

Religion and the State

Michel Troper
University of Paris X
France

Beyond normal differences in policy and political preferences between various groups and various historical periods, the way a State organizes its relations with religions is a reflection of some fundamental ideas regarding the very nature of the State.

If we consider the French case, it would seem that there is nothing in common between the situation before the Revolution when Catholicism was the religion of the State and other religions were at best simply tolerated and sometimes repressed, the situation during the revolution, where the Church was prosecuted, the 19th century when religions were organized as a public service and priests were civil servants, the 20th century when religions and State were separated, religion was defined as a free but entirely private practice and finally the present when some religious behaviors are regulated, as the wearing of the hijab in public high schools, a regulation that some view as a restriction of freedom of religion.

Yet, when we look at the debates and the arguments that have been used over several centuries, we may find that they all refer to a common conception of sovereignty.

I will try to show how the doctrine of sovereignty that has prevailed in France since the beginning of the 17th century implies that the State regulates religion, even when apparently there is a separation of church and State.

Then I will analyze the debates over the islamic veil and show how both parties also refer to that same conception.

Sovereignty

It would be easy to stress that because every State is sovereign and sovereignty is an absolute and unlimited power, every State necessarily has rules on religion. Of course could be a rule that prohibits the State from interfering with religion, but such a rule would still be a rule enacted by the sovereign State. Thus, by definition, there could be no such thing as a strict separation between State and religion.

For the same reason, a submission of the State to religion is impossible. A rule that would order courts to apply religious rules, would still unilaterally emanated from the State. Thus, it can always be repealed (perhaps not politically, but legally at least) and the courts can interpret it. One good example is that of Egypt.

Article 2 of Egypt's constitution of 1971, as amended in 1980, proclaims that: "Islam is the Religion of the State. Arabic is its official language, and the principal source of legislation is Islamic Jurisprudence (Sharia)." However, the Supreme Constitutional Court of Egypt decided that sharia is only binding because of article 2 and therefore that it derives its force not from religion but from the constitution, i.e. from the will of the constituent power. This implied that

sharia is part of the constitution, and must be interpreted not by religious authorities but by the court. On the basis of that doctrine, the court decided in 1993 that sharia includes beside absolute that are not subject to interpretation other principles that are relative and change with time and place. Then the court has considered in all the cases it examined that the principles of the sharia that were in question were only relative principles, and it gave a very liberal interpretations of these principles. One example is particularly striking: in 1994 a decision by the Minister of Education limiting the wearing of the islamic veil in schools has been considered perfectly constitutional, i.e. compatible with sharia law.

Nevertheless it is true that although all states necessarily have rules regulating religion, in some cases we find only negative rules, the State explicitly or implicitly giving religion full autonomy.

One might think that the choice between having only such negative rules or actively regulating religious activities is one of policy and would simply reflect the preferences of the rulers of the moment.

However, sovereignty is not an empirical quality of the State. It not an absolute principle from which specific rules can be deduced. It is a doctrine – or rather a family of doctrines - that is constructed in order to justify the type of political power that has being exercised first in Europe since the 17th century, then in the rest of the world. While all states must use such a doctrine, the particular shape of the doctrine may vary according to the needs of the political power that it seeks to justify.

Thus, the French conception of sovereignty was developed in the 17th century mostly for the purpose of controlling religion.

In order to end the religious wars, there was an urgent need not only to build a strong power capable of keeping peace and security, by imposing itself upon religious parties, but also to justify that dominance with a principle that would be of a religious nature. That principle was the divine right of kings.

Such a principle could nevertheless become dangerous for the kings because the Church could claim a monopoly to interpret divine law and thus gain supremacy over kings, who would thereby be deprived of much of their power. The situation of kings would be particularly difficult in case of a conflict between religious and secular laws. This is precisely what happened with King Henry IV of France, who was the heir to the throne according to salic law, but who had been excommunicated by the Catholic Church. In order to let salic law prevail over canonic law, the best way was to claim that salic law itself was divine and that sovereignty resided entirely in the king. In order to claim autonomous power over political affairs, kings needed to subordinate religion by affirming a divine right of kings, which then allowed them to act independently of the Church's views.

Since the king's power did not depend on the church, it was unlimited, *absolutus*, and could be exercised over any possible subject matter. As such, sovereignty could be defined, as an absolute and supreme power, *summa potestas*, which could not be made subservient to any other power, not even that of the Church that of the Church. Sovereignty therefore also would not depend upon the personal virtue of the king, but rather upon the essence of the monarchy

But, if it is unlimited in the sense that there is no other power above it, it is also unlimited in the sense that there is no domain that it cannot rule. In particular, religious matters are within the king's power and the actual exercise of that power over religion is necessary not only because it is a means to keep peace and order, but also because the unity of the nation and citizenship itself are not natural. It has to be forged by the State, by creating a set of common beliefs and practices.

This conception has been maintained under different forms and with different specific policies from the 17th century to this day.

Before the Revolution it took the form of "gallicanism", a doctrine that claimed the right of the king to decide over all matters regarding the church, except over purely spiritual questions. But what was spiritual and what was temporal was also for the king to decide. Similarly, in the 19th century, the three religions existing in France were considered a public service, religious buildings belonged to the state and ministers were paid as civil servants.

The same idea is the base of the modern doctrine of *laïcité*. It is connected to the French conception of sovereignty in two different ways.

First, it has never been understood as a complete separation between State and religion or as a mere statement of freedom of religion. From the initial act of 1905, special provisions had to be made for religious buildings that were – and still are - public property and were placed at the disposal of religious authorities and sometimes maintained by the State. Moreover, in three departments, that were German in 1905 and became French again in 1918, religions still are a civil service and ministers civil servants. Moreover, since it is within the duty of the State to forge and keep the unity of the State by educating citizens and providing them with common values. Therefore *laïcité* is not without content and schools are expected to teach fundamental values and a common conception of the good. Similarly, to the extent that private schools (the vast majority of which are religious) play a role in the public service of education they are entitled to public subsidies.

Secondly, the State is the guarantor of civil peace and liberty, the only source of law and individuals do not possess any rights other than those granted by the State. Therefore these rights cannot be conceived as rights against the State, but law, i.e. the State, defines them. French philosophers of the Enlightenment, e.g. Montesquieu or Rousseau defined political liberty as the right to be submitted to the laws, whatever their content and whatever the source of the laws. The reason is that the law being a general rule, that is public, every citizen knows the consequences of his actions and is capable of choosing to act or not. Of course, this even more true when the law becomes the expression of the general will. As a consequence, a statute regulating some activity does not restrict the liberty of citizens but defines it. Rousseau could write that if I am sent to prison on the basis of a law, I am "forced to be free". Thus, freedom of expression is defined by the Declaration of the Rights of Man of 1789 "The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law". The last phrase, "as shall be defined by law", is important. It means that freedom of expression will be equally guaranteed both when any

kind of writing is permitted and when law punishes some types of writings. The same is true for freedom of religion.

It is therefore not surprising that very different conceptions of laïcité coexist. For some, laïcité is a sort of a secular religion; for others it only means neutrality of the State towards religion. But neutrality may also mean either that the State leaves religion entirely to the private sphere or that it treats all religions equally. On the base of these different conceptions different choices of policies can be equally be advocated, all in the name of laïcité, e.g. financing religious schools or refusing any public funding; banning religious education in public schools or encouraging it; keeping or abrogating the special legislation for Alsace; prohibiting local authorities to subsidize for the construction of mosques or on the contrary encouraging such construction on the principle that Catholics, protestants and Jews already enjoy the use of religious buildings that are private property.

This is the background against which the problem of the veil has been debated in France.

The hidjab

On march 15 2004 a statute was enacted prohibiting the wearing in primary and secondary public schools (but not in universities) signs or dress that ostensibly demonstrates religious affiliation. Although the law was written to apply to crosses or yarmulkes, thus formally treating all religions equally, it was clear that its chief purpose was to ban the Muslim veil or hidjab. This is the reason why it was considered by some, mainly outside France, as an infringement on freedom of religion. E.g. President Obama said in his Cairo speech (June 4 2009) that, “, it is important for Western countries to avoid impeding Muslim citizens from practicing religion as they see fit - for instance, by dictating what clothes a Muslim woman should wear”.

However in the very long and passionate debate over the veil freedom of religion was never the main issue, even for most of those who opposed the prohibition. Indeed the word “hidjab” was hardly ever used.

One of the reasons was that even after since the law of separation between State and church, religion could be practiced and taught even in public schools, where chaplains were authorized to teach catechism. What was forbidden was religious propaganda within the precinct of the school. Thus, before the act of 2004, the relevant question was whether the veil could be seen as an instrument of religious propaganda or a mere exercise of religious freedom. Another issue was gender equality.

There was a general suspicion that some of the young women wearing the veil did not act on their own free will but were manipulated by fundamentalist groups or at least pressured by their fathers. Because of the French conception of liberty, a majority in the country believed that it was the duty of the State to protect these women against their particular communities and to integrate them as citizens into the national community. They merely disagreed on the means. Some thought that the young women ought to be protected both by allowing them to wear the veil if they sincerely chose to do so and by accepting them in schools, so that they could be taught republican values. Others thought that a prohibition to wear the veil would provide the girls who wished to resist their families with a strong argument, to the effect that

they would go to school and be integrated as citizens of the republic.

The debate was thus not freedom of religion, or secularism, but on whether or not banning the veil would further the purpose of republican integration and protection of women. Another complication arose from what was felt as a contradiction between the fundamental values of the republic, which include equality of men and women, and the particular interpretation of Islam which placed in a subordinate position, that the veil had come to symbolize.

At first, following an advisory opinion issued by the Conseil d'État in 1989, the government left it to school authorities to decide whether to admit or not these young women on a case-by-case basis. These local school authorities were left to discover if the veil was worn as an instrument of religious propaganda.

At the time, most commentators found this way of dealing with the problem extremely clever. They thought that a general rule would provoke mass demonstrations. On the other hand, decisions taken by school authorities would be challenged in court and judges would discover a coherent set of principles, so that law in a way similar to the US would govern the country.

However, this proved highly impractical, mainly because school authorities had no clear guidelines as to what constituted religious propaganda and were facing both strong opposition from teachers committed to a tradition of militant laïcité if they accepted young women wearing the veil and demonstrations from Muslim fundamentalists if they did not. When their decisions were challenged courts proceedings were too long and judicial opinions allowed for too many subtle distinctions, so that it was difficult for school principals to know what the law required in a given case.

In 2003 President Chirac created a committee of politicians and experts to analyze the situation and propose a solution. The committee reached an almost unanimous conclusion: the republican tradition required an act of Parliament. The law was passed the following year. Instead of prohibiting religious propaganda, the statute broadly prohibits all signs that ostensibly demonstrate a religious affiliation. It was not challenged before the Constitutional council and has been applied ever since without major incidents. In December 2008, the European Court of Human Rights, in a unanimous decision, rejected a complaint by two young women who had been expelled from a junior high school in 1999 because they had been admitted with their veil, but had refused to take it out for a gym class.

Today, the veil in schools does not pose any major problem. The girls who have been expelled are allowed to continue to receive an education, either by mail from a specialized department of the ministry of education or in private schools, mainly religious schools, subsidized by the State and where the law is not applicable.

Nevertheless, a new problem has arisen in the past few months. Some French cities have seen women wearing not merely a hidjab, but a Nikab, that covers the whole face except the eyes or even a Burkhaa that also hides the eyes. A parliamentary committee has been created to examine the matter, but it seems that the question will be discussed in the same terms: it does not bear on freedom of religion, but on public order. In the words of the Constitutional council "no one can prevail oneself of one's religious beliefs to escape common rules regarding the relations between public authorities and individuals".