THE FREEDOM OF CONSCIENCE iN THE FRENCH LAW

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FREEDOM OF CONSCIENCE IN THE CENTURY OF RUSSIAN PARLIAMENTARIANISM, SAINT-PETERSBOURG, RUSSIA, 26-29 avril 2006

The Advisory Council of the Commissioner on Human Rights in the Russian Federation, and the Russian Academy of Government Service for the President of Russia joined forces with other academic and governmental organisations to present a scientific seminar to mark the centenary of the beginning of the work of the first State Parliament, or Duma. Papers presented to the conference were arranged thematically. They addressed religious rights and freedoms in Russia in the twentieth century, which was contrasted with the international experience. Representatives from the USA, France, the United Kingdom, the Slovak Republic and Romania shared the experience of their home countries. The main matters covered included the collective exercise of freedom of conscience, processes of registration, securing the secular character of the civil state, co-operation with cultural organs of the state, minority religions, Hinduism, and ethno-confessional tolerance.

FRENCH REPORT: **The Freedom of conscience in the French Law**, BLANDINE CHELINI-PONT, Université PAUL CEZANNE, AIX-MARSEILLE

"You never will touch with too much scruple on this delicate and sacred thing, consciousness of a child", Jules Ferry, President of the French Government and Head of Public Education, Letter to the Teachers, November 27, 1883.

The French Law on Separation of the Churches and the State of December 9, 1905 is so related into historical French culture to the establishment of their famous “Laïcité”, that this law was celebrated in 2005 as "Laïcité Centenary", with hundreds of events and festivities in all country. Some myth of origins, which remains necessary even in the best democracies, because it permits populations to share a common and valuable history, is doubtless at work in this celebration of French Laïcité Centenary, commemorating Law of 1905. Myths have goals, but they do not have power of law neither are they real texts. Law of 1905 is one step to a slow legal building of French Laïcité. One decisive among steps, but other steps have more recently and more deeply, specified and integrated into French Constitution this term of Laïcité (article I, Constitution of 1958). They interpreted also Separation, as one way to organize relations between worships and State in France, when other rules exist on the territory, like those in place in Alsace. The constitutional principle which characterizes French State is less "separation" than neutrality, a term much more significant. Neutrality can include principle of separation, i.e. lack of public worships service according to the terms of article II of the law of 1905 (no more recognized official worship, no more religion directly related to State with public budget for clergy salaries and administrative expenses, no more direct financing of worships). But the principle of the Separation relating to the law of 1905, remains circumscribed to a simple law, which does not work for the entire French territory and has many amendments, including financial (1). More importantly, the principle of neutrality never meant that the French State does not know religions nor rejects religious fact. On the contrary, neutrality of the French State is a link for a balanced relation and serves as a welcomed and necessary counterweight to its absolute obligation to respect freedom of conscience, untouchable treasure of each citizen whose State is servant, preventing in that way and forever anyone from any compelled religious belief and preventing everyone in the same movement from a belief far different from his most intimate

conviction, this own belief being sacred and unreachable, whatever its contents are and even if its contents would be totally atheistic and anti-religious.

It is more because of this balance that the Law of 1905 should be celebrated: This law only cemented the association between neutrality of the State (end of its 'gallican' interventionism in life of religions and end of its very old relation with catholic Church) and its essential reason, freedom of conscience. It is indeed not so anecdotic to recall that the first words of this law, those of its article I, are as follows: "the Republic shall ensure the freedom of conscience", quite simply because this assertion is constitutional today and that, for simple that seems the sentence, underlies a definition which is not a definition inherited from French free-thinkers of previous centuries, making freedom of conscience as the absolute right of a free will, without religious feeling. On the contrary, freedom of conscience in the context of the law of 1905 protects religious beliefs, whereas traditional French freedom of conscience had been until this date the right to enlighten consciousness vis a vis religious or political obscurantism.

Therefore, freedom of conscience ensured by the Law of 1905 is not at all what thinkers of the French public school system had in mind at the end of the 19th century, when they dreamed of a better educated youth, moralistic indeed, but certainly free from religious yoke. When the legislator of 1905 uses this formula, he leaned the freedom of conscience in the basket of religious belief. Consequently it is this religious direction - more inherited from French Protestant thought against catholic Church 's power as well as against unique state religion- that one will find in French texts and jurisprudences, this imprescriptible right to keep a religious belief which implies life choices and conducts. It is this religious direction of freedom of conscience which will be devoted as a fundamental principle of constitutional value, by a Constitutional Council Decision of November 23, 1977, which devotes also and logically freedom of teaching as another fundamental principle.

However, after having tried in a first part to review the whole implication that the Law of 1905 impelled in the French Law compared to the freedom of conscience, understood as the religious consciousness, we will see that the other French tradition, less legal than philosophical, makes conscience as a strengthened place for religious emancipation and the seat of autonomous judgement. This sense did not disappeared, neither from the "consciences" nor from the mind of the lawyers, and it emerges strongly when it confronts with "the freedom of religious conscience". Not only freedom of "religious" conscience knows many legal limits in France but it is also subordinated to the project of a liberated consciousness which crosses French history and thought since 18th century. This taste for emancipation compared to religious requirements explains number of contemporary restrictions, like the famous prohibition of Islamic veil wearing in French public schools, when the veil as a freedom of religious conscience asserted by some, is considered by others as an obvious attack against "enlightened consciousnesses"...

I Thanks to the law of 1905, the freedom of conscience applies, above all, to the religious belief in French legal system.

To the first article of the Law of December 9, 1905 which affirms that "the Republic shall ensure the freedom of conscience" – as a personal freedom implemented by an additional sentence which protects collective dimension of religious practice "It guarantees the free exercise of the worships under the only restrictions enacted hereafter in the interest of the law and order" - answers the first article of the 1958's Constitution instituting the Vth French Republic: "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 ". We have there as a perfect circle which defines the Republic in its constitutional spirit (Laïcité) - if I allow myself to make this comparison- as a Trinity: neutrality, freedom of conscience, equality. The neutrality of the State is the first condition of Laïcité and results from the silence of the constitutional text about God or any divine principle, contrary to some older Constitutions or constitutional texts .

The Republic is self-referred, without transcendence at the top. Neutrality of the State imposed by the Republic means that the legal State resulting from the Constitution does not have a denominational agenda, nor that the common law is founded on some particular religious standards nor that any of its powers can claim any religious option. The religious incompetence of the French State is understood into consideration of its double task, which is 1) to ensure according to the first article of the law of 1905, the freedom of conscience, specified in the first article of the 1958's Constitution, with this assertion that the Republic shall respects all beliefs, and 2) to ensure the equality of all citizens before the law without discrimination of origin, race or religion. To some extent, these three conditions of Laïcité as constitutional spirit are entangled, and under its three conditions, the freedom of conscience holds an essential place. Indeed, if the French State does not have any more religious legitimacy nor does not interfere into the life and organization of religions, the freedom of conscience of each citizen obliges it to respect personal believes but also to guarantee the free exercise of the worships as collective believes, and to apply the as equally as possible its engagement to respect all beliefs without discriminating any, thanks to an equal and general law. The equality of the citizen in the respect of his belief and its worship requires that the State, while guaranteeing this right, never gives him any sign of inequality of treatment. The freedom of conscience thus implies the principle of neutrality as an absolute obligation of its public services to take no part into opinions and believes.

"Neutrality is the common law of all public agents during their office". It does not mean ignorance of religious fact but implies equality between the worships. If the legislator, in 1905, gave up recognized worships, and if the State cannot more recognize any religion as public or official, it never shall ignore any. Among the assets of the first article of 1905, of constitutional value, figure the assertion that all religions have the right to express themselves - what was not the case before- and as a counterpart of the preceding one, the assertion which there should not be, by one or more of them, entanglement with the State or negation of its fundamental principles.

So, if the State does not profess any religion while applying a strict equality between its citizens in its public services, that means that users must be treated in the same way however may be their religious beliefs. It is necessary and imperative that the administrative services, submitted to political power, assure not only whole neutrality but show its neutrality, so that users cannot feel discriminated. That is what the Council of State called the "duty of strict neutrality" which is obligatory for any public servant (Council of State May 3, 1950, Dlle Jamet and the contentious opinion of May 3, 2000 Dlle Marteaux). Apart from the service, the civil servant is free to express its opinions and beliefs, provided this expression do not have effect on the service (Council of State April 28, 1938 Demoiselle Weiss). During the office, a strictest duty of neutrality is required. Any

demonstration of religious convictions during work is prohibited as well as the wearing of religious sign - the Islamic veil recently-, even if the servant is not in touch with the public. This requirement for neutrality of civil servants is particularly present in the Public Education (Constitutional Council Decision, 84-185 of January 18, 1985, Loi Chevènement and Council of State, opinion of May 3, 2000, Dlle Marteaux) and in the public Health service (Administrative Court of Paris, October 17, 2002, Mrs. Christine E, concerning the respect of the "freedom of conscience" of users in a state of weakness or dependence).

So long, the freedom of conscience is recognized for civil servants, their personal convictions political as well as religious cannot be revealed nor known, and are never registered in their candidates' files (Constitutional Council Decision n° 76-77 of July 15, 1977, Dossiers des fonctionnaires), except those made for the choice of a future Prefect by the President of the Republic. The access to concourses is never prohibited due to religious opinion (CE March 13, 1953, Tessier). None public or private employment, according to the Preamble of the 1946's Constitution, subparagraph 5, can be made unreachable because of race, origin or religion. The authorizations of absence of public agents for the religious fests are granted each year by ministerial circulars. The freedom of conscience is also used as a reason to guarantee the freedom of teaching and to allow existence to private and denominational schools. It is again used to justify that in confessional schools, if they are under an official contract with the State and if theirs teachers are salaried by the State as previous by the Law Debré of December 31, 1959 (law n°59-1557), religious teaching is not obligatory and respects the freedom of conscience of children and parents. Confessional belonging of teachers in denominational private schools under contract with the State is not obligatory, in the name of their freedom of conscience, but at the same time, once engaged, they must respect the proper character of their establishment, and practise a "duty of reserve" vis-a-vis the expression of their own opinions and beliefs, if those differ from the religious culture transmitted there (Cour de Cassation, May 19, 1978, Dame Roy c/association Sainte Marthe). Thus, in many catholic schools, teachers, administrative staff and children are without religion or of another religion than Catholicism, in particular Moslem.

In the name of the (religious) freedom of conscience, beginning in the French constitutional history by the Law of Separation of 1905, it is also prohibited to force a doctor or a medical worker to act against his conscience (Constitutional Council Decision n°74-75 of January 15, 1975, about abortion right) , neither it is possible to force a patient to follow a treatment or a prescription he refuses . The freedom of conscience is also used as a reason for objection of conscience (refusal of using weapons), integrated in 1963 in the Code of the National Service (articles L 116 -1 and 116-8) and replaced by a specific service, become in 1983 an civil service affected to the Ministry for social Affairs.

II. The freedom of conscience strongly preserves nevertheless in France a value of "liberation" which re-appears in the conflicts of conscience and frequently dominates over the requirements of the religious conscience. This manner of seeing the freedom of conscience prevails largely in the French education system and explains the strict attitude of the public authority (and of the French opinion which shares this way of seeing) with the permissible scopes of the freedom of (religious) conscience, as understood by the Law of 1905.

We have in example, though of course this definition is not legal, the definition proposed on French National Assembly official website (www assembly-nationale.fr/site-jeunes/laïcité/fiches-dates/fiches-1989/fiche.pd), page “Juniors”, page “Laïcité” into a alphabetical list of related terms. Freedom of conscience is defined as a "moral autonomy. It is the right for an individual to determine his philosophical, religious, ideological, political convictions (...) apart from any external pressure, familial, social or political ". The religious freedom defined in the same list, is then " the faculty for any individual to adhere to a chosen confession or to refuse any (freedom of conscience), but also to express and teach its convictions and beliefs (freedom of thought) and to exert his worship publicly, according to his faith (freedom of worship)". These definitions are focused on self-determination and personal choice of intimate convictions which suppose a complete autonomy of the personal will and can be regarded as an effort against educational, social and cultural pressures around.

So that freedom of conscience is not understood as a freedom which allows, in the name of one imperative conscience, minority groups or single believer, to claim their right to exist and to be equally protected by a common law or on the contrary, by a specific or genuine law. It is an absolute right of the conscience to act without external support, and to find into itself the means of its world comprehension. For those who have read the *Discours de la Methode* of René Descartes, continuity of the Cartesian heritage and French subjective philosophy shines in this understanding of the freedom of conscience. The French conscience is enlightened and independent...

It is in the name of this enlightened freedom, that the obligation of public servants does not touch the academic level. In a famous decision of January 20, 1984, the Constitutional Council strongly reaffirmed that the principle of professorial independence was necessary in the interest of the service (DC. 83-135, Loi relative à l’enseignement supérieur). It validated article 3 of the submitted law relating to the higher education (n° 84-52 of 24 January 1984) which stipulates that "the public utility of the higher education is secular and independent of any political, economic, religious or ideological influence; It tends to the objective knowledge; it respects the diversity of opinions. It must guarantee to the teaching and researches their possibilities of free scientific creative and critical development ". The article 54 of the same law stipulates that" the professors-researchers, the professors and the researchers enjoy a full independence and a whole freedom of expression in their professional performance, under the reserves imposed to them, in accordance with the university traditions and the provisions of the present law, the principles of tolerance and objectivity ". The reason of this tradition of extreme confidence, granted to the academic level on which is exerted very few control (except cases of genocides revisionism or incitement to racial hate), is of course that their "scientific" example will educate French students to free conscience.

The deep influence which generations of philosophers gave to the French culture explains why the education given by the public educational system, provides at the same time the fundamental knowledge and a civic spirit, attentive "to open the door" to a critical attitude. Without debating on the sensible bankruptcy of my country’s school system, nor on the mitigated results of its method which contributes to whelm the streets with angry people in case of real or imaginary threat on social rights and freedoms, this free-conscience-impulse explained the strong French educational systems’ and public opinion mobilization against the wearing of the Islamic veil. How to form free consciences if some assert such a religious imperative requirement as a freedom? This difficult

question was in fact treated in the logic of the French school system. The teachers and teaching contents' neutrality regarding religion must be extended to pupils inside buildings.

Thus, if any freedom of (religious) conscience is recognized by pupils, it is not *stricto sensu* written in the last text of educational Orientation (Loi d'orientation 89-486 of July 10, 1989), but should take part in the freedom of expression, expressly recognized by pupils in this law (article 10). Nevertheless this freedom of expression is strictly framed, and to some extent undervalued by the legal minority of pupils. The obligatory character of the public Education and the principle of the obligatory assiduity of pupils make for example obstacle that for pupils ask for a systematic short or daily exemption of assiduity for religious reasons. Only specific authorizations of absences are allowed. Public holidays of the school calendar are indeed often catholic religious ferial days, related to catholic historical heritage of the French population. The texts specify that these authorizations can only be granted "in exceptional circumstances and for certain particular days insofar as they correspond to holy days, fitting in a calendar established at the national level and as they do disturb the continuity of schooling" (CE, Ass, April 14, 1995, Consistoire Central des Israélites de France, Circulaire of December 12, 1989 of the Minister for national Education).

By the same manner, respect of a time dedicated to religious teaching during the schools' week is obligatory in the public education, but out of the school building for the primary education level (Law of March 28, 1882) and the respect of the food religious rules in the school canteens is a recommended tolerance, though limited to another meat or protein substitute in case of pork meat, but it is not a legal obligations of the public restoration service.

The opinion of the Council of State of November 27, 1989, is very revealing on the freedom of conscience of pupils, because this highest jurisdiction, guardian of the "religious" tradition of the freedom of conscience, as it was built starting from the Law of 1905, could not ignore its existence. Questioned by the government about the compatibility of the wearing of religious signs with the principle of laïcité, the Council of State indicated: "It results from the above that, in teaching establishments, the wearing by students of symbols by which they intend to manifest their religious affiliation is not by itself incompatible with the principle of laïcité, as it constitutes the free exercise of freedom of expression and of manifestation of religious creeds". In its opinion, the Council of State initially recalled the distinction between the obligations made to the personnel and those to the pupils. Indeed, "it results from the constitutional and legislative texts and from the international engagements of France that the principle of the laïcité of the public education, which is one of the elements of the States' Laïcité and of the public services systems' neutrality, imposes that teaching is dispended in the respect of this neutrality by programs and teachers and in addition in respect of the freedom of conscience of the pupils". Concerning the pupils, the principle of Laïcité not only "prohibits [...] any discrimination in the access to the teaching which would be founded on the pupils religious convictions or beliefs " but also " the freedom thus recognized included for them the right to express and to manifest their religious beliefs inside the teaching establishments."

However the Council of State specified immediate limits of this freedom: ", but that this freedom should not allow students to sport signs of religious affiliation that, due to their nature, or the conditions in which they are worn individually or collectively, or due to their ostentatious and provocative character, would constitute an act of pressure, provocation, proselytism or propaganda,

or would harm the dignity or the freedom of the student or other members of the educative community, or would compromise their health or safety, or would perturb the educational activities or the education role of the teaching personnel, or would trouble public order in the establishment or the normal functioning of the public service ".

In the same way the exercise of the freedom of conscience must be limited "insofar as (it) made obstacle to the achievement of the missions reserved by the legislator for educational public service, which must, in addition to allowing acquisition by children of cultural and professional background as well as sense of responsibility as (wo)men and citizen, contribute to the development of their personality, inculcate to them respect of individuals, origins and differences, guarantee and support equality between men and women".

After this opinion, Lionel Jospin, then Minister for the national Education, spread a Circular, on December 12, 1989 declaring that "Laïcité as the constitutional principle of the French Republic, is one of the fundaments of the public school. At school, like elsewhere, religious beliefs of each one are a question of individual conscience and thus belongs to freedom. But at school where all young people live together without any discrimination, the exercise of the freedom of conscience, in the respect of the pluralism and the neutrality of public service, imposes that the entire educational community lives safe from any ideological or religious pressure ". By doing this, if "" any young must be respected in his personality - this respect being an integral part of the educational role of the school - the young must learn and understand that the respect of the freedom of conscience of others demands his own personal reserve".

Thus, administrative Justice examined particular cases basing on this official declaration like, since 1994, on the ministerial circular of François Bayrou, then Minister for national Education. This one established a distinction between discrete signs (allowed), expressing the personal attachment of pupils to personal convictions, and the conspicuous signs (prohibited), constituting in themselves elements of proselytism or discrimination. The Council of State, through its jurisprudence, cancelled several internal rules of teaching establishments, which prohibited in a general and absolute way the wearing of any distinctive sign. In the same way, it cancelled decisions of pupils exclusions. On the other hand, The Council of State admitted the legality of sanctions if justified by a disorder with the law and order, and in particular when girls refused to remove their scarf during sport lessons or to take part in others lessons for religious reasons. In these cases, the refuse, opposite with the obligation of assiduity exceeds their right to express their religious convictions.

This jurisprudence however showed its limits. On the one hand, the legal conduct retained by the opinion of the Council of State was discussed since their application could appear very different from one establishment to another. In addition, decisions made by heads of teaching establishments were difficult to do: difficulties of interpret what was conspicuous or not, difficulties of application, when parties refused dialogue. These difficulties leaded in a large part the reflection preceding to the Law n° 2004-228 of 15 March 2004, framing, in accordance to the principle of laïcité, the wearing of signs or clothes expressing a religious affiliation at elementary schools, schools and colleges.