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## Religious Liberty and French Secularism\*

*Jacques Robert\*\**

### I. RELIGIOUS LIBERTY

The democratic state that endeavors to respect the opinions of all its constituents must extend its protection to all religious groups if religious freedom is to be considered more than a particular, subordinate aspect of the freedom to form one's own opinion. These two freedoms seem to merge into one, but, at the same time, religious freedom both falls within and extends beyond the bounds of the freedom of opinion.

Religious liberty is first and foremost an individual liberty because it represents an individual's ability to give, or not to give, intellectual attachment to a religion—to choose the religion freely or to refuse it. But it is also a collective liberty in that, not exhausting itself in faith or belief, it necessarily gives birth to a practice whose free exercise must be guaranteed. Free exercise of religion must be assured in order to guarantee complete religious liberty. This proposition presupposes that every religious movement must be the master of its own activities, possessing the right to organize itself freely. This free organization inevitably poses the delicate problem of relations between religions—or churches—and the state.

### II. CHURCH-STATE RELATIONS

It is necessary to point out that the relations between churches and the state are not necessarily indicative of the general level of religious freedom in France. It is enough to say that such relations

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\*\* Professor Jacques Robert is the Honorary President of l'Université Panthéon-Assas, and a former member of the French Conseil Constitutionnel.

can be on equal footing with religious liberty—at least as much as any other specific relations.

France, for its part, has experimented throughout its history with nearly all of the existing formulas for church-state relations. If France has finally opted for what is termed a secular stance, it is because France found, at the beginning of the twentieth century, that the secular stance conforms more than any other to France's inclinations and ideals. This secular approach is not the only one to be practiced among democratic states; indeed, the secular approach is rare. Other approaches are perfectly conceivable and have been adopted by many states.

Even in a democratic state, it is possible that a sort of fusion exists between the “temporal” and the “spiritual,” or at the very least a union between them that can manifest itself in various forms: a state religion, recognized churches, and incorporation of the church into the state.

Even if Europe alone is considered, one notices an extraordinary complexity in relationships between church and state. Although all European countries demonstrate a profound Christian influence, no juridical system is comparable to another. One finds in Europe a mixture of state-church systems (for example, the systems of England, Denmark, Greece, Sweden, and Finland); systems of separation (such as the systems of Holland, Ireland, and France); and systems using formulas that combine basic separation and cooperation (such as the systems of Germany, Belgium, Austria, Spain, Italy, and Portugal). However, profound influences are diverse, and not always in the way that one would think. For example, religious influence is stronger in Ireland (in spite of its system of separation) than in Sweden (which maintains a state-church system).<sup>1</sup> The church-state connections are weaker in Catholic Europe than in Protestant or Orthodox Europe.<sup>2</sup>

From a legal perspective—especially in terms of sources of law—the fundamental principles that govern the relations between political power and religions are widely dispersed. They can be found in national constitutions, in European texts (European Convention

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1. See JACQUES ROBERT, *LA LIBERTÉ RELIGIEUSE ET LE RÉGIME DES CULTES* 109 (1977).

2. See *id.*

on Human Rights<sup>3</sup>), in the laws of each state, in each country's historically observed practices, in concordats formed with the Roman Catholic Church, in international law, in various conventions passed with particular religious confessions (for example, in Spain or Italy), and in informal accords. Also, note that the varied nature of the state's recognition of denominations implicitly permits a distinction between the more represented denominations (and presumably the better established or more serious denominations) and certain others. Unfortunately, this distinction is often left to the arbitrary discretion of political decision makers.

Certain groups also form under the auspices of a statute of public or private law; others form under common law or *sui generis*—the formulas vary. Radical separation is rare but is more frequent when it finds itself blended with the idea of a positive neutrality, or unofficial cooperation.

The cultural role of churches is marked, especially in education, with every modality of adaptation imaginable. Further, financing of churches by the government is rarely direct; it is usually masked by the cover of secret payments, public or discrete subsidies, tax exemptions, or payment through the maintenance of historic monuments. Secularization itself remains limited. In Holland, for example, the distinctive secularization of Dutch society does not keep a great number of social institutions or political parties from being organized on a religious basis.

These varied religious forms are not, in and of themselves, incompatible with the recognition of general religious tolerance. For a state to choose a privileged church or religion does not necessarily signify that others are disadvantaged, much less persecuted. It has simply become evident to France that a regime of total separation—by no means hostile to, but rather largely tolerant of religion—was the approach that conformed most with a modern democratic state.

### III. FRENCH SECULARITY

The substance of the notion of secularity is found entirely within two articles of the French Law of 1905:

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3. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, art. 10-1, Europ. T.S. No. 5.

Article 1: The Republic ensures the liberty of conscience. It guarantees the free exercise of religion, under restrictions prescribed by the interest in public order.

Article 2: The Republic does not recognize, remunerate, or subsidize any religious denomination.<sup>4</sup>

#### IV. THE NEUTRALITY OF THE STATE

The fact that the French Republic no longer recognizes any religion does not signify that the state fails to appreciate the existence of religions, churches, or religious movements. This fact simply means that the state has definitively abandoned the system of “recognized religions.” The state wished to erase all distinction between the old recognized religions—the Catholic Church, the two principal Protestant churches, Judaism—and the others. By removing the distinction of recognized religions, the state put all religions on the same level politically.

This policy of nonrecognition should not be understood to signify that the state does not wish to maintain good relations with religious groups. Nonrecognition is not an attitude of hostility or of suspicion. It simply implies that the existence of religion, contrary to concordative solutions, ceases to be a public affair. The inescapable consequence of this is that the state can no longer finance or subsidize a religion.

#### V. SEPARATION

At first, the implications of removing public funding for religious public services were notable: the disappearance of the Ministry of the Religious Budget and an end to favored treatment for religious ministers, particularly the naming of ecclesiastical dignitaries. Indeed, once a church fails to accomplish a mission of public service, a “public” religious organization ceases to exist and, therefore, the church or organization no longer has a right to be viewed as “institutional” by public authorities. The corollary of this end to public service by organized religions is that all churches are left with

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4. See Law of Dec. 9, 1905, arts. 1–2, J.O., Dec. 11, 1905, p. 7205 [hereinafter Law of 1905].

total liberty to organize themselves and to interpret their internal rules.

The jurisprudence of French tribunals—judicial and administrative—bears witness to their wisdom in not meddling in religious rules, in a law which is not their own.<sup>5</sup> The courts do not take jurisdiction unless a threat to public order exists.

#### VI. FINANCIAL “COEXISTENCE”

From a financial point of view, the law of separation only prohibits the inscription of credits intended to subsidize, permanently and regularly, service by churches. One can therefore conclude that the Law of 1905 allows for:

- The possibility of state subsidies for activities that have a general character despite taking place in a religious setting: charities, hospitals, nurseries, general charitable activities, etc.
- Direct administration by public collectives of certain religious services (religious instruction in public establishments such as high schools, junior high schools, hospitals, asylums, prisons, etc.) if the organization is deemed indispensable to insure for everyone the free exercise of religion.
- The payment of religious ministers when they render services to the general public (national religious ceremonies, media events, etc.).

On the other hand, tribunals exercise a certain oversight function over “disguised subsidies”; even so, their jurisprudence often appears indulgent.<sup>6</sup> The institutional separation of the churches from the state, which was sought in 1905, implies that the state does not disadvantage religions but ceases to recognize, to pay, and to subsidize them; such a separation comes with the obligation to be “religiously neutral.”

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5. See Conseil d’État, Feb. 8, 1908, Abbé Deliard, Rec. P. 128; C. Cass., Feb. 6, 1912, S. Jur. I, 1912, 137; Conseil d’État, Feb. 16, 1923, Presbyterian Association of the Reformed Church, Rec. P. 115; Conseil d’État, Jan. 25, 1943, Reformed Church of Marseille, Rec. P. 116; T.G.I., Paris, Oct. 29, 1976, *SOVEVOCA and the Consistorial Israelite Assembly of Paris*, JCP 1977, No. 18664 (note by Jean Carbonnier); Cass. 1e civ., Oct. 17, 1978, Abbe Coache v. Abbe Bellgo, D. 1979, at 120, 1979 Bull. Civ. I, No. 308.

6. See Conseil d’État, Nov. 28, 1913, Commune de Chambon, Rec. P. 774; Conseil d’État, May 16, 1919, Commune de Montjoie, Rec. P. 429.

## VII. NEGATIVITY AND POSITIVITY

This religious neutrality is, however, simultaneously negative and positive.<sup>7</sup> It is negative because the state that allows for all the diverse manifestations of thought, that does not reject any ideology but welcomes them all, would not know how to choose one it would officially champion and promote. Of course, the state might have secret preferences, but it must keep from publicizing these preferences, from supporting or giving priority to those who share these preferences, and from attempting to impose these preferences on other groups through pressure.

Two texts are worth invoking here:

- Article 10 of the Declaration of the Rights of Man and the Citizen, which establishes that no one should be harassed about his or her opinions, including religious opinions.<sup>8</sup>
- Article 2 of the Constitution of 4 October 1958 under the terms of which France is a “secular” state that “assures equality before the law for all citizens without distinction based on origin, race or religion.”<sup>9</sup>

These two texts create a perfect connection between the notion of negative neutrality that presupposes the discretion of the state and that of positive neutrality that implies the engagement of the state to guarantee to each person in his or her daily experience the free exercise of his or her religion. This puts at the disposition of all, if the situation requires, the means to observe their religions’ rules. From this exigency, several statutes have evolved in France, including the Statute of Chaplaincies, the regulation of the animal-slaughtering methods and slaughterhouse conditions, the recognition of conscientious objectors, and the de facto rearrangement of certain school schedules.<sup>10</sup>

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7. See Jean Rivero, *La notion juridique de laïcité*, D. 1949 CHRONIQUE 137; J.B. Trotabas, *La notion de laïcité dans le droit de l’Eglise catholique et de l’Etat républicain*, Paris L.G.D.J. 19670, at 223; J. Coulombel, *Le droit privé français devant le fait religieux depuis la séparation de l’Eglise et de l’Etat*, 1956 REVUE TRIM. DE DROIT CIVIL 7.

8. See Jacques Robert & Henri Oberdorff, *Libertés fondamentales et Droits de l’homme*, in TEXTES FRANCAIS ET INTERNATIONAUX (5th ed. 2002).

9. See *id.*

10. See JACQUES ROBERT & JEAN DUFFAR, *DROITS DE L’HOMME ET LIBERTÉS FONDAMENTALES* 298 (7th ed. 1999).

Thus, it is formally demonstrated that the “neutrality”—positive or negative—of the state cannot proceed without respect for liberty of conscience.

#### VIII. LIBERTY OF CONSCIENCE

The nonreligious nature of the state places citizens on equal moral footing with respect to the state. This equality is rigorous because the state does not claim to profess any particular faith in the name of the nation. Therefore, no room exists for categorization of second-class citizens on the basis of religious convictions. The will of the state to avoid knowledge of citizens’ spirituality is, from this fact, a guarantee of liberty for the diverse religious confessions.<sup>11</sup>

The “indifferent” state has no need to ask itself what counts as a religion because, in principle, it neither professes nor knows one. The principle of religious liberty precludes the operation of any type of distinction between religions, whether the religion is practiced by a “cult”<sup>12</sup> or by a traditional church. One finds in this preclusion the principal applications of religious freedom that are the principles of equality and nondiscrimination between religions. Further, the principle of nondiscrimination itself induces a positive attitude on the part of the state; the state must protect minority religions in the very name of religious freedom. The affirmation that the state guarantees liberty of conscience signifies not only that the state is itself obligated to respect this liberty, but also that it will take responsibility for preventing violations of this liberty by its citizens and others.<sup>13</sup>

The principle of liberty of conscience is also under the sanction of French penal law. The Law of 1905 created the crime of harming liberty of conscience. Article 31 of this law provides for the

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11. See L. De Naurois, *Aux confins du droit privé et du droit public*, 1962 REVUE TRIM. DE DROIT CIVIL 242.

12. Editor’s note: Professor Robert employs the French term *secte* here. The translation of the French word *secte* into English is problematic because in French, *secte* has almost as many negative connotations as does our English word “cult.” However, despite these negative connotations the word *secte* remains theoretically slightly neutral. Thus, there is a distinction in French between a *secte* and a *secte dangereuse*. The most accurate way to translate *secte* would probably be “rather unknown and probably dangerous religious movement.” For practical reasons, we have chosen to translate most instances of *secte* as “cult.” Where the author employs the term *secte* as a neutral term to refer to a new religious movement, it has been translated as “sect.” Also note that the French word *culte* has no negative connotation at all, and is best translated simply as “religion.”

13. See Naurois, *supra* note 11.

punishment of those who utilize violent acts or threats against an individual (creating either fear of job loss or causing injury to the individual's person, family, or wealth) to force that individual to participate, or to refrain from participating, in a religion.<sup>14</sup>

In a larger context, respect for freedom of conscience is affirmed by the recognition of the illicit character of all attitudes that show an attempt to discriminate on the basis of expressed or supposed beliefs and to cause one to fear, in any manner, because of these religiously held opinions.<sup>15</sup> This interdiction of all attitudes that are hostile to any religion is imposed on all: on individuals, on churches, and on the state itself.

Neutral and secular, the state would not be able to practice the slightest discrimination with regard to any religious movement nor favor any particular propaganda that could harm a religion, insofar as each movement respects the restrictions prescribed by the state according to its interest in public order.

#### IX. PUBLIC ORDER AND RELIGIOUS LIBERTY

French texts have often—and perhaps abusively—linked public order and religious liberty. One remembers the ambiguous and restrictive formulation of Article 10 of the Declaration of the Rights of Man: “No one shall be harassed on account of his or her opinions, including religious views, provided their manifestation does not disturb the public order established by law.”<sup>16</sup> One must also remember that even though the first French Constitution<sup>17</sup> considers the liberty conferred upon all people to exercise their religious beliefs to be a “natural and civil right,” its first article, consecrated to “fundamental provisions guaranteed by the Constitution,” defines the limits of that liberty. That article specifies that liberty only consists of the power to act in a manner that does not endanger public safety or

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14. See Law of 1905, *supra* note 4, art. 31.

15. See Conseil d'État, July 9, 1943, Ferrand C.D. 1944, at 150 (Corbinnier note); Conseil d'État, April 28, 1938, Demoiselle Weiss R.D.P. 1938, at 553; Conseil d'État, Dec. 8, 1948, Demoiselle Pasteau R.D.P. 1949, at 73; C. Cass. July 19, 1898, D.P. I 424; Trib. civ. Seine, Mar. 3, 1933, S. Jur. II 1934, 2, 67; Trib. civ. Seine June 18, 1945, Gaz. Pal. 1945, 2, 38; CA Amiens, March 3, 1975, Guy Ferchault v. Marcell Bascot, épouse Ferchault, D.1975, at 706 (note by Géraldy). See also for all these points: Jacques Robert, *La liberté religieuse et le régime des cultes*, in PUF COLLECTION SUP 109 (1977).

16. DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN, art. 10 (Fr.) (approved by the National Assembly of France on Aug. 26, 1789).

17. LA CONSTITUTION (1791).

individual rights. Thus the law, and the law alone, is always authorized to penalize the authors of those acts that would prove harmful to society because of their threat to public safety or their erosion of others' rights.

#### X. THE ISLAMIC SCARF

Reference to public order is found in the Law of 1905,<sup>18</sup> and it recently reappeared in an opinion from the Conseil d'Etat dated November 27, 1989.<sup>19</sup> That opinion discussed whether the wearing of religious badges or religious identifiers in French public schools is compatible with the principle of secularism in the public service of education.

Following a review of the internal and international texts upon which this principle is founded, the Conseil d'Etat clearly indicated that allowing students to wear such identifiers is merely an aspect of the general principle of secularism and neutrality of the state. The Conseil d'Etat found that these principles require the state to respect the students' liberty of conscience, meaning that the state should abolish all discrimination by public schools based on their students' religious convictions or beliefs.

The religious freedom thus recognized for these students secures for them the right to express and to manifest their religious beliefs within scholarly establishments, in the spirit of pluralism and respect for the rights of others. However, this recognition does not grant students free rein to flaunt symbols of religious adherence that by their nature, by the conditions under which they would be worn individually or collectively, or by their ostentatious or aggressive character would constitute an act of pressure, provocation, proselytism, or propaganda. Such flaunting would bring harm to the dignity and liberty of the students and other members of the educational community and would compromise the students' security and well-being, disturbing the teaching process and the teachers themselves. In the end, such flaunting would disturb the

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18. See Law of 1905, *supra* note 4, art. 1.

19. Opinion from the Conseil d'Etat dated November 27, 1989. The Conseil d'Etat has two roles. The first is as a judicial body that resolves litigation between individuals and the state. The second is as an advising body that provides non-binding opinions and advice to the executive branch. Often when a difficult legal question arises for the French government, the government turns to the Conseil d'Etat as a first step in finding a solution.

public order and the normal functioning of the public teaching establishment.<sup>20</sup>

Since this opinion, the Conseil d'Etat has been obliged to clarify its position. The council overturned a school's internal regulation stipulating that "wearing any distinctive sign, clothing or otherwise, of a religious, political or philosophical order is strictly forbidden."<sup>21</sup> Such a regulation, by the generality of its terms, effectively created a general and absolute prohibition that completely ignored the students' recognized freedom of expression in the context of the principles of neutrality and secularism in public education. Given this result, the decisions to exclude several young girls from junior high on the sole basis of this general prohibition must be overturned. Indeed, for those decisions to have been correctly made, the schools would have needed to establish that, under the circumstances, the wearing of this type of Islamic scarf constituted by its very nature "an act of pressure, provocation, proselytism or propaganda, or [that disturbs] the public order and the normal functioning of the teaching process."<sup>22</sup>

At first, the issue of the Islamic scarf only seemed to bother the conscience of other students. In the end, however, it might also disturb the conscience of the instructors. Certain instructors had already indicated that they were not far from refusing to teach students whose clothing negated, for the teachers, the very values that a republican school should represent. But such an attitude was intolerable. The principle of secularism requires the total absence of discrimination between students on the basis of their religion. The faculty must not be authorized to make any kind of distinction between students based on religious attire.

In summary, the state—secular, neutral, respectful of all opinions and beliefs, guarantor of freedom of religion and worship, and propagandist for no faith or ideology—cannot oppose religious movements that prosper in its territory using as its reason only the policy of protecting the public order. Further, all religious movements that respect the public order must have their religious practices protected equally. If not, history has given a privileged

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20. See Avis, No. 34893, *Assemblée générale plénière*, 1990 A.J.D.A. 3945 (note by P.P.C.); R.F.D.A., 1990, at 1–9 (note by Jean Rivero).

21. See Conseil d'État, Nov. 2, 1992, Kherovara & Kachour, N. Balo and Mme. Kizic.

22. Conseil d'État, Nov. 2, 1992, *Les Petites Affiches*, May 24, 1993, No. 62 (see note by Gilles Lebreton, *Port de signes religieux et laïcité de l'enseignement public*).

position to certain religions, favored only because they have been around longer and have been accepted with less reticence because society is more accustomed to having them in France.

Many today point out that the landscape has completely transformed into an environment of religious liberty confronted with a proliferation of movements whose dynamism and originality are simultaneously fascinating and worrisome. Identifying and characterizing these movements is difficult. Moreover, faithful members of much older religions are becoming more numerous in France, and they are also pressing for a de facto “official” status, which is recognized for others.<sup>23</sup>

#### XI. THE SECTARIAN PHENOMENON

French society is unfamiliar with the proliferation of religious denominations and the multiplicity of churches that are familiar to Anglo-Saxon societies. For us, the notion of a *secte* has a pejorative connotation that some great democracies of our day reject.<sup>24</sup> In France, a juridical theory of *secte* has been painstakingly elaborated after many years and through a constant flow of often passionate debates. This theory distinguishes *sectes* from religions; thus, the theory does not provide *sectes* with the same protection provided to religions by international texts.

Therefore, it is necessary to define the determinative criteria of a *secte* with precision. Many criteria have been successively advanced by modern sociology and, taken together, will identify a *secte*. However, these criteria, heretofore advanced by sociology, have been somewhat abandoned in our day.

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23. Even though France is a secular state that does not officially recognize any religion, in effect there remains a de facto regime of “recognized religions” consisting of the Catholic Church, the Reformed Church, the Lutheran Church, and the Jewish religion. These are the only churches to maintain official relations with the state. Other religions exist, of course, but they are simply “tolerated” and do not enjoy “official status.” Their lack of status is undoubtedly because they do not have a representative structure that is capable of ready dialogue with the state.

24. *See supra* note 12.

## XII. ESTABLISHING CRITERIA

*A. Number of Adherents*

The first criterion of a *secte* is that it has a small number of adherents. One here could easily bring up the contradiction that arises by retaining such a criterion in an era where respect of minorities is proclaimed as a national and international moral principle. However, by simply stepping inside the very notion of religion, one cannot help but notice that it is the religions (whose character as a religion is not or is no longer contested) that choose, by theological exigence, to be religions for those who profess membership, rather than simply religions for the masses. Based simply on the facts, one must expect many setbacks when attempting to use quantitative criteria. A community, numerically weak in a country, is often no more than a particular branch of a much larger group dispersed among different countries.

*B. Eccentricity*

A second criterion of a *secte* is eccentricity. If a *secte* must be defined with reference to rationality, one cannot differentiate between religion and *secte* because the nature of a religious faith is, at least in certain respects, irrational and mystic.

*C. Newness*

Another criterion of a *secte* is newness. Newness is probably the criterion that has the greatest impact. This is true because the age of a religious movement is easy to verify, but also perhaps because time is a familiar dimension in the law. A *secte* is essentially a “newly-born” religion.<sup>25</sup> The phenomena so frequently analyzed in religious studies, such as dissidence, schism, heresy, and reform, attest to the possibility of newly-formed confessions, created in a single moment. To forbid all creativity in theological research is, above all, to deny

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25. This idea of newness is determined with respect to the religion’s emergence in France. This is the only criterion that concerns French law, which does not consider itself competent to judge or regulate all the new religious movements that begin in other countries. French authorities only begin tracking a religious movement when it appears in France for the first time.

one of the most essential forms of liberty of conscience and to diminish the religious experience.

#### *D. External Origin*

Objection to newness is sometimes transposed from history into geography and becomes a type of objection to anything of external origin; but this is an inadmissible objection. In fact, it would be more valid against an established religion and, taken to its logical extreme, against Christianity as a whole. In law, this argument against anything of external origin is condemned by the principle of free communication, which today is inscribed in Article 10-1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>26</sup> This convention recognizes the right of every person to receive or to communicate ideas without regard to national borders.<sup>27</sup> Thus, the notion of a *secte* is difficult to define.<sup>28</sup>

### XIII. THE NOTION OF RELIGION

One could say that religion is defined by two elements: one objective and the other subjective. The objective element is given by the existence of a community. A community is more than a simple aggregation of individuals; it is a coherent group, a moral being. Religion is a collective phenomenon; it is not necessarily a mass phenomenon. There are churches that consider themselves national churches; others recognize their own minority status or micro-minority status. French positive law has wisely refused to integrate confessional statistics into its standards. Article 19 of the Law of 1905 is significant.<sup>29</sup> It does not give the slightest consideration to the makeup of a particular sectarian organization, whether it has a greater or smaller number of adherents that profess to be members.

The subjective element defining religion is faith or religious belief. Faith has its center in the individual conscience. Nevertheless, faith is not a solitary conscience, but a reciprocity of consciences that

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26. European Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, art. 10-1, Europ. T.S. No. 5.

27. *See id.*

28. Incidentally, is it not the same with religion? Do we know today with exactness what really constitutes a religion? *See* Jacques Robert, *Accepter la foi*, LE MONDE DES DÉBATS, Feb 1994, at 9; *see also* Robert & Duffar, *supra* note 9, at 298.

29. *See* Law of 1905, *supra* note 4, art. 19.

engenders religion. Because of this fact, these two elements—community and faith—are mutually dependent. One must have faith to give meaning to a group, but it requires a group, restrained as it might be, to bring faith to an expression which law cannot accomplish.

It is from a common faith, a spiritual communion, or a community of beliefs that a group draws its coherence. However, religious belief is equally difficult to define. One may be tempted to define religious belief with reference to the behaviors that manifest it: practices, observances, rights, liturgies, and sacraments. These behaviors often have an originality that signals the presence of a religion. Even so, this argument is not necessarily decisive. After all, municipalities were the first to organize civil baptism, and the *Cour d'assises* has its own ritual. Gestures alone are empty forms; only the belief that animates them can give them a religious significance.

One must return then to what is at the heart of the question: the object of the belief. Not every conviction is a faith. Neither a political party nor a school of philosophy constitutes a religion. The essence of religion is the call to a divinity, or at least to a supernatural power, transcendence, the absolute, or the sacred. The individual formulas vary.

Nevertheless, not all cases are equally litigious. There can exist, for example, an indecisive zone between the invocation of the supernatural, which is religion, and metaphysical speculation, which is no more than philosophy. Belief in a god, however, gives the general impression of a religion without requiring some sort of external representation of that god.

#### XIV. EVERYONE MUST RESPECT THE LAW

In the final analysis, no religious movement is above the law. Each church, association, or *secte* is responsible for its acts. French law will not leave unpunished the condemnable actions of all those who come to illegitimately proselytize and who thus contravene—voluntarily or not—the law's mandates. By contravening the law, these people situate themselves in the outer margins of society.

Penal infractions are numerous and strictly defined: fraud, abuse of trust, violence and assault, illegal confinement, lack of assistance to a person in danger, extreme breaches of fundamental social mores, organizing prostitution, illegal practice of medicine, abduction and brainwashing of a minor, etc.

Aside from criminal prosecution, the administration could either nullify an organization that was founded for an illicit purpose, that acts with illicit objectives, or that acts contrary to the law or to fundamental social mores. The administration could also pronounce a dissolution of the organization based on the ordinance of October 2, 1943, which allows the dissolution of groups and associations “having an activity contrary to the liberty of conscience and the liberty of worship.”<sup>30</sup> The administration could also invoke the text, modified in 1972, of the Law of January 10, 1936, which deals with combat groups and private militia.<sup>31</sup>

With regard to old as well as new religions, the state will not tolerate the slightest affront to order or law.

#### XV. PREVENTIVE ACTION

It is noteworthy that, in the area of private prevention, none are prohibited (especially not families) from warning their children or those close to them—those who are most vulnerable—against all temptations and social perils. Parents have always had complete latitude to protect their children from dangerous associations, perverse seductions, and harmful contagions. It remains true that the notion of public order can lead to different interpretations.

#### XVI. AGAINST ALL “MORAL RELIGIOUS ORDERS”

Today, public and social order is no longer confused with moral and religious order; the secular state, since 1905, respects and protects all religious denominations. However, it must not be forgotten that Judeo-Christian thought has forged the Western mentality and that we are more familiar with certain denominations than with others that may shock us by their exterior aspect, their esotericism, or their ostensible attachment to beliefs and rituals that are foreign to our culture. Cults are not the only groups that need be worried. The awakening of certain ancient religions and the expansion of their practice may also pose problems. From this point forward, a danger exists that discrimination will arise between old

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30. Ordinance of Oct. 2, 1943, J.O., Aug. 10, 1944, p. 32.

31. See the Law of January 10, 1936, J.O., Jan. 12, 1936, p. 522, regarding militant groups and private militias. See also CODE PÉNAL arts. 431-13-431-20 (Fr.) (amended by Ordinance No. 2000-916 of Sept. 19, 2000, J.O., Sept. 22, 2000, p. 14877), noted in Robert & Oberdorff, *supra* note 7, at 676.

and new religions since all do not exercise the same influence on the national culture and all do not have the same place in our common heritage.

If public law cannot ignore such “specific religious characteristics,” the recognition of a difference between religions will in no case lead to state sponsored discrimination between them. The protective equality of secularity must not be wiped out in the name of differentiation.

#### XVII. WHAT ABOUT PUBLIC OPINION?

Two major currents underlie public opinion. On the one hand, some—admitting that Max Weber’s classic analyses distinguishing churches from cults are completely outdated—believe that the evolution of science and faith has led to a sort of “deregularization” of all beliefs and to transfers and migrations heavy with amalgamations and derivatives. On the other hand, some continue to believe that to avoid abuses by certain misguided groups, it is better to put in place a systematic and nondiscriminatory general policy for all groups that appear to be cults. This goal may seem praiseworthy, but it brings us back to the problem of definitions that is so difficult to resolve.

Even so, a permanent tension currently exists between the temptation of ideological denunciation and the legal neutrality of the state.

#### XVIII. THE FRENCH LEGISLATIVE APPROACH

The fluctuations and frequent changes in the French legislative approach with regard to cults perfectly reflect the ambiguity of this redoubtable dilemma. Early in the process, numerous initiatives were launched that attempted to block new cults, or at least to keep them under surveillance to prevent them from branching further. In November 1998, the Prime Minister replaced the “l’Observatoire international des sectes”, created in 1996 to analyze the development of cults (International Cult Surveillance Center), with a “Mission interministérielle de lutte contre les sectes” (“MILS”) (Inter-Ministerial Mission for the Fight Against Cults). The MILS was established with a goal of creating a more operational tool to analyze cults and to improve the methods of fighting against them.

Similarly, one of the laws of December 18, 1998, regarding scholastic obligations, allowed the state to verify through accreditation officers the substance of the instruction provided in the setting of “private structures.” In June 1999, a parliamentary investigative commission presided over by Jacques Guyard submitted a report on “cults and money” that offered thirty propositions for countering the influence of cults in all domains where cults—an arbitrary and strongly-contested list of cults had earlier been prepared—were at work. And finally, in December 1999, the Senate Commission on Laws adopted a proposition by Nicolas About aimed at dissolving “malicious groups.”

All these initiatives clearly show that the phenomenon of cults is considered suspect and that plans are being made to protect society from these cults.

The clear excess of certain positions against cults and the impossibility—legal as well as political—of implementing the proposed anticult methods currently show that authorities are somewhat powerless to deal with this problem. Some groups are lobbying for an approach that would classify repeat criminal offenders and all groups that constitute “a threat to public order or a great danger to mankind”<sup>32</sup> within the statutory category of “combat groups and armed militias.” This statutory category was created by the law of January 10, 1936.

The Ministry of the Interior carefully clarified in a flyer dated December 20, 1999, that “the designation as part of the cult movement that is given to a group by the various parliamentary reports should not be considered enough alone to impute any kind of threat to public order by that group.”<sup>33</sup> It thus appears that the very idea of general legislation applicable to all cults has been definitively pushed aside. However, it was not ruled out that a fight against cults should begin based on existing legislation and the related case law concerning tax-related and scholastic obligations.

Another report, officially submitted on February 7, 2000, by the president of the MILS in Matignon, revived the idea of an emphasis on repressive legislation against cults. The report seemed to reserve these new methods for only those cults considered dangerous—

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32. *See supra* note 31.

33. *See supra* note 31.

groups considered to be totalitarian organizations that employ manipulative methods.

However, in May 2001, the senate adopted a “law tending to reinforce the prevention and repression of groups of a cultic nature.”<sup>34</sup> This text was the result of a long negotiation between the two assemblies, the government, and the MILS. The first version of the text, adopted by the senate at its first reading on December 16, 1999, had been largely modified on June 22, 2000, when it went before l’Assemblée Nationale. The deputies had introduced into the text, at the request of Madame Catherine Picard, the creation of a specific crime of “mental manipulation.” This change had evoked numerous hostile reactions and Madame Elisabeth Guigou, then Keeper of the Seals, requested further study on this point in association with the Commission nationale consultative des droits de l’homme (“CNCDH”), (National Consulting Commission on the Rights of Man). Because this commission esteemed the creation of such a crime inadvisable, the text was modified to only punish the crime of fraudulent abuse of ignorance or weakness. Thus the text, which is still in force today, only accounts for the case where a person is psychologically or physically subject to another as a result of serious or repeated pressure or techniques calculated to alter that person’s judgment or to lead that minor or that person to an act or omission that is seriously detrimental to that person.

Representatives of large religions are asking themselves today who will judge the detrimental character of that act or omission. Of necessity, it will be the judge. And the judgment will be subject to recent trends, to variations over time, and to external pressures. Even judges are currently asking themselves just how far one can go in applying such a text.

It is also noteworthy that this text envisions the possibility of judicial dissolution of cultic groups when a group has repeatedly engaged in such prohibited conduct as attempted murder, torture, rape and sexual aggression, or the illegal practice of medicine or pharmacy. What else is there, then, for the fight against cults, besides an arsenal of repressive laws? The state would be better off developing preventive methods and perhaps spending more time considering the true roots of the evil.

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34. This text is not the current law but was only part of the draft before its presentation to the National Assembly.

The National Assembly unanimously approved a law on June 12, 2001, that essentially adopts two provisions that were discussed at length. One has, in a way, dressed up the old notion—dating back to the Napoleonic Code—of fraudulent abuse of a state of ignorance or weakness. This language signifies that although any church leader, guru, or mage is free to deliver any message she wishes to deliver, she will still be subject to the law if she imperils the physical, moral, or material security of those who decide to follow her or if she derives a profit from her followers. Moreover, this text gives associations that attempt to fight cults the right to file a civil action against them. Certain organizations, associations, or groups who energetically combat the new religious movements could thus possibly step into the shoes of abused or victimized former adepts to seek convictions and reparations. This right promises considerable conflict with *pro-secte* groups formed by these movements who openly express desires to be present in the legal domain.

Thus, it remains that by extending criminal liability to new categories of crimes, by developing criminal liability for legal entities, and by creating the possibility of dissolution if the implicated legal entity or its leaders were convicted of any one of the infractions listed in the new text, the law of June 12, 2001, constitutes a new instrument in the struggle against cults. Additionally, it should be conceded that each analysis will have to be subject to very delicate handling and will require a necessarily subjective application.

How does one define—as noted above—and, even more important, how does one manage to circumscribe this complex and fluid notion of “a subjective state”? As for the necessity that the act or omission be seriously detrimental, this requirement leads one to an analysis in which it is difficult to remain objective. After all, certain rules or practices, respected through the ages by well-known religious congregations, such as fasting, poverty, chastity, obedience, and becoming part of a monastic order, could one day also be considered seriously detrimental to the individual. And, it does not make good legal sense to label a group as a “cult” solely by the nature of the crime that one suspects it will one day commit.

#### XIX. FRENCH MUSLIMS

The problem of Islam in France is evidently completely different from the problem of cults. The questions it poses, however, are nonetheless delicate. Today, Islam is numerically the second largest

religion in France. However, given this fact, Islam does not occupy as prominent a place in French social life as one might expect.

That the presence of so many Muslims in France is a recent phenomenon explains why there are comparatively few Islamic churches in France. Indeed, such an underrepresentation would seem all the more clear if the French system of jurisprudence was somehow linked to religious symbols and sounds; the ringing of church bells, Presbyterian attributions, and processions far outnumber such sights as minarets and such sounds as the muezzin's call to prayer.

One thus witnesses a great discrepancy between law and reality. As has been demonstrated, the legal equality between religions is total and may be considered a constitutional principle drawn from secularism. However, the Law of 1905 actually only recognizes churches, or Christian institutions, and it is terribly complex and difficult to make Islamic communities fit the church mold. Moreover, the Law of 1905 was limited to the management of then-existing issues, namely, the allocation of goods formerly belonging to public religious establishments between the various new religious associations. The law did not look to the future and did not foresee the possibility that new religious groups, absent from France in 1905, would later entrench themselves in France. For Islam, therefore, France is neither a land of heritage nor of sufficient infrastructure. It was in this context that the *imams* came to be. To make its voice heard in the future, Islam needs to have access to religious broadcasting and quality radio stations to present a positive image of itself and its rich diversities.

Where liberty is concerned, all religions are, of course, on an equal plane. Some, however, are more equal than others because they benefit from available legal advantages. These are the old recognized religions. These groups have solid structures that are accustomed to interfacing with the state. Additionally, as discussed above, the issues of property rights and allocation of goods are settled. In contrast, nothing similar has been contemplated to build up the religions that were not present in France in 1905. A number of solutions are being proposed today. Local collectives are being encouraged to construct mosques, to guarantee loans for their construction, or to consent to sell or lease land under favorable terms. But Islam today should be allowed to count on something beyond its own internal and foreign resources.

Will increased foreign influence be the price we pay for the absence of any public subsidies and for the weakness of indirect aid (training and education) for Muslims? It is urgent that we begin to carefully innovate these ideas without damaging the Law of 1905 and the principle of secularism. It is absolutely necessary that the state have representative Muslim structures in place to negotiate with directly.

The fluctuation of Paris Mosque, which seemed for a long time to be controlled by Algeria, led Pierre Joxe to create the Conseil de réflexion sur l'Islam de France ("CORIF"), (Council for Reflection on French Islam) in 1990. This council consisted of persons from different origins who were designated *intuitu personae*. The objective was twofold: first, to create a harmonizing organization that would advise public authorities on concrete problems regarding the exercise of the Muslim religion; and second, to encourage the creation of a representative structure for Islam in France. CORIF helped to advance many useful causes, such as the creation of religious plazas in cemeteries, the authorization of Muslim high priests, the construction of mosques, and the recognition of religious holidays. However, the absence of a truly representative Islamic structure is being felt more and more. Its absence grates on national and local public authorities who would like to permit Muslims to have a legitimate place in French society—to occupy the entire domain legally and permissibly in order to foster an integration respectful of beliefs and religious identities. The French government recently introduced some interesting initiatives to better structure French Islam and to replace CORIF with organizations more representative of the diversity of French Islam.

#### XX. OFFICIAL REPRESENTATIVES OF CHURCHES

All other major religions have a type of structure that can act as its official representative. The Catholic Church of France has a veritable government of shared responsibility: the Conference of Bishops of France meets each year and its president is the only person authorized to speak for all the French bishops.

For its part, the Protestant Federation of France is an association under the Law of 1901 that groups several religious associations under the Law of 1905. Four principal churches make up this group: the Reformed Church of France, the Reformed Church of Alsace-Lorraine, the Church of the Confession of Augsburg of Alsace-

Lorraine, and the Lutheran Church. One must also add to this list the Independent Reformed Evangelic Church, the Federation of Baptist Churches, the Evangelical Mission, and others. Some confessions remain independent, however, like the Federation of Evangelical Churches, the Darbists, and the Adventists.

As for the Christian Orthodox churches, they are grouped in an Orthodox Episcopal Confederation, but each church retains its autonomy (which is the same for the Armenians and the Coptics). All churches of Eastern tradition have collaborated to create a religious broadcast on public channels, entitled “*Chrétiens orientaux*” (Eastern Christians), in an attempt to strengthen the group and increase the religion’s influence.

The Central Israelite Consistory of France and Algeria designates the Grand Rabbi of France but has differing tendencies (orthodox and liberal) in its core beliefs. Further, there are other Jewish movements that defend, on a secularist plane, the material and moral interests of the Jewish community. Most are grouped in the *Conseil représentatif des organisations juives de France* (“CRJF”) (Representative Council of Jewish Organizations of France) that sometimes comes into conflict in its relationship with the Consistory. Finally, there is the *Fondation du judaïsme français* (French Foundation of Judaism) that follows principally the religion of the Shoah, allying itself to the World Jewish Congress.

#### XXI. ADOPTING AN OFFICIAL MUSLIM REPRESENTATION

The organizational structure of Islam in France is still up for debate. Evidence shows that a hierarchical structure such as that of the Catholic Church does not correspond to the Muslim religion—a religion that has never created a church and does not have a true clergy. And a corresponding structure must continue to be sought in other countries; after all, the French Catholic Church has been aptly criticized for being too papal and not Gallican enough. It would definitely be worthwhile today to begin planning for the establishment of a confederation grouping—for example, either ideologically or regionally—of the different Islamic religious associations.

In November 1999, Jean Pierre Chevenement launched a broad-based discussion on Islam that supported the notion of a national

representative body elected by regional representatives chosen by leaders of the mosques.<sup>35</sup> But no agreement was reached on the possible presence of independent entities. Even so, the deliberations on Islam have led to progress. This success gives hope that there is light at the end of the long tunnel France has been traveling. However, every time the proponents of a system of Muslim representation seem to come to a basic agreement on a process—however complicated—for the designation of future delegates to a central body, the date and details of implementation are again placed in doubt or postponed.

## XXII. THE POWER OF SIGNS

All religions use symbols as landmarks and measure time with their own holidays and historical calendar. Thus, their history takes root in their tradition and defines a self-perpetuating destiny. Therefore, for the state to designate an official holiday or to determine a celebration date is never a neutral process.

The French calendar is above all Christian, and even “Western-Gregorian” in that it is not even followed by Eastern-Orthodox Christians or Armenians. With the exception of the French national holidays (January 1, May 1, July 14, November 11, and May 8), all other holidays are Christian (Ascension, Easter, Passover, Christmas) and even Roman Catholic (August 15). Other large religions—often forgotten (Judaism, Islam, etc.)—also have their own holidays, and these holidays are numerous. But the state does not officially recognize these holidays. France permits them, of course; occasionally we mark the date. And in some cases, these holidays are accommodated—Friday for the Muslims, Saturday for the Jews. We also accommodate dietary restrictions and arrange for Kosher food and its equivalents. But is this a worthy solution? Why are there such differences for the different religions?

It is clear that we have not been able to truly get out of our rut—so convenient to maintain—of recognized religions. These are the religions with which we are familiar and with whom we have been dealing for a long time. And what if, without our having noticed, these traditional religions were to be today completely discredited, rejected, and replaced? Were this to happen, non-traditional

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35. This is currently not law, but only a proposal floated by Jean Pierre Chevenement.

spirituality would have senselessly given way to the dominant monotheistic traditions that have forged the Judeo-Christian or Islamic civilizations. Given that the great religious traditions and ideologies have been shown dramatically incapable of stopping the tragedies and massacres of history, how is it that the very word “religion” has not become suspect?

Now, in an attempt to see a little more clearly into the morass of churches and dispersed religions, efforts are currently underway to try to categorize them—divide them into categories of good and bad. Lists have been prepared, and these lists denounce “dangerous cults,”<sup>36</sup> based on uncertain criteria and unverified rumors. But among these sects and the major traditional religions that are supposed to be so steady and above suspicion, what is the status of all of the religious movements—new or old—that are not found in any list? These religions should enjoy the same official recognition as that of the traditional religions to which we are accustomed. If the state refuses to treat these religions equally simply because too few exist, this argument should also apply to all religious associations—and isn’t it impossible to number the various associations that could exist? And yet many of them do benefit from advantages, aid, and special consideration.

Further, as to the dangerous nature ascribed to and condemned in certain sects, some of our major religions are not totally innocent in this regard. Indeed, fanaticism has often reigned. Let us not reawaken the witch hunts and the Inquisition. And let us remember that, in spite of the recent decline in religious practice and the crisis involving the priesthood vocations, man has never had so great a need to reconnect to transcendental values.<sup>37</sup>

Andre Malraux predicted long ago that our new century would be religious, or would not be at all.

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36. The term in French is “sectes nocives.”

37. See JACQUES ROBERT, ENJEUX DU SIÈCLE: NOS LIBERTÉS [STAKES OF THE CENTURY: OUR LIBERTIES] 292 (2002).