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THE SECULAR PRINCIPLE

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For over half a century, secularity has been a constitutional characteristic of the French Republic. It first made its appearance in the Constitution of the Fourth Republic (October 1946) and this was confirmed, twelve years later, with the inauguration of the Fifth Republic. Article 1 of the present Constitution, promulgated on 4 October 1958, says "France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs." Furthermore, in the preamble to the Constitution "The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the preamble to the Constitution of 1946." And it is these two texts, which embody the values in which the social bond in France is grounded, that spell out what is to be understood by secularity. Thus, article 10 of the 1789 Declaration of the Rights of Man and of the Citizen says "No one may be troubled due to his opinions, whether or not they are on religious issues provided that the expression of these opinions does not disturb the peace". Article 11, which affirms that "Free communication of ideas and opinions is one of the most precious human rights…" is also sometimes invoked in connection with secularity.

Invention of "French-style" secularity
Freedom of conscience and worship

The 1946 preamble proclaims that "every human being, without distinction of race, religion or creed, possesses inalienable and sacred rights". It declares "as particularly necessary in our time" a number of political and social principles (equality between men and women, the right to strike…), one of which explicitly concerns our subject: "None shall be allowed to suffer wrong in his work or employment because of his origin, opinions or beliefs". It considers that the State "has a duty" to organize "free, public and secular public education at all levels". Finally, it refers to the "fundamental principles recognized by the laws of the Republic". According to constitutionalists, these principles include separation of Church and State, promulgated on 11 December 1905, freedom of education, and, of course, freedom of conscience. Can the French concept of the secular State be defined on the basis of these three principles?

One might begin by noting that two things are ruled out by the secular principle: an atheistic State (this is explicitly excluded, since "the Republic shall respect all beliefs"), and any official religion (public secular education, separation of Church and State) - the purpose being to ensure complete equality of citizens in matters of belief and complete freedom of conscience.

Defined in these terms, the French notion of secularity appears as a means of grounding the social bond in values recognized as universal. The now generally agreed view in France is that this is the best means. That is open to debate. The essential point is that secularity is to be understood as a particular way of embodying shared values. Secularity is intrinsic to those values, and France has ratified the European Convention on Human Rights, article 9 of which repeats and expands on article 18 of the Universal Declaration of Human Rights. We note that it is article 9 of the European Convention that today affords access to the European Court of Human Rights for anyone who considers that he has failed to secure respect for his

fundamental rights in the French courts.

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.
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> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

In every country, the way the principles set forth in this article are invoked derives in large part from that country's historical experience. That is why, before going into the details of the legal and social machinery which guarantee the secular principle in France and some of the discussions on the issue of secularity, it is useful to review very briefly the main stages in the historical development of the principle in France.

Invention of "French-style" secularity

While secularity is in no way exclusive to France - other countries have more or less adopted it, each in its own fashion, and there are schools of thought on the subject in several - it may nevertheless be said that, overall, we are here dealing with a "French invention". The invention took shape in a number of stages.

French Revolution

For France, the Revolution was the reference foundation period for everything pertaining to human rights. As we know, the French declaration of 1789 was drafted soon after fairly similar American ones. But the context was very different. For a young nation imbued with Protestantism in its many denominations, human rights stemmed from "the Creator" and entailed no major conflict with a particular religion. In the French context, marked by the religious monopoly imposed by Catholicism (following the 1685 revocation of the Edict of Nantes) and, concomitantly, the denunciation of "religious fanaticism" by Enlightenment philosophy, things were bound to be different. The Declaration of Rights was made "in the presence and under the auspices of the Supreme Being", and was to be disavowed by the Pope (even though many churchmen were involved in drafting it). Whereas in America an amicable separation seemed the condition of religious freedom, the French Revolution very soon found itself in conflict with the Catholic religion. In that conflict, it tried first to control Catholicism (1790), then to turn itself into a religion (the revolutionary cults of 1793, accompanied by politico-religious persecution), before establishing a short-lived separation of Church and State (1795) which, coexisting with the maintenance of quasi-religious revolutionary fervour, did not in the end resolve the conflict. In all, then, the Revolution proclaimed secular principles but did not succeed in applying them. Understandably, therefore, the heritage of the revolution would long continue to appear ambivalent.

Nineteenth century and establishment of the secular State

While putting an end to the separation of Church and State, Napoleon confirmed certain changes made by the Revolution and thereby stabilized the secular principle at its first stage. The foundations of the State were secular, and the French Civil Code contained no religious provisions. The registration of births, marriages and deaths was secularized and a civil marriage was the required preliminary to any religious wedding ceremony (free and optional) (1). While the Catholic Church had the benefit of a Concordat (signed with the Pope in 1801), it had to

accept a regime of formal equality with other "officially recognized religions": Lutheran and Reformed Protestantism, Judaism. These religions, bowing to laws that would henceforth be agnostic, provided the "succour of religion" as a public service and instructed citizens in a shared morality.

French society is thus officially a religiously pluralist society. From 1815 onwards, that pluralism was overshadowed by a dualistic conflict which historians describe as a "conflict between two Frances". Despite periodic lulls and many attempts at conciliation, this conflict was to dominate the century. The issue was fought out between a "clerical camp" and an "anticlerical camp". The former argued that France must once again become a Catholic nation, the "elder daughter of the Church", and that Catholicism was an essential element of the country's identity. The latter thought of modern France as founded on the "values of 1789". This France, "daughter of the Revolution", did not identify herself in terms of religious allegiance.

After an initial victory by the Republicans involving the secularization of education (the 1880s), the conflict came to a head at the turn of the century: the "hate" campaign against the Jewish, Protestant and Freemason minorities (culminating in the Dreyfus affair) mounted by a strain of intransigent Catholicism was countered by emergency measures against religious congregations - which found themselves forbidden to teach (July 1904). It was in this atmosphere that the separation of Church and State took place (December 1905).

Issue of secularity peacefully resolved

The context of secularization was thus fraught with conflict. Yet with the establishment of the secular Republic, the conflict gradually died down. The paradox is only on the surface. While the inexorable movement of the struggle might push anticlericalism towards harsh measures, the benchmark ideals driving it included respect for freedoms and the commitment to democracy. The provisions of the secular education Acts and the Act on separation brought this latter aspect to the fore. Indeed, in 1905, although the regime of officially recognized religions had been abolished, there was greater freedom of religion: under the Concordat, all assemblies of bishops were forbidden, yet they started meeting freely again from May 1906 onwards. Much more important still, obliged by a Papal encyclical not to comply with the Act on separation, French Catholicism escaped the logical consequences of this thanks to a new Act of January 1907 designed, according to the then government Minister Aristide Briand, "to make it impossible for the Catholic Church to transgress the law, even if it were to be doggedly determined to do so".

This conciliatory policy gradually bore fruit. An agreement was reached with the Pope (1923-1924). In 1946, when the Constitution was being drafted, France was governed by a coalition of three parties: the Communist Party, Socialist Party (SFIO), and Popular Republican Movement (MRP, a Christian democrat party). It is a significant paradox that secularity became a constitutional principle at one of those rare moments in French political life when Christian democracy had an important influence. However, while there was no longer a pitched battle over the conception of France's identity, that did not mean the end of all tension. The interpretation of the notion of secularity, particularly as concerns relations between the State and private schools, has remained a subject of democratic debate, and big demonstrations in support of the opposing views took place in 1984 and 1994.

Freedom of conscience and worship

The Act on the separation of Church and State set forth the basic tenets of French secularity: freedom of conscience and worship, free organization of churches (2), non-recognition of churches and their equality before the law, and freedom to express religious beliefs in public. The secular principle also applied to institutions, notably schools and freedom of education. On very many points, the degree of consensus was such that there was need only in exceptional

circumstances for reference to the Act. On certain others, particularly some still very recent problems, secular legislation and case law were accompanied by a social debate.

The same may be said of the right to freedom of conscience. Culturally, this is understood as including the freedom of atheists, people indifferent to religion, those who combine a variety of beliefs and those espousing a formerly-recognized form of worship, etc. This right begins with freedom of conscience: no one should be obliged to express his religious or philosophical beliefs. Census forms may not therefore make reference to religious affiliation, and in troubled times (3) the *Conseil d'Etat* (4) has recalled that no one may require hotel guests to state their religion.

But while no one is obliged to express his beliefs, everyone must be able to do so freely without incurring any social penalty. The law affords particular protection to civil servants: no administrative document concerning them may mention their "religious or philosophical opinions or activities". Similarly, threatening someone (for example, by making him fear loss of employment) in order to encourage him "to practice or refrain from practising a religion, to belong or cease to belong to a cultural *association* (non-profit-making organization), to contribute or refrain from contributing to the expenses of a religious body" is an offence.

We see here that freedom of conscience is not reduced to freedom of individual belief. It very logically implies freedom of worship which is also carefully guaranteed, so that every weekend millions of people wishing to do so are able peacefully to take part in a religious service. Here again, in general, this freedom has become so much a part of the general culture that it would no longer occur to anyone to try and stop people from practising a religion. It can however happen, in the event of a conflict like the Gulf war of 1991, that the authorities may protect certain religious services as a preventive measure.

The churches' freedom to organize, i.e. set up an administrative and functional structure, presents thornier problems, since that means reconciling an individual freedom and a collective freedom. The question arose when the Act on the separation of church and State was being drafted: who was to be assigned the use of religious buildings, which were public property? Following the example of legislation in certain states of the United States of America and that governing the Free Church of Scotland, it was decided that these assets should be assigned to *associations* "which complied with the general organizational rules of the religion they intended to administer" (article 4). This meant that a Catholic parish where a majority of the members no longer recognized the authority of their bishop would see the church handed over to the minority who remained faithful to him. At the time, this avoided any possibility of breaking up the Catholic church in France. In the long term, though, it proved necessary to ponder the consequences of applying such a principle. Thus, today, some churches are occupied by a "schismatic" traditionalist faction. The principle of non-recognition put an end to the situation prior to 1905 where, as we have seen, there were four recognized religions. If the churches exist as private-law bodies, there can be no public-law regime for any form of religious activity. This has two consequences, among others: abolition of the "public service" the churches were expected to provide, and the disappearance from the public services provided by the State of any religious dimension. The disappearance was sometimes quite slow: indeed, not until 1972 were jurors in assize courts relieved of the duty to take the oath "before God and before men".

This religious neutrality of the public domain implies that there should be no religious emblems on public buildings constructed after 1905. This restriction appears to be a mere rejection of iconoclasm, but in fact it goes much further. There may no longer be an official religion, but the traces left by the public role religion has historically played in France are still in place. This is particularly visible in the calendar, where the Third Republic even added Easter Monday and Whit Monday to the four "obligatory feast days" of the Catholic church - Christmas, Ascension, Assumption and All Saints, which were declared public holidays in 1802. France has not therefore cut herself off from her religious roots, but the holy days of other religions - such as Judaism, Islam or Buddhism - are recognized only in the granting of individual leave of absence for civil servants and school children.

This example shows the difficulty of fully realizing the ideal, after the end of the "officially recognized religions" system: that of establishing equality among all religions, from the majority religion to those with the smallest number of adherents. The founder of secular education, Jules Ferry, stated: "freedom of conscience issues are not a matter of quantity, they are a matter of principle". But it has to be recognized that while this principle of equality often works well, it does nevertheless have three limitations. First, it is not established everywhere: three departments in eastern France (5), which were German from 1871 to 1918, have kept the "officially recognized religions" regime. This local right is de facto an important departure from the law, even if it is not now the source of any major conflict. Secondly, in practice the authorities do indeed have to take account of the size of religious groups. For example, the religious broadcasting which public television is required to provide under the terms of its licence applies only to Catholicism, Protestantism, the Eastern Orthodox Church, Judaism, Islam and Buddhism. Obviously, access to this kind of broadcasting cannot be extended ad infinitum. Finally, the "exclusive purpose" of a religious non-profit-making organization must be "the practice of a religion". Even if case law has not placed a strict construction on "exclusive", this means that the organization of religious activities is not in itself sufficient to bring a group within the purview of the 1905 Act. *Associations* that engage in publishing and healing are not recognized by the *Conseil d'Etat* (4) as religious *associations*. In the eyes of public opinion, these are very often not "religions". Sometimes this means reopening the very debate on what may be legitimately regarded as religious which the secular principle of non-recognition rightly set out to avoid.

Secular neutrality, the principle of official non-recognition of any religion, means that no stipend or direct subsidy may be paid to any church. However, this principle goes hand in hand with the existence of chaplaincies subsidized by the State, very flexible rules concerning bequests, the possibility of tax relief for donations, and upkeep of the religious real estate made available to the churches in 1905. Indeed recently the authorities have been finding solutions which reconcile the principle of non-recognition with that of the freedom of religion to promote the building of mosques.

Secular principle in education

The free public demonstration of religious beliefs does not in general present any particular problem. It takes place as part of the freedom of opinion, which enjoys powerful protection. For example, in summer 1997, young Catholics surrounded Paris with a symbolic chain of friendship during the JMJ (*Journées Mondiales de la Jeunesse* - World Youth Days). Other religions regularly hold large gatherings, like the one at Le Bourget organized every year by Muslim groups. Contacts between the representatives of religious communities and the authorities, and meetings between the communities themselves contribute to the peaceful nature of religious demonstrations.

Better known, the so-called "headscarf" (hijab) affairs have led to debate on the secular principle in schools. Those opposed to girls wearing headscarves have stressed the need for a distinction between belief and knowledge, and the danger that the headscarf, a ritual garment specific to women, could symbolize a rejection of gender equality. The partisans of tolerance have urged that the transmission of knowledge can aim at the universal without denying the existence of the particular, and pointed out the many different symbolic meanings of the headscarf. Beyond the passions it may have aroused, the debate has brought out into the open some essential problems facing a democratic society. The *Conseil d'Etat* (4) has ruled: the wearing of religious symbols at school is not, in itself, contrary to the secular principle. It becomes so if it is ostentatious, a factor in school absenteeism, proselytism and disorder. So the problem has to be dealt with case by case.

Freedom of education - which has always been guaranteed by law - has sparked another debate: should it include the grant of public funds to private schools? After much to-ing and

fro-ing, the Debré Act (1959) became the common rule for all private educational establishments: very substantial financial support is given to those which sign a contract with the State. This contract allows them to have their "own character", a specific educational aim, on condition that the curricula prepared by the Ministry of National Education are respected and freedom of conscience ensured. Although the fundamental principles have thus been laid down, education remains the area where in practice there are differences of interpretation. This is logical, for while the secular principle implies respect for freedom of conscience in the broad sense (including freedom to practice a religion and the free expression of religious beliefs), it also implies freedom to think, i.e. equality of rights as between commitment to a religion and the absence of such commitment, and access to the instruments of a critical approach to any dogmatic or synthetic (in the philosophical sense) system. Primary, secondary and higher education are the guarantor of this freedom to think, and that is why the provision of "free and secular public education", in France, is a constitutional duty of the State.

So secularity cannot be reduced to a legal system, it is also a culture, an ethos, an emancipation from all "clericalism" understood as control of the mind by an established discourse rejecting all debate. Professor Claude Nicolet has perfectly captured this essential aspect (and one that does not lend itself to codification in law) of the secular principle, in her historical account of the triumph over attempts at clerical domination: that triumph is one which every human being, every citizen must achieve "at almost every moment, within his own heart. In every one of us, always ready to awake, sleeps the little "king", the little "priest", the little "important person", the little "expert" who will seek to impose himself on others or on himself by force, specious argument, or quite simply laziness and stupidity". And secularity is "a difficult but daily effort to preserve oneself from them (…) It seeks maximum freedom through maximum intellectual and moral rigour (…); it demands free thought, and what is more difficult than real thought and real freedom?" (6)

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(1) These measures, taken in the revolutionary movement of 1792, have remained in force, distinguishing France from other European countries.
(2) "Church" is used here as a generic term, synonymous with "worship" or "religion".
(3) During the Second World War, when there was a frenzy of discriminatory legislation against the Jews.
(4) France's supreme administrative court and national body advising the government on legislation.
(5) The Upper Rhine, the Lower Rhine (= Alsace) and Moselle (= part of Lorraine).
(6) C. Nicolet, La République en France (The Republic in France), Paris, Le Seuil, 1992./.

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