

Secularism French style

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‘Secularism (laïcité): the word smells of gunpowder; it evokes passionate and contradictory resonances; and the contradiction is not just the usual one where minds are opposed for or against a clear idea; it relates to the very content of the notion, and the meaning of the notion. These disagreements should not surprise us. The notion of secularism was born in tumult: the conflict of ideas and, above all, the conflict of parties. It conveys the intuitions, temperaments, mystiques. Moreover, it does not follow from a calm development and an effort at definition (Jean Rivero).’²

Whilst article 1 of the Constitution of 1958 defines the Republic as ‘laïque’ and freedom of conscience is a general value and part of employment rights within the Preamble to the 1946 Constitution, but there is no proper definition of secularism. The result is that the law is built up from the outcome of sniper attacks from one side or the other over many years. The best restatements are contained in official reports, notably the Stasi Report of 2003³ and in the advisory opinions of the Conseil d’Etat on specific issues. Paragraphs 10 to 18 of the Stasi Report suggests that the common destiny of France comes through the ‘yeast of secularism’. It argues that ‘secularism balances recognition of one’s own identity with efforts necessary to knit together individual beliefs through social bonds’.⁴ As the Conseil constitutionnel has stated:⁵

The principle of secularism is listed among the rights and freedoms which the Constitution guarantees. The neutrality of the State follows from it. It also follows that the Republic does not recognise any religion. The principle of secularism requires especially respect for all beliefs, the equality of all citizens before the law regardless of religion and that the Republic guarantees the freedom of religious practice. It implies that the State does not fund any religion.

Secularism is a regular preoccupation of the administrative courts, both in their judicial and in their advisory capacities. Recent high profile decisions of the Conseil d’Etat have confirmed this. But there is a strong line of consistency in the approach of these courts for the last hundred years.

¹ The author admits to being a minister of religion in the Catholic Church and a regular invited professor at French universities.

² J. Rivero, ‘La notion juridique de laïcité’ D 1949 Chr 137.

³ Commission de reflexion sur l’application du principe de laïcité dans la République, *Rapport au President de la République* (Paris 2003).

⁴ *Ibid*, para. 17.

⁵ Decision 2012-297 QPC of 21 February 2013, para. 5.

Within the legal issues relating to secularism, one can identify three different areas of concern: the funding and support for religious activities, the requirements for the delivery of public services (including the behaviour of public service personnel), and the behaviour of users of the public service.

The funding of religious activities is governed by the loi of 9 December 1905,⁶ which ended the Concordat with the Papacy of 1802. Under article 2, the basic principle is that religious activities are not to be subsidised: ‘La République ne reconnaît, ne salarie ni ne subventionne aucun culte’ (‘the Republic neither recognises, nor employs nor supports any religion’). Under the Concordat, the Catholic Church was the established religion and its priests were paid by the State. The State may indirectly pay money for activities associated with religion, but never directly. Most obviously, under the 1959 Loi Debré it makes contracts with the bodies running some church schools in order to provide education. Likewise, the State supports the upkeep of many churches as heritage monuments either by the property belonging to local authorities⁷ or by way of payment to church associations. But the State does not purchase religious services.

In the recent Christmas Crib case,⁸ the issue arose whether a local authority could erect a Christmas crib on its premises or whether this breached the prohibition on subsidising religion. As was noted in the Rapport Public of the Conseil d’Etat in 2004, ‘the problems connected with the fact that French secularism is a secularism “on a Christian foundation” should not be under-estimated’.⁹ So in this case, how could traditional Christmas practices be reconciled with a secular state?

In this case, the local association of free thinkers asked the mayor of Melun to refrain from having a Christmas crib in the Hôtel de Ville. The mayor continued with the installation and the association brought an action to quash the decision for illegality. They appealed to article 28 of the loi of 1905 which prohibited the erection or imposition of a religious symbol on any public building. (This was originally directed against having a crucifix.)

A crib is a depiction capable of bearing several meanings. Of course it is a scene which is part of Christian iconography and which therefore has a religious significance. But it is also an element in the decorations and illustrations which traditionally and without any particular religious significance accompany the end of year festivities.

This plurality of meanings enabled the Conseil to fudge the question of whether the crib was permitted. It all depends on the facts. Legally, it is only permitted ‘when it has a cultural,

⁶ Note that this *loi* does not apply to Alsace or Lorraine which were part of Germany at the time. Hence it is possible that a theologian can be president of Strasbourg university: see *Le Monde*, 13 December 2016. See generally, Conseil Constitutionnel, 2012-297 QPC of 21 February 2013.

⁷ The decision in CE Ass 18 November 1949, *Carlier*, decided that churches belonging to the commune under the 1905 *loi* were part of public property.

⁸ CE Sect, 9 November 2016, *Fédération départementale des libres penseurs de Seine-et-Marne*, decision no. 395122.

⁹ *Rapport Public 2004*, ‘Un siècle de laïcité’, p. 392

artistic or festive character, without expressing the endorsement of a religion or demonstrating a preference for any religion'. So legality all depends on the facts of the case and the intentions of those who set up the crib. It also depends on where it is set up. The Conseil d'Etat stressed that the neutrality of public buildings prevented the setting up of a crib unless it was a purely cultural, artistic or festive icon. By contrast, it is possible to set a crib up in a public street, unless it has a proselytizing purpose. By simply noting that the crib depicted the founder of Christianity as its justification for concluding that this was a religious symbol, the Cour administrative d'appel of Paris had failed to give a legal basis for its decision to quash the decision of the mayor. It needed to look further into the purposes pursued by the mayor in installing a crib.

The Christmas Crib case follows the basic principle on the absence of funding or affixing symbols, but in a different way from what the 1905 loi envisaged. That loi was concerned with public bodies transferring funds to be spent on religious activities or setting up symbols. The loi is now interpreted as being about the way in which the state may be seen to endorse religion. This decision was subsequently applied by the Tribunal Administratif of Grenoble in ordering the removal of a statue of the Virgin Mary erected by the local authority some 5 years earlier.

When it comes to regulating the conduct of public services and the behaviour of public servants, French law has been rigorous. The legislation in relation to the public competition to become a secondary teacher has provided since 1852 that candidates be approved by the Rector of the local Academy and by the Minister of Education. It was held in 1912 that the Minister could reject a Catholic priest as a candidate to become a secondary teacher in philosophy. The ground was that his church role made it impossible for him to demonstrate that he would conduct his teaching with the impartiality and neutrality necessary.¹⁰ (In those days, Catholic priests were obliged by canon law to wear clerical dress.) This opinion was controversial. An opinion of the Conseil d'Etat some 60 years later concluded that secularism and the neutrality which it requires did not automatically prevent a cleric from becoming a school teacher.¹¹ Article 1 of the *loi* of 1905 declared that 'The Republic ensures freedom of conscience'. But the principle of secularism prevents public employees from having the right to express their religious beliefs, especially by wearing any insignia which would demonstrate their membership of a specific religion.¹²

The decision of the Cour de cassation's Assemblée Plénière upholding the right of a private nursery to sack a Muslim teaching assistant because she refused to remove her *jilhab* at work has been well commented elsewhere.¹³ The internal rules of the nursery required a balance between freedom of religion and respect for the principles of neutrality and secularism in all the activities in which personnel were engaged. The civil courts found that, in this nursery, there was not a general philosophical ban on wearing religious insignia, but one which was limited. It arose from taking account of the small team of employees and the direct

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¹⁰ CE 10 May 1912, *Abbé Bouteyre S.* 1912.3.145 note Hauriou; D. 1914.3.74 conclusions Heilbronner.

¹¹ Avis 21 September 1972. See the earlier decisions in the post-1944 period quashing the refusal to accept the candidature of Catholics for teaching posts: Rivero, above note 1, p 139.

¹² CE Avis 3 May 2000, *Mlle Marteaux*, Leb.169.

¹³ Cass. Ass. Plén., 25 June 2014, JCP 2014 J 903. See M. Hunter-Hénin, 'Religion, Children and Employment: The *Baby Loup Case*' (2015) 64 ICLQ 717.

relationship of this role with both parents and children, as well as being proportionate in realising the goal of ‘developing a social action directed to small children in a deprived working-class area in order to enable women to work without making any distinction in terms of political or religious opinion’. The Cour de cassation quashed the broader grounds offered by the Cour d’appel which related to whether the nursery was an organisation with a particular set of beliefs that would justify derogations from the freedom of religion under the European Convention on Human Rights. In other words, it turned the question of whether a ban was permissible into a fact-sensitive question. Earlier parts of this litigation had led the French Ombudsman (the *Défenseur des droits*) to invite the Conseil d’Etat to give an advisory opinion on the role of religious neutrality and public services.

The opinion of the Conseil d’Etat¹⁴ indicated that the private sector might be involved in public services if the activity was in the general interest, it was in some way controlled by the administration and either it was able to exercise public power or the public body was involved in the fixing of specific objectives to be performed and in the control over whether they were delivered. These requirements go beyond mere subsidy or regulation of an activity. But the Conseil took the view that, as a general principle, outside this area of public services, the principles of secularism and neutrality were not legally required. In consequence, the ban on employees of a public service manifesting their religious beliefs applies only to public employees or employees employed by private bodies who are involved in the operation of a public service. The result is that private bodies delivering public services (often on a contracted out basis such as in transport or health services) are subject to the rules on neutral secularism when delivering public services. This affects the freedom of religious expression of their employees. (You cannot wear a cross as a bus driver driving children to and from a state school, but you can wear a cross in the evening taking an office party from a business to a restaurant.) In public services the requirement to observe religious neutrality is not subject to a condition of proportionality. This is the major difference with the reasoning of the Cour de cassation in the *Baby Loup* case. Miriam Hunter-Hénin criticises the lack of rigour in looking at evidence to justify the need for a ban in the *Baby Loup* case.¹⁵ The evidence was hypothetical and lacking empirical evidence, rather than actual, and that would normally not be enough. In the public sector, no such careful analysis is required.

Users of public services are given more freedom. As the Conseil d’Etat’s advice of 2013 pointed out ‘the user of a public service is not, in principle, bound by the requirement of religious neutrality.’¹⁶ But there is a long history of attempts by secular mayors to clamp down on religious practices in public. The struggles between secular mayors and Catholic clergy were regular events in the years leading up to World War I. Under article 27 of the 1905 *Loi* ‘ceremonies, processions and other external manifestations of a religion are regulated according to [the general powers of mayors in relation to public order].’ In *Abbé Olivier*,¹⁷ the commune of Sens had banned Catholic clergy from taking part in funeral processions wearing their vestments on the ground that this was necessary to maintain public order. The Conseil d’Etat accepted that the mayor could ban processions, marches and ceremonies which were external manifestations of a religion, but this could not extend to

¹⁴ 19 December 2013.

¹⁵ *Ibid*, at p 724.

¹⁶ Page 30.

¹⁷ CE 19 February 1909, S 1909.3.34, conclusions Chardenet; D 1910.3.121 conclusions Chardenet.

banning traditional funeral processions unless there was a serious reason of public order to justify a restriction. In that case, the mayor and the commune failed to provide evidence that their decision had been taken in the light of such public order considerations. The need for the Conseil d'Etat to quash attempts by public authorities to use such public order powers to prevent religious processions did not go away.¹⁸

From the late 1980s, the target has moved from Catholics to Muslims, particularly in relation to schools. In 1989, the Conseil d'Etat produced an opinion setting out the basic principles governing the wearing of religious insignia by pupils at school (notably the *burqua*). In brief, it affirmed the freedom of conscience and that the wearing of religious symbols was not, in itself, contrary to secularism. But the Conseil insisted that this must not disrupt the running of the public service and so the wearing of ostentatious or campaigning symbols which constituted an act of pressure, provocation, proselytising or propaganda could be prohibited.¹⁹ Thus, school pupils may be excluded legitimately if they disrupt excessively the normal running of their school through their exercise of their freedom of expression.²⁰ In a 1996 case, 17 young women wearing headscarves at a secondary school in Lille engaged in a demonstration within the school which disrupted its normal operations. As a result they could be excluded. But the Conseil d'Etat went out of its way to state that the wearing of the headscarf by these 17 pupils did not constitute in itself an 'ostentatious sign whose wearing was an act of pressure or proselytising'.

The Stasi Report of 2003 reviewed the position and led to a *loi* in 2004. During the parliamentary deliberations, Jean-Paul Costa, then a judge of the European Court of Human Rights, gave evidence. Having been a senior member of the Conseil d'Etat when it produced its opinion in 1989, it was not surprising that he suggested that the ban on religious signs did not violate fundamental freedoms. He also expressed the view that the ban on religious signs would be upheld, should it come to his Court. The *loi* was duly passed on 15 March. In the June of the same year, a Section of the European Court of Human Rights in Strasbourg heard a case involving a ban on the wearing of Moslem dress in a Turkish university.²¹ The Court drew on the Stasi report and the French *loi* as indicating a diversity of opinion in Europe and favoured a large margin of appreciation for national legislators. This view was then upheld in 2005 by the Grand Chamber, in which Costa sat as a Judge.²² The Strasbourg Court's ruling was also drawn on with approval by the French Conseil constitutionnel in a decision of November 2004 on the Constitutional Treaty of the European Union.²³ It concluded that the interpretation given by the Strasbourg Court did not create any incompatibility between the Charter and French constitutional principles of secularism. The Conseil cited the Strasbourg Court's decision explicitly to show that the French principles of secularism would be permitted 'which prohibit anyone from relying on religious beliefs to exempt themselves from general rules governing the relationships between public authorities and individuals'.

¹⁸ See CE 25 January 1939, *Abbé Marzy*, Leb. 709; CE 14 May 1982, *Association internationale pour la conscience de Krishna* Leb. 179.

¹⁹ Avis 27 November 1989.

²⁰ CE 27 November 1996, *Ligue Islamique du Nord* Leb.461. See generally, the 'Circulaire Fillon' of 18 May 2004, JORF 22 May 2004, p 9033 implementing the *loi* of 15 March 2004 on the wearing of religious insignia in schools.

²¹ Application no 4774/98 of 29 June 2004.

²² *Leyla Sahin v Turkey*, Grand Chamber 10 November 2005.

²³ J. Bell, 'French Constitutional Council and European Law' (2005) 54 ICLQ 735

That view was confirmed in *SAS v France*,²⁴ when the 2010 *loi* banning the wearing of the full-face veil in public was upheld by the Strasbourg Court. So the debate in France centres on the application of French principles, rather than the European Convention.²⁵

The case law on both the power to restrict public expressions of religious practice on grounds of public order and to control the exercise of religious liberty by the users of public services is essentially casuistic. The reconciliation between the right of religious freedom and the neutrality of the public service encourages a similar casuistic and fact-sensitive approach. This is seen clearly in the *Burkini* case in the summer of 2016.²⁶ In the wake of the terrorist attack in Nice on 14 July, the mayor of the southern French commune of Villeneuve-Loubet issue a byelaw governing public order and security on local beaches. It prohibited access to the beaches to ‘any person not appropriately dressed, respecting good morals and the principle of secularism, and respecting the rules of hygiene and safety of bathers relating to the public seashore. The wearing of clothes during bathing having a significance contrary to the above-mentioned principles is strictly forbidden on the beaches of the commune.’ This was clearly directed against clothing which manifested that a person belonged to a particular religion. The byelaw was challenged by the national Ligue des droits de l’homme and an association against Islamophobia. They failed to obtain an interlocutory order from the Tribunal administrative of Nice suspending the byelaw, but, in a decision only four days later, the Conseil d’Etat ruled that it should be suspended.

The grounds of the suspension of the byelaw related essentially to the facts, rather than to the principle, because the role of the administrative courts is simply to review substantive judgments of policy made by the administration. The authorising power, art.2212-1 of the Code on local government, entitled the mayor to regulate public order, security, safety and public health in the commune including beaches. The Conseil d’Etat interpreted the power essentially in line with the way it had construed the same power in the *loi* of 1884 in the case of *Abbé Olivier*. The first point is that the power to maintain order has to be exercised in a way that respects the freedoms guaranteed by law. The second and consequent point is that the measures taken in respect of bathing must be ‘appropriate, necessary and proportionate having regard only to the requirements of public order, such as follow from the circumstances of time and place’. No other circumstances may be taken into account, and the mayor needed to show that the measures were justified by risks of threats to public order. The Conseil noted that the mayor was unable to present in the oral hearing any evidence of a risk threatening public order. In the absence of such risks, the mere emotion and fears resulting from the terrorist attacks in the general area did not constitute a sufficient justification for public order measures. As in the *Abbé Olivier* decision, the evidence was not forthcoming and so the decision was illegal. Since there was a serious infringement with fundamental freedoms of movement, of conscience and of the person and the byelaw was manifestly illegal, the Conseil suspended it pending a full hearing (which will no doubt never take place). The Conseil d’Etat did try to provide some guidance to the 34,486 local mayors in France exercising these powers.

The Conseil d’Etat is essentially trying to navigate the balancing of conflicting principles by legalism and the insistence on evidence-based policy-making. At the same time, French law

²⁴ [2014] ECHR 695, Application no. 43835/11. M. Hunter-Hénin, ‘Living Together in an Age of Religious Diversity: Lessons from Baby Loup and SAS’ [2015] Oxford Journal of Law and Religion 1.

²⁵ For criticism, see Ilias Trispiotis, ‘Two Interpretations of “Living Together”’ [2016] CLJ 580.

²⁶ CE Ordonnance of 26 August 2016, *Ligue des droits de l’homme*, nos 402742, 402777.

is trying to move on a distinctive path.²⁷ At the same time, it claims to be part of the mainstream of European view in that secularism is claimed to be part of the freedom of all guaranteed by a neutral state. To go back to Rivero, the current state of French law in relation to Muslim dress closely resembles the period between 1905 and the First World War when the secular authorities were often sniping at the Catholic Church, and that took a long time to reach a point of equilibrium which, perhaps, is being destabilised again as the Christmas Crib decision may illustrate.

²⁷ See M. Hunter-Hénin, 'Why the French don't like the *burqa*: *Laïcité*, National Identity and Religious Freedom' (2012) 61 ICLQ 1.