

SUMMARY

In a mission letter dated 29 January 2010, the Prime Minister asked the Conseil d'Etat to study "legal grounds for a ban on the full veil", which should be "as wide and effective as possible", while emphasising the importance of "not offending our Islamic compatriots". **The Conseil d'Etat accordingly conducted this study in strict accordance with the terms of this request and without considering the desirability of legislation on this matter.**

While binding legislation applicable to specific areas already exists, there appeared to the Conseil d'Etat to be no legally unchallengeable basis for a general ban on the full veil as such. It therefore considered the possibility of a ban on concealment of the face, by any means, but even this broader ban, if applied to the whole of the public space, ran a serious risk of being in conflict with constitutionally and conventionally guaranteed rights and freedoms. **On the other hand, the Conseil d'Etat was of the opinion that public security considerations and the fight against fraud, reinforced by the requirements of some public services, were such as to justify the obligation to keep the face uncovered in certain places or in the performance of certain formalities.**

1. MANY LEGAL PROVISIONS ALREADY SERVE TO BAN OR IN CERTAIN CASES DETER PEOPLE FROM WEARING THE FULL VEIL OR MORE GENERALLY FROM CONCEALING THEIR FACES.

a) The following are already banned from wearing the full veil:

- Public employees, when exercising their functions, in accordance with the principle of secularism;
- Persons in public education establishments (Act of 15 March 2004): the full veil is banned in schools, again in accordance with the principle of secularism (*laïcité*).

Furthermore the head of a company may ban employees and other persons frequenting company premises from wearing the full veil if it is a hindrance to the sound operation of the establishment.

b) Some existing provisions based on public-security and anti-fraud considerations also require people to identify themselves at particular times and hence to uncover their faces. They may flow from legal or regulatory provisions or from service requirements.

Persons must uncover their faces when:

- submitting to identity checks and inspections as stipulated in the Code of Criminal Procedure;
- having identity documents made (which must show the holder's face);
- performing certain official formalities (marriage, voting, collection of children from school, etc.);

- entering certain places, where security considerations require identification (as expressly ruled in the case of consulates or airport departure lounges);
- gaining access to regulated places or services, for which personal identification or checks based on objective criteria are necessary (as, for example, age in bars or restaurants where alcohol is served). Refusal to uncover the face would then be a justification for refusing access or refusing service.

c) On the other hand, the act of **forcing somebody to wear the full veil or to conceal the face** can only be prosecuted indirectly on the basis of certain common law offences, such as violence or threats used to make somebody obey an order and – if the bill on violence to women currently being examined is adopted – “psychological violence within a couple”.

France therefore has a wide range of individual prescriptions or prohibitions, making its legislation, compared with that of similar democracies, one of the most restrictive with respect to these practices.

2. A GENERAL BAN ON THE FULL VEIL AS SUCH OR ON THE CONCEALMENT OF THE FACE IN THE PUBLIC SPACE IS VERY LIKELY TO BE IN CONFLICT WITH THE CONSTITUTION OR THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS.

The Conseil d’Etat has reviewed various principles that may provide a basis for a ban on wearing the full veil in the public space, or more generally, on concealing the face.

a) A general ban on the full veil alone would create considerable legal uncertainty.

It appears to the Conseil d’Etat that there is no legally unchallengeable basis for such a ban.

■ **To begin with, the Conseil d’Etat clearly rejects the principle of secularism (*laïcité*) as the basis of a possible ban.** It mainly applies in relations between the public authorities and religions or persons who subscribe to them. It is directly binding on public institutions, thereby justifying the neutrality requirement imposed on representatives of public authorities in the exercise of their duties. On the other hand, it can only be directly binding on society or individuals by virtue of the specific demands on certain public services (as in the case of educational establishments).

■ **The principles of the dignity of the human person and equality between men and women, while both have a solid constitutional basis and feature prominently in case law, would be difficult to apply in this instance.**

• *The principle of protection of the dignity of the human person*, however fundamental it may be, did not appear to be so obviously applicable to this issue as to offer a basis for a general ban on the full veil. There are a number of different interpretations of the principle of dignity and two of them in particular appear to conflict or to be mutually restrictive: that of the collective moral requirement to protect dignity, even at the expense of the person’s right to self-

determination (reflected in case law in the decision by the Conseil d'Etat of 27 October 1995, *Commune de Morsang-sur-Orge*, on the banning of "dwarf throwing"), and that of the protection of freedom of self-determination as a consubstantial aspect of the human person, which has an important place in the case law of the European Court of Human rights. The Court has thus enshrined a "principle of personal autonomy" to the effect that we should all be able to live according to our convictions and personal choices, even if it means putting ourselves at moral or physical risk, provided we do not harm anybody else. This principle is of particular relevance given that most women who wear the veil do so voluntarily, according to the Ministry of the Interior.

- ***The principle of equality between men and women***, although it too is firmly enshrined in case law, would be difficult to apply in this instance. While it applies in cases where unequal treatment is meted out by others, it is not intended to apply where a person chooses a particular status him or herself, i.e. when this person exercises his/her personal freedom, which may lead him/her to adopt a form of behaviour that does not conform to this principle.

Despite their firm foundation in law, these grounds do not appear to constitute a legal justification for banning the full veil since they cannot be applied to persons who have deliberately chosen to wear it. The Conseil d'Etat cannot therefore recommend them as the legal basis of a general ban.

- **Similarly, public security could not provide a basis for a general ban on the full veil alone, since no particular public security problems have been associated with the veil as such.**

- **Lastly, a limited ban on the full veil would be legally fragile in light of the principle of non-discrimination and its implementation would probably be a very delicate matter.**

b) The Conseil d'Etat has therefore examined the legal possibility of a general ban on concealing the face in the public space.

To that end it reviewed the requirements of public policy. However, this constitutional notion has different meanings in law. Its three traditional pillars are public security, public peace and public health but only the first of these can be relied upon in this instance. By virtue of constitutional case law, public order has another specific purpose, namely that of combating fraud, which may involve preventing people from concealing their appearance or indeed demanding that they reveal their identity.

Moreover, public policy has what is often referred to as a "non-substantive" dimension, which historically has covered "public decency", "public order" or "dignity". But this non-substantive public policy, for the reasons given above, is not in itself a sufficient basis for a general ban on concealing the face.

The Conseil d'Etat has therefore considered a new, broader conception of public order, which might be defined as constituting the essential rules of life in a society. In our Republic these rules could have the following implication: when an individual is in the public space (in the broad sense of the term, ie when he is likely to come across another person quite fortuitously), he may not conceal his face to the point of being quite unrecognisable.

But the Conseil d'Etat has had to rule out such a basis. Apart from the fact that such a conception has never been formulated in law and would therefore be unprecedented, it would also run counter to the case law of the Constitutional Council, which continues to observe a traditional definition of public policy, as

shown in recent decisions, and open up a whole new area of collective obligations, whose consequences cannot be gauged.

3. IN THE CIRCUMSTANCES, ONLY PUBLIC SECURITY, A COMPONENT OF PUBLIC POLICY, AND THE NEED TO COMBAT FRAUD COULD PROVIDE A BASIS FOR A BAN, BUT ONLY AT PARTICULAR TIMES IN PARTICULAR PLACES.

On this basis the Conseil d'Etat felt that the obligation to uncover the face might be given a solid basis in law if it were to be enshrined in two provisions.

■ The first would consist in strengthening and extending the special police powers of the prefect and, where appropriate, the mayor so that they could impose a wider ban on concealment of the face in order to prevent any threat to life and property. Given that these general police powers are not necessarily supposed to be exercised in all public places, the prefect might be granted a special police power to ban the concealment of the face in any place open to the public where there was a specific threat to public policy (in banks or jewellers, at sports meetings or during international conferences, for example).

■ The second would consist in banning the concealment of the face in two particular cases:

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

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

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

Lastly, with respect to sanctions, the Conseil d'Etat has identified two different cases:

■ In the case of people who conceal their faces without knowing that a ban has been imposed, the Conseil d'Etat proposes that they be enjoined to submit to mediation, organised by an accredited body. This injunction would be imposed either as the main sanction or in addition to a fine. The rules could be adapted to suit the motive for and the nature of the concealment of the face: clearly the wearing of the full veil could not be sanctioned in the same way as the wearing of a balaclava.

■ As to the instigators of the practice, the Conseil d'Etat has envisaged making it a specific offence to coerce others by violence, threats, abuse of power or abuse of authority to conceal their faces in public on the grounds that they belong to a category of persons defined *inter alia* by gender. The corresponding sanction would be more severe as the offence would be an indictable one. The court may also require convicted persons to submit to social mediation.

The Conseil d'Etat has drafted wording for provisions that might be envisaged but has not put forward proposals, this being the prerogative of Government or Parliament authorities.