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Religion and the Secular State: French Report

PROLOGUE

In the context of the political and legal controversy raging in the United States since the 1990s around the meaning of the U.S. Constitution and the spirit that animated its Framers, many in the academic and legal community in the United States reject the interpretation of the principles of neutrality and separation as they have been interpreted by the Supreme Court, especially since *Everson* in 1947.¹ We are well aware that the expression ‘Secular State’ can have a pejorative sense in the American milieu and can cause fierce criticism against ‘radical’ liberalism, its ethical weakness ethics or its contaminating atheism.

We start from the French understanding of the term Secular State. This term is not pejorative in the French context, and what it represents to lawyers in France is the exact definition of their state: a non-confessional state, without organic or conventional ties to one or more religions, whose “philosophical” ideal is republican and democratic. These notions are no longer contested by any French political or academic factions. A consensus has operated since the synthesis of the Fifth Republic.

I. SOCIAL CONTEXT

France is a country of some 66 million people with three characteristics, a population of ancient roots possessed of a great many traditions, customs, and a particular way of life, and a population highly urbanized due to various industrial transformations. At the same, the modern population is the fruit of intense and constant immigration since the nineteenth century. France today has four million foreigners, most of them with European familial roots that are ancient (Italy, Belgium, Poland, Spain, Portugal) or more recent (Poland, Lithuania, Romania), but also many from the Maghreb (Algeria, Morocco, Tunisia), Africa (Mali, Chad, Senegal, Niger, Burkina Faso, Côte d’Ivoire, Togo, Benin, Zaire, Rwanda, Comoros), or Asia (Vietnam, China, Sri Lanka). This extreme variety is the result of several factors: The attraction of a strong economy driven by Europe’s industrial revolutions, the dramatic demographic deficit caused by two world wars, the considerable economic growth after World War II, and the migratory influx that followed the end of the French colonial empire. The existence of a large francophone heritage of this empire still favors France as a destination in the process of economic migration.

If immigration now affects all European countries, for a long time France and the United Kingdom were the most affected by this phenomenon. Since the 1970s, the policy of naturalization and acquisition of French nationality by birth or marriage in France favored a rapid expansion of French citizenship to economic migrants and their families. The spirit of this policy was “assimilation,” meaning that once becoming French, the foreigner would acquire with citizenship a specific and customary behavioral attitude, the most specific manifestation of which would be discretion in public religious behavior and in relationship to others.

This model, also a legacy of the complex history of France in its difficult march to political modernity, was completely disrupted in the 1980s. Two phenomena have

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1. *Everson v. Board of Education*, 330 U.S. 1 (1947).

developed that somehow, disrupting certitudes in matters of relations between the state and religions, have changed acquired habits. The first phenomenon is the strong denunciation of discrimination against people of immigrant origin – discrimination in employment, housing, education, compensation, and especially social considerations. The second phenomenon is a challenge to French “laïcité” as a social praxis of discretion in the public space. This praxis began to be denounced as a far more insidious form of discrimination that, forcing everyone to reserve their religion to their private space, is in fact encouraging contempt for religion.

It is true that in the French context, the advent of the secular state was not an easy affair, and it corresponds to a veritable war for influence between two conceptions of the state and its relationship with religion. One is a conception according to which the state, itself confessional, promotes one religion for which it is also the protector (France of the *Ancien Régime*); the other is a conception in which the state is not religious, does not favor any religion, and even uses its sovereign power to consign religious expression to the private sphere (Republican France).

The model in both cases is the preexistence of the state, an historical not an ideological preexistence, despite the assertions of Edmund Burke concerning the extreme autonomy of the French society of the *Ancien Régime* (which was also profoundly non-egalitarian). The state in France existed before the organization of the legal and civic order. So that the rights and freedoms of citizens, the freedom of civil society, are above all subject to an order, which, while refusing to consider itself as transcending the republican order, nevertheless remains sovereign and subjects rights and freedoms to the limits of laws, whose creation is also strictly regulated.

To move, then, from the monistic state – which excluded the state influence of Catholicism and methodically reduced the margin of influence of this religion on society in the name of emancipation of consciousness – to a state of law that does not interfere in the religion of its citizens, and integrates religious pluralism as a new constitutional value, is a difficult challenge. There have been recent discussions about religious discrimination against Muslims and other minority or extensively proselytizing religions,² so that, without really touching the shape and the official philosophy of the secular state in France, there is a greater taking into account of diversity as attempts are made to translate the spiritual vitality of French citizens into law.

II. THEORETICAL AND ACADEMIC BACKGROUND

We have mentioned that the secular form of the French State is not questioned today in academia. The State is neutral (it does not profess any religion); it is in a condition of separation from religion, and it leaves full freedom of conscience to its citizens, who have the right to believe in nothing, to not practice religion, as they have the right to believe personally and collectively. The State leaves full freedom to religious groups to organize under private law. This theoretical and academic consensus is nevertheless characterized by important variables and major disputes.

These variables and arguments concern the exact scope of the general principle that defines the nature of the contemporary French republican regime and more specifically its constitution. This principle is called laïcité – secularism. To what extent is this principle, or should it be, a civil religion that serves as a unifying narrative for the French population? Is laïcité simply the heart of the French identity, or is it no more than an expression of the state of French law? Depending upon the answers arising from academic studies, the organization of religious pluralism in French society is going to be considered dangerous, possible, difficult, or welcomed.

For orthodox upholders of a secularist (*laïcist*) identity, the secular state is a state that should absolutely hold itself apart from religions, readily dangerous in their appetite for power and their influence on the people’s consciences. In this view, religion is above all

2. Françoise Gaspart and Fhrad Khosrokhavar, *Le Foulard et la République* (Paris: La Découverte, 1995). Claire de Galember, “Le Voile en Procès,” *Droit et Société* 68 (2008): 11-31.

considered to be a code of obligatory thoughts and behaviors encroaching on the freedom of people to think and act as they please. The secular state then is finally nothing more than the emanation of a moral code or meta-legal ideal, the secular ideal (*l'idéal laïque*), which is that of an emancipated, progressive, but also humanistic and compassionate society. To paraphrase the words of the philosopher Eric Voegelin, proponents of this laïcité identity are “gnostics,” aware and convinced.³

Orthodox thinkers were never a majority in the French academic and political landscape, which is characterized by its great critical diversity. Most scholars, historians, lawyers, and philosophers admit that the French secular state happened as a result of extraordinary conflict, that it certainly had anti-clerical roots, but that its social liberalism has always been hampered by the strength of a universal fantasy that served it as a substitute transcendent order. At the same time, these scholars recognize that conflicts have subsided, that a synthesis took place at the beginning of the 1960s, and the French secular state has finally established the conditions for the peaceful existence of belief in the national territory.⁴ The secular state in France guarantees neutrality and equal access to public services, non-discrimination on religious grounds, and the equality of citizens before the law. The secular state protects the freedom of belief and conscience of its citizens.

The responsibility of this state in the secularization of French society (religious indifference) is still debated. Are the French – have they become – less Catholic because of the collective collapse of religious practice in the 1960s, because of the strong anti-clericalism conveyed by the public education system, because of the renewal of the French population by immigrants who have no particular religious culture or are non-Catholics? On this issue, opinions are sharply divided.⁵

Finally, there remains another school of academic thought that tries to free French *laïcité* from its ertswwhile messianic fantasy, by emphasizing the concrete implications of values consolidated by the constitution. In a way, these thinkers would like to render more technical and operational the possibilities offered by the rule of law. They would wish reflection upon the future of the French in a pluralistic society to be even more forward-looking and subject to prediction, even to the point of proposing a new version of the national imagination, in which diversity would be integrated as a positive value.⁶

III. CONSTITUTIONAL BACKGROUND

A. Concerning the Existence of a “Relationship” between Church and State

Since the French Revolution, the French State has been no longer a confessional state, except for the period of the Restoration (1815-1830). By the *Declaration of the Rights of Man and of the Citizen*, freedom of thought and opinion, including religious thought and opinion, was nevermore to be questioned. Similarly, from the time of the Revolution and most particularly with the establishment of the Civil Code in the early twentieth century, the only laws recognized by the French State are those that the state promulgates, and relationships between citizens of the country are governed by the

3. “The Republic is a philosophy before it is a regime; it is a church, a secular church whose dogma is free thought and whose priest is the teacher,” Emile-Auguste Chartier, dit Alain. The most representative contemporary author who defends this thesis of *laïcité-identité* is Henri Pena-Ruiz, *La Laïcité* (Paris: Flammarion, 2003), 254, and *Histoire de la Laïcité: Genèse d'un Idéal* (Paris: Gallimard, 2005), 144. See also Claude Nicolet, *L'Idée Républicaine en France* (Paris: Gallimard, 1982).

4. Jacques Le Goff, René Rémond, and Philippe Joutard, eds., *Histoire de la France Religieuse 3: Du Roi Très Chrétien à la Laïcité Républicaine 18ème-19ème Siècle* (Paris: Seuil, 2004), 540, 3ème Partie, Une Vitalité Religieuse Toujours Torte. Paul Airiau, *Cent Ans de Laïcité Française: 1905-2005* (Paris: Presses de la Renaissance, 2005), 288; Yves Tripier, *La Laïcité, ses Prémices et son Evolution depuis 1905 (le Cas Breton)* (Paris: L'Harmattan, 2003), 183.

5. Jean Battut, Christian Join-Lambert, and Edmond Vandermeersch, *1984: La Guerre Scolaire a Bien eu Lieu* (Brussels: Desclée de Brower, 1995).

6. Jean Baubérot, *Vers un Nouveau Pacte Laïque?* (Paris: Seuil, 1990), 266.

statutory framework. A religious framework, the religious law, has no legal force, and no strong social and moral weight. With the Napoleonic Empire, France began a “concordat” relationship that recognized four religious groups (Catholic, Reformed, Lutheran, Jewish) to which it assured protection, funding, and influence over the population. Other religions present in the country had a “private” right to exist. They could not be practiced publicly. This system would be in place until 1905, when it was supplanted by the French Law on the Separation of Church and State of 9 December (*loi du 9 décembre 1905 concernant la séparation des Églises et de l’État*). Meanwhile, the government had organized a non-denominational school system (1880s) without any possible control by the Catholic Church, had established a non-sectarian health and hospital system, and had timidly began its more strictly social dimension, legislating wage labor. Religions could organize into simple private associations (*associations culturelles*) (1901). After 1905, public freedom of worship would be guaranteed, and religions could organize in religious organizations (*associations cultuelles*) (1905), which are exempt from certain taxes.

This review of the main French constitutional texts in force highlights a republic called “secular” (*laïque*), protecting the rights and freedoms of citizens, in particular freedom of religious opinion. Thus, from the Revolution, Article 10 of the *Declaration of the Rights of Man and of the Citizen* (*Déclaration des droits de l’Homme et du citoyen*) (DDHC) of 26 August 1789, a text of constitutional value,⁷ guarantees freedom of conscience and opinion: “No one shall be disquieted on account of his opinions, even religious opinions, provided that their manifestation does not disturb the public order established by law.” Article 1 of this same text, in explaining that “Men are born and remain free and equal in rights. Social distinctions may be based only upon the common good,” implicitly prohibits discrimination for religious reasons. Thus, religious beliefs must be protected in the same way as other opinions.⁸ Also, the Preamble to the Constitution of the Fourth Republic, 27 October 1946, reprised in the preamble of the Constitution of 4 October 1958,⁹ states that “(...) The French people (...) solemnly reaffirm the rights and freedoms of man and citizen enshrined in the Bill of Rights of 1789 and the fundamental principles recognized by the laws of the Republic. (...) No one may be injured in his work or employment, because of his origins, opinions or beliefs.” In addition, the thirteenth paragraph of the Preamble of the Constitution of 1946, confirmed by the Constitution of 1958, provides for “the organization of public education free and secular at all levels” as “the duty of the State.” As for the current version of the Constitution of the Fifth Republic, of 4 October 1958,¹⁰ of which the Preamble includes all the benchmarks mentioned above, it affirms that “France is a republic indivisible, secular, democratic and social,”¹¹ which “ensures equality before the law for all citizens without distinction of origin, race or religion. It respects all beliefs. Its organization is decentralized.”¹² This explicit recognition of *laïcité*, however, does not provide any precision as to the scope and content of this principle in the constitutional text. Nevertheless, the law of 9 December 1905 on the separation of church and state,¹³ sometimes regarded¹⁴ as a subsidiary source of constitutional law concerning religions because it contains several fundamental principles recognized by the laws of the Republic¹⁵ (PFRLR) (separation of church and state, freedom of conscience,¹⁶ freedom of

7. Which will be included in the preamble of the Constitution of the Fifth Republic on 4 October 1958 as a key element of the constitutionality bloc. This refers to a set of basic texts to which the current constitution refers because of their fundamental interest, for the protection of fundamental rights, and upon which the Constitutional Council has conferred constitutional value for its famous decision 71-44 DC, of 16 July 1971, *Liberté d’association*, <http://www.conseil-constitutionnel.fr>.

8. That is, they are protected by Article 11 of the DDHC.

9. It is a question of another constitutional standard of reference.

10. Revised by the constitutional law of 23 July 2008.

11. Article 1 of the Constitution.

12. Article 2.

13. <http://www.legifrance.gouv.fr>.

14. Doctrinal opinion outlined in Francis Messner, Pierre-Henri Prétot, and Jean-Marie Woehrling, eds., *Traité de Droit Français des Religions* (Paris: Litec, 2003), 390.

15. Constitutional principles laid down by the Constitutional Council (Cons. const.) or Conseil d’Etat (CE).

worship and banning subsidies) fortunately does provide an interpretation of the concept of *laïcité*.

The Constitutional Council pronounced, for the first time, upon the principle of *laïcité*, in a decision of 19 November 2004 on the constitutionality of the Treaty establishing a Constitution for Europe (TECE), affirming that the provisions of the Article 1 of the 1958 Constitution “forbid anyone to rely on religious beliefs to overcome common rules governing the relations between public authorities and individuals.”¹⁷ More recently, in a decision of 22 October 2009, the Council reaffirmed the constitutional principle of *laïcité*.¹⁸

B. On the Mention of Religious Freedom in the Constitution

Religious freedom or freedom of religion figures in the constitutional text. This is a fundamental principle of the right of religions in France, alongside equality between religious beliefs and the neutrality of public authorities with regard to these beliefs. The French Constitution recognizes religious freedom through devotion to freedom of opinion and belief in the “constitutional bloc.”¹⁹ It protects with the same force opinions and beliefs. In addition, the Constitutional Council described freedom of conscience as a “fundamental principle recognized by the laws of the Republic” in its 1977 decision *Liberté d’enseignement et de conscience* (Freedom of education and of conscience),²⁰ which implicitly includes freedom of religious belief in its 5th recital, recalling the requirements of Article 10 of the DDHC as respect for religious beliefs, in conformity with public order, and the principle of non-discrimination in employment on the basis of beliefs.

Thus, while it is true that very relevant doctrinal distinctions²¹ are made between freedom of opinion, freedom of conscience, freedom of worship, and freedom of religion,

16. If this has clearly been reached by the Constitutional Council in its decision Cons. const., 23 November 1977, decision no. 77-87 DC, *Sénat, Yvelines* (*Journal officiel de la République française* (JO) of 25 November 1977, 5531, Recueil, 87, <http://www.conseil-constitutionnel.fr>; *Gaz. Pal* 9-10 and 11-13 June 1978, 293-300, note Flauss), in a ministerial response of 13 November 1995, no. 20155, the Overseas Ministry arrogated jurisdiction to clarify that: “The principles laid down by the law of 9 December 1905 must be regarded as ‘fundamental principles recognized by the laws of the Republic’ in that they specify the constitutional principle of secularism of the French Republic recalled in Article 1 of the Constitution of 4 October 1958. Such is the case of the principles of freedom of conscience, freedom of worship and the prohibition of subsidization of religion by the state, the county and the municipalities set out in Articles 1 and 2 of the Act of 9 December 1905.” See www.questions.assemblee-nationale.fr.

17. Cons. const., 19 November 2004, decision no. 004-505 DC, *TECE* (recital 18), *JO* of 24 November 2004, 19885, Recueil, 173, <http://www.conseil-constitutionnel.fr>.

18. Cons. const., 22 October 2009, decision no. 2009-591 DC, *Legislation to ensure parity of funding between public and private elementary schools under partnership agreement when they receive students enrolled outside of their municipality of residence* (recitals 4, 5 and 6), *JO* of 29 October 2009, 18307, <http://www.conseil-constitutionnel.fr>.

19. Composed as we have seen of the collection of elements to which the Preamble of the Constitution of 1958 returns.

20. Cons. const., 23 November 1977, decision no. 77-87 DC, *Sénat, Yvelines* (recital 5).

21. Authors agree in recognizing that freedom of conscience is the freedom to define oneself in relation to acts involving one’s convictions, including religious beliefs; freedom of religion refers to the right to manifest beliefs without suffering any external constraints. But the French legal doctrine distinguishes between, on the one hand, religious freedom, individual rights, and, on the other hand, freedom of religions, the collective right of every religious denomination to regulate its internal organization (principle of self-determination), but also the freedom to speak and act in the State. Some consider that religious conviction is nothing but a type of particular opinion [Jean-Jacques Israël, *Droit des Libertés Fondamentales* (Paris: LGDJ, 1998), 426]. Others believe that “freedom of conscience includes the right to believe what we want and to relate to the religion that is preferred. But it does not involve the free practice of religion: freedom of conscience and freedom of religion are two separate things.” [Henry Barthélemy, *Traité Élémentaire de Droit Administratif* (Paris: Rousseau, 1933), 273; Jean Morange, *Droits de l’homme et Libertés Publiques*, 5th ed. in *Droit Fondamental* (Paris: PUF, 2000)]. Jean François Flauss distinguishes three approaches to the notions of liberty of conscience: “The first, the most restrictive, apprehends liberty of conscience e la liberté de conscience as part of religious freedom, that is to say as a right of the individual to believe or not believe in religious matters. In a second perspective, liberty of conscience is understood in an ‘extensive’ manner. It would be a liberty of adherence to

the latter cannot be exercised without the first. Therefore, it is possible to conclude that the constitutional guarantee of religious freedom is characterized by three features²²: a collective dimension, inclusiveness,²³ and the externalization of conviction in religious exercise.

This constitutional codification recognizes, in effect, the individual dimension, corresponding to freedom of conscience and religious opinion, and the collective dimension, integrating the right to freedom of worship, freedom of religion, which includes the organization of churches or religious communities and all forms of organized religious speech. Taken into account, then, are on the one hand the freedom of *forum internum*, that is to say, freedom to join a religion or not to adopt a religion, or freedom to change religion by conversion, and on the other hand the external freedom (*forum externum*) to express ones religious beliefs, including collective manifestations of religion in the public sphere. Such expression of course cannot interfere with the rights of others, as required by Article 4 of DDHC, which has constitutional value, whereby “Freedom is being able to do anything that does not harm others: thus, the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of these same rights. These limits can only be determined by law.” For example, the freedom to wear religious symbols must be reconciled with the neutrality of the educational space. Also, aggressive proselytism is prohibited as it is likely to undermine the freedom of each individual to believe or not to believe.

Finally, other constitutionally recognized freedoms give effect to religious freedom. There is freedom of speech,²⁴ without which it would be impossible to express religious opinions; freedom of assembly²⁵ permits meeting in public or in private on religious matters; freedom of association²⁶ is indispensable in the establishment of religious groups; freedom of expression makes possible, for example, religious processions. These related fundamental liberties allow all to express their opinions, including religious opinions, about everything that is of interest in the public debate.

C. *The Existence of a Religious Reference in the Foundations?*

Since the French Revolution, references to God or the Divine Providence are more than scarce. There remains, in the preamble to the DDHC 1789, the evocation of the “Supreme Being” under whose auspices the National Assembly, as author of the text, convenes. This reference is included in the Declaration of the Rights of Man and of the Citizen of the unimplemented Constitution of 24 June 1793. The Declaration is part of the constitutional block of the Fifth Republic today, but this reference to the Supreme Being has never been used or referred to in any constitutional debate on the possible implications of its presence in the text, in contrast finally to its usage in the American Declaration of Independence, which manifests, even if this Declaration does not have constitutional “value,” the veritable deist roots of the American constitutional spirit, accepting a transcendent natural order that organizes and explains the sacred nature of rights and liberties, in a certain sense “exteriorized” and at the same time limited by the sovereignty of the People in respect of this order even as it limits the exercise of power in the name of the People.

D. *On the Existence of a Special Mention of the Principles of State Neutrality, Equality between Religions, Cooperation, and Religious Pluralism?*

whatever opinions one would desire ... Finally, a third, very analytical approach, is sometimes defended: liberty of conscience would present an autonomous character, in relation to freedom of opinion as well as freedom of religious, it would be freedom of belief.”

22. See Messner et al., *Traité de Droit Français des Religions*, supra n. 14 at 43.

23. Which affects fundamental life choices.

24. Article 11 of the DDHC.

25. CE, 19 May 1933, *Benjamin*. Liberty granted by the laws of 30 June 1881 et 28 March 1907.

26. Constitutionalized, through the law of 1 July 1901 on the partnership agreement, the decision of 1971, above.

If the 1958 Constitution does not establish a constitutional system for churches, it does proclaim the equality²⁷ of all citizens irrespective of their religion, and respect for all beliefs, as evidenced by the first two articles. Article 2 lays down the basic principles of equality of all citizens before the law regardless of their religion and respect by the State of all religions, thus ensuring religious pluralism at least as assuming a variety of religions. This design can establish a doctrine of open or positive *laïcité-neutralité*,²⁸ supported by President Nicolas Sarkozy during his visit at the Lateran in 2007.²⁹ This provides a favorable opportunity for the State and religious denominations to work together to promote the common good of society, since this collaboration respects the autonomy and spheres of action of religions,³⁰ without the principle of cooperation, being expressly included in the constitutional texts. Such a “*régime concordataire*”³¹ as remains in Alsace-Moselle, illustrates, in practice and in the extreme, this kind of collaboration.

The principle of equality implies that no religion has a special public status. Religions are in principle private businesses, subject as such to private law. If equality requires, according to the Constitutional Council, “that to similar situations, similar solutions should be applied, it does not follow that different situations cannot call for different solutions.”³² Pluralism cannot be conceived as providing that every creed and religious group is subject to a non-discriminatory legal regime. The principle of equality does not therefore mean that the same treatment should be applied to all religions. Indeed, some qualifications to equality can be justified by necessities of general interest, or to restore full equality where the uniform application of the same rule would result in de facto discrimination, or to take account of certain particular contexts. The latter case is illustrated by the legal inequality that exists between the concordat regime of Alsace-Moselle, the situation in the rest of the metropolis, and the local law of the DOM-TOM (*Départements et Territoires d’Outre-mer*).³³

The principle of neutrality of public authorities towards religious beliefs means that there exists in France neither a state religion nor an officially recognized or qualified dominant religion. This principle derives from Article 1 of the Constitution, and implies a non-confessional state lacking competence to define the content of beliefs or interfere in

27. This principal, fundamental in a democratic society, takes a particular importance in France. See Pierre-Henri Prétot, “Les Religions et l’Egalité en Droit Français,” *Revue: Les Cahiers de Droit* 40 (1999): 849-866.

28. Jean Morange, “Le Régime Constitutionnel des Cultes en France,” in *Le Statut Constitutionnel des Cultes dans les Pays de l’Union Européenne* (Paris: Litec, 1995), 119-138; Philippe Ségur, “Le Principe Constitutionnel de Laïcité,” *Annales de l’Université des Sciences Sociales de Toulouse* 44 (1996): 117-134; Jean Baubérot, *Vers un Nouveau Pacte Laïque?* (Paris: Seuil, 1990); Maurice Barbier, “Pour une Définition de la Laïcité Française,” *Revue des Débats* 2 (2005): 134; “Face au Nouveau Millenium: La Liberté Religieuse dans une Société Pluraliste,” *Conscience et Liberté* 54 (1997), Berne, notably the articles of Jacques Robert and of Jean Baubérot; Guy Coq, *Laïcité et République, Le Lien Nécessaire* (Paris: Editions du Félin, 1995), 334; “La Laïcité,” *Pouvoirs* 75 (1995).

29. The President recalled that “it is not disputed by anyone that the French system of secularism (*laïcité*) today is freedom: the freedom to believe or not to believe, freedom to practice religion and freedom to change religion, freedom not to be prejudiced in one’s conscience by ostentatious practices, freedom for parents to give their children an education in conformity with their cond’appeler de ses vœux victions, the freedom not to be discriminated against by the administration based on one’s belief” adding that he must “take into account the Christian roots of France, and even to enhance them, all while defending a *laïcité* that had finally reached its maturity,” and to hope for “the advent of a *laïcité positive*, that is to say, of a secularism that, while ensuring freedom of thought, freedom to believe and not believe, does not consider that religions are a danger, but an asset.” For him, “it is a question of seeking dialogue with the great religions of France and and of having the principle of facilitating the daily life of great spiritual currents rather than trying to complicate them.” See Discourse of Nicolas Sarkozy at the Palais du Latran, 20 December 2007, available at http://www.elysee.fr/documents/index.php?mode=cview&cat_id=7&press_id=819.

30. It would be a question of “*laïcité de cohabitation*” according to the expression of Emile Poulat in *Liberté Laïcité. La Guerre des Deux France et le Principe de Modernité* (Paris: Cerf-Cujas, 1988).

31. See infra n. 33.

32. Cons. Const., 12 juillet 1979, décision n° 79-107 DC, *Loi relative à certains ouvrages reliant les voies nationales ou départementales*, (considérant 4), *JO* of 13 July 1979, Recueil, 31, <http://www.conseil-constitutionnel.fr>.

33. The French Overseas Departments and Territories, consisting of all the French-administered territories outside of the European continent.

the internal organization of religious organizations but perfectly entitled, in the interests of social organization, to regulate religious activity insofar as public policy requires, for example through the religious police. This neutrality applies to public services, to their agents, as well as to public education. Indeed, the Constitutional Council has identified the principle of neutrality of public service³⁴ which prohibits such service be provided in a manner that differentiates, based on political or religious beliefs, both for administrative staff and users of the service.

IV. LEGAL BACKGROUND

As with all freedoms, Parliament has intervened to clarify the content and scope of the constitutional principles of religion, to set the framework for the exercise of freedom of worship, and to determine the limits to freedom of religion necessary in a democratic society. These laws are in compliance with the relevant international treaties³⁵ by virtue of their supra-legality as required by Article 55 of the Constitution of 4 October 1958.³⁶ In addition, the French Parliament, aware of the implications of the accession of France to the Council of Europe and, to a lesser extent the EU, will draw on the outcome of judgments handed down by the European Court of Human rights (ECtHR) – on the basis of Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms³⁷ (ECHR) relating to freedom of thought, conscience and religion – or, marginally, by the Court of Justice of the European Union (ECJ), on the basis of Article 10 of the Charter of Fundamental Rights of the EU,³⁸ which have become binding since the entry into force of the Treaty of Lisbon.³⁹

Considering the issue of conformity of the principle of *laïcité* as it prevails in France to freedom of religion as enshrined in Article 9 of the Convention, the ECtHR has held that freedom of religion is not absolute and could be restricted. Paragraph 2 of Article 9 provides, in effect: “Freedom to manifest one’s religion or beliefs may be subject to such limitations as are prescribed by law and are necessary in a democratic society, for public safety, the protection of public order, health or morals, or the protection of rights and freedoms of others.”⁴⁰

A. Regarding the Specific Laws Governing Constitutional Principles and the Relevant Jurisprudence that Give a Particular Interpretation

The law of 9 December 1905 on the separation of church and state⁴¹ represents the most important legislative basis. Known as the law on *laïcité*, it illustrates at the same time the principles of freedom, equality, and neutrality. Indeed, Article 1 of this law states that “the Republic guarantees the freedom of conscience. It shall guarantee the free practice of religion, subject only to restrictions imposed in the interest of public order,” recognizing the principle of religious freedom in all its dimensions. Subparagraph 1 of Article 2, which provides that “the Republic does not recognize, pay or subsidize any religion. As a result, from 1 January following the enactment of this Act, shall be removed from state budgets, departments and municipalities, all expenses related to the exercise of religion.” That article carries the principle of neutrality of public authorities, with regard to religious beliefs, without distinguishing correspondence to the principle of equality of

34. Cons. const., 86-217 DC, 18 September 1986, *Loi Relative à La Liberté de Communication*, <http://www.conseil-constitutionnel.fr>.

35. Including the International Covenant on Civil and Political Rights, 1966, Article 18.

36. Under the terms of this provision, “Treaties or agreements duly ratified or approved shall, upon their publication, have an authority greater than that of laws, subject, for each agreement or treaty, to its application by the other party.”

37. Adopted by the Council of Europe, 4 November 1950.

38. Adopted during the European Council in Nice, 7 December 2000.

39. 1 December 2009.

40. A judgment of the European Court of Human Rights of 4 December 2008, *Dogru v. France*, App. No. 27058/05, provides a relatively recent illustration.

41. *JO* of 11 December 1905: 7205, available at <http://www.saosnois.com/separation-eglise-etat1905.htm>.

religions. However, this law establishes the practical arrangements for implementing these principles in organizing the transfer of public institutions of worship from legal representatives to religious associations, created by law freely enjoyed,⁴² addressing issues of ownership (public) places of worship⁴³ and the principles governing the religious police⁴⁴ ... etc. A law supplementing that of 1905 was voted on 13 April 1908, authorizing the state, departments, and municipalities to incur obligations necessary for the maintenance and preservation of religious buildings whose ownership has been recognized by law.

In addition, the 1908 law provides for the establishment of religious associations for religious worship. Indeed, Article 4 reflects the legal establishment of mechanisms to ensure religious freedom by substituting religious associations of private law for former public institutions of worship,⁴⁵ to the extent the principle of freedom of worship, extension of freedom of conscience, imposes on the State a number of positive obligations. Even if it does not subsidize worship, the State must provide everyone an opportunity to practice their religion (to attend ones religious ceremonies, to be instructed in the beliefs of the religion of one's choice ... etc.). The status of these new associations is defined by the Act of 1 July 1901, relating to the "contract of association." The jurisprudence of the Council of State will thereafter be part of a positive trend in the legislative sense, canceling most municipal ordinances banning the external exercise of religious worship.⁴⁶

Finally, Article 31 of the 1905 Act protects individuals against all constraint in the exercising or not of religious worship, while Article 32 protects freedom of worship against any disturbance.

The law on the separation of church and state, passed 9 December 1905 is extended to three departments overseas by the law of 11 February 1911, Article 2 of which states that "the Republic does not recognize, nor pay, nor subsidize any religion" and, consequently, "public institutions of religion are removed."

Other laws take into account the implications of the principle of neutrality in the functioning of French public services, which continue to be governed by the principle of equality, a constitutional value. Thus, as a general matter, a balance is struck to reconcile freedom of opinion and neutrality of the public service. Article 6 of Law No. 83-634 of 13

42. Articles 3-12 organize the devolution of movable and immovable property of former institutions of public worship: 1° / for new religious associations founded according to the recommendations of the Law, for collateral for religious services; 2° / for services or public institutions or public utility for a charitable collateral assignment. As for the property from the state, counties or municipalities, they are reimbursed. The law decides writing inventories to divide property. The law foresees leaving "at the free disposition of associations" new "buildings [affected by Public Domain and] used for public religious worship" (art. 13). Other affected buildings (archdioceses, dioceses, seminaries, schools of Protestant Theology, presbyteries) are left temporarily - during 2-5 years - to free disposal of associations before being taken over by the state departments or municipalities (art. 14). For the Catholic Church, this transfer was already provided by the Concordat of 15 July 1801.

43. Articles 14-17.

44. Articles 25-36. For example, Article 27 indicates that "ceremonies, processions and other exterior manifestations of worship are regulated in conformity with Article 97 of the Code of municipal administration. Le ringing of bells is regulated by municipal law, and in the case of lack of accord between the mayor and the religious associated, by prefectural law, and Article 28 prohibits "raising or affixing any sign or religious emblem on public monuments or in any public place whatsoever, with the exception of religious buildings, burial land in cemeteries, funerary monuments, as well as museums or exhibitions. (...)"

45. Pius X had refused religious associations under the 1905 Act, Article 2 of the law passed 2 January 1907, concerning the exercise of public worship, providing that without religious associations, buildings assigned to the exercise of worship continue to be left at the disposal of the faithful and the ministers of religion to practice their religion. After negotiations, diocesan associations were created, in lieu of religious associations, for Catholics by the agreements Briand-Cerretti of 1923-1924. The Conseil d'Etat recognized the status of compliance with the provisions of French law, including the laws of 1901 and 1905 (opinion of the EC, 13 December 1923), and Pius XI authorized their constitution in the Encyclical *Gravissimamque Magnan* of 18 January 1924. See Jean Foyer, "De la Séparation aux Associations Diocésaines," *Revue des Sciences Morales et Politiques* 2 (1994): 147-166.

46. For a principle of jurisprudence, see the case of *Abbot Didier*, 1 May 1914, protecting traditional manifestations of worship and confirming that the public domain can be made available to a church for religious celebration. CE, 1 May 1914, no. 49842, published in *Recueil Lebon*, available at www.legifrance.gouv.fr.

July 1983 concerning the rights and obligations of public officials permits freedom of opinion of these officials and excludes any distinction between them and the users of their services base on their religious beliefs. In practice, the wearing of religious symbols by public officials has led to recent decisions of the various administrative courts that reaffirm an old case. Because the principle of equality of users⁴⁷ imposes neutrality on the public service, to respect the opinions and beliefs of officials, the government must neither offend their beliefs nor discriminate against them on this basis. The judge in this case inferred an obligation for all those working for a public service to submit to a strict duty of neutrality.⁴⁸ Specifically, a public official, in contact or not with the public, cannot manifest his beliefs and opinions in the context public service, for example in the wearing of religious symbols.⁴⁹ Outside of service, public officials remain subject to a duty of confidentiality which prohibits them from making remarks that may have repercussions on their service.

This duty of neutrality of agents is susceptible to sanction as explained by the Council of State: “an instance of a service agent of public education manifesting in the performance of his duties his religious beliefs, including wearing a sign to mark his belonging to a religion, constitutes a breach of his obligations.”⁵⁰ The non-renewal of the employment contract of a public official, the implied reason being the wearing of a garment ostentatiously showing membership in a religion, is justified, even if the conduct in question would not be considered deliberately provocative or evidence of an attempt at proselytization.⁵¹ Also, “the fact of a public official refusing to obey repeated orders from his superiors and deliberately transgressing, by wearing in the course of his service clothing ostentatiously expressing his devotion to a particular religion, the principle of *laïcité* of the State, constitutes a fault of particular gravity.”⁵²

Beyond public officials, the same principles apply to public services in general. Thus, the principle of neutrality of the public service would oppose the display on public buildings, including the town hall, of signs symbolizing claims of political, religions, or philosophical opinions.⁵³

Regarding users of public services, the expression of religious opinion was permitted but was qualified by the judge. The Council of State has adopted a liberal position in the field of education, whose main lines appear to be progressively being applied to other public services. In an opinion of 27 November 1989 on *laïcité* and education,⁵⁴ the Council of State recognized for users of the public education a right to express and manifest their religious beliefs within scholarly establishments, within the limits of other requirements that must be reconciled. For example, regarding absences, the right to receive, but always individually (for the duration of the year), a leave of absence is granted to students when this exception is necessary for the exercise of worship but also remains compatible with the organization of studies and respects the public order of the institution.⁵⁵ The freedom to express religious beliefs yields in the face of acts of pressure, provocation, proselytism,⁵⁶ or propaganda of students, behaviors that undermine the dignity, pluralism, freedom of the student or member of the educational community, or

47. CE, 1951, *Société des Concerts du Conservatoire* ; DC 1973 décision du Conseil constitutionnel ; CE, 1984, *Commissaire de la République de l'Arriège*; CE, 1997, *Commune de Gennevilliers*, CE, 20 October 1995 *Kouchnir* (equal access to public education: enrollment in preparatory class) ; CE, 10 July 1995 *Contremoulin* (equal treatment: criteria for granting an exemption).

48. CE, 8 December 1948, *Demoiselle Pasteau*, Rec. 464; CE section, 3 May 1950, *Demoiselle Jamet*, Rec. 247.

49. CE, 3 May 2000, *Mademoiselle Marteaux*, no. 217017; TA Paris, 17 October 2002, *Ebrahimian*, no. 01-740/5; CAA Lyon, 27 November 2003, *Nadjet Ben Abdallah*, no. 03LY01392.

50. CE, 3 May 2000, *Mademoiselle Marteaux*.

51. TA Paris, 17 October 2002, *Ebrahimian*.

52. TA Lyon, 8 July 2003, *Melle Nadjet Ben Abdallah*, no. 0201383-0 203 480; CE, sect., 15 October 2003, no. 244428: “use by a public officer of the public service messaging in favor of a religious association is a breach of the principle of secularism and the obligation of neutrality, and justifies the sanction of temporary exclusion of functions for a period of six month, three months suspended.”

53. CE, 27 July 2005, *Commune de Sainte-Anne*, n°259806.

54. Available at the site of the Assemblée nationale, www.assemblee-nationale.fr.

55. CE Ass. 14 April 1995, *Koen et Consistoire central des israélites de France*.

56. CE, 27 November 1996, *Ligue islamique du Nord*.

health⁵⁷ or safety, disturbance in the conduct of teaching activities,⁵⁸ and problems affecting the normal operation of the service.⁵⁹

This balance is applied pragmatically, beyond the sphere of education only, and the high court calls on the administration to make an assessment case by case on the balance between these requirements and the freedom of conscience of users, rejecting, however, the prohibition in principle of the expression of religious beliefs by users.⁶⁰ The Charter of secularism in the public services, of Dominique de Villepin, signed 13 April 2007, applies these principles to consumers and public officials by providing, in addition, that “users of public services should refrain from any form of proselytism.”⁶¹

B. The State Control on Proselytizing (Freedom of Religion, Freedom of Circulation and Distribution, etc.)

Control on proselytizing is exercised through the “religious police,” which is an important body whose main dispositions are contained in the Act of 9 December 1905 on the Separation of Church and State (Law of Separation). Articles 26-35 govern, under the principle of freedom of worship, meetings (Article 26, for example, bans political meetings in places of worship), processions, ceremonies, or other external events (alignment on common law demonstrations on public roads), ringing of bells (Article 27), and religious symbols in public places (Article 28).

These dispositions, revealing the absence of a special system for religious police, are fully consistent with freedom of religion as constitutionally established. To implement these provisions, the clergyman has a power of organization; the police powers of the mayor are residual.⁶² Enforcement actions are taken by the Prime Minister, the Prefect or the mayor, and the general police authorities at national and local levels. From this perspective, the purpose of the measure resides in the maintenance of the public order, which must be seen as its only object, and which traditionally comprises three elements: security, peace, and public safety. Moreover, as this measure is by definition an attenuation of freedom of religion, it imposes on those who exercise it strict compliance with the necessity test. Finally, the requirement of proportionality of the measure to the disorder caused is required.⁶³

Article 433-21 of the Penal Code⁶⁴ addresses the issue of marriage: “Any minister of religion who will perform religious wedding ceremonies in the usual way without being justified by the fact that the marriage was previously received by civil officials shall be punished by six months’ imprisonment and a 7500 euro fine.” In criminal matters, several other crimes related to religious practices are punished, such as circumcision, described as “deliberate violence resulting in mutilation,”⁶⁵ the crime of obstruction of abortion ... etc.

The problem of burials is envisaged by Article L2213-7 of the General Local Authorities Code,⁶⁶ which provides that “The mayor or, failing that, the representative of the State in the emergency department, provides that any deceased person is buried and buried decently without distinction of religion or belief”; that ritual slaughter is subject to Articles R214-70 and following the Rural Code, particularly Article R214-73,⁶⁷ which explains that “It is unlawful for any person to conduct or arrange for ritual slaughter

57. CE, 20 October 1999, *Ministre de l'éducation nationale contre époux Aït Ahmad*.

58. CE, 10 March 1995, *Epoux Aoukili*.

59. CE, 2 November 1992, *Kherouaa*.

60. CE, 14 March 1994, *Yilmaz*.

61. Text available at <http://www.dgdr.cnrs.fr/bo/2007/07-07/521-bo0707-cir5209.htm>.

62. Article L. 2212-2, 3°, of the Code général des collectivités territoriales is responsible, however, for ensuring order in the churches.

63. See on this theme, Emmanuel Tawil, “La Police Administrative des Cultes en Droit Français,” *Revue de la Recherche Juridique-Droit Prospectif* 1 (2004): 507-529. For the jurisprudence, CE, 5 February 1909, *Abbé Olivier, Rec.*, 186; CE 25 January 1933, *Abbé Coiffier, Rec.*, 100 ; CE 2 July 1947, *Sieurs Guiller, Rec.*, 293.

64. Disponible sur le site <http://www.legifrance.gouv.fr>.

65. Cour d'Assises de Paris, 18 February 1999.

66. Id.

67. Id.

outside the slaughterhouse. The provision of premises, land, plant, machinery or equipment to perform ritual slaughter outside the slaughterhouse is prohibited.”

Applied in a liberal and pragmatic manner by administrative judges, these texts reveal little that is binding.

The issue of prevention of sectarian activities is found in French administrative policy. Other than Law No. 2001-504 of 12 June 2001 on the suppression of sects, numerous texts, official but without legal value, address this subject.⁶⁸

Regarding the dissemination of religious beliefs, the issue has been resolved for the audiovisual sector, the full freedom of the press as applied to the print sector having no opposition, since the law of 29 July 1881, to the expression of any current ideas, and excluding no church from this freedom. There are, indeed, several religious newspapers in France,⁶⁹ and those that are not provide liberal space for religious issues, thus ensuring an effective pluralism of opinions without the economic constraints that burden the print press these days. The solution for preserving the pluralism of ideas and currents of expression, which represents a constitutional objective,⁷⁰ in audiovisual media, while safeguarding the neutrality of the public service imperative,⁷¹ is Article 13 of the Law of 30 September 1986, which indicates that “The Superior Council of Audiovisual⁷² ensures compliance with the pluralistic expression of thought and opinion in service programs of radio and television, especially for political and general news programs.”⁷³ Article 56, more explicit, ordered France Television “to program on Sunday morning religious broadcasts dedicated to major religions practiced in France. These programs are conducted under the responsibility of the representatives of these religions and come in the form of broadcasts of religious ceremonies or religious comments. The costs of production are borne by society in a ceiling set by the annual provisions specifications.” This obligation of internal pluralism allows taking into account religious opinions, which is a guarantee of religious pluralism in the public service. The practical arrangements are set forth in the specifications laid down by decree of the individual broadcasters.⁷⁴ The expression of non-religious philosophical convictions – such free thought – is provided by Radio France under the pluralism of thought. In addition, Decree No. 92-280 of 27 March 1992 amended lays down the principles for the dissemination of advertising in religious programs.

C. *On the Existence of Laws that Protect Peaceful Coexistence and Respect among Communities*

The 1905 Act, by its task of defining the place of religious activities in French society in accordance with the constitutional principle of equality of religions, should suffice in a democratic state to protect peaceful coexistence and respect among various religious communities. Nevertheless, a further answer can be deduced from the laws punishing hate speech and hate crimes or, more symbolically, from the law establishing the High Authority for the fight against discrimination and for equality.⁷⁵

68. See the interministerial report of 1982, the report of the national police of 1984, the two parliamentary reports: Rapport Vivien made public in 1985 [Alain Vivien, *Les Sectes en France, Expressions de la Liberté Morales ou Facteurs de Manipulations ? Rapport au Premier Ministre*, February 1983 (La Documentation Française, 1985), <http://www.ladocumentationfrancaise.fr/> and Rapport Gest-Guyard en 1996, Alain Gest and Jacques Guyard, *Les Sectes en France*, Assemblée Nationale, Rapport no. 2468, made public 10 January 1996].

69. *La Croix, La Vie, Témoignage Chrétien, Le Monde Musulman, Hawa Magazine*.... On this subject see Phillipe Riutort, “L’information en Matière de Religion. Une Spécialisation Moralement Fondée?” *Lavoisier Réseaux* 1 (2002), 132-161, <http://www.lcp.cnrs.fr/IMG/pdf/Riut-02a.pdf>.

70. Cons. const., 86-217 DC, 18 September 1986, *Loi relative à la liberté de communication*, <http://www.conseil-constitutionnel.fr>.

71. In its decision no. 96-380 DC of 23 July 1996, concerning the France Telecom company, the Constitutional Council has stressed that neutrality was a “constitutional principles governing public service.”

72. Independent administrative authority responsible for ensuring the independence of public service on the one hand, and monitoring the private sector on the other.

73. Law no. 86-1067 of 30 September 1986 relative to freedom of communication (Loi Léotard), <http://www.legifrance.gouv.fr>.

74. Articles 18 and 19, *JO* of 1 September 1987, 10038 and 10045.

75. Law no. 2004-1486 of 30 December 2004 establishing HALDE, <http://www.legifrance.gouv.fr>.

D. On the Landscape that Results in Relation to Constitutional Principles

French law is at present trying to reconcile neutrality of the state in a pluralistic society and effective exercise of different cultural practices in respect of public order. A difficult task given the complex issues involved and the diversity of religious issues (*faits religieux*). We see that the intrinsic link between the constitutional principles of freedom, equality, and neutrality is found at the legislative level and, in the latter context, the jurisprudence has often preceded the texts, which, in general, they have endorsed.

V. PUBLIC POLICY

A. On the Existence of Specific Administrative Bodies Responsible for Religious Affairs and Religious Communities and their Impact on Religious Freedom and the Social Situation

Within the Ministry of the Interior, the Central Bureau of Worship (BCC), created by a decree of 17 August 1911, succeeded the Department of Worship (Religious Denominations), for which the separation of church and state in 1905 had removed the reason for existing.

The BCC controls the observance of the principles contained in the secular law of 1905 (cancellation of illegal subsidies ...) and administrative religious police (law and order for processions, etc.). It provides the relationship between the state and established religious associations, and it has contributed to the establishment of regional groups of the French Council of the Muslim Faith (*Conseil français du culte musulman* - CFCM).⁷⁶

CFCM is an association governed by the law of 1901 and intended to represent the Muslims of France. Established in 2003,⁷⁷ it was formally established and supported by Nicolas Sarkozy, then Minister of the Interior. CFCM intervenes in relations with the French political power, in the construction of mosques, in the halal food market, in the training of certain imams, and in the development of Muslim representation in prisons and in the French army. It also fixes the dates of the month of Ramadan in France, and, through the European Council for Fatwa and Research, enacts fatwas intended to be applied in France. The Board of Directors is elected for three years by the delegates of mosques, whose number is determined by the area of the places of worship. The council in turn elects the executive office that elects the president of the CFCM for the term. Regional Councils of the Muslim Faith (CRCM) are elected at the same time. The board is composed of seven branches:

- The Coordinating Committee for Turkish Muslims in France (CCMTF)
- The French Federation of Islamic Associations of Africa, the Comoros and the Caribbean (FFAIACA)
- The Federation "Invitation and mission for the faith and practice"
- The National Federation of Muslims of France (FNMF)
- The Great Mosque of Paris (GMP)
- Rally of Muslims in France (RMF)
- The Union of Islamic Organizations of France (UOIF)

The Buddhist Union of France (UBF), founded in 1986, is a nonprofit, apolitical federation. It provides links between Buddhist Associations and all public authorities. As such, it brings together associations and Buddhist congregations governed by the laws of 1 July 1901 and 9 December 1905, and their implementing regulations, it is a representative interlocutor with governments, religious communities, humanitarian agencies and academic and general, with any national or international body legally constituted, it works to present Buddhism as one of the great spiritual traditions of humanity through the diversity of its traditions, it develops exchanges between Buddhist

76. Charles Conte, "Qu'est-ce que le Bureau Central des Cultes?" *Les Idées en Mouvement* 158 (2008).

77. The CFCM was created 28 May 2003 by publication in the *JO* of 7 June 2003.

thought and modernity, it participates in the integration of Buddhism in the French secular society, it strengthens the links between Buddhist associations of France, it is an information center on Buddhism, and it protects and defends the values of Buddhism.

To these institutions, we must add the *Conference of Bishops of France*, the *Protestant Federation of France*, the *Inter-Orthodox Episcopal Committee in France*, and the *Representative Council of Jewish Institutions in France*. All of these religious authorities are asked for opinions, either informally or through the *National Ethics Committee*, when a reform is proposed in an area that engages freedom of conscience or, more generally, an ethical issue. Despite the lack of institutionalization, these bodies that are accepted both by the interested faithful and by the state remain privileged interlocutors for the public authorities.

This poses a problem with respect to the principle of equality of religions in the face of the emergence of new religious movements (Evangelical, Pentecostal, etc). Eventually, the State must choose between renouncing providing religious representation in some of its committees and consider only hearings or a system of *amicus curiae* before those committees for all faiths interested in the debates.

B. Official Links: On the Existence of Bilateral Relations, Formal or Informal, between the State and Religious Communities and their Level of Recognition

The French legal system establishes a real separation between religious denominations and the State. It therefore does not officially recognize any religion. Therefore, religious groups, religious communities, do not have, in principle, specific status. The situation of the Catholic Church, however, yet remains special. Indeed, despite the regime of separation, the Concordat of 1801 has never been repealed and continues to be applied in Alsace-Moselle. This raises the question of the status and the legal regime of the Concordat in France. The peculiarity of the content of concordat agreements, bearing in general to all matters of interest to the Church in its relation to the State, appears to be directly linked to the specific character of the nature of the Holy See, understood here as the central government of the Catholic Church. In effect, the legal qualification of an agreement does not derive exclusively from its content, but especially from the nature of the subject that contracts. In bilateral negotiations with a state, the Holy See presents itself as a sovereign and supreme institution of the Catholic Church, with an international personality. Thus, during the concordat negotiations, the two contracting parties, namely the Holy See and the state, will consider each as autonomous subjects coordinated a single system: the international legal order. On the basis of the concordat, a truly bilateral contract, the Holy See and the state require one vis-à-vis the other to hold to legal conduct, whether positive or negative. Such concordat agreements, in which are recorded the mutual obligations of both parties, often have the substantial form of a treaty.⁷⁸ But the question arises whether the institution of the concordat is or is not “governed by international law.” If since the entry into force in 1980 of the Vienna Convention on the Law of Treaties signed and ratified by the Holy See, the situation has been clarified, it is not the case in France, the State not having ratified the treaty. Several questions remain unanswered. So it is with the application of Article 55 of the French Constitution, the compatibility of the concordat with said article, or the conditions for modification or termination of the arrangement. In any event, one can affirm, for the reasons stated above, that these three departments – Haut-Rhin, Bas-Rhin, and Moselle – experience a concordat regime (legal and international), with a legal dimension built on the basis of the Napoleonic Concordat and Organic Articles, gradually changed during the nineteenth century, according to successive French, then German, government reforms. The regime in 1918, upon return of these territories to France, has been maintained, while undergoing recent changes. If in these three departments are recognized the Catholic, Protestant

78. Concerning form, such agreements are either in solemn form or in simplified form.

(Reformed Church and Church of the Augsburg Confession), and Jewish denominations, peculiarities also exist in some overseas territories.⁷⁹

VI. THE STATE AND THE AUTONOMY OF RELIGIONS

A. *On State Intervention in the Lives of Religious Organizations: The Doctrine, Personnel Selection, the Financial Affairs of the Community*

Freedom to organize within churches falls within the doctrine generally referred to as the principle of self-determination. This essential dimension of the collective freedom of religion means, as confirmed by the ECtHR, the prohibition on states to say what are legitimate and what are illegitimate religious beliefs. It implies the right to be a religious organization, and for the organization to define the internal rules that seem most appropriate to its purpose and that can give the organization the necessary financial and economic means. France does not impose a predefined legal framework for worship, and the State cannot interfere in the operation and internal guidelines for religious institutions,⁸⁰ providing they do not violate public order.

Therefore, the government cannot interfere in the doctrine of the church and is incompetent to recognize the quality of a minister of religion in an individual. The jurisprudence of the Court of Cassation and the Council of State quickly established after the adoption of the 1905 Act, that the function of the Minister for Religious Affairs is legally recognized as such by the religious hierarchy; it enjoys a private status. This situation is of course different for regions where the Concordat is in force and the involvement of public authorities is more obvious, as in the case of the departments of the Rhine and Moselle (Alsace-Moselle) who do not have, following the disannexation in 1918, built the “separation.” The Law of 18 Germinal, Year X (Concordat and Organic Articles of the Catholic Religion and Protestant Religions), the order of 25 May 1844 (the Jewish religion), and the texts applying to congregations were held under Article 7 law of 1 June 1924. The four recognized religions (Catholic dioceses of Strasbourg and Metz, Church of Augsburg Confession of Alsace and Lorraine, Reformed Church of Alsace and Lorraine, Jewish consistories of Strasbourg, Colmar, and Metz) are private and autonomous institutions engaged in an activity of general interest. They are organized under public law and funded by the State and the municipalities (General Local Authorities Code, Articles L2541-14 and L2543-3). Governments are required to organize religious instruction integrated into the curricula of schools and secondary schools and vocational teaching establishments.

Unrecognized religious groups, qualified as religions by the administration or the judge, are organized under private law. They have a specific legal framework, for which the pivot elements are made by the registered association from local law and the ability of local authorities to voluntarily subsidize the institutions and activities of unrecognized religions in the absence of legal prohibition.

The Overseas Territories and Overseas Department in fall of in matters of religious organization under local rights. The local religion law of the department of Guyana, under an order of 27 August 1828, supports and organizes only Catholic worship, while religious denominations of the Overseas Territories, of French Polynesia (Tahiti and Marquesas), of Wallis and Futuna, and of New Caledonia are organized under a decree of 16 January 1939 (Decree Mandel). This text applies to “religious missions” located in “territories” not under the “regime of separation.”

B. *Communities: Are They Legally Free to Organize Themselves and Act Freely in the Public Sphere?*

79. Thus, in Wallis and Futuna, education is entrusted to a Catholic mission.

80. See, for example, CE, 27 May 1994, *Bourges*, Rec. CE, 263, à propos of the lack of public control over the removal of a military chaplain by the religious authorities.

In the public sphere, religions should respect public order and other fundamental freedoms. The government being required to remain neutral with respect to their specificities without being indifferent to this important fact of life, some mechanisms exist to allow true effectiveness of religious freedom, which the state is obliged to guarantee. This requires the involvement of churches, notably in prisons or public hospitals, through the institution of the chaplaincy of public services on the basis of Article 2 of the law on the separation of church and the state.

VII. RELIGION AND THE AUTONOMY OF THE STATE

No religion has a specific role in the government of the country and no way to control other religious groups in any manner whatsoever. The Catholic Church still has a status of ‘public religion’ in the case of state funerals for major politicians. Recently the President of the Court of Auditors, Philippe Seguin, a leading politician, received the tribute funeral of the Republic, in the Church of the Invalides, with a Catholic religious ceremony presided over by the Archbishop of Paris and in the presence of the entire government. Similarly, more recently, the storm that pushed the ocean inland in Vendée and caused a hundred deaths was followed by a Catholic “public” celebration and the use of Toscin throughout the department Vendée during the celebration (March 2010).

Are also practiced are ecumenical or interreligious public ceremonies such as religious celebrations remembering the Allied landings in Normandy, for example, which are ecumenical, and Judeo-Christian ceremonies that can follow events commemorating the Deportation and Extermination Jews in France during World War II. Muslim public celebrations are still very rare, but they are beginning to multiply.

VIII. FINANCIAL AND TAX ISSUES

A. *Control of the State’s Finances and Property of Religious Communities*

Finances and property of religious communities do not follow the same legal regime according to the legal form of the organization. Indeed, the law of separation, establishing religious associations, removes public institutions of worship (Article 2) and assigns property to newly created religious for-profit associations (Article 3). This reform aims at movable goods and immovable property of menses, factories, presbyteries, and other public religious establishments (Article 4). A decree of 16 March 1906 aimed at implementing the allocation of property of suppressed ecclesiastical institutions (*établissements ecclésiastique*) and enabling the establishment and operation of religious associations (*associations cultuelles*). Vacant property unclaimed by associations formed in accordance with the law, are assigned to communal establishments and charitable assistance.

The state departments or municipalities remain the owners of places of worship assigned to worship before 1801; these buildings belong to public authorities, which provide major repairs.⁸¹ They are placed at the disposal of the faithful and the ministers of religion to which they are assigned. This is the case of buildings for Catholic worship.

The administration, the owner, may not hinder the use according to the assignment, for example by closing the church, or by prescribing civil ceremonies.⁸² Nor may the owner organize guided tours of the furnishings classed as contents of the church, without first obtaining the agreement of the one “charged with regulating the use of the building to ensure to the faithful the practice of their religion.”⁸³

Resources of religious associations (those created by the 1905 law and Catholic religious associations or diocesan) include membership fees, funds, and collections as well as payments for religious services. Also, a religious association may collect it in the

81. CE, 28 October 1945, *Chanoine Vaucanu*, S. 1946, 3, 34.

82. CE, 8 February 1908, *Abbé Déliard*, S. 1908, 3, 52. et CE, 9 January 1931, *Cadel*, S. 1931, 3, 41.

83. CE, 4 November 1994, *Abbé Chalumey*, J.C. 1994, IV, 2643.

form of donations (manual or notarized) or bequest of property of all kinds – movable property, immovable property, shares, civil societies ... subject to the principle of speciality. Thus, a diocesan association cannot keep the property that is not necessary for worship. Where appropriate, it must give.

This waiver for religious associations, which do not benefit from the recognition of public utility, derives from Article 1 of the Law of 25 December 1942. However, the acceptance of such donations and bequests is subject to an administrative authorization granted by the prefecture. These gifts and bequests are exempt from transfer duty under Article 795-10 of the General Tax Code.

Article 6 of the 1901 Act, which establishes the legal regime of these associations, limits their opportunities to acquire estates, intended from locations for administration and meetings of members, to buildings strictly necessary for the performance of their religious activity (worship, teaching).

This religious heritage, already subject to administrative supervision, does not escape taxation. So it is with places of worship, held in parallel as private, which are subject to the property tax,⁸⁴ the sale by a religious association of books or any other document to propagate its doctrine and from which it has derived the bulk of its resources, which is subject to business tax⁸⁵ ... etc.

B. State Aid (Fiscal, Social, Educational, Charitable, Tax Subsidies through Grants)

Article 2 of the 1905 Act prohibits direct funding of religion out of public funds. There is therefore in France no direct funding of religion by the State, under penalty of cancellation by the administrative judge of such a decision made by a public authority.⁸⁶ Grants, even made indirectly, are normally prohibited. Thus, the aid granted by a municipality to a young man to continue his studies at the seminary is rejected.⁸⁷ Yet, many processes involve financial support for religions:

- Private schools under contract, whether or not they are religious – in large majority Catholic – are funded in ways that bring them closer to the situation of public schools.
- The buildings used for religious worship, built before 1905 and that have not been claimed by a religious association, remain the property of the State, counties, or municipalities, which provide major repairs.
- Indirect aid: personnel, minister of religion or real property, government guarantee for loans issued by religious or diocesan associations for the construction of new places of worship.
- In fiscal matters, besides a very favorable legislation, the Act of 23 July 1987, a new Article 238 bis to the general tax code, created a tax deduction for donations made to various categories of associations, including religious associations whose activities are by definition related to the practice of a religion or maintenance of his ministers.

It should be noted, on this last point, that worship and cultural associations do not come under the same law and therefore do not follow the same financial and tax system:

84. Articles 1407-1414 du CGI.

85. Articles 1447 à 1518 B du CGI.

86. CE, 9 November 1992, *Commune de Saint Louis contre Association Siva*, D., 1992, IR, 252. A problem arises concerning the recent establishment of religions like Islam with regard to reconciling the constitutional principle of equality of religions and the principle of non-funding of religion. In fact, by refusing to fund the construction of places of worship for these beliefs (on behalf of the secular state) while funding under cultural heritage maintenance places frequented by other believers (Catholics, Protestants Jews), the Government may be accused of discrimination. However, in the absence of any help building places of worship demanded by followers of any religion or simply by selling places of worship they currently enjoy under the cultural heritage, or to be paid by Catholics, Protestants or Jews a fee for use of places of worship belonging to the State, local authorities resort to legal artifices to help finance the construction of places of worship for Muslims.

87. CE, 13 March 1953, *Ville de Saumur*, Rec.131.

- Cultural law (1901) can obtain grants from public funds, but individual donations do not have a particularly favorable tax treatment, unless the association is declared of public utility.

- A religious association (1905 law) cannot receive subsidies from public funds, but individual donations benefit from a privileged tax regime.

But French law offers a double opportunity for a religious group, very little used: Create first a religious association managing the place of worship itself, and then in addition create an association per the 1901 Act, which administers the ancillary buildings and activities that take place in them.

Also, the Law of 1 August 2003 on sponsorship, counts among the beneficiaries of public donations, religious associations and charitable organizations authorized to receive donations and legacies as well as public institutions of recognized religions in Alsace-Moselle.

IX. LEGAL EFFECT OF RELIGIOUS ACTS

In principle, religious acts arising from compliance with the precepts, rites and rules of life prescribed by the religion, are not binding obligations from a strictly religious point of view. Positive law, they represent only religious facts (*faits religieux*), values, or activities. These acts are a “presumption of legality” because the decisions of religious authorities lie outside the control of the judge. Some of these actions may produce some legal effect. For example, marriage (polygamy is prohibited in France), adoption (and the freedom of parents to educate their children in the religion of their choice), divorce (its refusal on the grounds of religious belief) lead a religious influence on family law. In terms of contract law, there is no objection to the introduction of religious clauses given that is the autonomy of the parties that prevails ... some religious requirements impose specific legal adjustments as with issues of burial or ritual slaughter.

X. YOUTH RELIGIOUS EDUCATION

More specifically, in the various fields of public policy, the legislature has intervened to apply the secular dimension to the functioning of public services. Thus, in education, the principle of neutrality imposes protection of freedom of religion and the preservation of the free exercise thereof. Therefore, Article 2 of the Law of 28 March 1882,⁸⁸ on compulsory public education,⁸⁹ provides that primary schools arrange about once a week for parents who wish to do so to give religious instruction to their children. However, the secular nature of education is affirmed, especially by the law of 30 October 1886 on the organization of primary education,⁹⁰ which entrusts primary public education to an exclusively secular staff; private religious schools recognized and accredited by the national authorities are exempt from this prescription. For these schools, we must refer to the Article 1, Paragraph 3 of the Law of 31 December 1959 on the relationship between the state and private schools, which indicates that “In private institutions (...) [contracted] (...), education placed under the contract is subject to state control. The establishment, while retaining its own character, must give instruction in the full respect of freedom of conscience. All children, regardless of origin, opinions or beliefs, have access to this.” In addition, the Act of 26 January 1984 on Higher Education⁹¹ states that “The utility of higher education is secular and independent of any political influence economic, religious or ideological; it tends to the objectivity of knowledge, it respects the diversity of opinions. It must guarantee to teaching and to research their possibilities for free scientific development, creative and critical.”

88. Corresponding to L 141-3 of the Education Code.

89. Law Jules Ferry.

90. Id.

91. Law Debré.

Also there are many ministerial circulars in this regard. From Jean Zay circulars, 1936-1937, which prohibit all forms of propaganda, political or religious, school, and all proselytizing, to the Bayrou circular of 20 September 1994 recommending the ban from school all “ostentatious signs, which are in themselves elements of proselytism or discrimination.” This is a question of instruments, whose legal force and efficiency are criticized.

The Legislature recently came to strengthen the application of the principle of *laïcité* in public elementary, middle, and high schools. Following the report of the commission to discuss the principle of *laïcité* of the Republic, chaired by Bernard Stasi, made public on 11 December 2003, Law No. 2004-228 of 15 March 2004 was adopted, regulating, in application of the principle of *laïcité*, the wearing of symbols or clothing denoting religious affiliation public elementary, middle, and high schools,⁹² which adds this to the Education Code Article L. 141-5: “In schools, colleges, and public high schools (*les écoles, les collèges et les lycées publics*), the wearing of religious symbols or clothing by which students conspicuously manifest a religious affiliation is prohibited. The internal regulations stipulate that the implementation of a disciplinary procedure is preceded by a dialogue with the student.” Ministerial Circular François Fillon, 18 May 2004, specifies the procedures for implementation of this law.

A problem rests in the analysis of proselytism. This arises from the French “cultural” identification of visibility, ostentation and proselytism (*visibilité, ostentation et prosélytisme*). In France, the term proselytism is descriptive but never negative, in contrast to the law of the European Convention on Human Rights, which distinguishes legitimate proselytism from the principle of religious freedom and abusive proselytism.⁹³ The French distinction between visibility and proselytism makes it difficult to deal with two antagonistic principles, individual freedom to express religious beliefs and respect for the equal freedom of others. As soon as there is visibility, the reflex solution is prohibition, which contradicts the fundamental principle laid down in 1789. Indeed, in France we find ourselves faced with a particular philosophical choice that is expressed after 1989 to challenge the solution of the Circular Jospin, Minister of National Education, in the face of the growth in the number of veiled girls in public schools. The Bayrou Circular (named for the minister who succeeded Jospin) of 20 September 1994 clearly identified visibility, ostentation and proselytism, an identification that the Conseil d’État constantly refused.⁹⁴ The strength of the administrative authority was defeated by the intervention of the legislature in 2004. In all of these cases, there is, moreover, a tendency to the essentialization of attitudes, which ultimately contributes to a negative interpretation of the exercise of certain freedoms. This leads to the assumption of negative behaviors based on certain external signs. In a free society one should take into account what is done rather than what is or appears to be.⁹⁵

Neutrality is the very type of a problematic notion, not in principle but in its practical implementation. It is difficult to determine an abstract essence of neutrality. It is a practical attitude, a matter of reserve, discretion, respect for others, of absence of active proselytism in the territory of convictions. Such a principle can be evaluated only in practice and under particular circumstances. If one were to remain in the realm of abstraction, one could in the name of neutrality ban not only all visibility but all convictional membership. The absurdity of the result confirms the need for assessment *in concreto*. Should abusive proselytizing or non-observance of neutrality be presumed from

92. See <http://www.legifrance-gouv.fr>.

93. On this point see Patrice Rolland, “La Régulation de la Liberté Religieuse: Le Cas du Prosélytisme,” in *Chemins d’Europe. Mélanges en l’Honneur de Jean Paul Jacqué*, ed. Jean-Claude Piriis et al. (Paris: Dalloz, 2010), 577-589. The note of l’Observatoire de la Laïcité, *Laïcité et Gestion du Fait Religieux dans les Structures Socio-éducatives*, recalls these principles (5-6), http://www.gouvernement.fr/sites/default/files/fichiers/structures_socio_educatives.pdf.

94. See for example Conseil d’État, 27 November 1996, Husband Jeouit: the headscarf only, in the absence of other circumstances, does not constitute an act of pressure or proselytism.

95. Such a development marked progress in the battle against sects. Miviludes finally abandoned the attempt to capture the essence of the sect in order to sanction what has been done.

the wearing of a simple sign? Can we, conversely, assume the respect of neutrality on the mere absence of visible signs of convictional membership? The European Court Grand Chamber confirmed that a visible religious sign did not in itself constitute proselytism, if not accompanied by a characteristic behavior.⁹⁶ France has for its part, through six successive judgments concerning an employee's dismissal over a wearing a veil in a private kindergarten, confirmed its tendency to confuse visible signs and improper proselytism.⁹⁷

XI. RELIGIOUS SYMBOLS IN PUBLIC PLACES

Article 28 of the Law of Separation of Church and State prohibits the presence of any religious symbol on and in public buildings.⁹⁸ This prohibition is particularly respected in school enclosures. We confront two very different approaches here, although the purpose and meaning of the neutrality of public spaces is identical in both cases,⁹⁹ as an essential means of ensuring respect for others in all its dimensions. A first approach – very French – certainly carrying a great mistrust of the entire encumbrance of intolerance that a religion can convey, finds neutrality in a lack of visibility. The second approach, probably less mistrustful in regard to *faits religieux* opts for visibility, provided that it is respectful of plurality.

This division may be observed at the highest level in Europe in the two judgments in *Lautsi v. Italy* of the European Court of Human Rights. The first judgment by Section 3 of the Court on 3 November 2009 had unanimously condemned Italy on the grounds that “the presence of the crucifix could easily be interpreted by students of all ages as a religious symbol, and they would feel that they were being educated in a scholarly environment marked by a given religion. This can be encouraging to some religious students, but can be emotionally disturbing for students of other religions or those who profess no religion” (§55). This first judgment chose to find neutrality in absence or emptiness. In the Grand Chamber judgment of 18 March 2011, however, the Court chose another way of conceiving neutrality, as something that can still be maintained despite the visibility of religious symbols (here, the crucifix in Italian public classrooms). This visibility is not accompanied by any proselytism or indoctrination, especially as education includes knowledge of other religions. The religious symbol was perfectly passive. The visibility of certain traditional religious symbols is accompanied by a recognition of a plurality of equally respected beliefs. Neutrality is here assured by a form of visibility or pluralistic presence reflectin as much as possible the reality of the plurality that children find in society outside of the educational milieu. The French choice is incontestably the neutrality of the school environment, to the extent that this neutrality was extended to young students attending public school, as is widely known.

At the same time this, Article 28 recognizes the right to display symbols on buildings of worship, whether private or public, as it is the case for Catholic cathedrals and parish churches, which remained state property after the 1905 law, the Catholic Church refusing to endorse the property. It does not seem possible for example to prohibit the presence of minarets of mosques around France, as has been voted in Switzerland. Minarets have

96. *Lautsi and Others v. Italy*, ECtHR Grand Chamber, App. No. 30814/06, 18 March 2011.

97. In the so-called Baby Loup case, an employee of nursery association, open to children from disadvantaged backgrounds (almost free) and financed by public funds, was let go in 2010 for wearing a veil upon returning from maternity leave, while the rules of the nursery clearly stipulated the prohibition of religious symbols for its employees according to the principle of neutrality and secularism. The whole debate has focused on the limits of religious expression in the workplace, coupled with another debate on the possibility of invoking secularism through private organizations. The case law cited: Avis de la Haute Autorité de Lutte contre la Discrimination et l'Exclusion (HALDE) of 1 March 2010 ; Conseil de Prudhommes de Mantes, 13 December 2010 ; Cour d'Appel de Versailles, 27 October 2011 ; Chambre Sociale de la Cour de Cassation, 19 March 2013 ; Cour d'Appel de Paris, 27 November 2013. Assemblée Plénière de la Cour de Cassation, 16 June 2014.

98. It is prohibited, in the future, to raise or affix any sign or religious emblem on public monuments or in any public place whatsoever, except for buildings used for worship, burial grounds in cemeteries, monuments and museums or exhibitions.

99. It is assumed here that *laïcité* is never a mask for an anti-religious struggle.

existed in the French landscape for a long time, as on the island of Reunion or department of Mayotte. The Great Mosque of Marseille, under construction, is an example of great height.

A tolerance of fact exists with Article 28, for Christmas time when municipalities organize specific lighting in the streets and can also display crèches (Nativity of Christ) in public areas. Though the custom of the crèche still exists in public primary schools, it is gradually becoming scarcer in areas where populations are mixed. There is to our knowledge no case law for violation of secularism by a public exhibition of nativity scenes in France.

Another very important tolerance is practiced in regard to thousands of memorials that exist on French territory. Erected after the First and Second World Wars or the colonial wars that followed, these monuments frequently mix religious themes with their patriotic statuary. These monuments are located either in cemeteries or in communal places dedicated for this purpose.

In fact, the cult of the dead and its representation seem to escape the strict neutrality imposed on the public space. Contained in Article 28, the prohibition of religious symbols does not apply to cemeteries still in the public domain since the late nineteenth century. They retain all their decorations, the visible nature of religious space, whose emblems are mostly Christian. Family tombs themselves are marked by religious affiliation of the families.

In this regard a problem arose concerning the relocation of graves in a space more particularly devoted to the Jewish or Muslim religionists. This problem was raised by the Committee on Legal Reflection on the Relationship of Religion with Government headed by Jean-Pierre Machelon, professor at the University René Descartes Paris V, dean and director of studies at the practical School of Higher Studies, in a report dated 20 September 2006. Indeed, Muslims in France are increasingly likely to be buried on French soil, while previous generations practiced more massive return of bodies to the home country. It was found in a report of the fact-finding mission on the assessment and prospects of the funerary legislation that lack of “faith squares” in cemeteries would be the major cause of the expatriation of about 80% of the bodies of Muslims in France.

However, the municipal law of 5 April 1884 provides in Article L2213-9 of the General Code of Territorial Units that “it is forbidden for a mayor in the exercise of his police powers concerning cemeteries and funerals to make distinctions because of the beliefs of the deceased.” Therefore, the law prohibits the creation of faith squares insofar as the mayor would have to consider the religious affiliation of the deceased in the award of a concession. However, in view of respecting the wishes of the deceased of Muslim or Jewish faith, the Ministry of Interior by two circulars of 28 December 1975 recommended that mayors “reserve to the French of the Islamic faith, if the request is presented to them and whenever the number of burial justifies it, a special square in existing cemeteries.” On 14 February 1991, the Interior Ministry recognized the possibility for the mayor to consolidate the graves of deceased wishing to be buried in a proper square for their religion, subject to the preservation of neutrality of the cemetery.

X. CONCLUSION

A. *About the 2010 Law Prohibiting Hiding the Face in the Public Space, Known as the Anti-Burqa Law*

The *laïcité* of the French State has been for a long time been a major political issue in a society that remains in the majority Catholic. Today, a less narrow understanding of *laïcité* has been reached by the highest courts and academia, at the same time as it becomes an ideological issue among the different French political families. In addition to the neutrality maintained by the State and its services, a constitutional secularism permits the religious freedom of citizens and ensures convictional pluralism with more finesse with each passing day. But *laïcité* is also a world view, that of the French Enlightenment,

where the emancipation of conscience, freedom of thought and free will is a political objective. As a progressive ideology to defend an ultimate value for all citizens collectively, it went from a core value of the French left to a core value of the populist right, but also through the rest of the political spectrum without any real challenge. It is no longer Catholics and minority movements which are the objects of suspicion from the administration or public opinion, a suspicion upon which political parties ride, but it is Muslims, as a population arising from immigration, a constantly increasing demographic, and themselves crossed by the most diverse currents, more or less radical, which are believed to undo the secular equilibrium, especially as this involves not only religious discretion in the public space public, but also now the visibility of equality among citizens.

So in addition to the confusion that we have seen between visibility and offensive proselytism, there is another widespread confusion, between Islam, Islamist threat, and identity revocation of social groups that are economically disadvantaged but sufficiently organized to live as islands unto themselves (“*vase clos*”). This French fear – which is not a question of racism and discrimination against “recent arrivals” – explains the complex focusing of the public and legislators against religious symbols in the public space, because the public space in France, beyond its utility, also “reflects” the secular nature (“*caractère laïque*”) of French society. This “cultural” factor has increasingly struggled to find its justification in a world of religious globalization, but it is impossible just to do away with it, as a sort of detritus that needs to disappear, a reflection only of French intolerance.

Republican sentiment in France should not be considered only as a secular ideology, a purely anthropocentric vision to replace preexisting worldviews that were strongly tinged with religion, based on hierarchy, the sacred, and the separation of public and private domains. If it can function as such in the official discourse, it also operates on another level as a form of culture and a belief system whose object is the Republic, conceived as a sacred communion.¹⁰⁰ It is necessary to consider the whole process of articulating on the one hand conventional and elite expressions of the republican identity, found in the public domain and in mechanisms of socialization such as schools, political parties, and festivities, and on the other hand the “sacred foundations of the Republic,” the “profound cultural resources” (symbols, memory, myths, and traditions)¹⁰¹ upon which the citizens of the Republic can rely for daily maintenance of their identity. Thus, Republican sentiment is actually an inextinguishable socio-cultural-political-religious mixture that composes an alloy resistant to the passage of time.¹⁰²

In the case of the full veil, this inextricable mixture explains in very large part the public defiance of opinion and the near-instantaneous response of the legislature if not to make it disappear, at least to slow down the proliferation of it in the streets of the country. The full veil takes a prominent position, with a symbolic violence that should not be ignored as negligible or of another time; the whole tradition of emancipation and equality that is the basis for French civil and civic order, expressing the conquest of the philosophical spirit against weight of religious and social traditions that gave women a subordinate and constrained place. And this ideal of emancipation applied to women is now part of the legend of the Great French Nation. Perhaps the number of full veils in France is very few, and perhaps the plight of women in France is far less favorable than is imagined; perhaps women who cover even the face feel that in doing this they are exercising their full freedom.¹⁰³ But here we come to the ideal representation of the self,

100. Anthony D. Smith, *Chosen People. Sacred Sources of National Identity* (Oxford: Oxford University Press, 2003), 9, 18.

101. *Id.* at 31.

102. *Id.* at 25.

103. Not only would they exercise their full freedom, but they would often make a complete break with their social or family environment – notably by conversion – practicing for themselves a form of voluntary asceticism far from any constraint. In doing so, they would correspond to the position “ultra” among all possible positions of belief, in the ultra-modern times that characterize contemporary societies.

which, for the French, carries the pride of having always been, if not the first, in favor of improving the “feminine condition.”

B. The Full Veil versus the Feminine Condition, the New “Combat Laïque”

This feminine condition is literally a position in direct opposition to the full veil. What in fact does the full veil signify in the French context? It signifies the exclusion of women from the view of passers-by, whoever they are. It is women only who are affected by this dress practice, distinctively and exclusively. The inequality in the broad sense that this garment represents arises from the fact that, in the public space, the principle of equality implies a code of mutual recognition. And the minimum of the minimum in the French context is to see and be seen “face to face” when one is a human being. In the former segregationist states of the United States or South Africa, the idea of separating the whites from the blacks arose from the whites not wanting to see the blacks in the same places as they were, and when they were obliged, on buses and in schools, universities, hospitals, the blacks were hidden from the presence of whites. One does not hide oneself from the view of others in a country where the equality of human beings is a constitutional principle. This would be a rupture of the implicit “pact” that animates the community. What remains of this pact if the female half excludes herself or is excluded by a garment that hides her from the eyes of passers by? Upon such inequality is superimposed gender equality: only women, by reason of their sex, must wear this garment that hides them from the other. The wearing of the full veil suppresses sexual diversity in the streets. Such diversity has a deep significance in this country where the entire education system has sought, for forty years, to establish a compulsory co-existence in schools and at an early age. That requests for non-diversity will be multiplied in France, particularly in public swimming pools, even if they are justified by modesty and religious obligation, will be detrimental to the principle of equality between men and women. The fact that this exists, or has existed in countries, such as the Afghanistan of the Taliban or the Nigeria of Boko Haram, where the full veil and rejection of formal education of girls go hand-in-hand, anchors the correlation between the garment and the sexual inequality it symbolizes, *ipso facto*.

Finally, this garment hiding the face induces a major sartorial discrimination. It can be included in the long list of clothing obligations applied by caste systems, like those of established orders of the Ancien Régime, or that much more tragic of Jews in the streets of the Nazis, recognizable by their yellow stars. The full veil is like a quintessence of all of these repulsive imaginings. Women are objectively and discriminatively segregated from others – unknown by others who are not “authorized” to see them. When a vestment is separating to this degree, either by hiding a woman’s face because she is a woman, or by obliging a person to wear a bell because she has leprosy, the approach is similarly intolerable in a society of citizens. Even though this behavior is practiced by an extreme minority, it is still highly inflammatory and is forbidden under the umbrella of public order, and of the human dignity included in the components of this public order,¹⁰⁴ even more *the minimum requirements of life in society and the constitutional principles of liberty and equality*.¹⁰⁵

104. See the celebrated case concerning “dwarf tossing,” 27 October 1995: *Commune de Morsang-sur-Orge*, no. 136727.

105. Decision in conformity with the law of 2010 by the Conseil Constitutionnel: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2010/2010-613-dc/decision-n-2010-613-dc-du-07-octobre-2010.49711.html>.