FREEDOM OF CONSCIENCE IN THE FRENCH LAW

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> *"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 to historical French culture to the establishment of their famous “Laïcité”, that this law was celebrated in 2005 as the "Laïcité Centenary", with hundreds of events and festivities all over the country. Some myths of origin, which remain necessary even in the best democracies, because they permit populations to share a common and valuable history, are undoubtedly at work in this celebration of the French “Laïcité Centenary,” commemorating the Law of 1905. Myths have goals, but they do not have the power of law nor are they real texts. The Law of 1905 is one step in the slow legal process of building French Laïcité. One decisive step (among many, to be sure), but other steps have more recently and more deeply, interpreted and integrated this term of Laïcité into the French Constitution (article I, Constitution of 1958). They also interpreted Separation, as one way to organize relations between churches and the State in France, while other rules continue to exist on the French territory, like those in place in Alsace. The constitutional principle which characterizes the French State is less "separation" than neutrality, a term much more significant. Neutrality can include the principle of separation, i.e. lack of public (State-sponsored) worship services according to the terms of article II of the Law of 1905 (no more “recognized” official churches, no more religion directly affiliated to the State with public budget for clergy salaries and administrative expenses, no more direct financing of worship services). 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 acknowledge religions or reject religious fact. On the contrary, neutrality of the French State is a link for a balanced relationship and serves as a welcomed and necessary counterweight to its absolute obligation to respect freedom of conscience, an untouchable treasure of each citizen whose State is a servant, preventing in that way and forever anyone from any compelled religious belief and preventing everyone at the same time from holding a belief far different from their 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 (the end of Gallican interventionism in life of religions and the end of its very old relation with Catholic Church) and its essential reason, freedom of conscience. It is indeed not so anecdotal to recall that the first words of this law, those of article I, are as follows: "***the Republic shall ensure the freedom of conscience"***, quite simply because this assertion is constitutional today and that, as simple as that sentence seems, it underlies a definition which is not a definition inherited from French free-thinkers of previous centuries, making freedom of conscience the absolute right of free will, without religious feeling. On the contrary, freedom of conscience in the context of the Law of 1905 protects religious belief, whereas traditional French freedom of conscience had been until this date the right to an enlightened consciousness vis-à-vis religious or political obscurantism.

Therefore, the 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 any religious yoke. When the legislator of 1905 uses this formula, he applied freedom of conscience to religious belief. Consequently, it is this religious direction- more inherited from French Protestant thought against catholic Church's power as well as against the confessionalism of the King- that one will find in French texts and jurisprudence, this imprescriptible right to maintain a religious belief which implies life choices and conducts. It is this religious direction of freedom of conscience which will be upheld as a fundamental

principle of constitutional value, by a Constitutional Council Decision of November 23, 1977, which also logically upholds freedom of teaching as another similarly fundamental principle[1].

However, after having tried in a first part to review the whole implication that the Law of 1905 impelled in French Law compared to the freedom of conscience, understood as the religious consciousness, we will see that another French tradition, less legal than philosophical, makes “conscience” a strengthened place for religious emancipation as well as the seat of autonomous judgement. This sense did not disappear, either from the "consciences" nor from the mind of lawyers, and it emerges strongly when it confronts "the freedom of religious conscience". Not only does freedom of "religious" conscience face many legal limits in France but it is also subordinated to the project of a liberated consciousness which spans French history and thought since 18th century. This taste for emancipation in lieu of religious requirements explains a number of contemporary restrictions, like the famous prohibition of the Islamic veil in French public schools, while 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, freedom of conscience applies, above all, to the religious belief in French legal system.

The first article of the Law of December 9, 1905 affirms that "*the Republic shall ensure the freedom of conscience*" as a personal freedom. It is implemented by an additional sentence which protects collective dimension of religious practice as "*it guarantees the free exercise of the worships under the only restrictions enacted hereafter in the interest of the law and order*". The first article of the 1958’s Constitution instituting the 5th French Republic declares: «*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 here a perfect circle which defines the

[1] Decision n°77-87 about the eventual unconstitutionality of the Law n°59-1557 of December 31, 1959 relating to the freedom of teaching, article 5: *Considering in addition that under article 10 of the Declaration of the Human and Citizen Rights of 1789 “ No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law”, that the Preamble to the Constitution of 1946 recalls that “Each person has the duty to work and the right to employment. No person may suffer prejudice in his work or employment by virtue of his origins, opinions, or beliefs”; that the freedom of conscience must thus be considered as one of the fundamental principles recognized by the laws of the Republic*

Republic in its constitutional spirit (Laïcité) - if I may make this comparison- as a Trinity: neutrality, freedom of conscience, and equality. The neutrality of the State is the first condition of Laïcité and emanates from the silence of the constitutional text about God or any divine principle, contrary to some older Constitutions or constitutional texts[2].

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 particular religious standards nor that any of its powers can claim any religious legitimacy. The religious incompetence of the French State is understood as a two-fold 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 Constitution, with the assertion that the Republic shall respect 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 in spirit are entangled, and under them, freedom of conscience holds an essential place. Indeed, if the French State no longer has religious legitimacy nor does it interfere in the life and organization of churches, the freedom of conscience of each citizen obliges the State to respect personal beliefs as well as to guarantee the free exercise of the religion as collective beliefs, and to apply, as equally as possible, its legal commitment in order to respect all beliefs without discrimination, this is all thanks to an equal and general law. The equality of the citizen in respect of his belief and exercise of that belief, 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 in religious opinions and beliefs.

"*Neutrality is the common law of all public agents during their time in office*". This does not mean ignorance of religion but implies equality between the traditions. If the legislator, in 1905, gave up recognized churches, and if the State is no longer able to 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

[2] Constitutional Chart of June 4th, 1814, Constitutional Chart of August 14th, 1830, Preamble of the Constitution of November 4th, 1848, Constitution of January 14th, 1852 and Senatus-Consulte of May 21st, 1870, Constitutional Law of July 16th, 1875

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 no matter what their religious beliefs might be. It is necessary and imperative that the administrative services, submitted to political power, assure not only complete neutrality but show this neutrality, so that users do not feel discriminated against. That is what the Council of State called the "*duty of strict neutrality*" which is obligatory for all public servants (Council of State May 3, 1950, *Dlle Jamet* and the contentious opinion of May 3, 2000 *Dlle Marteaux*). Outside their service, the civil servant is free to express religious opinions and beliefs, provided this expression does not influence the service given to the State (Council of State April 28, 1938 *Demoiselle Weiss*). During their time in office, a strict duty of neutrality is required. Any demonstration of religious convictions during work is prohibited as well as the wearing of religious signs - the Islamic veil most recently-, even if the civil servant is not in direct interaction with the public. This requirement for neutrality of civil servants is particularly present in the Public Education system [3](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).

The freedom of conscience is recognized for civil servants, their personal convictions- political as well as religious- cannot be displayed or made 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 public offices cannot be restricted for religious opinion (CE March 13, 1953, *Tessier*). No employment, according to the Preamble of the 1946 Constitution, subparagraph 5, can be made ineligible because of race, origin or religion. The authorizations of absence of public agents for the religious holidays are granted each year by

[3] Decision 84-185 of the Constitutional Council of January 18, 1985, Law Chevènement, about the neutrality of teachers: "if it cannot be interpreted as a possibility to harm the freedom of conscience of teachers, which has constitutional value, forces these teachers to observe in their teaching a duty of reserve"

ministerial circulars. Freedom of conscience is also used to guarantee 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 their teachers are salaried by the State as described by the Law *Debré* of December 31, 1959 (law n°59-1557), religious teaching is not obligatory and must respect 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-à-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 non-religious or of another religion besides Catholicism, in particular Islam.

In the name of the (religious) freedom of conscience, installed in 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 rights)[4], neither it is possible to force a patient to pursue a treatment or a prescription he refuses[5]. The freedom of conscience is also used as a reason for conscientious objection (refusal to use weapons), integrated in 1963 in the Code of the National Service (articles L 116 -1 and 116-8) and replaced by a specific service, became, in 1983, a civil service affected to the Ministry for Social Affairs.

[4] Clause of conscience determined by the article L 2212-8 of the Code of Public Health. This article disposes that: "a doctor is never held to practise an voluntary pregnancy interruption" but, if he refuses to practise it, he must inform, without delay, the interested person and immediately communicate to her the name of experts suitable to make this intervention".

[5] "The freedom of conscience consecrated by the European Convention on Human Rights also forces to respect the will of the patient", Council of State, Ordinance of the Judge "des référés" of August 16, 2002, N°249552, Mrs. Valerie FEUILLATEY and Mrs. Isabelle FEUILLATEY, in connection with the blood transfusion made in spite of the refusal on a Jehovah Witness, ordinance given on the basis of the Law n° 2002-3003 of March 4, 2002 relating to the right of the patients. However, in another case, Mr. X. had been hospitalized in a public hospital because of a renal insufficiency. In a written letter communicated with its medical file, he announced its refusal, as Jehovah Witness, on any blood product. He specified that he refused any transfusion of blood product "even on the assumption that this treatment would constitute the only means of saving its life". The EC estimated that the obligation made to the doctor to always respect the will of the patient finds its limit in the obligation the doctor has - in accordance with the goal of his activity - to protect health of his patients. Indeed, taking into account the extreme situation in which Mr. X. was, the doctor who cared of him, focused on trying to save him, was pressed to achieve an vital act proper to the survival and proportioned to the state of the patient. The doctor thus did not make a fault while he wanted to protect the life of Mr. X. (EC, Ass., October 26, 2001, Mr. X).

II. The freedom of conscience remains 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 public authorities (and of French public opinion which shares this way of seeing things) with the permissible scopes of freedom of (religious) conscience, as understood by the Law of 1905. We have for example, though of course this definition is not legal, the definition proposed on French National Assembly official website, page "Juniors", page "Laïcité" into an alphabetical list of related terms. Freedom of conscience is defined as "moral autonomy." It is the right of an individual to determine his philosophical, religious, ideological, and political convictions (among others) apart from any external pressure- familial, social or political ". The religious freedom defined in the same list, is then "the faculty of any individual to adhere to a chosen confession or to refuse any (freedom of conscience), but also to express and teach his convictions and beliefs (freedom of thought) and to exercise his religion publicly, according to his faith (freedom of worship)". These definitions are focused on self-determination and personal choice of intimate convictions which presuppose the complete autonomy of the person free will and can be regarded as an effort against educational, social, and cultural pressures.

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

It is in the name of this same enlightened freedom, that the obligation of public servants does not reach 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 relevant law relating to the higher education (n° 84-52 of 24 January 1984) which stipulates that "*the public utility of higher education is secular and*

independent of any political, economic, religious or ideological influence; It tends to 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 ". Article 54 of the same law stipulates that "*the professors-researchers, the professors, and the researchers enjoy full independence and complete freedom of expression in their professional performance, under the reserves imposed to them, in accordance with 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 controls (except cases of genocide revisionism or incitement of racial hatred), is of course that their "scientific" example will educate French students to free conscience.

The deep influence which generations of philosophers gave to 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 thinking. Without debating the sensible bankruptcy of my country's school system, nor on the mitigated results of its method which contribute to overwhelm the streets with angry people in case of real or imaginary threats on social rights and freedoms, this free-conscience-impulse explains the strong French educational systems' (and public opinion's) mobilization against the wearing of the Islamic veil. How can one form free consciences if some students assert a religious imperative requirement as a freedom? This difficult question was in fact dealt with the logic of the French school system. The teachers and curricular 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[6]), 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

[6] First Article (modified by the Law 94-665 of August 4, 1994 and by the Law 98-657 of July 29, 1998):
- Education is the first national priority. The public service of education is conceived and organized for pupils and students. It contributes to equality of chance. The right to be educated is guaranteed for anyone, in order to permit him to develop his personality, to raise his initial and continuous level of knowledge, to share social and professional life, to exert his citizenship.
Art 10: - The obligations of the pupils consist in the achievement of the duties inherent to their studies; they include assiduity and respect of rules concerning management and collective life inside the establishments. In the schools and high schools, the pupils lay out, in the respect of the pluralism and the principle of neutrality, *the freedom of information and the freedom of expression*. The exercise of these freedoms cannot harm the teaching activities.

extent undervalued by the legal minority of pupils. Only specific authorizations for holy days absences are allowed. Public holidays of the school calendar are indeed often Catholic religious holy days, related to the 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).

In the same manner, respect of a time dedicated to religious teaching during the schools' week is obligatory in public education, but must be done outside of the school building for primary education (Law of March 28, 1882) and the respect of the religious rules regarding in the school cafeterias is a recommended tolerance, though limited to another meat or protein substitute in the case of pork, but it is not a legal obligation of the public food service[7].

The opinion of the Council of State of November 27, 1989, is very revealing of the freedom of conscience of pupils, because this highest court, guardian of the "religious" tradition of 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 explained: "*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 reiterated 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 public education, which is one of the elements of the States' laïcité and of the civil service systems' neutrality, imposes that teaching is dispensed in the respect of this neutrality by programs and teachers and in addition* ***in respect of the freedom***

[7] The Academy of The North's General Department of Supervisory (administrative unit of the Ministry for Education) made, trough its juridical service, a very instructive point on this question, on March 31, 2006, *Taking account of religious requirements regarding school restoration*, http://netia59a.ac-lille.fr/~siteia/espace_juridique/secondaire02.php

of conscience of the pupils". Concerning the pupils, the principle of Laïcité not only "*prohibits* [...] *any discrimination in the access to 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 on this freedom: "*but this freedom should not allow students to wear 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 educational community, or would compromise their health or safety, or would perturb the educational activities or the educational 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) constituted an 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 foundations of the public school. At school, like elsewhere, religious beliefs of each one is 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 freedom of conscience, in the respect of pluralism and neutrality of public service, imposes that the entire educational community lives safe from any ideological or religious pressure*." By doing this, if "*any young person must be respected in his personality - this respect, being an integral part of the educational role of the school - the young person must learn and understand that respect of the freedom of conscience of others demands his own personal reserve.*"

Thus, administrative Justices examined cases based on this official declaration such as, since 1994, 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 other lessons for religious reasons. In these cases, the refusal, opposite with the obligation of assiduity, exceeds their right to express their religious convictions.

This jurisprudence however revealed its limits. On the one hand, the legal conduct retained by the opinion of the Council of State was debated since the application could appear different from one establishment to the next. In addition, decisions made by heads of teaching establishments were difficult to apply: Difficulties of interpretation what was conspicuous or not, difficulties of application, when parties refused dialogue. These difficulties led in a large part to the reflection preceding 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[8].

[8] Article 1: "It is inserted, in the Code of Education, after the article L. 141-5, an article L. 141-5-1 thus written: "Art L. 141-5-1. - In the public elementary schools, schools and high schools, the wearing of signs or clothes by which the pupils express conspicuously a religious membership is prohibited",