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THE STATE AND RELIGION

A comparison of France and Britain

By

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London, 9th February 2005
The Horticultural Hall

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It is indeed a great honour to have been asked by the Association of Franco-British Lawyers to present, together with my colleague John Bell, a comparison of French and British law on the relations between the State and religion. The task is a formidable one in view of the difficulty and sheer scope of the subject.

I - It is difficult first of all because it arouses passions. For many people religious life or its absence is a deep, personal matter touching the very meaning of their existence. On a less private level, in the social sphere, these relations are complex, because they are rooted in the history and culture of each nation. They are sometimes peaceful, often turbulent and always evolving, in Britain as in the rest of Europe. France experienced the revolutionary violence of the Terror, then the Concordat in 1801, and relatively peaceful relations between the State and religion during the first three-quarters of the 19th century. After the aggressively anti-clerical laws of 1880-1905, peace was restored; then came the First World War. In about 1990 a new controversy broke out over the Islamic headscarf. Perhaps today religious peace has been restored again, or is it the calm before the storm? In the words of a contemporary Jesuit, now deceased, "*The Church has never stopped [….] being attracted by the protection of the State and has never stopped fighting the all-powerful State"*

In the course of history change has been progressive and radical, and now even the sources of law have changed. The European states belonging to the Council of Europe are subject to the European Court of Human Rights, which, under article 9 of the Convention on Human Rights, reconciles religious freedom and the laws of the States when it regards them as legitimate.

I can only present a few fragmentary aspects of this very difficult and huge subject here, leaving many gaps. Alongside its considerable legal, political and sociological dimensions, what is at issue is a theological meaning of human existence. For a believer, every decision and action of society concerns God, therefore religion is entitled to intervene "to a certain extent", but only to a certain extent. (*Render to Caesar that which is Caesar's and to God that which is God's,* to quote from Luke's gospel)

Increasingly, since the 14th century the State has not accepted that society should be governed by religion: history shows a constant reduction in the temporal power of religions. Christianity itself, at least since the 20th century, no longer regards the "Christian religion" as the only trustee of the divine in this world. The state has freed itself from religion, except in one important matter: it must respect and preserve religious freedom.

It has always been difficult to maintain a balance between the State and religion. French law insists on secularity, but French society is not secular; it remains religious, at least in part, but there is a diversity of religions (and of non-

believers). It is no longer a case of the relations between the State and religion, but between the State and religions.

II - One can easily appreciate how wide and difficult an issue our subject is. It is also very current, especially for the French, as we approach the centenary of the law of 1905 on the separation of religions and the State. (The law is entitled “the separation of the Churches”, but there is no Jewish, Muslim or Buddhist Church, but rather many religions, and an increasing number of forms of worship).

There is another more recent form of French legislation, passed almost a year ago on 15th March 2004. This law, often called the law on the Islamic headscarf, has not met with approval either in Britain or in most of the other EU countries. The law has exposed a new and important aspect of relations between religions and the State: the fact that France is finding it hard to integrate her immigrant Muslim population.

Finally, there is another current issue that, at least to some extent, involves the relations between the State and religions: that of the possible entry of Turkey into the European Union.

Before talking about these three current aspects - very briefly in the case of the third - I will give a simplified account of the basic and somewhat contradictory facts which influence these relations.

III- Like all the EU countries, France and Britain, following a long history, seem at first sight to have a shared understanding of the essential values governing relations between the State and religions: the lack of legislative power of the Churches, forms of worship and religions; freedom of worship; freedom of conscience which allows every citizen the right freely to choose his or her religion, to be a non-believer, or to change religions; and, more fundamentally, tolerance, religious pluralism and open-mindedness.

However real it may be, this consensus shows the faults usually found in all forms of ecumenism: it is ambiguous and masks differences.

The differences exist because relations between the State and religion in Europe operate within the framework of several different systems:
1) *National Churches*: for example in England and Scotland, the Anglican and Presbyterian churches are “established”
2) *Recognised religions*: the government confers a special status on several religious confessions, whilst ensuring freedom of expression for others. Examples are Belgium and Alsace-Moselle in France where Napoleon Bonaparte’s Concordat of 1801 still applies.
3) *Religions recognised on an equal footing*: for example in Germany and the Netherlands the system is sometimes called “separation” but it differs from the

French system because the authorities do not refuse to recognise religious confessions.
4) *Secularism*, stipulated by French law in 1905, but unknown in other European countries, particularly in Britain.

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IV – Secularism established itself in France in successive stages long before 1905. From the 14th century the monarchy was in conflict with the Pope, leading eventually to Gallicanism. The philosophy of the 18th century *Enlightenment* was often vehemently anti-clerical, anti-Catholic and anti-religious. One of the first civil laws of the Revolution, the law of 20 September 1792, took away from the clergy the registration of births, marriages and deaths and determined the form of civil marriage. These provisions were later taken up by the Civil code and became normal practice. By contrast, after bloody and violent persecutions, the many anti-Catholic and anti-Christian measures brought in by the Revolution were short-lived. Among them were the Civil Constitution of the Clergy of 24 August 1790, the abolition of the Christian era (D16 vendémiaire year II, 6 October 1793), the Republican calendar (D.3 brumaire year II, 17 October 1793), and the transformation of Notre Dame Cathedral in Paris into the temple of reason (D.20 brumaire year II, 10 November 1793). Also, on the eve of Thermidor, on the “sacred mountain” Robespierre celebrated an act of worship of the Supreme Being after having burnt the “monster of atheism” at the Tuileries (D. 20 prairial year II, 30 June 1794).

The Concordat of 1801 between the First Consul and Pope Pius VII brought religious peace through a compromise whereby State control won out over the independence of the traditional churches. Under the Concordat Catholicism was “the religion of the great majority of the French people”. It provided for the remuneration of ministers of religion and placed public worship under the regulatory oversight of the police. Through “additional articles” similar provisions were made for Protestants and Jews, but not for Muslims, since there were none, except for about a hundred mameluks who, since the Egyptian expedition, had formed a company of the Imperial Guard which disappeared with the fall of the Empire.

V - Putting an end to the very long traditional collaboration between the Catholic Church and the State, the law of 1905 rejected the Concordat. Article 2 states that “the Republic neither recognises, nor pays salaries for, nor gives subsidies to any religion”. Today, this law is often seen as an instrument for peace, particularly for the Catholic Church which has found its mission again, freed itself from State control and is free of responsibility for the maintenance of church buildings built before 1905. But one should not forget that during the previous twenty years there had been a climate of hate. The Holy See immediately opposed the setting up of the associations which, according to the law, were to

look after places of worship. It was only afterwards, at the end of an extraordinary process, that diocesan associations were accepted, and peace was restored.

So the law of 1905, which was an aggressively anti-Catholic law, became a law of pacification, thanks to the Council of State - "regulator of parish life" - and especially thanks to the mood of national reconciliation after the 1914 war. As is often the case with a last will and testament, the law did not fulfil the objectives of its authors: legislative history is full of such reversals.

At the time, the word "secularism" was not used. It appeared later in the Constitutions. Article 1 of the 1946 Constitution states that France is a "secular …Republic". The Constitution of 1958 (art.1) adds that France "*ensures equality before the law for all citizens without distinction of origin, race or religion*. And that France "*respects all faiths*".

The Council of State has given a very simple definition of secularism as "*the neutrality of the State*", which rules out any political or militant ideology.

From 1924 to 1988 secularism continued without incident, apart from a few short-lived controversies. One occurred in 1959, over subsidies to private schools and the possibility for communes and departments to guarantee loans for financing the construction of places of worship, two relaxations of the law of 1905.

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VI- After the Second World War there was a considerable level of Muslim immigration, especially from North Africa, which for some time presented few difficulties for secularism. It was in 1988 that difficulties arose when some young Muslim girls wanted to wear the Islamic headscarf at their secondary school in Creil.

The wearing of the Islamic headscarf does not, in fact, often emerge as a religious issue. The debate is actually political rather than religious (although in Islam it is difficult to distinguish the religious from the historic and the political). The wearing of the headscarf was soon seen to signify that, obeying the will of her father, the wearer refused to accept the rules of western life, equality of men and women, co-education, the teachings of the biological sciences, gymnastics and even going to the swimming pool. But above all, it was a rejection of female emancipation.

The first reaction of French law came in the form of opinions and jurisprudence from the Council of State which hoped to play the same conciliatory role as it had previously played in the application of the law of 1905. In an opinion given to the government at the request of the prime minister of the day, Lionel Jospin, the

Council of State laid down a principle: pupils had a right to wear a religious symbol, but there was an important exception to this right, namely that ostentatious symbols, or those displaying affiliation which constituted an act of provocation, proselytism or propaganda, disturbing teaching or order in the schools, were prohibited.

Although this legal opinion calmed some antagonism, school heads were critical of it, because they found it difficult to apply.

In response to their demands, the legislator intervened, making a minor change: The law of 15 March 2004 applies to “conspicuous” symbols, which do not have to be “ostentatious”. The law was immediately contested by all the French religious authorities (Christian, Jewish and Muslim) and all the legal community, as a threat to freedom which would make matters worse. What happened was the opposite: protests from young Muslims decreased.

Why? Was it because of the symbolic majesty of the law? It was because of a political incident. After two French journalists were taken hostage in Iraq by Islamic terrorists, the French Muslim community decided to avoid provocation. As in the case of the law of 1905, it was an external event that changed the situation in which the law operated and allowed an improbable peace.

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VII- The possibility of Turkey joining the EU also seems to raise difficulties in the relations between the State and religion. I cannot discuss them, since I do not understand the issue. The European Union consists of European states- according to its proposed constitution- and Turkey is not in Europe but in Asia.

Law can certainly remodel nature. For example, the French civil code regards a wild rabbit as real property (article 524), or more precisely as “a fixture”, which means that in some cases, it comes, partially, under the same legal regulations as real property. Turkey belongs to the Council of Europe, which means that in some cases it comes, partially, under the European legal system, particularly with regard to human rights. But the legislator cannot do everything; he cannot decide that Asia is in Europe. He can say that a table is a hat; but that does not make it true. A table is not a hat, a rabbit is not a building, and Turkey is not in Europe. There are no possible and lasting legal regulations without respect for truth and reality.

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VII - I am aware that I have not dealt with many important issues relating to the subject. For example, recently Christmas trees were forbidden in a state school at the request of Muslim parents because they would have been “conspicuous” religious symbols. The same thing applied to the nativity scene in Provence – of all places! - and the gingerbread St Nicholas, traditional in Northern France. Greetings card sent to or from a state school had to be worded “Happy Holidays” instead of “Merry Christmas”. More serious and just as overzealous as this are the bureaucratic hassles inflicted in the name of secularism on Protestant communities (about youth camps and the construction of church buildings), and on Catholic chaplaincies.

One may ridicule relations between religion and the State, but that does not mean they are insignificant. Reason will prevail - however, the law is not a rational phenomenon, nor is it reasonable, especially in matters of religion. Perhaps reason will not prevail over secular sectarianism and Muslim intolerance. If that happened, the law of 15 March would indeed be a step backwards.

I have omitted many major issues involving law – almost every kind of law, since religion figures in most questions governed by law. Here is a long list of the various subjects I have omitted, with just a few examples.

The law on individual rights : abortion, the birth of a handicapped child, artificial insemination, euthanasia, bioethics, sects, conflicts between freedom of expression and offending religious feelings, medical treatment, changing first names etc.

Family law: marriage, especially, nowadays homosexual marriages, couples living together, divorce.

Administrative law (the largest category , since it involves relations between the powers of the State and civic liberties): the representation of the elected representatives on the French Muslim Council, associations, religious congregations, private schools (Catholic, Protestant and Jewish), places of worship, the tax and social position of ministers of religion, dates of examinations in state schools, concerts in churches, ritual slaughter, religious dietary restrictions in schools or hospitals, regulations in cemeteries (areas set aside for particular faiths),identity photographs, blood transfusions, male and female circumcision, “entreprises de tendance” (enterprises established to promote an ideology), and so on.

Labour law: The Christian churches often speak out against mass redundancies and restructuring programmes, whilst finding it hard to distance themselves from political parties.

Criminal law: paedophile priests, terrorism carried out by Islamic groups against the State etc.

Everyday life also provides constant examples of offences by individuals against the religious feelings of others. The State does what it can with the police and criminal law, but with limited success. There have been desecrations of cemeteries - Jewish, Christian and Muslim - and also of synagogues and

mosques- rarely of churches; and anti-Semitic, Islamophobic and ant-Christian insults. All these issues and the discussion and examinations they generate, are amplified by media attention.

When the sacred declines, the barbaric appears. A State or a society which ignores religious realities easily falls into autocracy- or alternatively into theocracy- the rule of the ayatollahs or, in the past, of the Taliban, ignoring the realities of civilian life.

IX - What conclusions should be drawn? Firstly and most importantly, there is the simple truth that law cannot and must not do everything. The overly-legalistic approach seen in France with the law on the headscarf had a beneficial effect (perhaps temporarily) in reducing conflict with young Muslims. But its harmful effects - the loss of freedoms - will probably prove more long-lasting. In his last work, Georges Bernarnos wrote this admirable sentence: “Rules *are not our guardians; we are the guardians of the rules.”* The mutual respect which the State, society and religions must have for one another is only possible if the people will it through public opinion, and practise it in their behaviour. Also, jurisprudence, which should be pragmatic, realistic and exert a calming influence, must impose this respect when necessary, as was the case in France with the Council of State.

Despite differences in methods and principles, it seems to me that in its essentials, French law does not differ greatly from English and Scottish law. All three legal systems establish a measured, constantly evolving balance between the right of States and those of religions. Perhaps French law is usually seen as being less pragmatic, but I am not sure that this is so, because of the importance of case law in France, particularly that of the Council of State. This body is more empiricist than juridical and more attached to the realities of French history than to the letter of the law. Perhaps French law is also less liberal, but I am not sure about this either. Before making up my mind I will wait to hear what John Bell has to say.