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- Secularity, Laicity, and Accommodation of Religious Minorities
- The case of Canada

- Two principles of the liberal democratic State:

- neutrality toward different conceptions of the good life, religious or not,
- authority over any religious authority.

- Religious neutrality does not mean the absence of any relationship between the State and the religious institutions, as religious freedom, like cultural freedom, can be seen as:
- -- a positive right, ie. the believers' right to act in all areas of social life according to her/his religious values;

- -- a negative right, i.e. the prohibition of any interference by the State, individuals, groups (majority religion) in the expression of individual religious belief.

- In both cases, public order (individual rights, security, etc.) must be respected.

- 1. Positive right = Secularity
- The philosophy of secularity affirms a divine end to the human and natural universes, and it defines religion as a social positive fact. Religious beliefs and practices are community realities, and constitute a legitimate and socially useful way of life.
- Accordingly, a relationship must be maintained between State and religious institutions, and the State must contribute to the live of the religious collectivities.
- Religious institutions may exert an influence over public school education, and religious instruction in public schools may be funded by public monies.

- The State may assume responsibility for the salaries for religious personnel, the operating costs of places of worship, the maintenance of buildings and the social and charitable activities of religious NGOs. It may permit a Church to levy a tax, or allow it tax exemptions. It may also fund private denominational schools.
- State accommodations of religious practices are deemed necessary following the principles of freedom of religion and of neutrality of outcome: religious dress code for civil servants, ritual slaughter (*halal* food), provision of prayer room and time for prayer at workplace, burying spaces.

- Beyond these general characteristics, secularity regimes vary. Canada and most European States follow the secularity principle, which can take 3 forms:
- -- Established or national religions: Greece, Denmark, Sweden,
- -- Institutionalized pluralism: Netherlands up to1983, Belgium,
- -- Privileges to Christian churches:
- minor ones: Spain, some provinces in Canada;
- major ones: close cooperation between State and Christian churches: Germany.

- 2. Negative right = Secularism, or Laicism

- Another philosophy, “secularism,” rejected all religious authority over the temporal world. It does not condemn religion in itself, neither rejects a peaceful coexistence with religion if the latter favors the common good.

- Laicism considers religious belief and conduct as entirely personal. It dictates a strict separation of the State from religious institutions: the State must not support any religious definition of the common good. It must not fund any religious institution, or adopt any religious emblem, and its agents must not exhibit any religious belief.
- State religious neutrality means State indifference to religion, but not State hostility towards religion. The State does have one obligation: to ensure the freedom of religion. French jurists have underscored this obligation: “a complete separation between the State and Churches would not correspond to the State of law” (Woehrling, *idem*: 43). Thereafter, State agents must respect the religious beliefs of public service users.

- The United States political institutions, including the Supreme Court, have been able to more strictly embody the laic/secular principle than the State often seen as a model of laicism: France. Since the 18th century, some religious groups and lobbies (more recently segment of the Christian right) have lobbied for the abolition of US secularism, but have failed (Froidevaux- Metterie), because of the historical religious plurality of the civil society, and because of the adhesion by the Christian Churches to a strict secular principle.

- Nevertheless, recent debates about prayers in school, school vouchers, display of the Ten Commandments in courthouses, or the definition of marriage show how conflictive secularism could still be in the U.S.

- According to Nussbaum (Veiled Threats? in Opinionator, July, 11th, 2010:4), “the accommodationist position has been dominant in U.S. law and public culture ever since George Washington wrote a famous letter to the Quakers explaining that he would not require them to serve in the military because the ‘consciencious scruples of all men’ deserve the greatest ‘delicacy and tenderness’”. Modern constitutional law applied an accommodationist standard: the gvt may not impose a substantial burden on person’s free exercise of religion without a compelling state interest (peace, safety). The landmark case is Adell Herbert, 7dayadventist who was fired from her job because se refused to work on Saturday. She sought unemployment compensation from state of South Caroline, and was denied on grounds that she had refused suitable work. The US Supreme Court ruled in her favor, and argued it was a denial of her equal freedom to worship in her own way.

- Accommodation does not mean public funding for religious activities, or any other form of support of religion by the States. It means respect of freedom of religion, and neutrality of outcome (égalité des effets de la loi) of the law.

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- Contrary to the US, France had to fight a powerful Christian church in order to impose a religious neutrality of the State. Thereafter, the political opposition to any religious institutions influence on public and political life is strong in the public opinion.

- Since 1886, by law, public schools teachers must be ‘laïques’. Since December 1905 a law prohibited any relationship between the State and religious institutions. It did not mention *laïcité*, a term only introduced in the 1946 and 1958 Constitutions and which specific meaning is unclear as the French Constitutional Council avoids defining it precisely.

- As the guarantor of religious freedom, the French State has set up religious chaplaincies in public colleges, hospitals, prisons, and in the army (respect of the rights of believers). It has organized ritual slaughter. Following judgments by Conseil d'État (State Council), it has allowed numerous accommodations (i.e. *halal* food at schools, and hospitals, right to Muslim dress code in 1989).
- BUT indirect discrimination is not recognized by French law. Affirmative action would be unconstitutional. So, obligation of accommodation of religious practices in the name of neutrality of outcome does not exist (i.e. no obligation of prayer room at the work place, or change in work schedule).

- Nevertheless, because of the political influence of the Catholic Church and electorate, and of its colonial past, the French State has often “contravened” the principle of a separation of State and Church:
- -- 1901 law, obligation for any religious organization responsible of a cult to register as ‘NGOs for the cult’ (*associations cultuelles de droit privé*) (Pie X forbade Catholics to create such NGOs),
- -- article 2 of the1905 law: municipal (*communes*) funding for maintenance of any religious building built before 1905 (all religious buildings are State property)
- -- by 1924 and 1944 laws, recognition of the 1801 Concordat for Alsace-Moselle (Haut-Rhin, Bas Rhin, Moselle),
- -- since 1959, public funding of the Catholic school sector (25% of the school clientele),
- - use of the emphyteotic lease[1] to facilitate the building of mosques in view of Muslims’ limited financial resources.

- [1]. A long-term contract (99 years) which allows users the use of a building or a land for an annual fee (in this case, quite low).

- Secularism and Laicism are constitutional principles, and as such their interpretation and their application vary according to the power of national religious institutions (Catholic Church in Europe, Latin America; several Christian Churches, United States; Islam, Turkey), and according to political struggles. The Netherlands case is illustrative of the changing nature of the relationship between State and religion starting in the 1970's.

- Some French interpretations of laicism are essentially discourses of intolerance. They oppose any religious expression in the public sphere. These interpretations, very present in historically Catholic societies (Spain, Quebec) are a discursive manipulation by some cultural elites, and politicians (Blondel, 2005; Pena-Ruiz, 2004; in MHD p. 25).

- These segments of the elites and of the public opinion develop a monist and nationalist idea of the law. They see the State and its institutions as places where to teach a national ideology of atheism and of republicanism (***universalisme abstrait) and not as places of gathering of individuals of all origins and faiths, requiring respect of cultures and religions of minority groups (headscarf, kirpan). According to the French republican nationalism, any individual must show a sense of belonging to French republican culture, and not identifiy himself ostensibly as a particular group member*****. Thereafter, all cultural particularisms must be prohibited in public space (notably schools).** Ethnic, and religious institutions are conceived as threat to the unity of the society and of the Statem (see Attendus in 2010 law prohibiting the burqa)

  This interpretation, coined laic fundamentalism, does not have any constitutional value, it is a political opinion.

- **Canada**

- The Canadian regime is not *laic,* and more similar to a secularity regime where State grants privileges to Christian Churches. The 1998 de-confessionalization of Québec public denominational schools has given a distinctive character to the Québec State, however it still falls under the Canadian regime, which characteristics are:

  - Protection of the freedoms of conscience and religion, renewed in 1982 in the Canadian Charter of Rights and Freedoms (Section 2).Strong protection of religious minorities.

- - The Supreme Court's definition of religious freedom as the freedom to believe or not believe, which has led to the courts prohibiting certain practices connected with Christian religions: prayer in public schools (Ontario, Manitoba, Saskatchewan), abolition of the prohibition against working on Sunday (Supreme Court's decision: Big M Drug Mart, 1985).

- **No definition of religion**, as the Canadian State does not deem itself competent to determine what is a recognized and acceptable dogma. Belief is a free personal choice. In Syndicat Northcrest c. Amselem ([2004] 2 R.C.S. 551), the Supreme Court develops this "personal and subjective" definition of the freedom of religion.

- - No mention of the separation of Church and State in the 1982 Constitution, the proclamation of which begins with the words “In the year of our Lord . . . ” and the preamble of which states: “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.” Until 2010 the Supreme Court had however never invoked the supremacy of God in its rulings, and a distance has been maintained between legislatures, governments and the religious sphere, as has been shown when the de-confessionalization of Québec schools1 which did not generate any debate in the House of Commons or any polemical declarations by the federal government.

- - No State intervention in religious minorities’ institutional organization (contrary to Belgium since 1979, France since 1989, cf creation of a national Muslim body).

- 1. En 1997, la *Loi sur l'instruction publique* prévut l'enseignement, dans les établissements publics, des religions catholique et protestante jusqu’en juillet 2008 when an Ethics and Religious Culture program will be introduced.

- In the 1867 Constitution, public education was intended to be universal, mandatory, religious and moral, i.e. Christian. The public system was established as a Protestant system, and special status granted to Protestant and Catholic minorities in order to protect their collective religious activity, including the right to have religious schools (Article 93). The 1982 Charter enshrines this privilege (Section 29). Therefore, public funding of Catholic Schools in Ontario (confirmed by the Supreme Court (Adler c. Ontario, [1996] 3 R.C.S. 609).

  Religious education allowed in public schools, although this is now rarely applied, given the secularization of the public school sectors. In Alberta, the 1988 School Act stipulates the possibility on request by parents, of an‘ alternative program’, i.e. a “program that emphasizes a particular language, culture, religion or subject-matter.” This has allowed for the creation of faith-based programs funded and administered by the public school sector.

- Exemptions from municipal and school taxes and from taxes on the sale of religious buildings; religious leaders’ stipends minimally taxed.

- 1. Because Canada’s provinces joined Confederation at different times, the Canadian regime encompasses a wide range of school systems: Protestant, Catholic, or neutral in their religious orientation, and public or private. For example, in Newfoundland there are 7 denominational schools systems (réseaux d'écoles confessionnelles***)***

- Some public funding for private denominational schools in Alberta, British Columbia, Québec, Ontario and Alberta, Newfoundland if the schools meet the standards of public education programs. Public funding of the private sector, whether faith-based or not, is not permitted in the Maritime Provinces (Menendez, 1996: 65-68).
- One feature very distinctive of the Canadian regime, the taking into account of neutrality of outcome (**indirect discrimination** experienced by believers). In a 1985 ruling (Ontario Human Rights Commission v. Simpson Sears Ltd [1985]2 S.C.R. 536), the Supreme Court created the **obligation of reasonable accommodation.** The case opposed a Seventh Day Adventist employee asking to keep her full-time job while not working on the Sabbath, and her employer who was refusing this request. The Court felt that an accommodation should reduce the discrimination experienced by the employee because of her faith.

- The Court specified that the solution should be reasonable, i.e. that no “undue hardship” could be imposed on the employer (exaggerated financial cost, significant inconveniences, reduced safety norms, effects on other employees’ rights or on collective agreements). The Court felt that the work schedule could be arranged. The spirit of this ruling applies to other aspects of work and to other areas such as the tendering of private or public goods and services.
- Selon le jugement de 1985 de la C.S., il n’est pas de la fonction de l’école de reproduire des préjugés de la majorité culturelle mais d’enseigner le respect des droits et libertés de chacun.

- Conclusion
- Factors of the differences: Canada, France, US
- 1. Historical religious plurality: US, English Canada; Catholic Monoculture: Québec, France
- 2. Notions of majority culture and of indirect discrimination in law
- No notion and Neutrality of procedure: France. The notion of majority culture and of indirect discrimination is almost inexistent in the French political thought, and absent in the law, as the Republican common public culture is supposed to be uniquely political.
- Notion present and Neutrality of outcome: US, Canada.

- Annexes and informations which could be useful during discussions

- Thesis David Martin (1978)
- Secularity, and laicism or secularism foster a variety of forms according to 4 factors:

- 1) the role of religion in the building of a national identity;

- 2) the influence of the Protestant Reformation;

- 3) the importance of liberal and socialist currents;

- 4) the position of the Churches in regard to the Enlightenment and democracy (unlike Protestant Churches, the Catholic Church did not accept democratic regimes until the late 19th century).

- **Signes religieux à l'école**

- **En France invocation de la vulnérabilité des élèves qui forment une** population dite captive, vulnérable à influence, sinon à coercition, conséquemment les enseignants ne doivent pas porter de signes religieux.

- Des pressions sur des mineures pour les voir porter le foulard islamique et la lutte contre un islam radical et violent furent invoquées en France pour légitimer la loi interdisant les signes religieux ostensibles le 15 mars 2004. En 1989 le Conseil d'État français dans un avis autorisant le port du foulard par trois élèves expulsées d'un collège, avait préconisé sur ce point un examen au cas par cas et en 1994 la CDPQ avait estimé que c'était faire injure aux jeunes filles que de présumer de leur choix non éclairé.

- Being no laic, the Canadian and the Quebec States cannot prohibit the wearing of any religious symbol by clients of public services: hospitals, schools. Mais, au Canada, la liberté religieuse de l'élève pourrait être limitée si les 3 mandats principaux de l'école étaient compromis, i.e. sécurité, efficacité[1], maintien de l'ordre, ou/et si atteinte était avéré aux droits d'autre(s) élève(s) ou du personnel scolaire. L'État canadien, québécois plus vraisemblablement, et les Parlements pourraient, comme en France, invoquer des risques (prosélytisme, influence indue sur mineures) pour limiter le port de signes religieux à l'école et la liberté religieuse de certains élèves.

- [1] Dans le cas de l'élève refus d'assister à certains cours, ce qui pourrait compromettre son instruction.

- Au Québec, en 1994, une élève voilée est expulsée (70 élèves portent le foulard dans la province MHD 9). La CDPQ émet un avis favorable sur le droit au port du foulard au nom de l'égalité de traitement (des élèves chrétiens portent des signes), au nom d'atteinte au droit à l'instruction publique ET de la neutralité religieuse de l'État.

- En 2006, la C.S. ne trouve pas de risque avéré au port d'un kirpan placé dans un fourreau fixé aux vêtements d'un élève sikh, port qui avait motivé l'expulsion ce dernier de son école en 2001 (Multani c. Commission scolaire Marguerite-Bourgeois [2006] 1 R.C.S. 256)[1].

- [1] Un jugement en Ontario avait autorisé le port du kirpan par un enseignant s'il était de taille raisonnable, dissimulé et fixé aux vêtements (Pandori c. Peel Board of education, (1990) C.H.R.R.D./364).MHD 12 note 58.

- Examples: Reasonable accommodation
- A great many reasonable accommodations have been adopted in Canada since 1985,[1] with an important one being the accommodation allowing an agent of the State to wear a religious marker (Sikh turban authorized in the Royal Canadian Mounted Police, Grant v. Canada (A.G.), [1995] 1 F.C. 158).
- Some Québec examples include: at the Montreal Children's Hospital, the installation of a manually activated entrance door to allow Hassidic Jews to visit patients on the Sabbath; in public schools, the creation of a mobile pedagogical day so that children of Orthodox, Coptic and Catholic faiths can celebrate Easter on their respective dates; no interruption of public services in Chinatown during the Chinese New Year; Laval Hospital no blood transfusions for Jehovah's Witnesses, elimination of pork from the diet of Jews, and the right for the husband to be present during medical examinations of his Muslim wife.

- French Legislation
- 1802 Concordat financement de 4 cultes reconnus: catholique, hébraïque (financé à partir de 1831) organisé en consistoires locaux sous direction d'un président laïc et encadré d'un consistoire central), réformé (Calvinistes), protestant luthérien. En vigueur en Alsace-Moselle.
- Loi Guizot 1833 légalise écoles privées et oblige les communes à ouvrir une école publique 1aire
- Loi Falloux 1850 reconnaît deux types d'école: privées dites libres, publiques; éducation religieuse au programme dans les deux types, les ministres du culte siègent aux conseils académiques et au conseil supérieur de l'instruction publique: loi incarnant le retour des Catholiques au pouvoir sous IIeme République
- Loi Camille Sée 1880 Filles obtiennent droit d'accès aux écoles publiques secondaires
- Lois Jules Ferry 1881-1882 Instruction publique gratuite et obligatoire, expulsion des Jésuites de l'enseignement public, neutralité des programmes, instruction morale et civique en place de l'instruction religieuse dans écoles publiques,
- Loi Goblet 1886 personnel uniquement laïc dans enseignement publique
- Laïcisation des hôpitaux, des cimetières 1881 et des funérailles 1887, suppression des aumôneries militaires 1883, rétablissement du divorce 1884, interdiction prières dans assemblées publiques (tribunaux) 1884, obligation service militaire pour séminaristes 1889
- 1910 Loi sur associations cultuelles pour droit de culte: organisation des cultes en droit privé
- 1905 Loi de séparation Église-État: non reconnaissance publique des cultes, interdiction de les financer
- 1989 Exclusion de 3 élèves portant foulard islamique par un principal de collège et avis favorable à port foulard par Conseil État
- 2004, 15 mars, loi interdisant signes religieux ostensibles
- 2010, loi interdisant port burqa dans services publics

Types de régimes de sécularité

Luxemburg's Minister of Religious Affairs (ministre des Cultes) invoked a democratic argument to establish the positive definition of religious freedom:

– There are States like ours that adopt a benevolent neutrality in regard to religious communities because we believe that religions play a public role, whereas others consider this a private matter. . . . If there are strong currents of opinion, they must be expressed, and I find it normal for religious communities to be able to play a role in public opinion just as others do.

("Entrevue," *Le Jeudi*, January 30, 2003, in *Plural Oracle Hors série 3*, 2003: 3) [*our translation*]

- National religions
- When a majority faith has helped to forge the national identity, the State has “established” a religion. It recognizes it as the national religion, and subsidizes its institutions.
- Cases are: Greece (Orthodoxy); Sweden until 1999, Norway, Denmark, Iceland (all Lutheranism); Finland (Lutheranism and Orthodoxy); Andorra, Malta, the Vatican (Catholicism).
- In United Kingdom, the monarch is head of the England (Anglican) church, but no established religion per se.

Institutionalized pluralism

The Netherlands had developed a so-called system of pillars. A pillar is a life community. The Calvinist Protestant and the Roman Catholic Churches have historically been such pillars, in providing their members with political parties, unions, hospitals, media, schools, universities and community organizations. Non-religious, humanist and socialist, currents were accorded the status of pillar. The State in part funded the operations of institutions connected with these various currents. Starting in the 1960's, the pillars system faded away to disappear in1983. Belgium has still a similar regime.

- Close cooperation between State and Christian Churches (stipends for church ministers, funding for building construction and maintenance costs, for religious teaching in public schools, and possible funding for denominational schools): Austria, Spain, Finland, Italy, Ireland, Germany, Poland, Alsace-Moselle, Portugal, Luxembourg, some Canada provinces.
- The German case is the clearest example today of major privileges to two Christian Churches.