrel).

conquests in the early Middle Ages. A research done by Gleize et al. (2016) revealed that this expansion constituted a substantial politico-religious change and cultural transformation in the Mediterranean regions, via North Africa and later spread across what are now known as south and south-western of France, and thereafter continued from then on, when North African men served in the French army at the end of World War I. In the mid-20th century, more precisely in 1950s, after World War II, Muslim immigrants (mostly men) began to arrive in greater numbers, particularly from the Maghreb countries, to respond to French demand for cheap labour (Dargent, Duriez, & Liogier, 2009). Moreover, in 1964, French and Turkish government signed a labour agreement, which triggered a great number of Turk immigrants. The culmination of the increased immigration was catalysed by a 1974 law that gave permission the families of immigrants to join them (Zwilling, 2017). This has resulted in alteration to the patterns of religious affiliation (Tebbakh, 2004 as cited in Dargent, Duriez, & Liogier, 2009). If the Muslim population of France can be estimated at between 2.1 million and 4.7 million between 2006 and 2016, as per research by French officials and Pew Research Centre [5] — in theory, the figure could even double by 2020-2025 (INSEE, 2016; Euro-Islam Info, 2014; McGinty, 2006; Esposito, 2002). Nonetheless, the exact number is never officially issued by the government to the public due to laws prohibiting the official collection of data regarding citizens' religion or ethnicity, unless the laws are modified or changed.

Discrimination of Muslim Women in the Context of French Jurisprudence

Considering that the female Muslim population could be high in number, there are greater probabilities that cases of discrimination, social injustice, and segregation have

[5] Despite the fact that there is no existing research reveal a particular percentage of Muslim women in France, and concomitant with the increasing of anti-Muslim (women) sentiments in the EU (including France), some would argue that Islam is still considered the fastest growing religion in Europe (so as France). See for example Euro-Islam Info (2014); Pew Research Centre, 2011; McGinty (2006); Esposito (2002).

become like an iceberg. It seems to be appeared small on the surface, yet the unidentified problems lurking underneath are far bigger than what is actually seen. Thus, the two case studies analysed in this research are a matter of the utmost importance, as they may help to uncover a lot of issues of religious and gender discrimination and inequality in the context of French jurisprudence. The case study method is particularly revealing of larger societal trends. As stated by Arbuckle (1990) "a case study is a detailed perception of connected processes in individual and collective experience of a particular section or group within wider society; through case study analysis we are able to see quite sharply the tensions and movements characteristic of the larger group" (p. 7). Of the two cases of Muslim women which are the subject of this study, the case of Baby-Loup and the burkini filed to the two highest national courts originated in immigrant (or have immigrant background) communities. Both of these cases are related to religious attire, or attire that is considered to have religious character. The phenomenon of headscarf and burkini will be investigated in this thesis, and subsequently, the representation of Muslim women in the French jurisprudence will also be analysed. This will be achieved by exploring how events, actors, relationships, themes, and processes are portrayed through two cases selected from the decisions of the national Supreme Court: Court of Cassation (*La Cour de Cassation*) and of the State Council (*Le Conseil d'État*). It will be done with consideration to the regulations and jurisprudences pertaining to the banning of religious attire, such as the Act of December 9th of 1905 and the 1958 Constitution, which impose strict neutrality in public services pertaining to all civil servants (LégiFrance, 2013a). These Acts state that any manifestation of religious belief in the framework of the public service is prohibited, and the wearing of religious signs is also prohibited, even when the agents are not in contact with the public (*laïcité* [6]). Secondly, Law no. 228 of 2004 prohibits the use of religious symbols in public schools (excluding universities). Thirdly, the 2016 Labour Law, as well as other internal

regulations in private enterprises, prohibit or restrict wearing the veil or other ostentatious religious symbols in the private sector; as a result, some jurisprudences (national courts level and/or European courts level) impose restrictions regarding outfit which is considered has religious character. All these regulations and the discourses on *laïcité* have prevented Muslim women from consistently wearing their headscarves – which in turn permanently altering their everyday life.

Social Impact of the Laws and Discrimination

In practice, some women decide to choose the middle way by taking their headscarves off when working and wearing it after work. Yet evidently, many Muslim women still refuse to take the headscarves off in the work milieu or when they have a job interview, as they think that it reflects inconsistency. This can lead to rejection of their candidacy or dismissal by the employers. This has become a religious and social phenomenon that requires a sociological explanation. On those grounds alone, isn't sociology a social science grappling with a real social world, not an ideal world as expected and imagined? Dargent, Duriez, & Liogier (2009) said religious phenomena often cannot be separated from other social phenomena, as both are influenced by international exchanges and not necessarily dependent on local values and practices of the host country. They argued that values themselves are unstable and changing across time and space. Values, cultures, or practices may be adopted from somewhere else and manifested in daily life by the society.

Since law and jurisprudence are inherently societal discourse and courts' decision might influence ideas and behaviours, therefore they might also have an impact on the minds, points of view of attitudes and actions of the readers/people (Titscher et al., 2000; van Dijk, 1997a). The main objective of this study is to examine the representation and interpretation

[6] Laïcité is a term used in this dissertation, refers to the principle of secularism, particularly in France.

of Muslim women in French jurisprudence in order to consider if the legal text discourse associates such cases with Islam and Muslims, and to find out if this contributes to the reproduction of discrimination or the strengthening of stereotypes towards French Muslim women. Thus, the aim of this research is to use CDA (Critical Discourse Analysis) to legal texts by analysing two particular cases of Muslim women presented in the two national Supreme Courts using discursive strategies combined with a sociological point of view. This will be done by looking at the textual analysis regarding the roles of those who produce or those who read the texts. The research examines the utilisation of language in legal text, its relation to law, and its institutions. This is done with the hope that this approach will be fruitful for the analysis of legal discourse within the sociological context – with the objective of revealing the ideological constructions that forms the underlying foundation the actual texts of the legal documents. The achievement of these aims requires a preliminary discussion of a number of topics and issues, which are of great relevance to the subject of this study and will enable greater understanding of the textual analysis.

1.1. Organization of the Study

The introductory first chapter entitled "Perceptions, Realities, and Challenges", portrays the representation and interpretation of French Muslim women today. This opening part delineates several pivotal motives for choosing the topic, and justifies the principal objectives of the thesis. It discusses the study context to provide the research background and set a foundation for the following chapters. This section starts by commenting on the disharmony between the West and Islam and the generalized and homogenized representation of Islam and Muslims in the West. More specifically, Muslim women's frequent association with fundamentalism and oppression, their depiction as inferior, as a threat or as the 'other' in the French society. The 'stereotyping' of Muslim women will then

be introduced as the phenomenon under this study. After contextualising the issues of 'stereotyping' of French Muslim women, outlining the research questions for the thesis and the methodology to be used to define the theoretical and methodological perspectives the study has adopted, the two case studies will be briefly introduced. This is followed by a concise explanation of data collection and the limitations of the study. Finally, this section will be closed with a concluding note.

The second chapter, entitled "Literature Review", constitutes the essential background of the study, which contains three major themes: significance of sociological study based on socio–legal phenomenon; headscarf and burkini: between French laws and *laïcité*; feminism, gender bias, and social science. The segment begins with a conceptual description of the headscarf (and burkini) as social personal identity in religious study, offering a more detailed discussion of various models of headscarves and other religious outfits, as well as providing historical context from the point of view of Abrahamic religions, which also have the tradition of head covering or veiling. It then continues to explore the concept of religion and contextualise and understand the headscarf and burkini from a sociological perspective. This relates them to the French laws and *laïcité* in restricting and justifying limitation of religious symbols within the French jurisdiction. All these concepts are to be considered in the context of French Muslim women, together with related topics including a brief explanation of the French judicial system in order to give a succinct insight of how the cases are treated and objectives of the thesis. Other questions will be surveyed, such as Western attitudes towards the headscarf and burkini, and the boundless controversies as to whether Muslim women have the right to maintain their headscarves in public places or while working. Furthermore, the study considers whether 'Frenchness' (being French) and 'Muslimness' (being Muslim) are compatible or incompatible. This chapter attempts to present a perspective that questions the perceptions usually assumed by the headscarf (and

the burkini) and *laïcité*, namely social and gender inequalities (social discrimination and segregation) against French Muslim women (manifesting religious affiliation) that remains outside the area of French policies of integration and immigration. Moreover, since this research is concerned with women and gender issues, which are also elements of social structures, there is also a subsection discussing feminism (including Muslim feminism) and gender bias in religious exegesis.

The third chapter presents the methodology adopted in the study, entitled "Critical Discourse Analysis". It identifies the origins and development of CDA by exploring its objectives and perspectives, investigating concepts such as 'critical' and 'interdisciplinary', as well as the role of language, text and discourse in social practices. It also delineates the significance of critical studies and their important standpoints towards resistance against a social crisis for liberation and change. The methodology focuses on the contribution of text and discourse in (re)producing and legitimising social power abuse, discrimination and inequalities. Thus, it also further advocates the dialectical liaison between discourse and society through the discursive mechanisms and linguistic description. Nevertheless, the research reflects on the discourse analysis, both as a theory and a method of interpreting legal texts and analysing court's decisions, which become the subject of analysis and will hopefully reveal power relations, ideological constructions underlying legal texts, and the hidden interests that might be carried through discourse.

The final fourth chapter is entitled "Textual Analysis – Representations", which begins by providing a deeper description of the case studies, their backgrounds and the events surrounding the plaintiff and defendant: Baby-Loup vs. Mrs. F (henceforth called Mrs. F, as the abbreviation of her full name); and LDH, two individual citizens (Mrs. D & Mrs. C), CCIF vs. Mayor of the city of Villeneuve-Loubet (on the case of burkini). The data comprises two legal decisions made by national Supreme Courts: State Council and Court

of Cassation. CDA is used to examine the representations of French jurisprudence by exploring these two cases involving Muslim women. Discourse analytic readings of legal text can be difficult because of the infrequency of the discourse itself in the particular texts. Inevitably, the courts' decisions may contain long, technical and complicated sentences and argumentations, riddled with incomprehensible multi-part tests that are hard to understand not only for ordinary audiences but even for some law practitioners or academics themselves; in contrast, the actual and substantive judgment or appeal is extremely short (Johnson, 2014). This analysis will be achieved using ethnomethodology, phenomenology, and analytic discourse analysis used in the texts to describe the phenomenon under investigation, and more importantly, to be fair-minded and unbiased of relevant discourses in approaching the legal text. The discursive descriptions, explanations and interpretations of legal texts are designed to reveal systems of control, or, if there exist inequality or discrimination against Muslim women, and to see if they contribute to reinforcing a sense of "us" versus "them" and thus excluding "the others". The chapter concludes by bringing together the topics discussed in previous chapters. Ultimately, it also attempts to assess how the concepts of identity, difference, religious-ethnic relations, and French laws are tackled in a growing multicultural and multifaith society of France.

1.2. Study Context

For the general Western public, including France, Islam (and Muslim women with personal religious identity) is particularly ominous "news". Government, elites, politicians, the geopolitical strategists, media, and academic experts on Islam (although marginal to the culture at large) overall concur: Islam is a threat to Western civilization and thus inherently contradicts with liberal secularism (Verkaaik & Arab, 2016; Bangstad, 2016; Fernando, 2014; Korteweg & Yurdakul, 2014; Lyons, 2012; Said, 2003; 1997). This thesis is designed

to examine representation of Muslim women in French jurisprudence. However, before tackling the subject matter of this thesis, it is important to comment on the overall existing disparities and tensions between Islam and the West, as two (seemingly) distinct realities where conflicts, bias, prejudice, and stereotypes are frequently raised. That being said, even so, this research does not wish to dwell too much on the discussions of the orientalist nature of Islam's portrayal in the West, as well as the increasing visibility and importance given to issues related to Islam and to political violence spread in the discourses of the elites or in the news media. These perhaps have much been well documented or discussed elsewhere in other research. Instead, essentially, it puts emphasis on the discussions of the homogenised representation of Islam (particularly Muslim women), and the misconceptions about Arabs and Muslims, as well as the geocultural or geopolitical underpinnings of the Middle East, which might have not yet been largely discussed. Having adequate knowledge and understandings could contribute to look at ways to redress the discomfort and prejudices raised by outward signs of otherness which might be the root cause of alienating communities and creating further injustice.

Misconception of Muslim and Arab Diversity in Western Discourse

In his book titled *Orientalism*, Edward Said (2003) described that it is commonly mentioned in literary and cultural studies, as well as in studies related to Islam's representation, that Islam and Muslims are depicted as 'threatening' and as the 'other'. Said (2000) opined that orientalism itself has been a discourse, or a politically, historically, and culturally produced form of knowledge about those who were not Western, and in turn reproduced the Western identity. It does not "simply represent a considerable dimension of modern political-intellectual culture, and as such has less to do with the Orient than it does with 'our' world" (p.79). He then situated his determination of orientalism in the context of power relations, drawing upon Foucault's notion of discourse and Gramsci's concept of

hegemony to illustrate how Western culture brought out dominant ideas about the 'Orient' (Said, 2000). As a result, orientalism plays an important role in the nation-building project, and thus it is vital to acknowledge this concept when discussing the construction of dominating themes that describe Muslim women minorities.

The constructed images that Westerners, including the French, are built with the confidence and influence of massive news that Muslims must have Arabic cultural customs. This special attention and 'stereotyping' is given to Muslims settling in Western societies due to political concerns as well as religious and cultural differences – among other reasons – between Muslims and Westerners/non-Muslims. Albeit the origin of Islam first began in the Arabian Peninsula, and the Prophet Muhammad is also an Arab, Islam and Muslims are completely two dissimilar entities. Islam is a (monotheistic) religion revealed by God/Allah and all Muslims are the adherents of Islam, but the Muslim community consist of various ethnic groups who embrace different *madhhab/madzhab* (school of thought within the *fiqh*/Islamic jurisprudence); therefore, religious interpretation and practices might be divergent across territories. Muslims, like other human beings, make mistakes and fallacies, have preferences, and some simply do not exercise the best implementation or judgment. Generally, from the Western point of view, Muslim society cannot be separated from history, doctrine, and Islamic discourse that is biased, inegalitarian, intolerant, anti-pluralistic, and supports the establishment of a caliphate system that threatens the existence of non-Muslim societies and joint democracy. It represents the anti-concept of citizenship where every citizen has equal rights in a political system. In addition, there is a strong perception that Muslims are easily raised to commit acts of global terrorism and violence. Therefore, it is perceived that they are incompatible or they are unable to respect or adhere to Western (secular) values and democracy (Nielsen, 2008).

What might be the crucial issue at hand is that there are some self-proclaimed experts – including academics, State elites, and politicians – who actually have very limited knowledge of the geocultural or geopolitical underpinnings of the Middle East, but who nevertheless express their opinions and discourses in public or in academic settings and end up sharing an inadequate view of what actually exists and happens in the region. To illustrate this, the first misconception was to regard the Arabs as a single "Muslim Nation". In fact, Muslims are not necessarily Arab and vice versa. Arabs is an ethnolinguistic entity, not a religious entity. According to Qurtuby (2017), an anthropologist at King Fahd University of Petroleum and Minerals in Saudi Arabia, Arabs are considered to be the second largest group of "ethnolinguistic" in the world after the Chinese. As an ethnolinguistic entity, Arabs/Arabic is a cultural, linguistic, and ethnic term that refers to Arabic-speaking people in the Middle East and/or North Africa who are ethnically Arabs and share the same cultural background. Moreover, although the majority of Arabs are Muslim, there is also a large number of non-Muslims living in the vast majority of Arab countries that practice Christianity, Judaism, Zoroastrianism, Baha'ism and even agnosticism, and atheism (Coury, 2018). Arab Christians are the most dominant group of non-Muslim Arabs. Millions of Christians live in the region, including in Egypt and Syria, with around 8.9 million and 1.25 million followers, respectively, based on the World Christian Database (2011). They mostly follow the traditions of Eastern Churches, such as the Greek Orthodox Church or the Greek Catholic Church or the Protestant Churches. In addition, there are also followers of the Maronite Church (the largest in Lebanon), the Coptic Church (based in Egypt), and the Syrian Orthodox Church (in Syria) (Qurtuby, 2017).

Another reality is that, 'Arab Muslims' are statistically a minority as compared to the total number of Muslims around the world. To briefly illustrate, the Muslim population around the world reached approximately 1.7 billion people between 2010 and 2017 (The

World Factbook – CIA, 2017; Worldometers, 2017). The populations of the Arab countries total about 408.15 million people and about 389.43 million people in those countries are Muslims (The World Factbook – CIA, 2017; Worldometers, 2017). Based on these statistics, 'Arab-Muslims' comprise only 22.91% or less a quarter of all Muslims worldwide. This signifies that the 'non-Arab-Muslims' are much more numerous and account 77.09%. In other words, more than 3 out of 4 Muslims are non-Arabs or non-Arabic speaking. For example, the number of Muslims speaking Urdu/Hindi/Bengali, is greater than the Arabic-speaking Muslims. About 511.81 million or 29.9% of Muslims are South Asian – Pakistani, Bangladeshi, Indian, and Sri Langkan (The World Factbook – CIA, 2017; Worldometers, 2017). Moreover, Muslims speaking Bahasa/Malay, mainly spread across in Southeast Asia are also significant in number: approximately 260.05 million people or 15% of Muslims throughout the world (The World Factbook – CIA, 2017; Worldometers, 2017). Geo-religious facts give us the idea that Islam, which has become an integral part of many cultures of different nations and different languages, is much larger than just the Arabic countries. For instance, it is notable to observe how Islam has been internalized in different parts of continents/countries, how and what the process was, the characteristics, and how these Muslims interact with other faiths or non-believers. Consequently, albeit Muslims are geographically characterised by their different religious practices, diverse ethnic identities, and various cultural habits and experiences, the discourses about Islam and Muslims are still likely to disregard their ‘diversity’ and ‘differences’ (Qurtuby, 2017; Poole, 2011; 2010).

The second misconception is that, as Muslims, the Arabs are far from a being single and monolithic Muslim entity. Arab ethnicities themselves may also belong to many different tribes and *madhhab*. Apart from Sunni Arabs who are the dominant population, there are also many Shiite Arabs (in Iraq, Saudi Arabia, Yemen, Lebanon, Bahrain, Qatar, United Arab Emirates, etc.), followed by Ibadi Arabs based in Oman (Qurtuby, 2017). As

Arabs, both Muslims and non-Muslims have shared the same language, tradition and culture, although there certainly are many variants and local uniqueness among the Arabs themselves, not only due to historical and geocultural differences but also due to the acculturation with various non-Arab traditions, cultures and societies.

The third misconception is to see that all Arab countries are implementing the Islamic government system. Like other nations in the world, Arabs are also heterogeneous in all aspects of life, not solely their customs, traditions and culture but also when it comes to theological/religious issues, political views, systems of government, socio-economic systems, etc. In fact, some countries have established the monarchy system. Some follow the sultanate system like Oman. Others are unitary constitutional monarchies, such as Kuwait, Bahrain, Qatar, Jordan, United Arab Emirates and Morocco, or an absolute monarchy, like Saudi Arabia and Oman, or hereditary monarchy like Qatar. Moreover, there are also Arab countries running a republic political system, for example Egypt, Yemen, Sudan, Lebanon, Algeria, Syria, Iraq, Tunisia, Iran, etc. Interestingly, most of Arab countries rejected the political/governmental system of the caliphate (*Khilafah)* model.

Challenge of Terrorist Attacks and Anti-Muslim Rhetoric

The spread of news related to violence and oppression committed as the alleged pretext of Islam has widened the knowledge gap about Islam and facilitated the deterioration of the relationship between Islam and the West (Lyons, 2012; Lewis, Mason, & Moore, 2011; Bouma, 2011). The reporting of such events in Europe and the world in general can be summarised in the following incidents: the fatwa against Salman Rushdie in 1989 because of his book *The Satanic Verses*; the ban on minarets in Switzerland in 2000; the events of 11 September 2001 in the United States; the death of Muslims in Afghanistan (2001) and Iraq (2003) as well as hate crimes against Arabs and Muslims in Western countries; the Bali bombings in 2002 and 2005; the Madrid train bombings in 2004; the bombing of 7 July 2005

in London, UK; the crisis over Danish cartoons of the Prophet Muhammad in 2005; riots in England (2011); the Boston Marathon bombings in April 2013; shooting and suicide bombings at the Istanbul airport and at central shopping centre in 2016; suicide bombings in Brussels in 2016; suicide bombing in Ansbach, Germany in 2016; truck attack on a crowd in Berlin in 2016; Istanbul night club shooting in 2017; Saint Petersburg Metro bombing in 2017; truck raid into a shopping street in Stockholm 2017; Hamburg knife attack in 2017; van strike into pedestrians in Barcelona 2017; Westminster attack, Manchester Arena and Parsons Green tube station bombing, and London Bridge attack in 2017. These incidents are portrayed in the news media to be caused by Islamic beliefs conveyed justify brutal and violent acts – such these terrorist attacks – against non-Muslim societies. Even though, in reality, there are ample of victims were identified as Muslims. However, news media demonstrates how coverage of these events stereotype Muslims or spread erroneous information about Islam. Besides the reported events in relation to political violence and religious conflict, what is equally important is what has been said to illustrate the 'stereotyping' of Muslim women. For instance, the depiction of Muslim women as oppressed (often indicated by the veil or headscarf), illiterate, culture-oriented, and under the authority of men. These false information and discourse are some of the bewildering factors that increase the prejudice against, disregard for, and alienation of Muslim women within Western societies. What is malignant regarding these discourses [7] is that they further isolate, marginalize, and finally exterminate – which is the main intention – Muslim women in so-called Western nations (Affiah, 2017; Bouma, 2011).

Alternatively, those who spread anti-Muslim (women) rhetoric through contentious

[7] Not to mention several discourses echoed by some State elites and numerous demagoguery politicians, for example when French Minister for women's rights, who, in March 2016, compared "Muslim women who wear the veil with American Negroes who accepted slavery" or when the former Prime Minister Valls, still in 2016, pointed out that "the symbol of the French republic, Marianne, isn't wearing a veil because she is free and thus described Islamic veil as symbolising the enslavement of women" (Le Monde, 2016a).

discourses are at least keen to obscure religious identities among Muslim women themselves (Faulkner & Hecht, 2007). According to Lyons (2012), such stereotyping and discourses about Islam and Muslims have existed since the time of the crusades, and continue to grow now. These discourses also claim that Islam is irrational and frivolous, incompatible with democracy since it is a violent religion that coerces people to convert, upholds male domination, and degrades women's dignity (Lyons, 2009 as cited in Bouma, 2011, Nielsen, 2008; Daniel, 1989). These discourses somehow give rise to unfounded hatred and hostility to Muslim neighbourhoods and community members more than those of other religions or beliefs. Further, Lyons (2012) added that the discourses may intend to produce "fear of the Muslim other, to sell the 'different' from the majority, and or seem to be 'strange' or 'deviant' within the dominant "war on terrorism" as essential to Western security, and to lead the West into its greatest confrontation with Islam" (p. 2).

The attitudes that emerge often seem to seek logical and comprehensible reasons behind behaviours perceived by host societies. Furthermore, various studies have shown that negative stereotyping and discourses towards Muslim women are daily exposed to massive news and representations – for example Beydoun, 2018; Fernando, 2014; 2009; Lyons, 2012; Lewis, Mason, & Moore, 2011; Bouma, 2011; Poole, 2011; 2010; Richardson, 2010; Marsden & Savigny, 2009; Farouqui, 2009; Bowen, 2006 – portraying these women as "the 'other', inferior, irrational, backward 'medieval', fearful of modernity, exclusive, unsociable, fanatic and idiotic as they 'admit' polygamy; finally, they are caught up in a jealous rage at the Western world's failure to value them or their beliefs" (Lyons, 2012, p. 3). Furthermore, particularly in the French context, discourses focusing upon Islam (and/or Muslim women) is incompatible with western values. It has been threatening French norms, culture and customs as it revolves around extremism, terrorism, fanaticism, disputes, social and political instability (Fernando, 2014; 2009; Bowen, 2010; 2006). It is somehow proven

by a survey conducted by IFOP for *Atlantico* in July 2015, titled *les français et leur perception de l'islam* (the French and their perception of Islam) unveiled that 44% of French people perceived the Muslims existence in France a jeopardy for the French identity (IFOP, 2015b). On the other hand, the State elites and politicians insisted that the Muslim (women) are neither regarded as scourges nor internal issues, yet for that matter, as inconstant existence necessitating strict observation – even though, for society per se, they do not seem to be majorly effected by this passing existence (Liogier, 2009). Evidently, another survey by IFOP for *Atlantico* in January 2015 about the relationship of the French to Islam in France (*le rapport des français à l'islam en France*) revealed that the majority of French population (66%) considered that Muslims reside peacefully in the country, whereas 29% of the French viewed that Islam and most of Muslims are vexatious (IFOP, 2015a). However, as the situation evolved and security issues escalated, Islam and Muslims became the scapegoat for acts of terrorism and extremism (Liogier, 2011; Poole, 2011; 2010). At some point, such instances of 'Islamophobia' are an empirically traceable reality and unfortunately supported by the State as well as its apparatus (Liogier, 2016a; 2016b; 2011). Arguing in the same vein, Eric Fassin (2016), professor of Political Sciences and Sociology at the University of Paris VIII, in an interview with *Politis* firmly opined Islamophobia leads to official racism. Moreover, Vanessa Codaccioni (2016), a French sociologist-historian-political scientist, in an interview for the *Reporterre*, urged to review the 1972 law against racism and to include Islamophobic hate speech and attacks, considering the escalation of the anti-Muslim and anti-immigrant racism. If this were indeed the case, one cannot ignore this inconvenient truth, that the biggest perpetrator of Islamophobic action or violence is the State. Thus, one could also argue that the false rhetoric and the coverage portrays often stigmatize Muslim women – particularly those with headscarves – as jeopardy (Deltombe, 2005), are spread and

maintained by some of government elites, politicians as well as media, merely to justify the so-called policy of 'necessary strict observation'.

From a post-structural position, whereby discursive texts and processes of governmentality concurrently operate to preserve power relations (Brantlinger, 2013), deconstructing identities within the legal text are relevant for addressing broader systems of domination against Muslim women minorities, in particular, with religious identity. By deconstructing the 'other', we may then challenge the systems that maintain minorities in inferior social statuses. Moreover, as mentioned before, this thesis will investigate discourses against Muslim women specifically under French jurisprudence. One of those two cases examined, the case of Mrs. F vs. Baby-Loup is treated by the Court of Cassation as it does not involve public officials or public services, which means it is a case of an individual versus private company/institution. In contrast, the other case implicated functionary and its services. It is understood by the general public that values of secularism are not applicable to employees of private employers who do not manage a public service, as stipulated in the 1946 Constitution (4), and reaffirmed in Article 1 of the 1958 Constitution (LégiFrance, 2013a), stating: "the principle of neutrality is not binding on private individuals; a company or an association cannot invoke the principle of *laïcité* (French secularism) to limit the religious freedom of others, either its employees or customers. There is no labour law equivalent to the principle of neutrality of public officials". However, there now exists labour law, introduced in 2016, correspondent with the tenets of neutrality of government employees, where "the private employer has the right to demand the employee an adherence to the values conveyed by the company, which may justify a restriction of her/his freedom of conscience" (LégiFrance, 2016a), in which further explained in Chapter 4.

The case of Baby-Loup and the case of the burkini are two of paramount significance since these two sparked a great deal of polemics, grabbed the attention of the public, and massively generated public debates, nationally and internationally. The UN Committee of Human Rights or OHCHR (Office of the High Commissioner for Human Rights – United Nations) and the OIC commented on the latter issue, as well as people in many parts of the world wrote and produced satire and memes on social media about the case. Notably, photographs of four armed French police standing over a woman in confrontation on a beach shore at the town's Promenade des Anglais, Nice (south of France), forcing her remove some of her clothing to adhere to the controversial ban on the burkini, have made notorious headlines worldwide. It is reported that the woman was fined by the police officers and the ticket cited that she was not wearing "an outfit respecting good morals and secularism" (Quinn, 2016). In addition to that, many government elites, national figures, politicians, academics, and human rights defense organisations commented on the case, either for or against, as a part of an abundant news coverage.

The case of Mrs. F vs. Baby-Loup, on the other hand, took quite a long time – which was more or less six years of litigation, from 2009 (when she first filed her case to the court of first instance, tribunal *prud'hommes* [industrial/labour] of Mantes-la-Jolie on 9th February 2009) to 2014 – for the Court of Cassation to ultimately have a firm decision, which will be investigated in detail in Chapter 4 as well. As a consequence, this decision became the foremost judgement of the Court of Cassation concerning a Muslim women's headscarf while working for a private company. Since France embraces the Civil Law system, where in practice judges tend to follow previous judicial decisions, several lawyers, academics, law practitioners opined that this judgment has, nevertheless, become a major decision in the context of French legal precedent and jurisprudence for Muslim women manifesting their belonging to a religion in private sector. The decision encompasses the time from when it

was written going onward. A private employer is able to restrict an employee's religious freedom and expression whenever the company regulation or practical functions of the job make it compulsory or necessary. It is therefore essential to explain what was happening outside the court too, both socially and politically, since the voices of the people may help us understand the issues from several perspectives. Both cases became a widely debated hot-button issue – in which the mainstream press possibly entered them into their lexicon.

1.3. Research Questions and Methodological Overview

The research conducted here is not based on a preconceived hypothesis that needs to be tested – instead, it is focused on examining questions, "to explore a topic, to develop a detailed view, to take advantage of access to information, to write in expressive and persuasive language, to spend time in the field, and to reach audiences receptive to qualitative approaches" (Creswell, 1998, p. 24). Since the research involves real cases or real stories as the core idea of the research, thus it includes grounded theory method (GTM). Indeed, cases or stories are data sources with a soul, and there is no methodology values and honors that more than grounded theory, as originally developed by Glaser and Strauss (1967). One of the mandates from the grounded theory is to develop theories based on real study case or people's lived experiences rather than proving or disproving existing theories (Glaser & Strauss, 1967). In grounded theory we often do not start with a hypothesis, rather, focusing on examining questions or topic, developing a theory, and then seeing how and where it fits in the literatures (Ralph et al., 2015; Tolhurst, 2012; Charmaz, 2008; 2005; Stebbins, 2001; Strauss & Corbin, 1998; Strauss, 1987; Glaser & Strauss, 1967). Therefore in this section, the following research questions will be elucidated:

(1) What are the socio-political factors that are conducive to this type of representation?

(2) Secondly, are there any social and/or political interventions used and allowed to legitimise particular legal decision?

(3) Consequently, does legal discourse reproduce systems of dominance/non-dominance and equality/inequality and do the court decisions contribute to the (re)production and reinforcement of stereotypes or prejudice against Muslim women?

This will be achieved by analysing the social-discursive strategies of French jurisprudence, dealing with two cases of Muslim women filed in the Supreme Courts. Such analysis has to be conducted within the socio-cultural context of the communities concerned in France. The core objective of this research is to investigate the discourses within French jurisprudence by looking at the decisions of two highest courts on two cases concerning Muslim women during the period between 2014 and 2016, which means that the focus is legal discourse as the object of analysis. Thus, the thesis aims to discover the various representations and meanings around the discourses of Muslim women generated and negotiated through the legal texts under investigation. This will be examined in order to see how the issue has been represented, with the intent of revealing the ideological constructions underlying the legal texts/courts' decisions issued by the national Supreme Courts.

Method of Analysis: CDA

The main theoretical framework informing the analysis of data was done by involving the combination of a sociological definition of "law" and "discourse" through discursive analysis of legal texts by adopting the configurations of the CDA approach and establishing theoretical foundations of social constructionism and discourse analysis, which views discourse as a social practice (Fairclough, 1992). Hence, since discourse analysis is based on social constructionist theory (Niemi-Kiesiläinen et al., 2007) where it perceives discourse (including legal discourse) as constructing the social world, this can come to signify what is real or tangible and what is perceptive or conceptual. More importantly, the

thesis will not appraise whether the court's decision is right or wrong, as constructionist readings do not attempt to find a correct or valid interpretation of law. Rather, this thesis will seek to uncover the principles of the concepts and interpretations of law through a social and cultural lens (Niemi-Kiesiläinen et al., 2007).

Concepts like sex and gender are considered to be constructed socially in this study. This will apply to how these concepts are constructed in legal texts. The concepts employed in social interaction could have a consequence on legal arguments and be relevant in legal discourses. For example, the concepts in people's minds about representation or stereotyping of Muslim women may, nevertheless, influence the legal analysis of the cases. It is acknowledged that legal language contributes to the construction of reality and society's perception of the representation of Muslim women in general. Therefore, exploring the processes where the facts and concepts are constructed seems exceptionally relevant to legal interpretation (Niemi-Kiesiläinen et al., 2007).

Critical Legal Discourse Analysis (CLDA) is the exercise of CDA to legal texts from a multi-conscious feminist perspective (Wodak, 2007; Pether, 1999; Fairclough, 1992, p. 5). CLDA considers law as language and culture, and since it is also interdisciplinary, combines the theoretical orientation of CLDA with feminist legal theory, which will be suitable in this research and can be understood as a methodology for identifying the (re)production of hegemonic notions and social inequalities related to sex and gender. Ainsworth & Hardy (2004) continue this point, arguing that "CDA reveals the reproduction of power relationships and structures of inequality" (p. 238). It is then obvious that the critical nature of CDA is fitting for an investigation into the judicial decisions on the two cases concerned. This research also uses the work of some feminist legal scholars as a guiding example of the application of CDA to legal discourse, which is then intertwined and related to one another.

Theoretical and Conceptual Framework

This study also utilises a sociological definition of "legal discourse" based on Bourdieu's concepts of subject formation and habitus in conjunction with Foucault's conception of law as power. Foucault and Bourdieu both focus on the theory of subject formation. Foucault described "how we are made in culture, our bodies 'disciplined' and 'punished' by discourse – on 'power as it functions within institutions and to create knowledge and truths…the constitution of the subject…the way the body is formed, shaped and branded in disciplinary practices" (Foucault as cited in Pether, 1999, p. 60). Whereas Bourdieu explained "how we become who we are," and habitus, "the embodied experiences that produce both our perception of the world and the world that is fashioned in the image of what the habitus identifies as normal", or how our personal experiences and norms shape our perception of the world (Foucault as cited in Pether, 1999, pp. 55-59). In this perspective, foregrounding the cultural potential of legal discourse involves examining how legal culture constitutes identities and its responsibilities of citizenship while, at the same time, denying their aptitude for it (Harris, 2003).

This research, at some point in Chapter 2 and Chapter 3, will also adopt a post-structural epistemology as a discursive framework for analysing and interrogating themes of identity within the legal text. There are a few rationales for this position. In fact, post-structuralism can work alongside studies in political economy, which might be understood here as a discipline intersecting with social inequalities all existing within a global capitalist system (Springer, 2012). Other scholars have stated that neoliberalism, included in the discipline of economic and philosophical thought behind contemporary capitalism, is a prominent concept for comprehending issues of citizenship and (im)migration of people, particularly in countries with developed social welfare states (Bauder, 2011; Stasiulis & Bakan, 2005). Contemporary understandings of migration, citizenship, and the policies

involved require consideration of the globalized and neoliberal context. Furthermore, in analysing the legal text as well as examining themes of citizenship and identity therein, it might be better to associate language with identity, which further emphasizes the importance of a post-structural approach.

Post-structuralism corroborates the importance of language, especially in its application in perpetuating knowledge and power (Springer, 2012; Agger, 1991). The paradigm of knowledge and power is crystalized in Foucauldian thought, whereas discourses culminate to legitimize a particular truth. Neoliberalism can be applied to this paradigm and, in the words of Springer (2012), "offers no exception to the notion that power operates as a field of knowledge serving some purposes" (p. 134). Furthermore, CDA is fittingly appropriate within a post-structural framework due to its focus on power and inequality. This is based on the argument that CDA comes in multiple formats, yet is met by a common scrutiny: "hidden power structures should be revealed, inequality and discrimination have to be fought, the analyst has to reflect on his/her own position and make his/her standpoint transparent" (Forchtner, 2010, pp. 18-19). Thus, the judicial opinions of those two cases are significant not just as a legal documents that are binding on the parties involved directly and/or indirectly, but also as a discourse – a conduit of knowledge.

CDA subsequently offers a method of systematically extracting data relevant to one's investigation, where theoretical parameters are not intended to be prescriptive about how to analyse research findings. However, a combination of theory should, in general, be parallel with its core deconstructive purpose of "enabling a critical view of how…texts fit into a larger contextual setting", as well as the way those texts adapt to the larger contextual setting (Huckin et al., 2012, p. 119). Therefore, the study objective first reveals the implied connotations and ideologies of the legal texts, and, second, verifies how legal texts might impact or manipulate the socio-cultural context by, for example, reproducing stereotypical

discourses. More specifically, the purpose of the analysis is to understand the phenomenon of Muslim women as a minority, with their personal (religious) identities in the context of French jurisprudence. This will be analysed in order to determine how views about the phenomenon are likely to have an influence on public attitudes and thus on behaviours adopted towards Muslim women. Moreover, another objective is to demonstrate how the topic is represented in French jurisprudence. This is done through an analysis of the courts' language use and strategies and by observation of how certain choices may influence readers' thoughts and attitudes. This is "based on the belief that reality is socially constructed and the goal of social scientists is to understand what meanings people give to that reality" (Schutt, 2009, p. 92).

Discourse in 'Foucauldian methodology' is also criticized as difficult to define and apply (Dreyfus & Rabinow, 1983). However, it remains a useful concept for social research (Scott & Marshal, 2009, pp. 181-182; Fairclough 1992, p. 3), particularly when it contains "all forms of talk and text" (Gill, 1996). Discourse, in fact, may have varied definitions depending on the discursive strategies employed. Nonetheless, discourse analysis assembles power and knowledge, and that knowledge is socially constructed through varied discursive strategies and elements and their interaction with more substantial contexts (Wodak & Meyer, 2009; Fairclough, 1992, p. 5; Foucault, 1978, pp. 100-102). Moreover, discourse itself is the text manifestation of social meanings, and thus the existence of social structures of ideas, knowledge, and power that are documented in texts (Fowler et al., 1979; Halliday, 1978; 1973). In other words, although discourse analysis observes social-discursive processes, they do not just reflect or represent "social entities and relations, they construct or 'constitute' them," so that understanding the "social effects of discourse" is the target of discourse analysis – how "different discourses construct key entities in different ways, and position people…in different ways as social subjects" (Fairclough, 1992, pp. 3-4).

Employing the CDA Analysis: Social Impact of Legal Cases on Muslim Women

As a general approach, CDA is attractive due to its possibility to investigate social and cultural issues, such as the phenomenon of several cases relating to Muslim women and their personal (religious) identity, and exhibit how discourse itself might be one of the causes of discrimination, segregation, inequality or injustice. CDA allows for a complex analysis on the language within the legal text. It is fruitful for not only analysing texts as series of words, but also for classifying the meaning of those texts in wider social and political contexts (Ainsworth & Hardy, 2004, p. 239). It is by means of this complex analysis of language that the concept of discourse becomes well-defined, specifically, as the circulation of meanings and texts in thought, talk, and social structure (Hodge, 2012, p. 3). From this, there is a robust reason to advocate that discourse leverages identity, as meanings behind concepts involved with 'us versus them' or 'the other' inscribe particular intents or purposes on social groups. This accounts for why identity is an imperative component for CDA (Hodge, 2012; Ainsworth & Hardy, 2004).

Acting on this premise of discourse, there is a pivotal relationship between the legal text as a discourse contributing towards inequality for Muslim women in France, particularly with their personal (religious) identity, with or without immigrant and/or refugee background. Within CDA, discourse is relevant in examining systems of knowledge, which in turn reproduce systems of power (Titscher et al., 2000; van Dijk, 1996a). This research is interested in how legal texts act as discourses to construct identity and how processes of discriminatory practices and religious or racial profiling [8] become justified due to these constructed identities.

Moreover, the structures and discursive strategies of the collated texts will also be

[8] Ethnic or racial profiling generally depicts how law enforcement is performing their duties based on race, ethnicity, religion or national origin rather than individual behaviour, which has been or may be involved in unlawful or criminal activity. See Bou-Habib (2011); Warren & Farrell (2009); Cleary (2000).

examined, together with a determination of their social and cultural context. As mentioned earlier, discourses are not only restricted to linguistic description, but are also social, cognitive and ideological in nature – thus controlling utterance, behaviour, and action (van Dijk, 2009b; 2005; van Leeuwen, 2008). This will help to identify hidden meanings and ideologies, and to facilitate analysis of the socio-political perspectives involved (Wodak, 2009 & van Dijk, 1996b). In sum, the purpose is to deconstruct the selected texts by exploring how discursive techniques and strategies are employed to reconstruct a particular representation of Muslim women in the jurisprudence. Since CDA is a critical, multidisciplinary mode of analysis, and not an approach with a unitary framework, my approach will basically be multidisciplinary in nature (van Dijk, 2005; 2003). This is apparently in line with contemporary sociology, which is characterized by openness, interdisciplinary and multidisciplinary approaches, reflexive inherent logic, and scientific orientation. Therefore, these features make sociology as an open discourse formation (Spasic, 2004).

Legal Context and Strategic Timeline

Based on the empirical research, there were actually six cases in total in the two Supreme Courts concerning Muslim women during the decade of 2007 – 2017 (even until these latter days), notably since the Law no. 228 of 2004 pertaining to *laïcité* through the prohibition of the utilisation of religious symbols in public schools. Other supporting laws and regulations emerged in the aftermath, strengthening the secular law. Most of the cases were related to Muslim women showcasing their religious belief, either at schools or universities, at the work place, and at public places like beaches (in the case of the burkini). Four cases were referred to the State Council, and two cases were referred before the Court of Cassation, as indicated in the strategic timeline below (Figure 1). Moreover, one case was filed by a minor. As a consequence, the referral before the court was represented by (in the

name of) her parents (LégiFrance, 2007). The rest of the cases were filed by the persons concerned (together with NGOs), either to the State Council or the Court of Cassation. There was also a case of Mrs. B & ADDH vs. Micropole Universe SA referred to the Court of Cassation. However, on April 2015, the Court decided to suspend proceedings and give reference for a preliminary ruling to the CJEU (Court of Justice of the European Union) for the final and binding judgment (Court of Cassation, 2015).

Figure 1.
Strategic Timeline Muslim Women Cases Concerning Religious Symbol/Attire in Two French Supreme Courts (2007 – 2017)

Sources: Adopted and modified from LégiFrance, 2016c; 2010; 2007; 2004; Court of Cassation, 2015; 2014a; 2014b; State Council, 2017; 2016a; 2016b.

1.4. Data Collection

The sociological analysis of legal data aims to go beyond the apparent identity of terms used by individuals to assert their causes or settle disputes in order to identify contemporary social changes. The corpus which will be examined in this study includes

courts decisions (from two Supreme Courts) referring to the two selected cases – Mrs. F vs. Baby-Loup and controversy of the burkini filed by Mrs. D, Mrs. C, CCIF and LDH vs. Mayor Villeneuve-Loubet. Data has been selected through scientific analysis, including the use of databases in law (courts/judges' decisions), which serves to account for sociological phenomenon. In France, to analyse the legal database or to access litigations in the Court of Cassation or State Council, one must find it available online or obtain it from the official public site of LégiFrance, which contains all the decisions/judgments delivered by the Court of Cassation and State Council. However, Court of Cassation and State Council themselves have their own official sites that can be accessed publicly, which means that the texts analysed were readily available and accessible via the internet as they are public documents. This also makes the CDA approach more cost-effective – another significant advantage of CDA – as it is relatively easy to access and compile data. Moreover, it is also worth noting that all scientific research must comply with ethical standards, as the nodal of research integrity is ethics themselves (O'Leary, 2010). However, since this research is dealing with the public legal documents under analysis and can be accessed publicly through electronic resources. Hence, none of ethical issues arise in relation to consent and data availability or confidentiality.

Being able to access print legal documents in electronic form was a noteworthy benefit. This allows social scientists to access a great array of legal texts to analyse, thereby increasing the scope for generalization of findings and the means to gain insights into the types of ideological and cultural meaning-making disseminated within the legal texts, which will be comprehensively analysed in Chapter 4.

Research Design

To study the thesis objectives, the research also adopted a descriptive design and, thus, CDA as a qualitative method was used in sampling and data analysis. According to

Bogdan & Biklen (2003), when conducting qualitative research, "research questions are not framed by operationalizing variables; rather they are formulated to investigate topics in all their complexity, in context" (p. 2). Similarly, Peshkin (1988) categorized qualitative interrogatory as "notably suited for grasping the complexity of the phenomena we investigate" (p. 416). One of the components of grounded theory is theoretical sampling: the process of data collection that allows for the development of theory. During theoretical sampling, the researcher simultaneously collects, codes, and analyzes data and uses this ongoing process to determine what data to collect next and where to find them. In accordance with theoretical sampling, non-random sampling or purposive sampling or strategic sampling was used. This technique of sampling was employed because this research was selecting specific legal texts based on relevance to this study. This sampling strategy was effective because it looks for things which "include deviant, extreme, unique, unfamiliar, misunderstood, misrepresented, marginalized, or unheard elements of a population" (O'Leary, 2010, p. 168). One of the advantages of non-random sampling is economical, whereas its shortcoming is that researchers may distort data with their "unwitting biases" (O'Leary, 2010).

Non-random sampling was applied to select two court decisions: two cases in national Supreme Courts regarding Muslim women and their religious attire or attire which is considered has religious character. The first case was referred and decided by the Court of Cassation in 2014 (Mrs. F vs. Baby-Loup), and the second case (LDH, Mrs. D, Mrs. C, CCIF vs. Mayor Villeneuve-Loubet / Burkini case) was referred and decided by the State Council in 2016. The research design will be further elaborated in Chapter 4.

1.5. Limitations

As already pointed out, this study deals with the court's ruling, particularly the decisions of the two French highest courts (State Council and Court of Cassation) in 2014 and 2016 on two cases concerning Muslim women: one case refers specifically to the headscarf and the other refers to a swimsuit called burkini. The first limitation pertains to the veil/*hijab*/headscarf. Since there are many variations or terms of the so-called "Islamic headscarf" (which will be explained thoroughly in Chapter 2), therefore this research is limited to the discussion of the headscarf, which signifies a simple veil (not integral veil – *burqa/niqab* – as its use in public has been banned by the French government through the law no. 1192 of 2010) (LégiFrance, 2010). Muslim scholars themselves have different points of view about the integral veil (e.g.*burqa/niqab*), where most of them have reached an agreement upon the issue that this type of veil is not a symbol of Islam, but rather of a particular culture in the Arabian Peninsula (Qurtuby, 2016; Shihab, 2012; 2005; Qaradawy, 2009). However, the research itself did not provide an in-depth scholarly argument about Islamic laws, notwithstanding several portions of the research that delve into aspects of Islamic laws.

Second, an issue often found when applying CDA to legal texts (CLDA) is the difficulty in finding discourses in the texts due to scarcity. Court decisions contain technical, complicated arguments, with the actual and factual judgement often proving to be considerably short (Niemi-Kiesiläinen et al., 2007). Therefore, the key information is difficult to interpret due to data obscurity and limitations. The third limitation is that since this is qualitative research, the generalizability is not the core objective here. Yet, because the unit of analysis contains cases and decisions from two highest courts, this study may provide valuable insights to a larger audience or a broader scope. Previous research has suggested that working with a sample that is small allows to conduct a close and careful

study (O'Leary, 2010). However, as scholarship evolves, future research may focus on the jurisprudence of other (probably lower) tribunals, and/or not solely in France but also in other tribunals in/across the EU.

Fourth, the nature of qualitative research frequently positions the researcher's duty as the main instrument of data collection, analysis, and interpretation (Creswell, 2003). Language is socially constructed and never static, thus the researcher is naturally not immune to the process and product of these constructions. Consequently, the findings, interpretations and conclusions are served as a limit of the researcher.

The fifth limitation is the risk of personal bias, which can affect data collection and/or cause subjective analysis of the findings. The utility of discourse analyses, including CDA, is the researcher's ability to make interpretations and explanations through conscientious, reflexive and accurate methods of research (Fairclough, 2001; Fairclough & Wodak, 1997). Aside from that, personal bias might probably affect data collection, analysis, and interpretation. It is therefore crucial to be careful not to involve subjective supposition on a morally-superior level, which might affect the findings. Eisner (1998) suggested that how we see, interpret, and respond to a particular situation will provide a unique individual signature, and it does not necessarily means a shortage or disadvantage, but rather a personal perception of a situation. Similarly, Peshkin (1988) suggested that it is indeed preferable to be fully aware of our subjective opinions when doing the research, rather than presuming we are totally free from subjectivity. Therefore, subjectivity and bias themselves shall never be thoroughly lessened from one's thought. For that reason, unveiling the researcher's philosophy and position contribute to more equitable judgement from the readers toward the result of the research (Wodak, 1999; Peshkin, 1988). Arguing along the same lines, Niemi-Kiesiläinen et al. (2007) advised that "a researcher should be open-minded *vis-á-vis* other discourses, as it is better to be conscious of one's theoretical assumptions and anticipated

discourses and further experiences have shown that one usually finds also some unanticipated discourses" (p. 84). Moreover, the conclusions and the results drawn are not intended to be generalized to all sub-populations of Muslim women in France. For that reason, the discussion was restricted to the frameworks determined by the established literature review.

The sixth and last limitation is that critiques of CDA [9] and visual analysis have suggested that since both are relatively recent in development, most parts of research using methods of inquiry on language (including legal language) remains exploratory and lacks "analytical procedures" (Flick, 2009, p. 246). On the contrary, Gee (2005), Fairclough (2001) and van Dijk (1993b) argued that research examining language is vital to the quality improvement of such analytical procedures. In this sense, the research contributes to knowledge by broadening CDA and applying it to the changes in society, thus justifying a sociological approach to a social phenomenon on the basis of its legal expression, that is representation of Muslim women in jurisprudence, specifically in the context of a secular country such as France. Above all, concerning limitation, interpretations should focus on the epistemic gain about truth no matter how many limitations the research may have, rather than worrying about the absolute truth (Eisner, 1998).

1.6. Concluding Note

The image and representation of Muslim women in French jurisprudence has been chosen because of the controversial nature of the topic and the frequent misunderstandings and conflicts between Muslim immigrant communities and native French citizens. Most (if not all) cases of Muslim women that were brought before the Supreme Courts since 2007

[9] See Chapter 3, subsection 'Genesis, Critics and Evolution' for a thorough and comprehensive argument in addressing the critics of CDA.

were considered related to their personal (religious) identities. Consequently, the reason for looking into the subject of the representation of Muslim women in French jurisprudence is, first, the concerning ambiguity that is demonstrated in public attitudes towards Islam. Second, the (mis)representation of Islam and Muslims as a homogeneous or as a monolithic entity in Western (European) society in general and in French society in particular provides a further reason for choosing this topic. Third, the widespread curiosity and public ignorance in relation to personal (religious) identities of women in Islam provides another motivation for this analysis. A fourth reason, which constitutes the core motivation and objective of the study, relates to the microanalysis involved in this project, namely, the power, importance and conscious or unconscious influence that language and discourse may have upon the public audiences and/or different social groups.

The latter analysis will be achieved by exploring how text structures and discursive strategies may have a function in controlling the beliefs and thoughts of people. In other words, how the judges'/courts' decisions are written and for what purpose may impact the implicit discourse behind the actual reporting process, which thus consciously or unconsciously affects readers. Words surely have weight but, as [legal] language is considered to be limited in its structure yet boundless in its meanings and implications, it is the concern of this study to examine how it is written, what is written, and why it is written. It is pivotal to consider how people in general are conscious or unconscious of the power of language in conveying and sometimes shaping their own beliefs, knowledge, and attitudes. That is why exploring the importance of associating language/discourse use and choice with social practices by bringing together the text strategies within its discursive social connotations is of paramount significance. Before discussing these notions through exploring the perspectives and aims of CDA, the next chapter will first introduce and contextualise the position of social personal (religious) identity of Muslim women settling

into a French application of integration and citizenship through a comprehensive literature review.

Chapter 1. Introduction: Perceptions, Realities, and Challenges

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Chapter 4. Textual Analysis - Representation

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Chapter 2. Literature Review

2.1. The Significance of Sociological Study based on Socio-Legal Phenomenon

What form does the law take in order to cope with or manage the social changes as well as issues of law? This issue becomes interesting within vast changing plural society and legal issues contained therein. Montesquieu (as cited in Lascoumes & Serverin, 1986) argued that laws, in all its forms, depend on social aspect. Moreover, laws function as social cohesion in the democratic political system (Rocher, 1996). Accordingly, social phenomena arises in society must be objectively considered by a method that allows law as an essential component of social facts, including social solidarity (integration and regulation) (Durkheim, 1899; 1892). Durkheim thus divided solidarity into two forms. First, mechanical solidarity, which is used in a simple and uniform society. The law must therefore preserve uniformity. Second, the organic solidarity that plays a role in a complex, diversified and advanced society, where the law is there to settle differences (Durkheim, 1893). In this sense, law is a vital element which constitutes social harmony and social solidarity. Therefore, it can be said that law is not an incarnation of individuals, but rather a manifestation of groups, so that all legal phenomena must have social reasons and can be studied scientifically (Lévy-Bruhl, 1926 as cited in Soubiran-Paillet, 2000; Commaille, 1989).

Arguing in favour, Newman (2012) stated that law can be defined sociologically, because it is, nevertheless, a social institution, and thus is publicly and society oriented so as to "preserve order, avoid chaos and make important social decisions…the legal system has its mechanisms for enforcing the laws, settling disputes, and changing outdated laws or creating new ones. These activities take place within a larger system of governance that allocates and acknowledges power, authority, and leadership" (pp. 30-31). As a

consequence, sociology of law must be seen as "a specialized branch of general sociology" (Lascoumes, 1991, p. 39).

In the sociology of law, discourse analysis – including legal discourse – has been long neglected and slow in its development (Niemi-Kiesiläinen et al., 2007; Banakar, 1998). This is due to "the ambition of sociological theory to pose grand questions and to answer them by grand theories" (Banakar, 1998). Secondly the mainstream sociology of law has been continuously influenced by several forms of structural functionalism – it solely slightly affected by constructionist methodologies – therefore its research determination is more keen to empirical research (Niemi-Kiesiläinen et al., 2007). Other (legal) sociologists, like Reza Banakar said that sociology of law is treated as a 'stepchild' experiencing a crisis of identity, to illustrate how it is located between sociology and legal science (Banakar, 1998). Similarly, Niemi-Kiesiläinen et al. (2007) highlighted that there are at least two reasons why Banakar use a word 'stepchild'as an analogy. First is "the lack of a common paradigm may be a consequence of the emphasis on empirical and functional orientations" and second is "the lack of interest in discursive methods within the sociology of law" (p. 72). However, Banakar (1998) himself wrote that another scholars have confirmed that actually both sociology and legal science have dissimilar outlook of sociology of law.

From sociological point of view (for sociologists), interpretation of law should systematically and empirically be regarded as a social phenomenon (Cotterrell, 1998). In understanding sociological conceptions of law, one notices that law essentially expresses its social meaning within its rich complexity and refers to a more or less coherent body of doctrine (Cotterrell, 2006). Consequently, a great emphasis on the importance of coherence is "essential in understanding of law should be systematic and general, theorised and organised, as to manage both legal doctrinal and social complexity" (p. 57).

On the other hand, from a legal point of view (for lawyers, judges, attorney, legal scholars, etc.), the interpretation of law is frequently empirical, which means it should be based on observation, experience and facts, rather than just a theory or pure logic (Goodwin, 2005; Campbell & Stanley, 1963). A possible issue, according to Niemi-Kiesiläinen et al. (2007), is that the courts always decide individual cases and its interest in sociological knowledge is more on behavioural science. Meanwhile, knowledge produced by social science almost always concerns populations. This leads to a dilemma between sociological data and decision making by the courts (Niemi-Kiesiläinen et al., 2007).

Some scholars might argue that sociologists' viewpoints are rooted in the sociology of law, while legal scholars/law practitioners see from the perspective of sociological jurisprudence. The latter is more specific and focuses on the cases that have led to the trials. However, in order to provide legal discourse from several perspectives, this research integrates insights gleaned from a view of sociology of law and sociological jurisprudence literature – although the latter is not too profoundly discussed – resulting in certain crucial commonalities intersecting on issues like sex and gender, culture, ideology, discrimination, injustice, and/or inequalities. Albeit it is quite vague to draw a line between sociological jurisprudence and sociology of law, it would be pertinent to paint a distinction between the two that seem to have similar concepts, but differ in terms of subject matter and approach to the law. Yet, above all, these two are affected by four critical elements: the State, the dominant political power, the history of the construction of the legal field, and the interconnection between existing laws (Villegas & Lejeune, 2011). The next paragraph will reveal how they are distinguished, as to some extent both are intertwined. The analysis will also slightly explore sociological jurisprudence. This dissertation considers that it would be pivotal to explain both, so that a clear perception will be acquired in viewing the

representation of Muslim women in French jurisprudence through two cases examined in the research.

As mentioned earlier, discourse analysis (including critical discourse analysis) is based on social constructionism and its basic principle concerns that "social reality is formed by the use of language, and language is never totally objective" (Niemi-Kiesiläinen et al., 2007, p. 88). And so as "legal reality is formed in the use of legal language and legal language is too never objective" (p. 88). The constructionist approach justifies that neither things nor people can have a constant or permanent meaning in language, yet it is we who construct it (Hall, 1997, p. 15; pp. 24-25). However, constructionist readings are not concerned with legal dogmatics, believing them unnecessary to find a valid interpretation of law. Rather, constructionists are more interested in how social and cultural values are represented in the concepts and interpretations of the law (Niemi-Kiesiläinen et al., 2007). Then why must the (critical) (legal) discourse analysis be seen not only from the lens of sociology of law, but also sociological jurisprudence, though this is (considered) not part of sociology? Ervasti (2012) argued that sociology of law is needed to "enhance an understanding of the inner world of law that is of relevance for law and legal policy" (p. 139). This standpoint accounts that sociology of law will not be understood properly if it is merely seen from the theoretical tradition of sociology. On those grounds, legal scholarship, such as sociological juisprudence is entailed. That being said, inevitably, both have pivotal commonalities intersecting and intertwining one another. Other probable answer might include, that the judicial system, including all its apparatus (judges, lawyers, attorneys, legal scholars) is a part of society. Thus, the system will not last without people, making it unimmune to social changes, community norms and general attitudes (Niemi-Kiesiläinen et al., 2007).

2.1.1. Distinguishing between the Sociology of Law and Sociological Jurisprudence

Sociology of law studies "juridical phenomena from a sociological point of view" (Dalberg-Larsen, 2000). It is considered to be a multidisciplinary field, "situated at the frontier of legal science and general social science, of sociology" (Ervasti, 2012, p. 139), which continues from multiple perspectives (Cotterrell, 1986; 1985), and should be seen therefore as multidisciplinary field of research (Ervasti, 2012). It examines how law affects society and vice versa (Gurvitch, 1973). It also analyses the interrelationship and linkage between legal doctrines, institutions, practices and social context (Cotterrell, 1994). It explains the reasons for "certain phenomena and their effects, by using the methods and theories offered by the social sciences" (Ervasti, 2012, p. 143). The sociology of law is not used to understand the function of law because it does not belong to the legal system; sociology of law can only facilitate a first order observation (Luhmann, 2004). One of its tasks is to explore the social forces that lead to the creation of legal norms and institutions as well as to make changes in positive law (Kahn-Freund, 1953 as cited in Robson, 1972). To summarize, sociology of law aims to explain theoretically the law and legal institutions of a given society (Pound, 1912). It is a theoretical science that generally describes a social phenomenon, consisting of contents, goals, applications and the impact of legal rules (Hall, 1938).

Sociological jurisprudence, on the other side, is a study of law aiming at real social problems, so that the law is studied in more concrete actions rather than in textbooks. The objective is to make law, including judicial decisions and administrative processes, have social control to reconcile the different interests of individuals in a society, and ultimately construct social harmony (Ervasti, 2012; Charnay, 1965). Likewise, Rudolph von Jhering (1818-1892) said that although each law is created and based on interests or motives, the

main social objective of the law is to support and guarantee social welfare, instead of individual well-being, as well as to create social harmony within rapidly changing social conditions. Contrarily, he rejected the notion that the law is the product of the subconscious or the right operated due to historical forces that do not count the individual effort (Macdonell & Manson, 1914). His ideas had great influence on Roscoe Pound's thinking.

Pound (1912) perceived sociological jurisprudence as the jurisprudence of social engineering, or functional jurisprudence, or jurisprudence of interests. One of the main goals was to provide alternative illumination to fill some gaps between formal law ("theoretical law or books") and factual legal practices ("law applied or in action") (Pound, 1910). Research in the vein of sociological jurisprudence should also focus on "central legal institutions or bodies, such as courts, legislation or administration" (Dahlberg-Larsen, 1990 as cited in Ervasti, 2012, p. 140). Likewise, Charnay (1965) emphasized that the study of jurisprudence is seen fruitful from two perspectives: either as part of social phenomenon or society, as well as its feasible contributions to sociology of law per se. He then elaborated that "the study of jurisprudence – in more strict sense of sentence: all the decisions made by the various orders of jurisdiction, and in broader sense: the result, the solutions adopted by a particular organ – until now are led by mainly a legal point of view; since it constitutes a contingent technique of systematizing law as a form of recognition and creation" (Charnay, 1965, p. 515).

Likewise, Eugen Ehrlich (1862-1922) believed that the importance of the law depends greatly on the authorities responsible for its implementation. He found "all eras, social, political and cultural movements necessarily influence the personal element, but that if an individual judge yields, more or less, to these influences, if he/she is more inclined to follow the tradition or is rather willing to introduce changes and innovations, that depends very much on one's personal temperament" (Ehrlich as cited in Haines, 1922, pp. 106-107).

As a result, he argued, the dogmatic science of law should, to some extent, be replaced by sociological jurisprudence, as it is the true science of law (Ehrlich, 1922).

There are two aspects of sociological jurisprudence. First is the function of Durkheim's perspective, centred on the rule of utilitarianism, in the Kantian sense (Kant's moral philosophy). Second, there is the customary tradition or local wisdom that affects the value of judges and appears implicitly in the process of judicial decisions (Langone, 2016). The aspect of functional means that whenever lawsuits happen, sociological jurisprudence will examine from the social context and how they can give impact on social interaction. A good legal decision is a decision which educates its citizens about appropriate social behaviour and results in preventing social conflict in the future. And at the same time, judges, lawyers, jurists must consider another crucial aspect, which is custom tradition that focuses on appreciating mores and local values which will reflect in their legal decisions. In this sense, as law practitioners, judges, jurists and lawyers are social engineers, because they shape rules of law in order to promote a more harmonious social existence (Langone, 2016).

In the context of sociological jurisprudence, a judge should become a social engineer who understands the societal principal of law and is aware of the effects of his/her actions in the social order. This is because law is indeed a human creation designed to deal with social problems. Therefore, a judge should not apply legal rules rigidly or passively (Pound, 1922a as cited in Mass, 1957). He argued that law is the product of a social demand and the importance of any legal rule lies on how fair enough it satisfies that demand. "What we are seeking to do and must do in a civilized society", Pound says, "is to adjust relations and order conduct in a world in which the goods of existence, the scope of free activity, the objects on which to exert free activity are limited, and the demands upon those goods and those objects are infinite" (Pound, 1922b as cited in Runes, 1956, p. 69). This is due to law has the core duty for the constitution of society, controls people's behaviour and constitutes norms in

society (Dalberg-Larsen, 2005 as cited in Ervasti, 2012), and thus has an educative power which organises society through sufficient information on legislation (Cotterrell, 1985). This is the same as a judge, as it involves social engineering in the sense of helping to prevent and resolve social conflicts effectively. This also helps the norms of society to meet the citizens' expectations (Nelken, 1984).

Benjamin Cardozo, an American judge who is renowned for his contribution to sociological jurisprudence and legal pragmatism, highlighted that a judge is obliged to minimize his own subjective view and to consider the mores of the community at large before making a final decision. He urged all judges to practice the methods of sociology in order to objectively choose important values and mores of the community, so that the courts will have an appropriate and comprehensive perspective in deciding the prosecution. He believed that the method of sociology is the best possible method for judges to recognize and measure contemporary social values in order to create a case law that is supportive of social security and welfare (Cardozo, 1921 as cited in Hall, 1947).

While law is intended to stabilise society's expectations, it cannot necessarily be used to alter the society's behaviour (Luhmann, 2004). For this reason, law enforcement is important to provide behavioural control and solutions to conflict (Luhmann, 2004). Moreover, legal systems also exist within society to demonstrate what expectations will be met with social approval and which will not. For example, courts are a key component of the legal system. They are responsible for making fair and just decisions about what is legal and illegal (Johnson, 2014). They have the authority to assess and decide all cases equally, applying the same rules. As a matter of fact, problems of interpretation and application of statutes exist among judges, which render them unable to reach common accord for particular cases due to such gaps in law (Luhmann, 2004). This is based on divergent perceptions, as we often find out that a case may have different judicial decisions in the

lower-level courts/courts of first instances than in the Courts of Appeal or in the highest courts (Court of Cassation or State Council). This same process is reflected in the two cases of Muslim women, which are presented and investigated in this research.

Actually, this is one of the reasons that there are two major type of judges: conservative and progressive (Mahfud, 2011). Many conservative judges consider the law exactly as written in the Act or regulation. Therefore, what is determined to be just and fair if it is in compliance accurately with the articles and verses in the Act or regulation, as it guarantees the legal certainty. So that in this sense, good judges are those who comprehend and implement the Act properly. This is based on positivist legal approach where the law is treated only as an Act/regulation in order to pursue legal assurance, often at the expense of social justice (Mahfud, 2011). On the contrary, other judges are following a progressive legal approach that outweighs the developmental sociology of law. They see the law as the crystallization of moral and ethical values, which exist within society. Therefore, the law is essentially sourced from the conscience per se. It is not merely what is transcribed in the Act or regulation, it is rather a sense of righteousness that exists in the conscience of each judge (Mahfud, 2011).

As a consequence, in giving a judicial opinion or decision, the judges will not solely be bounded by the law literally, as they perceive each case as having its own characteristics, which sometimes are not explicitly regulated or contained therein. This means that judges may settle a dispute based on his/her own consideration – using their own judgment and wisdom on how the Act/law/regulation seems or sounds according to him/her, not in accordance with the case concerned. In other words, since judges are regarded as the personification of the law, as well as part of social system, they are obliged to guarantee the sense of justice for every justice seeker through legal process in courts. It is therefore crucial for judges to have good legal analysis, integrity, morality, ethics, and conscience (Mahfud,

2011). From the above explanation, it can be concluded that legal discourse analysis should nevertheless be regarded from these two points of view: sociology of law and sociological jurisprudence, since both are interconnected, critical of each other, and complement one another.

2.1.2. Conceptualisation of the Headscarf and the Burkini (and other religious attire) as Social Personal Identity in Religious Study

Veils are used by several Muslim women around the world, and come in all sizes, shapes, colours, and models. The terminology encompasses different meanings based on the context, especially for the headscarf. This dissertation uses the term headscarf as it is more general, rather than another term, such as *hijab or jilbab*. In some places in the Middle East, Europe, and America, the *hijab* is the same as the headscarf. However, in other places like Asia (Southeast Asia, East Asia, or South Asia), the meaning could be different since the people there have their own unique name for the headscarf.

The term *hijab* is derived from the Arabic language and means "hide," "screen," or "curtain" (*Encyclopaedia of the Qur'an*, 2017). *Hijab* is also rooted in the Arabic word *jalaba*, which means "collecting" and "carrying" or *jalabiyyah*, (*Encyclopaedia of Islam*, 2017), which means a "long robe with cloak" or "a kind of outer garment, which covers the body, from head to toe." As a verb, a veil is defined as "to cover" or "to hide". But as a noun, the term "veil" has four phrases or expressions (El Guindi, 2003):

1. A long cloth used by women to cover head, shoulders and sometimes face;
2. Knitted length attached to the hat or women's head cap used to beautify or protect the head and face;
3. Part of the nun's head covering which encircles the face and covers the shoulders;

4. Textiles or thin fabrics that are hung to separate or to hide something behind it.

In the contemporary world, the *hijab* can be interpreted as a wide fabric used by Muslim women to cover head, neck, and/or chest. Or it could also be a long dress or two pieces of clothes, which consist of long-sleeved blouses and long skirts. The way Muslim women wear headscarves varies considerably based on the individual woman and the community in which she lives. This is due to the differences in interpreting and understanding the obligation of covering one's head, as well as the definition of *awrat*. This creates a variety of colours, models, and styles of headscarves. This has also been greatly influenced by each civilization's traditions and the culture of the local community. Some women wear it by covering their hair and neck, or wear it longer to also cover the chest or waist and hips. Others show some of their hair and neck. These types of headscarves leave the face clear and are often called a 'simple veil'. Meanwhile, few others leave nothing uncovered, except eyes e.g. *burqa* or *niqab* and referred to as 'integral/full veil'. The latter type of headscarf is completely banned in all public places in France. Typically, the headscarf not only functions to cover the *awrat*, but also contains the elements of ethics and aesthetics.

Here is some types of headscarf and attire usually worn by Muslim women around the world:

Source: Instagram

Hijab: is referred to as a headscarf. It is commonly square or rectangular with styles, colours, patterns, and various models. The *hijab* covers the head and neck, yet leaves the face clear. It is also considered to be a fashion

trend or fashion statement (Martin, 2004; El Guindi, 2003).

Source: Pinterest

Jilbab: in the Arabian Peninsula and North Africa, it typically means a modest dress, a tunic or long dress (Martin, 2004; El Guindi, 2003).

Source: Instagram

Jilbab (Southeast Asia): However, in Southeast Asia like Indonesia, Malaysia, Brunei Darussalam, Malay people in Singapore, some parts of Cambodia, southern Thailand, and southern Philippines, *jilbab* means a headscarf (rather than modest dress, as in parts of the Middle East). It usually has a square shape and can feature different colours or patterns.

Source: Instagram

Kerudung: Instead of using the term '*jilbab'*, the Southeast Asian people also use the term '*kerudung/tudung/selendang*' (which has the same meaning with headscarf/*jilbab*) to refer to one piece of a square scarf, which consists of decorated round panels in varied colours.

Telekung/mukena: two pieces of clothes, usually white or pastel (soft colour), fastened around the head with two strings and worn almost exclusively for praying. It is utilised by Muslim women in Indonesia, Malaysia, Singapore, Brunei, Cambodia, Thailand, and Philippines (Mahmadah, 2016; Shihab, 2012; 2005).

Source: Pinterest

*Esarp***:** a term for headscarf, like hijab, primarily worn by Turkish women and comes with many colours, patterns and designs (Martin, 2004; El Guindi, 2003).

Source: Pinterest

Shayla: long, rectangular black scarf, wrapped around the head and tucked or pinned at shoulders. Commonly used in the Gulf region (El Guindi, 2003).

Source: Pinterest

Dupatta: long, rectangular colourful scarf, worn commonly by South Asian: Pakistani, Indian, Punjabi, Bangladeshi and Sri Lankan. It ranges from very light and transparent to heavily ornate. Nonetheless, it is not limited to Muslim women merely, but also for Hindus and Buddhist women (Magnier, 2010).

Source: Pinterest

Ameera: two-piece scarf that covers the hair and neck. It consists of a close-fitting cap and an accompanying tube above the cap (El Guindi, 2003).

Source: Pinterest

Turban: a head wrap made of a long strip of woven fabric, which leaves the neck seen. Not limited to solely Muslim women, rather culturally worn by African women (for non-religious reasons), which is called *Gele* (El Guindi, 2003).

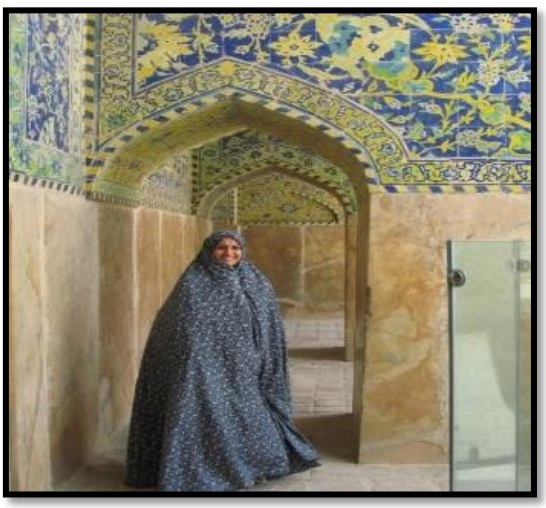
Source: Instagram

Abaya: mostly worn by women in Saudi Arabia or in the Arabian Peninsula and parts of North Africa. Typically black or dark colour, the garment is constructed like a loose robe or caftan and covers everything but the face, hands, and feet (Martin, 2004).

Source: Pinterest

Khimar: a cape-like head covering, which usually comes down to just above the waist. Same style as the *chador* but shorter – see below (El Guindi, 2003).

Source: Pinterest



Chador: normally used by Iranian women. They wear these semicircles of fabric draped over the head like a shawl. The chador has no fasteners; it is held in place under the neck by hand. Black is the preferred colour in public, but women often wear colourful versions at home or at the mosque (El Guindi, 2003).

Source: Pinterest

Burqa: utilised mainly in Afghanistan, mostly in blue colour, and covers the entire face and body with a mesh screen over the eyes. However, in other parts of Afghanistan and Pakistan they are sometimes white, brown, green, olive or mustard (Shaheed, 2008). It provides the most coverage out of all versions of the veil.

Source: Pinterest

Niqab: a veil that covers a woman's face leaving the eyes clear (Qaradawy, 2009). It is almost always worn with an *abaya*. Widely used in Arabian Peninsula, North Africa, and some parts of South Asia.

Source: Pinterest

Burkini: is a type of modesty swimsuit for women, made from light fabric which covers almost the whole body except the face, fingers and toes. It can also be worn for protection from the sun (Akou, 2013). The term 'burkini' were introduced in 2010s. It was not designed merely for Muslim women, rather it was first intended to

Source: Pinterest

> facilitate those who still want to swim with modest dress and protecting the skin from sun damage (Akou, 2013). It is actually not so much different than swimsuits for scuba diving. This burkini became one of the cases investigated in the study and triggered domestic and international controversy in 2016, after the banning from some municipalities, in particular the municipality of Villeneuve-Loubet

The Global Context of the Headscarf beyond Islam

Looking back on the history of religion, the concept of a headscarf/*hijab* or veil does not solely belong to Islam (Kahf, 2008). Prior to Islam, the holy book of *Tawrah*/*Torah* (Judaism) also acknowledges some terms related to headscarf/*hijab*, including *tif'eret* (Mahmadah, 2016). In ancient Greco-Roman and Babylonian society, the word *tzniut* or modesty, was an essential rabbinic virtue to distinguish Jewish women from their non-Jewish counterparts (Freund, 2012). Moreover, Jewish law requires married women to cover their hair (Schiller, 1995). Similarly, in the Bible, several similar terms are found: *zammah, re'alah, zaif* and *mitpahat* (Mahmadah, 2016). The most famous citation in early Christianity was from Paul's letter to the Corinthians concerning the necessity for women to cover their heads while praying (or when entering the church) (Freund, 2012). Besides Judaism, Christianity and Islam – the mores of Yazidism (mostly from the Kurdish tribe, also known as *Yazdani, Azidi, Yezidi, Zedi or Izadi*) require women to wear headscarves as part of cultural tradition, rather than religious tradition.

The tradition of head covering, or headscarf, was even recognized a long time ago, long before the existence of these three Abrahamic religions (Judaism, Christianity and Islam). This was in the very ancient tradition in 3000 B.C. of Mesopotamia, Assyria, as well as the Persian, Byzantine, and Greek Empires (El Guindi, 2003; Ahmed, 1992). Privileged aristocratic women in those ancient times wore the veil as to mark their class, rank, and social status. They were expected to wear clothes that can protect them from the gaze of strange men (Ahmed, 1992). The veil was the symbol of the differentiation between 'honoured' women and those who were 'publicly available' (Esposito, 2009; Ahmed, 1992). Even in the Assyrian sumptuary laws, it was regulated and written in detail that some women must use veils and others must not. The women who were forbidden to wear the veil included the poor, farmers, slaves, and prostitutes (El Guindi, 2003; Ahmed, 1992). Then, when the ancient Persian Empire conquered Assyria and Babylon, the elites, the nobles, and the rich also adopted the veil tradition of the ancient Mesopotamia. However, unlike the Assyrian regime that only applied the veil to the elites and the nobles, the Persian regime allowed 'ordinary women' to wear the veil as a symbol of simplicity and modesty (El Guindi, 2003; Ahmed, 1992). Moreover, several evidences revealed in the European renaissance pictures from the 1600s that many women were wearing headscarves. In a recent footage of an Edwardian documentary film by Channel 5 and the British Film Institut – just over 100 years ago, in 1901, in Manchester UK, as shown by pictures below – British female workers were portrayed wearing headscarves going to and come back from work. Professor Vanessa Toulmin, a British culturian & historian says that "what's fascinating is that the girls' hair's all covered… So women do not show long hair… So you see the girls, the shawls are completely covering them and you don't see their hair at all. You just see their faces. There's all this debate now about the hijab and about women covering their hair and we forget that.

We've lost that as part of our culture – that 100 years ago you wouldn't walk out in the street of Lancashire with your hair down." (Channel 5, 2019).

In the contemporary context, it is more or less the same. Surely, not all women from these various cultures and religions always wear headscarves. Some may wear headscarves only for religious rituals, others may wear headscarves in daily life – both in private and public spheres – and some may not wear it at all (Mahmadah, 2016; Fogelman, 2012; El Guindi, 2003; Ahmed, 1992). Besides Muslim women, many Christians still maintain the headscarf tradition, with the majority of members of Catholic and Orthodox women's religious orders (nuns) wearing "the habit" – a modest outfit in mostly dark colours that covers the hair and body. Ordinary Christian women (mostly of the Eastern Church) also cover their hair, including followers of the Russian Christians Orthodox Old-Rite Church, Egyptian Coptic, Maronite Lebanese Christians, Orthodox Christian Syrians, Albanian Christians, Church Orthodox Oriental, Eastern Orthodox Church, and Eastern Catholic Church (Qurtuby, 2017; El Guindi, 2003).

In addition to these Christian groups, women from several sects and Jewish communities such as Heredi, Lev Tahor, Yemenite Jews, and Ethiopian Jews also wear headscarves (Fogelman, 2012; El Guindi, 2003). Jewish Heredi people are primarily concentrated in the town of Beit Shemesh, Israel, where the garments they wear cover the entire body (including face). This garment looks more like *niqab* than *burqa*, which is called *frumka* (Douillet, 2014; Kersauzie, 2014). Another women outside these three Abrahamic religious groups also wear headscarves, such as Yazidi/Ezidi, Persian, Druze (Druzeisme), Assyria and Chaldean/Kaldean women (Açikyildiz, 2014; Nissim, 2003; Abu-Izzedin, 1993; McCurdy & Rogers, 1902). For Druze women, the headscarf they wear is called "*mandil/mendil/thorhah*" (Nissim, 2003; Abu-Izzedin, 1993). For Hindu women, they are required to wear "*ghoonghat"* or in the Sanskrit word "*Avagunthana"* – which means veil

or headscarf – in front of and idol of God, during prayer (at home or outside), during visits to and at the temple. The *ghoonghat*, based on the *Ramayana*, is to keep shame and remain modest (Sethi, 2011; Patton, 2002; Altekar, 1959). In Sikhism, it is mandatory to wear the headscarf when in the place of worship (the *Gurudwara*) – for both men and women. Sikh women usually wear a turban called *dumalla* when she is baptized (Sidhu & Gohil, 2009). Moreover, in the Middle East, including in Saudi Arabia, Bahrain, Emirates, Kuwait, Qatar and Oman, many non-Muslim women wear headscarves in their daily lives, as part of their culture tradition. Similarly, in Eastern Europe, women also wear headscarves (and other headwear fashion) as part of the Slavic tradition to reflect their traditional culture, though not specifically for a religious purpose.

In both the historical and contemporary context, one might claim that the headscarf does not solely belong to Islam or is utilised by Muslim women only. If we see from the context of quantity and frequency of wearing – regardless the context of region or culture, for example – it may be argued that amongst those groups of women (Muslim or non-Muslim background, religious or cultural background), it is Muslim women who wear headscarves more often in public or private life (Mahmadah, 2016; Shihab, 2012). However, if we also consider the context of region or culture, it can be said that those groups of women, practically without exception, wear headscarves as well in regular daily life. As demonstrated by, not only religious history, but also in this modern era, headscarves are a cultural practice shared by various ethnic and religious groups in the Middle East or in Asia or in Europe including Jews, Christians, Muslims, Hindus, Sikhs, Arabs, Druze, Persi, Yazidi, Assyria, Chaldean, Coptic, etc. Therefore, since the headscarf is not solely the 'property' of Muslims, it can thus be deduced that, the headscarf is not merely an aspect of "Muslim identity" is justified.

Examples of women's dress in other cultures and religions:

Syrian, Lebanese, Armenian & Georgian Christian women (nuns)
Source: Pinterest, 2019

Arab Christian Women
Source: Qurtuby, 2017

Orthodox Christian Ethiopian woman (nun)
Source: Pinterest, 2019

Jewish Yemeni women
Source: Times of Israel, 2014

Ethiopian Jewish women, also known as Beta Israel
Source: Jerusalem Post, 2018

Jewish Lev Tahor
Source: National Post, 2013

Frumka worn by Jewish Heredi
Source: Pinterest, 2019

Yazidi/Ezidi women
Source: Time, 2015

Druze women
Source: PressTV, 2018

Chaldean-Assyrian women
Source: Associated Press, 2017

Eastern European Women or Slavic tradition
Source: Pinterest, 2019

Nuns in Notre-Dame abbey of fidelity of Jouques, France
Source: Saje Distribution (2019), a documentary film titled "*Leur Souffle*" by Cécile Besnault & Ivan Marchika

British female workers leaving the Alfred Butterworth cotton factory near Manchester in 1901
Source: Channel 5 UK, 2019

The Interpretation of Headscarf beyond Religious Identity

The veil or headscarf has actually various terms, which are actually not a simple matter. The headscarf has two notions: women's attire (aspects of the body) and cross-cultural. In this case, although the veil can basically be interpreted as a fabric used to cover the head (and hairs), but in the society context, the veil also presents two sides of story that can be different and contradictory. On the one hand, there is an attempt to ban, and on the other hand there is an effort of coercion or necessity or willingness/grace in its use.

As a phenomenon, the headscarf carries diverse messages, not only to the definition per se, but also to the meaning in its application in the society, which may convey religious symbols and social (personal) identity. Even as part of pop culture, headscarf actually involves various dimensions, such as the material dimension, space, communication, and

religion. However, in general, the attempt to provide a proper definition of the Muslim headscarf has been based on the Islamic (religious) tenets – the provisions in the *Qur'an* and the *hadith* – which can be defined more broadly as part of Muslim fashion or 'Islamic' dress. According to the exegesis of the *Qur'an*, headscarf is interpreted as *khimar* or veil (as mentioned in the *Qur'an* chapter 24 *An Nur* verses 31). Whereas the term headscarf is contained in the *Qur'an* chapter 33 *Al Ahzab* verses 59, which has the meaning as proper modest clothes (spacious enough and not too tight fitting on the body) that can also cover the head and the chest. Moreover, in the study of religion (Islam), clothing has a particular function (Shihab, 2005; 2000), as follows:

1. as a cover of *awrat* (cover parts of the body that cannot be seen except by certain people, there is a difference between women and men's *awrat*):
2. as a finery (something that can be used to beautify)
3. as a protection from weather (hot season or cold season)
4. as an identity (that can distinguish between one with another).

Hence, a headscarf is part of the way someone dresses, and it certainly has the functions mentioned above. Of course, wearing a particular dress or headscarf does not automatically making a person 'kind' or 'unkind', nor reflect someone's level of religiosity. However it may at least encourage the wearer to behave respectably, to be polite and modest, and further prevent the wearer from bad deeds or immoral behaviour (Shihab, 2012; 2005). This is in line with the one of the purposes of clothing, which can be interpreted as the most obvious sign of a person's outward appearance. Clothing can identify a person as a member of a particular group, and often it is also a distinguishable sign of one's social status (Shihab, 2012; 2005; Barnard, 2002). Further, metaphorically, clothing is as a symbol of the "skin of society and culture", which could communicate the affiliation of a culture and as an expression of identity (Barnard, 2002).

Nonetheless, in this context, the purpose of the religion (Islam) has not merely been defining a particular mode of clothing because the way someone dresses (including how to wear the headscarf) might be completely dissimilar based on the particular circumstances of women themselves, as well as their customs, culture, or traditions. Therefore, the essence of the meaning of headscarf/veil/*hijab* and its implementation, which is known and practiced in Southeast Asia or South Asia or Eastern Asia for example, has a different meaning and application in the culture and social structure of Arab or Middle Eastern societies.

Thus, the conceptual development of the term "headscarf" can be contested among Islamic jurists and scholars, especially over the issue of mandatory or non-mandatory wear. However, most contemporary scholars agree that the wearing of the headscarf should be viewed as the consciousness of a choice and freedom of expression of identity without any coercion or pressure, and as a consequence, it should be respected and appreciated (Shihab, 2012; 2005). Furthermore, they also emphasized that customs and traditions have a great influence on how Muslim women wear the headscarf, so the customs or traditions of a particular society must not be imposed on others for the sake of religion and vice versa (Shihab, 2012; 2005).

In this context, religion is not only a belief system unified by practices related to sacred things and practices that unite a morally sound community. According to Durkheim (1968), religion is also part of social solidarity. On the other hand, if it is based on the conception of social identity (Hall, 1990), then the use of a headscarf is not merely a representation of cultural identity rooted in religious traditions but also a significant part of group identity, which has common values in a community that depend on the blend of moral values and the growing emotional bond within the community. Consequently, even though headscarf is part of a religious identity, it is also a distinct marker among fellow Muslims. At the same time, it is viewed as a choice on how to dress, which reflects values of decency,

taste of fashion, art, or health and economic interests. For that reason, the headscarf has a broad meaning beyond being merely a symbol of piety or politeness or cultural resistance. The interpretation of headscarf has gone beyond religious identity to influence other identities including social, cultural, and political identities. On one side, there is an attempt to make the tradition of the headscarf a homogenous assertion of identity, but on the other hand, sociologically, the headscarf is a social practice in which there is a process of production and reproduction of meaning, which can lead to a dialectical relationship between certain discursive events with situations, institutions, and social structures that shape them (El Guindi, 2003). The next section will closely analyse this sociological concept of headscarf and burkini.

2.1.2. Religion in the Perspective of Sociology

Based on the existing phenomenon, the headscarf and the burkini have now entered new stages in its community structure. Even the existence of the headscarf has developed to mirror the realities of Muslim women's lives, not only in France, but also throughout the world. This has been widely adopted or modified into diverse forms of meaning. Although it began as an ideological symbol or religious symbol, the existence of headscarf in society also become the passage of a cultural process in social reality, which has both subjective and objective dimensions. This is what Peter Berger explained in his conception of thought on social construction as well as his view on religion as a social reality (Berger, 1967; Berger & Luckmann, 1966).

According to Berger (1967), humans, as social individuals, gathered in a society are dialectical products, dynamic and plural, not as a single reality, static and final. In this dialectical process there are also aspects of externalization (self-expression), objectivization (as the process by which human beings create various realities in their life) and

internalization (the absorption of the objective world into subjective consciousness, so that each individual is influenced by social structure). This internalization is then manifested in socialization. This concept can further be seen in the existence of the headscarf and/or burkini as a social phenomenon.

By following Berger's (1966) social construction, the reality of the headscarf is preserved until these present days. In this context, the headscarf continues to be internalized as well as externalized in everyday life of Muslim women so it becomes a subjective reality. Thus, referring to Berger's (1967) concept, the headscarf or the burkini becomes part of a subjective reality, based on the religious aspect. Moreover, religion is fundamentally seen as a social reality, as a part of historical products but at the same time can also be influenced by factors of globalization (Berger, 1967). In his 1967 book *The Sacred Canopy: The Element of a Sociological Theory of Religion*, Berger argued that religion is in fact capable of providing alternative solutions to varied social issues as well as giving characterization to the passage of values and norms in society. Arguing along the same lines, O'Dea (1970; 1966) emphasized that religion has several functions. First of all, religion serves a very significant function of identity and offers an opportunity for the individual to recognize the identity of others, both in the past and the infinite future. It provides standardized values of the institutionalized standards of society that have been and will be formed. It gives moral support for the uncertainty of human life (O'Dea, 1970; 1966). In addition, it proposes a transcendental connection through worship that gives an emotional foundation to a stronger sense of security and identity in the midst of uncertainty of human life and offers salvation alternatives from disappointments, human punishment, and anguish (O'Dea, 1970; 1966). It supports established values and goals, increases morale, and reduces hatred. Religion also maintains the predominance of group goals over individual desires and places group discipline over individual interests and benefits (O'Dea, 1970; 1966).

As a consequence, religion is perceived as the sacred canopy, which protects the people from meaninglessness, chaos, and/or chauvinism (Berger, 1967). From this perspective, religion, which is essentially faith-based, might shape community behaviour and define the existing social order within a certain society without eliminating existing social structures. That is to say, religion is transformed into a form of norms and behaviours, as well as a cultural phenomenon, on one side, and a cultural system on the other side. As a matter of fact, religion is a part of civilization and is not merely a protective canopy, but also a sacred canopy that underpins the fabric of society.

Likewise, Durkheim (1893) perceives the existence of religion over the sacred and the profane. According to him, religion is a projection of society's experiences and a medium of symbolic expression of collective life. The closer the social bond of a society, the deeper the religious feeling of the sacred things, which accompanies every collective manifestation. This concept is based on his thought regarding the relationship between religion and social solidarity as a social fact. Durkheim viewed that there is a root of religion in a social structure of society, so the society itself determines whether something is sacred or profane.

Durkheim's notion of the sacred and the profane was discussed in the context of society's problems and needs. The sacred related to something that transcends monotonous everyday life, associated with collective representations that are set apart from society and not solely consisted of "creatures" with a soul, but also other sacred objects (such as trees and stones), and/or inanimate sacred objects (such as holy ceremonies). Whereas the profane related to each individual and mundane things (such as sleeping, eating, jobs, bills, and rush hour commute). It stems from the fact that, Durkheim was trying to identify the essence of religion that has always existed throughout the ages, even in the form of primitive/simple religious analysis (Ritzer & Goodman, 2003; Durkheim, 1968). In this case, the most

elementary form of religion might be found in totemism, which has two main components: (1) belief system and religious ceremony (ritual); (2) religious community. It is through this simple society, Durkheim (1973; 1968) seeks explanations of religious phenomena in order to understand the fundamentals of social life.

Although Durkheim (1973; 1968) retained the essential truth or *raison d'être* of religion and revealed its social reality, he did not explain how religion is positioned in modern life. In his view, religion is a reflection of the existence of every society without questioning rationalization of religion. Meanwhile, Berger considered that religion is not solely a reflection of social process, but that society also produces religion in its dialectical relationship, which might allow for rationalization of religion. Therefore, the question of the headscarf or the burkini is indeed part of social structure, experiencing the dialectical process through objectivization and internalization. Thus, its utilisation reflects individual externalization in a social aspect which is collective, external and coercive, but not tend to be bounded rationality.

According to Shihab (2000), religion is arguably the most important theme for mankind since serious problems frequently faced by humanity are often related or explained by religion. This reality is based on the assumption that religious issues have implications for the development of the life of mankind especially in matters of humanity, morality, and aesthetics. To some extent, religion also provides the most comprehensive meanings and explanations about other realities of human life such as death, sorrow, pain, tragedy, and injustice. As Erich Fromm (1950) assessed, the need for religion is rooted in the basic conditions of the existence of human species. Humans typically need a form of security like religion in order to overcome their isolated existence, doubts, and inabilities, as well as to answer the fundamental question of the meaning of life. Fromm (1950) added "to some people, return to religion is the answer, not as an act of faith but in order to escape an

intolerable doubt; they make this decision not out of devotion but in search of security" (p. 4).

When an individual is aware of the necessities of his life, he/she will not merely prioritize the mundane aspect, but will also seek alternatives beyond him/herself, i.e., religion (Burger, 2007). Furthermore, it is also worth noting the Whitehead's philosophy of religion which might be correlated with the concept of Fromm's 'in search of security'. Arguing in favour, Whitehead (1996) emphasized that religion helps people to identify the meaning of life and significance of existence – it is the source of vision and the engine of struggle. He opined: "Religion is what the individual does with his own solitariness... and if you are never solitary, you are never religious... Religion is a vision of something beyond reality that is waiting to be revealed. A remote possibility as well as a reality that is realized today. Something that gives meaning to the past. Something that if possessed is the supreme ideal that deserves to be aspired, but at the same time it is also something that overcomes all the desires ..." (pp. 15-18). In essence, religion gives a peaceful feeling needed in order to be brave enough to adventure into a temporal world, and so it awakens to an eternal dimension of value. However, even though religion often has a good influence – it is not necessarily good – it can trigger a "dangerous delusion" (e.g., a religion might encourage the violent extermination amongst adherents or between adherents and non-adherents) (Whitehead, 1996). Contrary to this assertion, some might argue that religion itself does not trigger isolationist beliefs or violent behaviour. It is the individuals' interpretation that might be false and inconsistent with the value of the religious teachings, as humanity's capacity for rationality is limited. Nevertheless, the peculiar characteristic of religious truth is that its truth is explicitly related to values. The truth gives meanings to mankind and awakens human beings about the permanent aspects of the universe which may be viewed valuable (Whitehead, 1996; Fromm, 1950). Alternatively stated, the impetus for religion are the

inescapable demands of the soul (Nursi, 2013; Shihab, 2000). Psycho-sociologically, individuals form a new interpretation for him/herself to know, to devote to God, and to surrender to the omnipotence of the absolute (Whitehead, 1996; Fromm, 1950).

While an individual's embrace of belief in religion varies, the most important aspects are not the differences in one's conception of religion, but rather the impulse of his/her soul for religion (regardless of the appellation of the religion). Therefore, one can find an inner atmosphere in his/her truest self by practicing worship (Nursi, 2013; Shihab, 2000). By doing this, one will feel serene and peaceful, and such circumstances can be seen in their behaviours (Fromm, 1950). To put this into perspective, the fundamental difference between being religious and non-religious is a perspective in analysing things. One may just feel happy as non-believer (non-religious). However, for some others, who decided to be religious, being in this circumstance make them much happier and grateful, though is seen from another perspectives, to wit, from the religious perspective itself. In this way, individuals and social aspects of religion are mutually dependent. Therefore, religion to some extent serves as a kind of bridge between philosophy and the emotions and purposes of social cohesion in a particular society (Whitehead, 1978; Fromm, 1950).

Having said that, here is actually the gap between the two different understandings. That, on one side, in a liberal secular society for example, religious attire (such as headscarves or burkinis) are often assumed to be contradictory and incompatible with modernity. The difference in perspective can be seen from a dual perspective. Firstly, this dichotomy is like separation between heaven and earth. Reality of the earth or profane, principally – in the repertoire of modern liberal secular society – is regarded as an objective reality. Whilst, reality of the heaven or canopy is seen as a subjective reality. Logical thinking and rationality are always paramount and have the supreme level of knowledge. Forasmuch as religion or religious things might be regarded illogical, less important and

placed at the low level under science and knowledge (Shihab, 2000). Secondly, in terms of origins. According to 'religious' community, in its original sense, God is the basis or principle of all things. They see that humans are the interpretation of God. God is the one who designed and planned the birth of humans, the earth, and the universe. Conversely, for the liberal secular society, the human is the basis of the reality and God is regarded as a human plan and a human interpretation. It is the human who interprets the existence of God. Taking this notion even further to the other extreme, some human beings argue that God does not exist (atheism).

For a 'religious' community, both heaven and earth are objective realities. Both are equally important and therefore must be achieved with the greatest earnestness. Religious science and modern science should be complementing each other, explaining each other's significance and purpose. One cannot prioritize one aspect of science and leave the other behind. As mentioned above, for the wearers' point of view – aside from a mere personal preference – a burkini or a headscarf might relate with the religious aspect, as it is a form of piety and godliness. This community believes that religious and modern sciences should be combined and complemented one another. Religious sciences are the lanterns of the soul, while modern sciences are the enlightenment of intelligence. Said Nursi, a prominent Kurdish Muslim intellectual, had voiced this almost six decades ago, and urged that "minds should be enlightened with science, and hearts need to be illumined with religion. When two are combined, the truth will be revealed, yet when separated, there will be fanaticism in the first one and arise doubts on the latter" (Nursi, 2013).

2.1.3. Sociologically Contextualising and Understanding the Headscarf and the Burkini

First, it is important to discern that, as a garment, the headscarf and the burkini are not "sacred-religious items", but rather "profane-secular stuff" (Berger, 1967; O'Dea, 1966; Durkheim, 1893), just like other types of clothing: dress, t-shirts, shirts, hats, shawls, suits, etc. They are part of products of human culture. Nonetheless, in the context of the Islamic community, the use of headscarves particularly becomes a way to mark the identity of a group member and to prevent its wearers from harassment. This condition is in line religious teachings of Islam through the verses of the *Qur'an*, which gives meaning to the function of clothing. It also appears in religious practices in many countries that represent traditions and symbols to the birth of a sacred identity as well as the renewal of a traditional cultural identity. As a matter of fact, in France, the existence of headscarf forms a new public space that allows people or individuals to actualize their cultural identity, as well as to represent a part of their individual identity, reflecting their difference from the majority.

From the point of view of Stuart Hall (1993; 1990), cultural identity is a mirror of historical similarities. Together with cultural codes, it forms a group of people together even though they may appear to be externally different. Thus, identity can be interpreted as an imagination that was born when we are viewed differently by others. Conceptually, identity can be viewed as a self-narrative too that distinguishes us from others, so that identity exists in juxtaposition of the others. The constructed and contextual nature of identity can lead to an identity representation that is never sole or static, but is always related to the historical context with its cultural background (Hall, 1990).

Identity becomes pivotal in social science because it assists in understanding the existing social reality. Accordingly, when it comes to identity, it is ultimately associated with a group of people. Verkuyten (2005) highlighted that the idea of identity is the

relationship between an individual and his/her environment. He pointed out that identity can actually portray human existence in simpler terms, which can facilitate humans to behave in a better way. This is what social identity means, in good circumstances. For Verkuyten (2005), social identity becomes part of social definition by seeing or acknowledging the difference within the society itself, which enables a person to have an identity. Therefore, to place someone's social identity within the social structure should be based on the membership relationships in social space and have continuous structural characteristics, values, norms, symbols, and language that reflect and reinforce characteristics of a particular group in a particular culture.

However, in the context of the headscarf or the burkini, as it stands on the point of view of Stuart Hall, then their existence is not merely a representation of cultural identity. Yet, there are powers fighting over it (Hall, 1996), with different constructions and meanings according to the interests of actors involved in formulating the headscarf. This would then signify that headscarf is certainly situated between cultural traditions, economic sphere (markets), and religion (Islam). Consequently, it is often interpreted to be constructive and dependent on the context because it is evident that when someone is wearing a headscarf or a burkini, for example, it does not necessarily mean that the woman has Arabic roots or culture. Moreover, there is also a pattern of syncretic blend, which is oriented to the market domination, traditions, and religion (Islam). If so, in the perspective of sociology, the construction of the meaning of the headscarf or the burkini is not only rooted in cultural identity, but also a reflection of a social personal identity that embeds the values, norms, economic and emotional bonds which develop within a group.

Furthermore, social identity is the knowledge of the individual, where one feels as a part of a group that has similar emotions and values (Tajfel, 1996; Tajfel & Turner, 1986; Tajfel & Turner, 1979). They underline that the understanding of social identity is based on

the existence of individuals within their communities. Additionally, a human being builds his/her identity and a sense of being as an individual; social creatures cannot be separated from norms, structures, and social roles (Tajfel, 1996). Therefore, in the theory of social identity, an individual is not solely regarded as him/herself, but also as a part of a particular group, so that his/her existence may also be seen through comparison between in-groups and out-groups (Tajfel & Turner, 1979). This reinforces and validates an individual's sense of belonging to a certain social group.

Users/wearers of headscarves or burkinis are not merely reflecting their cultural identity, but also their social identity. Structurally, wearing a headscarf or a burkini can be classified into various groups that delineates a person's social identity. Women may wear a burkini or a headscarf due to theological application, cultural products, political reasons, psychological reasons (such as fashion trends), or health reasons (such as prevention from skin cancer). To this point, social identity can also be used as a marker of the difference between 'me and 'him/her', between 'me and them' not merely because of cultural factors, but as well as other social aspects in community structure in order to explain social change (Turner, 1999; Tajfel & Turner, 1979). So basically, wearers of headscarves or burkinis are exercising their social actions in order to achieve social objectives. In this sense, the choice to wear or not to wear a headscarf or a burkini is essentially partly a choice of behaviours or deeds carried out by the person herself independently – not a form of oppression or compulsion or a mark of separation or exclusivity, as generally depicted by the western society – and partly taking action to achieve certain social and cultural goals. In most cases, the action taken must be related to others – as in nature, humans are social beings – so this is what we call social action, or an action oriented or influenced by others. In relation to this, Max Weber (1922) put forward his views that social action must involve others or some consideration of the behaviour of others. For Weber, action is said to occur when individuals

attach subjective meanings to their actions (Ritzer & Goodman, 2003; Weber, 1922). In fact, all human actions are also directed by meanings, therefore to understand and explain an action, meanings or motives behind and beyond must be explored and appreciated (Weber, 1922).

Similarly, wearing a burkini or a headscarf could reflect various types of actions associated with values rationality, instrumental rationality, or traditional actions, which may also be influenced by environmental factors. Hence, the question of using/wearing a burkini or a headscarf today is not only seen as something tied to the concept of rationality in a bureaucracy, hard and rigid like an iron cage. It also has subjective meanings that can be based on various aspects, such as culture, historic context, and social environment. Even though Weber (1922) focused on individual interactions and at the level of micro-analysis, it is nevertheless linked to social structures. Thus, in other words, an action that has social meaning is an action that is based on subjective meanings given by each individual or individuals, and it considers the behaviour of others and is therefore manifested in its appearance or performance. In this scenario, wearing a headscarf or a burkini, can provide various interpretations through social action and simultaneously have subjective meanings for the wearers (actors).

In light of this, the process of wearing a headscarf that a person might experience is likely also influenced by many external factors, which come from outside one's self, especially from the social environment. If this is the case, then a headscarf and a burkini are tied to social control, which could be social pressure or involvement of social actions expressed through interactions and relationships within a community (Ritzer & Goodman, 2003). This is in line with the nature of social control that becomes a means or a process done by a group in a society, where it is oriented towards values, ideologies, norms, and

status attached to the group. Through social control, a person or a group is directed to behave in accordance with the values and norms that apply in a particular community.

Regarding Durkheim (1973; 1893), his notion of solidarity is related to the division of labour in society, yet the bond of social solidarity in this context mostly constitutes a contractual relationship with rational approval. However, he emphasised that social solidarity refers to a form of social nexus between individuals and/or groups based on moral sentiment and mutual trust, which are reinforced by a feeling that we are in "the same boat." Within social solidarity, there is propinquity, which is based on shared moral feelings and shared beliefs reinforced by common emotional experiences. Likewise, when women decide to wear a headscarf or a burkini, it might be more fundamental than just a contractual relationship. Nonetheless, it is substantially a part of reflection of social solidarity that grows and develops in a particular community as an expression that arises and flourishes due to social relations and refers to the common interest and mutual support in a group. Subsequently, since a moral aspect is also paramount to social solidarity, the use of a headscarf or a burkini then is embedded into the moral aspect and the idea of unified feelings within a community.

2.2. Headscarf and Burkini: Between French Laws and *Laïcité*

2.2.1. Headscarf, Burkini, Integration, and Citizenship

While the law banning the headscarf [1°] was first enacted in 2004, the headscarf affair itself extends back almost three decades, from the first headscarf incidents in 1989 until the present day. Certainly, there are other cases related to religious symbols, such as the Sikh

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[1°] Law no 228 year 2004 prohibiting the use of ostentatious religious symbols in public schools was institutionalized in early September the same year. The law banned headscarves, kifayeh/yarmulkes, Sikh turbans, and large crosses as signs showing one's religious affiliation in an ostentatious manner. Other less visible symbols of religious affiliation, such as Stars of David, small Qur'an, Hands of Fatima, and small crosses were allowed (LégiFrance, 2004).

turban (*dastaar*) or the Jewish *kippa* (*kifayeh*). However, these cases are quite rare and remain classified. Moreover, among all types of cases of manifesting religious affiliation, Muslim women's attire (including headscarves and burkinis) has received the most public spotlight, mainly due to the fact that there are several cases relating to them, which oftentimes leads to controversy and public debates (Rorive, 2009). Because of these circumstances, Muslim women perceived that the government's response stands out as a notably different and heavy-handed policy (Louati, 2016; Joppke, 2009).

The compatibility of the headscarf or the burkini with *laïcité* constituted the main axis of the discussions on the headscarf and the burkini affair in France. Other considerations, such as public order, the rights of others, proper function of public education, religious freedom, gender equality and individual autonomy also affected the French headscarf policy. Most of the time, these considerations were either incorporated under the general public discussions or viewed as integral to the aim and function of *laïcité* in French society.

These discussions inevitably put the integration of immigrants, in this case Muslim women, into the centre of the political agenda. Typically, Muslim women refers to ones mostly from Maghreb (Morocco, Tunisia and Algeria) as they constitute the French Muslim majority (INSEE, 2017a; 2017b). Thus, it further means there are close parallels between the headscarf/burkini discussions, and those about citizenship and the integration of immigrants that delineated and divided the party politics since the 1988 election until the latest election in 2017. The increase in votes in favour of the extreme right National Front (FN) party and Le Pen's anti-immigrant discourse indirectly impacted the policy issues and agendas of other parties as they worked to keep their voters. Mrs. Le Pen and her FN was strongest in south-eastern coast and in areas with high unemployment and low wages (INSEE, 2018; 2017a; 2017c; Ministry of Interior, 2017). She gained twice the support that

her father did when he ran for president in 2002 (33.9%), cementing the far right's hold on the French political landscape. As a result, the success of the FN in attracting more votes played an important role in making the issues of immigration, integration, and national identity highly politicized in France. This socio-political context, as well as the French citizenship model, affected the headscarf policy differently (Nielsen, 2009), in the sense that it was not subsumed under the general terms of the discussion about *laïcité*. More importantly, these two factors were not explicitly addressed as considerations about the headscarf or the burkini issue.

Historically, integration and being a good citizen came to be massively stipulated in the late 1980s and early 1990s, after the successive waves of immigrants started coming to France during the 19th and 20th centuries following the industrial revolution, World War I and finally after the World War II. INSEE (2017a; 2017b; 2016; 2014a) recorded that immigrants in France consecutively are from other European countries, Maghreb countries, sub-Saharan Africa, Turkey, and Asia. Immigrants are expected to integrate with French liberal and secular values. Therefore, a successful integration is considered an achievement of the individual immigrant involving a certain form of autonomy defined as emancipation, or disassociation from one's cultural and religious background, more specifically strict limitation of religious symbols in public space. This perceived necessity of successful integration makes women who wear headscarves or burkinis often face complicated situations. Thus, they are often not considered as 'real French women' and feminists in their own right, and therefore categorized as a 'failure' of integration. On the contrary, other Muslim women who do not wear headscarves or burkinis are considered assimilated as a result of a 'successful' integration (Listerborn, 2015; Fernando, 2009). Nonetheless, the decision to choose how to dress and what style a woman prefers should not be used as a

measure of successful or failed integration and national identification, yet rather as an exhibition of fundamental rights in relation to her own body and image (Dwyer, 2008).

Integration has been conceptualized as an individual achievement, and the definition of the nexus between cultural diversity and nationality unity increasingly relied on an excitement of French citizenship as a fulfilment of autonomous individuality (Thomas, 2006; Troper, 2000). Autonomy meant being capable of freeing or emancipating oneself from subnational community identities (also referred to as certain differences) like religious or cultural identities or symbols (Favell, 2001). Integration has also been defined as an individual achievement, as indicated by putting one's culture, ethnicity, and religion under the rules of public life (Adida, Laitin, &Valfort, 2010; Favell, 2001). This scheme of integration as a realization of individuality exempt the notion of ethno-religious group rights from the mechanisms of representation. Representation of ethno-religious groups is mostly practically not allowed in the public sphere, as it is perceived as against the notion of "*vivre ensemble*" or "live together" and will accentuate differences which are incompatible with the general view point required to participate in discussions about the common good in the society. In brief, national unity required integration of the immigrants, and integration required them to adjust their relationship with religion and culture as citizens (Favell, 2001).

This emphasis on individualism and personal autonomy have been continuously repeated in the arguments against the headscarf (or later the burkini), which claim that Muslim women wearing headscarves or burkinis are non-autonomous subjects. For opponents, the headscarf is a symbol of women's subordination or oppression, and it is perceived as a burden in their life. Therefore, for most Westerners, Muslim women are generally considered "the other" due to their high visibility (Lorcerie & Geisser, 2011; Delphy, 2008). The image of Muslim women wearing the headscarf or veil is seen as a sign of oppression (Choudhury, 2009; Delphy, 2008). Thus, the wearers are considered to have

strong attachment to their cultural and/or religious community – and sometimes regarded as fundamentalist or extremist or radical – which is not in line with the national identity and community. Consequently, wearing a headscarf or a burkini is viewed outside the range of autonomous individuality.

The emphasis on autonomy, integration, and the popular French slogan of "*vivre ensemble*" (live together), as requirements for good citizenship. The fundamental basis of citizenship is twofold: there needs to be a relationship between citizens, as well as between the citizen and the State. During the headscarf/burkini debates, opponents argued that the headscarf and the burkini are against the principles and goals of *laïcité*. In turn, these principles historically served to keep public institutions (and nowadays many private institutions) – except for university students – away from religious symbols to ensure citizens learn humanist, secular (national) ideas and values as a substitute for religious morality. These beliefs are deeply rooted in the history and legacy of the French Revolution and the Enlightenment, which ended church-sanctioned royal rule and secularized the French society (a deeper discussion might be found in the next section). *Laïcité* assures that citizens were secluded from the influence of religion, and that they were taught those national secular values that would create autonomous French citizens, constructing a social connection from those values (Troper, 2000).

Subsequently, it is not only the headscarf and the burkini affairs or the debates about integration and citizenship, which overlap, but also the issue of Muslim immigrants and their integration into mainstream French society. As commented earlier, the slogan of "*vivre ensemble/*live together" has been at the centre of both debates. As a consequence, the autonomy of the individual citizen regarding their cultural and religious community attachments and the role of *laïcité*, are common themes that connect the headscarf and burkini affair with the debates on integration and citizenship. Further, these debates figured

into the public-political discussions within the general framework of the issue of the conformity of the headscarf and the burkini with *laïcité*. Among these, individual autonomy, *laïcité* and the function of public interests constituted the significant justifications for banning the headscarf or burkini (which was then later suspended by the State Council) (State Council, 2016a; 2016b).

At the legislative level, the Stasi Commission (parliamentary commission) – specifically addressing those who are immigrants or are of immigrant origin – pointed out that the aim of *laïcité* regarding individual citizens' identities was to allow them to attain autonomy and a crucial distance from their community attachments of religious and cultural character, a distance that separates their public and private status, as a citizen and as the bearer of certain group (ethno-religious) identities. This concern highlights the nexus between *laïcité* and individual autonomy provides a wider practical definition of *laïcité* according to the Stasi than just a separation between the church and the State. The Commission made an integration between individual autonomy and the conceptualization of *laïcité*, which means that *laïcité* is a guarantee for the co-existence of individuals from different backgrounds in the public sphere, and at the same time restricting public display of religious and cultural behaviour or signs (at public institutions including: hospitals, schools, universities [except for university students], government offices, and many other private institutions/companies). Thus, this emphasis has been clearly becoming the central element of *laïcité* and the headscarf affair.

The first report of the *Haut Conseil à l'Integration* (HCI, 1991), [11] as well as in the Stasi Commission (2003), articulated the official doctrine that the citizen was obligated to become autonomous with respect to culture and religion. Scott (2004) examined that this

[11] HCI is a French institution that prepares an annual report and issues advisory opinions at the request of the government on the integration of residents' foreigners or of foreign origin. It was established in December 1989, but was then dissolved in December 2012.

official doctrine of integration "did not hold up to the old standard of cultural assimilation (according to which one had to embrace not only the values of secularism, but speak, eat, dress and 'look' French), yet it did demand a singular national identification" (p. 39). By doing this, it is obvious that the government is exercising its power through the control of bodies in the public sphere under the plea that a particular group of women (using/wearing religious or cultural symbol as personal identity) could be "threatened, discriminated and denied an equal status in society, despite the Republic's values of democratic transparency" (Wagner, 2011, p. 45).

In this sense, the report constructed a vision of political culture and uniformity of identity, while putting aside the impacts of economic class and social inequality on French Muslim women minorities. It is social disparity and social discrimination that remains outside the area of French policies of integration and immigration. In her 2007 book, *The Politics of the Veil,* Scott argued that the State conflated equality with sameness when reacting to the headscarf (or burkini) issues. For instance, she noted that Frenchness and Muslimness (in this context: wearing the headscarf) were oppossing identity categories, resulting in French Muslim women wearing a headscarf being considered different, and therefore being rejected. If they wish to be equal with others and be a part of the nation, they would be required to emancipate themselves from the difference of their identity, which means getting rid of their headscarves. Scott (2007) further investigated that the French insistence of sameness is the pillar for equality through topics of secularism, racism [12] / new racism, [13] individualism, and sexuality. She argued that nationalism and racism/new racism

[12] Racism may also be defined as racial discrimination, that according to the UN Convention on the Elimination of All Forms of Racial Discrimination "shall mean any distinction, exclusion, restriction of preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social or cultural or any other field of public life" (UN-OHCHR, 1969). Racial discrimination can be extended as well based on markers of observable difference due to membership of a cultural group (UN-OHCHR, 1969).

had a place in the headscarf/burkini controversies. This defensive nationalism, according to her, "rested on the belief in the unchanging, indeed unchangeable, truth of a certain national identity" and "to challenge that truth was to challenge the very idea of French sovereignty and of the sovereign people whose will was said to be incarnated in the national representation". Accordingly, if integration means embracing the values of secular universalism (not cultural assimilation) and if abstracting one's self from the difference of her religious or cultural identity in practice require sameness (not equality), it can be said that, Scott's argument that sameness is conceived on the basis of nationalism or in some cases racism/new racism is justified. On the other hand, some would rebut that the policy on the headscarf or the burkini, implemented by the French government cannot be related to total defensive nationalism (or even racism), nor does it hold up to an argument that defensive nationalism resulted in headscarf laws or burkini bans and led to militant or aggressive secularism. They might argue that to presume secularism or masked racism is somehow overemphasized. One reason is if racism is defined as discrimination and prejudice against people based on racial groups, ethnic origins or colour lines (Cazenave & Maddern, 1999; Du Bois, 1903), then, inevitably, Islam is not a race, yet is a faith-based monotheistic religion, and does not belong to a specific race or ethnicity. As a consequence, Muslim women are of multiple races, and thus interpretations and instances of racism are not monolithic, making it more difficult to ascertain their occurrence.

Another obstacle is that national identification and nationalism are two different concepts. National identification or attachment can be defined as a broad and complex concept of attitudinal characteristics and sense of belonging to the homeland and citizenship.

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[13] New racism, a term coined in 80's described as "more indirect, more subtle, more procedural, and as if more ostensibly non-racial" (see Pettigrew & Meertens, 1995), relies more heavily on manipulation of ideas within mass media, including public discourse, and to reproduce and disseminate the hegemonic ideologies needed to justify racism itself (see Cole, 2009; Leach, 2005).

The citizen's religiosity, ethnicity, and religious beliefs – as well as socialization, legitimacy of political institutions, and laws – might have an impact on the strength or relative weakness of national identification. The French model of integration and the conceptualization of autonomous individuality aim to build a community of citizens who share a certain civic national identity and a political culture by leaving religious, cultural, and ethnic differences outside the boundaries of the public sphere (Troper, 2000). In the cases of French Muslim women minorities – especially in the context of the headscarf/burkini affair – this notion of autonomy leaves the issues of social inequalities and discrimination, which greatly narrow the opportunities for these women to have fair access the employment market, obtain and retain decent jobs, be economically independent, and achieve self-actualization (Adida, Laitin, & Valfort, 2012; 2010). Regrettably, one could argue that these social issues of discrimination, exclusion, and marginalization do not yet have concrete policy solutions offered or provided by the government. As a result, the typical notion of the so-called 'integration' caused a series of verdicts in the courts, therefore making the models of social integration and universal citizenship difficult to implement. For this reason, it may be argued that the concept of autonomy and integration is an ideal but, in actuality, is non-realistic and impractical.

An alternative argument is that this policy is a part of an anti-Muslim sentiment, or Islamophobia, and thus somehow might shape daily forms of racism/new racism or social discrimination and marginalization, or even more violent forms of exclusion (Lean, 2012; Schiffer & Wagner, 2011; Meer & Modood, 2009; Meer & Tehseen, 2008; Poynting & Mason, 2007; Modood, 2005). Furthermore, if anti-Semitism, based on UN (1999) definition, is generally regarded to be a form of racism, then why can't Islamophobia be regarded as such as well? Considering that Judaism, just like Islam, is a monotheistic religion that is not tied to single race since those who embrace it consist of multiplicity racial

groups. Therefore, indeed, one could not ever speak of Islamophobia and fight for Muslims if they would not willing to fight against anti-Semitism, and vice versa. However, to compare anti-Semitism with Islamophobia is not necessarily to equate them. But to discover some parallels that might help the society to fight against a growing and dangerous anti-Muslim racism (Reisigl & Wodak, 2001; Elmasry, 2001; Ter Wal & Verkuyten, 2000).

From this point of view, the most probable answer is that it is rather the interests of certain native majorities in France (for example, white French women/men, secular, atheist/agnostic individuals, and so on) that have led public denunciation of the demands for social and legal recognition by minority groups like French Muslim women who wear religious symbols/attire (rather than from the point of view of defensive nationalism or racism or militant secularism). That is, the notion of secular universalism is culturally hegemonic, not in the sense of nationalism or racism, but in the sense that there are particular dominant interests that exist essentially in it and prevent it from being at an equal distance from all (cultural and/or religious) differences (Butler, 2000).

Immigration and Laïcité in the Context of French Citizenship

Furthermore, given the parallels between the immigration, *laïcité* and citizenship debates and the headscarf/burkini affair, it is essential to examine these affairs in connection with the conceptualization of French citizenship. The response to the issue of the Muslim headscarf and burkini took its shape within the context of a particular interpretation and application of the ideal of universal citizenship, which signify that citizens' equality before the law obliges "a political obligation that individuals develop a different relation as citizens towards their culture and its place within the polity" (Favell, 2001, p. 72). In other words, a female citizen must not bring her cultural or ethnicity or religious attachments to the public sphere (rather keep them in her private sphere), and in her relationship with the State, she must become an abstract and universal individual. Consequently, on one side, in this context

universal citizenship brings togetherness. Yet, on the other hand, it requires generality and homogeneity for participation in the public sphere as a sphere of unity and co-existence of citizens. Hence, to some extent, socio-politics representation is closed off to ethno-religious group differences which are considered antithetical to the national unity of citizens in the public sphere (Scott, 2004). From this perspective, will the conceptualization of integration and the universal citizenship (freedom and autonomy from particularistic identity) withstand within the context of an increasingly diverse French society? Will this formula of universal citizenship and national identity create social issues amongst minority groups, as their ethno-religious differences do exist, and in reality everyday life, they are still also parts of the objects of social discrimination and social segregation?

What complicates the picture here is the issue of social discrimination and inequalities against women who cannot or do not wish to maintain the distance between their public (as citizen) and private status (as the bearer of ethno-religious identities). They will then be perceived to be dissimilar and unable of absorbing the required general values in public sphere. This condition gives consequences in the form of social discrimination or segregation which "prevent some individuals from enjoying equal access to all offices, places, and public employments" (Scott, 2004, p. 38). Scott (2004) noted that this has been mainly the case for those individuals who are categorized as "immigrants" and are of North African, Sub-Saharan African, or Turkish descent. Although, many of these individuals are "several generations removed from any 'immigrant' experience …" because their difference is "deemed irreducible (not susceptible to assimilation or abstraction)" (p. 38). Scott (2004) further argued that by calling these citizens "immigrants" describes how lots of French people still consider them to be outsiders "even if they were born in France, and are citizens," (p. 38) and have equal civil and political rights. However, in social practice their particular

ethno-religious identities are not recognized, and this of course translates into them not being represented well enough.

Secondly, one must also consider the understanding of *laïcité* that resulted in the enactment of the headscarf law. Practical application and different meanings of *laïcité* help us analyse the aspects of the heavy-handed French response to the Muslim headscarf and burkini. Ultimately, there has been a huge gap which explains that the French response to the headscarf/burkini issue was the presumed non-autonomy of the headscarf/burkini-wearer, which justified the State in intervening on the part of these women. This intervention was to –protect them from a religious culture influence that was perceived as non-egalitarian and oppressive. Some feminists support the policy, others are against, believing that the headscarf law (or the Mayor's decree on the burkini ban) is paternalistic legislation, whereby the State claims to rescue Muslim women from their patriarchal counterpart and from what the State sees as a fundamentalist interpretation of Islam that is marked by oppressive and non-egalitarian gender relations. Constructing the meaning of the headscarf and the burkini as a lack of individual autonomy portrays the Muslim women as victims of an oppressive and coercive religion as well as of the authority of their fathers or brothers or husbands or the imams (Beydoun, 2018; Fernando, 2014). Under these circumstances, it would define that the State, to some extent, presupposes that it knows the exact real interests of the Muslim women. This unfortunately adds to the irony that, the imposition on Muslim women to wear headscarves by Muslim men, as proclaimed by the State, is exactly the same thing as the other men (State/regulators) are forcing them to remove their headscarves. The government is thus trapped in a so-called 'wicked problem' or classic liberal conundrum: respect, empower and liberate women, therefore should not be controlled from wearing anything they want. Yet that liberation must have limits and the control must be exercised and under scrutiny when it comes to headscarves or other attires which considered having religious

characters. With that in mind, what one categorizes as beyond limits or unbearable is somewhat subjectively accounted.

Paradoxically, the output of this policy is to exclude and expel Muslim women from the working milieu in France, leaving them to feel helpless and economically dependent. If we grant that the judgment of the State regarding the oppression of Muslim women was valid, expelling them from the labour market would mean letting them suffer under even greater authority than that of their patriarchal structures. From the perspective of the State, that raises the issues of Muslim women's freedom. This ruling and subsequent barrier to employment is unfortunately the most damaging outcome for Muslim women. From a socio-political perspective, presuming that the Muslim women wearing headscarves or burkinis are non-autonomous individuals distracts one from the substantive social and political issues, which the headscarf or burkini wearers might be responding to by choosing to firmly put it on. So, can the headscarf or the burkini actually be a means of self-empowerment worn in response to certain social inequalities? Answering this question requires us to think beyond the official French construction of the problem, which believes that certain Muslim women are forced to wear headscarves (or burkinis) and that these women have an erroneous consciousness that makes them believe that the headscarf (or the burkini) is their independent choice and their way of being closer to God (Mahmadah, 2016; Joppke, 2016; Shihab, 2012; 2005). Though contrastingly, sociological studies have shown that the decision to wear headscarves or burkinis is a self-contained decision without any coercion, any subjugation, or any torture of any kind from any individuals (Fernando, 2014). Some believed that it is more than just an issue of human rights, or freedom of religion, or freedom of expression – it is the highest form of honour, appreciation and the utmost respect for their self-esteem and their body (Beydoun, 2018; Fernando, 2014). Yet nevertheless, this kind of belief is often perceived as expressions of communalism/*communautarisme*, a term which is pejoratively

utilised for those who advocate more their own sectarian community over the universal Republic. Whereas, for many Muslim women, this might be a simple demand for not to be segregated and for equal right: the right not to be ostracized for one's decision to cover her hair/head.

2.2.2. *Laïcité* versus the Headscarf and the Burkini in the Context of EU and International Laws

Before we begin to examine why "French model" of laicism appears to be substantially closed and antagonistic to any religious expression or public role for religion, it seems opportune to revisit the "history of freedom" since the French Revolution. Historically, *laïcité* emerged after the 1789 French Revolution, a result of the power struggle between the French State and the Catholic Church, struggle between the nobility and the bourgeoisie, as well as a philosophical clash of liberalism/secularism/democracy and absolute monarchy (Wagner, 2011). The Enlightenment and the Revolution of 1789 assumed an aspect hostile to the Church as a result of its excessive interference to (pre)existing ethical, judicial, social and political structures at that time, which was then Cardinal Ratzinger named "a new schism" amongst Catholics and the "laymen", where the very word "lay" assumed a connotation of antithesis to religion [14] (Ratzinger & Pera, 2007; Ratzinger, 2000). Hence, there came into being the secular State, which abandons the divine legitimization and annuls any intervention of State Church (Catholic Church) to the socio-

[14] Catholic Church was very predominant in every aspect of life at that time. The Empire and the Church appear to be almost similarly identified with one another. Whereas, unlike, in the US or in the UK for example, society was in fact formed to a large extent by groups of Protestants or Anglicans, which from its beginnings saw itself as a movement of empowerment, emancipation, liberation and purification, and thus had no difficulty in developing a relationship with the enlightenment or reformation. These typical societies are generally based on a free union of people and thus founded on free churches, rather making a 'State Church' as an essential. In this respect, for concrete historical reasons, one could argue that the "history of freedom" and the separation between Church and State imposed by the French Revolution and by the State systems that followed it were differently motivated and structured from other liberal secular counterparts. See for example Wagner, 2011; Ratzinger & Pera, 2007; Ratzinger, 2000.

political order, and strictly puts aside divine matters as private matter (Ratzinger & Pera, 2007; Ratzinger, 2000).

Some would argue that the core purpose of the State in this dominion struggle was to assure the citizens' loyalty to the State, not to the religion. During the transition from a monarchy to a republic, there was religious, political, and legal turmoil. This instability eventually triggered the release of the first Napoleon's Concordat of 1801 to stabilize unconducive situation through militaristic authoritarian order (Wagner, 2011). Napoleon's Concordat put emphasis on cultural pluralism which "was dedicated to a system of recognized and commonly agreed sects" (Wagner, 2011, p. 39). For example, it acknowledged that majority of citizens practiced Catholicism, yet refused to grant it official status as the 'national religion' (Wagner, 2011). Napoleon also issued a decree in 1808 recognizing Judaism, but with an admonition that it will not be interfering the affairs of the State and citizens' obligations (Wagner, 2011).

Furthermore, another pivotal change appeared with the Act of December 9th of 1905, which further stressed that the State favours no religion or believers, and ensures that there is zero presence of religious involvement in State policies and vice versa, as indicated in the first and second article: "The Republic ensures the freedom of conscience. It guarantees the free exercise of cults under the only restrictions enacted below in the interest of public order"… "The Republic does not recognize, pay or subsidize any worship ... [all expenses relating to the exercise of worship] will be removed from the State budgets, departments and communes... The public institutions of worship are deleted" (LégiFrance, 2016b). As a matter of fact, although the term '*laïcité*' per se was not directly written in the 1905 Act, it nevertheless served as the key legal basis for *laïcité* (Baubérot, 2014; Liogier, 2009). The complete constitutional acknowledgement of *laïcité*'s principles was subsequently legitimated within the ambit of Article 1 of the 1946 Constitution and the 1958 Constitution:

"France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis" (LégiFrance, 2016a).

As time passed and *laïcité* developed to be more than just a separation between the State and the Church, but a segregation *vis-à-vis* to all religious beliefs, including Islam. To this aim, the State established a mechanism of national unity and identity of its citizenry over and against all religious and regional differences by ensuring the neutrality of the public sphere. It secularized all aspects of the public education system, social sphere, economy, and politics by substituting religious values and morality with secular values and principles. *Laïcité* mainly aims to protect citizens' consciences from the claims of religion; therefore, it requires a strict separation between the public and private spheres, as well as restrictions on expressing religious beliefs in the public sphere. Over time, the conceptual basis of *laïcité* has become a prominent element of the process of nation-building (Baubérot, 2014; Liogier, 2009; Roy, 2005). As nation-states began to emerge across Europe, national identity began to replace religious identity as the principal pillar of allegiance and conscience.

Nation-building entails the relationship between the State and the subject. Several theoretical differences in the conceptualization of the State have been described by Gramsci and Althusser, as well as Foucault. The first two explained a vivid distinction between State and subjects, whereas Foucault attested that "no neat division can be drawn between State and civil society, between State power and the individual, between State and the nation: all are inextricably and deeply interpenetrating and constitutive of each other" (Foucault, 2004). To some extent, Foucault's conceptualization of the State as well as his concept of power are complicated. The first leads to a complex understanding of governmentality, whereby subjects are actively self-governing, or self-disciplining in compliance with societal norms and morals. To be more specific, the concept of nation-building, consciously or

unconsciously, drives citizens to adopt and adapt wholeheartedly *laïcité'*s values and morality in order to be considered successful to integrate and merge with the majority of society. Thus, the latter is an intricate relationship beyond the binaries of oppressed and oppressor, as is often the case with Marxist and post-Marxist epistemologies. Foucault's concept of power related to "a domain of relations" (Foucault, 2004, p. 311) or "the relations of force" (Chen, 1996, p. 313). Hence, the weight of discourse is necessary for Foucauldian analyses, notably with analysing power relations. On the other hand, Hall (1996) criticised Foucault's emphasis on discourse in relation to power had deviated from addressing the ideological theories as articulated by Gramsci and Althusser. However, he then suggested that it is probable that Foucault's ideas on discourse are proportionate to post-Marxist theory and therefore should not necessarily be perceived as bothersome, yet rather as a positive shift from the 'old superstructure paradigm' into the 'domain of the discursive' (Hall, 1996 p. 135). If we begin to analyse structural systems of domination from the French State, such as those exercised against Muslim women wearing the headscarf or the burkini within a conceptual framework that stresses the function of discourse and governmentality as proposed by Foucault, then we might infiltrate the conflict between post-Marxism and post modernity and get into a post-structural framework. Even though there exists an overlap between the post-modern philosophy and a post-structural framework, the latter seems to be relevant to the study as its theoretical boundaries afford an analysis of the discursive, and therefore provides a structural concept that could be beneficial in investigating identity socio-politics.

Furthermore, in order to abide by International Law, the French Constitution ratified international treaties, which may directly applicable before national courts. Moreover, courts regularly review the compatibility of legislative provisions with the European Court of Human Rights (ECHR) requirements and set aside any provisions deemed to be

conflicting, as well as it interpret domestic law in a sense that is compatible with ECHR requirements. First, Article 27 of the International Covenant on Civil and Political Rights (ICCPR) reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language". Second, Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states: "The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant shall be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Finally, Article 14 of the Council of Europe's ECHR (or formally known as the Convention for the Protection of Human Rights and Fundamental Freedoms), drafted on 4 November 1950 by the Council of Europe and entered into force on September 3rd of 1953 affirms: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". This signifies that *laïcité* indeed bears in itself the notion of "State neutrality, religious freedom and respect of cultural pluralism" (Wagner, 2011, p. 40). In the same way Carbonnier (1969) highlighted that *laïcité* ensures equal treatment of all religions as well as freedom of expression, yet again it should be based on its fundamental pillar, that is State neutrality.

As a member state of the EU, most of European fundamental and civil rights are recognized in French laws because "these norms are directly applicable or because these norms are transposed into national law" (Eijken & Vries, 2015, p. 6). In particular, besides Article 14, Article 9 of the European Convention for the Protection of Human Rights and

Fundamental Freedoms – in which the State Council and Court of Cassation frequently cite these two Articles (together with the recent French Labour Code) in their decision as evidence or justification of their arguments/judgments – also serves as a regional legal instrument, which requires the member states of the EU to protect individual rights, specifically related to freedom of religion (ECHR, 1950): the right to freedom of thought, conscience and religion; the right to equal protection of the law, including the prohibition of discrimination or exclusion on the basis of religion; the right of persons belonging to religious minorities to profess and practice freely their religion and the right to protection against incitement to discrimination, hostility, or violence. The mandate and attention of the courts is on the basic civil and political laws and claims. As part of this thesis, these allegations concern freedom of expression, freedom of thought, conscience, and religion as Article 9 of the ECHR:

(1) Everyone has the right to freedom of thought, conscience and religion; this right implies the freedom to change one's religion or belief, as well as the freedom to manifest one's religion or belief individually or collectively, in public or in private, through worship, teaching, practices and the performance of rites;

(2) The freedom to manifest one's religion or beliefs may not be subject to any restrictions other than those which, provided by law, constitute necessary measures, in a democratic society, for public security, the protection of public order, health or morality, or the protection of the rights and freedoms of others.

This article explains that even though Clause 1 ensures that every individual has the right to freedom of belief and religion, Clause 2 limits the right to manifest religious belief in the public sphere as stipulated in State law. Dispute or conflict regarding expression and religious manifestation of the citizens are justified under particularly Article 9.2. Moreover, the State legislation must be "(1) directed towards a legitimate aim; (2) carried out in

accordance with domestic law; and 3) necessary in a democratic society" (ECHR, 1950). With regard to the need to maintain a secular democratic society, it must meet two requirements: "if the action of the State is 'necessary' and if it is 'proportional', consistent with its stated purpose" (Kamal, 2008, pp. 681-682). As a consequence, at the national level, when there is a different interpretation between the citizens and the Court of Appeal or the court of first instances/lower-level courts, it is the State Council and the Court of Cassation that has the authority to decide the dispute between citizens and (the interference of) the State (including public institution and public official) or other disputes between an individual and a private institution.

Furthermore, it is also worth noting that to resolve conflict between citizens and private companies particularly, the courts in France also commonly refer to the labour code. This labour code, also known as the El Khomri Law, derived from the surname of a former Minister of Labour. This code is relevant to religious expression in the working environment. It was officially introduced in August 2016 (LégiFrance, 2016c) and expanded the prohibition of the utilisation of religious symbols (religious attire included) or political symbols or signs of trade union membership to private companies. Some would argue that the law is highly likely to target Muslim women wearing a headscarf (Teeple-Hopkins, 2015). It is explicitly stated in Article 1321-2-1 that private companies can apply the principle of neutrality and certain restrictions imposed only and aimed at the more efficient operation of the company (LégiFrance, 2017). Former Minister El Khomri spoke on several occasions in the media to make this article clearer, and she promised the publication of a technical guide for religious symbols (including the right to religious expression and religious clothing) in private companies. This practical guide was published online on February 9th of 2017. However, the explanation on the neutrality clause – as for private enterprises, it is not bound to this principle of neutrality (Teeple-Hopkins, 2015) – as well as

on the limits to the right of religious expression in the private sector are still vague and unclear. In addition, there are no such publications on guidance of the so-called "religious clothing". As a result, this law creates confusion and categorized as a highly problematic reality for both employers and employees, and could lead to potential disputes or misinterpretations of the law (Zwilling, 2017; Teeple-Hopkins, 2015). Thus, in the context of the influence of the Muslim women headscarf or attire on Muslim women's identity, these two distinct human rights – the freedom of conscience and the freedom to manifest religious beliefs – as well as the national labour code, are in fact interconnected and carry a practical meaning for Muslim women.

2.2.3. A Review: The Judicial and Legal Systems in France

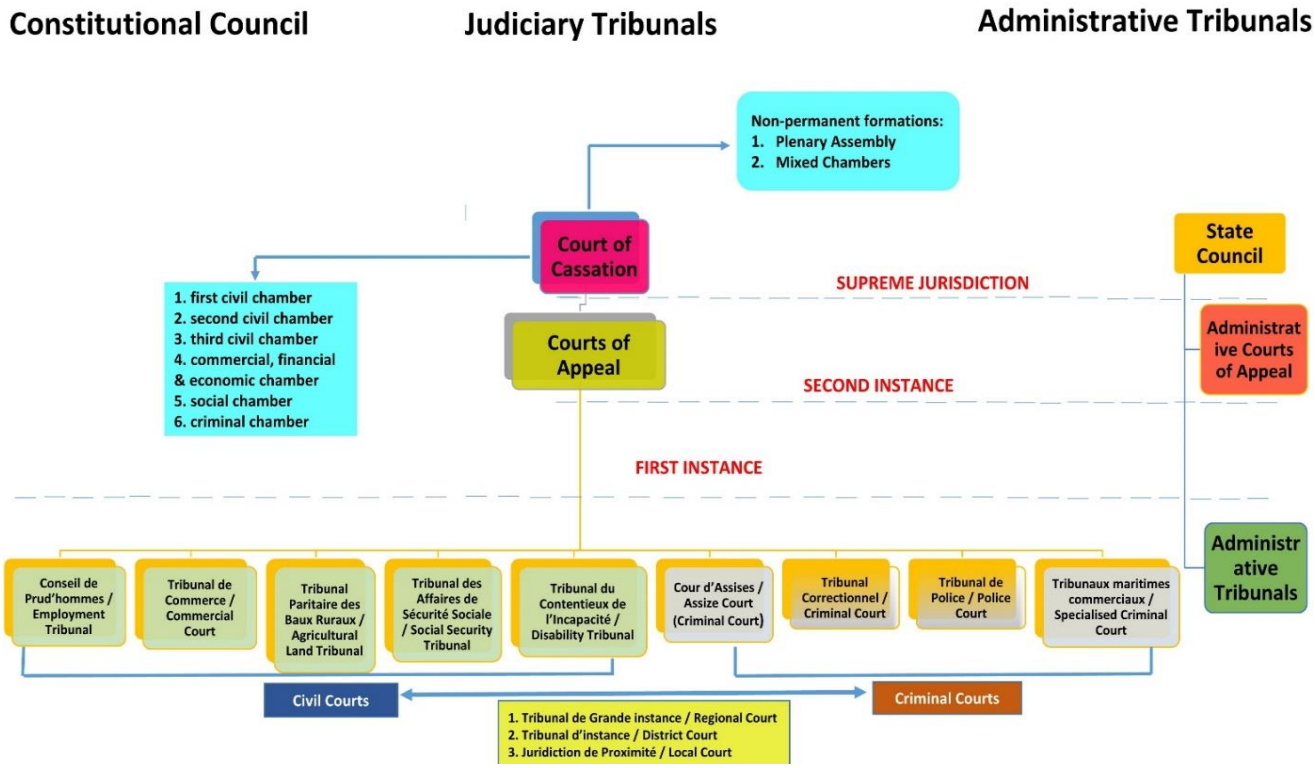
This segment will merely give an overview of the judicial system in France. It will not probe into detail, as it is committed to provide a brief concept and a concise understanding of how the cases are treated, as well as how complicated and exhausted the process is. It subsequently portrays the method and the stage of how citizens can file their lawsuits before the different types of courts, from the bottom to the very top, as described as simply as possible in Figure 2 below.

Before understanding how the Supreme Courts – (State Council with 8 Courts of Appeal/*Cours administratives d'appel* and 42 administrative tribunals; and Court of Cassation with 36 Courts of Appeals, 161 higher/regional tribunals [*tribunaux de grande instance*] and 307 lowest/first level tribunals [*tribunaux d'instance*]) – operate in France, we need to first understand the French law system. As distinct from the English legal system, for instance, which uses a system of "Common Law", contrastive legal studies in France have tended to focus mainly on a system of "Civil Law", meaning that it was codified and originated from ancient Roman law and inherited from 1804 French Civil Code (*Code de*

Napoléon) (Terre, 2009; Chantebout, 2004). This Civil Code remains to be the cornerstone of French laws to this day, though it has been updated and extended many times to take into account a changing society.

France mainly deals with a dual legal system (Chantebout, 2004; Lawson, 1959): one branch, known as public law (*droit public*), defines the principles of operation of the State and public bodies and deals with complaints or litigation concerning public officials in the exercise of their office. This law is applied generally through public law courts (*les tribunaux administratifs*). The other system known as private law (*droit privé*), applies to private individuals and private entities, and is administered through two judicial channels: civil litigation and criminal offences.

Figure 2. The Judicial System of France



Sources: expanded and modified from European e-Justice, 2013; Ministry of Justice, 2013, 2012; Terril, 2009.

Laws in France, as in other democratic countries, are generally proposed by the government, and must be passed by the two houses of the French Parliament: the National Assembly and the Senate. They officially become law as from the date on which they have been passed by Parliament, signed into law by the President. Moreover, there is also a hierarchy to French laws (Terre, 2009; Chantebout, 2004). Here they are, in order of greatest to least importance, known as:

- *loi organique*/organic law (institutional acts akin to the Constitution)
- *loi ordinaire*/ordinary law (ordinary acts that have been voted on by Parliament regarding matters specifically left within the purview of Parliament by the Constitution)
- *ordonnance*/ordinance (measures taken by the government in matters that would be normal and relevant to keep the country operating)

There are also regulations (*règlements*), which are issued by the executive power and can be further broken down into: *décrets* (for the Prime Minister and President) and *arrêtés* (for the executive branch members who are not the President or Prime Minister). Statutory instruments such as *lois, décrets, ordonnance, arrêtés* turn into law on signing by the minister(s) and are published in the official gazette (*Journal Officiel de la République Française*), either in hard copy or in the electronic version is sufficient (Terre, 2009; Chantebout, 2004).

As stated earlier, State Council and Court of Cassation are in fact the two supreme jurisdictions in France. There also exists a third, unique aspect of the French judiciary that is the Constitutional Council (*Conseil Constitutionnel*) (Ministry of Justice, 2013). This branch oversees review of statutes before they are enacted as well as overseeing national elections and answering questions from citizens regarding the constitutionality of laws. This Constitutional Council is made up of nine members: three are appointed politically by the president, three by the head of the National Assembly, and three by the head of the Senate

(Ministry of Justice, 2013). Nonetheless, since two cases investigated in this study are situated specifically in both State Council and Court of Cassation, then we are merely focusing to discuss these two Supreme Courts.

In light of this understanding, one might need to be careful to equate other Supreme Courts in different countries. Take, for example, the American Supreme Court, which constitutes a distinct model and deals with a different logic (Carcassonne & Duhamel, 2015). Therefore it is incompatible to compare these organs as they are differ in terms of tasks and functions. The American Supreme Court has a double mission – to guarantee the uniform interpretation of law, as well as to ensure the correct implementation and practice of the law across the nation. In contrast, the French State Council and Court of Cassation have separate specific functions (as will be discussed below). Thus, in view of these considerations, it might arguably be more relevant to compare between the American Supreme Court to a merger of the French Constitutional Council and the Supreme Courts of both jurisdictions – the Court of Cassation and the State Council (Carcassonne & Duhamel, 2015; Calon, 1978).

The ordinary tribunals (judiciary order) deal with civil litigation as well as criminal litigation, whereas administrative tribunals (administrative order) supervise the government (all governmental institutions, including local and national) and deal with complaints or lawsuits concerning public officials and public services. The highest level of orders are in each authority of the Court of Cassation and the State Council, which have the final and binding force decision (European e-Justice, 2013).

The Court of Cassation – a supreme jurisdiction for judiciary tribunals – functions to ensure the rules of law have been correctly applied, according to the facts that have been observed and appreciated by the courts in the first degree and/or Court of Appeal (Court of Cassation, undated). In other words, it gives the judgement – concerning litigation – whether the judges applied the rules of law correctly, in the light of the case before them and the

questions put to them. It thus ensures the unity of law in the Republic. Under certain conditions, the Court of Cassation may issue opinions in civil and criminal matters at the request of other courts. If the court deems that the impugned decision results from the proper application of the law, it will dismiss the appeal. Should the court decide the law was improperly applied, it will 'interrupt' the decision and annul it in whole or in part. In the majority of cases, it will not re-adjudicate the case per se but will return it to the lower-level court (Court of Cassation, undated).

Moreover, the Court of Cassation is composed of six chambers, each under the authority of a president: first civil chamber; second civil chamber; third civil chamber; commercial, financial and economic chamber; social chamber; criminal chamber (Court of Cassation, undated). There are also two bodies of non-permanent formations: the Plenary Assembly, which brings together members of each chamber, and mixed chambers consisting of members of at least three chambers. Thus, these formations – chaired by the first president or by the most senior (oldest) president of the court's chamber – examine cases which give rise to divergent interpretations of the law between the trial judges (lower-level courts) or between the chambers of the court. The prime general advocate or a general advocate also intervenes with these formations to give her/his opinion. The court also has a documentation service, studies and report which responsible for disseminating the jurisprudence of the court.

The State Council (Ministry of Justice, 2013) is a supreme jurisdiction for administrative tribunals. As mentioned earlier, it has authority in case of dispute of an administrative act a liability action against public officials and/or public services. It is seized by a written request that can be formed (Ministry of Justice, 2013):

- by any citizen against the French State or another legal entity of public law in order to contest a decision taken by the executive power (excess of power);

- by any person interested in obtaining compensation for a fault of the French State or its services or public institutions, local authorities or their affiliated institutions, hospitals or similar services.

It furthermore verifies that the law has been properly applied and in the same way by all administrative jurisdictions (administrative Court of Appeal and administrative tribunals). The State Council gives judgment for certain appeals against the decisions administrative tribunals (for instance disputes concerning municipal elections). It also has an advisory role giving opinions to the government on the most important bills and draft decrees (Ministry of Justice, 2013).

From the above explanation, it is understandable that the burkini case investigated in the research was addressed to the State Council, as it deals with public officials/institutions, in accordance with the decree of Mayor Villeneuve-Loubet. The other case of Baby-Loup was brought to the Court of Cassation due to a confrontation with private companies/institutions. In addition to that, since France is a part of the EU – even though it has its own national laws and regulations – it is nevertheless under the jurisdiction of EU treaties and the EU Charter. Consequently, at the national level, one party can always refer to the EU treaties and EU Charter and ask national judges to apply it, as is expected of EU member-states (Eijken & Vries, 2015; Ferraro & Carmona, 2015). Furthermore, at the EU level, some cases may then be addressed to the CJEU or the ECHR. Citizens who consider their fundamental rights and freedoms are infringed upon by the EU or one of the member states (after exhaustion of all courts available at national level), they are also able to refer their lawsuits to the CJEU or the ECHR against a member state (ECHR, 2016; European e-justice, 2016). Or another alternative citizens may have is to bring the case internationally to the UN Human Rights Committee (UN-HRC) and may refer to the articles in the International Covenant on Civil and Political Rights (ICCPR) and/or International Covenant

on Economic, Social and Cultural Rights (ICESCR), likewise in the case of Mrs. F vs. Baby-Loup, which further examined in Chapter 4.

2.3. Feminism, Gender Bias, and Social Science

2.3.1. Feminism and Legal Discourse

The paradigm of feminism is neither a homogeneous nor a monolithic conception. The development of feminism is a contextual process, which is why its definition becomes dynamic and diverse according to social and cultural realities. Some feminists perceive that gender roles are socially constructed so that it is an impossibility to generalize women's experiences across cultures and histories (Benhabib, 2001; Butler, 1999; West & Zimmerman, 1987). Randall (2010) added that post-structural feminism is in fact based on the philosophies of post-structuralism and deconstruction, in which that discourse has been instrumental in shaping the concept of gender socially and culturally, and thus emphasizes the social construction of gender and the discursive nature of reality (Butler, 1999).

Since this study is concerned with the structures of society, as well as hierarchical relations between the gender groups that are reproduced via discourses, feminist theory is highly relevant with CDA. In particular, legal discourse analysis has been heavily influenced by feminist legal theory for it supplies many examples of discourse analytic readings of legal materials. There are four reasons why CDA, to some extent, cannot be separated with feminist theory (Niemi-Kiesiläinen et al., 2007). First of all, a social constructionist approach to gender and sex is a common feature of diversiform of feminist theory, regardless of biological gender is or is not a category that occurs earlier than language, because discourse constructs for the biggest part of the meanings associated with gender and sex (Lacey, 1998; Naffine & Owens, 1997). Second, we barely cannot disprove that society and social relations are organised by the duality of sexes (Svensson, 2001). Third, in many social

contexts, the difference between gender and sex are not vividly recognised. In this sense, gender is perceived as a matter of culture which constitute behavior differences between women and men that are socially constructed–created by men and women themselves. Whereas sex more refers to humans biological reproductive functions (male and female) (Niemi-Kiesiläinen et al., 2007). Therefore, discourse analysis has been utilised as one method to make gender and sex become perceptible. For this reason also, feminist legal science functions, not only in discourse analysis in social science, but also in law science (Niemi-Kiesiläinen et al., 2007). Fourth, in its essence, contemporary feminist theory, just like CDA, is trans(multi)disciplinary. This means feminist legal studies are performed reciprocally with feminist studies in different disciplines and, specifically, in gender studies and feminist theories (Niemi-Kiesiläinen et al., 2007).

In another aspect, feminist (legal) theories and gender studies offer a theoretical context as well as contemporary legal theory that contributes in recognizing discourses of sex and gender in law and unveil the latent assumptions, "as they challenge the objectivity of legal language, the autonomous character of the legal system and they encourage exploring the nexus between legal discourse and other social discourses" (Niemi-Kiesiläinen et al., 2007, p. 87). Although the advantages of discourse analysis are not restricted to feminist studies merely, yet discourse analysis can be applied to investigate legal cases in which "identities, categories, boundaries and concepts are defined or meanings given to human actions" (p. 88). Again, as stated in Chapter 2, it is also worth remarking that constructionist readings do not question legal principles as incontrovertibly true nor seek for a proper interpretation of law, rather they are interested in what way or by what manner social cultural values appear in the concepts and interpretations of the law. At this scope, "such readings may have also consequences for interpretations of law" (Niemi-Kiesiläinen et al., 2007, p. 88).

2.3.2. Muslim Feminism

Muslim women who wear headscarves or burkinis are represented by several Westerners or non-Muslims as under repression or by some liberal or radical feminists who perceive that the headscarf or other religious attire a form of oppression or a mark of separation or exclusivity. However, Choudhury (2009) pointed out that this idea of "false consciousness stating a veiled woman is by the very fact that she wears an oppressed veil. To be free, the veiled woman must come out of the veil. Such reductionism imagines that veiled Muslim women were nothing but victims of their situation" (pp. 158-159). Halley et al. (2018; 2006) introduced "the governance of feminism", where feminism must seeks not only to analyse and criticize the problem, but to design, pursue, to see another point of view and implement reforms to address the problem in the real world (p. 348). Therefore, one could argue that wearing a headscarf or a burkini should be considered as a human right or as a belief system or a devout lifestyle, rather than looking at it from a single incompatible, cynical standard.

Secondly, it is also paramount to revisit the essence of feminism definition and what it is called by "Islamic feminism" or "feminism through Islam" or "Muslim feminism", [15] irrespective of pros and cons over the term itself. These terms are more widely used, since the era of theology of feminism, continued by the third-wave feminism, until postmodern feminism, as they reflect the plurality of discourses of empowerment that Muslim women find through their faith and how they comprehend the Islamic teachings that inspire them with equitable rights and duties to men, the privilege they endure in their lives to independently decide their education, profession/occupation, practice of faith, marriage, as

[15] Many scholars prefer not to use Islamist feminism, as it is correlated with negative impression which is rooted in the fundamentalist Islamist movement. See Saadallah (2004), Yamani (1996). Or another scholars argued that the term "Islamist" is a political tool created specifically to demonize Islam, because there are no terms refer to violent Christians or Hindus or Buddhist or Jewish as Christianists, Hinduists, Buddhistists, or Jewishists. See for example Beydoun (2018).

well as the empowerment they are granted from their connection with God, both as women and as humbly submissive to God.

It is clearly stated in the *Qur'an* that women are equal to men, including their rights and obligations, where the *Qur'an* uses the term "*zawj"* (a pair), which means linguistically according to Shihab (2001a) as 'different or distinct yet needing or requiring reciprocally' or other meanings 'the equity of both sexes' (Marsot, 1996). Similarly, the rights and obligations of the wife is recognized fairly with the rights and obligations of the husband (Fakih, 1996). It is the *Qur'an* that for the first time in human history recognized women as legitimate entities and granted them specified rights and authorities in matters of marriage, divorce, property, and inheritance (Shihab, 2012; 2005; 2001a; 2001b; 2000; 1995; Badran, 2002). Moreover, speaking about headscarf/*hijab*, there are in fact ample discussions and debates about women's *hijab*, but one would also critically question: what about men's *hijab*? Is it only addressed or intended merely for women? Does it really exist? It has been found that, it is not uncommon for non-Muslims and even many Muslims to often associate the religious commandments on *hijab* with females. However, interestingly, according to Shihab (2012; 2005; 2000; 1995), Islam actually has ordained *hijab* for both men and women, as stated in the *Qur'an* chapter 24 *An Nur* verses 30-31. In these verses, indeed, before addressing women and telling them to conceal the bodies, God first addresses the believing men to lower their gaze. In other words, it is men who first need to put "*hijab*" on their gaze and are obliged to manage and control their stare. Yet albeit, it may not be necessarily on men to conceal some parts of the body like it is for women, but the issue of modesty and humility cannot be neglected.

In the early history of Islam, it had been delivered and demonstrated concretely by Prophet Muhammad that through the Islamic tenets he had made fundamental reform to the condition of Arab society at that time, particularly related to the position and rights of

women. Back in around 7th century CE, in the Arabian Peninsula, when Islam was initially revealed, where in that era and even long time before, women were born solely to give birth. Specifically in the culture of Arab society prior to Islam, women or girls were considered unreliable to protect or defend the family or tribe (Shihab, 2005; 2001b). Women can be inherited from one man to another as hostage or bail if the men lose war. Moreover, infanticide was rife among the ancient Arabs, having a daughter was considered a huge disgrace and humiliation to fathers. When news of a baby girl befell them, their faces turned dark and they are ashamed (Shihab, 2005; 2001b). According to them, the more female family members, the weaker and strengthless the tribe, and as a consequence, women will be captivated and despised by slavery. Having a daughter meant fear of starvation, fear of falling into poverty or fear of diminution of their wealth, because for them, girls are non-productive. The society cannot bear the ignominy, until they killed their daughters or buried them alive. These traditions were banned and opposed by the teachings of Islam brought by the Prophet Muhammad which then generated excessive refusals from tribal heads, local important figures, and society at that time (Muhammad, 2006; Shihab, 2001b). *Qur'an* condemns the disappointment and the darkness of their faces, the shame that is in their hearts, and moreover juxtaposes their heinous attitudes and treatments to their daughters with the destruction of the universe – all was narrated and recorded in the *Qur'an* chapter 16 *An Nahl* verses 58-59, chapter 81 *At Takwir* verses 8-9, chapter 17 *Al Isra* verses 31, chapter 6 *Al An'am* verses 151, chapter 6 *Al An'am* verses 140, and capter 6 *Al An'am* verses 137 (Shihab, 2001b; 2001a; 2000).

Shihab (2005; 1995) argued that the Islamic tenets delivered by the Prophet Muhammad place women as an esteemed entity with honour and dignity. The affirmation of the principle of equality between women and men can be read in various chapters and verses, such as *Qur'an* chapter 49 verses 13; *Qur'an* chapter 53 verses 45-46; *Qur'an* chapter

4 verses 1, *Qur'an* chapter 7 verses 190 and so on. Admittedly, that there are considerable practices in some parts of the Muslim world that degrade and humiliate women; however, it certainly is not what is contained in the *Qur'an* or how Islam had been taught, but rather derives from local traditions, customs, and culture (Shihab, 2005; 2000). Thus, it may not be prudent or correct to simply generalize one particular cultural practice, which is disrespectful of women, by deducing that it is a representation of Islam and/or Muslim women as a whole.

Furthermore, feminism as an interdisciplinary approach of equality and equity based on gender issues, has, for history, evolved from the critical examination of inequity between sexes and against any discrimination or exclusion based gender or race or religion, infringements of human and civil rights, stereotyping, misconception/misrepresentation or objectification. Feminism, according to Hooks (2000), is not a means of spreading hatred among men, but rather a movement to end sexism and oppression by emphasizing the unequal power relations between women and men. Moreover, being a feminist is not necessarily a prototype of women or men with categories of particular character, thought and appearance. This is to say that a man can surely be a feminist as long as he has awareness of the injustice and is willing to change the inequity/inequality and repression against women. On the other hand, women can uphold the patriarchy as well as men. Some women strongly resist any concept of feminism. They include themselves in faction of counter-feminism which seeks to require the status quo and refuse questioning the condition and position of women.

Saadallah (2004) pointed out that Muslim feminism is indubitably a feminist movement arose historically and culturally from Islam, both as a religion and as a belief. She then emphasised "the argument for Muslim feminism should be based on the notion of empowerment and a rights-based approach, one which refutes the criticism that it is only

culturally relativist manifestation and it is important to identify Muslim feminism as a tactical change in the feminist movement rather than as a non-feminist project" (p. 217). In other words, Muslim feminism literally talks about women's empowerment, honour and respect for women that actually exist in the principles of Islam. For that reason, Muslim feminism should essentially be included within a more holistic discourse of feminism because it is working towards emancipation, women rights, and women development in all social domains. Similarly, Badran (2002) emphasized "there is no contradiction between being a feminist and being a Muslim. Muslim feminism advances women's rights, gender equality, and social justice using Islamic discourse as its paramount discourse…" (pp. 4-6). Yet, she still suggests that the term should be utilised mindfully with regards to history and context.

2.3.3. Gender Bias in Religious Interpretation

In contrast to the above analysis, some would argue that Islam is incompatible with feminism, or that Muslim feminism is not actually a feminist movement (Moghadam, 2002; Mojab, 1999; Moghissi, 1998; Afkhami, 1995; Shahidian, 1994). Nevertheless, Saadallah (2004) highlighted that "the impact of Muslim feminism is more comprehensive than secular feminism, which has been resisted in Muslim societies because of its identification as a Western intrusion and thus a threat to its authenticity" (p. 224). Moreover, for the opponents, it is regarded that the term feminism is not well-accepted and seems to contradict with Islamic tenets (Mojab, 1999; Moghissi, 1998; Shahidian, 1994). Any Muslims who perceive themselves as feminist will be seen by other Muslims that they have deviated from the teachings of the *Qur'an* and labelled as heretical or perverted (Saadallah, 2004; Bullock, 1999).

One of the factors, according to Yamani (1996), is due to the fact that most interpretations of the *Qur'an* have been products of the discourse of male *ulama* (religious leaders), or in other words, most of the exegesis of the *Qur'an* have been developed by *mufassirs* (an author of a *tafsir*/exegesis of the Qur'an) that are merely done literally and intended to strengthen the affirmation of patriarchal vision. Admittedly, the traditional interpretation of women's issues in the Islamic sources have been characterised by patriarchal attitudes, and like other major religions, cultural practices have been given too much influence in the interpretation of religious texts pertaining to gender issues. However, despite the fact that feminism is a contested term in the present, it has historically many types of feminists who have been experiencing difficult times to find similarity and common ground, to name a few: Jewish feminists and Christian (Catholic) feminists (Rupp & Taylor, 1999).

Furthermore, religion is often presented as an effective means for oppressing women (Choudhury, 2009). It thus achieves the highest legitimacy because it transcends the supra empirical, and is seen as the "sacred canopy", as a protector (Berger, 1967; Durkheim, 1893). Religious interpretation throughout the history has been male-dominated and obeyed absolutely by many people from different ages (Saadallah, 2004). As a result, the sexist interpretation mushroomed and eventually suppressed the fate of women for centuries, after finally feminist theology came into existence and grew within religious history, for example, and thus began to expunge patriarchal domination (Wadud, 1999; Abu Zayd, 1995). The male-dominated religious interpreters/thinkers often do not even pay enough attention to the intense perception of several religious teachings and its implications of such products that have led and served as legitimizing various forms of discrimination, injustice, and violence against women (Bouma, 2011; Saadallah, 2004; Yamani, 1996).

Gender bias in religious interpretation – as a portrait of the dominance of patriarchal religious interpreters/thinkers – has marginalized and sealed the path of growth of women interpreters/thinkers who are able to engage in various struggles of religious thought. This makes the product of gender biased thinking is increasingly unchallenged, and further has been perceived as a trusted, valid, irrefutable reality by most of religious people. Thus, unfortunately, the change towards the development of gender-sensitive itself is not as easy as it is said.

In addition, religious interpretation based on gender-sensitive is undoubtedly a necessity in upholding gender equality and justice. Indeed, religious interpretation is definitely not a religion per se. In the normative level of *ilahiyyah* (divine elements of God), the truth of the holy book can literally be said to be absolute. However, in the historical-interpretative level, the truth may also be claimed as relative. This is due to the process of interpretation as ultimately a process of understanding that cannot be separated from reduction, and since human language has its limitations and humans themselves are bounded by their rationality, as a consequence it will never perfectly capture the exact meaning of God's word. For that matters, religious interpretation may always be changing and adjusting as it relates to geo-socio-culture of the concerned society.

Amina Wadud, in her *book Qur'an and Women: Rereading the Sacred Text from a Woman's Perspective* and Nasr Hamid Abu Zaid, in his book *Women in the Discourse of Crisis*, are some of those who fight for theology feminism, specifically, Muslim feminism by reinterpreting the *Qur'an* related with gender equality. By combining hermeneutic studies of the *Qur'an* and feminism, Muslim feminists have succeeded in altering the very different perceptions of women diametrically from the understanding of conservative *mufassirs* on women. Both understand that the interpretation is indeed as an attempt to relate the text of the *Qur'an* to the real contemporary problems in order to provide solutions to the

issues of today's society, especially to those who strongly negate the women's existence and contribution. Notwithstanding, there are some debates among Muslim scholars themselves whether or not feminist ideology does exist in Islam; however, there is a common point where both feminist ideology and Islamic tenets encourage women's empowerment and development (Yamani, 1996).

On the basis of this understanding, some would argue to have another critical outlook: being both a Muslim and a feminist is not only possible, but actually inevitable. That the truest, sincere Muslim – consciously or unconsciously – is undoubtedly a feminist (Mardiasih, 2019; Affiah, 2017). A genuine Muslim will understand that one of the virtues of Islamic principles is to look at people equally and justly (Mardiasih, 2019; Affiah, 2017). From the history, we have learned that the first person who had faith and lived the truth of Islam was a woman, named Khadija, the wife of Prophet Muhammad. Khadija was a strong, beautiful, and independent woman. She took care of her entire business on her own, rejected men who asked for her hand as they did not meet her standards, and chose who she wanted to marry. She was a leader and a pillar of her community in her era. As a business woman, she was managing a huge business and excelled to the point that she was nicknamed *Ameerat-Quraysh* (The Princess of Quraysh) (Affiah, 2017; Muhammad, 2006). In light of this historical evidence as well as what was stated in the *Qur'an* about the equality of women and men, one could confirm that albeit the term 'feminist' or 'feminism' did not yet exist at that time, but its values were indeed contained therein and implemented in the early days of the rise of Islam. For that matter, some are convinced that Muslim women who have career goals and high standards are actually not 'modern Muslims' (Mardiasih, 2019; Affiah, 2017). There is nothing modern about female empowerment in Islam. Muslim women have been given an extremely high status in Islam from the beginning. They are honoured and placed three times higher than men (Mardiasih, 2019; Affiah, 2017; Shihab 2012; 2005; 1995).

Therefore, if others consider Muslim women who are independent and make decisions for themselves are pursuing so-called 'some modern versions' of Islam, then it is certainly a false contention, as it has been this way all along (Mardiasih, 2019; Affiah, 2017; Muhammad, 2006).

In the context of this study, Muslim women who filed their cases in the Supreme Courts are in fact not easy, as they need to struggle from lower-level courts/courts of first instances, Court of Appeal until the highest ones. Not to mention the disproportionate media scrutiny and anti-Muslim women discourses produced by several demagoguery politicians or government apparatus that result in political interference in the case. Being a Muslim woman with a headscarf or wearing a burkini at the beach or swimming pool does not necessarily mean avoiding being a feminist or rejecting feminism, as this concept stands for social political ideological movement fight for women equality and empowerment. One of the obvious reason why Muslim women would even go through the exhausting tribunals is that they seemingly eager to strive for their civil rights and to fight against the isolation, segregation, marginalisation, discrimination and social injustice based on gender and sex, race or religion that they encounter.

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Chapter 3. Critical Discourse Analysis

3.1. Analysis Frameworks and Approaches of CDA

3.1.1. Introduction

Critical research provides a method of analysis, which utilizes an investigative and explorative technique for review and a way critique all facets of society. It is a methodology that critically discusses social, cultural, economic, and political aspects in order to evoke awareness and perception. Wodak (2001a) highlighted that the main mission of critical theory is to give guidance to "'remembering' a past that was in danger of being forgotten, to struggle for emancipation, to clarify the reasons for such a struggle, and to define the nature of critical thinking itself" (p. 9).

Wodak (2001a) described the significance of critical studies and its important standpoint towards resistance against a social crisis for liberation and change. In the late 1990s, this approach developed into the international movement of CDA. Such a critical approach aims to raise knowledge and awareness among people and in hopes of generating transformation in their perspective and intellectual approaches. CDA's goals encompass change, transparency, critical thinking, and self-reflection. It is also concerned with the contribution of text and discourse in (re)producing and legitimising social power abuse, discrimination, and inequalities. Thus, it also further advocates for the dialectical liaison between discourse and society. Therefore, hopefully, the discursive mechanisms and linguistic description will reveal power relations and the ideological constructions that are underlying in various texts (including legal text) that shape the public opinion, such as legal cases. Kress (1996) illustrates CDA's intention to reach socio-political aims:

> "(...) broadly speaking that of altering inequitable distributions of economic, cultural and political goods in contemporary societies. The intention has been to bring a system of excessive inequalities of power into crisis by uncovering its workings and its effects through the analysis of potent cultural objects – texts – and thereby to help

> in achieving a more equitable social order. The issue has thus been one of transformation, unsettling the existing order, and transforming its elements into an arrangement less harmful to some, and perhaps more beneficial to all the members of a society" (p. 15).

Moreover, as a critical investigation of discrimination, social injustice, and social inequalities, what matters in the context of CDA is "the language in which power, hegemony, values, ideology, social justice, political interests, authority, control and discrimination are expressed, constituted and legitimized" (Huckin et al., 2012, p. 123). Similarly, Bloor & Bloor (2007) emphasized that CDA is interested in the role of language use (including judges' verdict and discourse) in social change. Thus, all forms of communication are determined by language and are filled with various discourses and meanings.

Critical analysts pay more attention to the suggested ideologies behind the utilization of language and to the interests that might be carried through discourse. They may analyse issues in society characterized by a perspective of inequality, discrimination and segregation in social and/or education systems, cultural and/or religious differences, gender or political discourses. CDA considers itself to be part of a political projection that relates discourse in social practices and relationships, seeks situations of dominance, discrimination, inequality or prejudice – as manifested in the linguistic and discursive forms used to represent marginalized or isolated community, discriminated groups or organizations, and emphasizes on discourse's outcomes on social practices and development (Fairclough, 2010, p. 8; Weiss & Wodak, 2003, p. 15; Meyer, 2001, p. 30; Titscher et al., 2000, p. 147). More precisely, besides examining social issues, CDA "describes, explains and interprets relations between language and society, between discourse and social practices" (Blackledge, 2005, p. 1-2).

In this chapter, the applied CDA analysis will mainly examine and look for "the origins of social problems and find ways to analyse them productively" (Bloor & Bloor, 2007, p. 12). Moreover, it investigates CDA by discussing its origins and development,

defining its perspectives and objectives through notions such as text and discourse in social practices, critical evaluation, interdisciplinary engagement, and the character of language.

3.1.2. Genesis, Critics, and Evolution

Historically, CDA has evolved from various disciplines. They include French discourse analysis (as proposed by Althusser, Foucault and Pêcheux where language and ideology meet), social semiotics (Hodge, Kress and van Leeuwen), sociocultural change in discourse (Fairclough, 1992; 1989), discourse-historical methods (Ruth Wodak, the group in Vienna, influenced by the Frankfurt School), critical linguistics (developed in Britain in the 1970s by Fowler, Kress and Hodge), socio-cognitive studies (van Dijk, since 1980), reading analysis (the linguist Utz Maas combines Michel Foucault's theories with a hermeneutic methodology), and ultimately the Duisburg School (influenced by Michel Foucault's theories) (Fairclough & Wodak 1997, pp. 262-267). Over time, CDA continued to develop through their sociological approaches (Weiss & Wodak, 2003, p. 6; Titscher et al., 2000, p. 144); and therefore CDA examines "social interactions in a way which focuses upon their linguistic elements, and which sets out to show up their generally hidden determinants in the system of social relationships, as well as hidden effects they may have upon that system" (p. 5).

The CDA movement subsequently emerged as "a network of scholars" particularly in the early 1990s when Teun A. van Dijk, Norman Fairclough, Gunther Kress, Theo van Leeuwen and Ruth Wodak introduced specific theories and methodologies into CDA (Wodak, 2001a, p. 4). Notably, in *Language and Power*, Fairclough (1989) contributed a significant influence on CDA. The core objective of these analysts was to critically reveal social, cultural, and political ideologies, relations and contexts in language use and discourse. In a particular way, these authors influence the manner in which both language and society

are approached and illuminate how they become crucial notions in the critical study of discourse. They consider discourse not as a mere reflection of social reality, but as a reproduction and maintenance of real social structures.

However, CDA also could not escape from criticism. It has been criticised for not affording methodical and detailed textual analysis, and moreover, the theoretical framework of CDA seems 'eclectic' and 'unsystematic' (Schegloff, 1998; 1997). Achieving meanings and results by focusing only on textual analysis while disregarding the world of media, and ignoring the varied perception and interpretation of the reader – the recipient of discourse – is insufficient because all these external factors are also necessary for a critical analysis (Cameron, 2001). CDA researchers are criticised for having a biased manner because they are motivated by ideological principles (Schegloff, 1998).

Addressing the above critiques may cause a sort of repetition and redundancy, as it has been partly explained in the sub-section of limitations. However, this segment will specifically respond to the shortcomings of the CDA approach. Most of, if not all, methodological approaches certainly have shortcomings, including CDA. CDA is criticised to be neither a specific approach, nor a systematic structure of analysis. It is criticised to be biased. Nonetheless, this latter criticism is valid for all projects of scientific research. Particularly, when collecting empirical data, social researchers inevitably bring a certain degree of bias to their research based on each previous experiences – in which it is often intertwined with researchers' interpretations, worldviews, and paradigms – both "recognized and unrecognized, conscious and subconscious" (O'Leary, 2010, p. 263). CDA is a critical research technique that relates textual analysis to a socio-political context, aims to investigate how texts and discourse may (re)produce, shape or reflect: social norms, religiosity, cultural behaviours, economic trends/standards, laws, political opinions, as well as interactions and relations within a society (Wodak, 2009; Fairclough, 2003). Moreover, the issue of

subjectivity and multiplicity of verity is inevitable in qualitative social research since they cannot be completely annulled from one's thought, therefore clarifying researcher's position helps to have a justifiable analysis of the research (Wodak, 1999; Peshkin, 1988). Fairclough (2001) confirmed that he is "a socialist with a generally low opinion of the social relationships in society and a commitment to the emancipation of the people who are oppressed" (p. 4). This signifies that his approach is based on the commitment to emancipation, so it is important to recognize that his method of data analysis is built from this particular standpoint. He further stressed that the CDA approach is a vivid set of guidelines, and that it can never be entirely objective: it may come from a certain perspective, may produce a biased and incomplete analyses, and may contain particular concerns or interests (Fairclough, 2002; 2001). Moreover, Wodak (1999) also pointed out that researchers "cannot separate their own values and beliefs from the research they are doing … [therefore]… researchers must be constantly aware of what they are doing" (p. 186). This is why the term "critical" of CDA suggests a self-reflective researcher who takes into account his/her own position while doing research about social issues (p. 185). Self-reflection indicates to two aspects: "a constant awareness of one's own biases, and a constant balancing between theory and empirical phenomena, in an attempt to understand the social life rather than announcing truths" (p.186). Hence, researchers need to mindfully equilibrate between theory and empirical phenomena when analysing and interpreting discourses. It is therefore essential for researchers to notice repeated patterns – both on the micro or macro levels – in the analysis of the discourse, for they are able to minimize subjectivities.

From the point of view of the researcher, what really matters is how clear, compelling, and rigorous the research is. CDA practitioners have always emphasized the importance of context and intertextuality for their analysis. Certainly, discourses do not occur in a vacuum, rather they are outcomes of histories of interplays between peoples,

groups, interest, ideologies, and ideas (Wodak, 2001; Fairclough & Wodak, 1997). Fairclough and Wodak (1997) urged to place discourse in a historical context: "Utterances are only meaningful if we consider their use in a specific situation, if we understand the underlying conventions and rules, if we recognize the embedding in a certain culture and ideology, and most importantly, if we know what the discourse relates to in the past. Discourse is not produced without context and cannot be understood without taking the context into consideration … discourses are always connected to other discourses which were produced earlier" (p. 276).

As for the methodological criticisms, according to Weiss and Wodak (2003), CDA is "a theoretical synthesis of conceptual tools" (p. 7). Weiss and Wodak (2003) argued that a plurality of theory and method should not be seen unsystematic or eclectic, the multeity and reciprocity within disciplines might be counted as a constructive benefit due to "the plurality of theory and methodology can be highlighted as a specific strength of CDA" that provides huge spaces for "innovative and productive theory formation" (p. 6). Above all, CDA is still supported because of the importance of its agenda and its social commitment (Paltridge & Hyland, 2011; Paltridge, 2006). Therefore, to have a full account of any discourse, we need to also study it from a historical-discoursal angle. We must be mindful of how the present discourse more or less measures or conforms with other discourses, and how the interplay of both local or global powers have impacts on the discourse present form and content, so that this focus would outweigh both the textual and social aspects. The present analysis attempts to put the various aspects pertaining to the phenomena of two cases of Muslim women in the Supreme Courts in a careful and balanced manner, with a holistic approach utilizing important contexts: historical, social, and linguistic. The following section will provide a definition of CDA and the approach applied in this study by bringing together its perspectives and ideological agenda.

3.1.3. Objective and Perspective

CDA is a critical multidisciplinary research scheme (van Dijk, 2001b) concerned with the study of discourse, text, and language use – overall communication methods. It involves the exegesis of language (Hesmondhalgh, 2006, p. 154), and it concentrates on consequences of representation and or its social politics, aiming at revealing the meanings beyond (p. 121). It merges social theories and social practices: languages, phrases and/or expressions, where social and political aspects are (re)produced in text and oral communication. Titscher et al. (2000) pointed out that CDA conceptualizes "languages as a form of social practice, and attempts to make human beings aware of the reciprocal influences between language and social structure of which they are normally unaware" (p. 147). In brief, CDA is generated from greater interest in the social, political, and rhetorical aspects of discourse (Huckin et al. 2012, p. 108).

According to van Dijk (2001a) CDA is defined as "a type of discourse analytical research that primarily studies the way social power abuse, dominance, and inequality are enacted, reproduced, and resisted by text and talk in the social and political context" (p. 352). It has been particularly referred to as 'discursive reproduction of social power' (Fairclough, 1989; Wodak, 1989) and concerned with 'the feminist movement and the critical study of gender' (van Dijk, 2008, p. 8).

Furthermore, the CDA approach was also generated by the theory of 'ideology' and by the study of 'social problems' such as discrimination, inequality, and racism (van Dijk 1998; 1993a), as well as by the theory of the critical study of political discourse (Chilton & Schaffner, 2002). As a consequence, CDA is mostly concerned with research that challenges domains of social issues in order to strive against the abuse of social power, ethnic minority difficulties or gender inequality. Hence, the core mission of CDA is to criticise a social system by looking at how situations of inequality, discrimination, prejudice, abuse of law or

power, excessive control, or injustice are produced, sustained or challenged in discourse, and to confirm if these situations affect social behaviours, relationships and identities (Weiss & Wodak, 2003; Fairclough, 2003). This emphasises that CDA stands with the oppressed and unjustly treated. Therefore, as CDA is ethically critical, this attempt calls attention to unveil the manipulative power in society of which people are generally unconscious. The evidence above summarizes why CDA is the right methodology for this research.

3.1.4. Method, Theory, and Approach

CDA is regarded as both "a theory and a method of analysing the way individuals and institutions use language" (Richardson, 2007, p. 1). It should not be comprehended as a uniform theory or a fixed method with a single theoretical framework, but rather as a 'critical' approach (Blackledge, 2005, p. 2; Weiss & Wodak, 2003, p. 13; Meyer, 2001, p. 14). CDA is 'critical' as it investigates the opaque relationships between "(a) discursive practices, events and texts, and (b) wider social and cultural structures, relations and processes" (Fairclough, 2010, p. 93). In Bourdieu's opinion (1977), an approach 'critical' means to accept that people's use of language and their social practice are connected with 'causes' and 'effects' that are normally invisible to them. In this sense CDA helps audiences to assess statements/documents/reports critically, and not take anything for granted or believe naively what particular individuals or groups or society try to (re)produce, disseminate and legitimate a message or an instruction, through different means of discourse.

Unlike most other approaches, CDA is "always explicit about its own position and commitment" (Meyer, 2001, p. 17) because it leads to a vivid moral and political position when tackling the social problem under examination (Richardson, 2007, p. 2). Wodak & Mayer (2001) added that CDA functions "to make choices at each point in the research itself, and should make these choices transparent. It should also justify theoretically why certain

interpretations of discursive events seem more valid than others" (p. 65). Thus, the critical approach in CDA bears the meaning of an assurance to delve into a clearer assignment of language in revealing ideological and power relations in a socio-political context, and results in employing a new attitude and perspective that will contribute to social change through a more 'conscious' discourse (van Dijk, 1996b). Moreover, CDA actually offers the instruments and allows access to those who are keen to conduct critical thinking and social change; however, it is not intended to judge what is right and what is wrong, as it is not meant to impose certain ideologies on certain issues or situations.

Furthermore, van Dijk (2008) found that research via CDA "is not a homogeneous movement – as is true for any social movement" (p. 8); therefore, it must be "multitheoretical, multimethodical, critical and self-reflective" (Wodak, 2001b, p. 64). Since the nature of CDA is heterogeneous, one could argue that it may cause confounding perceptivity; nevertheless, "the apparent confusion may lead to new arguments and debates and, overall, to innovation and change" (Weiss & Wodak, 2003, p. 13). In this context, CDA appears to be a capacious, critical, and interdisciplinary project. It crosses boundaries and combines social theories with linguistic strategies to understand social problems and to accomplish research objectives. This is another positive facet of the CDA method, and a convincing argument to utilize its capacity through this research.

3.2. Features of CDA

3.2.1. Inter(multi)disciplinarity

CDA is heterogeneous and wide-ranging in theory and methodology (van Dijk, 2001b), as it utilizes a mixture of approaches from diverse academic backgrounds. Weiss & Wodak (2003) stated that "studies in CDA are multifarious, derived from quite different theoretical backgrounds and oriented towards very different data and methodologies" (p. 12).

From the perspective of Fairclough (2010), CDA has three basic features: relational, dialectical, and transdisciplinary. It is relational as it focuses on social relations. It is dialectical as it concentrates on interactions between discourse and other social components. And in order to realize such objectives, it is necessary to draw upon some disciplines – sociology, linguistics, politics, and law – that focus on the interdisciplinarity of CDA or, as Fairclough (2010) would prefer to call it, as a 'transdisciplinary' form of analysis (p. 4). Moreover, Weiss & Wodak (2003) opted 'transdisciplinarity' or 'multidisciplinarity' which become "catchwords of academic discourse" (p. 15). This signifies that CDA focuses more on sharing interests between several disciplines, for example "sociology, linguistics, anthropology, politics, law, ethnography and ethnomethodology, [16] as well as cognitive and social psychology" (Bloor & Bloor, 2007, p. 2). Obviously, this inter(multi)disciplinarity is vital for the fruition of CDA objectives for "gaining a proper understanding, constituting and transmitting knowledge, and in organizing social institutions or in exercising power" (Wodak, 2001a, p. 11) – just as social theories necessitate to explain and interpret the ideologies of discourse. Besides, this inter(multi)disciplinarity itself requires a sense of critical analysis within the study (van Dijk, 2001b).

3.2.2. Power, Control, and Domination

The trend in critical studies, based on van Dijk (2008), is to establish a linkage between society (power and dominance) and discourse, social practices and the events being researched. This is the reason why CDA concerns itself with the nexus of power and dominance between "social entities and classes, between women and men, between national, ethnic, religious, sexual, political, cultural and sub-cultural groups" (Titscher et al., 2000, p.

[16] A methodology for the analysis of methods used to achieve social production, developed by Harold Garfinkel (1974).

164). Power can also be translated as manipulating the thoughts and actions that are considered to control the way individuals figure out the meaning and purpose of a text or a conversation. Accordingly, the core endeavour of CDA is to look for how inequalities or discriminations are reproduced through language use and, as a result, in discourse, opinions, attitudes, and actions.

The term 'power' encompasses the way in which CDA deals with social power, not the power of individuals. This is because "the social power of groups or institutions" is perceived as critical notion in CDA (van Dijk, 2001a, p. 354). Social power can be defined in terms of "the control exercised by one group or organisation over the actions and/or the minds of another group, thus limiting the freedom of action of the others, or influencing their knowledge, attitudes or ideologies". And since it is "organised and institutionalised, so as to allow more effective control, and to enable routine forms of power reproduction" (van Dijk, 1996a, pp. 84-85). In order to reach effective control, the very first step is to necessarily have "access to specific forms of discourse", either in politics, science, philosophy, or the media. The next step is to have influence over people's perception and knowledge, and in turn, (some of) their attitudes (van Dijk, 2001a, p. 355). Moreover, van Dijk (2008) deduced that indeed social power is about "the control of the minds of the masses, and such control requires the control over public discourse in all its semiotic dimensions" (van Dijk, 2008, p. 14). This implies that social power takes control on individuals' point of view and their behaviours, meanwhile dominance involves power abuse on people's resources or actions (van Dijk, 2000b). Such power and dominance is usually held by the dominant groups or influential people who have privileged access, allowing them to manipulating the thoughts and actions of others through discourse. For example those who run the power and authorities, who have high status or philanthropic positions, who own reputation or celebrity, who master the knowledge, 'culture' and, as a consequence, "a preferential access to public

discourse and communication" (van Dijk, 2001a, p. 355; 1996a, p. 84). However, dominant groups who have power to steer public discourse, but do not necessarily control economic resources, are defined as elites (van Dijk, 2001a).

Another important aspect is what Gramsci called "hegemony", which refers to the power of dominant groups through "laws, rules, norms, habits, and even a quite general consensus" (Gramsci, 1971 as cited in van Dijk, 2001a, p. 355). In this context, those who possess the power to make laws, regulations relating to education, economy, gender issues and immigration for example, or judgements in courts – are likely those governing groups and institutions that gain access to powerful resources provided by politics, society, culture, media, and other tools that control the social narrative. More importantly, if the elites (government, politicians, public figures) or other dominant social groups take control on socio-political discourse and its structures, this signifies that the minds/thoughts of the public are also under their influence (van Dijk, 2001a). Consequently, through public discourse, governing groups may exercise considerable control over people's thoughts, allowing them to influence their knowledge, beliefs, ideologies and behaviour. This can occur during daily conversations between people, communities, media events, or public debates. Hence, according to van Dijk (2001a), "these notions of discourse access and control are very general, and it is one of the tasks of CDA to spell out these forms of power" (p. 356).

3.2.3. Ideology

Van Dijk (1998) delineated his point of view regarding ideologies. He said they "are representations of who we are, what we stand for, what our values are, and what our relationships are with other groups, in particular our enemies or opponents, that is, those who oppose what we stand for, threaten our interests and prevent us from equal access to social resources and human rights (residence, citizenship, employment, housing, status and respect,

and so on)" (p. 69). In this context, ideologies are actually representations of 'our' and 'other' or 'us' and 'them' values of life and the social relationships that occur in between. Ideologies may be formed of a social group schema that depicts its "fundamental social, economic, political or cultural interests" (p. 69). They are both social and mental phenomena.

Historically, ideology points to "a new science of ideas, an "idea-logy", which would then be the ground of all other sciences (McLellan, 1986, p. 6 as cited in Richardson, 2007, p. 32) – a concept which was first constructed by Antoine Destutt de Tracey after the French revolution (Kennedy, 1979). He emphasized that "the ideas we hold are not the product of God or nature but are generated by our social environment as perceived through our physical senses" (p. 32). Whereas, Karl Marx (1848, p. 27 as cited in Richardson, 2007) believed that ideas and beliefs are "not the product of experience per se, but rather 'alter' according to their economic circumstances" (p. 32).

As mentioned above, the term 'ideology' that initially appeared in the late eighteenth-century (after the French Revolution) is an idiom that has undergone a shift since then, both in its meaning and its value. Althusser and Gramsci shifted from Karl Marx's monolithic concept of ideology and pioneered a more overt understanding on what way or by what means ideological forces function in society (Devereux, 2003; Althuser, 1971). From Thompson's point of view (1990 as cited in Wodak, 2001a) ideology concerns with "social forms and processes within which, and by means of which, symbolic forms circulate in the social world" (p. 10). Again according to Fairclough (1992) ideology relates to implications, significations, outcomes or incarnation of truth or 'reality' like 'the physical world', 'social relations', 'social identities', which are built and assembled to 'forms/meanings of discursive practices', then finally included in 'production', 'reproduction' or 'transformation' of power relations (p. 87).

Furthermore, van Dijk (1998) described ideology as a system of 'ideas' or 'beliefs', or 'cognition' and regarded ideologies as 'social' as long as they are connected with "group interests, conflicts or struggles" (p. 5). Besides considering ideologies as cognitive, he categorized ideologies "in terms of social groups, group relations, institutions at the macro-level and in terms of social practices at the micro-level" (van Dijk, 1998, p. 9). This is to argue that ideologies do not merely impact minds, ideas and principles. Rather, it is also concerned with socially obtained, changed and shared beliefs. Therefore, they are not 'personal' belief or experience, not sort of 'false consciousness', not substantially dominant, not certainly 'negative', and finally not "the same as any other socially shared belief or belief systems" (van Dijk, 2008, p. 117). Negative ideologies may have the mission to "legitimate or obscure power abuse, or conversely they may be used to resist or denounce domination and inequality" (van Dijk, 1998, p. 69). And on the contrary they may also "positively serve to empower dominated groups, to create solidarity, to organize struggle and sustain opposition" (van Dijk, 1998, p. 138). In this sense of positivity, more generally, ideologies simply serve groups of people in the organization and management in order to achieve goals, social practices, and social life (van Dijk, 1998, p. 138).

Furthermore, ideologies lie in text, and subsequently interpretation of discourse produces various ideological interests (Fairclough, 1992). Thus, ideologies are typically "assumed to conceal, hide or otherwise obfuscate the truth, reality or indeed the 'objective, material conditions of existence' or the interests of social formations" (van Dijk 1998, p. 138). In relation to this, CDA aims at revealing hidden ideological situations which could be found in the legal text investigated in the research by making them more vivid, detailed and obvious in social communication (Bloor & Bloor, 2007).

3.3. Discursive Strategies

3.3.1. Discourse, Language, and Text

Discourse, language, and text are the key elements in CDA. This section discusses the differences between them, as they are sometimes used as overlapping expressions. First of all, according to Fairclough (1989) and Fairclough & Wodak (1997), two elements i.e. discourse and language are forms of "social practice", rather than solely "individual activity" (p. 22; p. 258). Language is a means of communication, a mode by which people can express themselves; it has the capability to influence thoughts and attitudes of others, and can be a persuasive method of (re)producing cultural, social, economic and political ideologies; it is a mode of a "socially conditioned process", which takes place in society and is viewed as reciprocally 'shaping' society and its structures (Fairclough, 1995, p. 54; 1989, p. 22).

This signifies that utilisation of language in any kind of text that is "always simultaneously constitutive of social identities, social relations and systems of knowledge and belief", which means that every text brings its own contribution to shape the characteristics of society and culture (Fairclough, 1995; 1989). "Whenever people speak or listen or write or read, they do so in ways which are determined socially and have social effects" with the objective of preserving or changing social interactions or relations (van Dijk, 1997b; Fairclough, 1989, p. 23). In other words, in CDA particularly, language concentrates on exercising of power as pointed out by Chouliaraki & Fairclough (1999) "language is central to contemporary social life, and to the calculations of and struggles over power" (p. 9). This could indicate that a person or a group in power or that possesses particular authority is capable of achieving intended goals through influential and powerful language to convince, persuade, change, or manipulate the minds and attitudes of others.

On the other hand, discourse, according to van Dijk (2009a) is a "multidimensional social phenomenon, a form of social interaction, a social practice, a mental representation,

an interactional or communicative event or activity, a cultural product, an action, a linguistic verbal and grammatical or even an economic commodity that is being sold and bought" (p. 67). Moreover, Bloor and Bloor (2007) distinguish between discourse and text. They opined that discourse refers to "the whole act of communication involving production and "comprehension", whereas text refers to "actual written or spoken data" (p. 7). Arguing in the same fashion, Fairclough (1989) described text as a "product rather than a process – a product of the process of text production" while discourse is used to refer to "the whole process of social interaction of which a text is just a part" (p. 24). In short, a text is seen as a creation or a product, yet discourse is regarded as the social process or the intended result deduced from the text, and this process involves interpretation (Fairclough, 1989). When saying that discourse is a social process, it means that – similar to language – it is also "shaped and constrained by social structure in the widest sense and at all levels", as well as being "socially constitutive" (Fairclough, 1992, p. 64). Furthermore, its participation in the construction of social identities and relationships and in the reproduction of ideological beliefs and systems of knowledge is of vital significance.

To summarize, the utilisation of language should be analysed within its social context, which means that CDA constitutes an empirical textual analysis of language application in social interactions (van Dijk, 1997b). Furthermore, discourse operates ideologically. This means that discursive practices can generate an imbalance of social powers and social relations between particular groups based on various issues that are influenced by ideology such as religion, gender, politics or culture.

3.3.2. Discourse Analytical Approach

Various approach of CDA [17] are based on Foucauldian concepts (Wodak, 2003; van Dijk, 2001; Weiss & Wodak, 2001a). Discourse analysis is interested in examining

discourse, narratives, texts and language from the perspective that they are inspired by ideology of a particular institution. Similarly to law, it is produced in its institutions and discourses.

The selected corpus of writing analysed in this study consists of legal text, more specifically jurisprudence, which means judge's verdict or court rulings which have legally binding status and serve as a direction/guidance for other judges to decide similar cases in the future. The discursive mechanisms that will be analysed in the corpus of texts such as implicit meanings, rhetorical devices, and semantic strategies. In addition, the objective of legal text analysis is to figure out whether there exist social or political structures in the meanings and forming of legal text. More essentially, how particular legal text may support "the formation or change of social cognitions of the readers or the reproduction or legitimation of power of elites" (van Dijk, 1991, p. 45). Legal text, in this case, judicial opinions or courts' decisions, are directed at many readers or audiences (Chemerinsky, 2006; Leib et al., 2013), which means the parties before the court are most directly affected by the court's decisions. It is also aimed at other courts or other branches of government, including agencies and the legislature. In addition, judicial opinions provide guidance not only to the attorneys involved in the instant litigation, but to all other attorneys. Moreover, legal education is also counted in the target, which focuses on learning the law by reading and analysing appellate court decisions, including law students and academics. Finally, and perhaps most importantly, it is directed at and affects the general public.

Discourse is a "piece of text", represented as social practice and situated within "social subjects" (Fairclough, 1992, p. 4). It involves different social structures, as they may be examined in a diverse array of manners. Another part, two (out of three) pillars of

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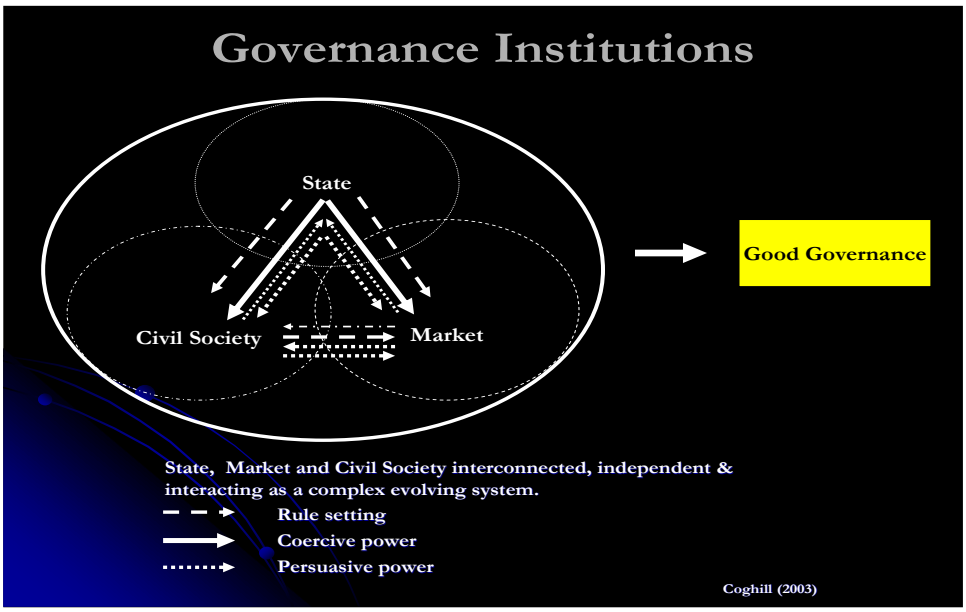
[17] Some approaches within CDA are for example social discoursal of Norman Fairclough, historical discoursal of Ruth Wodak and cognitive discoursal of Teun A. van Dijk.

governance (Coghill, 2003; Mansbridge, 2003), namely the State/government (i.e. law institutions) and civil society (i.e. media) generally exhibits a one-sided view of reality that fits the interests of dominant groups, and its arguments aim at persuading audiences of its credibility, values and ideological standpoint. Particularly, among the pillars of governance shown in Figure 3, the State is the only institution that has the coercive power to produce a conducive political and legal environment. As the dominant entity, it has the role of controlling the guidelines and policies, as well as the process of production. In brief, the pillars of governance are not only independent, but concurrently interdependent and interacting within a complex system.

Moreover, CDA as stated earlier, is an interdisciplinary methodology that focuses more on social issues such as social discrimination, social segregation and inequality, dominance, and abuse of social power. CDA has taken an obvious position to "understand, expose and resist social inequality" (van Dijk, 2001a, pp. 352-353). Furthermore, it is concerned with different perception of society/individuals that impacts both social interactions and social events and requires its relevance, which might result from the

Figure 3. Governance Pillars/Institutions



interaction. Discourse analysis is curious about different explications practiced in social interaction, and seeks several consequences these explications may produce (Burr, 1999).

Fairclough (1996) described discourse as meaningful structures or a reasonable and a consistent expression which contributes to construct reality. Discourses may also involve "cultural resources which are mobilised in different situations" (Niemi-Kiesiläinen et al., 2007, p. 85). Albeit it does not necessarily generalize concepts – it indicates, justifies, and constructs social identities and power relations between society (people) itself and systems of knowledge. Such communicative events are social practices that bring into play various contributions. There is the producer (judge, prosecutor, lawyer), text (judicial opinion/court's decision) and the public (plaintiff, defendant, other law practitioner, academics, other sympathizer or contrarian). Moreover, it is important to note that these factors –such as the way public (legal text recipients) perceive (legal) decisions along with the reception process, their cognition of the ideological, power relations and social context of discourses, and social effects of legal discourse – are significant for a thorough critical analysis.

This study concentrates on legal textual analysis, its ideological perspectives and its discursive strategies. It explores the themes, the language characteristics and the discursive mechanisms of legal (text) decision. Themes, or what van Dijk (2000b) called 'semantic macrostructures', correspond to the most essential issues that can be captured optimally by recipients. Thus, the exploration of legal decision is likely to start with the analysis of subject/title or preamble/exposure of the case – which usually comes in the first paragraph – since it is pivotal in the functioning of 'textual' and 'cognitive', and also because it is firstly visible, easily understandable and bridge division in the full text decision that may otherwise impact on the readers. This research conducts an inspection of the decision or order of the court, which conclude all the complicated long and full argumentation. Lastly, the

backgrounds, considerations and argumentations of the case (events) are scrutinized. This includes the core facts incorporated in the legal decision – this part is typically a complex form of text processing. The summary (subject/title or preamble/exposure), main event (case procedure), previous events, background (context and history), consequences, comments, evaluation and decision/order are included as superstructures (van Dijk, 2002; 1991). This schema as a 'top down ordering' may have an impact on the mental model the readers construct of an incident (van Dijk, 1991, p. 121).

Once the semantic macrostructures in terms of themes have been examined, one may move to explore local meanings, such as coherence which is "what distinguishes an arbitrary sequence of sentences from a (fragment) of discourse" (van Dijk, 2000b, p. 40), and disclaimers such as 'apparent denial', 'apparent concession', 'apparent empathy', 'apparent ignorance', 'apparent excuse', and reversal among others (van Dijk, 2000b, p. 92). Moreover, semantic features are important elements behind which meanings are deciphered: "presuppositions, implications, inferences, concealments, euphemisms, disclaiming denials, negativisation, and in general the combined strategy of positive self-presentation and negative other presentation" (van Dijk, 1991, p. 177).

As discussed earlier, discourses help to reveal prejudice or prejudgement and implicit explanation, and this analysis of implicitness is important as it is "one of the most powerful instruments in the critical study of discourse" (van Dijk, 1991, p. 180). Meanwhile, prejudgements are sort of that implicitness and are defined as "a proposition that is semantically implied (entailed) by a statement as well as by the denial of that statement" (van Dijk, 1991, p. 183). In this context, one might say legal texts are weighted with implicit significations, which could be elaborated and may be depending on popular knowledge of the vast word as well as of the context (van Dijk, 2000a). This particular strategy helps to veil and give an excuse on prejudice or discrimination and utter the opinion that encourage

the reader to adopt (van Dijk, 1991). To this degree, legal discourse examines the structure/form and content of legal text at the micro and macro levels by taking into account the social context, then elaborating and interpreting the function and connotation of the texts. Structural description is the first strategy to show the roles of words/syllables, expressions and sentences in order to deliver implicit meanings, then another strategy such as explanation and interpretation as a next step.

3.3.3. CLDA: Analysing Court's Decisions

Legal discourse, as a complex type of discourse, is produced via legal texts written in legal language, which are regarded as unique and distinctive texts from other kinds of texts pertaining to their characteristics including specific technical terms. The analysis of legal texts contributes to the overall understanding and construction of legal discourse. As argued previously, the approach of CDA aims at integrating the description of mechanisms within the legal text with the social context (van Dijk, 2000a). It is capable to describe why legal discourses are part of social discourses and how these could have an impact on the perception of the readers. Therefore, the discourse structure and the strategies utilised in reading legal text are likely "more general social representations (attitudes, ideologies) we have about ourselves and 'others'" (van Dijk, 2002, p. 148). Legal discourses and social discourses both influence one another. However, legal discourses are preferred among social discourses, as they are granted privileged status by the State and have considerable power to form social relations (Niemi-Kiesiläinen et al., 2007). This powerful form, produced by the elites, conveys the justificatory and legitimizing powers of law publicly. As a consequence, CDA equips the fundamental background for CLDA, purifies the determination of discourse, and describes its motives generally. Likewise, CLDA also understand "language as social practice determined by social structures" (Pether, 1999, p. 57).

Legal discourse in this research derives ultimately from combining a sociologically defined conception of law and a CDA-based conception of discourse, which in accordance with sociology of law and sociological jurisprudence, has the purpose to "offer…a conceptualization of law that differs from and transcends its juridical understanding" (Deflem, 2008, p. 275). Whereas sociological jurisprudence here refers to the theorization of law aiming at real social problems, enriched by sociology and critical social theory, including social constructionist and deconstructive theories. Like discursive-social constructionist theories, sociological jurisprudence also pays attention to social reality and social relations that (re)produce injustice and inequalities through legal means (Langone, 2016; Douzinas & Gearey, 2005; Pound, 1912).

One of the most pivotal subventions of CDA to CLDA is that while CDA maintains beneficial instruments for a representative yet also critical lexical about discourse, it is progressively dealing with "textual silences, omissions, and absences, which have enormously manipulative potential" (Huckin et al., 2012, p. 121). This is vital for examining legal discourse, mainly concerning sex and gender. Manipulation or misuse of power in institutional settings indicates that CDA "routinely engages in institutional analysis", notably of "powerful institutions such as…the law", which is regarded to produce legal discourse – and being part of public discourse – that is suitable for CDA (Huckin et al., 2012, p. 123).

The concept of intertextuality is based mainly on the works of Bakhtin (1986; 1981) and Kristeva (1986), in which they explain that texts are constructed through other texts (Fairclough, 1992; Kristeva, 1986; Bakhtin, 1986; 1981). Nonetheless, texts themselves are not responsible for the production, transmission, interpretation of discourse. Intertextuality acknowledges how a single text may produce from certain (even potentially contradictory) discourses and assumptions thereof to build up its objects, such that texts should be put across "in relation to webs of other text and to the social context" (Lehtonen, 2007, p. 6;

Lazar, 2005, p. 14; Fairclough, 1992). Intertextuality is concerned with the effect of old texts on new ones, the ways rhetorical force of texts replaces in new contexts, and how in which texts can reshape contexts, including their re-contextualization over the journey of time (Huckin et al., 2012, pp. 120-121). The goal of an inter-textual reading is to make and reveal relationships between "discursive, social and cultural change", which are often concealed (Fairclough, 1992, p. 9). Since cases, statutes, and relevant legislative debate are interlinked and reference one another, therefore assembling the corpus of legal texts demands conventional legal research in order to surpass the "legally-sanctioned meaning" of texts. In doing so, it requires the application of sociological theory that synthesizes multiple tiers of consciousness to reflect the multidimensionality of the issue and subjects being constructed (Goodrich, 1986; & Matsuda, 1989 as cited in Pether, 1999, p. 55; p. 85).

Another sources of information for this thesis were the decisions that emanated from France's two Supreme Courts (Court of Cassation and State Council). Two cases regarding Muslim women were analysed to identify the discourses using critical discourse analytical approach to penetrate the surface of legal documents (court decisions). In all fair-mindedness, it must be acknowledged that legal text produced by the (highest) courts, such as the European Court of Human Rights (or it might also be included Court of Cassation and State Council), are known for its clear and thorough argumentation (Niemi-Kiesiläinen et al., 2007). Thus, at the most requisite level, the judicial opinions settle the dispute between the litigants, advise the public in respect to the rule of law, incite legitimacy of courts, and facilitate judicial constraint (Leib, David, & Serota, 2013). However, some critics also argue that the decisions are becoming unnecessarily complex and confusing. Critics also say that the decisions include difficult and technical terms or technocratic style and tone – contributing significantly to the obfuscation of the modern Supreme Court opinion – while the factual and substantive reasoning is short and concise (Liptak, 2010). Most of sentences

contained in the decisions might already be appropriate according to common legal practice and valid law. However, there might be found presumptions or prejudgments in another part of sentences (Niemi-Kiesiläinen et al., 2007). The way the court formulates its decision on a particular case regarding Muslim women's headscarf or burkini, for instance, has in fact social and legal consequences. CLDA can "challenge generally accepted interpretations of law by critically analysing and revealing their underlying concepts and taken-for-granted assumptions" (Niemi-Kiesiläinen et al., 2007, p. 85).

Discourses in legal texts are not easy to determine and sometimes researcher may find nothing. Niemi-Kiesiläinen et al. (2007) suggested that in order to find discourses, legal texts should be approached without bias or prejudgement, and that the researcher must be fair-minded and allow the text reveals itself. Through CLDA, the researcher concentrates on the utilisation of discourses as instruments to exercise power. Power is used as a strategy by individuals (in the discourse they apply) whose the ability or competence can impress and influence the lives of people; as well as it might be implied as discrimination, segregation or inequalities in the access of economic, education, social and cultural resources, for example jobs, schools, money, association, leisure time etc. (Fairclough, 2001; Burr, 1999; Foucault, 1978). Accordingly, some situations or particular groups are granted legitimization, while others are discriminated against or marginalised. The study will find what discourses are employed in the courts decisions to drive or silence others, what situations are conducive to using certain discourses, and what sorts of unjust relationships are created and reproduced (Eskola & Suoranta, 1998 as cited in Niemi-Kiesiläinen et al., 2007).

Moreover, CLDA views legal texts as social political endeavour, and it is critical of legal liberalism (legal-formal egalitarianism) because in spite of the formal equality pledged by liberal legal systems, legislators often adopt the same problematic concepts of feminine issues equipped in the society (Pether, 1999). In the context of liberal legal systems, the

habitus of legislators via discourse that is claimed as egalitarian regarding citizenship and the class and socio-economic position of men (Pether, 1999), i.e. through the discourse of social contract (Pateman & Mills, 2007; Mills, 1997) whilst at the same time the system itself frequently veils the law's contingency on gender (including race/ethnicity and class) (Pether, 1999). CLDA criticized liberalist belief in the binary thinking of modern Western doctrine. This is similarly contested by Derridean, a feminist, postcolonial and critical-jurisprudential works as attempts to efface contradictions between, for example, public versus private or free will versus determinism, and thereby stabilize their meanings (Kennedy & Oetken, 1991 as cited in Obasogie, 2014; Spivak, 2010; Moallem, 2006; Derrida & Mc Donald, 1992; Derrida, 1990; Derrida, 1967). In these matters, CLDA renders suspect the hegemonic liberal notion of social contract – "that set of legal concepts meant to safeguard from political interference an individual's personal freedom to engage in contractual agreements in order to promote his or her self-interest" (Treviño, 1998, p. 97).

In accordance with CLDA techniques of rendering visible, foregrounding, and subjecting to critique the discursive processes of inequalities, discrimination, injustices and marginalization contained in legal texts related to the two cases, this study's empirical analysis focuses on how problematic cultural assumptions, prejudgment and narratives in legal discourse lay the foundation for the representation of Muslim women in French jurisprudence. This research analyses texts through the lens of the sociology of law, sociology of gender, sociology of religion and sociological jurisprudence to break down and operationalize each of the concepts and dimensions involved. This is done in order to gain an integrative view of how these documents construct the issue and its subjects in ways that place Muslim women, particularly those with religious identities expressed through wearing a headscarf or a burkini, at risk of being marginalized or subjected to discrimination.

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Chapter 4. Textual Analysis – Representation

4.1. Introduction

The objective of this chapter is to explore the language and discourse related to legal decisions on two cases about Muslim women filed before the two Supreme Courts (State Council and Court of Cassation). These two case studies aim to reveal the image of Muslim women in France reflected in the French jurisprudence. The analysis is informed by CDA and guided by the idea that legal discourse may not only reflect but also (re)produce and (re)construct social reality.

Representation is a process of transmission of an event, people, places etc., using a medium in order to smoothly transmit it (Hall, 1997). Legal text (judges' decisions/court rulings), as examples of the mediums that represent reality. However, one might say that what is represented in legal text may not an exact copy of reality. Rather, it could arguably be a discursively presented reality. Reality is not necessarily a direct experience. It could be through the symbolic categories made available by a society, and these categories are the sifters or filters of the original reality they are transmitting. The result is arguably more or less the same as the original reality. Similarly, Hall (1982) described that "representation implies the active work of selecting and presenting, of structuring and shaping; not merely the transmitting of an already existing meaning, but the more active labour of making things mean" (p. 64).

In this study, representation refers to the process of meaning production through combination of kinds of roles (subject positions), different actors and their nexus in the discourses found in the legal text. It is as Hall (1997) defined representation as "...the production of meaning through language" (p. 28). It relates meaning and culture to language and allows us to see and understand things and people.

There are three core theories that explain how representation works: the reflective, the intentional, and the constructionist approaches. First, the reflective approach, as its name implies, is like a mirror. For example, language reflects meanings that already exist. Second, the intentional approach, on the contrary, argues that people enforce their own meaning of things. One intends to say words or sentences he/she actually means. Third, the constructionist approach argues that neither things nor people can have a constant or permanent meaning in language, yet it is we who construct it (Hall, 1997, p. 15; pp. 24-25). For instance, the elites, as a dominating power that aims to achieve hegemony, are involved in what Hall calls "the politics of signification" (1982, p. 67; p. 72). In this process, images about the world are produced and reproduced, generating particular meanings and interpretations of events, people, ideas, etc. Hence, as mentioned earlier, the discursive approach, as one variant of the constructionist approach, serves as the basis for the analysis in this paper.

Representation also relates meaning and culture to language and allows us to see and understand things and people (Hall, 1997). In other words, the more forms of representation occur repeatedly in a society, the more these representations tend to change into cognitive concepts and cultural methods. Furthermore, representation, according to Hall (1997), bifurcates into two models: objects representation and language representation. The first model means that objects in the outside world play a significant role in shaping our mental representation, the way we think and the way we perceive something. It is thus influenced by multiform cognitive processing methods such as similarity and difference, cause, effect, and temporal sequence (Hall, 1997). The second model indicates that language is utilised to delineate the world, i.e., discourse. Therefore, there is a strong connection between representation and cultural methods, between language and object representation (Gee, 1996).

The representation of the events will be analysed through examining the implicit meanings to describe and illustrate the events concerned, the themes and topics that arise as well as the actors and relationships involved. The study of language use and of such discursive strategies will hopefully unveil the ideological perspectives behind the representation of the events. This should facilitate a response to the question of whether or not the jurisprudences perceive that Muslim women with their personal (religious) identities are incompatible with *laïcité* or whether or not it associates such cases with injustice. It will also investigate if legal discourse reproduces or emphasizes discrimination and stereotypes against the Muslim women minorities.

Yet, prior to introducing the case studies and establishing the textual analysis, drawing attention to the French attitudes towards Muslim women and communities in France remains equally essential. The most resonant and repeated justification the French legislature (as well as the State elites and politicians) had for the ban on headscarves was and is that Muslim men force their wives, daughters, sisters to wear it (Beydoun, 2018; Fernando, 2014; Bowen, 2010; 2006). As discussed earlier, Muslim women minorities – particularly those wearing headscarves (or burkinis) who settle in Western countries, especially in France – experience frequent labelling such as being under oppression, uneducated/unskilled, poor, and submissive (Zwilling, 2017; Lorcerie & Geisser, 2011; Bowen, 2010; 2006; Nielsen, 2009; Choudhury, 2009; Delphy, 2008). Muslim women's actions and attitudes are viewed as being caused by religion or God (Bouma, 2011; Choudhury, 2009; Saadallah, 2004; Bullock, 1999). One specific attitude, which is prevalent and is worth mentioning at this stage, is considering that 'everything' is religiously driven for these women: what to wear, what to eat/drink, how to decide something, and how to behave, are examples of what many Westerners and Frenchmen consider to be supported by religion and/or hereditary religious tradition. Such stereotyping of Muslim women is likely

to be the outcome of media transmission or other political propaganda, (mis)perceptions of Islam as a religion and Muslims as its adherents, (mis)perceptions of interfusion between culture and religion, controversial issues identified within Islam and involving Muslim women, as well as everyday contact with them (Richardson, 2011; Poole, 2011; Farouqui, 2009; Poole, 2006; Said, 1997). Certain allegations are made about French Muslim women in particular and about Muslim women in Europe in general. The following reflections describe some of these claims (Institut Montaigne, 2016a; 2016b; Richardson, 2011, pp. 31-32):

- Muslims' rejection of integration within majority society and hence their preference to settle in segregated neighbourhoods. This in turn highlights the failure of Muslims [women] in succeeding in some spheres in society and the feeling that indigenous population is 'unjust' and 'Islamophobic';
- Muslims and their irrational demands, since the culture and values of the majority are deemed offensive to them and therefore need to be modified, quite apart from issues such as public dress code or the building of mosques;
- Muslims' 'mixed loyalties' reveal that Muslims are more loyal to their religion, or to their country of origin and/or to their specific local community, as well as the wider community as a whole, which appears, in some way, to maintain the idea that Muslim communities support extremism. This is taken to highlight the incompatibility between Islam and the West in terms of norms, values and interests.

This continuous reproduction of the image of Muslims (including Muslim women), as displayed above, is in line with what Hall (1997) portrayed that "representations sometimes call our very identities into question. We struggle over them because they matter – and these are contests from which serious consequences can flow. They define what is 'normal', who belongs – and therefore, who is excluded" (Hall, 1997, p. 10). Notably, in France, according

to the survey of Institut Montaigne (2016a), extensive hostility towards Islam and Muslim(s) (women) has been demonstrated; the failure of multiculturalism, the negative effect of religious multiplicity, and Islam's threat to national secular identity are ideas accepted by majority of native French. In addition, based on educational attainment levels, French people with no/lower qualifications or diplomas were twice as likely as those with degrees to have a negative approach towards Muslims (Institut Montaigne, 2016a).

Regardless of the positive or negative opinions that Muslim women may encounter, the behaviour of French/Western people depends on their knowledge and awareness of Islam and direct experience/contact with Muslim(s) (women), which in most cases reduces discrimination or injustice towards them. Hence, why does the French majority adopt such stereotypes and feelings towards Muslim women minorities? Does legal discourse contribute to reinforcing such a portrait? Or do the attitudes and actions of certain Muslim individuals or groups (i.e. women wearing headscarves or burkinis) contribute to reinforcement of negative perceptions and feelings towards Muslim women and their immigrant backgrounds or communities? This definition of representation is very significant to studying how Muslim women are represented in French jurisprudence and it is our role as researchers to look for the patterns that are used and reused to frame the events in a particular way.

4.2. The Case Studies

4.2.1. Baby-Loup vs. Mrs. F (The Baby-Loup Case)

Baby-Loup (Court of Cassation, 2014a; 2014b) is a private child care nursery in the Noé district of Chanteloup-les-Vignes, in Yvelines. It has been open 24 hours a day, 7 days a week since 2002. The child care nursery was founded in 1990 by a women's collective from Chanteloup-les-Vignes, and its purpose is "to develop an early childhood oriented

action in a disadvantaged environment, and at the same time to work for the social and professional integration of neighbourhood women" (Court of Cassation, 2014a; 2014b), by hiring local women and offering them a paid training for early childhood jobs. In 2003, a new internal regulation entered into force on 15 June, stated that, in general, "staff members must adopt, in the performance of their duties, behaviour and attitudes which respect the freedom of conscience and dignity of each person" (Court of Cassation, 2014a; 2014b) and precisely mentioned that "the principle of freedom of conscience and religion of each staff members, cannot preclude compliance with the principles of *laïcité* and neutrality that apply in the exercise of all activities developed by Baby-Loup, both in the premises of the nursery, its annexes or in outside accompaniment of children entrusted to the child care nursery" (Court of Cassation, 2014a; 2014b).

Mrs. F (Court of Cassation, 2014a; 2014b; Court of Appeal of Versailles, 2011) was one of Baby-Loup's employees since December 1991. She was hired in the job contract as an early childhood educator, and was eventually promoted to an assistant director position. In May 2003, Mrs. F was granted maternity leave followed by parental leave until December 8, 2008. When she returned to work, she presented herself wearing a headscarf. She was ordered to remove it, but she refused. Following her refusal and after several incidents with the management of the association, she was subject to a layoff, and then was dismissed for misconduct by a letter sent on December 19th of 2008.

Baby-Loup (Court of Cassation, 2014a; 2014b; Court of Appeal of Versailles, 2011) argued that its internal regulation in 1990, and likewise in 2003, explained that all staff must respect a principle of confessional neutrality, and that wearing any religious attire like a veil was never allowed out of respect for *laïcité*. It explained that Mrs. F knew this already and had abided by this regulation before 2003. In December 2008, during the resumption of her work, she came to the office wearing a headscarf and was quickly summoned to a meeting

prior to her dismissal and eventual firing. According to the Court Cassation (2014a; 2014b), after this decision, she appeared on the premises of the day-care several times. The management of Baby-Loup pointed out that Mrs. F intentionally wore her headscarf to engage in a conflict with the management. She also allegedly uttered insults and threats to management. The insubordination and the violation of her obligations to obey the internal regulations as well as the principle of *laïcité* caused her to be completely terminated on December 19th of 2008.

On the other hand, Mrs. F (Court of Cassation, 2014a; 2014b; Court of Appeal of Versailles, 2011) argued that at the end of April 2003, she found herself pregnant with her fourth child. She was placed on maternity leave followed by parental leave. During the leave, the director, Mrs. B, informed her that under a new regulation adopted in July 2003, she could not return to work with the headscarf she usually wore. She insisted that before going on maternity leave and parental leave, she used to work with her headscarf and there were no issues with her appearance. Because of the warning from the management, she requested a review meeting by mentioning that she was not opposed to a contractual termination, a meeting that was never realised. When she returned to work on December 9th of 2008, she was asked to remove her headscarf and she replied that she was always dressed like that. As she rejected the request, the employer presented her with letter of summons to the pre-review, with a layoff; however, she refused to sign the letter and remained there following the advice of an employee advisor and the labour inspector. The next day, she returned to Baby-Loup, as she admitted that she received no letter from the management. She claimed that while she was on the premises of the nursery, she caused no scandal or disturbance. Apart from that, she described that the surrounding neighbourhood is an immigrant community, mainly from the Maghreb and Sub-Saharan Africa, so the children are accustomed to seeing a good number of their family members wearing a headscarf. She

added that since 1997, the children in the care of the nursery have only been consuming halal meat on the premises of the day-care. Thus, her behaviour and practices were not out of the ordinary in the community context. After having passed and exhausted several courts in the first and second degree, Mrs. F. referred her case to the highest court, the Court of Cassation in December 2013. Prior to the final decision of the Plenary Assembly of the Court of Cassation – which ended six years of litigation, several prior decisions were taken on this particular case. Both of the previous decisions from the court of first instance (*Conseil des Prud'hommes*/tribunal of industry/labour [18]) as well as the court of the second degree (Court of Appeal of Versailles [19]) ruled in favour of the nursery (defendant) and confirmed the employee's dismissal, though both courts had differing argumentation. [2°]

Following a referral [21] to the Court of Cassation, the outcome temporarily shifted in favour of the dismissed employee (plaintiff), as the Social Chamber of the Court of Cassation in March of 2013 held that general religious neutrality duties could not be imposed by a private employer. Its decision was to annul the Court of Appeal of Versailles, and that it considered that the *laïcité* cannot therefore be invoked to deprive [employees] of the protection provided by the provisions of the Labour Code.

The clause of the rules of procedure imposing respect for the principle of secularity and neutrality being, according to the court, neither justified nor proportionate, the employers could not use it to dismiss their employee. In other words, a private employer could not therefore avail himself of the requirements of *laïcité* in order to circumvent the protection

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[18] Conseil des Prud'hommes (tribunal of industry/labour) Mantes-la-Jolie 13 December 2010, (2011) Rec D 85 and (2012) Rec D 904, Comments by J Porta.

[19] Court of Appeal Versailles 27 October 2011, (2012) *Revue de Jurisprudence Sociale* 106.

[2°] According to the tribunal of industry/labour, the Baby-Loup's activities could be characterized as a public service hence triggering the application of *laïcité* and requires general religious neutrality. In contrast, for the Court of Appeal of Versailles, religious neutrality requirements were mandated by the nursery's mission: offering care to young children.

[21] The term 'referral' is used rather than 'appeal' because the functions of the Court of Cassation are primarily to review the legal basis of decisions reached by the Court of Appeal, rather than to act as a third level of appeal on the merits. For a brief explanation, see Chapter 2 for a review of French Judicial System.

against discrimination in the workplace. The Social Chamber thus concluded by considering that the dismissal of the employee is 'discriminatory' and therefore 'null' (LégiFrance, 2013b). This Social Chamber 2013 decision subsequently emphasized the strong divide that exists in France between private agents, who are entitled to the protection provided under the French Labour Code, and public agents who, as representatives of the State, are bound by special duties under the French concept of *laïcité*.

This decision sparked several controversies in the public, including social and political interference. For instance, the French Interior Minister (at that time) Manuel Valls condemned the court's decision, saying, "this puts secularism in France in doubt and denounces in the National Assembly forum that this decision is an attack on secularism and urges for a law to counter it" (Assemblée Nationale, 2013). Later on, the Minister initiated to present the Medal of Merit to Natalia Baléato, the founder and director of Baby-Loup, and reaffirmed his support for the nursery. On that occasion, he declared "dear Madam, justice might disgusts you, but as Minister, I reward you and congratulate you ..." (CCIF, 2013). A few days after, (former) President Francois Hollande weighed in on the case, saying "the introduction of a new law could be considered to promote secularism in private organizations hosting children" (Le Bars, 2013). UMP Deputy (*l'Union pour un Mouvement Populaire*/Union for a Popular Movement) Philippe Houillon proposed to modify the Labour Code. Another elected member of UMP, Eric Ciotti told in an interview with TF1 that the decision was "a severe blow against secularism" and "a victory for the claims of ethnic groups, to the detriment of Republican values" (Reuters, 2013). The former head of the HALDE (*Haute Autorité de Lutte contre les Discriminations et pour l'Égalité*/High Authority against Discrimination and for Equality), Jeanette Bougrab, told Radio Europe 1 that "this is a dark day for secularism in France…It is like a feeling of mourning. My Republic is dying" (Seniguer, Sicard, & Sorel, 2013). Moreover, several Senators submitted

a bill to the Senate to extend the obligation of neutrality to private sectors to be responsible for early childhood and to ensure respect for the principle of *laïcité* (Sénat, 2013).

On the contrary, the President of the National Observatory of *Laïcité,* Jean-Louis Bianco, argued that "attacks on secularism may have been overestimated". Fatima Achouri, a management consultant and the author of *The Muslim Employee in France: Realities and Perspectives* said that "it was an attack on religious freedom. Some considered that Fatima Afif [Mrs. F] was proselytising. How can you do that just by wearing a veil? The case hid the fact that Muslim veiled women are largely excluded from the professional world", she emphasised (Pasquesoone, 2014).

Notwithstanding the absence of a system of precedent in French procedural law [22] (Deumier, 2006), the 2013 Social Chamber decision should have ended the debate. Albeit not legally binding, Court of Cassation decisions are usually followed by lower courts (Deumier, 2006). However, unexpectedly in this case, the Court of Cassation then remanded the case to the Court of Appeal of Paris for retrial; however, it did not apply the 2013 Social Chamber ruling on November 2013 by offering a contrasting decision and saying that "Baby-Loup was a 'company of secular belief' and thus could require religious neutrality from its employees" (Morand, 2013).

Swapping legal basis and relying on provisions not discussed before the 2013 Social Chamber of the Court of Cassation, the Court of Appeal of Paris held that, based on the facts, the restrictions on the employee's rights were justified by the *laïque* ethos, which the nursery was allegedly promoting. Nicolas Cadène, senior official at the National Observatory, is convinced that "this idea of a 'company of secular belief' won't hold". He also argued that "secularism isn't a belief, it's a constitutional principle. If we insist to utilise this concept,

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[22] If compared with the doctrine of precedent in English Law for Supreme Court, for example.

there is a risk that some businesses will use secularism to discriminate". Moreover, Jean-Claude Marin, the Court of Cassation's attorney general, albeit seemed in favour of confirming Mrs. F's layoff, yet at the same time, he also criticized the very argument of "secular belief". Baby-Loup, he contended, "is not 'a company fighting for secularism' – and thus couldn't use the principle as a means to justify the layoff".

After undergoing a heated public debate and an inevitable further referral, the Plenary Assembly of the Court of Cassation reached a final decision on June 25th of 2014 (which annulled the previous decision of Social Chamber), arguing that the Court of Appeal of Paris had erred in its choice of legal basis by qualifying the Baby-Loup nursery as a company of secular belief since the purpose of this organization was not to promote and defend religious, political, or philosophical convictions. Consequently, *laïcité* was not applicable. Yet it had nevertheless reached the correct decision. However, it added a general ban that could still meet legal proportionality and anti-discrimination requirements, stating that "the nursery is a small association, employing only eighteen employees, who were or could be in direct contact with the children and their parents, that the restriction on the freedom to manifest one's religion set out in the rules of procedure was not of a general nature, but was sufficiently precise, and justified by the nature of the tasks accomplished by the employees of the association and proportionate to the aim pursued" (Court of Cassation, 2014b). Moreover, the court did not think it necessary to examine whether the restriction amounted to discrimination on the grounds of religion presumably because the employee concerned was still free to hold her Muslim beliefs (in a sense that one should free from wearing ostentatious religious symbols). The Court of Appeal of Paris' conclusion that the dismissal had been fair and justified was consequently upheld, by considering that the Court of Appeal "could hold that dismissal for serious misconduct of [the employee] was justified by its refusal to accede to the legitimate requests of its employer to refrain from wearing her veil and by

repeated and characterized insubordinations" (Court of Cassation, 2014b). Ultimately, the Plenary Assembly concluded at the dismissal of her referral.

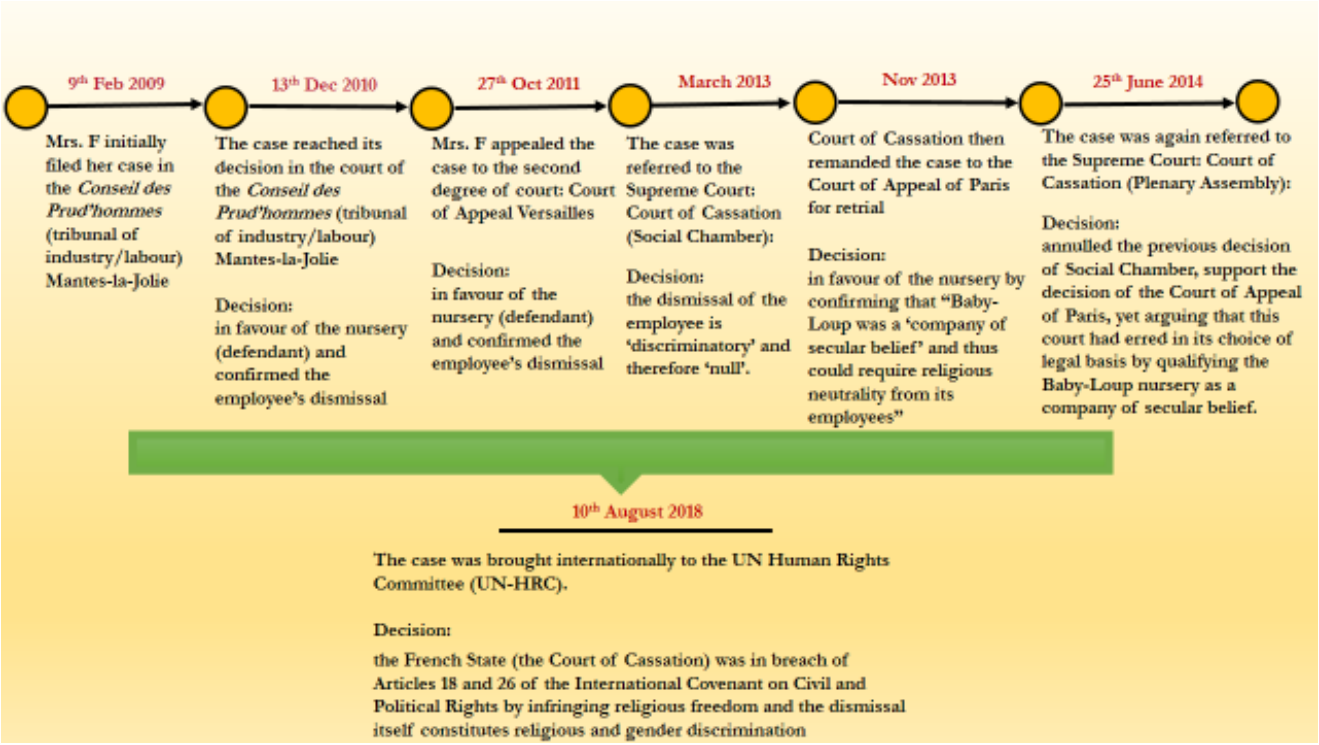
Following the judgment of the Plenary Assembly of the Court of Cassation and the massive public and media attention, the child nursery claimed that its situation has deteriorated, as the tension is rising between some parents and the management of the nursery. In order to lower the tension and escape the pressures, the nursery decided at the end of 2013 to leave Chanteloup-les-Vignes where it had been established for 12 years and reopened in the neighbouring town of Conflans-Sainte-Honorine in March 2014. However, in September 2014, the nursery almost stopped its operation due to financial reasons, yet after granting the parliamentary reserve subsidy of MP Valérie Pécresse, its situation had improved.

However, in a recent decision, published on August 10th of 2018, the UN Committee of Human Rights or OHCHR (Office of the High Commissioner for Human Rights – United Nations) has latterly ruled against the Plenary Assembly of Court Cassation ruling on last June 2014. Right after the Court of Cassation legitimized the dismissal of Mrs. F – at the culmination of a 6 years long legal struggle – Mrs. F decided, through her lawyer, to take the case internationally to the UN Human Rights Committee (HRC). The HRC had ultimately determined that the French State (the Court of Cassation) was in breach of international agreements on human rights by infringing religious freedom and the dismissal itself constitutes religious and gender discrimination (Huffington Post, 2018; France2TV, 2018; LaVielle, 2018). Below (Figure 4) is the strategic timeline of six years of litigation on this particular case in the National Courts 2009 – 2014, as well as in the UN-HRC 2018.

Rebutting the court's judgment, the HRC confirmed that wearing a so-called "Islamic headscarf" could not be considered as "ostentatious" sign of religious conviction or "constituting an act of proselytism". According to HRC, the court's judgment shows that the

French State has violated Articles 18 and 26 of the International Covenant on Civil and Political Rights (Huffington Post, 2018; France2TV, 2018; LaVielle, 2018), in which French Constitution had regularly ratified (Wagner, 2011). Both articles deal with freedom of religion and the State's duty to protect its people against religious and gender discrimination. Moreover, in the HRC's report, it has been found that the State had not explained "to what extent the wearing of the headscarf would be incompatible with the social stability and welcome promoted within the nursery" (Huffington Post, 2018; France2TV, 2018; LaVielle, 2018). Furthermore, the nursery compromised its own goal of empowerment – it was meant to "enable the economic, social and cultural integration of women...without distinction of political or confessional opinion" (Huffington Post, 2018; France2TV, 2018; LaVielle, 2018).

Figure 4. Strategic Timeline - Six Years of Litigation on the Case Baby-Loup vs. Mrs. F in the National Courts 2009-2014, and the UN-HRC 2018



Sources: Adopted and modified from OHCHR, 2018a; 2018b; Huffington Post, 2018; France2TV, 2018; LaVielle, 2018; Navva, 2018; Court of Cassation, 2014a; 2014b; Court of Appeal of Versailles, 2011; Conseil des Prud'hommes, 2010.

The HRC also criticised the grounds of judgment such as: the dismissal for "serious misconduct" and the obligation of "neutrality". It thus concluded that the court's decision in fact has "disproportionately affected Mrs. F, both as an employee and as a Muslim woman", was "particularly stigmatizing" and constituted "inter-sectional discrimination based on gender and religion". Another court's argumentation – stating that "by wearing a headscarf, Mrs. F violates the fundamental rights and freedoms of children and parents attending the nursery, concerning that the nursery is a small association employing only eighteen employees" – is categorized as "inadequate justification" (LaVielle, 2018; Navva, 2018). As a consequence, the HRC urged the State to "adequately" grant compensation to Mrs. F due to job loss as well as reimbursement of any legal costs she had incurred. The HRC also requested the French authorities to provide information within three months to give legitimacy to its findings in order to avoid the similar infringements in the future (OHCHR, 2018a). Having said that, albeit HRC's view is not legally binding and likely has no consequences like sanctions, the HRC has the ability to condemn a certain State's actions (i.e. denial of issues or refusal of policy change) in its General Recommendations or Concluding Observations or country-specific reports, which leads to political embarrassment that urges States to reconstruct or reconsider their laws on a specific issue (OHCHR, 2018b).

The case of Baby-Loup is interesting in many respects, as it illustrates the legal complexities underlying religious claims in employment contexts and the intertwining of various layers of norms that are potentially applicable. It is sitting at the crossroads of several legal regimes (anti-discrimination and human rights protection frameworks) and of several legal orders (EU, Council of Europe, international and national orders). Freedom of religion in the workplace is covered by Council Directive 2000/78/EC on the November 27th of 2000, which established a general framework for equal treatment in employment and occupation. It was entrenched into the French Employment/Labour Code, under article L 1321-3.

Another legal order cited by the Court was Article 10 of the 1789 Declaration of Human Rights and Citizen and Article 1134 of the Civil Code. It will also fall under the ambit of article 9 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; and article 10 of the EU Charter of Fundamental Rights, which guarantees everyone the right to hold and to manifest religious beliefs. Within international laws quoted by the court, Articles 4 and 14 of the 1989 Convention on the Rights of the Child and 1958 New York Convention. These provisions are directly applicable before French national courts.

4.2.2. LDH, Mrs. D, Mrs. C, CCIF vs. Mayor Villeneuve-Loubet (The Burkini Case)

The controversy of the burkini (State Council, 2016a) was initially triggered when Smile 13 (*Sœurs marseillaises initiatrices de loisirs et d'entraide)*, a women's association for leisure and mutual aid in Marseille, planned to have an event for women and children called "Burkini Day" on the September10th of 2016. The event would be held in a speed water park in Pennes-Mirabeau, south of France. In the invitation, the association requested the participants not to wear two-piece bikini swimsuits or a one-piece swimsuit. Rather, wearing burkinis was encouraged by the organizer and authorized by the park. Senator Amiel, Mayor of Pennes-Mirabeau (Bouches-du-Rhône), where the park is located, had announced plans to ban the event, as he felt the event was a "provocation and will likely to disturb public order" (Le Monde, 2016b). He further convinced the water park's director to cancel the reservation of the association (Le Monde, 2016b; Le Monde, 2016d). As the event's advertisement was already shared months before, the local authorities accordingly issued a refusal to host the event. Moreover, on August 3rd of 2016, both Mr. Ravier (Senator of the National Front as well as the Mayor of the 7th sector of Marseille) and Mrs. Boyer

(MP Republicans as well as the Mayor of the 6th sector of Marseille) – who are very active on social media – indicate the event to be "the visible expression of the will of the fundamentalists to mark their territory". The issue was thus widely publicised and quickly became a national political controversy, resulting in approximately thirty mayors of municipalities located in the French coast to prohibit directly or indirectly the wearing of burkini on their beaches (Le Monde, 2016c).

On August 5th of 2016, the Mayor of Villeneuve-Loubet (Alpes-Maritimes) – one of the thirty mayors of municipalities which prohibit burkini on the beach – issued a concrete regulation (a Mayor's decree) to forbid swimmers from wearing clothes obviously showing a religious affiliation/symbol (such as a burkini) in all public beaches in that city. It is mentioned in the article 4.3 of the Mayor's decree:

> "(…) on all the beach areas of the municipality, access to bathing is prohibited, from 15 June to 15 September inclusive, to any person who does not have a correct outfit, respectful of good morality and the principle of secularism, and respecting the rules of hygiene and swimming/bathing safety adapted to the public maritime domain. The wearing of clothes, while bathing/swimming, having a connotation contrary to the principles mentioned earlier is strictly forbidden on the beaches of the municipality."

This new regulation, according to the Mayor, was based on the concern and worries resulting from recent terrorist attacks in Nice on July 14th of 2016 (State Council, 2016a).

Refusing to remain silent, LDH, two individual citizens (Mrs. D and Mrs. C), and CCIF, initially submitted a class action to the Administrative Tribunal of Nice, requesting the judge to order the suspension of the decision made by the Mayor of the municipality of Villeneuve-Loubet (Robert-Diard, 2016). They argued that fundamental freedom has been seriously infringed by the Mayor of Villeneuve-Loubet in exercising its authority. Nonetheless, on August 22nd of 2016, three judges of the Administrative Tribunal of Nice dismissed the class action suit, and it faced exactly the same decision as in the Administrative Tribunal of Appeal (State Council, 2016a). Dissatisfied with the court's ruling, the plaintiffs filed a referral before the State Council. Subsequently, the day after the State Council

holding a public hearing on August 25th of 2016, the judge made the decisions, inter alia: the annulation of the decision of administrative Court of Nice; the decree of the Mayor of Villeneuve-Loubet to be suspended; and rejection of charging the State the sum of 5,000 euros under administrative justice.

Similarly to the case of Baby-Loup, the burkini ban prompted several reactions and comments (both for and against) from the State elites, politicians, academics, historians, feminist activists, etc. Yet, it also stirred a world-wide debate with people labelling the ban as Islamophobia (McKenzie, 2016; *The Strait Times*, 2016). For example, at least several important State figures: former French Presidents: Mr. François Hollande and Mr. Nicolas Sarkozy, former Prime Minister Manuel Valls, the President of the party National Front Marine Le Pen, former Minister of National Education Najat Vallaud-Belkacem, former Minister of Social Affairs and Health Marisol Touraine and MP for Socialist Party Benoît Hamon rendered commentaries to the flare-up of the bitter political row over the burkini.

Mr. Sarkozy, in a televised TF1 interview, had branded the full-body burkini swimsuits worn by some Muslim women a "provocation" that supports radicalised Islam (Chrisafis & Farrer, 2016) and proposed "a law that prohibits all conspicuous religious signs, not only in the school, but also in the university, in the public administration as well as in the private companies, and if necessary reform and revise the State Constitution" (Le Monde, 2016e). Moreover, Mr. Valls openly declared support for the Mayors who have issued banning orders for wearing burkinis (Le Figaro, 2016a). According to him, "the burkini is a political sign of religious proselytism that locks up the woman". In the interview with *Politico Europe* he said "the burkini is neither a new range of swimwear, nor a fashion. It is the expression of a political project, a counter-society, based notably on the enslavement of women" (Kroet, 2016). He comments supported burkini prohibitions, saying that burkinis were "the affirmation in the public space of a political Islamism" and "the translation of a

political project, of counter-society" (Le Figaro, 2016a; Huffington Post, 2016; Europe1, 2016).

Rejecting massive global criticism, Mr. Valls said, "France is a different country. The liberal conception of the Anglo-Saxons is not mine" (Le Monde, 2016f). He then argued that bare breasts, like Marianne, a national symbol of the French Republic, are more representative of France than a burkini or headscarf. He explained that, "Marianne has a naked breast because she is feeding the people! She is not veiled, because she is free! That is the republic" [23] (Chrisafis, 2016). Yet, his statement and inference of Marianne's bare breasts sparked criticism from his national counterparts. Many of them believe that the former Prime Minister is lack of knowledge of historical culture.

French historians, Mathilde Larrere and Nicolas Lebourg for example, explained that images of Marianne with a naked breast portrayed a classical allegory and suggested not to perplex Marianne with the earlier 1830 Delacroix painting of Liberty Leading the People, where the figure has her breasts uncovered. Furthermore, several feminist activists such as the former Green Party Minister Cécile Duflot criticized that Valls' praise of Marianne's bare breasts gave an indication of the lamentable and demeaning view of women held by some male French politicians (Chrisafis, 2016). Another feminist militant activist Caroline de Haas also reacted firmly stating "I'm very ashamed. Stop taking the liberty of individuals, it cannot create anything good" (Bancaud, 2016). The feminist association *Osez le féminisme* also released a counterclaim by demanding "what is the link between a veiled woman at the beach and mass murders committed by jihadists?" (Bancaud, 2016).

Contrary to the Prime Minister Valls's views, the French President at that time,

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[23] Surprisingly, after so many years of doctrinal controversy over Muslim women, Mr. Valls – in October 2016, about four and a half months before the election of the presidential candidate of his Socialist Party – declared that "it is the fact of our history (...), of our immigration which has been and remains a chance for our country. Islam is an inseparable part of ourselves, of our culture and now of our roots" (France Info, 2016). Even though he was then finally defeated by his party counterpart, Mr Benoît Hamon.

François Hollande, announced that legislation on the burkini ban as inapplicable and unconstitutional in a speech on September 8th of 2016 (Le Figaro, 2016b). Former Minister of National Education Najat Vallaud-Belkacem and former Minister of Social Affairs and Health Marisol Touraine took an opposite stand with their patron, former Prime Minister Manuel Valls. They both argued that the Mayor decrees have gone too far and may incite racist speech, which could jeopardise the unity of the Republic (L'Obs, 2016). Moreover, Benoît Hamon, MP Socialist Party, criticized that the heated public debate about the burkini signifies the failure of French politics and reaffirms that France has a problem with Islam and Muslims (Le Monde, 2016g).

Jean-Louis Bianco, the President of Observatory of *Laïcité* stated that some 'police measures' can be taken in the face of "risks of disturbance of public order"; however, he warned that "those who want to practice a clothing policy will provoke communitarian withdrawal contrary to the objective of *laïcité*" (Observatoire de la laïcité, 2016). Moreover, some others pointed out that Marianne has been portrayed in different ways, including her portrait depicting her fully covered, by typically covering her head with a Phrygian cap, that symbolised freedom and the Revolution.

Furthermore, internationally, the UN Human Rights Committee (HRC) encouraged the government to lift the ban, saying it will not improve security and that it will fuel religious intolerance and the stigmatisation of Muslim women (Nebehay, 2016). Human Rights Watch also stated that it is as a form of collective punishment against Muslim women for the actions of others (Bénédicte, 2016). Finally, the opinion of Malala Yousafzai (a young Pakistani activist for human rights and female education and the youngest-ever Nobel Peace Prize laureate) could strongly be relevant to the case, stated in an interview with *The Guardian:* "I believe it's a woman's right to decide what she wants to wear and if a woman

can go to the beach and wear nothing, then why can't she also wear everything?" (The Economic Times, 2016).

4.3. Findings and Analysis

4.3.1. Composition of the Corpus and Research Methodology

Simply having data present poses challenges. There is no conscionable way to firmly decide the definition of data in social research within the social world we study. The reflexivity in the collection of data and its analysis are inevitably paramount. This section seeks to describe, interpret and explain the linguistic and discursive mechanisms used in legal text, particularly court rulings/decisions of the two aforementioned cases, by exploring how themes, events, main facts, considerations, participants, and related issues are represented in the legal discourse.

As this is a qualitative analysis, only two cases have been selected. The first one, outlined above, is a case that has been chosen to represent a lawsuit filed before the Court of Cassation. The second case was to represent a lawsuit filed before the State Council. These two cases had an abundance of public attention, as well as social and political influence impacting their outcome and affecting wider implications. As stated previously, legal texts, notably court decisions, contain detailed technical intricate theorem of particular case, whereas the order or the conclusion is much shorter and more concise. That being said, the judicial decision of the Court of Cassation is relatively more succinct rather than the State Council, which is quite longer and detail, since it addresses each plaintiff and defendant. The corpus of legal texts regarding the cases was accessed electronically via website of the State Council, the Court of Cassation, and the LégiFrance law database.

After online legal sources were established for this study, data collection was then conducted, focusing archival data – data that can be collected directly from (pre)existing

online sources (Lewis-Beck, Bryman, & Liao, 2004). Pertaining to the median length of the overall court opinions (as explained in Table 1), the average size of both court judgments that are used in this study is between 2,300 and 4,000 words (5 to 8 pages with quite tight and dense single-spaced writing). The case of the burkini has nearly 2,300 words and case of Baby-Loup has almost 4,000 words, which is the longest and densest in length (around 8 pages) and also has the longest intensity of time (six years) that the case needs to endure the litigation. These words count are limited to main courts' decision only, while the appendices of the verdicts are excluded. Table 1 indicates the words count of the two selected cases respectively within each court's considerations.

Table 1. The Median Length of the overall Opinions/Considerations in each case in two different types of Supreme Courts

No.	Case	Words Count on Courts' Opinions/Considerations	Courts Type
1.	Mrs. F vs. Baby-Loup	3,885	Judgment of Plenary Assembly Court of Cassation on 25 June 2014, no. 612 (13-28.369).
2.	Burkini	2,244	Order of State Council on 26 August 2016, no. 402742, 402777.

All 3,885 and 2,244 words of legal texts were read and analysed thoroughly and meticulously in order to find the discourses with regards to how Muslim women were represented in French jurisprudence. To detail this further, NVivo 12 was used as nodes to record any themes that began to emerge during the coding phase. NVivo 12 is a software that is commonly used for qualitative research. NCapture add-ons from NVivo 12 were also used in this study to easily capture all contents needed from online sources and then automatically extracted into spreadsheet format.

The collected data were then highlighted, categorized, sorted, tagged, and analyzed using NVivo 12 software. The research adapted the process of data analysis of GTM, which consists of five basic components: theoretical sensitivity, theoretical sampling, coding, theoretical memoing, and sorting (Thornberg & Charmaz, 2014; Glaser, 2005; Glaser, 1978; Glaser & Strauss, 1967). These five components were then integrated by the constant-comparison method of data analysis, particularly in this research, included: coding, noting (memoing), abstracting & comparing (sorted identified sequences, similarity, and relationship), checking & refinement, generalizing, and theorizing. Codes were organized into themes representing the construction of meanings and interpretations, and then each code was re-read and traced back to the context from which it was derived, either being confirmed by the data or being dismissed as representative of the theme. The methodology emphasized a thematic step-by-step 'repeated-reading' of the sections per sections within the legal texts (Braun & Clarke, 2006, p. 87). Re-reading the document and spending time to pay close attention to these primary codes built confidence in the drawn codes and themes. This allowed to generate strongly reflective themes based on each code, as well as develop a sense of theoretical saturation for the purpose of this study. The importance of sensitizing concepts [24] emerge in addressing the inevitable subjectivity of the research while coding the legal texts. Brevity is crucial here because "data reduction, simplification, lies at the heart of coding" (Bailey, 2007, p. 127). This was an extremely difficult task, as choices had regularly to be made in the thick of the sheer volume of data, in order to determine what was the most appropriate or relevant data. Moreover, sensitizing concepts are pivotal to the methodology as they provide the researcher a general hint, direction and background ideas in dealing with empirical specimens that reveal the overall research problem. The goal of

[24] The term was originated by Blumer (1954), the late American sociologist, who differentiated between definitive concepts and sensitizing concepts, in which he explained in his article "What is wrong with social theory"? In *The Journal of American Sociological Review.*

the research was to understand the "main concerns" related to the case being examined. Once the main concerns emerged from the data, a theory is thus developed that explains how [legal] discourses might induce (in)direct discrimination and how it is regarded as socio-legal phenomenon. Therefore, this sensitizing concept cannot be simply ignored during social qualitative research (Allen, 2011; Charmaz, 2005; Blumer, 1954).

The concepts such as *laïcité*, neutrality, power/policing power/authorities, securitization/safety turned out to be the guiding concepts in analysing the courts' judgment, acting as macro concepts that provided theoretical connection with other themes and concepts that arose from analysing the subject matter. The two cases were selected to interrogate themes drawn from the Supreme Courts' decision, as their material consequences have basically led to (in)direct discrimination, segregation, and security measures against Muslim women manifesting religious affiliation. If the emphasis on language within power relations holds true, as in post-structuralism, then critically analysing the constructions of meaning within the legal text will allow for at the very least a legitimization of the systematic (in)direct discrimination happening against Muslim women with headscarves.

In addition, this CDA combines data collection and analysis, rather than separating them into two different processes. As stated previously, it is thus equally important to sensitize concepts within the context of GTM (Glaser, 1978) to generate themes from the legal texts, and at the same time analyse (code) the data (Charmaz & Bryant, 2011). Acquiring theoretical saturation through the GTM approach involves consistently re-checking data with obtained theories, and applies through revisiting themes and the codes that constructed them (Thornberg & Charmaz, 2014; Glaser, 2005). Subsequently, the latter part of this chapter examines the themes drawn from the legal text in accordance with general themes from the French Constitution. The judgment of the Court of Cassation and the State Council are two distinct documents: the first is longer and focuses more on elaborating facts

(elucidated and ascertained) though is considerably concise on the Order/Decision/Conclusion part, whereas State Council's judgment is much shorter and emphasises legal analysis/legal reasoning and details the order (rights and obligation) for each plaintiff and defendant, which will be analysed further in the next two sub-sections.

4.3.2. Genre Analysis

CDA is considered to not be simply as an act of linguistic description, but rather a linguistic explanation. Therefore, genre analysis has become an indispensable and feasible means employed in the analysis of court judgment, a discourse for specific purposes of communication (Maley, 1985). Since the study investigates the cases in two Supreme Court judgments, the type of legal analysis is *ratio decidendi.* [25] The following explanations are the findings of the paper in terms of rhetorical segments and the content, linguistic markers and the function of each segment, and the court judgments developing from the above-mentioned corpuses. The schematic breakdown will be figured out in the next page about move analysis.

The following paragraph is a description of how the legal texts of the Supreme Courts' decisions are organised. First, the heading section usually contains a brief summary of jurisdiction, decision time and number, title of proceeding, nature of the case the parties involved, etc. The linguistic markers generally are decisions or judgments (in the case of the Court of Cassation). The people's court or preamble begins with Republic of France/in the name of the French People (for the State Council). Second, the preamble/introduction part describes the situation before the court and answers these questions: who (the parties) did what (facts) to whom and how the previous court has dealt with the case. Besides that,

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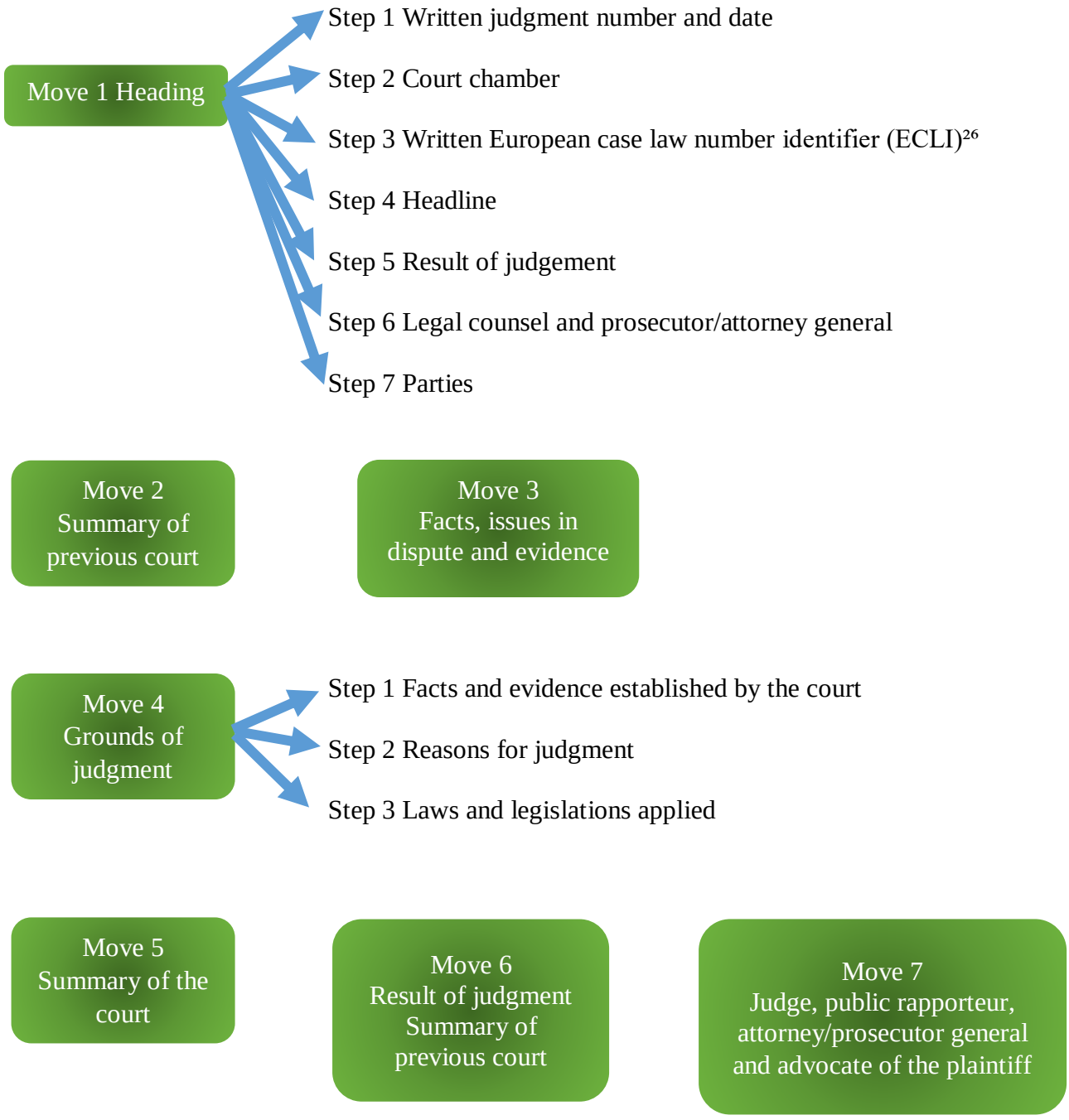
[25] A legal term which signifies that a decision is indispensable to having a binding force for the later decision of the same (level) court or inferior courts. See Hill & Hill (2002), *The People's Law Dictionary*.

specifically for the State Council, it also delineates each set of evidence/reasons from the point of view of both the plaintiff and the defendant. The linguistic markers are the introduction/summary and the proceedings/trials that have been completed. Third, the segment of facts/evidence explains the facts in chronological order, or by description. It provides grounds of judgement including the disputed facts, the agreed and found facts, and evidence. Linguistic markers, in most cases, are the factual background or agreed statement of facts. Fourth, analysis argumentations, including legal analysis/legal reasoning for judgement as well as the law and legislation (statutes) are applied. Analysis and presentation/discussion arguments become the linguistic markers of this segment. Particularly, for judgement/decision established by the State Council, it is equipped with additional analysis (legal analysis/legal reasoning) section, which provide a more detail explanation in order to seize and comprehend the judgement/report of court's order, usually in a separate paper or an annex, produces the comments or arguments of the judge and the application of the statutes to the facts as found. Lastly, the conclusion part expresses the final judgment – a disposition, or firm and concise decision made by the court or judge (Court of Cassation) and specify the effects on the parties (State Council). Thus judgement, conclusion, disposition, costs, revert, remand, affirm, dismissal, maintenance, commutation are mostly the linguistic markers.

The findings and results are subsequently listed as follows: Moves and Steps of the courts' judgment are more or less the same between judiciary tribunal (Court of Cassation) and the administrative tribunal (State Council). However, if we compare the structure (Moves and Steps) of the courts' judgment, both courts are relatively quite different and do not necessarily follow exactly the same Moves and Steps, as shown below in the Figure 5 and Figure 6.

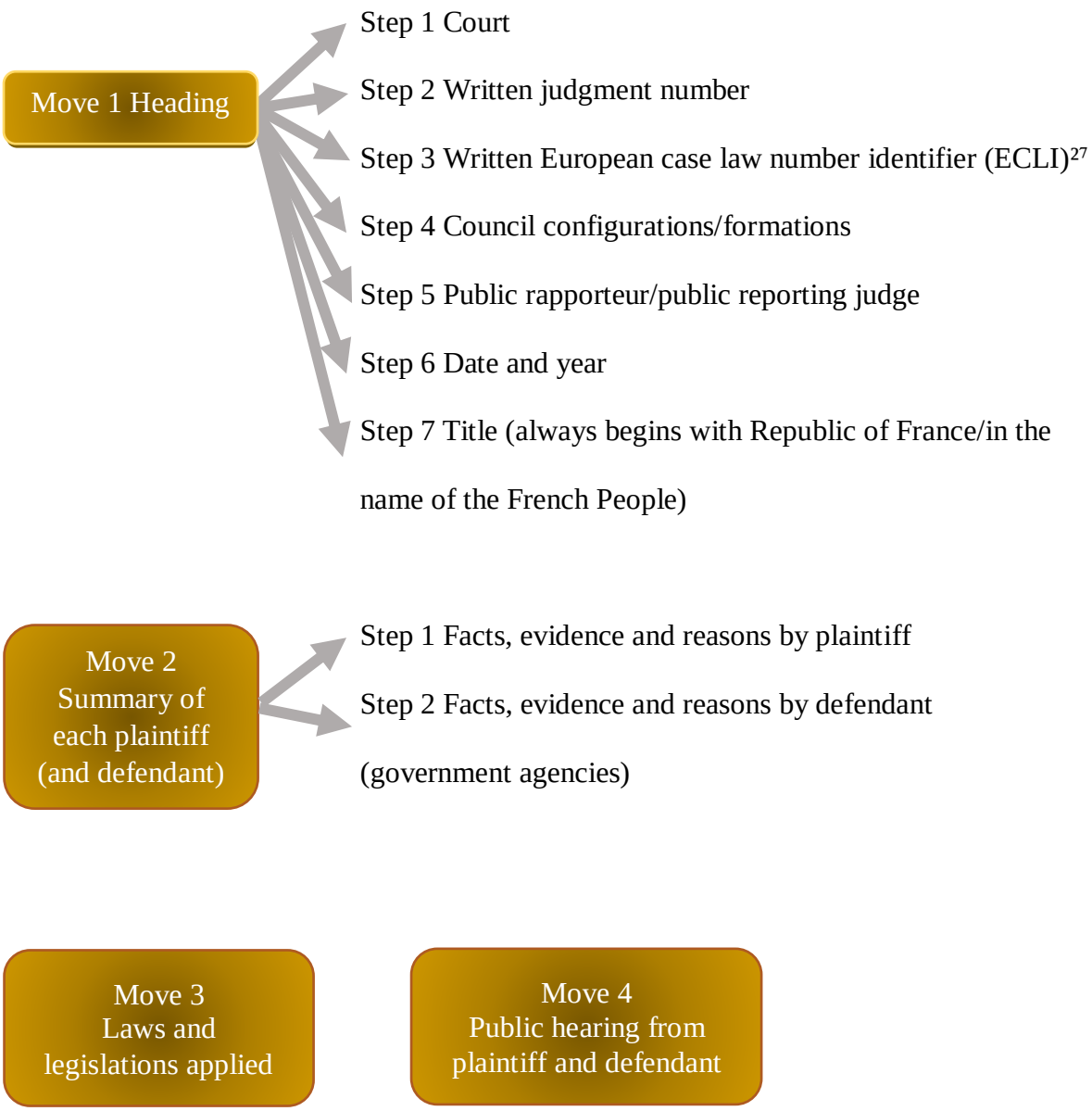
Figure 5. Move Analysis of Court of Cassation



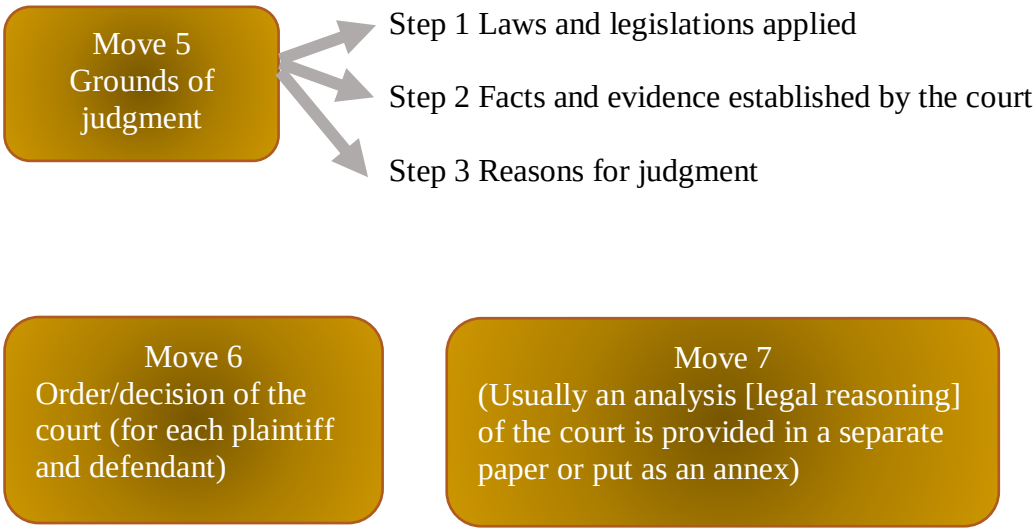
[26] ECLI is a unique number attached to every court decision made by national Supreme Courts and recognized at the European level. It consists of five parts: the country (FR for France); the jurisdiction (CCASS for the Court of Cassation/CC, CE for State Council); the year of the decision (4 digits) and the serial number (for CC composed of 3 separate parts: the year, the decision number and the type of decision. While for CE corresponding to the number of the decision and the date of reverse reading).

Sometimes, Move 4 is not consecutively identified in a court judgment. That means that some of them are tangled up with each other. And some Moves may have embedded Steps or even sub-Steps, or they might be lack or omitted in the court judgments.

Figure 6. Move Analysis of State Council



[27] Ibid



The above-mentioned move analysis is applicable to the judgments by the State Council, where Move 2 does not always provide Step 2, as it could only entail Step 1. Moreover, Steps in Move 5 are not necessarily in sequence.

4.3.3. Rhetorical Segments and Functional Analysis

Every type of writing (including legal text) exists with a purposed intention. In scientific research, for instance, the objective is to convince the intended audience that the work reported is a valid contribution to science (Myers, 1992). Court judgments are quite different in this regard. They are more sturdily performative than research reports, with the fundamental act being the decision. Since a judgment serves both a function of declaratory and justificatory (Maley, 1994), particularly in court judgments, the judge attempts to convince his/her professional and academic peers and moreover, public audiences of the soundness of their argument. However, the reality is that this has additional functions because what a court judgment points out is not merely its justification, but also its legitimacy (Maley, 1994). As a result, the facts, evidence, and argumentation analysis supporting the decision or disposition are inevitably requisite. Under such a premise, a court judgment can be segmented according to the different rhetorical roles. Table 2 provides an

overview of the scheme of the average percentage of each rhetorical segment of each court judgment.

Table 2. Percentage of Each Rhetorical Segment

Rhetorical Segments		Average Percentage	
Label		**Court of Cassation**	**State Council**
Heading		3%	3%
Preamble/Introduction		7%	9%
Context/Facts	Facts elucidated	23%	17%
	Facts ascertained	26%	19%
Analysis argumentation (including additional analysis)	Legal analysis/ Legal reasoning	35%	40%
	Statutes	5%	4%
Order/Decision/Conclusion		1%	8%

From the analysis of the data above, we can conclude the main differences between the judgments of the Court of Cassation and the State Council are: a) analysis argumentation (legal analysis/reasoning) takes much more proportion in the State Council's decision than in the Court of Cassation, as the first provide a specific separate analysis of its own; b) both courts frequently place facts elucidated and facts ascertained where the latter has higher proportion in each judgment. However if compared between these two, the Court of Cassation relatively emphasize more about the facts ascertained; c) decision in the Court of

Cassation is extremely short such as ‘dismissal of the appeal’, ‘inadmissible’, ‘cassation’ or ‘partial cassation’ or ‘partial cassation without referral’, etc. In the case of Baby-Loup, the decision is merely one word: ‘dismissal’. On the contrary, the order/judgment of the State Council often specifies clearly each of the consequences for both the plaintiff and defendant. All those differences can be accounted for in the French legal culture.

For the comparative legalists, one of the pressing tasks is try to capture whether globalization represents the attempted imposition of a one particular legal culture on societies in actual practice, not just limited to the concept of legal culture (Nelken, 2014). Indeed, it is foreseeable that the French legal culture is also under the impact of the economic globalization, legal, social, and political cooperation. Some law specialists would argue that the practice of legal precedents could help to protect and guarantee impartiality and efficiency in administering justice, as it will prevent different laws being applied to similar cases or contradictory verdicts on similar cases despite the application of the same law by inexperienced or incapable judges. Consistency between legislation and enforcement should better be maintained as well.

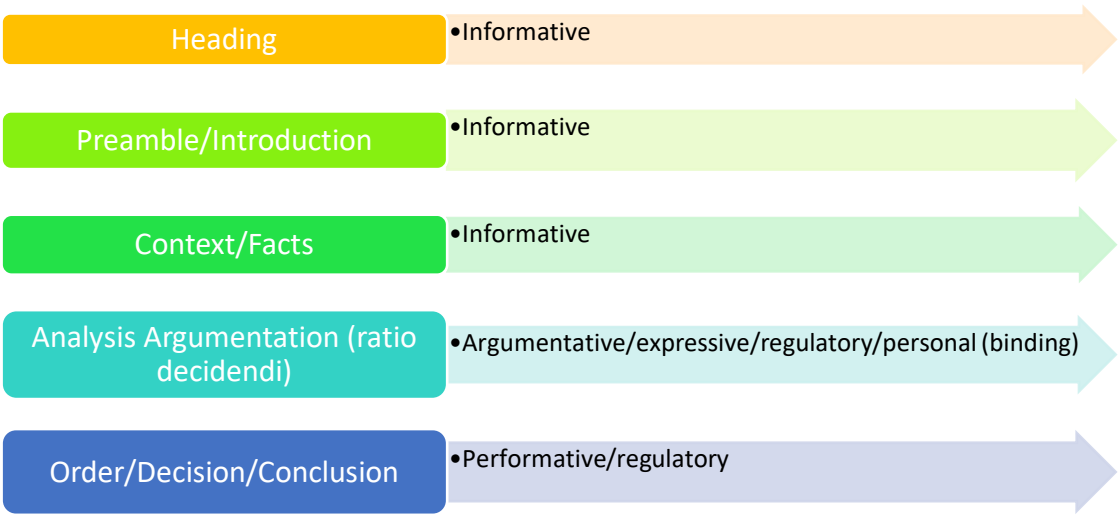
Furthermore, language serves various purposes and different functions in accordance with the concrete situations. Firth (1957) highlighted that functional approach considers language as interactive and interpersonal, as a way of behaving and making others behave. Similarly, Halliday (1985; 1978) emphasized that language is what it is as it performs certain functions. He used the term ‘function’ to signify the purposive nature of communication and outlined seven different functions of language. In other words, social and society demands on language have helped to shape its structure.

Thus, legal documents may also serve multiple functions, including acquiring information, enticing, persuading, commemorating events such as proportional and reciprocal communications, or achieving performative goals, such as producing or

withdrawing legal relationships. As a distinctive genre of legal discourse community, court judgments typically have a performative target. They are intended to determine or alter legal relationships relevant to some polemics, controversies or disputes before the court. In fact, one should utter that the decision/disposition part of a court judgment cater the performative function (Fiorito, 2006); the other parts of a court judgment have their own functions. Figure 7 below describes the nexus between the rhetorical distribution and functional analysis of a court judgment.

It should be noted that legal text should not be limited to the legal language itself but a notion extending to the discourse, genre, rhetoric and culture. The study of legislation and the research of court judgments are also necessitated in the study to answer research questions. As stated earlier, legal analysis in both Supreme Courts is firm and solid, although the analysis in the State Council might obviously be even more and stronger. However, this is probably under the impact and the compensation of the Civil Law system, in which to some extent, legal analysis appears sufficiently in the court judgments. Thus, legal analysis argumentation remains an argumentative, expressive, regulatory statements as well as a *ratio decidendi*.

Figure 7. Rhetorical Distribution and Functional Analysis of the Judgement of State Council and Court of Cassation



Moreover, genre analysis, in combination with socio-cultural analysis, will provide an interesting area in the discourse analysis of legal genres such as legislation, court judgments and other legal documents (Nelken, 2014; 1984). In fact, legal text is more than just a symbolic transfer, but a socio-political-cultural communication, that is why when CDA is carried out, one should not just do superficial research such as the lexical or structural features. Rather, one must go further to probe into the underlying rationales for those features from a sociolinguistic perspective, such as a cultural angle and grasp of different legal contexts (Nelken, 2014).

4.3.4. Sources and Quotations

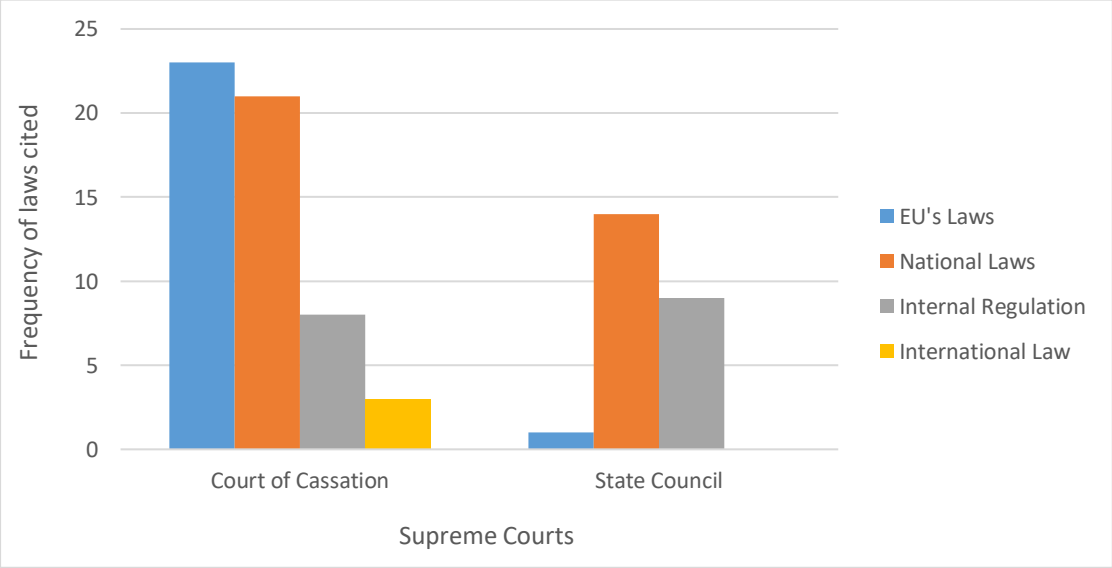
The major sources used to build and analyse the case studies were the opinions and arguments of law representatives – including judges, prosecutors and lawyers – were gathered in the court's ground judgment. They all refer to the dominant power exercised within the judiciary system. Regarding laws and regulations of the case studies, the State Council frequently cites the national laws (such as the 1789 Declaration of the Human Rights and the Citizen, the 1958 Constitution, the Code of Administrative Justice, General Code of Territorial Collectivities, and the Civil and Labour Code). In contrast, the Court of Cassation mostly quotes the EU laws – 23 times in total (such as the Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union). Additionally, besides national laws, the Court of Cassation also mentions applicable international law provisions (such as the 1958 New York Convention and the UN Convention on the Rights of the Child) as demonstrated in Figure 8. Apart from that, the court often takes into account the jurisprudence at the regional EU level for similar cases as well, which is illustrated below:

> "(…) supposing that the employer had been in the particular case of an enterprise of conviction within the jurisprudence of the European Court of Human Rights".....

> "that by holding a legal person under private law, constituting an enterprise of conviction within the jurisprudence of the European Court of Human Rights".... "constituting an enterprise of conviction within the jurisprudence of the European Court of Human Rights...."

As stated previously, the core sources of fundamental and civil rights are the EU Charter, the EU treaties, and EU-specific secondary legislation (Eijken & Vries, 2015). Hence, national laws are appended to them in order to secure everyone within a unified European jurisdiction. Moreover, in the context of EU policies that address anti-discrimination, fundamental and civil rights – as quoted by the Supreme Courts – the reference will be under the Lisbon Treaty (2009), which is a core and critical element of the EU and supranational area of freedom, security, and justice.

Figure 8. Representation of the Frequency Citation of National Laws, EU Laws, International Laws, and Internal Regulations in two Supreme Courts



In line with this, there are also the EU Charter fundamental rights, which have the same legal value as the treaties and are derived from the European Convention on Human Rights (ECHR), the European Social Charter and other human rights conventions, as well as

the constitutional traditions common among the EU Member States (Ferraro & Carmona, 2015).

At some point, each Member State develops and follows its own definitions and categorisations of fundamental and civil rights, which are sometimes interchangeable and overlapping; however, there is common legal ground that is recognised and embodied in the fundamental rights. Although in reality some Member States find it challenging to adopt the Charter as a superseding guidance of national law, they are obliged to comply and correspond with EU law. This includes the protection and promotion of fundamental rights, which are pivotal across all EU policies and therefore should act as the extension of the Union. The term 'fundamental civil rights' is used to describe all rights including protection against discrimination based on gender or religion.

Furthermore, the EU or its Member States also acknowledged that the UN charters; including the Universal Declaration of Human Rights; International Covenant on Fundamental, Civil and Political Rights; and several other UN conventions contain discrepancies of understanding or point of view. Important fundamental and civil rights, according to Eijken & Vries (2015) inter alia contain the right not to be discriminated against, in particular based on "nationality, gender, religion, ethnicity, sexual orientation, disability, age, privacy, data protection, and asylum" (p. 7).

4.3.5. The Event: Notion about Discourses

As the main centre of investigation in the study, CDA tackled legal texts containing the notion of discourse through two cases in order to represent Muslim women in French jurisprudence. Figure 9 demonstrates the frequency use and notion about discourses found in the legal text varied across the two cases – as compared to the other terms – the word "neutrality" or other sentences related with the term, for example "principles of neutrality"

or “an obligation of neutrality” or “respect and maintain neutrality” have been repeated 14 times and mostly mentioned in the case of Baby-Loup vs. Mrs. F. It is also worth noting that the word neutrality is often linked with *laïcité,* to cite some of them:

> “that Article 14 of the Convention on the Rights of the Child - which is not directly applicable - carries no obligation that a company receiving small children or dedicated to early childhood is obliged to impose on its staff an obligation of neutrality or *laïcité….”*
>
> “that *laïcité*, a constitutional principle of State organization, the founder of the Republic, which, …., a principle of neutrality and a prohibition on wearing any ostentatious sign of religion….”
>
> “that an enterprise cannot set itself up as an ‘enterprise of conviction’ to apply principles of neutrality - or *laïcité* - which are applicable solely to the State; that neither the principle of *laïcité* established by Article 1 of the Constitution….”
>
> “(….) principles of *laïcité* and neutrality that apply in the exercise of all activities developed by Baby Loup, both in the premises of the nursery or its annexes in accompanying the children outside entrusted to the nursery"; that it subjects all staff to a principle of *laïcité* and neutrality, applicable to all of its activities….”
>
> “(….) that "the principle of the freedom of conscience and religion of each staff member cannot hinder compliance with the principles of *laïcité* and neutrality that apply in the exercise of all the activities developed….”

The second discourse that exhibits support for “*laïcité*” includes statements referring to wearing a headscarf or a burkini as an action that “impedes to respect and fulfill the principles of *laïcité/*secularism”; it also refers to “the principle of *laïcité/*secularism…” or “*laïque* [28] / secular”, which is repeated 7 times in the case of Baby-Loup and once in the case of the burkini. Moreover, another discourse that includes phrases like “power” or “police/policing powers” or “authorities” or “regulate/supervise” appear 11 times in the case of burkini and 3 times in the case of Baby-Loup. Then the word “security” or “safety/safeness” are used 7 times throughout the court decision of the burkini, and null in the case of Baby-Loup. Finally, discourses like “integration” (social and professional

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[28] *Laïque* is a French term to explain thing that has no religious character, which is independent of any religious denomination.

integration), or "inclusion" emerge 6 times in the case of Baby-Loup.

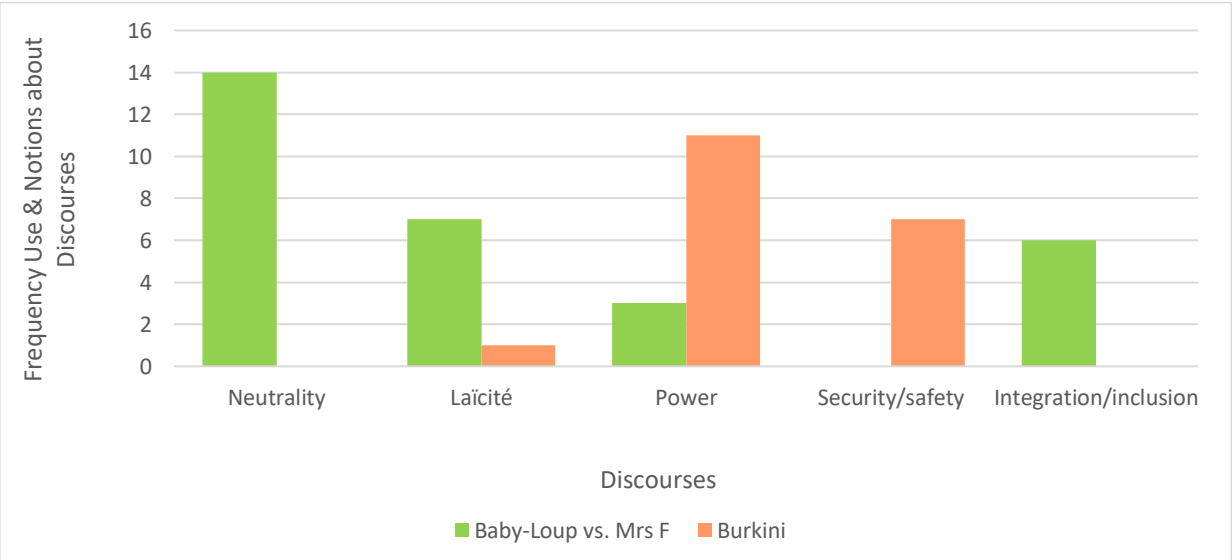
When a discourse is cited frequently and repeatedly, it might be considered or depicted as more important than other discourses (van Dijk, 2001a; 2005; Wodak & Meyer, 2009). In most cases, all the discourses mentioned above refer to some kind of ideological and security concern, such as an immanent psychological threat – or a more transcendent threat to the social, economic, political, and religious life.

Figure 9 below provides a visualisation of the frequency use of four notions that present in the cases of the burkini and Baby-Loup: neutrality, *laïcité*, power, security/safety, and integration/inclusion.

Particularly in the case of Baby-Loup, the Court of Cassation considers that:

> "(…) qualifying the Baby Loup association as a company of secular belief cannot be a justification for dismissing an employee in reason for wearing a religious sign, since the purpose of this association, was not to promote and defend religious, political or philosophical convictions. But rather that restrictions on the freedom of the employee to manifest his religious beliefs must be justified by the nature of the task to be performed and proportionate to the aim pursued. Therefore, the dismissal for serious misconduct of Mrs. F was justified by her refusal to access lawful requests of her employer to refrain from wearing her veil and by the repeated and characterized insubordinations described in the letter of dismissal and making it impossible to continue the employment contract."

Figure 9. The Frequency Use and Notions about Discourses found in the Legal Texts of Two Cases of Muslim Women



This is to say that the principle of the freedom of conscience and religious manifestation of each employee cannot actually impede obedience with the principles of secularity and neutrality that are applied and regulated in the exercise of all activities of a company. The restraints of the employees' freedom to manifest their religious affiliation must be enacted and supported by the internal regulation in order to be sufficiently appropriate. The employer may decide to introduce further restrictions, but only if they pursue a legitimate aim and are proportionate. One could conclude that the employer has the right to require the employee to adhere to the values conveyed by the company, which may justify a restriction of its employees' freedom of conscience (including manifesting religious belief). This was also explicitly noted in the CNCDH's (*Commission Nationale Consultative des Droits de l'Homme/*National Advisory Commission on Human Rights) opinion – which contained therein the *Avis sur la Laïcité* (Opinion on *Laïcité*) – regarding *laïcité* and its application in private enterprises (LégiFrance, 2013a):

> "Since the principle of neutrality is not binding on private individuals, an enterprise or an association cannot invoke the principle of *laïcité* to limit the religious freedom of others, whether it be its employees or its customers. In labour law, there is no equivalent to the principle of neutrality of public service employees…. In any case, the prohibition cannot be general or absolute. The assessment of the situation must be made in concrete, and the terms and conditions of this restriction must be able to be discussed with the interested parties on a case by case basis. It is up to the employers to justify the necessity and the proportionality of their decisions with regard to the concrete tasks of each employee and the context of their executions, in order to demonstrate that their decisions are necessary and proportionate and that it is based on the objective elements unrelated to any discrimination…."

Some would argue that the 'general' scope of the neutrality rules, as well as the several emphasis on *laïcité,* are merely a subterfuge to evade the use of word 'discrimination', thus restricting the freedoms of Muslim women in particular, and of all in general, for the mere intent of defeating wearing the headscarf. Right after the Baby-Loup final judgement – which was considered as the first major decision in the context of French legal precedent and jurisprudence for employees manifesting their religious affiliation in the

private sector – *laïcité* and neutrality clauses started to flourish in very similar cases that occurred afterwards concerning the wear of religious symbols in the private sector sphere (CCIF, 2018). Moreover, the continuous insistence of using the concept '*laïcité*' or 'secularism' or 'neutrality'— particularly in internal regulations of private companies – which contributes to the widening of the social gap and can be used as a tool to (directly/indirectly) legitimise discrimination and marginalization. This systematically differentiates Muslim women workers from others, while also creating a means of economic surveillance of them and governing their capacity to succeed in the French labour market.

Furthermore, there are imminent parallels between the headscarf discussions, and those about citizenship, national identity and the integration of immigrants into the centre of the political agenda, as already explained in Chapter 2. Thus, it includes citizenship policies and the relation between cultural and religious diversity and national interest become the most salient issues. Integration became progressively conceptualized as an individual achievement and ability to subordinate one's religion and/or culture to the rules of socio-political life. Unfortunately the ban on headscarves is often closely associated with the inability of Muslim women to integrate socially and professionally. In the verdict of the case of Baby-Loup, it is evident that the court supports that social and professional integration is one of critical arguments in the headscarf debates, as it is narrated in the court's ruling:

> "(…) freedom of thought and religion from the child derived from the New York Convention or that of respecting the plurality of religious options of women for the benefit of which is implemented a social and professional integration in a multi-faith environment are not constitutively linked to an enterprise of conviction…"

> "(…)that retaining the Baby-Loup nursery could impose an obligation of neutrality, to its staff in the performance of their duties, including prohibition to wear any ostentatious sign of religion to the reasons for the need to protect the freedom of thought, freedom of conscience and freedom of religion, to build for each child as well as the plurality of religious options of women for the benefit of which is implemented a social and professional integration, to the professions of early childhood…"

> "And whereas that are erroneous, but superabundant, the motives for the judgment qualifying the Baby-Loup nursery as an enterprise of conviction/belief, since the purpose of this nursery was not to promote and defend religious, political or philosophical convictions, but, according to its statutes, "to develop an early childhood-oriented action in disadvantaged areas and to work for the social and professional integration of women (...) without distinction of political and religious opinion…"

In addition, as explained earlier, the two chambers of the Court of Cassation – the Social Chamber decision and the Plenary Assembly – differed profoundly in their assessment of the proportionality of the restriction in their decisions. For the Social Chamber, a general requirement of neutrality was deemed disproportionate because of its wide scope – all staff, without any distinction, are affected by the prohibition, which moreover applies across all of the nursery's activities and in all of the nursery's premises. The Plenary Assembly, however, thought otherwise. The restriction, despite its wide ambit within the company, was proportionate, as it is stated in the Plenary Assembly judgment:

> "Whereas having noted that the internal regulation of the Association Baby Loup, as amended in 2003, provided that "the principle of the freedom of conscience and religion of each staff member cannot hinder compliance with the principles of *laïcité* and neutrality that apply in the exercise of all the activities developed, both in the premises of the nursery or its annexes and external accompanying of children entrusted to the nursery", the Court of Appeal could arrive at the conclusion, appreciating concretely the operating conditions of a small association, employing only eighteen employees, who were or could be in direct contact with the children and their parents, that the restriction on the freedom to manifest one's religion enacted by the internal regulation was not of a general nature, but was sufficiently precise, justified by the nature of the tasks performed by the employees of the association and proportionate to the aim pursued".

The term "proportionate" here seems loose, abstract, and vague in its assessment and requirements. Furthermore, the conclusion relies on the particular constraints weighing upon the nursery, notably its small size, which mandated that all members of staff come into contact with the children in their care, who come from a multi-cultural/multi-religious and socio-economically deprived area where the risk of religious tensions was thought to be particularly harmful. Assuming for now that the exposure to religious symbols may indeed

inherently jeopardize the social harmony of the locality and put children's freedom of conscience at risk, thus the Plenary Assembly relies on the assumption that wearing of ostentatious religious symbols by nursery assistants is necessarily harmful to the young children attending the nursery. Yet, it nevertheless remains difficult to understand why intermittent or irregular contact with children should justify permanent full-time restrictions on religious manifestation in the workplace. Moreover, looking beyond the wording of the contested clause, it considered the surrounding context and took into account the particular structure and specific goals of the Baby-Loup nursery. It is clear that this so-called contextual approach is in fact abstract in nature. Therefore, the scope of the "restrictions" per se indeed relates to the special character attributed to the institution, but ignores how they might be connected (or not) to the specific tasks assigned to the employee concerned. As a result, because this requirement is more likely to affect Muslim women, one might argue that it constitutes indirect discrimination. Furthermore, as stated previously, in its recent decision on August 2018, the UN-OHCHR reconfirmed that religious and gender-based discrimination are sufficiently and convincingly justified in this particular case.

Apart from that, it is also worth noting that the term "Islamic veil" is mentioned 3 times in the court decisions, and thus might seem disproportional since it is generalizing all meanings, as it is narrated in the court's judgement:

> "(….) that she was convened by letter on December 9th of 2008 to a preliminary review for possible dismissal, with layoff as a precautionary measure, and dismissed on December 19th of 2008 for misconduct, for violating the provisions of the internal regulations of the nursery by wearing an Islamic veil and because of her behaviour after this layoff…."
>
> "(….) that the disputed judgment, which did not reveal nor characterized, in view of particular and concrete elements of the case (tasks devolving to Mrs. Y ... personally in her employment, age of the children, absence of ostentatious behaviour or proselyte of Mrs. Y ...) the incompatibility of the wearing of her Islamic veil with the commitment and the employment of Mrs. Y...."
>
> "(….) that by refraining from seeking, as it was expressly invited, whether the employee's refusal to remove her Islamic veil could, with respect to the exercise of a

> freedom and the expression of lawful personal convictions, to be punished disciplinarily and to characterize a fault and thus to question the nullity of the dismissal…."

Even though, it could probably be true that the plaintiff, Mrs. F, has a confession of Muslim faith. However one could argue that the term "Islamic veil" might be unsuitable, subjective, and prejudiced. Given the fact that – based on the explanation in Chapter 2 – the headscarf or veil is not solely the 'property' of Muslims and not merely an aspect of 'Muslim identity', and is also a cultural practice shared by various ethnic and religious groups in the Middle East or in Asia or in Europe including Jews, Christians, Muslims, Hindus, Sikhs, Arabs, Druze, Persi, Yazidi, Assyria, Chaldean, Coptic, etc., as proven by not only cultural and religious history, but also contemporary world.

Moreover, in the case of Burkini, the court decided to suspend the execution of the Article 4.3 of the decree of the Mayor Villeneuve-Loubet concerning police regulations, security and exploitation of beaches granted by the State to the municipality of Villeneuve-Loubet, which stated that:

> "(….) on all the beach areas of the municipality, access to bathing is prohibited, from 15 June to 15 September inclusive, to any person who does not have a correct outfit, respectful of good morality and the principle of *laïcité*, and respecting the rules of hygiene and swimming/bathing safety adapted to the public maritime domain. The wearing of clothes, while bathing/swimming, having a connotation contrary to the principles mentioned earlier is strictly forbidden on the beaches of the municipality…."

This level of security is warranted by a belief that women who wear burkinis pose such a danger or cause serious security issues that exceptions must be made to the normal application of law. However, this also indicates a level of exaltation among the officers and legal authorities who are allowed to exercise their power and right to go beyond the normal application of law, or to put the state of exception into force. This exalted status is also made evident in the court's decision. In particular, as exhibited in this quoted judgment:

> "Under the Article L. 2212-1 General Code of Territorial Collectivities, the Mayor is in charge, under the administrative control of the *préfet*, of the municipal police which, according to the Article L. 2212-2 of this code, "is intended to ensure public order, safety, security and sanitation". Article L. 2213-23 further provides that: "the Mayor exercises police swimming/bathing and water activities practiced from the shore with beach gear and unregistered gear .... The Mayor regulates the use of the arrangements made for the practice of these activities. It provides emergency assistance and relief measures. The Mayor delimits one or more supervised zones in the coastal areas with sufficient guarantee for bathing/swimming safety and the activities mentioned above. It determines the periods of supervision ...."
>
> "(…) It follows that the police measures that the Mayor of a coastal municipality enacts in order to regulate access to the beach and the practice of swimming should be adapted, necessary and proportionate in light of the needs of the public order only, as they arise from the circumstances of time and place, and taking into account the requirements of good access to the shoreline, the safety of swimming and the hygiene and decency on the beach…."

The term 'power' or 'police power', speaks of authorities (police, Mayor) and society (Muslim women), and sees the use of power as an expression of unequal coercive relations and seeks to explain it in relation to the relationship between the parties. The existence of inadequate and coercive power dynamics within the police municipality occurred because women wearing burkinis were regarded as not wearing 'a correct outfit', were not 'respectful of good morality and the principle of secularism', and ignored the 'rules of hygiene and safety'. The utilisation of particular adjectives such as 'correct', 'good', 'respectful' and 'disrespected' by the decree of the Mayor of Villeneuve-Loubet (Alpes-Maritimes) has two sides. On one side, it exalts the descriptions and statuses of the institutions within the French citizenry. On the other hand, it degrades and discriminates women wearing burkinis by labelling them to be "disrespectful of good morality", among other claims. While it is agreeable that having 'competent' judiciary representatives is desirable, the standards that frame what is deemed appropriate behaviour is important to critique, especially in a state of exception. The exceptions to constitutional liberties become normalized under a state of exception (Agamben, 2005), and under this assumption, the authorities consider that it is reasonable for them to suggest that the maintenance of such security measures, as well as the

concerns resulting from the terrorist attacks or excessive worries of viewing the headscarf or the burkini as an act of proselytization or provocative behaviour, for example, are considered 'competent' and reasonable actions or exercising of power.

These discourses (as cited by the court judgement) nonetheless represent Muslim women as opposed to the behaviour of the French society in general, placing these women's community, as a minority, in opposition to the native citizens of France and depicting traditional or religious norms as in conflict with the French secular values. It was demonstrated above that wearing a burkini was validated in terms of religious motives by defining that it is incorrect attire for swimming, represents immoral and disrespectful of principle of *laïcité*, and disregards hygiene and safety. As to whether the burkini is viewed as an outfit that shows ostentatious religious symbolism, there are barely explicit mentions that relating this swimming outfit to the religion of Islam, but there are plenty of implicit associations with Islam. What is reflected above all are the trustworthy characteristics of the average citizen and the simultaneous construction of the native French citizen and the French Muslim women minorities (manifesting religious affiliation) at odds with each other due to conflicting differences. This results in the Muslim women seen and treated as the non-preferred citizen.

More importantly, the definitions or criteria of what was meant or what kind of swimming outfit that is categorized as 'correct', or compatible with "good morality" and *laïcité*'s tenets were not provided within the Mayor's decree as cited by the court's judgment. However, the Mayor is depicted as having the authority to determine whether or not some beach visitors adopted a 'correct' dress in accordance with the characteristics of 'good morals', 'decency' and 'hygiene' for swimming/bathing. Using the same logic, some might wonder what makes the burkini be seen as distinct to the wetsuit or drysuit for diving/scuba

diving. If so, one might questioned why a burkini has to be considered as religious (Islamic) attire, whilst the wetsuit/drysuit are not, although they both share a similar design and fabric?

The preference of such terms shifts critiques to human rights questions within French society and focuses the critique on the 'others' whose civil society requires assessment from the legitimate French institutions. A prominent construction of these women wearing a headscarf or other religious attire as non-preferred citizens includes a depiction of the hazardous, proselyte, provocative character and against the will of *vivre ensemble* (live together), which has been echoed as a concept of social integration. This means separating from cultural or religious backgrounds for immigrants, people of immigrant background, and refugees. This is primarily intended for those insisting on wearing religiously symbolic attire, including Muslim women.

Another aspect in this case, interestingly, is that the court prefers to use the term 'suspend', rather than, for example, 'abrogate' or 'modify' the article of the decree, [29] as shown below:

> "Article 1: The order of the judge of the Administrative Court of Nice dated August 22, 2016 is annulled.
> Article 2: The execution of article 4.3 of the decree of the mayor of Villeneuve-Loubet dated August 5, 2016 is suspended.
> Article 3: The conclusions of the municipality of Villeneuve-Loubet and those of the League of Human Rights, Mrs. D, Mrs. C, and the Association for the Defence of Human Rights Collective against the Islamophobia in France for the application of Article L. 761-1 of the Code of Administrative Justice are rejected.
> Article 4: The present order will be notified to the League of Human Rights, to Mrs. D, to Mrs. C, to the Association for the defence of human rights Collective against Islamophobia in France, to the municipality of Villeneuve-Loubet and the Minister of the Interior."

This particular use of language suggests that the cessation of the regulation is for a

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[29] Likewise in the case of nursing students vs. the Minister of Social Affairs, Health and Women's Rights which was decided by the State Council in July 2017 where the court used the term 'abrogation', 'annulment' and 'modification' as it considered the disputed decree is vitiated with illegality and unlawful infringement. See the decision online at LégiFrance, available from https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000035317186

period of time and on conditions set by the judge and is merely temporary in preventing from continuing or being in force or effect, and further may at times be re-applied/re-ordered as it deemed necessary. That it is based on the court's argument stating that the reasons expressed by the municipality do not present a logical and strong basis from the onset, and that the court's primary goals are indeed not to annul the article, with respect to the court's statement that "the disputed decree thus brought a serious and obviously unlawful infringement to the fundamental freedoms which are freedom to come and go, freedom of conscience and personal freedom." However, the term 'suspend' raises the questions of whether or when will the court allow the Mayor decree be re-enacted or re-regulated.

Another concern is the court's rejection of any financial compensation to the plaintiffs. The court refused to charge the State 5,000 Euros, as demanded by the plaintiff, and did not grant any other amount of monetary restitution, which in fact also generates another query. The court concluded that it is non-essential to impose the State at all, in this case the Mayor/municipality of Villeneuve-Loubet, to settle the amount of money for the class action of LDH, Mrs. D & Mrs. C, and CCIF (State Council, 2016). Then what can be implied if the judge decided to preclude the payment of a sum to the complainant? While in other quite similar cases the court ordered, not only to abrogate or modify the decree of a Minister or other government authorities for example, but also charged the State sums of money to the plaintiff, in which it is regarded as a compensation for the negligence of the State in treating its citizens. In this sense, should one argue that whether the judge considered the Mayor's decree on burkini ban has inconsequential implications? In such a circumstance, it then will be in juxtaposition with the court's justification mentioned above that the municipality's argument is illogical and has insubstantial legal basis. Or probably, is it categorized as 'non-preponderance of the evidence'? [3°] This could too imply, the judge did not 'wholeheartedly' believe that the case was stronger than the other side's case. This again

became a contrast with the court's judgment, which viewed the Mayor's decree as "serious and obviously unlawful infringement to the fundamental freedoms" (State Council, 2016a; 2016b).

Moreover, the court ruling includes other forms of discourse to convey legitimacy to French legal systems and their representatives, as demonstrated in the following:

> "Under Article L. 521-2 of the Code Administrative Justice, where a particular emergency arises, justifying its decision within a short period of time, the judge may order any necessary measure to safeguard the fundamental freedom to which an administrative authority would have committed a serious and manifestly unlawful infringement."
>
> "(...) The consequences of the application of such provisions in the present case constitute a situation of emergency which justifies the use of the powers of the judge hearing the application for interim relief under Article L. 521-2 Code of Justice Administrative."

Due to the constructed 'emergency,' the law granted the judge the ability to enforce any required measures for an unexplained particular period of time. Nonetheless, this clause can be ambiguous and therefore quite problematic, as the necessary conditions for an emergency to be declared are not outlined, nor are the conditions outlined for whom this law can be applied to. However, what could be represented above are the credible characteristics of the judgment, which this could synchronously construct the objective of sociological jurisprudence – judicial decisions must be cognisant of the social context in their investigations, and therefore must have social control to intercede the different interests between local administrative authority and some other citizen in a society.

As confirmed by the court, this dispute was intended to prohibit the wearing of the burkini, which is considered to be an outfit that ostensibly manifests religious affiliation

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[3°] Non-preponderance or preponderance of the evidence is one of the legal terms. Preponderance of the evidence signifies that an evidence that is of greater weight or more convincing than the evidence that is offered in opposition to it. The amount of evidence that must be presented to prevail in most civil actions. While, non-preponderance has the opposite meaning. See Hill & Hill (2002), *The People's Law Dictionary*.

during bathing/swimming on beaches. Nonetheless, the court was convinced that the risk of disturbing public order and on grounds judgement of hygiene or decency, as argued by municipality of Villeneuve-Loubet, was not legally and convincingly proven. Therefore, the municipality concerns resulting from the Nice terrorist attacks on 14 July cannot be sufficient to legally justify the contested measure.

The only perspective in the texts that condemns rationalization and correlation between a swimming outfit with decency and moral values and further attempts to briefly explain sociological insights on the debate is the voice of the Non-Governmental Human Rights Organisations, Association of Fighting against Islamophobia as well as some law practitioners and academics generally quoted in quality papers.

Albeit in concept and theory, both the State and the law are willing to prohibit a discriminatory practice. However, the legal precedent offers the instructions for use to exercise it legally. The language within the court decisions is certainly not operating outside of power relations and its core target to 'safeguard' freedoms and liberties might probably be a possible indication of the State's common tendency to commit as the oppressor – a circumstance that is less likely to occur in a well-maintained democracy (Chomsky, 2005). If the emphasis on language within power relations holds true, as per post structuralism, then critically analysing the constructions of meaning within the decision will allow for at the very least a delegitimization of the systematic oppression to those that do not fit the national interest/image or national security, in this case happening against Muslim women with personal religious identity.

As the legal precedent and jurisprudence implies, Muslim women are not only depicted as a possible ideological concern, but also as an immanent impendence. This only further justifies the rigorous procedures at the labour market's 'ports of entry' within the state of exception. Furthermore, when depicting the enforcement of the law and regulation,

the priorities are evidently focused on deterring potential for non-neutrality or ideological concern and security issues rather than helping accommodating social cultural (religious) diversity of these women. One point of view is that the concept of neutrality is defined by not wearing symbols or attire that may be interpreted to particular religious affiliation, it thus can also be said that the concept of neutrality itself is indeed partial. However, this standpoint neglects social reality of a diverse society (including religious and cultural) by objecting or expelling those who wear religious symbols without even considering for example their loyalty, contribution, and achievement in their workplace or country. The State is also responsible for administering policies for handling inadmissibility on the basis of discrimination, segregation, marginalisation, isolation or other social issues that may arise from the impact of the decision. Without much critical thought, it seems rational to respect the principle of neutrality, it is however equally essential to consider that these women are being presumed here as the primary suspects for their rights violations, to wear whatever they want or they feel comfortable.

4.3.6. Non-Preferred Citizen

A critical discourse analysis of the two jurisprudence examples show a number of identity-based constructions about non-preferred citizen. In particular, themes around securitization and racialization intertwine with one another to depict Muslim women wearing a headscarf and a burkini as fundamentally different, and therefore as a threat in both symbolically and physically. Simultaneously, the judicial systems and its institutions also become ‘exalted’ within the language and application of the jurisprudences, by which the readers are encouraged to perceive and confirm several stereotypes in the society. Therefore, the jurisprudence as a discourse constructs identities in binary terms, either as preferred or non-preferred.

Arguably, the concept of non-preferred citizen advances the framework of the segregation and marginalisation of Muslim women manifesting their personal religious identity to include those who are established citizens, yet become susceptible to neglect from the State because they are regarded for not supporting the *laïcité*'s values or national identity. Being non-preferred citizens in this context means people living in France might be considered as neither supporting the popular national image, nor the national interests of the white-secular-settler State. Yet cannot lawfully annulled their nationalities or simply deported. It is generally viewed that these interests of the white-secular-settlers are paramount and racially superior to those of 'coloured'-settlers or other immigrants, which allow greater legitimacy of socio-economic movements and political demands (Veracini, 2010; Elkins & Pedersen, 2005; Weiner, 1993). Moreover, this emphasis on integration and immigration policies also raise important questions about non-preferred citizenry: if the government prefers citizens that compatible into dominant categories of national identity, then what does this say about the State's view towards its own citizens who do not fit this category? In this case, these women could become susceptible to unfair legal processes, yet inspire little support from the nation as they are unwanted and possibly regarded as "less-than-whole citizens" (Engel, 2016). [31]

The conceptual frameworks of the non-preferred citizen are unfortunately complementary and help establish depth to the varying conditions of discrimination and segregation being enacted on these groups of women by the nation-building project. Although others might insist that the State never neglects its citizens, as it offers support for those who are jobless or have a lower income via housing or health insurance assistance.

[31] "Less-than-whole citizens" or also known as "fragmented citizens", a term which was introduced by Stephen M. Engel, an American political scientist in an effort to explain social and legal discrimination encountered by citizens (Engel, 2016). These citizens are often subject to inequality and discrimination on gender identity and expression (Engel, 2016; Spretnak, 1982) (including gender-religious identity and religious expression), from their superiors (could be State authorities and its apparatus or communities/individuals in private sectors).

However, if they are being economically dependent, don't they become a burden for the State? The economic value of Muslim women in general is depicted as being low as a result of labour-market discrimination (Adida, Laitin, & Valfort, 2010). Perhaps so low that it presents a possible vulnerability to the French economy (Adida, Laitin, & Valfort, 2012). It is certainly the case that all subjects of the State are reducible in economic terms, or into *homo oeconomicus* to borrow from Foucault's lectures (Foucault, 2004, p. 296), but this neoliberal philosophy of identity is not separate from the forces of racialization and securitization, which are also intertwined with the functioning of global capitalism. Therefore, all subjects of the State may be commodities of some sort, but this supposed economic value of a subject cannot be detached from symbolic forces that also define their identities. In line with racialising philosophies that suggest some citizens who are incompetent and economically dependent, it is apparent that they may become dependent on social assistance. There is a clear connection made here with racialising myths that suggest Muslim women are a drain on the social welfare system, although credible research suggests that this may not be the general case (Ceyhan & Tsoukala, 2002; Bannerji, 2000).

Another fact that there exist a political driven in the cases from the State elites or politicians may encourage to contribute the 'hardships' facing these women is an example of how power can be productive and oppressive. Considering the challenges facing most of them, this allows for an opportunity for humanitarian principles to become prioritized in the jurisprudences and/or State policy. However, this is not without some concern. It reaffirms that these non-preferred citizens are fundamentally 'different' from French natives through the discursive construction of divergent/'other' religious identity, genealogies and/or geographical heritage as 'dangerous' and 'uncivilized'.

For example, in the discourse of the partisans of the headscarf ban, a hard-line interpretation of *laïcité* represented France's fundamental values. To their belief, *laïcité* is

an ideal structure for living together in a democratic community and represents personal autonomy, freedom of choice, gender equality, co-education, emancipation from one's primary identities, and freedom of judgment. As a consequence, it is in fact incompatible with headscarf as it symbolized primarily the inequality between the gender and sexes, oppression and coercion of the individual conscience in relation to religious belief and practice, and moreover an absence of personal autonomy. In addition, in 2003 the Stasi Commission reports that wearing a headscarf was to serve an advocate an extremist agenda against France and its values and therefore is dangerous. And the State, including law institutions recognized and institutionalized this hard-line interpretation of *laïcité* as a policy with the legislation (including jurisprudences) of the banning headscarves which has expanded to the private sector.

Furthermore, the discourses within the jurisprudences do not draw from the solution to at least reducing the impact of (in/direct) discrimination, segregation, isolation or marginalisation emerged from most of jurisprudences. Thus, the State is not seen as accountable for these women's disobedience (due to maintaining their religious identity), and therefore claims any admissions are done so out of generosity, furthering a condescending position of national superiority. The non-preferred citizen is continuously constructed as potentially radical and susceptible to insubordinate or proselyte/provocative behaviour. Misrepresentation is made known as rounds for segregation or discrimination. The dangerous depiction of this group of women is a vital component for justifying the continuance of the general marginalisation against Muslim women manifesting their religious belief in the French white settler nation and thus represents a symbolic concern over the hegemonic white European identity within France. At this point, it might be deduced that these non-preferred citizen have been identified as being fundamentally different based on varying security risks, whether as a threat to public safety, the nation's

economy, or the symbolic French values. Quite a bit of time can be consumed by trying to find a socially and politically sensitive label for Muslim women, but the rise of nationalism dictates that 'they' will always need to be called something to create a distinction from the 'normal' French. Therefore, the legal operation for managing the people (citizen) is somehow rooted in securitization and divisive hierarchies: a binary of preferred and non-preferred, civilized and savage, hazardous and unhazardous.

Notwithstanding the jurisprudence evidently spends greater detail constructing the non-preferred citizen, these depicted identities are reducible to security concerns that are largely imagined and therefore ambiguous too. That is, the jurisprudence implies that the State and public cannot possibly know what the non-preferred citizen are up to, only that 'they' pose a serious threat to the public and nation. This ambiguity allows for the state of exception to flourish and subsequently justifies material consequences such as religious-racial profiling, controversial political intervention, and unfair trial by the press. A major theme indicated within the jurisprudence of the two cases was that the non-preferred citizen was a potential psychological, sociological, political and economic concern to the public. However, the material consequences involved with these security measures have been racialising individuals and social groups, particularly affecting Muslim women who wear headscarves or burkinis.

Although, as discussed earlier, in the case of the burkini, the judgment used the term "suspended" to the execution of article 4.3 of the decree of the Mayor Villeneuve-Loubet, nonetheless the term indicated that the postponement of the decree are momentarily and further whenever necessary can be proclaimed if condition or urgency is obliged. In other words, one might argue that the judges do not seem wholeheartedly to order the abrogation or modification of the Mayor's decree which considered discriminating against Muslim women. Furthermore, contrasting themes in the jurisprudences reveal that subjects are not

equal, especially in considering that some applications of the jurisprudences require (in/direct) discrimination that is strictly prohibited by the Constitution. Exposing this discourse to critical analysis is therefore important for challenging the ideologies that allow for discrimination and marginalisation. Indeed, the depicted 'headscarf or burkini as provocative action and advocacy to extremism agenda' needs to be rethought, reconceptualised in terms of anti-racism and social justice; it needs to be understood that the true crisis is the nation-building project itself.

From this standpoint, it is evident that the State and its law institution are taking pre-emptive action against an unsubstantiated threat. The threat is largely imaginative because it only declares substantiation through narrow, irreducible stereotypes towards Muslim women. For example, a few instances of terrorism conducted by Muslims, or criminal activities by Black (and/or Muslim) men have somehow legitimized massive security and exclusionary programs against entire social groups of people. As demonstrated within the jurisprudence, the depiction or the narration of non-preferred citizens as 'dangerous' contributes towards a discursive domain that legitimizes a security regime that have turned the rule of law upside down, contributing to the expansion of (in/direct) discrimination and marginalisation of Muslim women manifesting religious belief. This pre-emptive action is a theme that directly violates the civil rights cemented in the Constitution, which explicitly forbid such pre-emptive action by authorities and the State. Specifically, the 1946 Constitution and the reaffirmed 1958 Constitution (LégiFrance, 2013a), state that: "the principle of neutrality is not binding on private individuals; a company or an association cannot invoking the principle of *laïcité* to limit the religious freedom of others, either its employees or customers. There is no labour law equivalent to the principle of neutrality of public officials."

Furthermore, there is a prevalent theme within the Constitution that emphasizes equality among all people living within France, which is strictly stated in several legal texts, including: Article 1 and 2 of the Act of December 9th of 1905, Article 4 of the 1946 Constitution and Article 1 of the 1958 Constitution. In international treaties ratified by French Constitution: Article 27 of the International Covenant on Civil and Political Rights, Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights, Article 14 of the European Convention on Human Rights and Fundamental Freedoms, Article 9 European Convention for the Protection of Human Rights and Fundamental Freedoms. This fundamental right for equal treatment under the law is a direct antithesis particularly to the jurisprudence of Baby-Loup case. Meanwhile, in the jurisprudence of the burkini case the thesis for equal treatment is there, even though it takes into account several notices and analysis from the languages used in the decision form the issues of security or issues of unequal coercive power relations, and moreover lack of earnestness in the judgment.

One of the major themes constructed within the jurisprudences is that the non-preferred citizen is regarded as potentially extreme and radical and susceptible to disobedience to the *laïcité*'s values. In continuation, there is ample evidence to suggest that white secular French citizens, and institutions they occupy, are ontologically exalted. On these grounds alone the jurisprudence (in)directly discriminates against Muslim women with headscarves or other religious attire based on religion or social and ethnic origin, leading to the jurisprudence discursively constructing the identities of non-preferred citizens as lesser human beings.

The Constitution identifies that individuals cannot be discriminated by race, nationality, colour, religion, sex, ability, or age, however these characteristics of social inequality are often intertwined with one another. For example, when Muslim women with headscarves try to socialize or when they are competing in the employment market, they will

be suspected as having an extreme point of view and therefore need to be cautious or take necessary urgent actions based on condensed information about their religious (personal) identities, their 'ethnic' origin, their Muslimness, along with other stereotypical understandings of gender and race that are often subtle and unnoticed. It is no coincidence that every individual detained under scrutiny or discrimination is associated with Arab names, or Muslim identities, or Muslim appearances, as well as all men. The security threats accused against these women can be discursively produced on many fronts: 'they are a threat because of Muslim extremism'; or 'they are a threat because they have backgrounds or heritage from the Middle East' (even though they are already become French national); or 'they have double nationalities, French and North African/Middle Eastern'; or 'they are a threat because they look like they are from the Middle East'; or 'they are a threat because they do not look like they are North African nor Middle Eastern but their appearances may be associated with Islam and Muslims'; or 'they just look like they are Muslim'. These discourses vary, but all serve to maintain a system of oppression against a constructed 'other', despite that each discourse seems to explicitly oppose the concept of equality in the Constitution and depict a bleak reality of the State's commitment to a multicultural liberal democracy and a self-proclaimed 'racism-free' nation. To some extent, the concerns implied within the jurisprudence become more translucent as concerns about the cultural hegemony within France, which remains a white, secular heritage.

4.3.7. Between Frenchness and Muslimness vs. Sameness and Social Equality

Considering the fear that France's dominant white, secular heritage might be replaced with the 'backward' cultures and/or religion of the non-preferred citizen, the jurisprudences might be expected to manage and oversee the social order or social homogeneity rather than

social equality. Apparently, this ambiguity may serve purposes for maintaining power relations and purports a particular way for understanding the characteristics and social identities of Frenchness. Such characteristics and identities become conceived as investments, held in varying degrees of volume, and with outputs that are measurable. The role of social policy in a neoliberal State is that of economic growth, acting on the premise that even everyday unintelligible behaviour could be held accountable to economic analysis (Foucault, 2004). In considering the laws and jurisprudences as social policy, the concept of 'overseeing' then follows the neoliberal State's objective of continuous economic growth through governing social characteristics and identities, as Foucault (2004) points out:

> "There is the idea that the state possesses in itself and through its own dynamism a sort of power of expansion, an intrinsic tendency to expand, an endogenous imperialism constantly pushing it to spread its surface and increase in extent, depth, and subtlety to the point that it will come to take over entirely that which is at the same time its other, its outside, its target, and its object, namely: civil society" (p. 192).

It is understandable that the laws and jurisprudences conceptualize social and cultural benefits in terms of what is most beneficial for the State. If the neoliberal State is about continuous growth and expansion, then the laws and jurisprudences can be seen as a discursive mechanism for not only maintaining a French identity, but also as continuously pushing forward this identity. Thus it can be critiqued in this perspective as well, as it attempts to concretely establish social sameness instead of social equality.

Numerous material consequences can be connected with the laws and jurisprudences, including the large demonstration of security measures. They act as a discursive domain therefore discourse is relevant to consider here in order to justify its formation and maintenance, especially with regards to the laws and jurisprudences contribution to (in)direct segregation and discrimination through the language it employs. This culminates into a knowledge regime that concretizes the identities of these women as dangerous, oppressed and uncivilized.

On the other hand, in the perspective of the proponents of the hard line *laïcité*, it is by and large depicted as a monolithic principle that represents an immutable consensus value. Yet even though its principle is not monosemic, it has not enjoyed the status of an immutable consensus value. According to Olivier Roy (2005), there exist three substantial meanings of *laïcité*: political, legal, and philosophical. As a political concept, *laïcité* stands for the political conflict between the Republican State and the Catholic Church that constitutes the backdrop of the development of *laïcité* in France. Along the same lines, Bianco (2016) pointed out that *laïcité* was exploited politically and noted: "Aristide Briand, Ferdinand Buisson, Jean Jaures and Georges Clemenceau, those who believe that *laïcité* has already deviated from what is stated in the Constitution, had recalled that the law of separation of the churches and the State was first a 'law of freedom'. Some people want to question this basic principle because, for them, basically, what relates to Islam would be antirepublican by nature" (Bianco, 2016, p. 228).

In 2015, there was actually a significant, spontaneous popular movement: more than four million people gathered in a demonstration for tolerance and unity throughout France in order to voice their serious concern about fallacious *laïcité* (Harris-Interactive, 2015 as cited in Zwilling, 2017). Moreover, president Macron in one of his notes in December 2017 when receiving the representative of religious communities in the State palace, Elysée had warned regarding the radicalization of *laïcité* (Legrand, 2017). Proponents of the hard line *laïcité* (radicalization of *laïcité*) have the intention to completely erase all religious visibility in the public space, which is aggravated by a false concept of *laïcité* (Baubérot, 2014). CCIF (2018) pointed out that these proponents tend to have obsessive Islamophobia, they hide behind the invocation of the principle of *laïcité*, whereas *laïcité* itself guarantees precisely freedom of conscience, freedom and pluralism of worship. "They orchestrate political and media attacks, particularly violent on social networks, also target intellectuals, journalists or

associations (including the CCIF) for purposes of censorship, segregation, demonisation, while claiming themselves are practicing freedom of expression" (p. 17). One can observe this political meaning of *laïcité* in the headscarf and burkini debates that Islam as a religion and value system that had not gone through a process of secularization, as Catholicism had gone through during the 19th and early 20th century (Baroin, 2003a; 2003b). In the headscarf and burkini discussions, Islam and Muslim (women) have been replacing the Catholic Church as the main threat to the profane and terrestrial authority of the French State.

However, Roy (2005) emphasized what is more essential that the problem with the response to Islam and Muslim women lies in the lack of a vivid differentiation between *laïcité* as a legal principle, and *laïcité* as a philosophy. As a philosophy, *laïcité* implies a value system common to all citizens; a certain conception of the nation, republic, and citizen. This philosophical interpretation of *laïcité* is grounded on the ideas of the enlightenment, the idea of progress, and a certain ethical notion of rationalism. Thus, the notion of abstract autonomy that informs *laïcité* is part of a value system that defines a common life for citizens in the public sphere. Citizens are required to emancipate themselves from culture and religion and, thus, progress towards sharing a common life in the public sphere. In the aspect of abstract autonomy, *laïcité* is grounded on both the view that 'good' and 'correct' life is based on autonomy, and the belief that State must encourage the pursuit of abstract autonomy (Laborde, 2002). *Laïcité* was designed to replace a set of religious morality with secular values, and forge the identity of French citizens. These secular values are expected to be or must become a central role in establishing the social bond that would hold society together, and in teaching the secular values that would constitute this social bond. In this sense, the expectation is not merely defines legitimate political subjectivity, but also calls for a certain 'good' or 'proper' way of life.

To put it into the context of the study investigated, the French notion of abstract autonomy played a significant role in making the headscarf and burkini particularly regarded as heavy-handed and paternalistic. This is because both the headscarf and the burkini are perceived as symbols of non-autonomy, whether it be as an imposition on Muslim women or if it is an individual choice by them. Consequently, those analyses describe how laws and jurisprudences are part of the products of a hard line interpretation of *laïcité* that expects Muslim women to be abstractly autonomous and that defines a certain vision of the nation, citizen, and common life in the public sphere, to be shared by all citizens. As a result, when these women are able to achieve the so-called 'abstract autonomy', or in other words, release themselves form the frills of religion and/or culture, they will be treated as equal members of the French society. The predominant interpretation of *laïcité* positions the principle against the expressions of religious cultural group identity in the public sphere, and specifically against multicultural rights (Laborde, 2001). Therefore, representation of cultural or religious groups is considered antithetical to the structure of the public sphere. But representation of Muslim women as a structural group is the opposite. Thus, the idea of cultural group difference is rejected, religious symbols are considered a variant of cultural group difference, and from a social scientific perspective an issue like wearing the headscarf or burkini can be intricately related to social structural relations of race, gender, and class Y (Young, 1997).

Although claims for political and social inclusion are not entirely separate from claims for recognition of cultural difference, it is important to not assimilate issues of social justice to issues of cultural difference (Young, 2002; 1994). To this point, assimilating issues of social justice to those of cultural difference might dissocialize or depoliticize the claims for social inclusion as manifestations of cultural differences in France, where the predominant public and political discourses reject the idea of recognizing cultural group

differences as an appropriate means of regulating cultural diversity. In this kind of a social and political context, inclusion claims arising from structural inequalities might become depoliticized, and, therefore, also privatized, in so far as they are not differentiated from cultural differences that individuals are expected to leave aside or transcend in the public sphere.

On a relational account of autonomy, wearing the headscarf or the burkini can be an individual response to social structural inequalities. Thus, contrary to the arguments of the proponents of the headscarf ban, Muslim women can empower themselves by wearing a headscarf or a burkini (Mardiasih, 2019; Affiah, 2017; Choudhury, 2009; Saadallah; 2004; Badran, 2002; Yamani, 1996). However, the empowering function of the headscarf for the Muslim women ends up being paradoxical, because the expectation of abstract autonomy forces them to take on a symbolic role in which they are seen as representatives of Islam, whether they want to be or not. Furthermore, they cannot raise claims about the social structural inequalities that prevent them from fulfilling the expectation of abstract autonomy, because their cultural group belonging delegitimizes those claims. Claims made by cultural groups are considered antithetical to the structure of the public sphere in France. In this sense, both the headscarf or burkini worn by Muslim women constitute what Iris Young (2002; 1997; 1994) calls a structural group and, on the other hand, they belong to a cultural group that should not be represented in the French public sphere.

In this context, it can be criticized that the concept of abstracting oneself from her particular cultural and religious identities, confounds equality with sameness, and makes sameness a condition for equality (Scott, 2007). Therefore, philosophically, definition of *laïcité* led to the headscarf ban, whereas legally, its definition shows the opposite (Roy, 2005). In its philosophical interpretation, *laïcité* is based on a certain comprehensive value system that defines a vision of good life in the public sphere, to be shared by all citizens,

which has an ideological character, and is much broader than the legal interpretation. However, it also raises the question: What is the concrete concept of an abstract autonomy? How can we see Muslim women wearing religious symbols/attire as fully autonomous agents? Or, is an abstract autonomy a concrete concept for Muslim women? As have been explained in Chapter 2, this concept is an ideal, yet non-realistic and impractical, since abstract autonomy induces the State to ignore the social structural inequalities affecting the autonomy of Muslim women. Consequently, the State neglect to provide the external conditions that would enable Muslim women to achieve abstract autonomy. Roy (2005) concluded that the philosophical interpretation is a politically unproductive approach to *laïcité* because it is unable to constitute a ground for consensus in the society.

Based on this, one could imply that the use of discourse of some State elites or politicians persuade judge's decision or, vice versa, the use of discourse in judge's decision persuades the government/decision makers, its people and judicial systems, away from holding the jurisprudences accountable to the major themes of the State Constitution. Changing the discourse within the jurisprudences is possible and at the very least can provide groundwork for the subjects depicted within the jurisprudences to become affiliated with the subjects in the Constitution. It is important to note here that in any case people remain subjects under language and power. In similar fashion, the multitude of reasons for Muslim women with headscarf or burkini is reduced within the jurisprudences to strictly being provocative, proselytes, security threats or even for subverting the French government, *laïcité*, and liberal democracy. However, this can be replaced with a more open-minded discourse that contemplates the more likely reasons for them to simply wearing a headscarf or a burkini, such as comfort; art, ethics and aesthetics; health (protection from UV rays, etc.); feeling secure from the gazing of strangers; economic reasons (saving money from regular beauty hair care); and even wanting to look attractive in a practical way (being saved

from a bad hair day)—all of which construct a much more complex, innocent human being than the portrayed religious zealot or a dangerous radical.

Conclusion

The representation of Islam and Muslims in the West, especially Muslim women, has often been based on biased assumptions and negative stereotyping, instead of thorough results of research and empirical investigations. This such 'conflict' is old and intricate. Liberty, democracy, modernity, human rights, equality, and freedom of speech are differently perceived, interpreted and exploited across societies and cultures in both camps. Issues like gender, religion and politics are considered as controversial in the societies. Image of Muslim women is reinforced as inferior, obedient, dependent, exploited, passive and oppressed, and men are represented as authoritative, oppressive and incompatible with the values of modern, liberal societies. Women are thus portrayed as victims of male dominance and patriarchy. Moreover, it is claimed that Muslim women are obsessed with preserving their religion, customs and traditions, which is why actions undertaken by these groups are frequently justified by reference to religious values instead of to any other motivation. Whereas majority of Western women are less preoccupied with religious norms and usually describe themselves, as a result, as modern, liberal, secular, and civilised. In most cases, Muslim women subjugate individuality to the collective, and they favour a collective membership in which individual freedom is denied and where forms of critical thinking, freedom of choice, creativity or even beauty are subordinated notably to religious tenets (Choudhury, 2009). These kinds of assumptions highlight stark differences and underline the social and cultural boundaries between Muslim women minorities and the native population. Evidently, there is a strong sense of 'us' versus 'them' throughout social

political discourse, and the fact that this was a more political document (Nielsen, 2009) representing the tenseness in the headscarf and the burkini affairs.

Examples demonstrate that it is not Islam in itself that is condemned for the oppression shown by wearing the headscarf or burkini, but rather that it is a question of gender inequalities in Islam that is also greatly criticised. Therefore, it is essential to seek religious explanation, perspective of the phenomenon's gender, as well as from a sociological point of view. For this matter, others would argue that some of Muslim women are confounded between the Islamic principles and the culture and traditions that they grew up with. History has proven that Khadija, who lived a thousand years ago and was the wife of Prophet Muhammad, was an example of female empowerment who earned and managed her own successful business (Mardiasih, 2019; Affiah, 2017; Muhammad, 2006; Shihab, 2005). Nonetheless, the role of women in particular cultures appears to be limited to obeying and dependent on men and performing traditional chores, and some of their appearances are concealed behind *burqa* or *niqab*. Men are alleged for being authoritarian and oppressive towards women and opposed to modernity, freedom and liberalism. Specifically, most of communities of Muslim women immigrants in the West are recognized for their failure or refusal to accept integration into majoritarian society. Some of these beliefs and attitudes reflect reality while others encourage established stereotypes, feed more intolerance, and promote more discrimination and social inequality towards Muslim women. These ideologies are regularly generalised as a result of the West's collective understanding of Islam and Muslim women. Indeed, disagreement and prejudice are rife between Muslim women immigrants and the native populations of French societies, and between Muslim women immigrants and the government. The government as well as the majority society consider themselves invaded by Muslims and threatened by their traditions and culture, whilst Muslim women minorities regard themselves as discriminated against and threatened

by liberal secular French values. These principles are generally reproduced, redistributed and legitimised, not solely by the media, State and its apparatus, and politicians, but also law institutions through some laws and jurisprudences.

The jurisprudences reveal, either implicitly or explicitly, a probable connection between issues of religious symbols/attire and Islam, as a religion (though not always specified or named). Some examples, in particular, presume that the wearing of the headscarf as a form of coercion and is associated with Muslim conservatism, fundamentalism and is rife within Islamic extremism, that the concept of covering head and some other parts of the body is validated by religious values, justified, encouraged and even obliged by Islamic tenets. Thus, some aspects of the status of women in Islam are frequently assumed to be 'unjust', 'oppressive' and 'repressive' which is basically a question of men's superiority and authority over women. Moreover other passages reinforce the idea that such practices of Muslim women are unfamiliar to French people and alien to French society and culture, which raises the question of whether they resist the French secular liberal values and their degree of integration in French society.

Understanding the headscarf issue between French laws and *laïcité*, integration, and citizenship, the position of women within Islam and/or Muslim cultures, immigration and cultural differences, the crisis of identity, as well as the representation of Muslim women in French jurisprudence are intermingled issues which this thesis has attempted to tackle. The present study has sought to examine the representation of Muslim women in French jurisprudence through the most two polemic cases – since almost a decade – as they massively sparked public attention and debates, domestically and internationally. It is a qualitative analysis inspired by CDA. It has been achieved by examining the linguistic and discursive strategies used in the decisions of the two Supreme Courts over two cases of Muslim women who wore a headscarf and burkini swimsuits. The objective of the study has

been to explore the representation and interpretation of Muslim women in French jurisprudence, to examine if the legal text discourse associates such cases with Islam and Muslims, and to detect if such depictions contribute to the reinforcement or reproduction of (in)direct discrimination, prejudice and stereotyping against Muslim women in France. After contextualising such particular issues, a brief history of French Muslim women immigrants and their representation through two cases in two Supreme Courts has been presented. Additional essential background information to the research was provided to aid in the analysis of the conception of headscarf and burkini (and other religious attire) as social personal identity in the context of French laws and *laïcité*, (Muslim) feminism and legal discourse, and the position of women within Islam and Muslim cultures, including several gender bias in religious interpretation. The methodology of CDA has also been examined before introducing textual analysis of the collected data from the judgment of two Supreme Courts, with the aim of investigating positive self-representation and negative other-representation of the topic under study.

Many other research had demonstrated the association of prejudice and stereotyping against Muslim women are the prevailing attitude in the press, despite the fact that it is reproduced as well by some of the State's elites, authorities, demagogic politicians and other public figures. Albeit, the phenomenon of headscarf notably is not exclusively copyright of Islam and Muslim women, as a matter of fact it is also worn by other non-Muslim counterparts as explained in Chapter 2. However, through linguistic and discursive analysis, the courts' judgment have used or cited several terms which associated with ideological and security issues, such as a threat of psychological, social, economy, political and religious life.

The jurisprudence representation from the case of Baby-Loup raises the question of whether private sectors will broaden social gap because by taking refuge behind internal

regulations for the sake of neutrality or secular belief, it is legitimate enough to lay off its employees. Moreover, it is also important to note that this representation reaffirms the decision of the UN-OHCHR stated that religious and gender (in/direct) discrimination are adequately justified in the judgment of the Court of Cassation. Meanwhile, in the case of the burkini, albeit the court's ruling was in favour of Muslim women and lifting the burkini ban, however the term 'suspend' used by the State Council evokes another interrogatory of whether or when will the Court release the suspension of the decree in the future. Moreover, the judge's decision to refuse any payment to the plaintiffs also stirs other inquiries. Does the Mayor's decree on the burkini ban have any insignificant implications? Or is it classified as 'non-preponderance of the evidence'? Perhaps this is the underlying reason why the court considered it unnecessary to charge the municipality of Villeneuve-Loubet the sums requested (or any lesser amount) by the plaintiffs. The headscarf and the burkini are implicitly or explicitly associated with Muslim women immigrants, with Islamic values, and with 'backward' cultures. Islam is represented as a religion of restriction, repression, irrationality, intolerance, misogyny, and extremism. This view is grounded in the perceived hostility of Islam and its followers towards the host community, for they are seen as a 'threat' to the French culture. In a way, it is suggested that the minority group of Muslim women threatens modern, liberal, secular, and civilised French, on which it seeks to impose its medieval, primitive, and backward customs.

Through the research, it can also be revealed that there exists a reluctance of the State to provide the social conditions conducive to the achievement of autonomous agency, and this is a significant blind spot of the French model of citizenship. The two cases of the headscarf and the burkini demonstrated that the State demands individuals to be autonomous, which means to get rid of religious or cultural identities in the public sphere, and on the other hand, does not deliver to these individuals the conditions for the concrete realization of

abstract autonomy. The State insists that individuals should emancipate themselves from their particularistic differences and identities in order to become universal individuals. However, the State forgets to address the social inequality and discrimination that acts as an obstacle to the individual capacity to move beyond particularistic differences.

As shown in Chapter 2, becoming a good citizen as well as being integrated, both have become increasingly defined as an individual achievement of abstract autonomy. Thus, the more social inequality and discrimination marginalizes and disempowers Muslim women, the more the expectation of abstract autonomy marks them as subjects incapable of integration and of legitimate social political subjectivity. On one side, social inequality and discrimination affects the members of Muslim women communities, who are deemed to constitute a cultural group that should not be represented in the public sphere. On the other hand, these individuals cannot bring concerns about such social inequality and discrimination, because of their religious cultural group belonging. That is, the State expects Muslim women to unmark themselves, but asks this while remaining reluctant to actively recognize its responsibility to provide equal opportunity and social equality for these women. From this perspective, the French expectation of abstract autonomy in which the French model of citizenship is grounded, and the acceptable forms of representation in the public sphere, seems to displace the concerns about social and economic problems. Instead, the French model of citizenship results in excessive concerns about the individual capacity and ability of Muslim women minority individuals to achieve complete integration/abstract autonomy.

From the perspective of economic issues, very limited employment for Muslim women with headscarves in the labour market due to headscarf bans, both in the public sector and (most of) the private sector has left these women being unemployed, economically dependent and become the amenability of the government. However, on the other part, many

of them prefer not to give up their hopeless condition, as they started to establish internet-based enterprises or self-employed e-trading (Zerouala, 2014). Even though there is no specific statistic on the approximate percentage of these small-medium net businesses, yet it is obviously a massive and rapid breeding on social networks (Zerouala, 2014). This condition, nevertheless, supports to boost the economic value, which in turn re-contributes to society, as well as to the government through taxes.

Moreover, the jurisprudence neglects to represent conflicts, social inequalities and segregation between Muslim women minority and native French majority, between State authorities and Muslim women minority, between social classes, between liberal secular values and traditional cultural values. Majority of the people are likely to gain their impressions of Muslims (women) from the discourse about them in the media or from the rhetorical produced by State elites, politicians, public figures, etc. Yet, the ignorance about Islam on the part of French people, the lack of knowledge of legal instruments (judges, lawyers, prosecutor general) about immigrants' religion and culture, the effects of State's policies, and the negative generalisations that the authorities as well as the press make about Muslims are all responsible for the inaccurate image of Islam and Muslim women.

Especially when considering the press, the information transmitted about issues related to Islam and Muslim women to the general public arises from the choices made by the French media. In fact, the choices made by media organizations about the nature of news associated with Islam and Muslim women are demeaning to those communities since they frequently portray negative aspects that unfortunately occur in all societies – violence, religious radicalism, gender inequality, or examples of 'primitive' thinking and behaviour – of such ethnic groups and consequently demonise the entire faith. Such attitudes reinforce the construction of established stereotypes about Muslim women, and the reproduction of systems of inequalities and discrimination against Muslim women communities in France.

The descriptions – whether adopted consciously or unconsciously – which the media or State institutions convey about Muslim women are one of the causes for conflict and hostility between majority and minority groups within French society and, more generally, between Islam and the West. The greater the disagreements, the deeper the gap between 'us' versus 'them' and, as a result, an unwise government policy and sinister coverage from the media may generate other worse social problems, such as gender extremism, since extremism grows along with inequality (Yousafzai, 2014). Arguing in the same vein, Farah Pandith, in her book *How We Win*, – former diplomat, political appointee, and special representative to Muslim communities under Bush and Obama's administration – said that one of the determinant factors to turn someone into an extremist and a radical is when one feels that s/he is losing her/his identity. In social life, s/he is marginalized socially and politically. This emotion drives her/him to look for her/his lost identity in "another places". This adds to the irony that many of them, in most cases, are neglected, excluded, less embraced/accommodated, less understood, and their aspirations are often forgotten by the government as well as the society (Pandith, 2019).

The analysis of jurisprudences raise issues of social political nature about the power and the dominant ideology present within law institutions, and how it influences the representation of Muslim women in France. It enables unequal treatment of them as non-preferred citizens, a burden to the majoritarian secular society. This also evokes concerns about extremism, misogyny and disintegration. Cultural questions, therefore, such as identity and values are highlighted in order to condemn Muslim women unwillingness to integrate in French society, due to insisting for manifesting religious symbols. Some would argue that immigrants (including Muslim women) are generally 'welcome' when they identify themselves with the culture of the host society – which means to keep away from manifesting any types of religious affiliation, in this context, to utterly take the headscarf off

or replace the burkini with 'bikini' or other 'one piece' swimsuit might be more appreciated. Although the burkini ban was suspended since August 2016, it is still negatively viewed if Muslim women immigrants preserve their culture, customs, and religion. It is implicitly suggested that the immigrants' problems would have been avoided if they had complied with the norms of the host country and had adopted the so-called 'modern' and 'civilised' values.

Most immigrants (including Muslim women) generally leave their country of origin either because of conflict or war or Western invasion, or because they disagree with the system, or reject imposed social and cultural norms, or because they suffer from oppression, poverty, or insecurity. The questions that are mostly commonly raised – in the media and by ordinary people – reflect the sense that, if immigrants encounter in their new host societies what they lack in their own countries, what are the reasons that then make them assert their own identities so strongly or insistently affirming themselves through cultural or religious practice and belief, and rejecting or being apathetic with the modern liberal values of the Western country to which they have come? And why do they not just simply return to their own countries if they are unsatisfied with the life style, fashion, the customs and the norms adopted in liberal secular societies? Or the questions might be, for those who have immigrant backgrounds (second or third generations of people who were born and raised in France with French culture and values): What are the explanations that make them steadfast to keep and maintain their personal cultural or religious identities by still wearing the headscarf or the burkini, even though they grew up and raised within the liberal secular values? Accurate answers to these questions may not be so easy to formulate.

Some might suggest that we can analyse this hypothetically and treat the French State as the parents, and the female Muslim citizens who wear headscarves and burkinis as some of their children. Then how could the parents not appreciate that their children have certain choices about their outfit preferences or wanting to dress modestly? Do the parents not want

to know why some of their children feel excluded and unwelcome at home? It feels like the parents (or perhaps step parents) mistreat the children because they are different, and the children themselves cannot turn to anyone else, or cannot be the way the parents want them to be. While the children do not have a way to find their 'real' parents who are close to them and love them for who they are.

Others would argue that perhaps some of the State's apparatus, elites, policy makers, politicians, legal authorities, and public figures – who are continuously voicing anti-Muslim rhetoric, especially against Muslim women – refuse to (re)construct a purview of mutual respect and honour in a pluralistic French society. They might have forgotten that during colonization, the French enforced their ideas, values, and beliefs on people living in different countries and societies in an effort to dominate them. In those countries (which are predominantly Muslim) that were colonized, the French lived in their own ways, wore what they felt was comfortable and suitable, and applied their values, culture, and beliefs to everyday life. To name a few examples, France colonized Senegal for 283 years; Algeria for 130 years; Comoros for 109 years; Mali for 77 years and Tunisia for 75 years, and Morocco for 44 years (Clodfelter, 2017; Cardoni, 2004; Abun-Nasr, 1989; Wesley Johnson, 1985; Andrew & Kanya-Forstner, 1978).

In the past time, before the French revolution, the society experienced a deep traumatic history and the situation of bitterness from the extreme and excessive interference of the Catholic Church in every aspect of life (Ratzinger & Pera, 2007; Ratzinger, 2000). However, would it be possible that the past (physical and/or psychological) traumatic condition can actually be cured, remedied, or managed with other facts and realities? The question is, will we open ourselves to these other facts? It might be an alternative that help us to renovate our thoughts about those past traumatic situations. The fact today is that there are ample and robust laws and regulations that require zero presence of religious involvement

in State policies, as well as strict separation between the religion and the State, and between public and private spheres. Moreover, today's fact is that, as François Baroin said, Catholic Church is no longer a major threat to the profane and laïcité values. This position has been succesfully replaced by the headscarf and the burkini particularly, which are considered as a political sign of religious proselytism and a serious menace for the continuation of national secular ideas and values. Further query, rationally, could it be likely for a headscarf or a burkini, as other profane-secular stuff, constituting an act of proselytism? Wouldn't that be overly exagerrating, as a result of excessive worries? Another ineluctable fact is that a choice to wear a burkini or a headscarf is part of feminism itself that inevitably empowers women. The past life traumatic experiences is certainly worthy of appreciation, acknowledgement, and lessons-learning. Yet one could argue that, does this traumatic experience need to be eternally passed on to the present and future generations? Should the fears of the past be bequeathed to the hodiernal life? However, today's generations will have their own times as well as their own challenges, as each generation will write their respective histories.

In light of this understanding and in an effort to look for a better middle ground, we need to see from many different sides as it will provide a broader perspective. If we are in a total opposite, we surely could not find common ground. One should probably also consider that religion is part of these women's identity in the same way that agnosticism or atheism or secularism is part of the majority of citizens, and they cannot live without it. However, some of them could not (or would not) understand why those women cannot live without religion. Schieder's (2015) pointed out that secularism "will not seek to drive religions out of public life, but rather, hopes for their civic involvement". He thus added that the social, political, and civic involvement of religious communities is pivotal in the success of government to rule in a large and pluralistic society. Accordingly, religion, with all its complexities, to date, is still constantly and continuously a nodal idiosyncrasy of human life,

giving shape and purpose to our existence. Religion, in fact, has never been away. It has been intertwining with social and political issues and cannot be abandoned in any public life on pluralism or socio-cultural integration.

The decision to wear or not to wear headscarves or burkinis, as demonstrated in Chapter 2, is indeed part of one's actions or individual desires in determining the preference on what or how to dress. From a feminist perspective, one could argue that women have deep connection to what they wear, as it reflects their personal and emotional circumstances. This connection is rooted in being able to emphatically understand that it is about supporting and empowering among women themselves. Women perceive that empowerment is distinctly contagious, in a sense that when one favours other woman, she will favour others. Moreover, from a sociological perspective, it is also a part of social actions that can provide various meanings for themselves and their social environment. If it is related to cause or reason, the decision to wear the headscarf or burkini is a form of entity that is motivated by theological, psychological, health, fashion, socio-cultural, or economic reasons. This can also be considered as a rational social action as well as a social paradigm showing the existence of a self-expression and transformation of identity in real life in the society, not merely personal identity, social identity or cultural representation of each individual or community, but also has a meaning in conveying socio-cultural messages, as affirmation and formation of plural identity. More specifically, from Muslim women perspective, neither they see headscarves or burkinis as a burden nor a form of oppression nor a mark of separation nor a mark of exclusivity. They see it from a distinct perspective. It certainly is not a better or worse perspective, rather, merely another different perspective. For them it is a blessing. The issue that frequently arises is that some people often weigh something by employing ‘black and white’ approach, though in real life situations, there exist a substantial ‘gray area’. What is a burden on someone might be a blessing for others, and vice versa.

Some would argue that the decision to wear a headscarf is one form of feminism and a choice that empowers women, because the headscarf itself is a feminist tool for empowerment. Wearing headscarf is definitely a political as well as a social stance, as it is a form of rejection of women as objects and sexualization of their bodies.

Apart from that, the headscarf and the burkini also reflect the hybridization [32] process, which signifies the integration between sacred and profane including moral values, as well as the values of aesthetic or taste of fashion. In practice, although the use of headscarves is viewed as part of religious teachings that contain sacred truth and absolute values. Yet, as part of social phenomena, it is human creativity that can realize many art versions of headscarves and burkinis, so that its models are varied from one person to another or from one region or culture to another. However, it is not solely regarded as a reflection of creativity, art, or vision, but importantly is an extension of values that is much more meaningful. Based on the phenomenological perspective, the meaning of the headscarf or the burkini depicts unique characteristics of one's socio-religious identity. In this sense, even though wearing a headscarf/burkini itself is not necessarily a benchmark for one's level of piety, but at least it may also be a reflection of one's personality in realizing sacred and profane values in her life.

Furthermore, the existence of a headscarf-wearing community or individual decisions to wear the headscarf cannot be separated from the influence of globalization. This fact reveals that headscarf can also lead to the formation of glocalization in Muslim women's attire, which combines local and external cultures. Therefore, it is the case that the more migrant attitudes, histories, religion, culture and traditions are respected, the more open-minded they will eventually become towards the culture and values of those around them

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[32] Hybridization refers to a process of cohering or fusing between two or more different cultures to produce something new, without questionning time and space. But in this context, hybridization describes the integration of various aspects in constructing the meaning of the headscarf or the burkini. See the concept of cultural hybridization in Stockhammer (2012); Ghosh (2011); Wang & Yueh-yu Yeh (2005); Pieterse (2003).

and vice versa. If 'their' religion and culture is despised, crushed and depreciated in comparison to 'our' values, this creates more resistancy, frustration, distress, insecurity, and violence. To become modern without losing one's identity, and to integrate into another society without abandoning one's own culture, is a very complex process. There is no ready-made recipe or a proven path that can guarantee peaceful cohabitation or maintenance of cultural diversity, but all paths are worth to be explored to ensure a just and egalitarian society.

The main objective of this study was to raise awareness about the reciprocal influences between discourse and society, which normally are not a part of people's awareness. Another objective is to demystify the meanings and ideologies – conveyed through legal language use – that are unclear to recipients in law institutions and to people in general. The purpose is not to defend any faith or cultural practices but to support vulnerable groups that may suffer from social or religious-gender-based discrimination and segregation in majoritarian societies. The research carried out about the portrayal of Muslim women in the French jurisprudence – based on the CDA analysis of legal texts and the accompanying discussions in the media and public discourses – demonstrates that these groups have evidently been represented under scrutiny, posing ideological and security concerns as manifested and reproduced in the discourse of the jurisprudences.

This thesis does not offer a quantitative analysis of the overall reality about the representation of Muslim women in French jurisprudence, but rather presents a qualitative analysis of two case studies of Muslim women in the two Supreme Courts. The undertaken examination utilised local linguistic analysis to provide an ideological interpretation of the discourse used. The use of limited data requires reflection and excludes generalisations in commenting on the final results. Thus, the discussion of the findings of this study is applicable only to the selected texts that were actually analysed in this dissertation.

In hindsight, the study has some limitations. It could have been reinforced by assimilating the analysis of jurisprudence with an investigation of legal institutions as producers and audiences as receivers of court decisions, but the present study strictly focused on legal textual analysis. Parallel topics, such as the representations of such jurisprudence in the two Supreme Courts related to non-Muslim cases or representations of similar jurisprudence beyond the two Supreme Courts (such as lower courts) as a comparison would also be interesting areas for future investigation. Another potential research focus could bring the courts production, audience reception, and data analysis together to achieve a more systematic and complete view of ideology mechanisms in the discourse of the jurisprudence. While these topics are beyond the scope of this paper, they would provide a valuable framework for deeper understanding of the socio-legal issues facing Muslim women in France.

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Appendices

The appendices include the data (the main decision of the Court of Cassation and the State Council, including additional analysis of the judges) that were used for study analysis. The data, particularly the main decision of both Supreme Courts, using French language are presented followed by translation. Meanwhile, the additional analysis remains in French (not translated) acting as supporting data for the analysis.

Appendix A

1). The Decision of the State Council

LDH, Mrs. D, Mrs. C, CCIF vs. Mayor Villeneuve-Loubet

Conseil d'État

N° 402742
ECLI:FR:CEORD:2016:402742.20160826
Publié au recueil Lebon
Juge des référés, formation collégiale
M. Bernard Stirn, rapporteur
SCP SPINOSI, SUREAU ; SCP FABIANI, LUC-THALER, PINATEL, avocats

Lecture du vendredi 26 août 2016

REPUBLIQUE FRANCAISE

AU NOM DU PEUPLE FRANCAIS

Vu les procédures suivantes :

I - La Ligue des droits de l'homme, M. Hervé Lavisse et M. Henri Rossi, ont demandé au juge des référés du tribunal administratif de Nice, statuant sur le fondement de l'article L. 521-2 du code de justice administrative, d'ordonner la suspension de l'exécution des dispositions du 4.3 de l'article 4 de l'arrêté du 5 août 2016 du maire de la commune de Villeneuve-Loubet portant règlement de police, de sécurité et d'exploitation des plages concédées par l'Etat à la commune de Villeneuve-Loubet. Par une ordonnance n° 1603508 et 1603523 du 22 août 2016, le juge des référés du tribunal administratif de Nice a rejeté leurs demandes.

Par une requête et un mémoire en réplique enregistrés les 23 et 25 août 2016 au secrétariat du contentieux du Conseil d'Etat, la Ligue des droits de l'homme, M. Hervé Lavisse et M. Henri Rossi, demandent au juge des référés du Conseil d'Etat, statuant sur le fondement de l'article L. 521-2 du code de justice administrative :
1°) d'annuler cette ordonnance ;
2°) de faire droit à leur demande de première instance ;

3°) de mettre à la charge de l'Etat la somme de 5 000 euros au titre de l'article L. 761-1 du code de justice administrative.

Ils soutiennent que :
- ils sont recevables à solliciter la suspension de l'exécution de l'arrêté contesté ;
- la condition d'urgence est remplie dès lors que, d'une part, l'arrêté préjudicie de manière suffisamment grave et immédiate à un intérêt public, à la situation des requérants ainsi qu'aux intérêts qu'ils entendent défendre, d'autre part, l'appel a été formé dans les plus brefs délais et, enfin, l'arrêté contesté a vocation à produire ses effets jusqu'au 15 septembre 2016 ;
- l'arrêté contesté porte une atteinte grave et manifestement illégale à la liberté de manifester ses convictions religieuses, à la liberté de se vêtir dans l'espace public et à la liberté d'aller et de venir ;
- il ne repose sur aucun fondement juridique pertinent;
- la restriction apportée aux liberté n'est pas justifiée par des circonstances particulières locales.

Par deux mémoires en défense, enregistrés les 24 et 25 août 2016, le maire de la commune de Villeneuve-Loubet conclut au rejet de la requête. Il soutient que la condition d'urgence n'est pas remplie et que les moyens soulevés par les requérants ne sont pas fondés.

II - L'Association de défense des droits de l'homme Collectif contre l'islamophobie en France a demandé au juge des référés du tribunal administratif de Nice, statuant sur le fondement de l'article L. 521-2 du code de justice administrative, d'ordonner la suspension de l'exécution du 4.3 de l'article 4.3 du même arrêté du 5 août 2016 du maire de la commune de Villeneuve-Loubet. Par une ordonnance n° 1603508 et 1603523 du 22 août 2016, le juge des référés du tribunal administratif de Nice a rejeté sa demande.

Par une requête enregistrée le 24 août 2016 au secrétariat du contentieux du Conseil d'Etat, l'Association de défense des droits de l'homme Collectif contre l'islamophobie en France demande au juge des référés du Conseil d'Etat, statuant sur le fondement de l'article L. 521-2 du code de justice administrative :
1°) d'annuler cette ordonnance ;
2°) de faire droit à sa demande de première instance ;
3°) de mettre à la charge de l'Etat la somme de 5 000 euros au titre de l'article L. 761-1 du code de justice administrative.

Elle soutient que :
- elle est recevable à solliciter la suspension de l'exécution de l'arrêté contesté ;
- l'arrêté contesté méconnaît la loi du 9 décembre 1905 ;
- la condition d'urgence est remplie dès lors que, d'une part, l'arrêté contesté préjudicie de manière suffisamment grave et immédiate à un intérêt public, à la situation des requérants ainsi qu'aux intérêts qu'ils entendent défendre, d'autre part, l'appel a été formé dans les plus brefs délais et, enfin, l'arrêté contesté a vocation à produire ses effets jusqu'au 15 septembre 2016 ;
- l'arrêté contesté porte une atteinte grave et manifestement illégale au principe d'égalité des citoyens devant la loi, à la liberté d'expression, à la liberté de conscience et à la liberté d'aller et venir ;
- il ne repose sur aucun fondement juridique pertinent.

Par un mémoire en défense, enregistré 25 août 2016, le maire de la commune de Villeneuve-Loubet conclut au rejet de la requête. Il soutient que la condition d'urgence n'est pas remplie et que les moyens soulevés par l'association requérante ne sont pas fondés.

Des observations, enregistrées le 25 août 2016, ont été présentées par le ministre de l'intérieur.

Vu les autres pièces des dossiers ;

Vu :
- la Constitution, et notamment son Préambule et l'article 1er ;
- la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales ;
- le code général des collectivités territoriales ;
- la loi du 9 décembre 1905 concernant la séparation des Eglises et de l'Etat ;
- le code de justice administrative ;

Après avoir convoqué à une audience publique, d'une part, la Ligue des droits de l'homme et autres et l'Association de défense des droits de l'homme Collectif contre l'islamophobie en France et, d'autre part, la commune de Villeneuve-Loubet ainsi que le ministre de l'intérieur ;

Vu le procès-verbal de l'audience publique du 25 août 2016 à 15 heures au cours de laquelle ont été entendus :
- Me Spinosi, avocat au Conseil d'Etat et à la Cour de cassation, avocat de la Ligue des droits de l'homme et autres ;
- les représentants de l'Association de défense des droits de l'homme Collectif contre l'islamophobie en France ;
- Me Pinatel, avocat au Conseil d'Etat età la Cour de cassation, avocat de la commune de Villeneuve-Loubet ;
- le représentant de la commune de Villeneuve-Loubet ;
- la représentante du ministre de l'intérieur ;

et à l'issue de laquelle l'instruction a été close ;

Considérant ce qui suit :

1. En vertu de l'article L. 521-2 du code de justice administrative, lorsqu'est constituée une situation d'urgence particulière, justifiant qu'il se prononce dans de brefs délais, le juge des référés peut ordonner toute mesure nécessaire à la sauvegarde d'une liberté fondamentale à laquelle une autorité administrative aurait porté une atteinte grave et manifestement illégale.

2. Des arrêtés du maire de Villeneuve-Loubet (Alpes-Maritimes) du 20 juin 2014 puis du 18 juillet 2016 ont réglementé l'usage des plages concédées à la commune par l'Etat. Ces arrêtés ont été abrogés et remplacés par un nouvel arrêté du 5 août 2016 qui comporte un nouvel article 4.3 aux termes duquel : « *Sur l'ensemble des secteurs de plage de la commune, l'accès à la baignade est interdit, du 15 juin au 15 septembre inclus, à toute personne ne disposant pas d'une tenue correcte, respectueuse des bonnes mœurs et du principe de laïcité, et respectant les règles d'hygiène et de sécurité des baignades adaptées au domaine public maritime. Le port de vêtements, pendant la baignade, ayant une connotation contraire aux principes mentionnés ci-avant est strictement interdit sur les plages de la commune* ». Ainsi que l'ont confirmé les débats qui ont eu lieu au cours de l'audience publique, ces dispositions ont entendu interdire le port de tenues qui manifestent de manière ostensible une appartenance religieuse lors de la baignade et, en conséquence, sur les plages qui donnent accès à celle-ci.

3. Deux requêtes ont été présentées devant le juge des référés du tribunal administratif de Nice pour demander, sur le fondement de l'article L. 521-2 du code de justice administrative,

la suspension de l'exécution de ces dispositions de l'article 4.3 de l'arrêté du maire de Villeneuve-Loubet. La première de ces requêtes a été introduite par la Ligue des droits de l'homme, M. Hervé Lavisse et M. Henri Rossi, la seconde par l'Association de défense des droits de l'homme Collectif contre l'islamophobie en France. Par une ordonnance du 22 août 2016, le juge des référés du tribunal administratif de Nice, statuant en formation collégiale de trois juges des référés, a rejeté ces deux requêtes. La Ligue des droits de l'homme, M. Hervé Lavisse et M. Henri Rossi, d'une part, l'Association de défense des droits de l'homme Collectif contre l'islamophobie en France, d'autre part, font appel de cette ordonnance par deux requêtes qui présentent à juger les mêmes questions et qu'il y a lieu de joindre.

4. En vertu de l'article L. 2212-1 du code général des collectivités territoriales, le maire est chargé, sous le contrôle administratif du préfet, de la police municipale qui, selon l'article L. 2212-2 de ce code, *« a pour objet d'assurer le bon ordre, la sûreté, la sécurité et la salubrité publiques* ». L'article L. 2213-23 dispose en outre que : « *Le maire exerce la police des baignades et des activités nautiques pratiquées à partir du rivage avec des engins de plage et des engins non immatriculés…Le maire réglemente l'utilisation des aménagements réalisés pour la pratique de ces activités. Il pourvoit d'urgence à toutes les mesures d'assistance et de secours. Le maire délimite une ou plusieurs zones surveillées dans les parties du littoral présentant une garantie suffisante pour la sécurité des baignades et des activités mentionnées ci-dessus. Il détermine des périodes de surveillance…* ».

5. Si le maire est chargé par les dispositions citées au point 4 du maintien de l'ordre dans la commune, il doit concilier l'accomplissement de sa mission avec le respect des libertés garanties par les lois. Il en résulte que les mesures de police que le maire d'une commune du littoral édicte en vue de réglementer l'accès à la plage et la pratique de la baignade doivent être adaptées, nécessaires et proportionnées au regard des seules nécessités de l'ordre public, telles qu'elles découlent des circonstances de temps et de lieu, et compte tenu des exigences qu'impliquent le bon accès au rivage, la sécurité de la baignade ainsi que l'hygiène et la décence sur la plage. Il n'appartient pas au maire de se fonder sur d'autres considérations et les restrictions qu'il apporte aux libertés doivent être justifiées par des risques avérés d'atteinte à l'ordre public.

6. Il ne résulte pas de l'instruction que des risques de trouble à l'ordre public aient résulté, sur les plages de la commune de Villeneuve-Loubet, de la tenue adoptée en vue de la baignade par certaines personnes. S'il a été fait état au cours de l'audience publique du port sur les plages de la commune de tenues de la nature de celles que l'article 4.3 de l'arrêté litigieux entend prohiber, aucun élément produit devant le juge des référés ne permet de retenir que de tels risques en auraient résulté. En l'absence de tels risques, l'émotion et les inquiétudes résultant des attentats terroristes, et notamment de celui commis à Nice le 14 juillet dernier, ne sauraient suffire à justifier légalement la mesure d'interdiction contestée. Dans ces conditions, le maire ne pouvait, sans excéder ses pouvoirs de police, édicter des dispositions qui interdisent l'accès à la plage et la baignade alors qu'elles ne reposent ni sur des risques avérés de troubles à l'ordre public ni, par ailleurs, sur des motifs d'hygiène ou de décence. L'arrêté litigieux a ainsi porté une atteinte grave et manifestement illégale aux libertés fondamentales que sont la liberté d'aller et venir, la liberté de conscience et la liberté personnelle. Les conséquences de l'application de telles dispositions sont en l'espèce constitutives d'une situation d'urgence qui justifie que le juge des référés fasse usage des pouvoirs qu'il tient de l'article L. 521-2 du code de justice administrative. Il y a donc lieu d'annuler l'ordonnance du juge des référés du tribunal administratif de Nice du 22 août 2016 et d'ordonner la suspension de l'exécution de l'article 4.3 de l'arrêté du maire de Villeneuve-Loubet en date du 5 août 2016.

7. Les dispositions de l'article L. 761-1 du code de justice administrative font obstacle à ce qu'une somme soit mise à ce titre à la charge de la Ligue des droits de l'homme, de M. Lavisse, de M. Rossi et de l'Association de défense des droits de l'homme Collectif contre l'islamophobie en France. Il n'y pas lieu, dans les circonstances de l'espèce, de mettre à la charge de la commune de Villeneuve-Loubet, en application de ces dispositions, les sommes que demandent, d'une part, la Ligue des droits de l'homme, M. Lavisse et M. Rossi, d'autre part l'Association de défense des droits de l'homme Collectif contre l'islamophobie en France.

O R D O N N E :

Article 1er : L'ordonnance du juge des référés du tribunal administratif de Nice en date du 22 août 2016 est annulée.
Article 2ème : L'exécution de l'article 4.3 de l'arrêté du maire de Villeneuve-Loubet en date du 5 août 2016 est suspendue.
Article 3ème : Les conclusions de la commune de Villeneuve-Loubet etcelles de la Ligue des droits de l'homme, de M. Lavisse, de M. Rossi, et de l'Association de défense des droits de l'homme Collectif contre l'islamophobie en France tendant à l'application de l'article L. 761-1 du code de justice administrative sont rejetées.
Article 4ème : La présent ordonnance sera notifiée à la Ligue des droits de l'homme, à M. Lavisse, à M. Rossi, à l'Association de défense des droits de l'homme Collectif contre l'islamophobie en France, à la commune de Villeneuve-Loubet et au ministre de l'intérieur.

2). Translation

State Council

No. 402742
ECLI: FR: CEORD: 2016: 402742.20160826
Published in the Lebon Report
Judge, Court Panels
Mr. Bernard Stirn, Rapporteur
SCP SPINOSI, SUREAU; SCP FABIANI, LUC-THALER, PINATEL, lawyers

Reading on Friday, August 26th of 2016

REPUBLIC OF FRANCE

IN THE NAME OF THE FRENCH PEOPLE

Considering the following procedures:

I - The League of Human Rights, Mr. Hervé Lavisse and Mr. Henri Rossi, asked the judge of the Court Administrative of Nice, ruling on the basis of Article L. 521-2 of the Code of Justice Administrative, to order the suspension of the execution of the provisions 4.3 of article 4 of the order of August 5th of 2016 of the Mayor Villeneuve-Loubet concerning

police regulations, security and exploitation of beaches granted by the State to the municipality of Villeneuve-Loubet. By an order No. 1603508 and 1603523 on August 22nd of 2016, the judge of the Court Administrative of Nice dismissed their claims.

By an application and a reply filed on August 23rd and 25th of 2016 at the litigation secretariat of the State Council, the League of Human Rights, Mr. Hervé Lavisse and Mr. Henri Rossi, asked the judge of the State Council, ruling on the basis of Article L. 521-2 Code Administrative Justice:
1°) to annul this order;
2°) to grant their request of first instance;
3°) to charge the State the sum of 5,000 euros under Article L. 761-1 Code Administrative Justice.

They argue that:
- They are entitled to request the suspension of the execution of the disputed order;
- The condition of urgency is fulfilled from the moment of, on the one hand, the prejudicial order in a sufficiently serious and immediate manner of public interest, the situation of the applicants as well as the interests which they intend to defend, on the other hand, the appeal was filed as soon as possible and, finally, the disputed order is effective until September 15th of 2016;
- The disputed order is a serious and obviously unlawful violation to the freedom to manifest one's religious convictions, the freedom to dress in the public space and the freedom to come and go;
- It is not based on any relevant legal basis;
- The restriction on freedom is not justified by local circumstances.

By two defences, recorded on August 24th and 25th of 2016, the Mayor Villeneuve-Loubet concluded the rejection of the request. He argues that the condition of urgency is not fulfilled and that the pleas raised by the applicants are unfounded.

II - The Association for the Defence of Human Rights Collective against Islamophobia in France has asked the judge of the Court of Administrative Court of Nice, ruling on the basis of Article L. 521-2 Code of Administrative Justice, to order the suspension of the execution of 4.3 of the article 4.3 of the same decree of August 5th of 2016 of the Mayor Villeneuve-Loubet. By an order No. 1603508 and 1603523 of August 22nd of 2016, the judge of the Court Administrative of Nice dismissed his application.
By an application registered on August 24th of 2016 to the litigation secretariat of the State Council, the Association for the Defence of Human Rights Collective against Islamophobia in France ask the judge of the State Council for interim measures, ruling on the basis of Article L. 521-2 Code Administrative Justice:
1 °) to annul this order;
2 °) to grant their request of first instance;
3 °) to charge the State the sum of 5,000 euros under Article L. 761-1 Code Administrative Justice.

It argues that:
- It is admissible to request the suspension of the execution of the contested decree;
- The contested decree disregards the Act December 9th of 1905;
- The condition of urgency is fulfilled where, on one side, the contested decree is prejudice in a sufficiently serious and immediate manner to a public interest, the situation of the

applicants/plaintiffs and the interests they intend to defend, on the other side, the appeal was filed as soon as possible and, finally, the contested decree is effective until September 15th of 2016;
- The contested decree is a serious and obviously unlawful violation of the principle of equality for citizens before the law, freedom of expression, freedom of conscience and the freedom to come and go;
- It is not based on any relevant legal basis.

By a defence, recorded on August 25th of 2016, the Mayor of Villeneuve-Loubet concluded the rejection of the request. He argues that the condition of urgency is not fulfilled and that the pleas raised by the applicant association are unfounded.

Remarks, registered on August 25th of 2016, were presented by the Minister of Interior.

Considering the other parts of the files;

Seen:
- The Constitution, and in particular its Preamble and Article 1;
- The European Convention for the Protection of Human Rights and Fundamental Freedoms;
- The general code of local authorities;
- The Act December 9th of 1905 concerning the separation of churches and the State;
- The code administrative justice;

After convening a public hearing, on one side, the League of Human Rights and others and the Association for the Defence of Human Rights Collective against Islamophobia in France and, on the other side, the municipality of Villeneuve-Loubet as well as the Minister of Interior;

Having regard to the minutes of the public hearing held on August 25th of 2016 at 3 pm at which the following were heard:
- Mr. Spinosi, lawyer at the State Council and the Court of Cassation, lawyer of the League of Human Rights and others;
- The representatives of the Association for the Defence of Human Rights Collective against Islamophobia in France;
- Mr. Pinatel, lawyer at the State Council and the Court of Cassation, lawyer of the municipality of Villeneuve-Loubet;
- The representative of the municipality of Villeneuve-Loubet;
- The representative of the Minister of Interior;

and at the end of which the investigation was closed;

Considering the following:

1. Under Article L. 521-2 of the Code Administrative Justice, where a particular emergency arises, justifying its decision within a short period of time, the judge may order any necessary measure to safeguard the fundamental freedom to which an administrative authority would have committed a serious and manifestly unlawful infringement.

2. Orders of the Mayor of Villeneuve-Loubet (Alpes-Maritimes) of June 20th of 2014 and July 18th of 2016 have regulated the use of the beaches granted to the municipality by the

State. These decrees have been annulled and replaced by a new decree of August 5th of 2016 which includes a new article 4.3 under which: "On all the beach areas of the municipality, access to bathing is prohibited, from June 15th to September 15th inclusive, to any person who does not have a correct outfit, respectful of good morality and the principle of *laïcité*, and respecting the rules of hygiene and swimming/bathing safety adapted to the public maritime domain. The wearing of clothes, while bathing/swimming, having a connotation contrary to the principles mentioned earlier is strictly forbidden on the beaches of the municipality". As confirmed by the debates that took place during the public hearing, these provisions were intended to prohibit the wearing of outfits that ostensibly manifest religious affiliation during bathing/swimming and, consequently, on beaches that give access to it.

3. Two applications were presented before the judge of the Court Administrative of Nice to request, on the basis of Article L. 521-2 Code of Administrative Justice, the suspension of the execution of these provisions of the article 4.3 of the decree of the Mayor Villeneuve-Loubet. The first of these requests was introduced by the League of Human Rights, Mr. Hervé Lavisse and Mr. Henri Rossi, the second by the Association for the Defence of Human Rights Collective against Islamophobia in France. By an order of August 22nd of 2016, the judge of the Court of Administrative of Nice, ruling in collegiate formation of three judges of summary, rejected these two requests. The League of Human Rights, Mr. Hervé Lavisse and Mr. Henri Rossi, on the one side, the Association for the Defence of Human Rights Collective against Islamophobia in France, on the other side, appeal of this order by two motions presenting to the judge the same questions and which it is necessary to join.

4. Under the Article L. 2212-1 General Code of Territorial Collectivities, the Mayor is in charge, under the administrative control of the *préfet*, of the municipal police which, according to Article L. 2212-2 of this code, "is intended to ensure public order, safety, security and sanitation". Article L. 2213-23 further provides that: "The Mayor exercises police swimming/bathing and water activities practiced from the shore with beach gear and unregistered gear ... The Mayor regulates the use of the arrangements made for the practice of these activities. It provides emergency assistance and relief measures. The Mayor delimits one or more supervised zones in the coastal areas with sufficient guarantee for bathing/swimming safety and the activities mentioned above. It determines the periods of supervision ...."

5. If the Mayor is responsible for the provisions cited in point 4 of the law and order in the municipality, he must reconcile the accomplishment of his mission with the respect of the freedoms guaranteed by the laws. It follows that the police measures that the Mayor of a coastal municipality enacts in order to regulate access to the beach and the practice of swimming should be adapted, necessary and proportionate in light of the needs of the public order only, as they arise from the circumstances of time and place, and taking into account the requirements of good access to the shoreline, the safety of swimming and the hygiene and decency on the beach. It is not up to the Mayor to rely on other considerations and the restrictions he brings to freedoms must be justified by proven risks of breach of public order.

6. It does not follow from the instruction that the risk of disturbing public order have resulted, on the beaches of the municipality of Villeneuve-Loubet, from the dress adopted for swimming/bathing by certain persons. If it was mentioned during the public hearing of the wearing on the beaches of the municipality of the common outfits of nature of the Article 4.3 of the contested decree intends to prohibit, no evidence produced before the judge hearing the application for interim measures allows to retain such risks would have resulted.

In the absence of such risks, the emotions and concerns resulting from the terrorist attacks, and in particular that committed in Nice on July 14th, cannot be sufficient to legally justify the contested measure. In these conditions, the Mayor could not, without exceeding his powers of police, enact provisions which forbid access to the beach and swimming when they are not based on proven risks of disturbance of public order nor, moreover, on grounds of hygiene or decency. The contested decree thus brought a serious and obviously unlawful infringement to the fundamental freedoms which are freedom to come and go, freedom of conscience and freedom of personal. The consequences of the application of such provisions in the present case constitute a situation of urgency which justifies the use of the powers of the judge hearing the application for interim relief under Article L. 521-2 Code of Justice Administrative. It is therefore appropriate to annul the order of the judge of the Court Administrative of Nice of August 22nd of 2016 and to order the suspension of the execution of the article 4.3 of the decree of the Mayor of Villeneuve-Loubet dated of August 5th of 2016.

7. The provisions of the Article L. 761-1 Code of Administrative Justice preclude the payment of a sum to the League of Human Rights, Mr. Lavisse, Mr. Rossi and the Association for the Defence of Human Rights Collective against Islamophobia in France. It is not necessary, in the circumstances of this case, to charge the municipality of Villeneuve-Loubet, pursuant to these provisions, the sums requested, on the one side, by the League of Human Rights. Mr. Lavisse and Mr. Rossi, and on the other side, the Association for the Defence of Human Rights Collective against Islamophobia in France.

O R D E R R E D:

Article 1: The order of the judge of the Administrative Court of Nice dated August 22nd of 2016 is annulled.

Article 2: The execution of article 4.3 of the decree of the Mayor Villeneuve-Loubet dated August 5th of 2016 is suspended.

Article 3: The conclusions of the municipality of Villeneuve-Loubet and those of the League of Human Rights, Mr. Lavisse, Mr. Rossi, and the Association for the Defence of Human Rights Collective against Islamophobia in France tending to the application of Article L. 761-1 of the Code of Administrative Justice are rejected.

Article 4. The present order shall be notified to the League of Human Rights, Mr. Lavisse, Mr. Rossi, the Association for the Defence of Human Rights Collective against Islamophobia in France, the municipality of Villeneuve-Loubet and the Minister of Interior.

3). Analysis of the State Council (Analyses du Conseil d'État)

N° 402742 402777
Publié au recueil Lebon

Lecture du vendredi 26 août 2016

135-02-03-02 : Collectivités territoriales – Commune - Attributions - Police –

1) Conditions de légalité de mesures réglementant l'accès à la plage et la baignade - 2) Interdiction de l'accès aux plages et de la baignade aux personnes portant une tenue manifestant de manière ostensible une appartenance religieuse - Illégalité.

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1) Les mesures de police que le maire d'une commune du littoral édicte en vue de réglementer l'accès à la plage et la pratique de la baignade doivent être adaptées, nécessaires et proportionnées au regard des seules nécessités de l'ordre public, telles qu'elles découlent des circonstances de temps et de lieu, et compte tenu des exigences qu'impliquent le bon accès au rivage, la sécurité de la baignade ainsi que l'hygiène et la décence sur la plage. Il n'appartient pas au maire de se fonder sur d'autres considérations et les restrictions qu'il apporte aux libertés doivent être justifiées par des risques avérés d'atteinte à l'ordre public. 2) Le maire ne peut, sans excéder ses pouvoirs de police, édicter des dispositions qui interdisent l'accès à la plage et la baignade aux personnes qui portent une tenue manifestant de manière ostensible une appartenance religieuse alors qu'elles ne reposent ni sur des risques avérés de troubles à l'ordre public ni sur des motifs d'hygiène ou de décence.

26-03-05 : Droits civils et individuels - Libertés publiques et libertés de la personne - Liberté d'aller et venir -

Méconnaissance - Existence - Interdiction de l'accès aux plages et de la baignade aux personnes portant une tenue manifestant de manière ostensible une appartenance religieuse.

Le maire ne peut, sans excéder ses pouvoirs de police, édicter des dispositions qui interdisent l'accès à la plage et la baignade aux personnes qui portent une tenue manifestant de manière ostensible une appartenance religieuse alors qu'elles ne reposent ni sur des risques avérés de troubles à l'ordre public ni sur des motifs d'hygiène ou de décence. De telles dispositions portent une atteinte grave et manifestement illégale aux libertés fondamentales que sont la liberté d'aller et venir, la liberté de conscience et la liberté personnelle.

26-03-07 : Droits civils et individuels- Libertés publiques et libertés de la personne- Liberté des cultes -
Méconnaissance - Existence - Interdiction de l'accès aux plages et de la baignade aux personnes portant une tenue manifestant de manière ostensible une appartenance religieuse.

Le maire ne peut, sans excéder ses pouvoirs de police, édicter des dispositions qui interdisent l'accès à la plage et la baignade aux personnes qui portent une tenue manifestant de manière ostensible une appartenance religieuse alors qu'elles ne reposent ni sur des risques avérés de

troubles à l'ordre public ni sur des motifs d'hygiène ou de décence. De telles dispositions portent une atteinte grave et manifestement illégale aux libertés fondamentales que sont la liberté d'aller et venir, la liberté de conscience et la liberté personnelle.

49-04 : Police - Police générale -

Police municipale - 1) Conditions de légalité des mesures réglementant l'accès à la plage et la baignade - 2) Interdiction de l'accès aux plages et de la baignade aux personnes portant une tenue manifestant de manière ostensible une appartenance religieuse - Illégalité.

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1) Les mesures de police que le maire d'une commune du littoral édicte en vue de réglementer l'accès à la plage et la pratique de la baignade doivent être adaptées, nécessaires et proportionnées au regard des seules nécessités de l'ordre public, telles qu'elles découlent des circonstances de temps et de lieu, et compte tenu des exigences qu'impliquent le bon accès au rivage, la sécurité de la baignade ainsi que l'hygiène et la décence sur la plage. Il n'appartient pas au maire de se fonder sur d'autres considérations et les restrictions qu'il apporte aux libertés doivent être justifiées par des risques avérés d'atteinte à l'ordre public. 2) Le maire ne peut, sans excéder ses pouvoirs de police, édicter des dispositions qui interdisent l'accès à la plage et la baignade aux personnes qui portent une tenue manifestant de manière ostensible une appartenance religieuse alors qu'elles ne reposent ni sur des risques avérés de troubles à l'ordre public ni sur des motifs d'hygiène ou de décence.

54-035-03-03-01-02 : Procédure- Procédures instituées par la loi du juin - Référé tendant au prononcé de mesures nécessaires à la sauvegarde d'une liberté fondamentale (art- L- du code de justice administrative)- Conditions d'octroi de la mesure demandée- Atteinte grave et manifestement illégale à une liberté fondamentale- Atteinte grave et manifestement illégale-

Existence - Interdiction de l'accès aux plages et de la baignade aux personnes portant une tenue manifestant de manière ostensible une appartenance religieuse.

Le maire ne peut, sans excéder ses pouvoirs de police, édicter des dispositions qui interdisent l'accès à la plage et la baignade aux personnes qui portent une tenue manifestant de manière ostensible une appartenance religieuse alors qu'elles ne reposent ni sur des risques avérés de troubles à l'ordre public ni sur des motifs d'hygiène ou de décence. De telles dispositions portent une atteinte grave et manifestement illégale aux libertés fondamentales que sont la liberté d'aller et venir, la liberté de conscience et la liberté personnelle.

Appendix B

4). The Decision of the Court of Cassation

Mrs. F vs. Baby-Loup

Arrêt n° 612 du 25 juin 2014 (13-28.369) - Cour de Cassation - Assemblée Plénière - ECLI:FR:CCASS:2014:AP00612

CONTRAT DE TRAVAIL, RUPTURE ; CONTRAT DE TRAVAIL, EXÉCUTION ; ASSOCIATION

Rejet

- Communiqué relatif à l'arrêt n° 612 du 25 juin 2014 de l'Assemblée Plénière
- Rapport de M. Truchot, conseiller
- Avis de M. Marin, procureur général

Demandeur(s) : Mme X..., épouse Y...

Défendeur(s) : Association Baby-Loup

Sur les cinq moyens réunis, pris en leurs diverses branches :

Attendu, selon l'arrêt attaqué (Paris, 27 novembre 2013), rendu sur renvoi après cassation (Soc., 19 mars 2013, n° 11 28.645, Bull. 2013, V, n° 75) que, suivant contrat à durée indéterminée du 1er janvier 1997, lequel faisait suite à un emploi solidarité du 6 décembre 1991 au 6 juin 1992 et à un contrat de qualification du 1er décembre 1993 au 30 novembre 1995, Mme X..., épouse Y... a été engagée en qualité d'éducatrice de jeunes enfants exerçant les fonctions de directrice adjointe de la crèche et halte-garderie gérée par l'association Baby Loup ; qu'en mai 2003, elle a bénéficié d'un congé de maternité suivi d'un congé parental jusqu'au 8 décembre 2008 ; qu'elle a été convoquée par lettre du 9 décembre 2008 à un entretien préalable en vue de son éventuel licenciement, avec mise à pied à titre conservatoire, et licenciée le 19 décembre 2008 pour faute grave, pour avoir contrevenu aux dispositions du règlement intérieur de l'association en portant un voile islamique et en raison de son comportement après cette mise à pied ; que, s'estimant victime d'une discrimination au regard de ses convictions religieuses, Mme X..., épouse Y... a saisi la juridiction prud'homale le 9 février 2009 en nullité de son licenciement et en paiement de diverses sommes ;

Attendu que Mme X..., épouse Y... fait grief à l'arrêt de rejeter ses demandes, alors, selon le moyen :

1°/ que l'entreprise de tendance ou de conviction suppose une adhésion militante à une éthique philosophique ou religieuse et a pour objet de défendre ou de promouvoir cette éthique ; que ne constitue pas une entreprise de tendance ou de conviction une association qui, assurant une mission d'intérêt général, se fixe pour objectifs dans ses statuts « de développer une action orientée vers la petite enfance en milieu défavorisé et d'œuvrer pour l'insertion sociale et professionnelle des femmes (…) sans distinction d'opinion politique et

confessionnelle » ; qu'en se fondant sur les missions statutairement définies pour qualifier l'association Baby-Loup d'entreprise de conviction cependant que son objet statutaire n'exprime aucune adhésion à une doctrine philosophique ou religieuse, la cour d'appel a violé les articles L. 1121 1, L. 1132 1, L. 1133 1 et L. 1321 3 du code du travail, ensemble l'article 9 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales et l'article 4 & 2 de la directive 78 /2000/CE du 27 novembre 2000 ;

2°/ que les convictions ou tendances d'une entreprise procèdent d'un choix philosophique, idéologique ou religieux et non de la nécessité de respecter des normes juridiques ou des contraintes attachées à la nature des activités de l'entreprise ; que la nécessité prétendue de protéger la liberté de conscience, de pensée et de religion de l'enfant déduite de la Convention de New York ou celle de respecter la pluralité des options religieuses des femmes au profit desquelles est mise en œuvre une insertion sociale et professionnelle dans un environnement multiconfessionnel ne sont pas constitutivement liées à une entreprise de conviction ; qu'en se fondant sur cette « nécessité » pour qualifier l'association Baby Loup d'entreprise de conviction en mesure d'exiger la neutralité de ses employés, la cour d'appel a violé les articles L. 1121 1, L. 1132 1, L. 1133 1 et L. 1321 3 du code du travail, ensemble l'article 9 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, et l'article 4 & 2 précité de la directive 78 /2000/CE du 27 novembre 2000 ;

3°/ que l'article 14 de la Convention relative aux droits de l'enfant –qui n'est pas au demeurant d'application directe– n'emporte aucune obligation qu'une entreprise recevant de petits enfants ou dédiée à la petite enfance soit obligée d'imposer à son personnel une obligation de neutralité ou de laïcité ; que la cour d'appel a violé ledit texte par fausse application, outre les textes précités ;

4°/ qu'en tant que mode d'organisation de l'entreprise destiné à « transcender le multiculturalisme » des personnes à qui elle s'adresse, la neutralité n'exprime et n'impose aux salariés l'adhésion à aucun choix politique, philosophique ou idéologique seul apte à emporter la qualification d'entreprise de tendance ou de conviction ; que la cour d'appel a violé les articles L. 1121 1, L. 1132 1, L. 1133 1 et L. 1321 3 du code du travail, ensemble l'article 9 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, et l'article 4 & 2 de la directive 78/2000/CE du 27 novembre 2000 ;

5°/ que la laïcité, principe constitutionnel d'organisation de l'Etat, fondateur de la République, qui, à ce titre, s'impose dans la sphère sociale ne saurait fonder une éthique philosophique dont une entreprise pourrait se prévaloir pour imposer à son personnel, de façon générale et absolue, un principe de neutralité et une interdiction de porter tout signe ostentatoire de religion ; que la cour d'appel a violé les articles L. 1121 1, L. 1132 1, L. 1133 1 et L. 1321 3 du code du travail, ensemble les articles 9 et 14 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales et l'article 1er de la Constitution ;

6°/ qu'une entreprise ne peut s'ériger en « entreprise de conviction » pour appliquer des principes de neutralité –ou de laïcité– qui ne sont applicables qu'à l'Etat ; que ni le principe de laïcité instauré par l'article 1er de la Constitution, ni le principe de neutralité consacré par

le Conseil constitutionnel au nombre des principes fondamentaux du service public, ne sont applicables aux salariés des employeurs de droit privé qui ne gèrent pas un service public ; qu'ils ne peuvent dès lors être invoqués pour les priver de la protection que leur assurent les dispositions du code du travail ; qu'il résulte des articles L. 1121 1, L. 1132 1, L. 1133 1 et L. 1321 3 du code du travail que les restrictions à la liberté religieuse doivent être justifiées par la nature de la tâche à accomplir, répondre à une exigence professionnelle essentielle et déterminante et proportionnées au but recherché ; qu'en retenant que l'association Baby Loup pouvait imposer une obligation de neutralité à son personnel dans l'exercice de ses tâches, emportant notamment interdiction de porter tout signe ostentatoire de religion aux motifs de la nécessité de protéger la liberté de pensée, de conscience et de religion à construire pour chaque enfant ainsi que la pluralité des options religieuses des femmes au profit desquelles est mise en œuvre une insertion sociale et professionnelle aux métiers de la petite enfance, et que l'entreprise assure une mission d'intérêt général subventionnée par des fonds publics, la cour d'appel a violé les articles L. 1121 1, L. 1132 1, L. 1133 1 et L. 1321 3 du code du travail, ensemble l'article 10 de la Déclaration des droits de l'homme et du citoyen de 1789, l'article 9 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, l'article 10 de la Charte des droits fondamentaux de l'Union européenne et les articles 1 à 4 de la directive 78/2000/CE du 27 novembre 2000 ;

7°/ que des restrictions à la liberté de manifester sa religion ou ses convictions ne peuvent être créées que par la loi nationale au sens de la jurisprudence de la Cour européenne des droits de l'homme ; que cette loi nationale doit-elle même, au sens de cette jurisprudence respecter l'ordre interne de création des normes ; qu'il en résulte que la création d'un type d'entreprise de conviction fondée sur le seul principe de neutralité ne peut résulter que de la loi au sens organique du terme ; que la cour d'appel a violé les articles 34 de la Constitution, 10 de la Déclaration des droits de l'homme et du citoyen de 1789, 9 & 2 de la Convention des droits de l'homme et des libertés fondamentales, 4 et 14 de la Convention relative aux droits de l'enfant du 20 novembre 1989, L. 1121 1, L. 1132 1, L. 1133 1 et L. 1321 3 du code du travail, 1 à 4 de la directive 78/2000/CE du 27 novembre 2000, 10 de la Charte des droits fondamentaux de l'Union européenne, et a excédé ses pouvoirs ;

8°/ qu'une mesure ou une différence de traitement fondée notamment sur les convictions religieuses peut ne pas être discriminatoire si elle répond à une exigence professionnelle essentielle et déterminante et pour autant que l'objectif soit légitime et l'exigence proportionnée ; qu'en énonçant que les restrictions prévues au règlement intérieur « répondent aussi dans le cas particulier à l'exigence professionnelle essentielle et déterminante de respecter et protéger la conscience en éveil des enfants », la cour d'appel, qui a confondu exigence professionnelle essentielle et déterminante, et objectif légitime, a privé sa décision de base légale au regard des articles L. 1133 1 et L. 1132 1 du code du travail, 1 à 4 de la directive 78/2000/CE du 27 novembre 2000, 10 de la Charte des droits fondamentaux de l'Union européenne ;

9°/ que l'arrêt attaqué, qui n'a pas constaté ni caractérisé, au vu des éléments particuliers et concrets de l'espèce (tâches dévolues à Mme Y... personnellement dans son emploi, âge des

enfants, absence de comportement ostentatoire ou prosélyte de Mme Y...) l'incompatibilité du port de son voile islamique avec l'engagement et l'emploi de Mme Y..., a privé sa décision de toute base légale au regard des articles L 1121 1, L. 1132 1, L. 1133 1 et L. 1321 3 du code du travail, ensemble les articles 9 et 14 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, 1 à 4 de la directive 78/2000/CE du 27 novembre 2000, 10 de la Charte des droits fondamentaux de l'Union européenne ;

10°/ qu'à supposer que l'employeur eût été en l'espèce une entreprise de conviction au sens de la jurisprudence de la Cour européenne des droits de l'homme et définie par la directive communautaire 78/2000/CE du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail, en l'absence de dispositions particulières en droit interne, de telles entreprises sont soumises, comme tout employeur de droit privé, aux dispositions des articles L. 1121 1, L. 1132 1 et L. 1321 3 du code du travail dont il résulte que les restrictions aux libertés fondamentales des salariés, dont la liberté religieuse, doivent être justifiées par la nature de la tâche à accomplir, répondre à une exigence professionnelle essentielle et déterminante et proportionnées au but recherché ; qu'en retenant qu'une personne morale de droit privé, constituant une entreprise de conviction au sens de la jurisprudence de la Cour européenne des droits de l'homme, peut se doter d'un règlement intérieur prévoyant une obligation générale de neutralité du personnel dans l'exercice de ses tâches emportant notamment interdiction de tout signe ostentatoire de religion, la cour d'appel a violé les articles L. 1121 1, L. 1132 1, L. 1133 1 et L. 1321 3 du code du travail, ensemble l'article 4 & 2 de la directive communautaire 78/2000/CE du 27 novembre 2000, 9 et 14 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, 10 de la Charte des droits fondamentaux de l'Union européenne ;

11°/ que la qualification d'entreprise de conviction –ou de tendance– si elle autorise exceptionnellement le licenciement d'un salarié à raison d'une conviction ou de la manifestation d'une conviction contraire ou devenue contraire à celle de son employeur, c'est à dire pour un motif a priori discriminatoire ou interdit, n'autorise pas que le comportement ainsi allégué comme motif de rupture puisse être imputé à faute au salarié ; qu'en validant un licenciement prononcé pour faute grave, la cour d'appel a violé les textes précités outre les articles L. 1234 1, L. 1234 5 et L. 1234 9 du code du travail ;

12°/ que l'inscription éventuelle, dans le règlement intérieur d'une entreprise de tendance ou de conviction, de la nécessité pour les salariés de s'y conformer, ne peut avoir pour effet de constituer en faute le salarié dont la conviction viendrait à changer ; que la cour d'appel a encore violé l'ensemble des textes précités ;

13°/ qu' en toute hypothèse, aux termes de l'article 4 & 2 de la directive précitée du 27 novembre 2000, le régime dérogatoire prévu pour les entreprises de tendance s'applique « aux activités professionnelles d'églises » et « aux autres organisations publiques ou privées dont l'éthique est fondée sur la religion ou les convictions » lorsque « par la nature de ces activités ou par le contexte dans lequel elles sont exercées, la religion ou les convictions

constituent une exigence professionnelle essentielle, légitime et justifiée eu égard à l'éthique de l'organisation » ; que cette disposition instaure une clause de standstill qui exige que les dispositions spécifiques aux entreprises de tendance, autorisant une différence de traitement fondée sur la religion ou les convictions d'une personne, résultent de la « législation nationale en vigueur à la date d'adoption de la présente directive » ou d'une « législation future reprenant des pratiques nationales existant à la date d'adoption de la présente directive » ; que cette clause interdit pour l'avenir l'adoption de normes réduisant le niveau de protection des droits reconnus aux salariés par l'ordonnancement juridique de l'Etat membre ; qu'en retenant qu'une personne morale de droit privé, constituant une entreprise de conviction au sens de la jurisprudence de la Cour européenne des droits de l'homme, peut se doter d'un règlement intérieur prévoyant une obligation générale de neutralité du personnel dans l'exercice de ses tâches emportant notamment interdiction de tout signe ostentatoire de religion, et licencie pour faute un salarié au seul motif du port d'un signe religieux, la cour d'appel a violé les articles L. 1121 1, L. 1132 1, L. 1133 1 et L. 1321 3 du code du travail, ensemble l'article 4 & 2 de la directive communautaire 78/2000/CE du 27 novembre 2000, 9 et 14 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, 10 de la Charte des droits fondamentaux de l'Union européenne ;

14°/ que le règlement intérieur fût ce dans une entreprise dite de tendance ou de conviction ne peut contenir des dispositions apportant aux droits des personnes et aux libertés individuelles des restrictions qui ne seraient pas justifiées par la nature de la tâche à accomplir, ne répondraient pas à une exigence professionnelle essentielle et déterminante et ne seraient pas proportionnées au but recherché ; que l'article II A) du règlement intérieur de l'association Baby Loup, figurant au titre des « règles générales et permanentes relatives à la discipline au sein de l'association » applicables à l'ensemble du personnel, est ainsi rédigé : « le principe de la liberté de conscience et de religion de chacun des membres du personnel ne peut faire obstacle au respect des principes de laïcité et de neutralité qui s'appliquent dans l'exercice de l'ensemble des activités développées par Baby Loup, tant dans les locaux de la crèche ou ses annexes qu'en accompagnement extérieur des enfants confiés à la crèche » ; qu'en ce qu'elle soumet l'ensemble du personnel à un principe de laïcité et de neutralité, applicable à l'ensemble de ses activités, sans préciser les obligations qu'elle impliquerait, en fonction des tâches à accomplir, cette disposition, générale et imprécise, est illicite et porte une atteinte disproportionnée aux libertés des salariés ; qu'en décidant le contraire, la cour d'appel a violé les articles L. 1121 1, L. 1321 3 et L. 1132 1, du code du travail, ensemble les articles 9 et 14 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales ;

15°/ que la clause du règlement intérieur de 1990 selon laquelle « le personnel doit respecter et garder la neutralité d'opinion politique et confessionnelle au regard du public accueilli tel que mentionné dans les statuts » est entachée du même vice de généralité et contraire aux textes précités que la cour d'appel a derechef violés ;

16°/ qu'en estimant, sous couvert d'interprétation, que la disposition précitée de l'article II A) du règlement intérieur de l'association Baby Loup est d'application limitée « aux activités

d'éveil et d'accompagnement des enfants à l'intérieur et à l'extérieur des locaux professionnels » et « exclut les activités sans contact avec les enfants, notamment celles destinées à l'insertion sociale et professionnelle des femmes du quartier qui se déroulent hors la présence des enfants confiés à la crèche », la cour d'appel, qui en a dénaturé les termes et la portée, a violé l'article 1134 du code civil ;

17°/ que le licenciement, prononcé en violation d'une liberté ou d'un droit fondamental ou pour un motif discriminatoire, est nul, sans qu'il y ait lieu d'examiner les autres griefs visés à la lettre de licenciement ; que le licenciement intervenu en l'espèce à raison du refus de la salariée d'ôter un signe d'appartenance religieuse est nul, de sorte qu'en se fondant sur les autres griefs invoqués dans la lettre de licenciement pour justifier le licenciement, la cour d'appel a violé les articles L. 1132 4 L. 1121 1, L. 1132 1, L. 1133 1 et L. 1321 3 du code du travail ;

18°/ que le refus du salarié de se soumettre à une mise à pied conservatoire injustifiée ne peut justifier le licenciement ; qu'en l'absence de faute grave susceptible d'être reprochée à Mme Y... pour avoir refusé de quitter son voile, la mise à pied conservatoire n'était pas justifiée ; qu'en se fondant dès lors sur le fait que Mme Y... était demeurée sur son lieu de travail malgré la mise à pied qui lui avait été signifiée pour justifier le licenciement pour faute grave, la cour d'appel a violé les articles L. 1234 1, L. 1331 1, L. 1234 9, L. 1232 1 du code du travail ;

19°/ que n'est pas fautif le comportement du salarié qui n'est que l'expression du refus par celui-ci de se conformer à une décision illicite de l'employeur ; que l'ensemble des autres griefs reprochés à Mme Y... n'ayant été que l'expression, aussi vive soit elle, de son refus de se conformer à l'ordre illicite qui lui avait été donné de quitter son voile, la cour d'appel ne pouvait y puiser la justification de son licenciement pour faute grave sans violer les articles L. 1234 1, L. 1331 1, L. 1234 9, L. 1232 1 du code du travail ;

20°/ que, lorsque sont invoqués plusieurs griefs de licenciement dont l'un d'eux est susceptible d'entraîner la nullité de ce licenciement, le juge est tenu d'examiner ce grief au préalable, et de prononcer la nullité du licenciement, sans pouvoir s'en dispenser au prétexte que les autres griefs invoqués seraient à eux seuls constitutifs de faute grave ; qu'en s'abstenant de rechercher, comme elle y était expressément invitée, si le refus de la salariée d'ôter son voile islamique pouvait, s'agissant de l'exercice d'une liberté et de l'expression de convictions personnelles licites, être sanctionné disciplinairement et caractériser une faute et donc de s'interroger sur la nullité du licenciement, la cour d'appel a méconnu l'étendue de son office et violé les articles 4 du code civil, L. 1234 1, L. 1331 1, L. 1234 9, L. 1232 1 du code du travail ;

21°/ que ne caractérise pas une faute grave privative des indemnités de licenciement le seul fait de « se maintenir sur les lieux du travail » après notification d'un ordre d'enlever un signe religieux qui, à le supposer « licite » n'en était pas moins de nature à affecter la salariée dans ses convictions, et sans que ce « maintien dans les lieux » ait affecté le fonctionnement de l'entreprise, aucun trouble à ce fonctionnement n'étant caractérisé par l'arrêt attaqué ; que

la cour d'appel a violé les articles L. 1234 1, L. 1234 9, L. 1232 1, L. 1331 1 du code du travail ;

22°/ que la lettre de licenciement ne mentionnait aucun fait d'agressivité et encore moins à l'égard des « collègues » de Mme Y... ; que la cour d'appel, en lui imputant ce fait à faute, a violé le cadre du litige et les articles précités du code du travail et 4 du code de procédure civile ;

Mais attendu qu'il résulte de la combinaison des articles L. 1121 1 et L. 1321 3 du code du travail que les restrictions à la liberté du salarié de manifester ses convictions religieuses doivent être justifiées par la nature de la tâche à accomplir et proportionnées au but recherché ;

Attendu qu'ayant relevé que le règlement intérieur de l'association Baby Loup, tel qu'amendé en 2003, disposait que « le principe de la liberté de conscience et de religion de chacun des membres du personnel ne peut faire obstacle au respect des principes de laïcité et de neutralité qui s'appliquent dans l'exercice de l'ensemble des activités développées, tant dans les locaux de la crèche ou ses annexes qu'en accompagnement extérieur des enfants confiés à la crèche », la cour d'appel a pu en déduire, appréciant de manière concrète les conditions de fonctionnement d'une association de dimension réduite, employant seulement dix-huit salariés, qui étaient ou pouvaient être en relation directe avec les enfants et leurs parents, que la restriction à la liberté de manifester sa religion édictée par le règlement intérieur ne présentait pas un caractère général, mais était suffisamment précise, justifiée par la nature des tâches accomplies par les salariés de l'association et proportionnée au but recherché ;

Et attendu que sont erronés, mais surabondants, les motifs de l'arrêt qualifiant l'association Baby Loup d'entreprise de conviction, dès lors que cette association avait pour objet, non de promouvoir et de défendre des convictions religieuses, politiques ou philosophiques, mais, aux termes de ses statuts, « de développer une action orientée vers la petite enfance en milieu défavorisé et d'œuvrer pour l'insertion sociale et professionnelle des femmes (…) sans distinction d'opinion politique et confessionnelle » ;

Attendu, enfin, que la cour d'appel a pu retenir que le licenciement pour faute grave de Mme X..., épouse Y... était justifié par son refus d'accéder aux demandes licites de son employeur de s'abstenir de porter son voile et par les insubordinations répétées et caractérisées décrites dans la lettre de licenciement et rendant impossible la poursuite du contrat de travail ;

D'où il suit que le moyen, inopérant en sa treizième branche, qui manque en fait en ses dix-septième à vingt-deuxième branches et ne peut être accueilli en ses sept premières branches et en ses dixième, onzième et douzième branches, n'est pas fondé pour le surplus ;

PAR CES MOTIFS :

REJETTE le pourvoi

Président : M. Lamanda, premier président

Rapporteur : M. Truchot, conseiller, assisté de MM. Burgaud et Pons, auditeurs au service de documentation, des études et du rapport

Avocat général : M. Marin, procureur général

Avocat(s): Mr. Spinosi ; SCP Waquet, Farge et Hazan

5). Translation

Judgment No. 612 on June 25th of 2014 (13-28.369) - Court of Cassation - Plenary Assembly - ECLI: FR: CCASS: 2014: AP00612

CONTRACT OF WORK, BREACH: CONTRACT OF WORK, EXECUTION: ASSOCIATION

Rejection

Statement relating to the Plenary Assembly Decision No. 612 on June 25th 2014
Report by Mr. Truchot, Councillor
Opinion of Mr. Marin, Attorney General

Plaintiff/Applicant (s): Mrs. X ..., Spouse Y ...
Defendant (s): Baby-Loup Day-Care Nursery

The five teams have assembled, taken in their various branches:
Whereas, according to the judgment under appeal (Paris, November 27th of 2013), rendered after cassation (Soc., March 19th of 2013, No. 11 28.645, Bull. 2013, V, No. 75) that, according to a permanent contract of January 1st of 1997, which followed an Employment Solidarity from December 6th of 1991 to June 6th of 1992 and a qualification contract from December 1st of 1993 to November 30th of 1995, Mrs. X ..., spouse Y ... was hired as an early childhood educator as well as assistant director of childcare nursery and day-care centre managed by the Baby-Loup; in May 2003, she was granted a maternity leave followed by parental leave until December 8th of 2008; that she was convened by letter on December 9th of 2008 to a preliminary review for possible dismissal, with layoff as a precautionary measure, and dismissed on December 19th of 2008 for misconduct, for violating the provisions of the internal regulations of the nursery by wearing an Islamic veil and because of her behaviour after this layoff; that, considering herself the victim of a discrimination with regard to her religious convictions, Mrs. X ..., Spouse Y ... entered before the tribunal of labour on February 9th of 2009 in nullity of her dismissal and in payment of various sums ;

Whereas Mrs. X ..., Spouse Y ... complains the judgment as rejecting her requests, then, according to upon the way:

1° / that the tendency or belief of the enterprise supposes a militant adherence to a philosophical or religious ethics and aims to defend or promote this ethic; that does not constitute an enterprise of conviction, an association which, carrying out a mission of general interest, sets for objectives in its statutes "to develop an oriented action towards the early childhood in underprivileged environment and to work for the social and professional integration of women (...) without distinction of political and confessional opinion"; that based on the missions statutorily defined to qualify the Baby-Loup, an enterprise of conviction that its statutory purpose expresses no adherence to a philosophical or religious doctrine, the Court of Appeal violated articles L. 1121 1, L. 1132 1, L. 1133 1 and L. 1321 3 of the Labour Code, together the Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 4 & 2 of Directive 78/2000 / EC of November 27th of 2000;

2° / that the convictions or tendencies of an enterprise proceed from a philosophical, ideological or religious choice and not from the necessity to respect legal norms or constraints attached to the nature of the activities of the enterprise; that the alleged need to protect the freedom of conscience, freedom of thought and religion from the child derived from the New York Convention or that of respecting the plurality of religious options of women for the benefit of which is implemented a social and professional integration in a multi-faith environment are not constitutively linked to an enterprise of conviction; that based on this "necessity" to qualify the Baby-Loup, an enterprise of conviction, able to require the neutrality of its employees, the Court of Appeal violated articles L. 1121 1, L. 1132 1, L. 1133 1 and L. 1321 3 of the Labour Code, together Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and the Article 4 & 2 of the aforementioned Directive 78 / 2000 / EC of November 27th of 2000;

3° / that Article 14 of the Convention on the Rights of the Child – which is not directly applicable – carries no obligation that an enterprise receiving small children or dedicated to early childhood is obliged to impose on its staff an obligation of neutrality or *laïcité*; that the Court of Appeal violated said text by false application, in addition to the aforementioned texts;

4° / that as a mode of organization of the enterprise intended to "transcend the multiculturalism" of the people to whom it is addressed, neutrality expresses and imposes on employees no adherence to any political choice, it is only philosophical or ideological apt to carry the qualification of enterprise of conviction; that the Court of Appeal violated Articles L. 1121 1, L. 1132 1, L. 1133 1 and L. 1321 3 of the Labour Code, together Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 4 & 2 of the Directive 78/2000 / EC of November 27th of 2000;

5° / that *laïcité*, a constitutional principle of the organization of the State, the foundation of the Republic, which, as such, imposes itself in the social sphere cannot be the basis of a philosophical ethic that an enterprise could invoke in order to impose its staff, in a general and absolute manner, a principle of neutrality and a prohibition on wearing any ostentatious sign of religion; that the Court of Appeal violated Articles L. 1121 1, L. 1132 1, L. 1133 1 and L. 1321 3 of the Labour Code, together Articles 9 and 14 of the Convention for the Protection of the Rights of the Human Rights and Fundamental Freedoms and Article 1 of the Constitution;

6° / that an enterprise cannot set itself up as an "enterprise of conviction" to apply principles of neutrality – or *laïcité* – which are applicable solely to the State; that neither the principle of *laïcité* established by Article 1 of the Constitution, nor the principle of neutrality enshrined by the Constitutional Council as the fundamental principles of the public service, are not applicable to employees of private company which do not manage a public service; that they cannot therefore be invoked to deprive them of the protection provided by the provisions of the Labour Code; it follows from Articles L. 1121 1, L. 1132 1, L. 1133 1 and L. 1321 3 of the Labour Code that restrictions on religious freedom must be justified by the nature of the task to be performed, respond to a professional requirement which is essential and decisive and proportionate to the aim pursued; that retaining the Baby-Loup nursery could impose an obligation of neutrality, to its staff in the performance of their duties, including prohibition to wear any ostentatious sign of religion to the reasons for the need to protect the freedom of thought, freedom of conscience and freedom of religion, to build for each child as well as the plurality of religious options of women for the benefit of which is implemented a social and professional integration, to the professions of early childhood, and that the enterprise ensures a mission of general interest subsidized by public funds, the Court of Appeal violated Articles L. 1121 1, L. 1132 1, L. 1133 1 and L. 1321 3 of the Labour Code, together Article 10 of the 1789 Declaration of Human Rights and Citizen, Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10 of the European Union Charter of Fundamental Rights and Article 1 to 4 of Directive 78/2000 / EC of November 27th of 2000;

7° / that restrictions on the freedom to manifest one's religion or beliefs can only be created by national law within the meaning of the case-law of the European Court of Human Rights; that this national law must itself, within the meaning of this case law, respect the internal order of creation of the norms; that it follows that the creation of a type of firm of conviction based on the principle of neutrality can only result from the law in the organic sense of the term; that the Court of Appeal violated Articles: 34 of the Constitution, 10 of the Declaration of the Rights of Man and of the Citizen of 1789, 9 & 2 of the Convention on Human Rights and Fundamental Freedoms, 4 and 14 of the Convention on the Rights of the Child of November 20th of 1989, L. 1121 1, L. 1132 1, L. 1133 1 and L. 1321 3 of the Labour Code, 1 to 4 of Directive 78/2000 / EC of 27 November 2000, 10 of the European Union Charter of Fundamental Rights, and exceeded its powers;

8° / that a measure or a difference in treatment based in particular on religious convictions may not be discriminatory if it meets an essential and decisive professional requirement and provided that as long as the objective is legitimate and the requirement is proportionate; that by stating the restrictions provided in the internal regulations "also respond in the particular case to the essential and decisive professional requirement to respect and protect the awakening conscience of children", the Court of Appeal, which confused essential and decisive professional requirement, and legitimate objective, the decision of the Court is without a legal basis under Articles: L. 1133 1 and L. 1132 1 of the Labour Code, 1 to 4 of Directive 78/2000 / EC of November 27th of 2000, 10 of the European Union Charter of Fundamental Rights;

9° / that the disputed judgment, which did not reveal nor characterized, in view of particular and concrete elements of the case (tasks devolving to Mrs. Y ... personally in her employment, age of the children, absence of ostentatious behaviour or proselyte of Mrs. Y ...) the incompatibility of the wearing of her Islamic veil with the commitment and the employment of Mrs. Y ..., the decision is without a legal basis under with regard to Articles

L 1121 1, L. 1132 1, L. 1133 1 and L. 1321 3 of the Labour Code, together Articles 9 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1 to 4 of Directive 78/2000 / EC of November 27th of 2000, and 10 of the European Union Charter of Fundamental Rights;

10° / supposing that the employer had been in the particular case of an enterprise of conviction within the jurisprudence of the European Court of Human Rights and defined by the Community Directive 78/2000 / EC of November 27th creating a general framework in favour of equal treatment in employment and occupation, in the absence of specific provisions in national law, such enterprises are subjected, like any private employer, to provisions of Articles L. 1121 1, L. 1132 1 and L. 1321 3 of the Labour Code from which it follows that restrictions on the fundamental freedoms of employees, including religious freedom, must be justified by the nature of the task to be performed, to meet an essential and decisive professional requirement proportionate with the aim pursued; that by holding a legal person under private law, constituting an enterprise of conviction within the jurisprudence of the European Court of Human Rights, can be equipped with internal regulations envisaging a general obligation of personnel's neutrality in the performance of their duties, including the prohibition of any ostentatious sign of religion, the Court of Appeal violated Articles L. 1121 1, L. 1132 1, L. 1133 1 and L. 1321 3 of the Labour Code, together with Article 4 & 2 of Community Directive 78/2000 / EC of November 27th of 2000, 9 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and 10 of the European Union Charter of Fundamental Rights;

11° / that the qualification of an enterprise of conviction – or of tendency – if it authorizes exceptionally the dismissal of an employee because of a conviction or the manifestation of a contrary conviction or become contrary to that of her employer, that is to say for a reason that is a priori discriminatory or prohibited, does not authorize that the behaviour thus alleged as a reason for termination can be imputed to fault to the employee; that by validating a dismissal pronounced for serious misconduct, the court of appeal violated the aforementioned texts besides articles L. 1234 1, L. 1234 5 and L. 1234 9 of the Labour Code;

12° / that the possible inclusion, in the internal regulation of an enterprise of conviction, of the necessity for the employees to conform to it, cannot have the effect to constitute in fault the employee whose conviction would come to change ; that the Court of Appeal has again violated all the aforementioned texts;

13° / that in any hypothesis, according to Article 4 & 2 of the aforementioned directive of November 27th of 2000, the derogatory regime provided for enterprises of conviction applies "to the professional activities of churches" and "to other public or private organizations whose ethics are based on religion or belief 'where' by the nature of these activities or by the context in which they are exercised, religion or belief constitutes an essential, legitimate and justified professional requirement with regard to the ethics of the organization"; that this provision introduces a standstill clause which requires provisions specific to the enterprises of conviction, allowing a difference of treatment based on the religion or beliefs of a person, result from the "national legislation in force on the adoption date of the present Directive 'or' a future legislation incorporating national practices existing at the date of adoption of the present Directive"; that this clause prohibits for the future adoption of standards reducing the level of rights protection granted to employees by the legal system of the Member State; that by holding a legal person under private law, constituting an enterprise of conviction within the jurisprudence of the European Court of Human Rights, can be equipped with

internal regulation envisaging a general obligation of neutrality of the personnel in the exercise of their duties, including the prohibition of any ostentatious sign of religion, and dismissed for fault an employee for the sole reason of the wearing of a religious sign, the Court of Appeal violated articles L. 1121 1, L. 1132 1, L. 1133 1 and L. 1321 3 of the Labour Code, together with Article 4 & 2 of Community Directive 78/2000 / EC of November 27th of 2000, 9 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 10 of the European Union Charter of Fundamental Rights;

14° / that the internal regulation was in a so-called enterprise of conviction cannot contain provisions providing the rights of individuals and the freedom of individuals from the restrictions that would not be justified by the nature of the task to be accomplished, would not meet an essential requirement professional and decisive and would not be proportionate to the aim pursued; that Article II A) of the internal regulation of the Baby-Loup nursery, appearing under the title of "general and permanent rules relating to the discipline within the nursery" applicable to all staff, is thus written: "the principle of the freedom of conscience and religion of each member of personnel cannot obstruct with the principles of *laïcité* and neutrality that apply in the exercise of all activities developed by Baby-Loup, both in the premises of the nursery or its annexes in accompanying the children outside entrusted to the nursery"; that it subjects all staff to a principle of *laïcité* and neutrality, applicable to all of its activities, without specifying the obligations it would imply, according to the tasks to be accomplished, this provision, general and imprecise, is unlawful and disproportionately affects the freedoms of employees; that in deciding the contrary, the Court of Appeal violated Articles L. 1121 1, L. 1321 3 and L. 1132 1, of the Labour Code, together Articles 9 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

15° / that the clause of the internal regulation of 1990 according to which "the personnel must respect and keep the neutrality of political opinion and confessional with respect to the public accepted as mentioned in the statutes" is tainted with the same vice of generality and contrary to the aforementioned texts which the Court of Appeal has again violated;

16° / that by estimating, under the guise of interpretation, that the aforementioned provision of Article II A) of the internal regulation of the association Baby-Loup is of limited application "to activities of awakening and accompanying the children inside and outside professional premises" and "excludes activities without contact with the children, especially those aimed at the social and professional integration of women in the neighbourhood which take place without the presence of children entrusted to the nursery", the Court of Appeal, which distorted the terms and scope, violated Article 1134 of the Civil Code;

17° / that the dismissal, pronounced in violation of a freedom or a fundamental right or for a discriminatory motive, is null, without it being necessary to examine the other grievances referred to the letter of dismissal; that the dismissal in this case because of the refusal of the employee to remove a sign of religious affiliation is null, so that based on the other complaints invoked in the letter of dismissal to justify the dismissal, the Court of Appeal violated Articles L. 1132 4 L. 1121 1, L. 1132 1, L. 1133 1 and L. 1321 3 of the Labour Code;

18° / that the refusal of the employee to submit to an unjustified protective layoff cannot justify the dismissal; that in the absence of serious misconduct likely to be charged to Mrs. Y ... for refusing to take off her veil, the provisional layoff was not justified; therefore, relying on the fact that Mrs. Y ... had remained at her workplace despite the layoff that had

been served on her to justify the dismissal for serious misconduct, the Court of Appeal had violated the articles L. 1234 1, L. 1331 1, L. 1234 9, L. 1232 1 of the Labour Code;

19° / that is not faulty the behaviour of the employee which is only the expression of the refusal by this one to comply with a wrongful decision of the employer; that all other charges against Mrs. Y ... having been only the expression, as lively as she is, of her refusal to comply with the unlawful order she had been given to take off her veil, the Court of Appeal could not draw the justification for her dismissal for serious misconduct without violating Articles L. 1234 1, L. 1331 1, L. 1234 9, L. 1232 1 of the Labour Code;

20° / that, when several dismissal grievances/complaints are invoked, one of which is likely to result in the nullity of this dismissal, the judge is required to examine this grievance beforehand, and pronounce the nullity of the dismissal, without being able to dispense with this on the pretext that the other complaints raised by them alone constitute serious misconduct; that by refraining from seeking, as it was expressly invited, whether the employee's refusal to remove her Islamic veil could, with respect to the exercise of a freedom and the expression of lawful personal convictions, to be punished disciplinarily and to characterize a fault and thus to question the nullity of the dismissal, the Court of Appeal disregarded the scope of its office and violated articles 4 of the Civil Code, L. 1234 1, L. 1331 1, L. 1234 9, L. 1232 1 of the Labour Code;

21° / that does not characterize a serious misconduct dismissal benefits the mere fact of "stay at the work premises" after notification of an order to remove a religious sign that, to suppose that it was 'lawful' to likely affect the employee in her beliefs, and without this "staying in the premises" affected the operation of the enterprise, since there was no disturbance to this functioning characterized by the judgment under appeal; that the Court of Appeal violated articles L. 1234 1, L. 1234 9, L. 1232 1, L. 1331 1 of the Labour Code;

22° / that the letter of dismissal did not mention any act of aggression and even less about the "colleagues" of Mrs. Y ...; that the Court of Appeal, by imputing her this fact at fault, violated the framework of the litigation and the aforementioned articles of the Labour Code and 4 of the Civil Code Procedure;

But whereas it follows from the combination of Articles L. 1121 1 and L. 1321 3 of the Labour Code that restrictions on the freedom of the employee to manifest his religious beliefs must be justified by the nature of the task to be performed and proportionate to the aim pursued;

Whereas having noted that the internal regulation of the Baby-Loup nursery, as amended in 2003, provided that "the principle of the freedom of conscience and religion of each staff member cannot hinder compliance with the principles of *laïcité* and neutrality that apply in the exercise of all the activities developed, both in the premises of the nursery or its annexes and external accompanying of children entrusted to the nursery", the Court of Appeal could arrive at the conclusion, appreciating concretely the operating conditions of a small nursery, employing only eighteen employees, who were or could be in direct contact with the children and their parents, that the restriction on the freedom to manifest one's religion enacted by the internal regulation was not of a general nature, but was sufficiently precise, justified by the nature of the tasks performed by the employees of the association and proportionate to the aim pursued;

And whereas that are erroneous, but superabundant, the motives for the judgment qualifying the Baby-Loup nursery as an enterprise of conviction/belief, since the purpose of this nursery was not to promote and defend religious, political or philosophical convictions, but, according to its statutes, "to develop an early childhood-oriented action in disadvantaged areas and to work for the social and professional integration of women (...) without distinction of political and religious opinion";

Whereas, lastly, that the Court of Appeal could hold that the dismissal for serious misconduct of Mrs. X ..., spouse Y ... was justified by her refusal to access lawful requests of her employer to refrain from wearing her veil and by the repeated and characterized insubordinations described in the letter of dismissal and making it impossible to continue the employment contract;

From where it follows that the means, inoperative in its thirteenth branch, which in fact lacks in its seventeenth to twenty-second branches and cannot be welcome in its first seven branches and in its tenth, eleventh and twelfth branches, is unfounded for the rest;

FOR THESE MOTIVES:

DISMISS the appeal

President: Mr. Lamanda, first President

Rapporteur: Mr. Truchot, Counsellor, assisted by MM. Burgaud and Pons, auditors in the documentation service, studies and report department

General Counsel: Mr. Marin, Attorney General

Lawyer (s): Mr. Spinosi; SCP Waquet, Farge and Hazan

6). Analysis of the Court of Cassation (Analyses de la Cour de cassation)

ASSEMBLÉE PLÉNIÈRE du 16 juin 2014 à 14 heures 30

CONSEILLER-RAPPORTEUR : Laurent Truchot

PROCUREUR GÉNÉRAL : Jean-Claude Marin

POURVOI N° : E13-28.369

M. Fatima X... ép. Y...
(ayant pour avocats la SCP Waquet, Farge et Hazan)

c/

M. Association Baby-Loup
(ayant pour avocat Maître Spinosi)

ARRÊT ATTAQUÉ : Arrêt rendu après cassation le 27 novembre 2013 par la Cour d'appel de Paris - Pourvoi formé le 24 décembre 2013

AVIS

de Monsieur le procureur général Jean-Claude Marin

« La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui : ainsi, l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres membres de la société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la Loi. » (Article 4 de la Déclaration des droits de l'Homme et du citoyen de 1789).

L'affaire qui est soumise aujourd'hui à l'Assemblée plénière de cette Cour est particulièrement importante tant par les questions juridiques qu'elle soulève que par les débats de société qu'elle suscite. Il est peu de dire que l'arrêt qui va être rendu est attendu avec grand intérêt.

Cette affaire a en effet connu un retentissement exceptionnel dans la société civile en raison des questions qu'elle pose et qui nous concernent tous : liberté de manifester sa religion, liberté de ne pas avoir de religion, protection des jeunes enfants, droit des femmes, laïcité etc.… Ce retentissement s'est traduit par de nombreux articles dans la presse, des débats, des affirmations d'opinions diverses.

Mais, et ce qui est plus rare, ce foisonnement de commentaires et de prises de positions a également atteint la doctrine. Un rapide examen du site internet Doctrinal permet de recenser au moins 56 articles de doctrine ayant dans leurs titres les termes « Baby-Loup ».

Il est permis, toutefois, de se demander si l'intensité du débat n'est pas liée au fait que la liberté de manifester sa religion consistait, en l'espèce, dans le fait, pour une femme, du droit de porter un voile islamique. Or, on sait combien cette question agite et travaille notre société française depuis presque vingt ans.
Cependant, l'excessive sensibilité du contexte dans lequel se déroule le litige ne doit pas faire oublier que l'Assemblée plénière de la Cour est réunie, non pas pour trancher, de manière générale, la question du port du voile mais, simplement, pour dire si et dans quelles conditions un employeur privé peut, dans l'entreprise, limiter la liberté de manifester ses convictions religieuses.

Ainsi, 36 ans après l'arrêt Dame Roy[1] dans lequel elle avait été amenée à se prononcer sur la question de la liberté religieuse dans l'entreprise dans un litige opposant une salariée d'un établissement d'enseignement catholique qui avait été licenciée pour s'être remariée après un

divorce, attitude jugée contraire à la position de l'Eglise catholique, l'Assemblée plénière de la Cour se prononce à nouveau sur une question relative à la liberté de conscience.

Mais, depuis 1978, l'état du droit et l'étendue du champ d'intervention des libertés individuelles ainsi que la protection contre leur violation ont beaucoup évolué.

Un bref rappel des faits et de la procédure permet de cadrer le débat.

I - Rappel des faits et de la procédure

L'employeur, l'association Baby-Loup (ci-après « Baby Loup »), est une association sans but lucratif qui assure la gestion d'une crèche au sein du quartier Noé à Chanteloup les Vignes, dans les Yvelines.

Ses statuts énoncent que son but est de « *développer une action orientée vers la petite enfance en milieu défavorisé, et en même temps d'œuvrer pour l'insertion sociale et professionnelle des femmes du quartier* ».

Le règlement intérieur établi en 1990 précisait que « *le personnel doit avoir un rôle complémentaire à celui des parents pour ce qui est de l'éveil des enfants. Dans l'exercice de son travail, celui-ci doit respecter et garder la neutralité d'opinion politique et confessionnelle en regard du public accueilli* ».

Un nouveau règlement intérieur entré en vigueur le 15 juin 2003 énonce que, « *de manière générale, les membres du personnel doivent adopter, dans l'exercice de leurs fonctions, une tenue, un comportement et des attitudes qui respectent la liberté de conscience et la dignité de chacun* » et précise que « *le principe de la liberté de conscience et de religion de chacun des membres du personnel, ne peut faire obstacle au respect des principes de laïcité et de neutralité qui s'appliquent dans l'exercice de l'ensemble des activités développées par Baby Loup, tant dans les locaux de la crèche, ses annexes ou en accompagnement extérieur des enfants confiés à la crèche à l'extérieur* ».

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[1] Ass. Plen. 19 mai 1978, Bull n/ 1

Mme Y... a été engagée par l'association à compter du mois de décembre 1991 selon un contrat emploi-solidarité puis selon un contrat de qualification et enfin selon un contrat à durée indéterminée prenant effet le 1er janvier 1997, en qualité d'éducatrice et directrice adjointe de la crèche.

Mme Y... a pris un congé de maternité puis un congé parental entre le mois de mai 2003 et le 8 décembre 2008.

Lors de la reprise de son travail, elle s'est présentée revêtue d'un voile islamique. A la suite de son refus de retirer ce voile et après plusieurs incidents avec la direction de l'association, elle a fait l'objet d'une mesure de mise à pied conservatoire puis a été licenciée pour faute grave par lettre du 19 décembre 2008.

La lettre de licenciement est motivée essentiellement par le refus de respecter le règlement intérieur et par le refus de se soumettre à la mesure de mise à pied.

Mme Y... a saisi la juridiction prud'homale pour faire juger, au principal, qu'elle avait été victime d'une discrimination fondée sur sa religion et, subsidiairement, que son licenciement était sans cause réelle et sérieuse.

Par jugement du 13 décembre 2010, le conseil de prud'hommes de Mantes la Jolie a considéré que le règlement intérieur était licite et que Mme Y... était tenue de le respecter. Il a, en conséquence, jugé que, en refusant de s'y soumettre, elle a fait preuve d'une insubordination caractérisée et que son licenciement pour faute grave était justifié. Il a débouté Mme Y... de ses prétentions.

Ce jugement a été confirmé par la cour d'appel de Versailles dans un arrêt du 27 octobre 2011, lequel a été cassé par un arrêt de la chambre sociale de cette Cour du 19 mars 2013.

L'affaire ayant été renvoyée devant la cour d'appel de Paris, cette dernière a, par arrêt du 27 novembre 2013, confirmé le jugement du conseil de prud'hommes.

C'est cet arrêt qui est déféré à la censure de l'assemblée plénière.

II - <u>Discussion</u>

1 - Observations liminaires

Tels qu'ils viennent d'être résumés, les faits saillants de ce litige font apparaitre une problématique assez classique en droit du travail : celle de l'exercice, par le salarié, de ses libertés individuelles dans le cadre de ses relations avec l'employeur, au temps et sur le lieu du travail.

Dans cette affaire, l'employeur, une association qui gère une crèche, souhaite, pour des raisons sur lesquelles nous reviendrons plus longuement, que son personnel fasse preuve de neutralité,

notamment en s'abstenant de manifester sa religion. Face à elle, une salariée, employée depuis plusieurs années et qui, jusque-là, avait respecté cette obligation de neutralité, souhaite, lors de son retour après une absence assez longue de l'entreprise, manifester ses convictions religieuses par le port d'un voile. Le port du voile dit « islamique » est revendiqué par elle comme une manifestation de sa foi.

Nous sommes donc bien dans le cadre d'un conflit entre la liberté pour un employeur de choisir un certain modèle de fonctionnement de son entreprise et l'exercice d'une liberté individuelle par un salarié, au temps et sur le lieu du travail.

Un bref rappel des règles existantes est nécessaire.

A - La réglementation de la protection des libertés individuelles des salariés

La protection des libertés individuelles des salariés dans le droit du travail a toujours été une question intrinsèquement liée au fait que le contrat de travail crée un lien de subordination entre l'employeur et le salarié.

En effet, le salarié consacre une grande partie de son temps à son travail. Durant cette période, il est sous la subordination de son employeur et tenu d'exercer ses fonctions sous le contrôle et l'autorité de ce dernier. C'est la définition même du contrat detravail.

Cependant, par le contrat de travail, « *le salarié met à la disposition de l'employeur sa force de travail mais non sa personne* »[2]. Ainsi, il est aisé de concevoir que lorsque le salarié n'est pas au travail, son employeur ne se préoccupe en rien de son comportement. Mais, du fait qu'il ne met pas sa personne à la disposition de l'employeur, le salarié conserve, même pendant le temps de travail, des libertés sur lesquelles l'employeur ne peut empiéter. Le pouvoir de l'employeur est donc restreint dans ce domaine. Ainsi a-t-on été amené assez tôt à établir une distinction entre « la vie personnelle », ou la « vie extra- professionnelle » du salarié, et sa vie professionnelle.
Le premier à avoir théorisé cette question est le Professeur Despax dans un article paru en 1963[3] dans lequel, partant du constat que, bien que vie professionnelle et vie personnelle soient en principe étanches, cette cloison est en réalité parfois poreuse, puisque des agissements du salarié sont susceptibles d'interférer sur son travail. Selon cet auteur, « *la condition salariale est alors comme estompée mais elle reste toujours présente* ».

Le rôle de la jurisprudence a été de définir la frontière entre vie professionnelle et vie personnelle et d'arbitrer les débordements de l'une sur l'autre.
Cette protection de la vie personnelle du salarié entendue au sens large, dans le cadre du contrat de travail, va trouver une consécration législative et réglementaire, il y a une trentaine d'années, par le biais de la protection des libertés individuelles des salariés dans le travail.

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[2] Jean Rivero. Droit social, mai 1982, p. 417 et suivantes.

[3] Michel Despax : La vie extra-professionnelle du salarié et son incidence sur le contrat de travail. JCP 1963, I, n/ 1776.

Le législateur n'a pas protégé de manière explicite la vie personnelle des salariés, mais a posé des interdits afin de protéger leurs libertés individuelles dans l'exercice de leurs activités professionnelles, sans toutefois en définir précisément le contenu.

Ce sont les lois dites « Auroux » qui ont réglementé pour la première fois ces questions. En effet, la loi du 4 août 1982 a créé l'article L 122-35 du code du travail aux termes duquel le règlement intérieur « *ne peut apporter aux droits des personnes et des libertés individuelles et collectives, des restrictions qui ne seraient pas justifiées par la nature de la tâche à accomplir ni proportionnées au but recherché … ni comporter des dispositions lésant les salariés dans leur emploi ou leur travail en raison de leur sexe, de leurs mœurs, de leur situation de famille, de leurs origines, de leurs opinions ou confession ou de leur handicap à capacité professionnelle égale.* »

Cette même loi du 4 août 1982 a également posé, dans un article L 122-45 le principe de l'interdiction de toute sanction ou licenciement fondés sur un motif discriminatoire prohibé, lesquels étaient quasiment identiques à ceux énoncés à l'article L 122-35 et la conviction religieuse figurait parmi ces motifs.

Dix ans plus tard, la loi du 31 décembre 1992 a ajouté un article L 120-2 au code du travail aux termes duquel « *nul ne peut apporter aux droits des personnes et aux libertés individuelles et collectives des restrictions qui ne seraient pas justifiées par la nature de la tâche à accomplir ni proportionnées au but recherché* ».

Il est à noter que l'article L 120-2 reprenait en substance la première partie de l'article L 122-35 mais étendait la prohibition de l'atteinte aux libertés individuelles au-delà du règlement intérieur.

Donc, dès 1982 et, de manière plus large, depuis 1992, l'employeur ne peut pas discriminer les salariés en se fondant sur certains motifs énumérés dans une liste qui n'a cessé de s'allonger et ne peut porter une atteinte aux libertés individuelles qui ne soit pas justifiée par la nature de la tâche à accomplir ni proportionnée au but recherché.

La réglementation actuelle est la suivante :

Le code du travail, dans le livre premier de la partie réglementant les relations individuelles du travail, distingue les « *Droits et libertés dans l'entreprise »* et les « *Discriminations »*.

Le chapitre unique du Titre II consacré aux « *Droits et libertés dans l'entreprise »* comprend un article L. 1121-1, lequel est ainsi libellé :

« Nul ne peut apporter aux droits des personnes et aux libertés individuelles et collectives de restrictions qui ne seraient pas justifiées par la nature de la tâche à accomplir ni proportionnées au but recherché. »

Le Titre III relatif aux « *Discriminations »* contient, notamment, les dispositions suivantes.

L'article L. 1132-1 énonce :
« *[…] aucun salarié ne peut être sanctionné, licencié ou faire l'objet d'une mesure discriminatoire, directe ou indirecte, […], notamment en matière de rémunération, […], de mesures d'intéressement ou de distribution d'actions, de formation, de reclassement, d'affectation, de qualification, de classification, de promotion professionnelle, de mutation ou de renouvellement de contrat en raison de son origine, de son sexe, de ses mœurs, de son orientation ou identité sexuelle, de son âge, de sa situation de famille ou de sa grossesse, de ses caractéristiques génétiques, de son appartenance ou de sa non- appartenance, vraie ou supposée, à une ethnie, une nation ou une race, de ses opinions politiques, de ses activités syndicales ou mutualistes, de ses convictions religieuses, de son apparence physique, de son nom de famille, de son lieu de résidence ou en raison de son état de santé ou de son handicap.* »

L'article L. 1132-4 précise que « *toute disposition ou tout acte pris à l'égard d'un salarié en méconnaissance des dispositions du présent chapitre est nul* ».

Toutefois, l'article L 1133-1 autorise les différences de traitement fondées sur un motif prohibé « *lorsqu'elles répondent à une exigence professionnelle essentielle et déterminante et pour autant que l'objectif soit légitime et l'exigence proportionnée* ».

Enfin, les dispositions régissant le règlement intérieur figurent dans le livre troisième de la partie du code du travail relative aux relations individuelles du travail

Parmi ces dispositions, l'article L. 1321-3 du code du travail précise :

« Le règlement intérieur ne peut contenir:

[…]

« 2/ Des dispositions apportant aux droits des personnes et aux libertés individuelles et collectives des restrictions qui ne seraient pas justifiées par la nature de la tâche à accomplir ni proportionnées au but recherché ;

3/ Des dispositions discriminant les salariés dans leur emploi ou leur travail, à capacité professionnelle égale, en raison de leur origine, de leur sexe, de leurs mœurs, de leur orientation ou identité sexuelle, de leur âge, de leur situation de famille ou de leur grossesse, de leurs caractéristiques génétiques, de leur appartenance ou de leur non- appartenance, vraie ou supposée, à une ethnie, une nation ou une race, de leurs opinions politiques, de leurs activités syndicales ou mutualistes, de leurs convictions religieuses, de leur apparence physique, de leur nom de famille ou en raison de leur état de santé ou de leur handicap »

Il est à noter que le 2/ et le 3/ de l'article L. 1321-3 ne font que reprendre, pour le règlement intérieur, les obligations plus générales énoncées aux articles L. 1121-1 et L. 1132-1.

A ce stade de l'exposé, il convient de faire deux constats :

- d'une part, le code du travail ne précise pas en quoi consistent les libertés individuelles qui sont protégées dans l'entreprise.
- d'autre part, la réglementation distingue deux notions : la discrimination et l'atteinte aux libertés individuelles.

Il convient de reprendre ces deux éléments.

B - La notion de « libertés individuelles »

Les libertés individuelles ne sont pas définies dans le code du travail. Leur définition et l'étendue de ce qu'elles recouvrent doivent être recherchées dans d'autres normes supérieures telles que la Constitution ou les conventions internationales.

Compte tenu du litige en cause, nous ne nous intéresserons qu'à la liberté de conscience.

L'article 10 de la Déclaration des droits de l'Homme et du citoyen de 1789 qui fait partie intégrante de notre Constitution énonce que « *nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public.* »

D'emblée, il convient de remarquer que la liberté de religion présente deux aspects : un aspect absolu et un aspect relatif.

Ce qui est absolu, c'est la liberté de choisir sa religion et d'en changer à sa guise.

Ce qui est relatif, c'est la liberté de manifester sa religion. Cette manifestation ne doit pas troubler l'ordre public.

Cette distinction entre croyance et manifestation de cette croyance se traduit concrètement par ce qu'on appelle le « for interne » et le « for externe ».

Le for interne, c'est la conviction intime, la foi profonde. Cette liberté est absolue et inviolable. Le for externe c'est la manifestation extérieure des croyances ou des convictions. Cette manifestation peut se heurter aux autres croyances, générer des conflits, troubler l'ordre public. C'est la raison pour laquelle la liberté de manifester sa conviction n'est pas absolue.[4]

Cette distinction entre liberté absolue de croire et liberté relative de manifester sa foi se retrouve dans les chartes et déclarations de droits plus récentes.

Ainsi, l'article 9 de la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales énonce :

[4] Sur la distinction entre le for interne et le for externe, voir Ph. Waquet, Vie personnelle et vie professionnelle du salarié. Les Cahiers sociaux du Barreau de Paris, 1994, p. 289 et Ph. Waquet. Loyauté du salarié dans les entreprises de tendance. Gaz. Pal. 1996, p. 1427.

« *1 - Toute personne a droit à la liberté de penser, de conscience et de religion, ce qui implique la liberté de changer de religion ou de conviction, ainsi que la liberté de manifester sa religion ou sa conviction individuellement ou collectivement, en public ou en privé, par le culte, l'enseignement, les pratiques et l'accomplissement des rites.*

2- La liberté de manifester sa religion ou ses convictions ne peut faire l'objet d'autres restrictions que celles qui, prévues par la loi, constituent des mesures nécessaires, dans une société démocratique, à la sécurité publique, à la protection de l'ordre, de la santé ou de la morale publiques, ou à la protection des droits et libertés d'autrui ».

Il peut d'emblée être souligné que le libellé de cette disposition distingue, comme l'article 10 de la Déclaration des droits de l'Homme et du citoyen deux aspects dans la liberté de conviction : la foi et la manifestation de la foi.

En effet, après avoir précisé en quoi consiste la liberté de manifester sa conviction, l'article 9 précise que cette liberté peut être limitée dans certains cas et, notamment, pour la protection des droits et libertés d'autrui.

L'article 10 de la charte des droits fondamentaux de l'Union européenne qui, aux termes de l'article 6 du traité sur l'Union européenne, a la même valeur juridique que les traités européens, proclame la liberté de pensée, de conscience et de religion dans les termes suivants :

« *1 – Toute personne a droit à la liberté de pensée, de conscience et de religion. Ce droit implique la liberté de changer de religion ou de conviction, ainsi que la liberté de manifester sa religion ou sa conviction individuellement ou collectivement, en public ou en privé, par le culte, l'enseignement, les pratiques ou l'accomplissement des rites.*

[…] »

Il est à noter que cette disposition, contrairement à l'article 9 de la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales ne précise pas la possibilité de restreindre la liberté de manifester sa conviction.

Cependant, l'article 52 de la charte précise que des limitations aux droits et libertés reconnus par la charte doivent être prévues par la loi et qu'elles ne peuvent être apportées que si elles sont nécessaires et répondent effectivement à des objectifs d'intérêt général reconnus par l'Union ou au besoin de protection des droits et libertés d'autrui.

Enfin, le lien entre la charte et la Convention européenne des droits de l'Homme est prévu à l'article 52, paragraphe 3, dans les termes suivants :

« *Dans la mesure où la présente Charte contient des droits correspondant à des droits garantis par la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales, leur sens et leur portée sont les mêmes que ceux que leur confère ladite convention. Cette disposition ne fait pas obstacle à ce que le droit de l'Union accorde une protection plus étendue*. »

Il ressort de ce bref exposé que la liberté de manifester ses convictions n'est jamais considérée comme absolue, des restrictions pouvant, sous certaines conditions, lui être apportées.

A cet égard, tant l'article 9 de la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales que l'article 52 de la charte des droits fondamentaux de l'Union européenne précisent que la liberté de manifester ses convictions religieuses peut être limitée par la loi.

Que faut-il entendre par les termes « *prévues par la loi* » ?

Sur ce point, Monsieur le conseiller rapporteur relève que « *Selon la Cour européenne des droits de l'homme, " les mots « prévues par la loi » signifient que la mesure incriminée doit avoir une base en droit interne, mais ils impliquent aussi la qualité de la loi : ils exigent l'accessibilité de celle-ci aux personnes concernées et une formulation assez précise pour leur permettre de prévoir, à un degré raisonnable dans les circonstances de la cause, les conséquences pouvant résulter d'un acte déterminé ". D'après la jurisprudence constante de la Cour, la notion de « loi » doit être entendue dans son acception « matérielle » et non « formelle ». En conséquence, elle y inclut l'ensemble constitué par le droit écrit, y compris des textes de rang infralégislatif, ainsi que la jurisprudence qui l'interprète* »[5].

Selon les termes de la Cour de Strasbourg, « *[…] la « loi » doit se comprendre comme englobant le texte écrit et le « droit élaboré » par les juges (…). En résumé, la « loi » est le texte en vigueur tel que les juridictions compétentes l'ont interprété*.[6] »

Il importe avant tout que la « loi » nationale présente le double caractère d'être « accessible » et « prévisible ». Il faut que la norme en cause soit « *énoncée avec assez de précision pour permettre au citoyen de régler sa conduite; en s'entourant au besoin de conseils éclairés, il doit être à même de prévoir, à un degré raisonnable dans les circonstances de la cause, les conséquences de nature à dériver d'un acte déterminé* »[7].

Lorsque les actes dénoncés sont commis par des sociétés privées et non par un Etat, la Cour s'assure que le juge procède à un examen approfondi de la légitimité et de la proportionnalité de la mesure litigieuse adoptée par un employeur[8].

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5 Rapport, p. 44.

6 CEDH. 10 novembre 2005, Leyla Ôahin / Turquie, § 88.

7 CEDH, Dahlab / Suisse, arrêt du 15 février 2001, n/ 42393/98, 2001-V. cité au Rapport, p. 44, paragraphe 3. Voir, en sens contraire, sur l'absence de prévisibilité de la loi, CEDH, 30 septembre 2011, Association des Témoins de Jehova / France, Requête n/ 8916/05.

8 CEDH, 15 janvier 2013, Eweida et autres / Royaume-Uni, n/ par les juridictions du travail, sous le contrôle vigilant de la chambre sociale de la Cour de cassation.48420/10, 59842/10, 51671/10 et 36516/10.

Le code du travail français précise le cadre dans lequel l'employeur est autorisé à porter atteinte à des libertés individuelles.

Tout d'abord, le code du travail autorise l'employeur à apporter aux droits des personnes et aux libertés individuelles des restrictions lorsqu'elles sont justifiées par la nature de la tâche à accomplir et proportionnées au but recherché (article L. 1121-1).

Ce même code reconnaît ensuite à l'employeur la possibilité de traiter différemment les salariés entre eux lorsque cela répond à une exigence professionnelle essentielle et déterminante et pour autant que l'objectif soit légitime et l'exigence proportionnée (article L. 1133-1).

Enfin, des dispositions permettent à l'employeur, lorsqu'il élabore le règlement intérieur, de prévoir des règles qui portent atteinte aux libertés individuelles, ainsi que les sanctions en cas de contravention à ces règles, pourvu que ces restrictions soient justifiées par la nature de la tâche à accomplir et proportionnée au but recherché.

Il n'est pas inutile d'ajouter que la conformité des mesures adoptées par les employeurs avec ces dispositions du code du travail sont étroitement encadrées, tant par l'inspection du travail que

Il apparaît donc que les atteintes par l'employeur à la liberté des salariés de manifester leurs convictions religieuses sont bien « *prévues par la loi* » au sens, tant de l'article 9 de la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales que de l'article 52 de la charte des droits fondamentaux de l'Union européenne et que la clause du règlement intérieur de Baby Loup remplit également la condition d'être « prévue par la loi ».

C - Atteinte aux libertés individuelles et discriminations prohibées

Il ressort de l'exposé de la réglementation en vigueur que la protection des libertés individuelles des salariés dans l'entreprise présente deux aspects assez distincts :

- d'une part, la protection des libertés individuelles contre les atteintes qui y sont portées. Ces atteintes, pour être tolérées, doivent être justifiées par la nature de la tâche à accomplir et proportionnées au but recherché ;

- d'autre part, les discriminations directes fondées sur des motifs limitativement énumérées qui, elles, ne peuvent être justifiées que lorsqu'elles répondent à une exigence professionnelle essentielle et déterminante et pour autant que l'objectif soit légitime et l'exigence proportionnée.

La différence de régime juridique entre la discrimination directe fondée sur un motif prohibé et l'atteinte à une liberté individuelle repose sur le fait que, ainsi qu'il vient d'être dit, l'atteinte à la liberté individuelle peut être justifiée de manière plus souple que la différence de traitement fondée sur un motif prohibé.

Cette différence existe également au niveau de la sanction encourue. L'atteinte à une liberté individuelle se traduira par l'octroi de dommages-intérêts alors que la mesure ou l'acte fondé sur un motif discriminatoire prohibé est atteint de nullité, donc inexistant[9].

En matière de licenciement, cela se traduit par le fait que le licenciement prononcé en violation d'une liberté individuelle sera qualifié de licenciement sans cause réelle et sérieuse et donnera lieu à l'octroi de dommages intérêts alors que celui fondé sur un motif discriminatoire prohibé sera nul et le salarié devra être réintégré.

Certes, la prohibition des discriminations a parfois pour objet la protection de libertés individuelles. Cela ne signifie cependant pas que toute atteinte à une liberté individuelle s'analyse en une discrimination.

Il est donc important de distinguer les deux concepts.

Selon l'article 1er de la loi n/ 2008-496 du 27 mai 2008,[10] la discrimination directe est constituée lorsqu'une « *personne est traitée de manière moins favorable qu'une autre ne l'est, ne l'a été ou ne l'aura été dans une situation comparable* » sur le fondement d'un motif précis.
1La discrimination dans le travail est donc le fait de se fonder sur des motifs précis et limitativement énumérés, soit l'origine, le sexe, les mœurs, l'orientation sexuelle, l'âge, l'appartenance à une ethnie, une race ou une nation, la situation de famille, la grossesse, la religion, l'engagement syndical, etc.…, pour prendre des mesures défavorables à un salarié telles que refuser de l'engager, bloquer son avancement, le licencier, le sanctionner, moins le payer. La discrimination peut exister sans qu'il soit absolument nécessaire d'effectuer une comparaison avec d'autres salariés. La comparaison ne doit se faire qu'avec la situation qui aurait été celle si le motif de discrimination n'avait pas existé.
Cependant, pour établir que le traitement défavorable est la conséquence de l'existence d'un motif de discrimination, il est souvent nécessaire d'effectuer une comparaison, sauf si la mesure comporte, en elle-même, le motif de discrimination comme, par exemple, une prime réservée aux seuls hommes ou aux seules femmes. Ainsi, une femme ne pourra se plaindre qu'elle fait l'objet d'une discrimination en raison de son sexe que si elle établit que seuls les hommes sont mieux payés ou ont un avancement plus rapide ou ne sont pas licenciés.

Par exemple, la Cour de justice de l'Union européenne, saisie d'une question préjudicielle par la chambre sociale de cette Cour, a récemment jugé qu'une convention collective qui réserve le bénéfice d'une prime aux salariés mariés et la refuse aux couples liés par un PACS est une mesure discriminatoire fondée sur l'orientation sexuelle en ce qu'elle désavantage les homosexuels dans la mesure où ces derniers ne pouvaient pas (à l'époque) se marier et ne disposaient que du PACS comme cadre juridique pour une union conjugale[11].

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9 Article L. 1132-4 du Code du travail

10 Loi n/ 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations

11 CJUE, 12 décembre 2013, Hay, C-267/12.

S'agissant d'une discrimination directe justifiée par une exigence professionnelle essentielle et déterminante, la Cour de justice de l'Union européenne a jugé qu'une réglementation fixant à 30 ans la limite d'âge pour accéder à un emploi de pompier était justifiée par la nécessité d'avoir recours à des personnes assez jeunes[12].

La discrimination indirecte a un régime distinct qui se rapproche de celui des atteintes aux libertés individuelles. Une discrimination est indirecte lorsqu'une pratique ou une mesure apparemment neutre entraîne un désavantage particulier pour certaines personnes par rapport à d'autres. Ainsi, une pratique ou une mesure sera discriminatoire si son application a pour résultat que certaines catégories de salariés, les femmes, les noirs, les musulmans, les homosexuels, les salariés jeunes ou âgés, sont, dans une large mesure moins bien traitées que les autres.

La discrimination indirecte peut être justifiée si la pratique ou la mesure qui se révèle discriminatoire cherche à atteindre un but légitime et que les moyens pour réaliser ce but sont nécessaires et appropriés[13]. En l'absence d'une telle justification, la mesure ou l'acte fondé sur un motif discriminatoire prohibé est atteint de nullité, donc inexistant.

La Cour de Luxembourg rappelle régulièrement que le principe de non-discrimination interdit tant de traiter de manière différente des situations similaires que de traiter de la même manière des situations différentes[14].

Mme Y... a introduit son action prud'homale en soutenant qu'elle a été victime d'une discrimination en raison de sa religion. Dans le cadre de son pourvoi, elle reproche à la cour d'appel de ne pas avoir reconnu cette discrimination.

Dans son arrêt du 19 mars 2013, la chambre sociale a considéré que le licenciement de Mme Y... a été prononcé pour un motif discriminatoire et qu'il est, de ce fait, nul. La chambre sociale a déduit cette nullité du fait que la clause du règlement intérieur « *instaurant une restriction générale et imprécise, ne répondait pas aux exigences de l'article L 1321-3 du Code du travail* ».

Donc, du fait que la clause du règlement intérieur portait atteinte à une liberté individuelle qui n'était pas justifiée par la nature de la tâche à accomplir ni proportionnée au but recherché (article L 1321-3, 2/), la chambre sociale a déduit qu'il existait une discrimination fondée sur les convictions religieuses (article L 1321-3, 3/). Ce faisant, la chambre sociale parait avoir confondu une atteinte aux libertés individuelles et une discrimination fondée sur un motif prohibé.

Or, toute atteinte à une liberté individuelle résultant du caractère trop général d'une clause d'un règlement intérieur ne constitue pas nécessairement une discrimination.

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12 CJUE, 12 janvier 2010, Wolf, C-229/08

13 Article 1er, alinéa 2, de la loi n/ 2008-496 du 27 mai 2008

14 Voir, notamment, CJUE 27 janvier 2005 C-422/02 P, point n/ 33.

Le législateur a bien pris soin de séparer et distinguer les deux notions : atteinte aux libertés et discrimination.

S'il apparaît bien que Mme Y... a été licenciée pour avoir manifesté ses convictions religieuses, et donc qu'il a bien été porté atteinte à l'une de ses libertés individuelles, il convient de se demander si, comme elle le soutient, il s'agit d'une discrimination fondée sur ses convictions religieuses

Or, s'il est clair que Mme Y... a été licenciée parce qu'elle manifestait sa religion dans l'entreprise en violation des consignes de l'employeur, il n'est pas établi que c'est en raison même de sa confession musulmane.

En effet, il n'est pas soutenu ou prouvé, que d'autres salariés de confession musulmane ont été sanctionnés du fait de leur appartenance à cette religion, ni que l'interdiction de manifester sa religion ne visait, en réalité, que les salariés de cette confession, ni enfin que ces mêmes salariés auraient été traités différemment des autres dans leur emploi ou leur travail à capacité professionnelle égale du fait de leur confession.

Il découle de ces éléments que ce n'est pas la foi musulmane qui a motivé le licenciement de Mme Y... mais la seule manifestation de cette foi. Mme Y... n'a donc pas été discriminée en raison de sa foi mais elle a subi une atteinte à sa liberté de manifester cette foi.

Cet élément est fondamental pour la clarté du débat en raison des conséquences différentes attachées à la discrimination et à l'atteinte aux libertés individuelles.

La liberté qui se trouve au centre du débat est la liberté religieuse ou, plus précisément, la liberté de manifester sa religion.

* * *

La cour d'appel de Paris, dans l'arrêt attaqué, a considéré que « *Baby Loup peut être qualifiée d'entreprise de conviction en mesure d'exiger la neutralité de ses employés* ». Cette qualité autorisait l'association d'imposer à son personnel une neutralité confessionnelle. La cour d'appel en a conclu que la liberté de conscience de ce personnel ne pouvait faire obstacle au respect des principes de laïcité et de neutralité qui s'appliquaient dans l'entreprise.

La qualification d'entreprise de conviction est fortement contestée par Mme Y... dans le premier moyen du pourvoi. En effet, selon elle, Baby Loup n'est pas une entreprise de tendance ou de conviction car son objet statutaire n'exprime aucune adhésion à une doctrine philosophique ou religieuse (première branche), que la nécessité de protéger la liberté de conscience des enfants et la pluralité religieuse des femmes accueillies ne sont pas constitutivement liées à une entreprise de conviction (deuxième et troisième branches), que la neutralité n'impose au salarié l'adhésion à aucun choix philosophique (quatrième branche) ; que la laïcité est un principe constitutionnel d'organisation de l'Etat qui ne peut fonder une éthique philosophique dont un employeur pourrait se prévaloir pour imposer la neutralité à ses salariés (cinquième branche et

sixième branches), que la création d'un nouveau type d'entreprise de conviction ne peut résulter que de la loi et non du juge (septième branche).

Au vu de la motivation de la cour d'appel et de l'énoncé du premier moyen de cassation, il convient de s'interroger sur la situation de Baby Loup au regard du concept d'entreprise de conviction.

2 – Entreprise de tendance – entreprise de conviction

Lorsque la cour d'appel qualifie Baby Loup d'entreprise de conviction, elle se réfère expressément à la jurisprudence de la Cour européenne des droits de l'Homme et au droit de l'Union. Cependant, aux termes « entreprise de conviction », la doctrine française préfère les termes « entreprise de tendance ».

A – L'entreprise de tendance dans la jurisprudence française

Traditionnellement, la doctrine française n'emploie pas la notion d'entreprise de conviction mais utilise plutôt les termes « entreprise de tendance »[15]. Cette notion est un emprunt au droit allemand et au droit italien.

Le droit allemand reconnaît en effet l'existence d'une «Tendenzbetrieb», «*lorsque l'organisation et la manière de travailler sont orientées vers l'un des but définis au § 118 BetrVG et que ce caractère n'est pas accessoire pour l'entreprise*». Ces buts sont politiques, confessionnels, éducatifs, scientifiques, artistiques, de cohésion, ou de charité.

La France ne reconnaît pas légalement cette catégorie d'entreprise.

Cependant, dans les années 1990, il a été admis que dans certaines entreprises, en général, des associations, des syndicats, des partis politiques, des églises, des groupements à caractère religieux dans lesquels une idéologie, une morale, une philosophie ou une politique est expressément prônée, l'employeur peut exiger de ses salariés une certaine communauté de pensée ou l'adhésion à certaines valeurs défendues par l'entreprise. Dans ces entreprises, il est admis que la liberté religieuse ou d'opinion du salarié puisse être moins grande que dans les autres entreprises. Le salarié d'une telle entreprise ne peut prôner une philosophie, avoir un comportement ou des mœurs en contradiction flagrante avec les valeurs proclamées par l'entreprise.
En l'absence de consécration légale, la Cour de cassation s'est trouvée confrontée à certaines problématiques qui l'ont conduit à prendre en compte la spécificité des entreprises de tendance.

Dans une première affaire, s'agissant d'une salariée d'un établissement d'enseignement catholique qui avait été licenciée pour s'être remariée après un divorce, l'Assemblée plénière de la Cour[16] a jugé que les convictions religieuses de la salariée avaient été prises en

[15] Il semble que les termes « entreprise de tendance » sont apparus pour la première fois dans la note du Doyen Waquet « Loyauté du salarié dans les entreprises de tendance », précitée.

[16] Ass. Plen. 19 mai 1978, précité

considération et incorporées volontairement dans le contrat de travail et en étaient devenues une partie essentielle et déterminante. Il s'agissait donc, dans cet arrêt, d'une application stricte du principe du consensualisme contractuel découlant de l'article 1134 du code civil.

Cet arrêt a été rendu sur avis contraire du Premier avocat général Schmelck qui avait considéré que « *le simple fait que l'employeur soit un établissement catholique attaché à la règle canonique de l'indissolubilité de l'union conjugale est insuffisant pour lui permettre d'enfreindre le principe d'ordre public de la liberté du mariage en licenciant son employé pour le motif qu'il s'est remarié dès lors qu'il n'est pas établi que le second mariage avait réellement compromis les buts éducatifs propres à l'établissement* ».

Il convient de remarquer que le Premier avocat général Schmelck admettait que le licenciement aurait pu être justifié si le remariage avait eu pour effet de compromettre le but éducatif poursuivi par l'employeur. Dans ce contexte, la liberté du salarié n'était donc pas totale.

La « contractualisation » de la communion de pensée entre l'employeur et le salarié a été ensuite plus ou moins abandonnée. En effet, la chambre sociale a jugé qu'un salarié peut être licencié en raison de son comportement personnel à condition que celui-ci ait créé un trouble caractérisé au sein de l'entreprise, compte tenu de la finalité de celle-ci et de la nature des fonctions exercées par le salarié[17].

La référence à la finalité de l'entreprise signifie que l'appréciation du comportement du salarié rendu public sera différente d'une entreprise à l'autre. Dans l'affaire ayant donné lieu à l'arrêt du 17 avril 1991, il s'agissait du licenciement d'un sacristain employé par une association catholique qui avait eu connaissance de son homosexualité. La révélation de l'orientation sexuelle devait donc s'apprécier différemment selon que l'employeur était une église ou une entreprise commerciale ou de service.

La notion d'entreprise de tendance, dont les termes n'ont jamais été consacrés par la jurisprudence française, ne traduit qu'un équilibre entre la finalité de l'entreprise, le trouble causé par le comportement du salarié et la nature des fonctions de ce dernier. L'employeur pourra être d'autant plus inflexible envers un salarié et porter une atteinte mesurée à l'une de ses libertés individuelles si le comportement de ce salarié, compte tenu des fonctions qu'il exerce, est contraire à la finalité de l'entreprise et cause un trouble caractérisé au sein de celle-ci.

Plus la finalité de l'entreprise se réfère à une religion, une philosophie ou une conviction, plus le salarié devra avoir un comportement dans l'entreprise en accord avec cette finalité.

La notion d'entreprise de tendance a, en revanche, été consacrée dans le droit de l'Union et dans le droit européen des droits de l'Homme.

17 Soc. 17 avril 1991, Bull n/ 201.

B – Les entreprises de conviction en droit de l'Union

La directive 2000/78[18] a pour objet, selon les termes de son article premier, « *d'établir un cadre général pour lutter contre la discrimination fondée sur la religion ou les convictions, le handicap, l'âge ou l'orientation sexuelle, en ce qui concerne l'emploi et le travail, en vue de mettre en œuvre, dans les États membres, le principe de l'égalité de traitement* ».

Tandis que cette directive définit, à son article 2, le concept de discrimination, l'article 4, paragraphe 2, consacre la notion d'entreprise de conviction dans les termes suivants :

« *2. Les États membres peuvent maintenir dans leur législation nationale en vigueur à la date d'adoption de la présente directive ou prévoir dans une législation future reprenant des pratiques nationales existant à la date d'adoption de la présente directive des dispositions en vertu desquelles, dans le cas des activités professionnelles d'églises et d'autres organisations publiques ou privées dont l'éthique est fondée sur la religion ou les convictions, une différence de traitement fondée sur la religion ou les convictions d'une personne ne constitue pas une discrimination lorsque, par la nature de ces activités ou par le contexte dans lequel elles sont exercées, la religion ou les convictions constituent une exigence professionnelle essentielle, légitime et justifiée eu égard à l'éthique de l'organisation. Cette différence de traitement doit s'exercer dans le respect des dispositions et principes constitutionnels des États membres, ainsi que des principes généraux du droit communautaire, et ne saurait justifier une discrimination fondée sur un autre motif.*

Pourvu que ses dispositions soient par ailleurs respectées, la présente directive est donc sans préjudice du droit des églises et des autres organisations publiques ou privées dont l'éthique est fondée sur la religion ou les convictions, agissant en conformité avec les dispositions constitutionnelles et législatives nationales, de requérir des personnes travaillant pour elles une attitude de bonne foi et de loyauté envers l'éthique de l'organisation. »

Les dispositions de l'article 4, paragraphe 2, se lisent à la lumière du considérant 24 de la directive qui précise :

« *L'Union européenne a reconnu explicitement dans sa déclaration n/ 11 relative au statut des Églises et des organisations non confessionnelles, annexée à l'acte final du traité d'Amsterdam, qu'elle respecte et ne préjuge pas le statut dont bénéficient, en vertu du droit national, les Églises et les associations ou communautés religieuses dans les États membres et qu'elle respecte également le statut des organisations philosophiques et non confessionnelles. Dans cette perspective, les États membres peuvent maintenir ou prévoir des dispositions spécifiques sur les exigences professionnelles essentielles, légitimes et justifiées susceptibles d'être requises pour y exercer une activité professionnelle.* »

[18] Directive 2000/78/CE du Conseil, du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail.

Cette disposition appelle les observations suivantes :

Tout d'abord, l'entreprise de conviction est une église ou une organisation publique ou privée dont l'éthique est fondée sur la religion ou les convictions.

Les notions de « conviction » et de « religion » ne sont pas définies par la directive. Elles ne sont donc pas ce qu'on appelle des notions de droit communautaire ou de droit de l'Union et leur définition ne doit pas nécessairement être identique dans tous les Etats membres. Ces derniers disposent, par conséquent, d'une marge de manœuvre assez importante pour leur mise en œuvre et leur interprétation. Ainsi, les Pays-Bas utilisent le terme « philosophie de vie » (levensovertuiging) alors que l'Allemagne se réfère au terme de « foi ».

Dans ces entreprises, des différences de traitement fondées sur la religion ou les convictions d'un salarié peuvent ne pas constituer une discrimination sous réserve que soient remplies certaines conditions :

- il faut que la religion ou les convictions constituent une exigence professionnelle essentielle, légitime et justifiée par la nature des activités de l'entreprise ou le contexte dans lequel elles sont exercées ;

- la différence de traitement ne peut pas être fondée sur un autre motif que la religion ou les convictions ;

- les Etats membres doivent avoir prévu ou prévoir cette différence de traitement justifiée dans une législation adoptée antérieurement à la directive ou postérieurement à celle-ci, sous réserve qu'elle entérine une pratique nationale préexistante.

L'article 4, paragraphe 2, deuxième alinéa, précise que si ces conditions sont remplies, la directive n'interdit pas aux églises et aux organisations publiques ou privées dont l'éthique est fondée sur la religion et les convictions de requérir des personnes travaillant pour elles une attitude de bonne foi et de loyauté envers l'éthique de l'organisation.

La directive précise que, dans tous les cas, cette différence de traitement fondée sur la religion ou les convictions doit se faire dans le respect des dispositions constitutionnelles et législatives nationales.

Il ressort de l'analyse de cette disposition que le droit de l'Union ne s'oppose pas, en principe, à ce qu'une différence de traitement fondée sur la religion ou les convictions ne constitue pas, dans certaines entreprises, une discrimination prohibée. Cependant, la directive reste très prudente puisqu'elle entoure cette différence de traitement justifiée de nombreuses précautions : habilitation législative nationale, respect des dispositions constitutionnelles de chaque Etat membre, etc.

Il importe de noter que, contrairement à la position de la doctrine française, pour qui l'entreprise de tendance ou de conviction est celle dont l'objet essentiel de l'activité est la

défense ou la promotion d'une doctrine ou d'une éthique (mémoire ampliatif, p 14, *in fine*), la directive se borne à préciser que les églises ou les organisations publiques ou privées ont une éthique fondée sur une religion ou des convictions. Elle n'exige pas que le but de ces églises ou organisations soit la défense ou la promotion de cette religion ou de ces convictions.

S'agissant de l'habilitation législative, il a pu être écrit que l'article 4, paragraphe 2, institue une clause de standstill en ce que les Etats membres n'ayant pas déjà dans leur réglementation nationale de dispositions « légalisant » les entreprises de conviction ne seraient plus autorisées à adopter de telles législations. Monsieur le conseiller rapporteur rappelle la controverse doctrinale sur le sujet (Rapport, p. 34 et 35).

La qualification de clause de standstill parait excessive dans la mesure où la directive elle- même autorise les Etats membres à légiférer sur cette question après la date d'adoption de la directive. La difficulté ne réside pas dans le principe de l'adoption d'une législation future mais plutôt dans la définition de ce que recouvre la notion de *« législation future reprenant des pratiques nationales existant à la date d'adoption de la directive* ». Cette notion de « *pratiques nationales »* recouvre-t-elle les solutions jurisprudentielles adoptées par les juridictions nationales voire par la Cour européenne des droits de l'Homme ? Il est difficile de trancher cette question dans la mesure où cette notion n'a pas fait l'objet d'une interprétation par la Cour de justice.

En tout état de cause, la France, à l'inverse d'autres Etats, a préféré ne pas transposer l'exception visée à l'article 4, paragraphe 2 dans sa législation. A ce jour, aucune loi, qu'elle soit antérieure ou postérieure à la date d'adoption de la directive, ne régit spécifiquement les entreprises de conviction.

De tout cela, il ressort que les entreprises de conviction ne sont pas, en principe, contraires au droit de l'Union et qu'il appartient aux Etats membres de les incorporer ou non dans leur corpus législatif, sous réserve de satisfaire aux conditions de la directive.

C – Les entreprises de conviction dans la jurisprudence de la Cour européenne des droits de l'Homme.

En l'absence d'une jurisprudence claire et établie en droit interne, la cour d'appel de Paris s'est fondée sur la jurisprudence de la Cour européenne des droits de l'Homme pour estimer que Baby Loup pouvait constituer une entreprise de conviction.

L'arrêt Campbell et Consans / Royaume-Uni[19] consacre le terme conviction de la manière suivante : « *les convictions représentent un système d'interprétation constitué des convictions personnelles quant à la structure de base, aux modalités et au fonctionnement du monde ; il ne s'agit pas d'un système scientifique. Dans la mesure où les convictions revendiquent leur complétude, elles incluent leur perception de l'humanité, la vision de la vie et la morale* ».

Par la suite, la Cour européenne des droits de l'Homme a reconnu sans toutefois la dénommer

[19] 25 février 1982, Requête n/ 7511/76 ; 7743/76

ainsi, l'entreprise de conviction, pour des entreprises dont le caractère est religieux ou politique. La Cour considère que ces entreprises de conviction disposent d'une autonomie, comme sujets de droit bénéficiant, à ce titre, du droit au respect de leurs convictions garanti par l'article 9 de la Convention[20]. Une telle reconnaissance permet à l'employeur « *dont l'éthique est fondée sur la religion ou une croyance philosophique (d') imposer à ses employés des obligations de loyauté spécifiques* »[21].

Aussi, la Cour pourra-t-elle juger qu'un licenciement est légitime lorsque le salarié aura eu un comportement incompatible avec l'éthique défendue par l'entreprise.

Néanmoins, la Cour affirme la nécessité d'une certaine proportionnalité dans les restrictions apportées aux droits fondamentaux des salariés de l'entreprise de conviction, « *pour ménager un équilibre entre plusieurs intérêts privés* »[22].

Ainsi, elle a admis le licenciement du directeur des relations publiques pour l'Europe de l'église mormone, pour des faits d'adultère[23]. De la même manière, elle a considéré que celui d'une salariée d'un jardin d'enfants tenu par une organisation protestante, pour des faits de « militantisme déplacé » était justifié[24].

La Cour n'en demeure pas moins vigilante quant à l'adéquation entre la mesure de licenciement et la nécessité de préserver une certaine éthique dans l'entreprise de conviction. Elle a, en conséquence, jugé contraire à l'article 8 de la Convention, relatif au respect de la vie privée et familiale, le licenciement de l'organiste d'une paroisse catholique, pour des faits d'adultère[25].

Dans l'arrêt « Lautsi et autres / Italie »[26], la Cour dépasse la protection de la seule conviction religieuse ou politique, et y ajoute la « conviction laïque » et donc la dimension philosophique qu'elle implique. De manière plus large, c'est une des premières fois que le juge européen des droits de l'Homme étend la notion de convictions protégées, aux vues philosophiques et éthiques autres que religieuses ou politiques[27].

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20 CEDH, Association les témoins de Jehovah c. France, 30/09/2011.

21 CEDH, « Schüth / Allemagne », 23 septembre 2010, Requête n/ 1620/03 et « Associated Society of Locomotive Engineers & Firemen c. R.U., 27/02/2007, Requête n/ 11002/05 (syndicat)

22 Le champ d'application de la laïcité : la laïcité doit-elle s'arrêter à la porte de crèches ? Bernard Aldigé, avocat général près la Cour de cassation, recueil Dalloz 2013, p. 956.

23 CEDH, Obst / Allemagne, 23 septembre 2010, Requête n/ 00425/03

24 CEDH, Siebenhaar / Allemagne, 3 février 2011, Requête n/ 18136/02

25 CEDH, Schüth / Allemagne, précité

26 CEDH, 18 mai 2011, Requête n/ 30814/06

27 Voir aussi CEDH, Leela Förderkreis e ;V. ea. / Allemagne, 6 novembre 2008, Requête n/ 58911/00

Force est néanmoins de constater que, dans l'arrêt « Lausti et autres / Italie », bien que ce principe soit clairement affirmé, il ne s'appliquait pas à une entreprise mais à la conviction individuelle des requérants.

Dès lors, si la Cour européenne des droits de l'Homme n'a pas eu, jusqu'à présent, l'occasion de reconnaître l'existence, au sens strict, d'une « entreprise de conviction laïque », il convient de se demander si cette jurisprudence autorise les Etats parties à s'engager eux-mêmes dans cette voie.

L'affaire Baby Loup pourrait-elle constituer une opportunité de poser la première pierre d'un édifice jurisprudentiel ?

3 - Baby Loup : une entreprise de conviction laïque ?

Dans l'arrêt attaqué, la Cour d'appel de Paris a considéré que la protection de la liberté de conscience et de religion des enfants et le respect de la pluralité des options religieuses des femmes, dans un environnement multiconfessionnel, justifie l'imposition du principe de neutralité, « *pour transcender le multiculturalisme des personnes auxquelles elle (la crèche) s'adresse.* »

Dans cette affaire, le problème soulevé est celui de la légitimité de l'exigence de neutralité imposée au sein d'une structure privée, car ce principe vient heurter la liberté d'expression religieuse des salarié(e)s.

Cependant, l'ajout des termes « principe de laïcité » dans le règlement intérieur de 2003 a eu pour effet de faire resurgir le débat social sur la laïcité et le port du voile et a certainement conduit la cour d'appel de Paris à considérer que Baby Loup est une entreprise de conviction, sous-entendu, de conviction laïque.

<u>Nous ne partageons pas cette approche.</u>

En effet, dans une société laïque, la neutralité s'entend du principe applicable au sein de la seule sphère soumise aux autorités publiques.

Le concept de laïcité s'entend de la laïcité politique ou de la laïcité philosophique.

<u>La laïcité politique</u>

La loi de 1905, sans référence explicite à la laïcité, fixe son cadre par deux grands principes : la liberté de conscience et le principe de séparation des Eglises et de l'Etat[28].

Le principe de laïcité fait de l'Etat le garant de la protection de la liberté de conscience des

[28] Le Conseil constitutionnel a fait évoluer ce principe « *Le principe de laïcité figure au nombre des droits et libertés que la Constitution garantit. Il en résulte la neutralité de l'État. Il en résulte également que la République ne reconnaît aucun culte. Le principe de laïcité impose notamment le respect de toutes les croyances, l'égalité de tous les citoyens devant la loi sans distinction de religion et que la République garantisse le libre exercice des cultes. Il implique que celle-ci ne salarie aucun culte. »* (2012-297 QPC, 21 février 2013).

individus et du pluralisme des convictions. Une attention toute particulière s'impose à l'Etat dans le domaine de l'éducation des enfants.
En 1905, de manière contingente, il s'agissait de prévenir l'endoctrinement des élèves des écoles publiques par l'Eglise catholique.

La liberté de conscience, qui englobe la liberté de religion, entendue comme liberté positive et négative, la liberté de croire et la liberté de ne pas croire, ainsi que la liberté corrélative de changer de religion, désigne le choix fait par un individu des valeurs ou des principes qui vont conduire son existence.

La République laïque est indifférente aux convictions : elle ne conçoit que des citoyens égaux en droit. Elle « connaît » les religions, mais ne les « reconnaît » pas. En effet, l'Etat doit assurer le pluralisme des convictions au sein de la société civile, en gardant toute impartialité à leur égard. De cette laïcité politique découle, pour la sphère soumise aux autorités publiques, un principe de neutralité exclusive, c'est-à-dire une neutralité excluant tout signe ostentatoire religieux.

C'est en considération de ces principes fondamentaux que par son arrêt du 19 mars 2013[29], la chambre sociale a étendu le principe de laïcité aux entreprises privées qui accomplissent des missions de service public.

Dans notre espèce, la crèche gérée par l'association Baby Loup est une entreprise privée non soumise à l'autorité publique. Le principe dégagé par l'arrêt précité ne peut donc trouver ici à s'appliquer. Dans ce sens, l'avis rendu par le Conseil d'Etat suite à l'affaire Baby Loup ferme la porte à la possibilité de qualifier l'activité de la crèche de mission de service public.

Comme l'exprimait un commentateur à l'occasion de l'arrêt « Baby Loup » rendu par la cour d'appel de Versailles[30], « *[…] si la laïcité est un plat commode, on ne peut la mettre à toutes les sauces. La laïcité est une règle d'organisation de l'Etat et des rapports avec la (les) religions(s).*

En faire une référence normative destinée à trancher des conflits entre un employeur privé et un salarié n'a strictement aucun sens. Importer la laïcité dans l'entreprise, c'est la travestir. On prétend en effet en inférer, dans « l'espace social » dont l'entreprise est une des composantes, une obligation de neutralité alors qu'elle y postule au contraire la liberté pour chacun d'exprimer librement ses convictions religieuses. Au- delà de la sphère de l'action publique, la laïcité défend et soutient la liberté religieuse; elle ne la condamne pas »[31].

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29 Soc. 19 mars 2013, Mme Abibouraguimane / CPAM de Seine-Saint-Denis, DRASSIF, préfet de la région Ile-de- France Bull V. n/ 76.

30 CA Versailles, 27 octobre 2011.

31 P Adam, Semaine sociale Lamy, 28 novembre 2011, 1515

La laïcité philosophique

L'objet de l'association Baby Loup est-il la défense et la promotion de la laïcité entendue comme pensée philosophique ?

Le trouble entourant le concept de laïcité provient de son acception comme pensée purement philosophique. Une telle approche est revendiquée par une communauté philosophique, non confessionnelle, d'agnostiques et d'athées, qui adhère à une conception de vie, une morale et une éthique débarrassées de toutes références religieuses. Ce mouvement de pensée fondé sur une éthique dénommée - et de façon malheureuse - « laïque », s'oppose aux autres convictions et se manifeste par l'absence de signe religieux. A ce titre, l'éthique « laïque » représente une conviction qui, en tant que telle, doit être traitée à égalité avec toute autre conviction, dont les convictions religieuses, et bénéficier des mêmes protections étatiques.

La laïcité comprise comme conviction philosophique s'exprime au sein de la sphère civile par la neutralité. La neutralité est l'expression même dans ce cas de la conviction.

En doctrine, et ainsi que le rappelle Monsieur le conseiller rapporteur, nombre d'auteurs commentant l'affaire « Baby-Loup », partisans de la reconnaissance d'une entreprise de conviction ou de tendance, estiment que cette qualification étant reconnue aux entreprises dont l'objectif présente un caractère religieux, il serait inéquitable de ne pas attribuer cette même qualité à des entreprises ayant pour objectif la laïcité ou présentant à tout le moins un caractère areligieux.

Dans ce sens il ne fait aucun doute que des associations militant en faveur d'une laïcité politique dont l'objet est de promouvoir la séparation totale entre Etat et religions, pourraient être qualifiées d'entreprises de tendance ou de conviction. La laïcité politique prônée par ces associations ou autres groupements correspond sans doute à ce que la Cour européenne qualifie de « laïcité de combat », une attitude antireligieuse, voire irreligieuse, et non neutre[32].

Point de hiatus avec la jurisprudence de la Cour européenne qui, dès 1993, énonce, à titre de principe général, que « *la liberté de pensée, de conscience et de religion (…) est aussi un bien précieux pour les athées, les agnostiques, les sceptiques ou les indifférents. Il y va du pluralisme - chèrement conquis au cours des siècles - consubstantiel à pareille société* »[33].

A cet égard, la Cour européenne a été amenée plus tard à se prononcer sur la protection juridique de la laïcité dans l'arrêt « Lautsi et autres / Italie », précité.

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[32] CEDH, Dahlab / Suisse, précité.

[33] CEDH, Kokkinakis/Grèce, 25 mai 1993, §31.

De prime abord, il pourrait paraître étonnant que, dans cette affaire, la Cour s'exprime sur la laïcité en tant que conviction philosophique alors que, en l'espèce, la laïcité devait être analysée dans le cadre de l'éducation publique.

En effet, les requérants, des parents dont les enfants fréquentaient une école publique, reprochaient à celle-ci, et donc, par extension, à l'Etat italien, d'avoir, par la présence de crucifix dans les salles de classe, enfreint leur droit à éduquer leurs enfants selon une éthique laïque et donc violé leur droit à la liberté de pensée, de conscience et de religion.

Les requérants reprochaient à l'Etat son absence de neutralité et d'impartialité au regard des convictions dans l'éducation publique et, par voie de conséquence, la violation de leur droit d'éduquer leurs enfants selon leurs convictions personnelles laïques.

Ces manquements de l'Etat semblaient d'autant plus graves que la Constitution italienne, adoptée en 1948 établit à son article 7 que l'État et l'Église catholique sont, chacun dans son ordre, indépendant et souverain et que leurs rapports sont réglementés par les pactes du Latran. En outre, la Cour constitutionnelle italienne a induit des articles 7, 8, 19 et 20 de la charte fondamentale un principe de laïcité reconnu comme principe suprême de l'ordre constitutionnel italien[34]. Des articles 7 et 8, elle a retenu l'exigence de neutralité de l'État vis-à-vis des religions et la distinction entre sphères civile et religieuse[35]. Selon la Cour constitutionnelle, la laïcité implique, non pas l'indifférence de l'Etat vis-à-vis des religions, mais la garantie par ce dernier de la sauvegarde de la liberté de religion, dans un régime de pluralisme confessionnel et culturel[36].

Dans cette affaire, la Cour européenne des droits de l'Homme se trouvait dans une posture délicate pour juger si l'Etat italien avait ou non rempli son obligation positive de garantir, en restant neutre et impartial, l'exercice des diverses religions, cultes et croyances.

Cette difficulté était réelle puisque la Cour de cassation et le Conseil d'Etat italiens avaient adopté des points de vue contraires sur la légitimité de la présence de crucifix dans les écoles publiques, la Cour de cassation condamnant cette pratique.

Or, la Cour de Strasbourg elle-même a rendu, dans cette espèce, deux arrêts en sens contraire, le second, émanant de la grande chambre, autorisant l'Etat italien à maintenir les crucifix dans les écoles publiques.

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[34] Corte costituzionale, Décision n° 203 du 11-12 avril 1989, *Quaderni di diritto e politica ecclesiastica*, 1, 1990, p. 193-205.

[35] Néanmoins, la Cour constitutionnelle a reconnu pour la première fois la laïcité comme principe suprême lorsqu'elle l'a déclarée compatible avec l'enseignement *de la religion catholique* dans les écoles publiques. Toutefois, pour juger cet enseignement conforme à la laïcité, la Cour a dû recourir à une fiction : imaginer que l'enseignement strictement confessionnel garanti par le Concordat de 1984 pouvait être considéré comme un enseignement du fait religieux en général, exprimant comme tel l'attachement au pluralisme de l'État laïque et sa « non indifférence » aux exigences sociales.

[36] Corte costituzionale Décision n/.203, précitée.

Dans cet arrêt, la Cour, plutôt que de parler de « neutralité de l'Etat », insiste davantage sur le rôle de l'Etat de contribuer à assurer l'ordre public, la paix religieuse et, il convient de le souligner, la tolérance, dans une société démocratique, notamment entre groupes opposés.

La Cour, par un tour de force sémantique, réussit à extraire de la dimension religieuse du crucifix une valeur de tolérance vis-à-vis des autres religions et convictions. Le crucifix est reconstruit en symbole de laïcité, symbole passif autorisant l'expression des autres croyances ou non croyances. Selon l'opinion de deux juges, la tolérance religieuse de l'Etat italien constitue « *[…] un facteur crucial de « neutralisation » de la portée symbolique de la présence du crucifix dans les écoles publiques.* »[37] Ainsi, l'Etat italien satisfait-il à son obligation d'impartialité et de neutralité au regard des convictions religieuses et philosophiques. La Cour, en conformité avec sa jurisprudence précédente[38], peut donc conclure à l'absence de violation de l'article 2 du Protocole n/1[39] analysé conjointement avec l'article 9 de la Convention.

Ce n'est donc plus l'Etat qui doit être neutre mais le signe religieux ! Il s'agit d'une dénaturation du principe de laïcité politique.

Néanmoins, la Cour européenne des droits de l'Homme, de façon prudente, ne tire pas toutes les conséquences juridiques de son analyse. Elle ne tranche pas le conflit entre, d'un côté, le droit des parents d'assurer l'éducation de leurs enfants selon leurs convictions, et, de l'autre, l'intérêt de l'Etat à exposer des symboles religieux manifestant une religion ou une conviction. En effet, elle conclut à la non violation de l'article 2 du Protocole n/1 en ayant recours à la technique « de la marge d'appréciation ». Elle laisse ainsi le choix de la présence de crucifix dans les salles de classe des écoles publiques à l'appréciation de l'Etat italien.

Cet arrêt illustre la réticence de la Cour européenne, en présence de schémas politiques d'organisation étatique variés, à s'immiscer dans le mode de fonctionnement interne des relations entre les Etats et leurs Eglises[40].

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[37] Arrêt Lautsi / Italie, opinion du juge Rozakis, à laquelle se rallie la juge Vajic.

[38] La CEDH a jugé que la neutralité dans les écoles publiques découle du caractère obligatoire de celles-ci et, dès lors qu'elles « *doivent pouvoir être fréquentées par les adhérents de toutes les confessions, sans qu'ils aient à souffrir d'aucune façon dans leur liberté de conscience ou de croyance* » (CEDH, Dahlab / Suisse, précité, p.7)

[39] Article 2 Protocole 1 CESDH, relatif au droit à l'instruction : « Nul ne peut se voir refuser le droit à l'instruction.

L'Etat dans l'exercice des fonctions qu'il assumera dans le domaine de l'éducation et de l'enseignement, respectera le droit des parents d'assurer cette éducation et cet enseignement conformément à leurs convictions religieuses et philosophiques ».

[40] « (…) Enfin, lorsque se trouvent en jeu des questions sur les rapports entre l'Etat et les religions, sur lesquelles de profondes divergences peuvent raisonnablement exister dans une société démocratique, il y a lieu d'accorder une importance particulière au rôle du décideur national (…)» (Leyla Ôahin c. Turquie précité, § 109

En revanche, laisser une marge d'appréciation importante aux Etats dans la sphère soumise à leur autorité nécessite le renforcement de la protection du pluralisme des convictions au sein de la sphère civile. Aussi n'est-il pas surprenant que la Cour reconnaisse explicitement, et pour la première fois, le droit des individus de se prévaloir de la laïcité en tant que conviction. Elle affirme « *que les partisans de la laïcité sont en mesure de se prévaloir de vues atteignant le degré de force, de sérieux, de cohérence et d'importance requis pour qu'il s'agisse de convictions au sens des articles 9 de la Convention et 2 du Protocole n/ 1* ». Elle va jusqu'à préciser qu' « *il faut voir là des convictions philosophiques au sens de la seconde phrase de l'article 2 du Protocole n/1, dès lors qu'elles méritent respect dans une société démocratique, ne sont pas incompatibles avec la dignité de la personne et ne vont pas à l'encontre du droit fondamental de l'enfant à l'instruction* ».

Cette construction juridique de la notion de « conviction philosophique laïque » et donc, de droit à la liberté d'expression de cette conviction par ses partisans, va s'imposer au nombre des convictions à prendre en considération par l'Etat dans le cadre de son obligation positive d'assurer le pluralisme dans la société civile.

Mutatis mutandis, l'obligation positive de l'Etat d'assurer le pluralisme des convictions ne devrait-elle pas conférer une protection juridique aux partisans de la laïcité philosophique égale à celle dont peuvent se prévaloir les associations religieuses ?

En effet, selon la Cour, il n'est pas de démocratie sans pluralisme[41]. Elle interprète l'article 9 à la lumière de l'article 11 de la Convention pour en déduire une obligation positive des Etats de protéger le pluralisme des convictions dans une démocratie. En outre, elle consacre le principe d'autonomie des communautés religieuses, indispensable au pluralisme dans une société démocratique et au cœur même de la protection offerte par l'article 9.[42]

Ainsi, la Cour, pour protéger la liberté d'expression de mouvements parareligieux, interprète la liberté de pensée, de conscience et de religion comme s'appliquant à des vues atteignant un degré suffisant de force, de sérieux, de cohérence et d'importance[43].

En se fondant sur cette jurisprudence qui admet la notion de « conviction philosophique laïque » et sur la consécration, dans de nombreux Etats de la notion d'entreprise de conviction, l'Assemblée plénière de cette cour pourrait-elle consacrer la notion d' « entreprise de conviction laïque » à l'occasion de l'affaire qui lui est aujourd'hui soumise ?

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41 CEDH, Refah Partisi et autres/ Turquie, §88. En l'espèce, la Cour souligne le rôle essentiel des partis politiques pour le maintien du pluralisme et le bon fonctionnement de la démocratie.

42 CEDH, Obst/Allemagne, précité §44; Siebenhaar/Allemagne, précité, §41.

43 Bayatyan / Arménie [GC], Requête n/ 23459/03, § 110, CEDH 2011 ; CEDH, 6 novembre 2008, Leela Förderkreis e.V. et autres / Allemagne, Requête n/ 58911/00, § 80, et CEDH, 7 décembre 2010, Jakóbski / Pologne, Requête n/ 18429/06, § 44.

En l'espèce, force est de constater que même si Baby Loup a recours à la neutralité pour tendre à la réalisation de ses objectifs, cette association n'est pas une «entreprise de combat» militant en faveur de la laïcité. Son objet est plus social que politique.

Les statuts de Baby Loup disposent que l'objet poursuivi par cette association non lucrative, d'intérêt général, est d'offrir un accueil à la petite enfance et de s'engager dans une action pour l'insertion sociale et professionnelle des femmes, au sein d'un quartier réputé sensible.

L'implantation de la crèche par l'association répond au besoin de certains parents, habitants du quartier, d'éduquer leurs jeunes enfants dans un milieu de neutralité politique et religieuse.

Pour atteindre ses objectifs, l'association s'est fixé une politique d'égalité des chances propre à transcender les différentes références culturelles ou politiques et les conditions sociales présentes au sein du quartier. Cette politique se traduit par l'importance de la neutralité politique et confessionnelle du personnel.

Le financement de l'association par des fonds publics, qui représentent entre 80% et 97% de son budget de fonctionnement, consacre le caractère d'intérêt général de ses missions.

Objectifs et moyens de l'association, en particulier l'exigence de la neutralité du personnel employé, transparaissent naturellement dans le règlement intérieur de la crèche. Cette neutralité est entendue comme l'interdiction du port des signes ostentatoires d'appartenance religieuse ou communautaire.
Chaque salarié s'engage dans son contrat de travail à une obligation de discrétion et de respect du règlement intérieur.

Il serait erroné d'envisager la neutralité comme l'objectif poursuivi par l'association. Ce serait confondre but et moyens. L'objet de l'association, décrit dans les statuts, concerne l'insertion sociale d'une population défavorisée[44], en particulier des femmes et des jeunes enfants. A cette fin, l'association vise l'accès à l'autonomie sociale des femmes par la formation professionnelle, et l'éveil éducatif des enfants dans un climat serein, apolitique et areligieux. La mise en retrait de l'appartenance communautaire vise à traiter sur un pied d'égalité chacun des enfants, sans distinction de son origine ethnique, culturelle et sociale comme le prescrit le devoir de ne pas manifester de favoritisme envers certains enfants mentionné dans le règlement intérieur.

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[44] Le quartier Noé est une des ZUS les plus difficiles d'Ile-de-France avec un revenu médian annuel de 11.195 euros, un taux de chômage de 25%. La population étrangère extracommunautaire y est estimée à 35%, celle d'origine nord- africaine et sub-saharienne, de culture ou de confession musulmane y est très largement majoritaire, les moins de 25 ans représentent 52% des habitants.

Pour Baby Loup la neutralité des employées de la crèche, manifestée par l'absence de tout signe ostentatoire religieux, est propre également à favoriser le sentiment d'appartenance à une collectivité de travail.

Ce que prône la crèche c'est « le vivre ensemble » de ce quartier morcelé par le communautarisme

Tant les statuts de l'association, que le règlement intérieur et le mode de recrutement des employés de la crèche, indiquent que Baby Loup ne peut être assimilée à un mouvement militant pour la défense de la laïcité.

Seule la neutralité fait converger en apparence, et de façon trompeuse, la laïcité du service public étatique et la politique d'insertion sociale menée par l'association d'intérêt général Baby Loup.

C'est pourquoi nous considérons qu'elle ne peut pas être qualifiée d'entreprise de conviction laïque.

S'engager dans cette voie ne serait pas sans risque juridique :

A ce jour, la notion d'entreprise de tendance, pure création prétorienne, semble souffrir de contours flous. La terminologie trop vague de « caractère propre » ou de «finalité propre» utilisée par les juges pour qualifier cette catégorie d'entreprises contribue à l'insécurité juridique de la matière. Ceci est particulièrement regrettable puisque reconnaître la qualification d'entreprise de tendance signifie appliquer un régime juridique dérogatoire, moins protecteur des droits des salariés.

En droit allemand, la « Tendenzbetrieb » recouvre des entreprises à buts politiques, syndicaux, confessionnels, de charité, éducatifs, qui bénéficient d'un statut particulier. Leurs salariés sont tenus d'être en communion de pensées avec la finalité de l'entreprise, c'est-à-dire qu'ils sont, selon l'expression de « foi sûre »[45].

Toutefois l'existence dans le droit allemand d'une législation réglementant les «Tendenzbetriebe» s'explique par le fait que la Cour constitutionnelle a posé le principe selon lequel, s'agissant d'une liberté publique, il n'y a pas d'interdiction sans loi.

Envisager une telle transposition de cette notion dans notre Etat républicain pourrait s'avérer quelque peu hasardeux et surtout aller au-delà de l'office du juge. D'ailleurs n'est-il pas emblématique de relever, à cet égard, que le législateur français, au contraire du législateur allemand, n'a pas souhaité utiliser la possibilité qui lui était offerte à l'article 4, paragraphe 2, de la directive 2000/78 d'adopter une législation reprenant la jurisprudence nationale sur les entreprises de tendance (voir supra)?

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[45] Claire Morin, « Le salarié et la religion : les solutions de droit du travail », La Semaine juridique, Administrations et Collectivités territoriales n/ 12, 21 Mars 2005, 1145.

Si l'on admettait qu'une entreprise puisse légitimement se prévaloir d'une conviction laïque, la liberté religieuse des salariés serait très fortement restreinte et les juges ne pourraient pas contrôler le caractère justifié et proportionné de l'interdiction du port ostentatoire de tout signe religieux car c'est l'absence elle-même de tout signe religieux qui traduirait la conviction laïque de l'entreprise et, par conséquent, l'interdiction de manifester sa religion serait, par nature, justifiée et proportionnée.

Ce constat se trouve corroboré par la jurisprudence de la Cour européenne des droits de l'Homme.

La Cour européenne des droits de l'Homme, dans sa jurisprudence constante, juge que, dans le cadre de la liberté de religion et conviction « *[…] le devoir de neutralité et d'impartialité de l'Etat est incompatible avec un quelconque pouvoir d'appréciation de sa part quant à la légitimité des convictions religieuses ou à la manière dont elles sont exprimées*. »[46]

S'agissant d'associations religieuses, la Cour procède à la lecture de l'article 9, à la lumière de l'article 11 de la Convention, ce qui l'amène à conférer une autonomie auxdites associations et à condamner l'ingérence arbitraire des Etats dans leur vie associative[47]. Rappelons que cette disposition protège, en général, le droit des personnes de s'associer en vue de mener une action collective dans un domaine d'intérêt réciproque.

Selon cette jurisprudence européenne, le seul contrôle possible du juge porte sur la force du lien entre la manifestation de la conviction et cette conviction :

« *Pour être qualifié de « manifestation » au sens de l'article 9, l'acte en question doit être étroitement lié à la religion ou à la conviction. Des actes du culte ou de dévotion relevant de la pratique d'une religion ou d'une conviction sous une forme généralement reconnue en constitueraient un exemple. Toutefois, la manifestation d'une religion ou d'une conviction ne se limite pas aux actes de ce type : l'existence d'un lien suffisamment étroit et direct entre l'acte et la conviction qui en est à l'origine doit être établie au vu des circonstances de chaque cas d'espèce. En particulier, le requérant n'est aucunement tenu d'établir qu'il a agi conformément à un commandement de la religion en question*»[48].

Reconnaître la notion d'entreprise de conviction laïque au sein de la sphère civile présenterait

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46 CEDH, Eweida et autres c/ Royaume-Uni, précité.

47 « [*L*]*es communautés religieuses existant traditionnellement sous la forme de structures organisées, l'article 9 doit s'interpréter à la lumière de l'article 11 de la Convention, qui protège la vie associative contre toute ingérence injustifiée de l'Etat. Vu sous cet angle, le droit des fidèles à la liberté de religion, qui comprend le droit de manifester sa religion collectivement, suppose que les fidèles puissent s'associer librement, sans ingérence arbitraire de l'Etat. En effet, l'autonomie des communautés religieuses est indispensable au pluralisme dans une société démocratique et se trouve donc au cœur même de la protection offerte par l'article 9* » (Eglise métropolitaine de Bessarabie et autres c. Moldova, n/ 45701/99, Recueil 2001- XII, paragraphe 118.).

48 Cha'are Shalom Ve Tsedek / France [GC], Requête n/ 27417/95, §§ 73-74, CEDH 2000-VII, CEDH. Leyla Ôahin / Turquie, précité §§ 78 et 105, Bayatyan, précité, § 111, Skugar, décision précitée, et Pichon et Sajous, décision précitée).

par conséquent un risque non négligeable et incontrôlé de limitation forte de la liberté d'expression religieuse des salariés.

Au regard de la liberté d'association, si Baby Loup ne peut être qualifiée d'entreprise de conviction, peut-elle néanmoins imposer la neutralité à ses employées ? Cette exigence est-elle légitime, justifiée et proportionnelle au but recherché ?

4 - Baby Loup : une entreprise à la neutralité justifiée ?

Ce n'est pas l'appartenance à la religion musulmane de Mme Afif qui a posé difficulté au sein de la crèche, mais bien sa seule expression ostensible par le port du voile islamique.

C'est d'ailleurs la raison pour laquelle l'interdiction du port de signe ostentatoire religieux est limitée à la seule sphère de travail, qui plus est, en raison du contact avec des enfants en bas-âge. L'association, en vue de réaliser son objet social, n'a nul besoin de recruter ses salariés, ou même ses adhérents, en fonction de leurs convictions philosophiques ou religieuses.

Par contre, elle considère que dans l'intérêt des enfants et le respect du droit des parents de choisir l'éducation de leurs enfants, il est opportun, pour leur éducation, d'exiger une apparence de neutralité religieuse et politique à ses salariés.

Or, parallèlement, Mme Y... a toujours soutenu qu'en portant un foulard elle obéit à un précepte religieux et manifeste sa volonté de se conformer strictement aux obligations de la religion musulmane.

Dans l'arrêt Leyla Sahin / Turquie, précité, la Cour européenne des droits de l'Homme a considéré, à l'égard du foulard islamique que dans la mesure où une femme estime obéir *« à un précepte religieux et, par ce biais, manifeste sa volonté de se conformer strictement aux obligations de la religion musulmane, on peut considérer qu'il s'agit d'un acte motivé ou inspiré par une religion ou une conviction* ». Pour la Cour, ce raisonnement s'impose même « *sans se prononcer sur la question de savoir si cet acte, dans tous les cas, constitue l'accomplissement d'un devoir religieux* ». La Cour européenne adopte donc *« une conception personnelle ou subjective de la liberté de religion* ».

Point n'est donc besoin de s'interroger sur le sens du port du voile dans la religion musulmane, dès lors que, pour Madame Y..., il correspond à une expression de sa foi.

Or, Mme Y... travaille dans une crèche privée gérée par une association non soumise à l'autorité publique. Son employeur ne peut pas, par conséquent, se prévaloir de l'exercice d'une mission de service public pour imposer le respect de la neutralité religieuse à ses employés[49]. Il est donc indéniable que le fait de sanctionner Mme Y... pour avoir porté un voile islamique au sein de son

[49] Contrairement à la situation dans l'affaire ayant donné lieu à l'arrêt de la chambre sociale du 19 mars 2013, CPAM de Seine Saint-Denis, précité.

entreprise tombe sous l'empire de l'article 9 de la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales, qui protège, notamment, la liberté de manifester des convictions religieuses.

L'exigence de neutralité figurant au règlement intérieur en cause dans cette affaire s'analyse dès lors en une ingérence de l'employeur dans la liberté de conscience et de religion de la salariée.

Cette ingérence peut-elle être légalement justifiée ?

Il ressort de la jurisprudence de la Cour européenne des droits de l'Homme que l'Etat a une obligation positive en matière de liberté de conscience de l'ensemble des citoyens. Il doit permettre à chacun d'avoir la religion de son choix ou de n'en avoir aucune et d'exercer ou non librement sa religion.

A cet égard, et s'agissant plus précisément de la problématique qui nous est soumise, il y a lieu de rechercher, si et dans quelles conditions l'Etat peut prévoir que des employeurs privés sont autorisés à limiter la liberté religieuse de leurs salariés.

Tout d'abord, et ainsi qu'il a été exposé supra, l'article 9, paragraphe 2, de la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales précise que la liberté de manifester sa religion ou ses convictions ne peut faire l'objet d'autres restrictions que celles qui sont prévues par la loi.

Cette condition de « prévision législative », au sens de la jurisprudence de la Cour européenne des droits de l'Homme, est, remplie en raison des dispositions du code du travail qui encadrent les atteintes à la liberté de conviction et par le contrôle de l'application de ces dispositions, tant par l'administration que par le juge (cf. infra).

Ainsi, et si l'on s'en tient aux termes mêmes de l'article 9, paragraphe 2, il apparaît bien que la réglementation française prévoit que « l*a liberté de manifester sa religion ou ses convictions peut faire l'objet de restrictions prévues par la loi, et qui constituent des mesures nécessaires, dans une société démocratique, à la protection des droits et libertés d'autrui* ».

Ce but poursuivi par Baby Loup est-il légitime ?

Le but poursuivi par Baby Loup est d'accueillir des enfants en bas-âge et d'œuvrer à l'insertion sociale et professionnelle des femmes du quartier. Pour remplir sa mission, elle considère que la liberté de conscience et la dignité des personnes accueillies, enfants et femmes, doivent être respectées.

La Cour européenne des droits de l'Homme établit le principe selon lequel dans une société démocratique, où plusieurs religions coexistent, il peut se révéler nécessaire d'assortir cette liberté de limitations propres à concilier les intérêts des divers groupes et à assurer le respect des convictions de chacun[50].

La Cour affirme que la nécessité de préserver ce pluralisme dans l'éducation est plus impérieuse encore lorsque les élèves proviennent d'horizons culturels différents[51].

Baby Loup est une association. La liberté d'association est inscrite dans la déclaration des Droits de l'Homme et du Citoyen de 1789 et figure au rang des principes fondamentaux reconnus par les lois de la République et solennellement réaffirmés dans le préambule de la Constitution. Les associations constituent l'un des piliers de notre vie démocratique, sociale et culturelle.

En France, environ 10% des crèches privées existantes sont à caractère confessionnel.

En l'espèce, il s'agit d'une structure d'accueil d'enfants en bas-âge dans un quartier sensible marqué par sa multiplicité religieuse et culturelle. Compte tenu de l'importance de la protection de liberté de conscience des jeunes enfants, du respect du droit des parents d'éduquer leurs enfants selon leurs convictions personnelles ainsi que de la liberté d'association, la restriction par l'employeur de la liberté des salariés de manifester leur appartenance religieuse dans l'entreprise poursuit un des buts légitimes énumérées à l'article 9 de la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales, à savoir la protection des droits et libertés d'autrui puisqu'elle vise à faire respecter le principe du pluralisme nécessaire dans une société démocratique[52].

La Cour européenne des droits de l'Homme apprécie l'« ingérence » litigieuse à la lumière de l'ensemble des éléments de chaque cause, y compris la portée des actes incriminés et le contexte dans lequel ils ont été accomplis, afin de déterminer si l'ingérence est « proportionnée aux buts légitimes poursuivis » et si les motifs invoqués par les autorités nationales pour la justifier apparaissent « pertinents et suffisants »[53].

En droit interne, l'article L 1121-1 du code du travail permet à l'employeur de restreindre les libertés des salariés si les restrictions sont justifiées par la nature de la tâche à accomplir et proportionnées au but recherché.

Le principe est donc que, en France, les salariés sont libres de manifester leur religion dans les entreprises privées. Un interdit général concernant le port de signes religieux ou d'appartenance à d'autres convictions ne serait pas, bien évidemment, justifié.
S'agissant de Baby Loup, l'exigence de la neutralité religieuse et politique rappelée dans le règlement intérieur est le moyen de réaliser l'objet social de l'entreprise, soit l'insertion sociale par la construction d'un lien social dégagé de toute référence religieuse ou politique.

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[50] CEDH, 25 mai 1993, Kokkinakis / Grèce, §33 ; Requête n/14307/88.

[51] CEDH, Dahlab / Suisse, précité.

[52] CEDH, Refah Partisi (Parti de la prospérité) et autres / Turquie [GC], nos 41340/98, 41342/98, 41343/98 et 41344/98, § 67, CEDH 2003 II, et Leyla Ôahin, précité, § 99.

[53] Fressoz et Roire c. France [GC], no 29183/95, CEDH 1999-I

La neutralité politique et confessionnelle ne vise qu'à favoriser la socialisation de personnes appartenant à ce quartier sensible dont les enfants en bas-âge et les femmes.

Ainsi, la mesure d'interdiction de port ostentatoire de signe religieux vise à empêcher des actes de provocation, de prosélytisme et de propagande de la part des salariés dans le cadre de l'éducation de jeunes enfants.

La manière dont Mme Y... a manifesté sa croyance en portant un voile islamique ne constitue certes pas une menace pour l'ordre public. Il reste qu'au vu du jeune âge des enfants, l'Assemblée plénière devra admettre que le port du voile dans une crèche présente un risque certain de pression sur autrui.

Dans sa jurisprudence, la Cour européenne des droits de l'Homme considère que l'attitude des enseignants joue un rôle important. Par leur seul comportement, ceux-ci peuvent avoir une grande influence sur leurs élèves ; ils représentent un modèle auquel les élèves sont particulièrement réceptifs en raison de leur jeune âge, de la quotidienneté de la relation - à laquelle ils ne peuvent en principe se soustraire - et de la nature hiérarchique de ce rapport.

Selon la Cour, « *La liberté de manifester ses convictions religieuses peut être légitimement limitée lorsque cette restriction vise à protéger la liberté de conscience des enfants en bas-âge, considérés comme un public particulièrement influençable et sensible.*»[54] Le port du foulard, en particulier, emporte donc pour la Cour un risque d'atteinte aux sentiments religieux des élèves et de leurs parents.

Dans cet arrêt, elle établit le principe de primauté de la liberté de conscience des enfants en bas-âge sur la liberté pour un salarié de manifester sa religion.

De surcroît, le respect des opinions des enfants, principe fondamental de la Convention internationale des droits de l'enfant, du 20 novembre 1989 et notamment à son article 14 auquel s'est expressément référé la cour d'appel de Paris dans l'arrêt attaqué, tend à justifier la neutralité politique ou confessionnelle en milieu éducatif.

A cet égard, le Haut Conseil à l'Intégration considère que le respect des opinions de l'enfant doit être compris comme un droit de l'enfant à la neutralité et l'impartialité, en sorte que les personnels des établissements associatifs accueillant des enfants en mode collectif devraient respecter ces principes[55].

Monsieur le conseiller rapporteur a largement exposé l'état de la doctrine et de la jurisprudence sur la question de l'applicabilité directe ou non de cet article 14[56].

Au vu de la distinction opérée entre les dispositions de la convention qui sont d'applicabilité

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[54] CEDH Dahlab / Suisse, précité

[55] Avis du HCI, Expression religieuse et laïcité dans l'entreprise, 1er septembre 2011

[56] Rapport p. 58 et suivantes.

directe et celles qui ne le sont pas, l'Assemblée plénière pourra juger que l'article 14 est une disposition d'applicabilité directe et que la protection de la liberté de pensée, de conscience et de religion des enfants ainsi que la liberté des parents de guider leurs enfants constituent un objectif légitime qui peut être recherché par une crèche.

C'est donc au vu des objectifs de l'association, d'une part, et, d'autre part, parce que la salariée est en contact avec un certain type de public, en l'occurrence des enfants en bas- âge, que la restriction à sa liberté religieuse par son employeur se trouve justifiée.

Au surplus, la liberté de conscience des enfants dérive de la liberté des parents d'éduquer leurs enfants selon leurs convictions personnelles.

Dans une démocratie, donner la primauté à cette première liberté revient à consacrer la seconde. Dans cette optique, comment un enfant pourrait-il être soumis, dans une crèche privée, à des manifestations religieuses de la part du personnel, alors que ses parents n'auraient pas le droit de réclamer la neutralité pour lui, qui plus est, au cas d'absence de toute crèche publique laïque?

Comment pourrait-on en conclure qu'aucune crèche privée n'aurait le droit de proposer un service où toute manifestation religieuse serait interdite ?

L'observatoire de la laïcité n'occulte pas que le manque global de places en crèches ne garantit pas à tous les parents une véritable liberté de choix pour la garde de leurs enfants entre une structure privée et une structure relevant du service public, privée ou publique. Ne serait-il pas paradoxal de limiter l'initiative privée quand elle tend à pallier cette insuffisance en lui déniant le droit d'imposer le respect de la neutralité religieuse dans l'entreprise ?

Encore faut-il veiller à ce que la restriction à la liberté soit proportionnée au but recherché.

Avant de vérifier si tel est le cas en l'espèce, il faut rappeler que la restriction à la liberté de conscience ou de religion ne porte que sur la liberté de manifester sa religion. Il s'agit pour les salariés susceptibles d'être en contact avec des enfants en bas-âge d'agir avec réserve quant à l'expression de leurs opinions religieuses.

Selon le règlement intérieur, la restriction à la liberté de manifester la religion ne s'applique pas en dehors du champ d'activités de la crèche, et seulement aux activités entrainant le contact du personnel avec les enfants.

Mme Y..., suivie en cela par la chambre sociale de la Cour dans l'arrêt du 19 mars 2013, considère que la formulation du règlement intérieur est trop générale et abstraite.

Cependant, même si cette clause peut paraitre dans sa rédaction assez générale, elle ne peut pas être lue sans considération de la nature de l'entreprise, du nombre de salariés et de la nature des fonctions qu'ils exercent.

Si dans une entreprise comptant des milliers de salariés, une telle clause serait sans aucun doute trop générale et imprécise, elle n'a pas ces défauts si est pris en considération le fait que Baby Loup est une petite structure qui emploie peu de personnel et que, de ce fait, chaque membre du personnel est susceptible d'entrer en contact avec les enfants.

L'appréciation de la clause, sa généralité et sa précision doit se faire in concreto et non in abstracto comme a semblé le faire la chambre sociale.

Lue dans cette optique, la clause litigieuse du règlement intérieur qui exige des salariés qu'ils ne manifestent pas leur religion dans l'exercice des activités de la crèche, tant dans ses locaux qu'à l'extérieur de ceux-ci lorsque les enfants sont accompagnés à l'extérieur par des salariés, n'est ni générale ni abstraite puisqu'elle exige la neutralité dans les locaux de la crèche dans lesquels tous les salariés sont susceptibles d'être en contact avec les enfants et à l'extérieur pour ceux qui accompagnent les enfants.

Eu égard à la nature des fonctions des salariés de la crèche qui sont susceptibles d'entrer en contact avec des enfants et de la légitimité du but poursuivi, à savoir, assurer la liberté de conscience des enfants en bas-âge et de leurs parents, l'atteinte à la liberté de conscience qui est limité à l'interdiction de manifester sa religion est justifiée et proportionnée.

Enfin, il n'est pas inutile de préciser que Mme Y... a choisi librement d'exercer sa profession d'éducatrice au sein de la crèche Baby Loup, institution qui, en vertu des dispositions précitées du règlement intérieur et dont elle a eu connaissance au moment de la signature de son contrat de travail, lui imposaient un principe de neutralité religieuse et politique. Jusqu'à son retour de congé parental, elle a respecté cette exigence. Elle ne pouvait pas ignorer, au jour de son engagement, que la condition de neutralité était une condition essentielle au contrat.

La Cour européenne, dans une espèce où la requérante de confession protestante travaillait dans une crèche catholique, retient cette analyse fondée sur la liberté contractuelle pour conclure à la non violation de l'article 9, lorsque « *[…] l'intéressée était ou devait être consciente, lors de la signature de son contrat de travail et notamment du paragraphe 2 b, qui renvoyait à l'article 6 § 3 des réglementations, du fait que son appartenance à l'Eglise universelle et ses activités en faveur de celle-ci étaient incompatibles avec son engagement dans l'Eglise protestante* »[57].

Aux termes de ces explications, il nous semble donc :

- que la législation française contenue dans le code du travail et sa mise en œuvre sous le contrôle de l'administration et du juge, remplit les conditions prévues à l'article 9, paragraphe 2, de la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales pour que des restrictions puissent être apportées par les employeurs privés à la liberté, pour les salariés, de manifester leurs convictions religieuses ;

[57] CEDH, arrêt Siebenhaar / Allemagne, précité. Voir, mutatis mutandis, arrêt du 23 septembre 2008, Ahtinen / Finlande, Requête n/ 48907/99, § 41.

- que les règlements intérieurs des entreprises pris en application de cette législation remplissent également ces conditions ;

- que des employeurs privés peuvent, dans le cadre de cette législation, restreindre la liberté de leurs salariés de manifester leurs convictions, sans qu'il y ait lieu de recourir à la notion d'entreprise de conviction laïque, laquelle n'a pas de reconnaissance législative ou réglementaire en droit français et se heurte au principe de laïcité qui a une valeur constitutionnelle ;

- que des employeurs privés peuvent cependant, dans le cadre de cette législation, restreindre la liberté de leurs salariés de manifester leurs convictions à condition, toutefois, que ces employeurs aient un motif légitime de le faire et que la restriction soit proportionnée eu égard à la nature de la tâche à accomplir par le salarié ;

- que, constitue un objectif légitime d'apporter des restrictions à la liberté du salarié de manifester ses convictions, la volonté de protéger une autre liberté individuelle telle que la liberté de conscience des usagers ou des clients de l'entreprise ;

Il convient désormais de vérifier si la cour d'appel de Paris a fait une exacte application de ces principes.

III - <u>Analyse de l'arrêt attaqué</u>

La cour d'appel de Paris, a tout d'abord considéré qu'une personne morale de droit privé peut constituer une entreprise de conviction au sens de la jurisprudence de la Cour européenne des droits de l'Homme et se doter de statuts et d'un règlement intérieur prévoyant une obligation de neutralité du personnel, notamment par l'interdiction de porter un signe ostentatoire religieux.

La cour d'appel a considéré ensuite que les buts poursuivis par Baby Loup permettent de considérer qu'elle assure une mission d'intérêt général.

Elle a également estimé que la nécessité de protéger la liberté de conscience des enfants et celle de respecter la pluralité des options religieuses des femmes réinsérées par Baby Loup, autorisait cette association à imposer à ses salariés une neutralité politique et religieuse.

Elle en a conclu que Baby Loup peut être qualifiée d'entreprise de conviction qui est en mesure d'exiger la neutralité de son personnel, cette exigence étant rappelée par les statuts de l'association et par son règlement intérieur.

La cour d'appel a ensuite considéré que l'obligation formulée dans le règlement intérieur était suffisamment précise, que les restrictions étaient justifiées par la nature de la tâche à accomplir et proportionnées au but recherché au sens des articles L.1121-1 et L1321-3 du code du travail, qu'elles ne portent pas atteinte aux libertés fondamentales, ne présentent pas de caractère

discriminatoire et qu'elles répondent à l'exigence professionnelle essentielle et déterminante de protéger la conscience en éveil des enfants.

Enfin, la cour d'appel a considéré que le comportement de Mme Y... après sa mise à pied a caractérisé une faute grave nécessitant son départ immédiat de l'entreprise.

S'il apparaît, à la lecture de l'arrêt attaqué, que la cour d'appel a pu commettre des erreurs quant à la justification de la licéité de l'interdiction de manifester la liberté religieuse pour les salariés de Baby Loup, erreurs qui sont à juste titre critiquées par certains moyens, il n'en demeure pas moins qu'elle a correctement motivé sa décision en retenant que Baby Loup avait, sans violation injustifiée de la liberté de Mme Y... de manifester ses convictions religieuses, pu restreindre cette liberté et sanctionner cette salariée qui refusait de se soumettre à cette restriction.

1 – Sur la licéité de la restriction à liberté de manifester ses convictions religieuses.

Pour les raisons qui ont été largement exposées plus haut, il apparaît que c'est à tort que la cour d'appel de Paris s'est fondée sur la notion « d'entreprise de conviction ».

Les critiques contenues dans les première, deuxième, quatrième, cinquième et sixième branches du premier moyen ainsi que les première et quatrième branches du deuxième moyen semblent pertinentes à cet égard.

De même, en considérant que la restriction apportée à la liberté de manifester sa religion répond à une exigence professionnelle essentielle et déterminante de respecter et protéger la conscience en éveil des enfants, la cour d'appel semble avoir confondu l'objectif à atteindre – la protection de la conscience des enfants – et le moyen d'y parvenir – la neutralité religieuse – ainsi que le relève la huitième branche du premier moyen.

Cela ne doit cependant pas entraîner la cassation de l'arrêt car les motifs justement critiqués peuvent être considérés comme surabondants, l'arrêt étant par ailleurs justifié par d'autres motifs pertinents.

En effet, il a été exposé que nous considérons que Baby Loup ayant pour objet l'éveil éducatif des enfants en bas âge, elle peut avoir pour objectif légitime de protéger le droit des enfants à la liberté de conscience et celui des parents de guider les enfants dans l'exercice de ce droit. Ce droit est reconnu à l'article 14 de la Convention internationale des droits de l'enfant qui peut-être, rappelons-le, considéré comme étant d'applicabilité directe, ce que l'Assemblée plénière jugera en rejetant la troisième branche du premier moyen.

Baby Loup étant une crèche non confessionnelle, qui prône la neutralité religieuse et politique, le choix des parents de se tourner vers cette crèche, en l'absence de structure publique offrant cette neutralité, doit être respectée. Cette structure d'accueil propose aux parents un environnement de neutralité politique et religieuse que Baby Loup ne peut assurer qu'en demandant à ses salariés de respecter cette neutralité en s'abstenant de toute manifestation des convictions religieuses.

Or, la cour d'appel a relevé sur ce point « *la nécessité, imposée par l'article 14 de la Convention relative aux droits de l'enfant du 20 novembre 1989, de protéger la liberté de pensée, de conscience et de religion à construire pour chaque enfant, que de celle de respecter la pluralité des options religieuses des femmes au profit desquelles est mise en œuvre une insertion sociale et professionnelle aux métiers de la petite enfance, dans un environnement multiconfessionnel, ces missions peuvent être accomplies par une entreprise soucieuse d'imposer à son personnel un principe de neutralité pour transcender le multiculturalisme des personnes auxquelles elle s'adresse.* »

Elle a ainsi caractérisé la légitimité de l'objectif recherché.

L'atteinte à la liberté de manifester sa religion est licite puisqu'elle est fondée sur les dispositions du code du travail et de l'interprétation qui en est faite par l'administration et par les juridictions. La possibilité de porter atteinte à la liberté de manifester ses convictions religieuse est donc bien « prévue par la loi », au sens de l'article 9, paragraphe 2, de la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales. La septième branche du premier moyen doit être rejetée sur ce point.

L'atteinte à la liberté religieuse est prévue par le règlement intérieur dont la clause litigieuse n'est, ainsi qu'il a été exposé plus haut, ni générale ni imprécise si l'on prend en considération le fait que Baby Loup est une petite structure, que tous les membres du personnel sont susceptibles d'entrer en contact avec les enfants et que c'est l'accompagnement des enfants qui est mis en avant dans le règlement intérieur.

Sur ce point, la cour d'appel a relevé que « *l'obligation de neutralité dans le règlement intérieur, en particulier celle qui résulte de la modification de 2003, est suffisamment précise pour qu'elle soit entendue comme étant d'application limitée aux activités d'éveil et d'accompagnement des enfants à l'intérieur et à l'extérieur des locaux professionnels; qu'elle n'a donc pas la portée d'une interdiction générale puisqu'elle exclut les activités sans contact avec les enfants, notamment celles destinées à l'insertion sociale et professionnelle des femmes du quartier qui se déroulent hors la présence des enfants confiés à la crèche* ».

Cette motivation par laquelle la cour d'appel interprète la clause sur règlement intérieur au vu de l'activité de l'entreprise, n'encourt pas le grief de dénaturation invoqué aux deuxième et troisième branches du troisième moyen.

Ainsi, la restriction apportée à la liberté des salariés de manifester leurs convictions religieuses a été édictée dans un règlement intérieur qui peut légalement prévoir de telles restrictions et a pour objet d'atteindre l'objectif légitime de la protection du droit à la liberté de conscience des enfants accueillies dans la crèche.

Cette restriction était-elle justifiée par la nature de la tâche à accomplir par les salariés ?

Une fois encore, la crèche exploitée par Baby Loup était une petite structure qui emploie peu de

salariés. Ces derniers sont susceptibles d'être en contact avec des enfants L'exigence de neutralité qui se traduit par une interdiction de manifester ses convictions religieuses est bien justifiée par la nature des tâches à accomplir par les salariés.

La cour d'appel a considéré l'obligation de neutralité doit être « *entendue comme étant d'application limitée aux activités d'éveil et d'accompagnement des enfants à l'intérieur et à l'extérieur des locaux professionnels*; » et « *que les restrictions ainsi prévues sont, pour les raisons ci-dessus exposées, justifiées par la nature de la tâche à accomplir et proportionnées au but recherché au sens des articles L.1121-1 et L.1321-3 du code du travail* »

La cour d'appel a bien fait ressortir que la restriction à la liberté de manifester sa religion était justifiée par la nature des tâches à accomplir par les salariés. La neuvième branche du premier moyen doit être rejetée.

2 – Sur la procédure disciplinaire

Les deuxième et troisième branches du deuxième moyen critiquent le fait que la cour d'appel ait qualifié de faute disciplinaire le fait, pour Mme Y..., de porter un voile islamique. Selon le moyen, ce fait ne pouvait pas être qualifié de faute.

Il est vrai que la cour d'appel ne développe pas ce point. Dans la première partie de la motivation, elle démontre que le règlement intérieur qui apporte une restriction à la liberté de manifester ses convictions religieuses est licite et, dans un second temps, elle s'attache à démontrer que la faute de la salariée peut être qualifiée de faute grave. Ce faisant, elle sous-entend que le fait de ne pas s'être conformée au règlement intérieur est une faute.

Or, elle n'était pas tenue de caractériser l'existence d'une faute.

En effet, aux termes de l'article L 1321-1 du code du travail, le règlement intérieur est un document écrit par lequel l'employeur fixe, notamment, les règles générales et permanentes relatives à la discipline.

Le règlement intérieur de 2003 précise que « *toute infraction au présent règlement peut faire l'objet d'une sanction* ». Ainsi, le fait de ne pas respecter l'interdiction de ne pas manifester ses convictions religieuses est une infraction au règlement intérieur et est passible d'une sanction disciplinaire, laquelle peut être, aux termes du règlement intérieur, un licenciement sans préavis.

A partir du moment où la cour d'appel a jugé que clause litigieuse du règlement intérieur est licite, sa violation est une faute disciplinaire, contrairement à ce que soutiennent les deuxième et troisième branches du deuxième moyen ainsi que les deuxième, troisième et quatrième branches du quatrième moyen.

Enfin, s'agissant de la gravité de la faute qui a eu pour effet de priver Mme Y... de son préavis, la cour d'appel s'est fondée sur le fait qu'elle s'était maintenu dans les lieux après sa mise à pied

conservatoire et avait eu un comportement agressif relaté dans la lettre de licenciement.

Monsieur le conseiller rapporteur a exposé de manière très complète la jurisprudence de la chambre sociale en la matière de laquelle il ressort que, dans certaines circonstances, le fait de refuser de se soumettre à un ordre licite de mise à pied conservatoire peut caractériser une faute grave.

Le refus de Mme Y... de respecter le règlement intérieur en retirant son voile qui était une manifestation de ses convictions religieuses, justifiait le fait qu'elle puisse être mise à pied. La cour d'appel a analysé le comportement de la salariée et a déduit qu'il s'analysait en une faute grave. Ce raisonnement doit être approuvé.

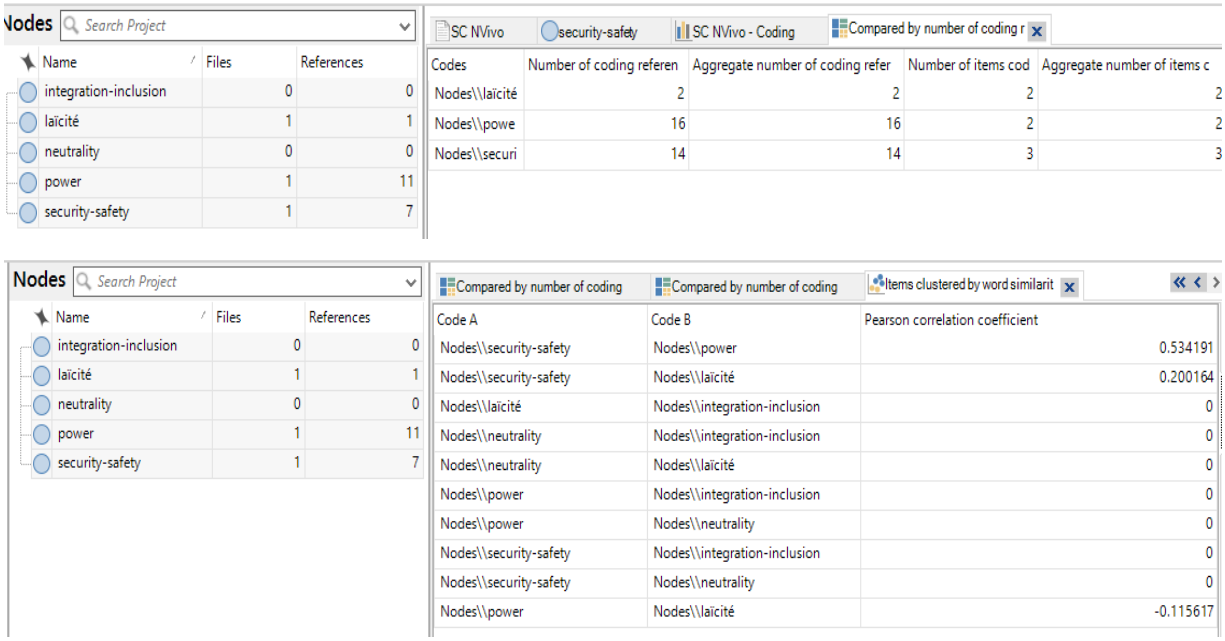
IV – <u>Conclusion</u>

Au vu de l'ensemble de ces considérations, nous concluons au **Rejet** du pourvoi.

<u>7). Summary of Coded Data and Tree Maps of Coded Data</u>

7.1. State of Council: LDH, Mrs. D, Mrs. C, CCIF vs. Mayor Villeneuve-Loubet (The Burkini Case)

7.1.1. Summary of Coded Data



Nodes | Search Project

Name	Files	References
integration-inclusion	0	0
laïcité	1	1
neutrality	0	0
power	1	11
security-safety	1	7

SC NVivo | security-safety | SC NVivo - Coding | Compared by number of coding r

Codes	Number of coding referen	Aggregate number of coding refer	Number of items cod	Aggregate number of items c
Nodes\\laïcité	2	2	2	2
Nodes\\powe	16	16	2	2
Nodes\\securi	14	14	3	3

Nodes | Search Project

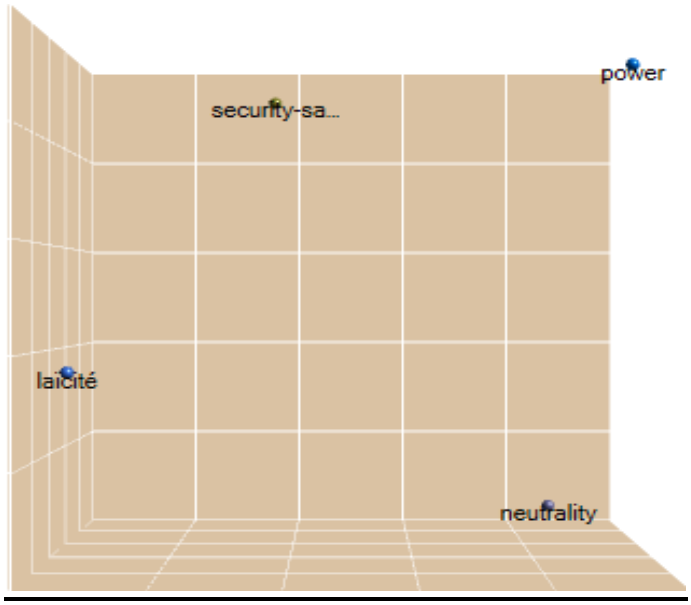
Name	Files	References
integration-inclusion	0	0
laïcité	1	1
neutrality	0	0
power	1	11
security-safety	1	7

Compared by number of coding | Compared by number of coding | Items clustered by word similarit

Code A	Code B	Pearson correlation coefficient
Nodes\\security-safety	Nodes\\power	0.534191
Nodes\\security-safety	Nodes\\laïcité	0.200164
Nodes\\laïcité	Nodes\\integration-inclusion	0
Nodes\\neutrality	Nodes\\integration-inclusion	0
Nodes\\neutrality	Nodes\\laïcité	0
Nodes\\power	Nodes\\integration-inclusion	0
Nodes\\power	Nodes\\neutrality	0
Nodes\\security-safety	Nodes\\integration-inclusion	0
Nodes\\security-safety	Nodes\\neutrality	0
Nodes\\power	Nodes\\laïcité	-0.115617

7.1.2. Compared by Number of Coding References

7.1.3. Items Clustered by Word Similarity



7.2. Court of Cassation: Baby-Loup vs. Mrs. F

7.2.1. Summary of Coded Data

Nodes

Search Project

Name	Files	References	Created On	Created By	Modified On	Modified By
security-safety	0	0	12/29/2018 5:00 PM	FS	12/29/2018 5:00 PM	FS
power	1	3	12/29/2018 5:00 PM	FS	12/29/2018 10:02 PM	FS
neutrality	1	14	12/29/2018 5:00 PM	FS	12/29/2018 10:08 PM	FS
laïcité	1	7	12/29/2018 4:59 PM	FS	12/29/2018 10:08 PM	FS
integration	1	5	12/29/2018 5:09 PM	FS	12/29/2018 10:09 PM	FS

CC NVivo | Word Frequency Query Results | Compared by number of coding | Items clustered by word similarit

Code A	Code B	Pearson correlation coefficient
Nodes\\neutrality	Nodes\\laïcité	0.651642
Nodes\\integration	Nodes\\power	0.005823
Nodes\\power	Nodes\\neutrality	0.00188
Nodes\\security-safety	Nodes\\laïcité	0
Nodes\\security-safety	Nodes\\neutrality	0
Nodes\\security-safety	Nodes\\power	0
Nodes\\security-safety	Nodes\\integration	0
Nodes\\integration	Nodes\\laïcité	-0.004524
Nodes\\integration	Nodes\\neutrality	-0.068156
Nodes\\power	Nodes\\laïcité	-0.082987

Search Project

Nodes

Name	Files	References
laïcité	1	7
neutrality	1	14
power	1	3
integration	1	6
security-safety	0	0

CC NVivo | Word Frequency Query Results | Compared by number of coding r

Codes	Number of coding references	Aggregate number of coding reference	Number of items coded	Aggregate number of items code
Nodes\\integrat	6	6	1	1
Nodes\\laïcité	12	12	2	2
Nodes\\neutrali	19	19	2	2
Nodes\\power	3	3	1	1

7.2.2. Compared by Number of Coding References

7.2.3. Items Clustered by Word Similarity

8). Word Count of Relevant Terms*

Notions about Discourses	Baby-Loup vs. Mrs. F	Mrs. D, Mrs. C, LDH, CCIF vs. Mayor Villeneuve-Loubet (The Burkini Case)
Neutralité / des principes de neutralité / une obligation de neutralité / respecter et garder la neutralité Neutrality / principles of neutrality / an obligation of neutrality / respect and maintain neutrality	14	0
Laïcité / faire obstacle au respect des principes de laïcité / le principe de laïcité fait obstacle / laïque / sécularisme Laïcité/impeding respect for the principles of laïcité/the principle of laïcité that impedes/ laïque/secularism	7	1
Sécurité, sûreté, salubrité Security, safeness, salubrity, health	0	7
police, pouvoirs de police, autorités power, police/policing powers, authorities, regulate/supervise	3	11
Intégration, insertion Integration, inclusion	6	0

*Note: this is a count of approximate specific words. Synonyms and stemmed words are also included.