FRENCH LAÏCITÉ, FREEDOM OF EXPRESSION AND ORDRE PUBLIC

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Table of content/Table des matière

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Abstract

The republication of cartoons of the Prophet Muhammad by Charlie Hebdo magazine has led to a defensive reaction from the French government. There is legislation going through Parliament in order to make the "secular" education system more stringent by the reinforcement of laïcité by a greater emphasis on indoctrination in the school curriculum. The pursuit by the French authorities under the guidance of President Macron to deregister Muslim charitable bodies and to suspend mosques has caused a minority to feel threatened. This has been followed up with the instruction to adopt "republican values" that may lead to disenfranchisement of the Muslim community by the state imposing secularism and monitoring their conduct which may increase suspicion. The question is if the enforcement of an interventionist state secularism is in accordance with the concepts of laïcité as it was originally developed and if the overbearing executive will undermine the ordre public. This paper argues that in superimposing the laïcité law the state is not in conformity with the original spirit of the doctrine and that freedom of expression to insult religion in satire should not be an absolute right because it could be a threat to the ordre public. The republican values can still be enshrined by reducing the tensions between the laïcité and ordre public and taking the approach of positive neutrality towards other religions.

Résumé

La republication de caricatures du Prophète Mahomet par le magazine Charlie Hebdo a provoqué une réaction défensive du gouvernement français. Un projet de loi actuellement débattu à l'Assemblée nationale vise à rendre le système « séculaire » d'éducation plus sévère, en renforçant la laïcité par une sensibilisation accrue au phénomène d'endoctrinement dans le cadre du programme scolaire. Les démarches entamées par les autorités françaises sous l'impulsion du Président Macron visant à dissoudre les associations caritatives musulmanes et à suspendre diverses autorisations accordées aux mosquées créent un climat de méfiance au sein de cette minorité religieuse. Dans la foulée, l'ordre d'adopter des « valeurs républicaines » risque d'aboutir à une exclusion de la communauté musulmane par un État imposant un sécularisme et un contrôle strict de sa conduite. Dès lors, la question est de savoir si la mise en place d'un État séculaire interventionniste est compatible avec le concept de laïcité tel qu'il a été originellement développé, et si un exécutif autoritaire est de nature à menacer l'ordre public. Cet article vise à démontrer qu'en imposant à outrance le concept de laïcité,

l'État entre en conflit avec l'esprit originel de cette doctrine ; et que par ailleurs, la liberté d'expression, lorsqu'elle est utilisée de manière satirique pour insulter une religion, ne devrait pas être considérée comme un droit absolu en ce qu'elle menace l'ordre public. Les valeurs républicaines peuvent tout aussi bien être préservées en réduisant les tensions existantes entre laïcité et ordre public, et en adoptant une approche de neutralité positive envers d'autres religions.

INTRODUCTION

In France the spirit of the revolution of 1789 still haunts public space, and its seismic pulse reverberates both externally and inside the corridors of power. The proclamation of liberty, fraternity and equality is considered sacrosanct and constitutes a French aphorism that is included in the Preamble as "*a common ideal*" in the French Constitution[1]. The founding principle of republican "*virtue*" is *laïcité,* which enforces a secular educational system, and is supplemented by the freedom of expression that is centered on the *ordre public*. The issue has come to light with the magazine Charlie Hebdo republishing the satirical cartoons of the founder of the Islamic faith. This served as a provocation to a minority community that itself led to the state proclaiming that it needed to shore up the principle of *laïcité* by legislation[2]. There is a need for an examination of the tension between *laïcité* and the *ordre public* and its impact on the minority, even if there is a separation of powers in the French constitution and the state is considered "*indivisible*".

The republication of the controversial drawings in 2020 of the Prophet Muhammad with the caption "*the pictures belong to history*" was timed to appear when those accused of the attack on the publishers in 2015 were being dragged to court[3]. This appeared to be sending a message of triumphalism and glorification which to Muslims was sacrilegious because no likeness of the Prophet Mohammad's has ever existed in public. The adoption of a defensive posture by the publishers of Charlie Hebdo magazine instigated a chain of events that included homicide and reaction by the state that has served to alienate members of the Muslim community.

The response of the French President Emmanuel Macron was to declare the state of emergency and to proscribe organizations, including those that were registered as charitable such as mosques. The French head of state also issued a statement defending the republication of the cartoons as freedom of expression, and to issue a bill in December 2020 for a reinforced

[1] Besides the Preamble, it is also included in Article 2 which states : "*The maxim of the Republic shall be 'Liberty, Equality, Fraternity'*". Article 72-3 also makes a reference to the *"common ideal of liberty, equality and fraternity*".

[2] "Charlie Hebdo republishes Muhammad cartoons on eve of terror attack trial", *Euro News,* September 9th, 2020 : https://www.euronews.com/2020/09/01/charlie-hebdo-republishes-muhammad-cartoons-on-eve-of-terror-attack-trial

[3] « La couverture à laquelle vous n'échapperez » ("The blanket you wont escape"), *Charlie Hebdo*, Septembre 1st, 2020 : https://charliehebdo.fr/2020/09/societe/la-couverture-a-laquelle-vous-nechapperez-pas/

laïcité law[4]. The increase in the powers of the state to intervene in welfare issues such as school meals and disallowing the head dress in private offices was coterminous with the statement of "*Muslim separatism*", of appropriating "*France's future*" and of "*Islam being a religion in crises*". Internationally, it led to some public figures in Muslim countries to call for a boycott of French goods and to cast its policies as racist and Islamophobic[5].

The most significant factor in the defence of the cartoons and its justification for those who published them is that they are based on "*freedom of expression*". This question needs an examination because defaming the Prophet Muhammad or other sacred symbols of Islam in France was preceded by the burning of Qurans in Malmo (Sweden) and in Oslo (Norway) in late 2020[6]. However, it is the response of French state that needs consideration, and the legal definition of such terms as *laïcité*, *ordre public* and the law of defamation that has become controversial in the aftermath of the republication of the cartoons. In France the concept of *ordre public* is an important consideration in permitting any religion to exercise its tenets and is presumed to be interpreted in harmony with the jurisdiction of the state. The *ordre public* is also a foundation of public liberty in other civil law countries where it upholds the concept of equal protection before the law[7].

In France the *Conseil d'État* is responsible for interpretation of threats to the *ordre public*, as it is the body that adjudicates cases in public law which fall under the executive or administrative domain[8]. The pending legislation on *laïcité* in the National Assembly has also

[4] "Fight against separatism – the Republic in action", speech by Emmanuel Macron, President of the Republic (Les Mureaux, October 2nd, 2020), France Diplomacy Ministry for Europe and Foreign Affairs: https://www.diplomatie.gouv.fr/en/coming-to-france/france-facts/secularism-and-religious-freedom-in-france-63815/article/fight-against-separatism-the-republic-in-action-speech-by-emmanuel-macron [retrieved on June 20th 2021].

[5] L. Alsaafia, "What's behind the Middle East boycott of French products?", *Aljazeera*, October 26th, 2020: https://www.aljazeera.com/news/2020/10/26/whats-behind-the-middle-east-boycott-of-french-products [retrieved on June 20th 2021].

[6] A. Chowdhury, "Quran Burning, Free Speech Debate & Racism in Scandinavia", *Boom*, September 2nd, 2020 : https://www.boomlive.in/fact-file/explained-quran-burning-free-speech-debate-racism-in-scandinavia-9589 [retrieved on June 20th 2021].

[7] The Spanish Constitution of 1978 gives is a good example of public order where it is proclaimed as both an individual and a collective right : article 16 proclaims that "*Freedom of ideology, religious and worship of individuals and communities is guarantee with no other restrictions on their expression than may be necessary to maintain public order as protected by law*".

[8] The Conseil d'État is the highest administrative jurisdiction – it is the final arbiter of cases relating to executive power, local authorities, independent public authorities, public administration agencies or any other agency invested with public authority. See Council of State of France - European Law Institute : https://www.europeanlawinstitute.eu/membership/institutional-members/council-of-state-of-france/

opened the debate on the French concept of citizenship and on the fact that the Constitution does not recognize divisibility between ethnic, religious, or racial groups[9]. This denial of a multicultural society constitutes an official policy and is relevant because since the Second World War, and the decolonialization of North Africa, migrations began from African and Asian countries, and led France to become the European country with the highest concentration of minorities[10].

This paper is divided into five sections with Section 1 setting out the historical origins and the development of the French principle of *laïcité* and its current application. It will also discuss the proposals in the bill that reached the Senate to augment the *laïcité*, and examine if they are in accordance with its philosophical rational in education; Section 2 deals with the concept of secular education system under international treaties and the European Convention of Human Rights; Section 3 examines the framework of *ordre public* and the defamation law and hate crime that has been decided in the courts in order to evaluate the insult to revered figures such as Prophet Muhammad; Section 4 considers the genre of satire and freedom of expression as a qualifying right, and analyses whether this right can be regulated; and Section 5 explores the impact of the government's policy of institutionalization of French Islam, as well as the "*republican values*" which have been entrenched by the state that emphasize "*indivisibility*" at the expense of the recognition of a community.

1. *LAÏCITÉ* AND SECULAR EDUCATION

In France, the Constitution as well as political traditions are based on the separation of the state and religion that dates back to the French Revolution, during which was proclaimed the Declaration of the Rights of Man and the Citizen 1789, that is still part of the preamble of the Constitution of 1958[11]. It includes several landmark provisions :

[9] French Constitution of 4 October 1958, Article 1 : "*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*".

[10] Recent research shows that France has the highest concentration of Muslim minorities in the country. It had 5,720, 000 individuals which represents 8.8% of the population; Germany has 4,950,000 individuals, representing 6.1% of the population; and the UK has 4, 130,000 individuals, *i.e* 6.3% of its population. See C. Hackett, "Five facts of the Muslim population in Europe", *Pew Research Centre*, November 29th, 2017 : https://www.pewresearch.org/fact-tank/2017/11/29/5-facts-about-the-muslim-population-in-europe/

[11] French Constitution of October 4th, 1958, Preamble : "*The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789,* […] *founded on the common ideal of liberty, equality and fraternity and conceived for the purpose of their democratic*

"Article 1. Men are born free and remain free and equal in rights. Social distinctions can be based only on public utility;

Article 2. The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression;

Article 3. The sources of all sovereignty reside essentially in the nation; no body, no individual can exercise authority that does not proceed from it in plain terms."

The intention in the Declaration was to create a balance of powers in which the executive, the legislature and the judiciary all had their functions and could keep the checks and balances in the constitution[12]. The articles that underwrote it were based on the concept of Montesquieu who advocated the establishment of a government where the executive did not have arbitrary power "*to debate for the senate, to execute for the magistrate, and to decide for the judges*"[13]. Montesquieu argues that liberty is lost if the three powers are not "*separated*"[14].

The French National Assembly enacted the Civil Constitution of the Clergy in September 1790 which required an oath on the constitution and not on the Papal authority. This decree had the effect of transforming the "*Gallican (Catholic) Church from an autonomous institution that wielded significant influence to one that was reformed, abolished, and resurrected by the state*" which "*represents a key development in the secularization that would stretch across Europe*"[15]. This ended the integration between the Church and the state, and although it was resurrected by Napoleon it has remained an essential part of the French republican tradition.

The Civil Constitution served to be the fundamental principle of a secular tradition that has been the building block of the framework of *laïcité* which prohibits the government from intervening in the state sector on account of any religion. The French legal system does not

development". Full text available online : https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958

[12] Declaration of the Rights of Man and of the Citizen, 1789, Article XVI : "Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution".

[13] C. L. de Secondat Montesquieu, "*De l'Esprit des Lois"*, ed. by J. Brette de la Gressaye, Paris, 1950, 4 vols, translation by Thomas Nugent, F. Neumann, New York, 1949, VIII, 2.

[14] *Ibid*, Chapter XI , Iiv-IV.

[15] G. Betros, "The French Revolution and the Catholic Church", History Review, 2020, Issue 68, pp. 16–21.

define formally what religion or secularism consist of in its legislative framework, and reference must be made to different laws and their interpretation by the courts[16].

This secular premise is based on a concept that denotes the absence of religious involvement in government affairs as well as a neutral stance of the state in religious matters. The *Loi concernant la separation des Églises et de l'État* [Law on the Separation of the Church and the State] was promulgated on December 9th, 1905, and established *laïcité*, as well as state secularism in France. It is the responsibility of French public schools to teach students the concept of *laïcité*, which is by implication the training into a secular sense of public citizenship[17].

The French Constitution of 1958 defined the two founding principles in education, the first of which is secularism (*laïcité*), which is set out in article L. 141-1 of the *Code de l'éducation* [French Code of education]: "*the Nation guarantees equal access of children and adults to instruction, training and culture: the organization of a free and secular education at every level is a State duty*". It implies "*the secular nature of teaching, curriculum, staff and school premises and the optional character of religious teaching in private schools contingent on the State being neutral towards religion*", but not the prioritization of "*religious instruction at the expense of religious instruction*". The second principle is "*educational freedom leading to the protection of alternative forms of education such as private education and, this includes also home schooling*". Article L. 151-3 of the *Code de l'éducation* states that "*primary and secondary schools can be public or private, the former being financed by the State and local political authorities whereas particular actors or associations support the latter*"[18].

[16] Loi du 9 décembre 1905 concernant la séparation des Églises et de l'État, Journal officiel de la République française, Decembre 11th, 1905, no. 336, also available in the version currently in force on the website of France Law at *www.legifrance.gouv.fr* where all the legal measures mentioned in this text can be consulted. This Law is not applied in certain territories of Metropolitan France and Overseas. For an exhaustive analysis of French legislation on religious matters, see F. Messner, P.H. Prélot , J.M. Woehrling, I. Riassetto (eds.), "Traité de droit français des religions", 2ème éd., LexisNexis, Paris, 2013, 1317 pages.

[17] See also *Conseil constitutionnel*, Decision N° 2013-297, QPC of 21 February 2013 (available online: *www.conseil-constitutionnel.fr/decision/2013/2012297QPC.htm*) which identified six distinctive characteristics of secularism: i) the neutrality of the State; ii) the non-recognition of any religion; iii) the respect for all beliefs; iv) the equality of citizens without distinction of religion; v) the free exercise of religion; vi) the exclusion of public funding.

[18] X. Ponsa , A. Van Zantenb, S. Da Costac, "The national management of public and Catholic schools in France: moving from a loosely coupled towards an integrated system?", *Comparative Education*, 2015, Vol. 51, No. 1, pp. 57–70, at 59 : http://dx.doi.org/10.1080/03050068.2014.935580

However, there have been some recent developments that have been significant in further secularizing education, and which prohibit the public manifestation of religion, such as the *Loi n°89-486 du 10 juillet 1989 d'orientation sur l'éducation* [Law on orientation in education og July 10th, 1989] that affirms the individual right to freedom of expression[19]. Under the Debré Act of 1959 the founding principles for education and of *laïcité* and freedom of choice have been reconciled by provisions stating that "*the State must provide an education to all children according to their aptitudes 'with equal respect for all beliefs'"*. It must respect "*freedom of religious practice and religious instruction* [*liberté des cultes et de l'instruction religieuse*] *among pupils attending public schools"*[20] and it must preserve "*the educational freedom of private Comparative Education schools abiding official norms"*[21]. Second, the Act introduces the possibility for private schools to sign a contract with the State. This allows two kinds of contracts : the "*simple contract*" and the "*association contract*" in faith schools that can exist and then receive state funding if the directors of the school sign the simple contract (*contrat simple*) and the contract of association (*contrat d'association*)[22]. The staff expenses can be covered by the state for teachers and educational aids for up to only 10 percent of their annual expenses[23].

The French principle of *laïcité* ensures that, in French primary schools, no course of study can be designed to teach religion, while in secondary schools, religion can be taught by chaplains but only outside the main curriculum[24]. Also, the staff is not allowed to belong to any religious order in primary schools[25]. In 2008, the private Muslim faith school, *Éducation et Savoir*, was established in Paris with an intake of 40 high school students through to 2009, but the school had to follow the state-mandated curriculum while offering classes on Arabic and

[19] Loi n°89-486 du 10 juillet 1989 d'orientation sur l'éducation, Chapter III, Rights and obligations, Article 10: "*The obligations of the pupils consist in the accomplishment of the tasks inherent in their studies; they include attendance and respect for the operating rules and the collective life of the establishments. In middle and high schools, students have, while respecting pluralism and the principle of neutrality, freedom of information and freedom of expression. The exercise of these freedoms may not affect teaching activities".*
[20] Code de l'éducation, article L.141-2.
[21] Code de l'éducation, article L.151-1. See also X. Ponsa, A. Van Zantenb, S. Da Costac, *op. cit.* n°19, at 59.
[22] *Ibid*, at 60.
[23] *Ibid*.
[24] See M.C. Ivaldi, "*The meaning of "Religion" in French case law. The judgement of the Conseil d'État"*, in *Stato, Chiese e pluralismo confessionale*, 2017, No. 39, p. 111. Available online : *www.statoechiese.it*
[25] Code de l'éducation, article L.141-5 : "*In public elementary schools, teaching is exclusively entrusted to lay staff*".

Islam[26]. If Muslims chose to send their children to one of France's 100+ small private Muslim schools, "*without decades of experience — it will likely not yet be subsidized by the state, upward mobility is not yet a given, and such schools are often viewed with suspicion by politicians and society writ-large*"[27].

There is also the possibility of enrolling in Catholic schools where Muslim pupils make up "*nearly 10 percent of enrolled students and some of these schools have up to an 80 percent Muslim student body due to the lack of private Muslim school alternatives*". There is a permission "*to wear the hijab and the recognition of Muslim holidays, offering also optional Arabic classes*"[28]. The stringency of the new French bill that has reached Senate stage is that it will strengthen *laïcité* law, impact the public manifestation of Islamic beliefs, and act as a surveillance mechanism over the Muslim community. It has a specific motivation to enact a law to reinforce republican values, and the preamble mentions the objectives of the text: "*projet de loi confortant le respect des principes de la République et de lutte contre le séparatisme*"[29].

The bill consolidates "*respect for the principles of the republic and the fight against separatism*" and includes several provisions in which secularism is the operating principle of its various clauses. In Chapter 1 (Public Services Provisions), article 1 sets out prohibitions against the wearing of the veil and other ostentatious religious symbols to persons accompanying school trips and allows internal regulations of swimming pools and public bathing areas to prohibit the wearing of the burkini[30].

In Chapter V (Education and Sports Provisions), article 21 relates to "*family education and compliance with compulsory education*" and stipulates that: "*In particular to strengthen the monitoring of the obligation of instruction by the mayor and the competent State authority in matters of education and thus ensure that no child is deprived of their right to education,*

[26] A. Van den Kerckhove, "Within the framework of "laïcité": Islam and education in France", *in* A. Veinguer Alvarez, G. Dietz, D.-P. Jozsa, & T. Knauth (eds.), *Islam in education in european countries. Pedagogical concepts and empirical findings*, Munster/New York/Munich/Berlin: Wraxmann, 2009, pp. 51–68.
[27] C. Ferrara, "Transmitting Faith in the Republic: Muslim Schooling in Modern Plural France", *Religious Education*, 2017, No. 2, pp. 1–14. See also by the same author "Pious Citizens of the Republic: Muslim and Catholic Negotiations of National Identity and Ethical Plurality in Contemporary France", *Boston University Theses and dissertation*, 2019. Full text available online : https://hdl.handle.net/2144/34898
[28] K. Bennhold, "For French Muslims, a Catholic Education", *The New York Times*, September 25th, 2008, sec. Europe : https://www.nytimes.com/2008/09/25/world/europe/25iht-schools.4.16488061.html.
[29] Principles of the Republic Bill under consideration by the Senate, 7 May 2021 : https://www.senat.fr/espace_presse/actualites/202101/principes_de_la_republique.html
[30] Chapter 1, Public Services Provisions, Article 1.

each child subject to the education obligation provided for in Article L. 131-1 is assigned a national identifier".

Its most far-reaching impact on *laïcité* is encapsulated in Section 2, that contains provisions relating to private educational establishments (articles 22 to 25) :

> *"strengthens the training of academic inspectors in the specifics of family education; require a declaration of recourse to family education within eight days at the start of each school year; remove the possibility of carrying out a validation of acquired skills for people providing family education to their children; maintain the current system of double declaration by parents to the mayor of their municipality and to the national education services, and in order not to complicate the administrative procedures for families wishing to educate their child as a family, entrust the decentralized services of the national education to send the list of children educated in families in the department to the president of the departmental council".*

There are also subjective concerns set out in the guidelines on pedagogy that :

> *"religious facts are not taught for themselves, but presented and explained within the framework of disciplinary teaching which mobilizes them, with the addition of the word 'multidisciplinary'; provide that a decree of the ministers concerned specifies the specifications of the contents of the initial training concerning the transmission of the values of the Republic in the higher national institutes of teaching and education, as already exists for the schooling of children in disability situation ; and fight against the infringement brought by the pupils, their parents or their legal representatives to the pedagogical freedom of the teacher exercising in the respect of the programs and the instructions of the minister in charge of national education and within the framework of the project of school or establishment with the council and under the control of the members of the inspection bodies".*

This amounts to a dogmatic adherence to a creed and is based on coercion that is against the original principle of teaching children upon which *laïcité* was created. It could be the anti-thesis of its founding fathers who developed the concept of children's education as a discipline. There are inherent aspects in this approach of ideological control that betray the origins of *laïcité*, which can be traced to the writings of Jean-Jacques Rousseau (1712-1778), the enlightenment philosopher who "*wished to clarify and disseminate ideas that would prove foundational for the modern notion of laïcité*"[31]. Jean-Jacques Rousseau encapsulated his teachings on growing up

[31] H. Rosenblatt, "On the Intellectual Sources of Laïcité: Rosseay, Constant, and the Debates about National Religion", *French Politics, Culture and Society*, Winter 2007, Vol 25, No 3, pp 1-18.

children in his treaty *Émile* which is regarded as "*the most influential work on education after Plato's Republic*"[32]. Rousseau argues :

> *"Our real teachers are experience and emotion, and man will never learn what befits a man except under its own conditions. A child knows he must become a man; all the ideas he may have as to man's estate are so many opportunities for his instruction, but he should remain in complete ignorance of those ideas which are beyond his grasp. My whole book is one continued argument in support of this fundamental principle of education"*[33].

Rousseau was against teaching children by information overload or of extraneous matters that were not relevant because the child could not evaluate verbal lessons. His view about compulsion in being taught upon the authority of others was a form of intellectual subordination. He writes "*I hate books; they merely teach us to talk of what we do not know*". The only book his fictionalized pupil Émile is allowed to read is Robinson Crusoe – an expression of the "*solitary, self-sufficient man that Rousseau seeks to form in a growing child*"[34].

There is variance between the English philosopher John Locke and Rousseau in their theories on education that can be distinguished. Locke's ideas were based on "*nurturing*" children which meant giving them information and knowledge[35]. This is a method that is based on "*reasoning with children*" in providing them with education[36]. It differs from Rousseau's ideal of education which is to blend with "*nature*" and is unlike educating pupils by "*making a finished product an instrument of its own manufacture*" in terms of consciously giving them education in a certain direction[37]. The essence of Rousseau's theory that forms the basis of the original *laïcité* is that there must be no coercion in education and *"it was possible to preserve the original nature of the child by careful control of his education and environment based on an analysis of the different physical and psychological stages through which he passed from birth to maturity and he believed that momentum for learning was provided by growth of the person (nature)*"[38].

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[32] R. Wokler, *Rousseau*, Oxford: Oxford University Press, 1996, p. 1.
[33] J-J Rousseau, *Emile for today*, translation by Boyd, ed. Everyman, London, 1956, p. 81.
[34] *Ibid*, at 69.
[35] J. Locke, "*Some thoughts concerning education, The Works of John Locke in Nine Volumes*", 12th edition, Vol. 8, London: Rivington, 1824, p. 66.
[36] *Ibid*, p. 102.
[37] J. Gianoutsos, "Locke and Rousseau, Early Childhood Education", *The Pulse*, Vol. 4, No 1, p. 16. Full text available online: https://www.baylor.edu/content/services/document.php?id=37670
[38] N.A.C Stewart and W-P McCann, "*The Education Innovators*", Vol. 1, McMillan, 1750-1880, pp. 110-111.

The spirit of *laïcité* as a concept is not different from the First Amendment of the US Constitution with respects to religious beliefs[39]. There is essentially no substantive variation between the form of secularism perceived by the founders of *laïcité* and the framers of the First Amendment. In common with the US, French secularism initially sought to ensure religious pluralism in public and private spheres by balancing both interests. However, the contemporary debate in France is towards remaking *laïcité* as a fundamental doctrine that is intolerant of religious beliefs and that transgresses *laïcité* by interpreting it as a non-liberal ideology rather than as a neutral concept between religions that inculcates knowledge by giving it equal public space.

The educational system will not benefit from increasing the secularization of education as Emmanuel Macron has suggested. The conversion of *laïcité* from a principle of neutrality to a doctrine of subordination will usurp the principle upon which it was founded. The effort to further secularize the educational curriculum by forcing concepts such as freedom of expression is based on a flawed exercise of violating the sacred tenets of religion and is against the letter and spirit of its progenitor that advocated a natural environment to raise children.

2. INTERNATIONAL CONVENTIONS AND PREVENTING INDOCTRINATION

The decision of the French President to reinforce the *laïcité* may also impinge on the international treaties that France has ratified into domestic law. This is encapsulated in the international resolutions of the UN among which is Article 26 of the Universal Declaration of Human Rights 1948. It states :

> *"1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.*
>
> *2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.*

[39] First Amendment to the United States Constitution : "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances*".

3) Parents have a prior right to choose the kind of education that shall be given to their children."

Article 2 of the First Protocol of the European Convention on Human Rights 1950 turns into an obligation the provision of education as a Right as follows:

"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

Although negative in its form, this article has been held to confer a positive right. The preamble to the protocol states that the object of the statute is in the collective enforcement of "*rights and freedoms*". These have come before the courts on the issue of interpretation.

In the *Belgian Linguistic Case*[40] the plaintiffs who were French-speaking felt disadvantaged by the lack of educational opportunity in the bilingual neighbourhood where Dutch-speaking children were attending schools of their own language. They relied on Section 4 of the Belgian Act of 1963 "*relating to the use of languages in education*" to argue that it breached Article 8 (right to private and family life) ; Article 14 (non-discrimination) of the European Convention of Human Rights ; and Article 2 of Additional Protocol 1 (right to education) of the Convention[41].

The European Court of Human Rights held that the Belgian State did not subsidize any French-language education in the municipality where the claimants lived, and that the provision made for such education was inadequate. However, there was no breach of Article 2 of Protocol 1 as the right to education does not extend to require States to establish, at their own expense, or to concede education of any type or at any level in particular[42]. This provision does not guarantee children or parents a right to obtain instruction in a language of their choice. There has been a violation of Article 14 of the Convention (anti-discrimination) in conjunction with Article 2 of Protocol 1 as the legislation prevented children from having access to French-

[40] European Convention of Human rights, *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in. Belgium"*, Judgment, 23 July 1968. Full text available online : http://hudoc.echr.coe.int/eng?i=001-57525

[41] Section 4 of the Belgian Act states that the language of education shall be Dutch in Dutch-speaking regions, French in French-speaking regions, and German in German-speaking regions.

[42] Article 2 of the First Protocol of the ECHR states : "*In the exercise of the functions which it assumes in relation to education and teaching, the State shall respect the right of persons to ensure such education and teaching in conformity with their own religious and philosophical convictions".*

language schools in certain communes of Brussels, solely on the basis of the residence of their parents.

This was not provided for Dutch-language schools, and it was deemed to constitute a discriminatory treatment. The interpretation of the right to education has been upheld by the ECHR despite its negative formulation for the provision of the term "*right*" and mention of a "*right to education*" that is positive in nature. The right to education is also protected by the UN Convention on the Rights of the Child of 1988, which provides in two optional protocols and 54 articles a comprehensive package for the development of the child. However, it places the responsibility on the parents of the child and requires the state to take into consideration the aspirations for their children. It is an obligation to formulate rights of the child in accordance with the wishes of his parents. Article 14 (1) states : "*States Parties shall respect the right of the child to freedom of thought, conscience and religion*". Article 14 (2) then elaborates that duty as follows : "*State parties shall respect the rights and duties of parents and, where applicable legal guardians to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child*".

The authorities are reminded by the Convention to pay particular attention to the culture, community, and identity of the child. The state cannot discriminate against the parental origins or racial or religious characteristics. It states in its article 2 a non-discrimination clause that reads as follows :

> *"(1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*
>
> *(2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members"*[43].

[43] The preamble to the Convention on the Rights of the Child states: "*Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the Child*". Full text available online: https://www.ohchr.org/en/professionalinterest/pages/cmw.aspx

This obligation has been underlined in another international treaty that is of recent origin. Indeed, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990 enshrines this for immigrants' children in receipt of income. Article 30 states :

> *"Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment"*[44].

Some written constitutions have entrenched into their frameworks the provision of a liberal education. These provide secular education that shows a non-religious approach and makes the option of not attending religious instruction into a fundamental right. Legal systems based on a written constitution have been instrumental in defining the process of impartial and objective treatment of religion in their educational curriculum for schools.

In *Canadian Civil Liberties Association v Ontario (Minister of Education)*[45], the Ontario Court of Appeal decided that regulations under the Ontario's legislation requiring two compulsory sessions of religious education a week in public schools contravened the principle of freedom of conscience and religion as guaranteed by section 2(a) of the Constitution Charter of Fundamental Rights and Freedoms of 1982. The Court reviewed the evidence based on the curriculum content and decided that there was "*sufficient indoctrinating material to preclude us from regarding it as trivial or inconsequential*"[46].

The possibility left by the school to exempt children from classes at the request of their parents was not considered sufficient to enable the freedom of choice as children could still be coerced to remain in the classroom. The Court held unanimously that the purpose and effect of the regulation was to provide for "*religious indoctrination, which the Canadian Charter does not authorise. Such indoctrination was not rationally connected to the educational objective of inculcating proper moral standards in elementary school students*". However, "*a program that*

[44] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Assembly, UN, Resolution 45/158 of 18 December 1990.
[45] Supreme Court of Canada, *Canadian Civil Liberties Association v. Ontario (Minister of Education*), 1990, 65 DLR (4th).
[46] *Ibid*, para. 58.

taught about religion and moral values without indoctrination in a particular faith would not breach the Canadian Charter"[47].

The Court also held "*that imposing a religious practice of the majority had the effect of infringing the freedom of religion of the minority and was incompatible with the multicultural reality of Canadian society*"[48]. To establish a violation of the right to freedom of conscience and religion, there needs an objective proof that they cannot practice or exercise fully their beliefs. It is not a subjective assessment, and the obligation of the state is to stay neutral and objective between religions, and it must not indoctrinate the pupils with any specific ideology where the constitution stipulates there be a secular framework in educational institutions[49].

3. *ORDRE PUBLIC* AND CONSTITUTIONAL REVIEW

The concept of *ordre public* is a key element in the application of *laïcité* and its interpretation in the framework of the French Constitution. It takes into consideration the preservation of the secular principles that govern the public law discourse in the jurisdiction of the French republic and the courts have had to interpret the legislation. The principles of liberty, equality and fraternity are the central tenet of the French constitution and the interpretation of these norms in framing public policy comes within the legal framework[50].

Article 1 of the Constitution of 1958 states that France "*shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law,*

[47] Supreme Court of Canada, *Canadian Civil Liberties Association v. Ontario (Minister of Education*), 1990, 65 DLR (4th). p. 344.
[48] *Ibid*, p. 363.
[49] Supreme Court of Canada, *SC v. Commission Scolaire des Chênes*, 2012, SCC 7, Judgment, 17 February 2012, para. 54: "*Under the constitutional principles governing state action, the state has neither an obligation to promote religious faith nor a right to discourage religious faith in its public education system. Only such neutrality is in keeping with the secularism of the state"*.
[50] In its Decision n°2018-717/718, QPC, 6 July 2018, *M. Cédric H. et autre [Délit d'aide à l'entrée, à la circulation ou au séjour irréguliers d'un étranger]* the *Conseil constitutionnel* ruled that articles L. 622-1 et L. 622-4 of the Code on the Entry and Residence of Foreign Nationals and on the Right to asylum (CESEDA) as amended by the Act n° 2012-1560 of 31 December 2012 on Detention of Foreign Nationals for the purpose of verifying residence permits and Amending the Offence to Provide Assistance to Illegal Residents with the view to exempting Humanitarian and Disinterested Actions (relative à la retenue pour vérification du droit au séjour et modifiant le délit d'aide au séjour irrégulier pour en exclure les actions humanitaires et désintéressées) were in breach of the constitutional principle of fraternity. The Court ruled that fraternity is a constitutional principle from which ensues the freedom to assist others for humanitarian reasons without consideration as to whether the assisted person is legally residing or not within the French territory (paras 7 and 8 of the ruling). However, the Court concluded that the provisions of Article L.622-4 must be interpreted in light of the principle of fraternity as being also applicable to any act of assistance provided on humanitarian grounds (para. 14).

without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis"[51].

The *Code civil* [French Civil Code] has a special significance for the concept of *ordre public* and its terms are set out in Article 6, which states it is not "*possible to deviate by a contract from law relating to public order and good morals*". It is followed in Article 1133, that states "*a cause is unlawful if prohibited by law or contrary to morality or ordre public*". The interpretation of these clauses has traditionally relied "*upon a narrow, or 'material', conception of public order – a tripartite notion composed of peace, health and public safety*"[52]. This implies obligations on the part of public authorities who have had to carry out their duties to the public, including the individuals.

Emmanuelle Neraudau-d'Unienville has defined the principles underpinning the *ordre public* as follows :

> *"Public order and the law of foreigners in the Member States of the European Union, inseparable and contradictory, are at the heart of national sovereignty; their development is part of European construction. Embedded in domestic law, they legitimize each other. National public order thus appears to constitute the basis of foreigners' law. The European framework obliges them to adapt to an evolving, modern context: fundamental rights recognized by European legal orders (ECHR, EU), requirements of European courts (EHD Court, CJEC) ... Despite state resistance (immigration, borders), the development of EU institutions and law must take into account the place occupied by foreigners within it and may be required, to achieve this, to reduce the specificity of the role of public order in their status. The rights of foreigners are called upon to constitute one of the foundations of a 'European public order', reflecting a common democratic ideal"*[53].

There has been an "evolutionary change" in the way the *ordre public* has been interpreted in the context of "*laïcité* as a legal principle" that has been transformed from "*legal rules requiring public authorities to stick to strict religious neutrality, whereas private*

[51] See also *Conseil constitutionnel*, Decision N° 2013-297, QPC, 21 February 2013, which identified six distinctive characteristics of secularism: 1) the neutrality of the State; 2) the non-recognition of any religion; 3) the respect for all beliefs; 4) the equality of citizens without distinction of religion; 5) the free exercise of religion; 6) the exclusion of public funding. Full text available online: *www.conseil-constitutionnel.fr/decision/2013/2012297QPC.htm*

[52] R. S. Alouanne, "Freedom of Religion and the Transformation of Public Order in France", *Review of Faith and International Affairs*, 2015, Vol. 13, pp 31-38: https://doi.org/10.1080/15570274.2015.1005909

[53] E. Neraudau-d'Unienville, F. Julien-Laferrière (Préfacier), « *Ordre public et droit des étrangers en Europe: La notion d'ordre public en droit des étrangers à l'aune de la construction européenne* », 2006, Brussels: éditions Bruylant, 791 pages.

individuals were guaranteed freedom of conscience as well as freedom of religion" to a concept imposing duties on individuals in the religious domain[54]. The concept of *ordre public* can be evaluated by its objective application in the *Conseil d'État* that has to balance the obligation for public authorities where they want to limit a constitutionally guaranteed right.

This was a principle set out in the Benjamin Case[55] regarding the prohibition by the mayor of the City of Nevers that precluded the plaintiff from holding a public meeting, in response to protests from teachers' unions (the plaintiff had a history of mocking teachers in his speeches)[56]. The *Conseil d'État* revoked the mayor's order prohibiting a vigorous analysis of the proportionality in infringing a freedom to preserve public order by preventing the meeting on the ground that it was disproportionate to the risk of public disorder that the meeting presented[57].

While this decision related to a freedom of assembly case, its principle of proportionality applies to freedom of expression as well. It was referred to in the M. M'Bala M'Bala Case, in which the *Conseil d'État*, in a decision of 9 January 2014, upheld the prohibition of a public performance by controversial comedian Dieudonné M'Bala M'Bala, because it was justified by the high risk that he would disturb public order by engaging in illegal hate speech[58]. The decision was given by a specific formation of the *Conseil d'État* known as *le juge des référés* [Interim Judge], a specific and single judge that rules within 48 hours when a fundamental right is at stake.

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[54] S. Hennette Vauchez, "Is French *laïcité* Still Liberal ? The Republican Project under Pressure (2004–15)", *Human Rights Law Review*, Vol. 17, Issue 2, June 2017, pp. 285–312 : https://doi.org/10.1093/hrlr/ngx014

[55] Conseil d'État, *19 May 1933, Arrêt Benjamin [Benjamin Case]*, N°17413 17520, published in the Lebon collection: https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007636694/

[56] Conseil d'État, *19 May 1933, Arrêt Benjamin [Benjamin Case], N°17413 17520, Contrôle des atteintes portées par le pouvoir de police à la liberté de réunion* [*Controls on Violations of Freedom of Assembly by Police Powers*] : https://www.conseil-etat.fr/ressources/decisions-contentieuses/les-grandes-decisions-du-conseil-d-etat/conseil-d-etat-19-mai-1933-benjamin, *archived at* https://perma.cc/AE3H-V7SX.

[57] Conseil d'État, 19 May 1933, N°17413 17520, *Arrêt Benjamin* [*Benjamin Case*] : https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007636694, *archived at* https://perma.cc/8MYJ-2FWJ.

[58] Conseil d'État, Interim Judge, 9 January 2014, N° 374508. Full text available online : https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000028460200, *archived at* https://perma.cc/G7JK-L55C.

The concept of human dignity is also defined in the Morsang-sur-Orge Case, that lead to a decision of the *Conseil d'État* published on October 27th, 1995[59]. The judgment referenced the "*Article L. 131-2 of the Municipalities Code which defined 'the purpose of the municipal police is to ensure good order, safety, security and public health'*" and "*Considering that it is the responsibility of the authority vested with municipal police power to take any measure to prevent a breach of public order ; that respect for the dignity of the human person is one of the components of public order ; that the authority vested with the power of municipal police can, even in the absence of particular local circumstances, prohibit an attraction which undermines respect for the dignity of the human person*".

The *Conseil d'État* has now abolished the subjective test based on abstract concepts found within these obligations and applied a more objective test. In a recent case "Ligue des droits de l'homme et autres – association de défense des droits de l'homme collectif contre l'islamophobie en France"[60], the Human Rights League Against Islamophobia appealed the ruling from Administrative Tribunal in Nice to enforce the ban on burkinis enacted by the mayor of Villeneuve-Loubet illegal. The appeal was under Article L.521-2 of the Code de Justice administrative (CJA) [Administrative Justice Code] which states that this restriction must be justified by the exercise of other fundamental rights and freedoms or the proper functioning of the enterprise and must be proportionate to this aim. The decision was that an alleged disturbance of ordre public was not established, and it canceled the order of the Mayor of Nice who ordered the suspension of the execution of power under Article 4.3. This meant that when mayors issue decrees restricting public behaviour, any alleged violation of communal order that led to the decree must refer to particular "circumstances, in terms of time and location"[61].

The concept of freedom of expression is integral to the framework of *ordre public* and is based on the presumption that liberty is an "*essential freedom*" in France[62]. It is protected by the French Constitution, which incorporates the Declaration of Rights of Man and of the Citizen

[59] Conseil d'État, 27 October 1995, Assembly, N°136727, published in the Lebon collection. Full text available online: https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007877723/
[60] Conseil d'État, Interim Judge, 26 August 2016, N° 402742 402777, published in the Lebon collection. Full text available online: https://www.conseil-etat.fr/ressources/decisions-contentieuses/dernieres-decisions-importantes/ce-ordonnance-du-26-aout-2016-ligue-des-droits-de-l-homme-et-autres-association-de-defense-des-droits-de-l-homme-collectif-contre-l-islamophobi
[61] *Ibid.*
[62] X. Dupré de Boulois, *Droit des libertés fondamentales*, PUF, 2018, p. 360.

of 1789[63]. Articles 10 and 11 of the Declaration protect freedoms of opinion and expression and describe the "*free communication of ideas and of opinions*" as "*one of the most precious rights of man*"[64]. Similarly, the European Convention on Human Rights, by which France is bound, provides that "*[e]veryone has the right to freedom of expression*", including "*freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers*"[65].

The ordinary courts and the *Conseil constitutionnel* which was established at the formation of the Fifth Republic on 4 October 1958, with various powers, including in particular the review of the constitutionality of legislation, have accepted that the freedom of speech is a basic right. The Council which adjudges the compatibility of French legislation with the Constitution considers that "*the freedom of expression and of communication is that much more precious because its exercise is a condition of democracy and among the guarantees that other rights and freedoms will be respected*"[66].

4. SATIRISING RELIGION AND FREEDOM OF EXPRESSION

Despite its foundational importance, freedom of speech was never intended to be absolute as the terms of the Declaration of the Rights of Man and of the Citizen prescribe limits to freedom of expression in its definition. Article 10 declares that "*[n]o one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order*"[67]. Article 11 provides that "*[a]ny citizen*

[63] French Constitution of October 4th, 1958, *Preamble*. Full text available online: https://www.legi france.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006071194, *archived at* https://perma.cc/95S6-F4KX, English translation *available at*: https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958, *archived at* https://perma.cc/MPL8-K9PA. See also additional sources: Conseil constitutionnel, Decision n°71-44 DC, 16 July 1971, para. 2 and Conseil constitutionnel, Decision n°73-51, 27 December 1973, para. 2.

[64] Declaration of the Rights of Man and of the Citizen, 1789, article XI. Full text available online: https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789, *archived at* https://perma.cc/G3K5-CBGQ, English translation *available online:* https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst2.pdf, *archived at* https://perma.cc/K6FB-WUUQ.

[65] European Convention on Human Rights, article 10, 4 November 1950. Full text available online: https://www.echr.coe.int/Documents/ Convention_ENG.pdf, *archived at* https://perma.cc/BFR2-WU6M.

[66] Conseil constitutionnel, 10 June 2009, Decision n° 2009-580, available online : https://www.conseil-constitutionnel.fr/decision/2009/2009580DC.htm, *archived at* https://perma.cc/7D2K-SK5T.

[67] Declaration of the Rights of Man and of the Citizen, 1789, article X.

may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by Law"[68].

Similarly, the European Convention on Human Rights declares :

> *"[T]he exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"*[69].

French law seeks to balance freedom of speech based on the likely harm to private individuals or to the general public based on the need to maintain the *ordre public*. The *Cour de Cassation*, France's highest court for civil and criminal matters, established the general principle that "*restrictions to freedom of expression should be interpreted narrowly*"[70]. The balance that French courts strike is "*between freedom of expression and other imperatives*" on a case-by-case basis and it is discernible that "*proper limits on speech can be separated into two broad categories : limits related to the rights of others, and limits related to public order*"[71].

Article 4 of the Declaration of the Rights of Man and of the Citizen defines freedom in general as "*being able to do anything that does not harm others*"[72]. In accordance with this definition, freedom of speech is limited by the "*right to privacy, the presumption of innocence, the right to 'human dignity', and by rules prohibiting defamation and insult*"[73]. This does not preclude the publication of satire against religion, or which demeans religious personalities, as was manifested in the Charlie Hebdo cartoons.

The precedence for the publication of those cartoons can be found in Voltaire's play *Fanaticism, or Mahomet the Prophet* in 1741, a five-act tragedy written in 1736 by the French

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[68] Declaration of the Rights of Man and of the Citizen, 1789, article XI.
[69] *Ibid*.
[70] Cour de Cassation, Crim., 14 February 2006, No. 05-81932, available online: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007069481, *archived at* https://perma.cc/NJE9-HEEK
[71] P. Wachsmann, « *La liberté d'expression* », *in R. Cabrillac, Libertés et droits fondamentaux*, 19ème édition, Dalloz, 2013, pp. 496-506.
[72] Declaration of the Rights of Man and of the Citizen, 1789, article IV.
[73] P. Wachsmann, *supra* note 72 at 497 ; X. Dupré de Boulois, *supra* note 63, at 363-66.

playwright and philosopher, which received its debut performance in Lille on 25 April 1741[74]. The script degrades the Prophet as "*a scheming, ambitious, and wicked tyrant, an impostor motivated by lust*". The remorse he is shown to exhibit for his ministry at the end of the play has been suggested as being disingenuous and for "*public edification*" and "*at best a passing impression and not a permanent trait of character*"[75].

The cartoons that have ridiculed the Prophet Muhammad do not come under the breach of the right to privacy but under the law against libel and defamation. This can be distinguished by privacy being a protected right under the *Code pénal* [Penal Code][76], the *Code Civil* [Civil Code][77], and the European Convention on Human Rights[78]. The law of defamation is also within the ambit of the *Code Civil* that aims to protect the presumption of innocence of criminal defendants by prohibiting the media from presenting a person who has not yet been convicted of a crime as being guilty of that offence[79]. Furthermore, the *Loi du 29 juillet 1881 sur la liberté de la presse* [Law of 29 July 1881 on Freedom of the Press] prohibits defamation and insults in both written and verbal form, and defines defamation as "*any allegation or imputation of a fact which harms the honour or consideration of the person or group to which the fact is imputed*"[80]. The same provision defines insult as "*any offensive expression, term of contempt, or invective which does not contain the imputation of any fact*"[81].

Legislators have tried to find a balance between freedom of speech and prohibitions against defamation. The statements may not be considered libelous if it can be shown they have been expressed in good faith, or if they are fact-based, although the "*exception of truth*" is itself

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[74] J. Morley, *The Works of Voltaire. A Contemporary Version*, trans. W. F. Fleming, New York: E.R. DuMont, 1901, Vol. I. Full text available online: https://oll.libertyfund.org/title/fleming-the-works-of-voltaire-vol-i-candide#Voltaire_0060-01_61

[75] A. Gunny, *Images of Islam in Eighteenth-Century Writings*, London: Grey Seal, 1996, p. 137.

[76] Code pénal [Penal Code] articles 226-1 to 226-2-1, available online: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=C50ABCA9B7BF412A2B73E353FBED9BE2.tplgfr23s_3?idSectionTA=LEGISCTA000006165309&cidTexte=LEGITEXT000006070719&dateTexte=20190607, *archived at* https://perma.cc/Q597-7BYC.

[77] Code civil [Civil Code], article 9, available online : https://www.legifrance.gouv.fr/affichCode.do;jsessionid=C50ABCA9B7BF412A2B73E353FBED9BE2.tplgfr23s_3?idSectionTA=LEGISCTA000006117610&cidText=LEGITEXT000006070721&dateTexte=20190607, *archived at* https://perma.cc/G9KA-Q99G.

[78] European Convention on Human Rights, art. 8.

[79] Code civil [Civil Code], article 9-1.

[80] Loi du 29 juillet 1881 sur la liberté de la presse [Law of 29 July 1881 on Freedom of the Press], article 29, available online : https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722, *archived at* https://perma.cc/SG4X-A4LJ.

[81] *Ibid.*

limited by the right to privacy, which implies that a true statement still may be considered defaming if it refers to a person's private life[82]. However, the government gives access to the minorities to their own media broadcasting networks, print and electronic platforms and this includes religious minorities[83].

French law of hate speech is based on "*inciting discrimination, hatred or violence against a person or group of persons because of their origins or because they belong or do not belong to a certain ethnicity, nation, race or religion*," as well as "*inciting hatred or violence against a person or group of persons because of their sex, sexual orientation, gender identity, or disability*"[84]. The liability for hate speech extends to the denial or minimization of recognized crimes against humanity, in particular the Holocaust and the Armenian Genocide[85]. It is punishable by up to a year in prison and a fine of 45,000€. In the analysis of these prohibitions against hate speech, including the denial of crimes against humanity, the concept of freedom of speech does include protecting human dignity[86]. It also offers protection to morality as decided in the *Société Les Films Lutétia* Case[87].

However, while the discussion about crimes against any other community is not allowed, even as a matter of debate, there is a lack of an objective assessment of Prophet Muhammad's dignified status as a revered figure to Muslims. The logical extension of hate crimes should transcend all religions and political victimization should be generic in prescribing sanctions when members of a community are affected. The permission to ridicule the most sacred personality in Islam is against the spirit of the law because of its offensive nature and provocation of its followers who consider it as a sacrilege. It seems to be justifiable at present on account of the tradition formed in the period before the French revolution when Voltaire's play was on stage, and the republication of the Charlie Hebdo cartoons were a re-enactment of

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[82] P. Wachsmann, *supra* note 72, at 498-499.
[83] Channels available on France 2 broadcaster : *Le Jour du Seigneur* (*http://www.lejourduseigneur.com/*), *À l'origine Berechit* (*http://www.alorigine-berechit.com/*), *Islam* (*http://www.france.tv/france-2/islam/*), *Présence protestante* (*http://www.france.tv/france2/presence-protestante/*), *Chrétiens orientaux* (*http://www.chretiensorientaux.eu/*), *Sagesses Bouddhistes* (*http://www.france.tv/france-2/sagesses-bouddhistes/*).
[84] Loi du 29 juillet 1881 sur la liberté de la presse [Law of 29 July 1881 on Freedom of the Press], article 24.
[85] *Ibid*, articles 24, 24 bis.
[86] X. Dupré de Boulois, *supra* note 63, at 363-65.
[87] Conseil d'État, Section, 18 December 1959, N°36385 36428, published in the Lebon collection. Full text available online: https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007637342/

the vilification of the Muslim faith and can be deemed as a deliberate exercise in manipulating opinion.

5. CITIZENSHIP RIGHTS AND REINFORCEMENT OF *LAÏCITÉ*

The secular framework in France as borne out by the concept of *laïcité* means that the state does not formally support any exemption for any immigrant minority such as Muslim associations in enforcing its compliance. The notion of any exclusion for a community based on ethnic, national, or religious origins is not accepted in order to safeguard the cultural homogeneity of the state. It is considered as part of its indivisibility and this is not dependent on its extent of integration.

The sociologist Danièle Hervieu-Léger has reflected on the state policy in the following terms :

> *"… one of the most decisive changes that have occurred since the beginning of the 1980s has been the transformation of a society in which cultural homogeneity seemed assured within the normative space defined by the great republican referents, to a multicultural society … The question of Islam, which has become the second religion in France after Catholicism – ahead of Protestantism and Judaism – constitutes the highly sensitive point of crystallization of a problem that is much more vast : the question of the relation between particularity and universality in the very definition of French identity"*[88].

In this context, while the French government has been trying to achieve a level of assimilation of the Muslim population and under Article 1 of the Constitution the government ventured to establish a single national body to represent the Muslim religion. On May 2003, the *Conseil Français du Culte Musulman* (CFCM) [French Council of the Muslim Faith] was set up in France officially to represent Islam in France, with a regional council in each of the regions.

Brigitte Basdevant-Gaudemet, specialist in relations between Islam and the French State and director of the *Centre de recherches Droit et Sociétés Religieuses* (DSR) [Research Centre of Law and Religious Societies] at the Faculté Jean Monnet has reviewed the main aspects of the State's approach to religious bodies and commented as follows :

[88] D. Hervieu-Léger, "The Past in the Present: Redefining Laicite in Multicultural France", in P. Berger (eds.), *The Limits of Social Cohesion*, London : Westview Press, 1998. p. 39.

> *"Equally, although there is no direct funding of religions from the public budget, public communities are not prohibited from granting subsidies to cultural or social institutions of a religious nature, and religions can also benefit from major forms of indirect aid in the form of tax deductions, in the context of private denominational schools, or by other means"*[89].

France does not follow the *lex fori* rule of applying the *forum non conveniens* principle in adjudicating disputes that come before the courts. It applies the laws of the foreigner's country based on citizenship in matters of family law[90]. The rules of international private law that include Muslim Family Law at the domestic level is applicable to non-French citizens living within France. It is of crucial importance because only one out of four million Muslims living in France have obtained French citizenship[91]. However, the application of the rule is contingent on maintaining the *ordre public* and to prevent the violation of any international treaty[92]. French judges have had to decide upon the legality of institutions such as Islamic marriages including polygamy, dowry (*mahr*), and divorce (*talaq*)[93].

The underlying assumption on the part of the French state is that Muslims should accept the norms governing religious practices within the French tradition of *laïcité*. This commitment to secularism is so crucial that France entered a reservation with the Secretary General of the United Nations with respect to Article 27 of the International Covenant on Civil and Political Rights (ICCPR)[94], disbarring its compliance with the following : "*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language*"[95].

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[89] B. Basdevant-Gaudemet, "L'Islam in France", in R. Aluffi, G. Zincone (eds.), *The Legal Treatment of Islamic Minorities in Europe*, Peeters: 2004, p. 59.

[90] In matters of family law, France has ratified the Convention of 24 October 1956 on the law applicable to maintenance obligations towards children ; the Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations ; as well as the Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes (all three conventions are governed by the Hague Conference on Private International Law).

[91] B. Basdevant-Gaudemet, « Le statut juridique de l'Islam en France », *Revue du Droit Public* (RDP), No 2, 1996, p. 355.

[92] For a general study of the exception of "public order" in international private law, see R. Libchaber, « L'exception d'ordre public en droit international privé » in B. Beignier et al. (eds.), *L'Ordre public à la fin du XXe siècle »*, coll. Recueil, thèmes et commentaires, Paris : Dalloz, 1996, p. 65.

[93] P. Fournier, *Muslim Marriage in Western Courts : Lost in Transplantation*, Taylor and Francis, 2016, p. 52.

[94] UN Treaty Collection, Chapter 1V, ICCPR, France, Declarations and reservations, 16 February 1966 : "(8) In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned". Full text available online: https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND

[95] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 23 March 1976.

The effect of this reservation means that France has no commitment to foster special cultural rights to its minorities which has been recognized in the European Court of Human Rights[96]. The French census does not even register its statistical information under the ethnic, racial, or religious groupings. There is no data describing the situation of minorities in France that could correspond to other multi-racial countries, and it has instigated "*a controversy of rare violence between those that would like to see statistics take into account the diversity of the population and those who denounce the danger that such statistics might pose of ethnicizing or racializing society*"[97].

The manifestation of this approach can be seen in the declaration of President Macron that there will be a more stringent interpretation of "*republican values*" and that the *Conseil Français du Culte Musulman* must agree to a "*charter of republican values*" as part of a broad clampdown on radical Islam[98]. The CFCM was presented with an ultimatum to create a National Council of Imams, which will reportedly issue them with official accreditation that can be withdrawn if they act against these French values. The charter will state that Islam is a "*religion*" and "*not a political movement*", while also prohibiting "*foreign interference*" in Muslim groups[99]. The legal framework will be affected when the new *laïcité* law is promulgated which in Macron's definition will replace "*separatism*" and infuse "*communitarianism*"[100]. The President has recognized the freedom from blasphemy and related it to the freedom of expression by attributing it to the human "*conscience*"[101].

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[96] ECHR, Guesdon v France, Communication No. 219/1986, para 5.6: "the State party argues that "the idea of membership of an 'ethnic, religious or linguistic minoritywhich the applicant invokes is irrelevant in the case in point, and cannot be held against the French Government which does not recognize the existence of 'minorities' in the Republic, defined, in article 2 of the Constitution as 'indivisible, secular, democratic and social'".

[97] P. Simon, "The Choice of Ignorance: The Debate on Ethnic and Racial Statistics in France", in P. Simon, V. Piché, A. Gagnon (eds), Social Statistics and Ethnic Diversity, Springer, Cham, 2015, pp 65-87.

[98] « Islam de France : le CFCM présente à l'Elysée un projet de « conseil des imams » » [Islam of France : the CFCM presents at the Elysée a project of a Council of imams], *Le Monde*, 19 November 2020. Full text available online: https://www.lemonde.fr/societe/article/2020/11/19/islam-de-france-le-cfcm-presente-a-l-elysee-un-projet-de-conseil-des-imams_6060279_3224.html

[99] *Ibid*.

[100] « Protéger les libertés en luttant contre le séparatisme islamiste : conférence de presse du Président Emmanuel Macron à Mulhouse », 18 février 2020, full speech transcript available online: https://www.elysee.fr/emmanuel-macron/2020/02/18/proteger-les-libertes-en-luttant-contre-le-separatisme-islamiste-conference-de-presse-du-president-emmanuel-macron-a-mulhouse

[101] « Macron sur l'affaire Mila : "La loi est claire : nous avons le droit au blasphème, à critiquer, à caricaturer les religions » », Le Monde, 12 février 2020, full article available online : https://www.lemonde.fr/societe/article/2020/02/12/affaire-mila-emmanuel-macron-reaffirme-le-droit-au-blaspheme_6029272_3224.html On the freedom of blasphemy, see also N. Colaianni, « *Il presidente Macron e la*

The judiciary has served to endorse the executive act of proscribing Islamic organizations that was part of the initial response of the state to the killing of Samuel Paty. This was confirmed by the ruling of the *Conseil d'État* in its two decisions, the first of which is *Association Barakacity,* in an ordinance published on November 25th, 2020[102] in which Barakacity association asked the judge for relief. The summary ruling upheld the dissolution of the NGO carried out on 28 October, 2020, by a decree in the Council of Ministers invoking article L. 212-1 of the *Code de la sécurité intérieure* [Internal Security Code] "*for the reasons, on the one hand, that the messages published on the social network accounts of the association and its president as well as the comments they aroused incite discrimination, hatred or violence"* and as part of the same ruling "*the incriminated words of the president of the association can be attributed to the association itself and constitute speech inciting discrimination, hatred or violence, which may justify a dissolution*"[103].

The Order stated: "*There is no need to refer to the Constitutional Council the priority question of constitutionality raised by the association Barakacity*"[104]. The *Question Prioritaire de Constitutionnalité* (QPC) [Priority Question of Constitutionality] was not transferred to the *Conseil constitutionnel* because the constitutional right was protected by the article L. 521-2 of the *Code de justice administrative.* This Article allows the provision when "*seized with a request to this effect justified by urgency, the summary judge may order all measures necessary to protect a fundamental freedom to which a legal person governed by public law or a body governed by private law responsible for the management of a public service would have caused, in the exercise of one of its powers, a serious and manifestly unlawful interference*".

The reason for that in the ruling was that under article 23-5 of the ordinance of 7 November 1958 on the organic law on the *Conseil constitutionnel* that "*is seized of the priority question of constitutionality on the three-fold condition that the contested provision is applicable to the dispute or to the procedure, that it has not already been declared in conformity with the Constitution in the grounds and the operative part of a decision of the Constitutional*

libertà di blasfemia », *Questione Giustizia*, 21 October 2020, full article available online : https://www.questionegiustizia.it/articolo/il-presidente-macron-e-la-liberta-di-blasfemia

[102] Conseil d'État, Interim Judge, *Association Barakacity*, N°445774, 445984, 25 November 2020, full text of the decision available online : https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-11-25/445774

[103] Conseil d'État, Press release available online: https://www.conseil-etat.fr/actualites/actualites/le-juge-des-referes-du-conseil-d-etat-rejette-la-demande-de-suspension-de-la-dissolution-de-l-association-barakacity

[104] *Ibid*.

council, unless circumstances change, and whether the matter is new or of a serious nature"[105]. In this instance the "*applicant maintains that by not providing that the decision to dissolve an association has a deferred effect in order to allow it to be challenged before a judge, the legislature vitiated the provisions of Article L. 212-1 of the internal security code of negative incompetence which undermines the right to an effective remedy. However, an association dissolved on this basis still has the legal capacity to challenge, before the administrative judge, the measure of dissolution and obtain, if necessary, the suspension of it by means of one of the summary proceedings"* in the CJA articles L. 521-1 or L. 521-2 which the judge *"seized on this second basis having to rule, in principle, within 48 hours*"[106].

The second ruling concerned the suspension on the *Grande Mosquée de Pantin* in the same date in which the *Conseil d'État* reviewed the sanction imposed by the administrative closure of the place of worship for six months pursuant to article L. 227-1 of the *Code de la sécurité intérieure*. The *Fédération Musulmane de Pantin*, which manages the place of worship, requested the Montreuil Administrative Tribunal's urgent applications judge to suspend this decision. In *Mosquée de Pantin*[107] the *Conseil d'État*'s interim judge rejected this appeal because, firstly, the "*dissemination, on 9 October 2020 on the 'Facebook' account, of a video calling for the removal of a history teacher because he had given a lesson a few days previously on freedom of expression, in particular through the use of caricatures, as well as a commentary mentioning the identity of that teacher*" had the effect of instigating "*violence and hatred in connection with the risk of committing acts of terrorism*"[108].

The judge also stated that the federation may "*request the reopening of the place of worship when it considers that it has taken measures to prevent the reiteration of the dysfunctions observed, in particular by the choice of imams authorized to officiate, the adoption of measures to effectively control attendance at the mosque and social networks under its responsibility"*[109].

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[105] Conseil d'État, Interim Judge, Association Barakacity, N°445774, 445984, Ordinance, 25 November 2020, para. 5.
[106] *Ibid*, para. 6.
[107] Conseil d'État, Interim Judge, Fédération Musulmane de Pantin, N° 446303, Ordinance, 25 November 2020.
[108] *Ibid*, paras. 14-15
[109] Conseil d'État, Press release available online: https://www.conseil-etat.fr/actualites/actualites/le-juge-des-referes-du-conseil-d-etat-rejette-la-demande-de-suspension-de-la-fermeture-de-la-grande-mosquee-de-pantin

The affirmation of republican values in these judgments can be traced to the French Constitution as secularism is "*a fundamental and explicit constitutional principle*"[110]. It is an unalterable principle which is based on French Constitution's eternity clause in article 89, according to which "[t]*he republican form of government shall not be the object of any amendment*". It could only be removed by a constitutional amendment after which the republican form of government could be altered. This provision does not explicitly refer to secularism but despite this clause in its framework the consensus is that it is a fundamental norm because of the "*importance of laïcité to the French conception of republicanism*"[111]. The motivation for this approach is to "*generate allegiance to the republic and to maintain unity, the state must monitor religion and regulate the corporate organization of religious groups*"[112].

Indeed, the principle of *laïcité* has been interpreted by the *Conseil constitutionnel* as precluding "*the use of development and the challenges to this concept posed by immigration and the increasing power of religions*"[113]. The tension that exists between *laïcité* and the *ordre public* is resolved in favour of the secular principles but the evolution of a doctrine after 200 years of its inception has meant that the freedom of expression is being held as a license to insult the founder of the Islamic faith. The wrongful use of freedom of expression has opened up the divisions of French society and the official response conveys a selective discrimination by the state[114].

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[110] A. Sajó, "Constitutionalism and Secularism: The Need for Public Reason", *Cardozo Law Review*, Vol. 30:6, 2009, pp. 2401- 2404.

[111] P. Ardant, « La Laïcité – Introduction », *Pouvoirs, Revue française d'études constitutionnelles et politiques*, N°75, November 1995, p. 5 (stating that secularism is one of the founding principles of the state, as a republican value); A. Bergounioux, « La Laïcité, Valeur de la République », *Pouvoirs, Revue française d'études constitutionnelles et politiques*, N°75, November 1995, p. 17 (describing laïcité as a fundamental republican principle).

[112] M. Troper, "Republicanism and Freedom of Religion in France", in J. L. Cohen, C. Laborde (eds), *Religion, Secularism & Constitutional Democracy*, Chichester: Columbia University Press, 2016. See also E. Daly, "The Indivisibility of the French Republic as Political Theory and Constitutional Doctrine", *European Constitutional Law Review*, Vol. 11, 2015, pp. 458-476 : "*laïcité, formalist equality and indivisibility all coalesce around a single republican doctrine, affirming the singularity of the French people, understood as an abstract and disembodied corpus of citizens whose juridical status is defined independently of their contingent characteristics, beliefs and origins*".

[113] Conseil Constitutionnel on the European Constitutional Treaty, Decision,19 November 2004, No 2004-505 DC.

[114] M. Troper, "Sovereignty and *Laïcité*", *Cardozo Law Review*, Vol. 30, 2009, pp. 2561-2563 : defines *Laïcité* "*completely by the usual idea of an absence of influence of religion on the State" or, as it is alternatively, expressed as "a separation between State and religion can also be characterized as an attitude of the State towards religion, decided unilaterally by the State*".

CONCLUSION

The French republic initiated the reforming of the law towards secularism when it abolished the "divine right of Kings" to rule upon enacting the Civil Constitution of the Clergy in 1791. This established a framework for the separation of religion and the state which is the basis for its secularising the institutions of state and education. The inception of *laïcité* was founded on the principles developed by philosophers of the enlightenment and J.-J. Rousseau was the originator of the premises that children had to be nurtured and not to be manufactured through their teaching in an ideologically free environment. However, the reinforcement of the law on *laïcité* has imposed a system of norms that may lead to the surveillance with instructions in its guidance for "*strengthening the principle of neutrality in the public service, as well as the training of public officials in the principle of secularism*".

This makes it a "top-down" measure in reaffirming the process of education which in its origins was a doctrine to protect the innocence of children and for their development of thought to be a matter of their own conscience. In indoctrinating a version of *laïcité* that will be subjective, the tension between it and the *ordre public* is likely to be increased. This tradition of public law that maintains the checks and balances on executive power within the doctrine of the separation of powers will come for increasing challenge in the *Conseil d'État* dealing with more litigation and referrals to the *Conseil Constitutionnel* and the rights of citizens. This will create further anomalies that may weigh on individuals seeking remedies against an abuse of power. The maintenance of the *ordre public* is in its current form considered a departure from previous norms and it is not idealistic, but expedient based on the state's interest to enforce legislation.

This engages the freedom of expression because the state has preserved it as inherent in the preamble of liberty, equality and fraternity. However, the republication of cartoons of the Prophet Muhammad which the President defended as espousing the freedom of conscience can be challenged as they promote hate speech based on the defamation of the most revered figure to Muslims. The license to cause insult by satire is an infringement of the rights of a community and is offensive and cannot be defended based on republican values. Its historical precursor is Voltaire's play "*Mahomet*" which was staged in another period of history and as rights and responsibilities of states have been recognised in international treaties and in the ECHR there is no justification for defending the cartoons.

The reinforcement of republican values is based on the debate of "separatism" will serve to marginalize a community and will achieve the opposite effect of its purpose. Tensions between the concept of *laïcité* and *ordre public* also exist in other European republican states with significant migrant populations. The Declaration of the Rights of Man and of the Citizen does not preclude the resolution of differentiation between the communities, even in an indivisable state that does not recognize the existence of minorities. It should approach the principle of *laïcité* as not being doctrine that has to be forged in minds but to consider this integral to the *ordre public* by assimilating their value system and preempting the tension that is likely to arise by using the instrument of law in a multicultural society.