

Draft of the presentation. Zoila Combalía (Universidad de Zaragoza, Spain)
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We are examining the legal controversy caused by the important and growing presence of Islam in Europe, in a secularized Europe with historically Christian roots.

The issue of the headscarf: a case in point and perhaps a minor one. It is, nonetheless, highly significant within the global, underlying issue.

The use of the headscarf has a religious foundation (found in the Koran), hence, when it is worn as a matter of free choice for Muslim women, it is a matter that pertains to her religious freedom and deserves the legal protection afforded fundamental rights and public freedoms. The problems have arisen when the use of the headscarf conflicts with other legally protected values. It has been fundamentally alleged to contravene: the secularity or neutrality of the State and public institutions, the freedom of companies in cases in which employees have been dismissed for wearing the headscarf, and the equality and non-discrimination of women. In these cases of conflict a balancing test between the affected legal values or rights is necessary.

A prior question: whether or not we should address this consideration (this balancing test) by means of a general law.

This is the option that has been chosen in France with the enactment of the Law dated March 15, 2004 regarding the use of the Islamic headscarf or other religious symbols in the state school system¹.

The key text of the law is the following: *“In public elementary schools, junior high schools and high schools, students are prohibited from wearing symbols or attire through which they conspicuously exhibit a religious affiliation”*.

The countless problems that can arise from putting the law into force become apparent. To point out only a few:

Shall only religious symbols be banned or must political or ideological symbols also be assumed to be included? In this regard, the question was posed of whether wearing a tee-shirt with the photograph of Che Guevara was compatible or not with the law.

¹ Surprisingly, a seemingly controversial law was approved with the support of both the left and the right and by an overwhelming majority of the Parliament: 494 members of Parliament voted in favor of the law versus 36 against and 31 abstentions.

One might also wonder what happens if the “symbol” is not worn for religious reasons; for example, a headscarf that is worn for aesthetic reasons, because it is fashionable, would it also be considered a “religious” symbol?

Fernández Flórez (a Spanish writer) tells of how, in the light of the health problems resulting from the abundance of mosquitoes in Cuba, during its control of the island Spain reacted by passing one law after another in order to control the situation without the mosquitoes showing the slightest sign of being impressed by such legislative activity. When the Americans arrived, they didn’t pass a single law. They fumigated; and the problem was solved.

That is, not all problems or social conflicts are resolved by enacting a law.

May be these conflicts regarding the limits of fundamental rights should not be resolved by means of a general law that in itself, is not fit to assess the nuances or to address the weighing up of the legally protected values in question.

With which legally protected rights does the use of the Islamic headscarf come into conflict? In this regard, we must distinguish between the conflicts that have been raised as a consequence of the use of the headscarf in public and in private.

- In public (basically in the field of education), wearing a religious symbol, such as the headscarf, has been understood to violate the lay nature of the State (we are therefore faced with a problem of conflict between religious freedom and the secularity of the State).

- In private, the problems have resulted from the use of the headscarf in certain jobs; in these cases, the conflict is not with secularity, but rather with the company’s freedom (religious freedom vs. freedom of the company).

I will focus on those conflicts that have resulted from the use of the headscarf in the state school system. I have chosen to give an overview of the problem in which I will manifest the different viewpoints from which the issue can be examined. I will leave aside the Turkish and German perspectives which have been or will be addressed by other professors in this conference.

First of all, the case of a female student who attends class with the headscarf must be distinguished from that of the teacher.

The case of the teacher has been far more controversial, because due to her role as a civil servant in a neutral educational center, a stricter restriction of her religious freedom may be justified.

In fact, the case of the teacher has been dealt with in different European countries. It has not been resolved in a universal way: in some cases, the decision has been in favor of the school that has forbidden the teacher to wear the headscarf; in others, the decision has favored the teacher.

That is, in the case of the teacher, judicial decisions vary depending on the specific facts and are divided depending on how the school's neutrality is interpreted:

- As absence of religion (fictitious absence of religion) that would obligate the teacher to remove any sign prior to entering the school.

- Or rather, neutrality understood not as an absence of religion, but as religious pluralism: the presence in the school (and amongst the teaching staff) of the different religious options present in the society (within the limits of non-indoctrination).

What happens when it is not the teacher, but the Muslim student who wears the headscarf to school? It must be pointed out that the conflict between a student wearing a headscarf and the secularity or neutrality of the school is almost exclusive to France and Turkey.

The conflicts that have occurred in other countries have always occurred together with a different element: either (as we have already seen) the teacher was wearing a religious symbol and not the student or, in the case of it being a student, the conflict has not been the consequence of considering the headscarf as being contrary to secularity, but because it has been considered an impediment to the educational activity (in physical education classes...) or because the headscarf was deemed to be contrary to the equality and non-discrimination of women.

Such has been the case in Spain. In Spain, the most striking case occurred in S. Lorenzo del Escorial in 2002 with the student, Fátima Ledrisse. She was a Muslim student at the state school and she wore the Islamic headscarf. The school's headmistress refused to allow the student to attend class with the headscarf because she considered it, in her own words, to be "*a symbol of sexual discrimination*". Amongst other politicians, the Minister of Labor and Social Affairs stated his position along the same lines when he alleged that the headscarf is "*a sign of discrimination towards women*" and, in rather unfortunate statements to the press, he likened this practice to genital mutilation. Finally, the Regional Authority for Education for Madrid adopted a temporary solution by resolving that "*the Moroccan girl may wear the headscarf to go to school (...) in light of the lack of legal regulations that impede [a person] from attending class while wearing this article of clothing (...). A subsequent regulation will*

have to examine whether the competence to determine the general procedure to be applied in cases such as this one lies with the Community or the Ministry of Education”.

Therefore, this conflict the prohibition of the headscarf has been argued because it has been deemed “*a sign of discrimination towards women*”.

In this regard, I believe that the following must be emphasized: neither the mandatory nature of wearing the headscarf, nor its meaning, are clear among Islamic sources and, in fact, some Muslim women wear it and others do not.

Insofar as its foundation in the Koran is concerned, the following verses are alleged: the sura 24, verse 31, and the sura 33, verse 59 that says the following: “*O Prophet! Tell thy wives and daughters, and the believing women, that they should cast their outer garments over their persons: that is most convenient, that they should be known (as such) and not molested...*”.

Based in these verses, some Islamic scholars conclude that the order to wear a headscarf was issued only to the wives of the Prophet; its use would have expanded later from this initial intention to the wives of all believers.

What must be stressed is that, when the European public authorities maintain that the Islamic headscarf is discriminatory towards women because it is a sign of submission, they are interpreting Islamic law which they are clearly not competent to do. Islamic law does not specify that that is the reason for wearing the headscarf and because, from an objective point of view, wearing a headscarf does not infringe on a person’s dignity. A headscarf may be worn with dignity, even with elegance. Quite another matter would be, for example, the case of the burka.

In this regard, I believe that the French authorities’ criterion was fitting when they stated that the argument that it contravenes the dignity of women is not pertinent.

It was thus sustained, for example, in one of the several cases that have been resolved by the French Council of State regarding expelling students from school for attending class with the chador. This is the Yilmaz case (1994), in which the Court stated that “*the scarf cannot be considered an offense against the dignity of women... based on what we know about the Islamic religion. It would appear evident that neither the administration nor the judge can interfere in such considerations, without grievously violating the principles of secularity of the State and religious freedom (...). It would be at the very least odd to think that wearing a distinctive [symbol] of one’s religion constitutes an offense to the dignity of women, it would denaturalize the sense of equality*”.

That is to say, the meaning of the headscarf as a sign of women's submission is an issue that Islam has not resolved and, therefore, a lay State cannot decide. Nonetheless, there are times when lay States end up by interpreting religious laws².

The conflict in other countries has been put forth not because it is judged to harm the equality of women, but rather the separation between religion and State.

The consideration that the use of the headscarf by female students contravenes secularity can only be maintained from a *combative* notion of secularity that does not limit itself to keeping public powers outside the sphere of the religious, rather it takes on a more active role, in an attempt to confine religion to the private scope of life (at home, in the temple, the conscience), and to hide its social manifestations.

In line with this reasoning, recently, the author Vargas Llosa published an editorial in a Spanish newspaper in which he compared State secularity with the privatization of religion. He said the following: "*The basic Charter of the newly-formed united Europe emphasizes the secular nature of the State and encompasses Europeans' religion and spiritual life to the domain wherein it belongs: the private domain*". He goes on to add: "*by definition all religions – all faiths – are intolerant, since each of them proclaims a truth and is unable to live peaceably with others that deny [said truth]*".

These statements are undoubtedly, arguable. In my opinion, a lay State is one that declares itself incompetent to perform an act of faith: to opt in favor of one belief or another and to state which is the true faith or the one that the State supports, but the lay State cannot prevent its citizens from performing that act of faith and from freely manifesting it in public, of course, in such a manner as to respect the freedom of others.

The notion of secularity that proposes turning religion into a "*bubble religion*", that is not present in (that does not contaminate) society, ties in with an ancient opinion that historically had its *raison d'être* in Europe, and was possibly even necessary. But, in the XXI century, if the lay State is not at the service of people's freedom to profess their religion; if, in the name of secularity, freedom is banned, then an abuse is being committed that in my opinion, cannot be justified in the XXI century and jeopardizes

² Dajani v. Dajani, 1988, Court of Appeal of California: The disagreement between the different experts called to testify before the Court, has forced the American Court to take part in the interpretation of the Islamic law when it shouldn't because it has neither the qualifications nor the competence to do it. The Court had to decide whether a Muslim woman loses her right to the dower or not when she is the one asking for a divorce. Particularly shocking is the following affirmation in which the American Court dares to refer to the wisdom of the Prophet. These are the words of the Court: « *The court also finds that, if the wife initiates a termination of the relationship, she foregoes the dower, and the court so finds that, in this case, the wife initiated the termination of the marriage and common sense and wisdom of Mohamed would dictate that she forego the dower, unless the parties agree otherwise...* ».

democracy and the progress in which it is frequently based on. That is, what was a step forward in the XIX century, is a step backward in the XXI century.

In my opinion, the issue of the headscarf is the “tip of the iceberg” of a much deeper legal, political, and sociological problem, which explains the vehemence of the debate about something that *per se* is as trivial as a female student attending class with her head covered.

There are those who would state that, behind the eagerness to make Islam invisible, together with defending the separation of religion and the State, there may lie the fear of losing one’s own cultural identity, if not a certain suspiciousness towards that which is culturally different or a certain Islam-phobia.

It has been written that, following the end of the Cold War between the U.S.A. and the U.S.S.R., some Western sectors are fostering a view of Islam as a threat, as a danger. An English analyst stated the following in this regard: “...*a societal Cold War with Islam would serve to strengthen the European identity at a critical time for the process of the European Union. Hence, in the West, there may well be a numerous group that is willing, not only to support a societal Cold War with Islam, but to take stances that would encourage it*”.

Behind this portrayal – taking the headscarf off the girl in order to put it on Islam, there lies an assimilationist option. This option would attempt to achieve the integration of immigrants by forcing them to “convert” to the mainstream culture.

In the case of Muslims, it would be a matter of turning them into what has been called “*Muslims without Islam*” (without headscarves, without mosques, without dietary restrictions, etc.).

Opposite assimilationism we have the so-called “mosaic societies” in which different cultures coexist, without mixing with one another: that is to say that cultural ghettos are created made up of foreigners who do not know the language, who do not attend the same schools, who do not go to the same shops, and who do not establish relationships with people from their adoptive country.

In the Islamic case, it has been translated as “*Muslims inside Europe outside Europe*”.

In light of these two extremes: *Muslims without Islam / Muslims inside Europe outside Europe*: the question that arises is whether or not there is an alternative.

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The viability of an alternative requires that first of all, we ask ourselves if it is possible for a person to feel both Muslim and European at the same time or if, on the contrary, they are incompatible identities.

There are some European Muslim intellectuals working towards elaborating an identity that is equally Islamic and European.

The means to this end consist of a serious, well-based re-reading of the religious texts (of the Koran and the *Sunna*) in the light of the new contexts: XXI century European society.

That is, when faced with a specific conflict that arises (the possibility of attending physical education classes in a mixed school, the possibility of polygamy, etc.) the question would then be: What answer does the Koran have for this problem that has occurred, not in VII century Arabia, but in Europe in 2005? But, how does the Koran respond to this?

Obviously, this reinterpretation would smooth the way to integrating Muslims in Europe.

I believe it is important to bear in mind that the attempts at forced assimilation end up leading to social isolation in ghettos.

That is to say, if in the eagerness for assimilation, room in the state school is not made for Muslim girls and boys, they will end up by attending their own schools, or by receiving their education at the mosques or at home.

In fact, six months after the French law came into effect, 47 students had been expelled under the provisions of the law for attending class with the Islamic headscarf. Many of them had been signed up at the CNED (National Center for Distance Education) and receive classes at the mosque. The question that needs to be asked is: Are we fostering the integration of these students into French society?

The alternative to both extremes would be that of a single intercultural society: common, yet plural, with shared basic values, but one in which there is room for everyone.

This intercultural-ness would suppose:

- On the one hand, the acceptance of certain common principles and values that would be defined by the dignity of the person and respect for human rights. From this standpoint, “cultural” practices such as genital mutilation would plainly be unacceptable.

This is what is clearly stated in a law that came into effect in Spain last year with the purpose of fostering the social integration of immigrants. Between several reforms it typifies genital mutilation as a separate crime on the basis that (I read the introduction of the Law) it is “*a practice that must be fought against with all the force possible,*

without any possible justification on the basis of so-called religious or cultural grounds”.

- But, on the other hand, along with the acceptance of certain common principles, respect for plurality.

From this perspective, if the use of the headscarf is not incompatible *per se* with the dignity of women, it must be deduced that it is part of her personal and religious freedom.

Of course, religious freedom, as with any other right, is not without its limits; therefore, in each specific case, it must be determined whether legitimate limits have been transgressed or not.

Thus, in those cases in which safety or health is in jeopardy, as in refusing to take off the headscarf to have a picture taken for an identity document, or for chemistry laboratory classes, or for gym class. The ban on the use of the headscarf may be more justified than when these circumstances do not occur.

In short, from this perspective, the problem of the headscarf is minimized and is limited to those specific situations in which the limits are trespassed.

These are conflicts that are amenable to case-by-case resolution on the basis of the specific circumstances and by means of meticulous consideration of the legally protected rights affected.