



# EUI Working Papers

MWP 2011/31  
**MAX WEBER PROGRAMME**

RELIGIOUS DIVERSITY AND THE DIVERGENCE OF SECULAR  
TRAJECTORIES. COMPARING SECULARIZATION  
PRACTICES IN QUEBEC AND FRANCE

David Koussens



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
**MAX WEBER PROGRAMME**

*Religious Diversity and the Divergence of Secular Trajectories.  
Comparing Secularization Practices in Quebec and France.*

**DAVID KOUSSENS**

EUI Working Paper **MWP** 2011/31

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper or other series, the year, and the publisher.

ISSN 1830-7728

© 2011 David Koussens

Printed in Italy  
European University Institute  
Badia Fiesolana  
I – 50014 San Domenico di Fiesole (FI)  
Italy  
[www.eui.eu](http://www.eui.eu)  
[cadmus.eui.eu](http://cadmus.eui.eu)

**Abstract**

In this working paper, I propose to analyze the treatment of the wearing of religious symbols in the public sphere in Quebec and France as political and juridical events that have crystallized, in different moments, certain kinds of secularism in each society. My goal is therefore to show how a religious symbol – and in particular those belonging to Islam – may reveal the potency of certain conceptions of secularism in a society, conceptions that may or may not find themselves re-inscribed in the law and as such consolidated by juridical secularism.

**Keywords**

Secularism ; Religious Symbol ; State Neutrality ; Quebec ; France

*David Koussens*

*Max Weber Fellow, 2010-2011*



## Introduction

Almost every week, Canadian and French media report events questioning the secular character of the State thereby making religious issues a matter of intense social and political debate. Admittedly the increasing number of minority religious groups, the growing appeal of Evangelical and charismatic movements and the more visible presence of some orthodox practices within Islam have certainly all challenged established patterns of state regulation of religious diversity. Overall, the religious landscape is not radically different today to how it was decades ago. But it is certainly the increasing visibility of certain religious practices (sometimes linked to immigration) that has contributed to the introduction of the religious issues in liberal democracy's everyday preoccupations.

Although "secularism" is now often invoked in the public debates, the term itself has not always been widely used. For example, in France, Jean Baubérot has shown that it was only in 1989, during the first controversy around the wearing of Islamic headscarves in state schools, that the word "secularism" gained wide usage in the common language<sup>1</sup>. We can observe a similar process in Canada in the 1990s, a period during which religious diversity became more visible in Canadian society and challenged state policies. While the word secularism was absolutely non-existent in Canadian public discourse before this decade, it is now employed almost every day in the public debate<sup>2</sup>.

The theoretical contributions relating to modes of secularization observed in different societies are numerous. In this working paper, I follow those who argue that the deployment of secularism in a society relies on its government's interpretation of four constitutive principals, that is to say: freedom of conscience and religion, equality, neutrality and separation of Church and State<sup>3</sup>. The deployment of secularism also emerges from the articulation of these four principles according to the State's practices of regulating religious diversity. As such, different ideal-type figures for thinking about a secular society may take form (for example, a figure of secularism of recognition, a figure of separatist secularism, a figure of antireligious secularism etc.). These figures arise as much from current representations in social debates, as from the nature of policies adopted – policies that may, of course, vary within a single secular regime, underlining its polymorphous character.

The political circumstances favour the emergence of a "narrative secularism", defined by legal scholar Alessandro Ferrari as a form of discourse about what secularism should be, a discourse that emerges in the public sphere, for instance in public reports, parliamentary debates or in the media. Then, "narrative secularism" is not creating law, but at the same time it is not void of normative forces. "Narrative secularism" may alternate with "juridical secularism" that emerges from the

---

<sup>1</sup> Jean Baubérot, "Liberté, laïcité, diversité - la France multiculturelle", in Paul Paul Eid, Pierre Bosset, Micheline Milot and Sébastien Lebel-Grenier (eds), *Appartenances religieuses, appartenances citoyennes. Un équilibre en tension*, 2009, Québec, Presses de l'Université Laval, p. 15.

<sup>2</sup> Micheline Milot, "L'émergence de la notion de laïcité au Québec. Résistances, polysémie et instrumentalisation", in Paul Paul Eid, Pierre Bosset, Micheline Milot and Sébastien Lebel-Grenier (eds), *Appartenances religieuses, appartenances citoyennes. Un équilibre en tension*, 2009, Québec, Presses de l'Université Laval, p. 31.

<sup>3</sup> Micheline Milot, *La laïcité*, 2008, Ottawa, Novalis, p. 17 ; This conception, proposed by sociologist Micheline Milot in 2008 found an expression in the Bouchard-Taylor Report in Canada. The report poses that secularism is articulated around four fundamental principles. It identifies "the freedom of conscience and religion", as well as "the moral equality of persons or the recognition of the equivalent moral value of each individual", which corresponds to "the final purposes that we are seeking...The other two principles express themselves in the institutional structures that are essential to achieve these purposes". These principles are State neutrality towards religions and the separation of Church and State. These institutional structures therefore result from the democratic process founded on the recognition of the sovereignty of the people. The separation of Churches from the State implies a "reciprocal autonomy" of Churches and the State. Autonomous, "the State (...) cannot embrace any of the numerous and sometimes hard to reconcile fundamental reasons that citizens embrace" and to which they fix their "convictions of conscience". It must be neutral on their behalf. These two institutional structures of secularism are therefore entirely inherent to secularization in modern societies. See Gérard Bouchard and Charles Taylor, *Building the Future. A Time for Reconciliation. Report*, Commission de consultation sur les pratiques d'accommodements reliées aux différences culturelles, Gouvernement du Québec, 2008, p. 134-136.

juridical and political regulation of religious diversity but “narrative secularism” may also be the fuel for such “juridical secularism”<sup>4</sup>. For this reason, while juridical secularism may seem more stable, at times it may show its vulnerability to the fluctuations of narrative secularism<sup>5</sup>.

In this working paper, I propose to analyze the treatment of the wearing of religious symbols in the public sphere in Quebec and France as political and juridical events that have crystallized, in different moments, certain kinds of secularism in each society. My goal is therefore to show how a religious symbol – and in particular those belonging to Islam – may reveal the potency of certain conceptions of secularism in a society, conceptions that may or may not find themselves re-inscribed in the law and as such consolidated by juridical secularism. The study focuses on the period between 1989 and 2010, two decades that include symbolic events in terms of the regulation of religious diversity in both Quebec and France, more precisely the first crisis about the wearing of the Islamic headscarf in state schools in France (1989) and in Quebec (1994), the adoption of the French Law banning ostensible religious symbols from state schools (2004), the controversy around practices of reasonable accommodations and the Bouchard-Taylor report in Québec (2007-2008), and the recent controversy over the wearing of the *burqa* in public spaces in France(2010).

### Religious symbols in Quebec-Canada

In Canada, the term “secularism” is absent from the law, and the absence of such a normative space where secularism is guaranteed comes with important consequence for the means employed by the State to articulate neutrality<sup>6</sup>. As such, the concept of neutrality is an implicit result of the constitutional guarantee of freedom of religion under the reign of the Supreme Court of Canada<sup>7</sup>. In this way, the neutrality of the State brings forth questions because its articulation is often accompanied by tensions surrounding the principle of equality between citizens<sup>8</sup>.

In Canada, the Supreme Court defined the principle of reasonable accommodation in 1985<sup>9</sup> to limit any infringement upon the principle of equality, a principle that must be understood in concrete terms. Following the idea that it is sometimes necessary to treat individuals in a differential manner in order to ensure true equality<sup>10</sup>, the jurisprudential principle obliges, in certain cases, the State, individuals or private enterprises to modify norms, practices or legitimate and justifiable policies which apply to all without distinction in order to take into account the particular needs of certain

---

<sup>4</sup> Alessandro Ferrari, “De la politique à la technique : laïcité narrative et laïcité du droit. Pour une comparaison France/Italie”, In Brigitte Basdevant-Gaudemet and François Jankowiak, *Le droit ecclésiastique de la fin du XVIIIe au milieu du XXe siècle en Europe*, Leuven : Peeters, p. 333-345.

<sup>5</sup> Jean Baubérot, “L’ évolution de la laïcité en France : entre deux religions civiles”, *Diversité urbaine*, vol. 9, n°1, p.23.

<sup>6</sup> Micheline Milot, *La laïcité*, 2008, Ottawa, Novalis, p.67.

<sup>7</sup> José Woehrling, “Neutralité de l’État et accommodements : convergence ou divergence ?”, *Options politiques*, vol. 28, no 8, p. 22 ; José Woehrling, “Les fondements et les limites de l’accommodement raisonnable en milieu scolaire”, In Marie Mc Andrew, Micheline Milot, Jean-Sébastien Imbeault and Paul Eid (Eds), *L’accommodement raisonnable et la diversité religieuse à l’école publique. Normes et pratiques*, 2008, Montréal : Fides, p. 50.

<sup>8</sup> Pierre Bosset, “Le droit et la régulation de la diversité religieuse en France et au Québec : une même problématique, deux approches”, *Bulletin d’histoire Politique*, 2005, vol 13, no 3, p. 80.

<sup>9</sup> See *O’Malley c. Simpson-Sears*, [1985] 2.R.C.S.536 : “In a case of adverse effect discrimination, the employer has a duty to take reasonable steps to accommodate short of undue hardship in the operation of the employer’s business. There is no question of justification because the rule, if rationally connected to the employment, needs none. If such reasonable steps do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part, must sacrifice either his religious principles or his employment. The complainant first must establish a *prima facie* case of discrimination. The onus then shifts to the employer to show that he has taken such reasonable steps to accommodate the employee as are open to him without undue hardship. Here, the employer did not discharge the onus of showing that it had taken reasonable steps to accommodate the complainant”.

<sup>10</sup> Myriam, Jézéquel, “L’obligation d’accommodement : un outil juridique et une mesure d’intégration”, *Éthique publique*, 2006, vol 8, no 1, p. 53.



minorities, mostly ethnic and religious groups<sup>11</sup>.

In the first instance, based upon the Quebec Charter of Human Rights and Freedoms and on the principle of reasonable accommodation, the Quebec Commission on Human Rights, in a decision dated 21 December 1994, authorized a young girl to wear the Islamic headscarf at her state school even though a school uniform was imposed<sup>12</sup>. The Commission revealed that the principle of reasonable accommodation must be applied in the matter of education, because it is “a condition required for the exercise of full equality concerning the right to receive public instruction”. The advice affirms the fact that educational establishments have the obligation to adapt their internal rules to the individual situations of students wearing Islamic headscarves as long as certain “essential elements” of the state school system are preserved.

This procedure of accommodation in the matter of the wearing of religious symbols was then systemized by a Supreme Court of Canada decision made on 2 March 2006<sup>13</sup>. By this decision, that authorized a young Sikh boy to wear his *kirpan* to state school in Québec, the Supreme Court recognized the validity of the accommodation that had been agreed upon in this particular case. However, the Court did not generalize the wearing of the *kirpan*, but instead clearly indicated that accommodation is appropriate if certain conditions are respected, notably concerning security. This decision made jurisprudence in that the procedure of reasonable accommodation must clearly be the measure followed by Canadian schools when deciding whether students may be authorized on an individual basis to wear a religious symbol within the school grounds. The Court also recalled the obligation that schools have in providing an education that values tolerance and diversity.

In fact, this particular case demonstrates the actual means of regulating the wearing of religious symbols from a Canadian approach. The Supreme Court does not evaluate whether or not the Sikh religion should be expressed in a more or less orthodox manner. Rather, it affirms the following in its decision: “the argument that the wearing of *kirpans* should be prohibited because the *kirpan* is a symbol of violence and because it sends the message that using force is necessary to assert rights and resolve conflict is not only contradicted by the evidence regarding the symbolic nature of the *kirpan*, but is also disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism”<sup>14</sup>. Furthermore, by this decision the Court allows the young Sikh the possibility of remaining in the public institution that is school. The Court specifically underlines the fact that “the deleterious effects of total prohibition outweigh the salutary effects”<sup>15</sup>.

In validating the practice of reasonable accommodation in religious matters, the Supreme Court of Canada judicially promises a conception of secularism that was later consolidated in 2008 in Quebec by a report presented by Gérard Bouchard and Charles Taylor<sup>16</sup>. This conception of secularism presents a number of traits in common with the ideal-type figure of “recognition secularism” engaged by Quebec sociologist Micheline Milot. “Recognition secularism” depends on the moral autonomy of each individual in the control of his or her own life and in the choice of his or her conception of the world, so long as these do not present a real attack on others or on the public order<sup>17</sup>. This conception of secularism is encouraged by the revival of liberal thought and certain similarities may also be found in the thought of Will Kymlicka. For his part, Kymlicka considers that “individuals must (...) have the resources and liberties needed to lead their lives in accordance with

---

<sup>11</sup> José Woehrling. “L’obligation d’accommodement raisonnable et l’adaptation de la société à la diversité religieuse”, *Mc Gill Law Journal*, 1998, vol. 43, p. 328.

<sup>12</sup> See Commission des droits de la personne et des droits de la jeunesse, « Le port du foulard islamique dans les écoles publiques », avis du 21 décembre 1994 (COM-388-6.1.1)

<sup>13</sup> See *Multani c. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 R.C.S 256, 2006 CSC 6.

<sup>14</sup> *Idem*.

<sup>15</sup> *Idem*.

<sup>16</sup> Gérard Bouchard and Charles Taylor, *Building the Future. A Time for Reconciliation. Report*, Commission de consultation sur les pratiques d’accommodements reliées aux différences culturelles, Gouvernement du Québec, 2008.

<sup>17</sup> Micheline Milot, *La laïcité*, 2008, Ottawa, Novalis, p.63 ; See also Jean Baubérot and Micheline Milot, *Laïcités sans frontières*, Les Éditions du Seuil, coll. La couleur des idées, p. 110.

their beliefs about value, without fear of discrimination or punishment”<sup>18</sup>. He then adds that the State must leave to individuals the possibility to put into question these beliefs. Neutrality of the State is not only perceived as the absence of intervention on the part of the State, but also as an obligation to intervene in order to allow citizens to revisit, if they wish, their conception of living a good life, which they have understood is not infallible. This process of establishing the neutrality of the State has finality. By allowing members of minorities to benefit from the culture of the society present in the public sphere, it enables individuals who make up political society to exercise freedom of thought and autonomy.

Note that the figure of recognition secularism, promised by the judicial system and consolidated in the Bouchard-Taylor report, does not seem to correspond to the “narrative secularism” that dominates in the public sphere in Quebec. Essentially, in Quebec, a passion for the principle of “*laïcité à la française*” can be detected over the past few years among intellectual and political groups<sup>19</sup>, and a very republican secular model is regularly invoked such as that which Quebec should take for example<sup>20</sup>. A study of conceptions of secularism defended by political parties in Quebec as part of the work of the Bouchard-Taylor Commission permits me to note the potency of ideal-type figures of “anticlerical secularism” as well as “separatist secularism” in political circles<sup>21</sup>.

These dominant representations are a shift from the “juridical secularism” that tends towards an ideal-type figure of recognition. Moreover, they only correspond to a partial representation of French secularism. They depend on certain symbolic norms that are strongly marked in the collective conscience in France and that have resonated in Quebec throughout the debates over reasonable accommodations<sup>22</sup>, such is the case with the French law of 15 March 2004<sup>23</sup> regarding the wearing of signs that manifest an ostensibly religious appearance in state schools. Let us now cross the Atlantic and travel in time. In France, it was in effect 15 years before 2004, that is to say in 1989 that the question of wearing religious signs, and precisely the Islamic veil, was presented for the first time.

### Religious symbols in France

In France, the controversy over the Islamic headscarf started in 1989 when three students were excluded from their school in a suburb of Paris for refusing to remove their scarves in class. In this context, the French *conseil d'État*, which is the highest administrative jurisdiction in France, had to give a verdict on the litigious question of whether or not the wearing of religious symbols was compatible with the republican principle of secularism. This jurisdiction rendered a decision detailing the conditions under which the Islamic headscarf may be permitted in teaching establishments<sup>24</sup>. The *conseil d'État* ruled that students benefit from freedom of conscience and expression and that this freedom “includes the right to express and to manifest their religious beliefs within educational establishments, while maintaining respect for pluralism and for the freedom of others”. Students may then wear religious symbols at school, but must nevertheless respect the teaching activities and the

---

<sup>18</sup> Will Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights*. Oxford : Clarendon Press, 1998, p. 81.

<sup>19</sup> See Daniel Weinstock, “*Pour le multiculturalisme canadien, contre la laïcité française*” Actes du colloque “Diversité de foi, égalité de droits” March, 23-24, 2006, Conseil du statut de la femme, Gouvernement du Québec, p. 99-104.

<sup>20</sup> See Daniel Baril, “Les accommodements religieux pavent la voie à l’intégrisme”, *Éthique publique*, 2007, vol 9, no 1, spring, p. 174 ; Paul Bégin, “Laïcité et accommodements raisonnables”, *Éthique publique*, 2007, vol 9, no 1, spring, p. 158 ; Yolande Geadah, *Accommodements raisonnables. Droit à la différence et non différence des droits*. 2007, Montréal, VLB éditeurs.

<sup>21</sup> See David Koussens, “Comment les partis politiques québécois se représentent-ils la laïcité?”, *Diversité urbaine*, 2009, vol. 9, no 1, p. 27-44. These figures of secularism will be defined later in the text.

<sup>22</sup> *Idem*, p. 29.

<sup>23</sup> *Loi no 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant ostensiblement une appartenance religieuse dans les écoles, collèges et lycées publics*, J.O no 65 du 17 mars 2004, p. 5190.

<sup>24</sup> Conseil d'État, 27 novembre 1989, *Avis portant sur la question de savoir si le port de signes d'appartenance à une communauté religieuse est ou non compatible avec le principe de laïcité*, Assemblée générale (section de l'intérieur), no 346893.

content of the educational programmes as well as the more general objectives of republican teaching. The *conseil d'État* clearly affirmed that: “the wearing of religious symbols by students, symbols which are worn with the intent to manifest belonging to a religion, are not *in themselves* incompatible with the principle of secularism insofar as they constitute an exercise in the freedom of expression and the manifestation of religious beliefs”<sup>25</sup>. In authorizing the wearing of religious symbols in state schools, the *conseil d'État* promised a conception of secularism which presents a number of traits in common with the ideal-type figure of “recognition secularism” and after this advice and for 14 subsequent years the wearing of religious symbols in general, and in particular the Islamic headscarf, were officially authorized in teaching establishments of the French public system<sup>26</sup>. The situation would nevertheless change.

Following the traumatic presidential elections of 2002 that revealed the growing popularity of Jean-Marie Le Pen, the leader of the extreme right party, and in the context of an increasing visibility of certain religious practices, French society seemed threatened by profound social rupture<sup>27</sup>. The search for a new form of social cohesion became imperative.

In 2003, the French representative Francois Baroin rendered a public report in which he considered secularism was threatened both by communautarism and Islamism. Describing the *conseil d'État*'s advice of 1989 as a “misunderstanding of the situation” that would underestimate the risks associated with Islamism, he affirmed that secularism should become a new political stake in order to boost the dynamic of republican integration<sup>28</sup>.

In this context, in an address to the public on 3 July 2003, the President of the French Republic Jacques Chirac indicated his willingness to reopen the debate concerning secularism. He appointed the civil servant Bernard Stasi as the head of a group in charge of reflecting upon the means for putting into place “a form of secularism which would serve as a guarantor of national cohesion and would respect individual differences”<sup>29</sup>.

The report presented by the *Commission de réflexion sur l'application du principe de laïcité dans la République* (Stasi Report)<sup>30</sup> indicated that the school must permit the construction of a “common destiny” for all French citizens. But the report considered that this project was actuality confronted with an increasing communitarianism, which was seen to lead to exclusion. The *Stasi Report* recalled that “the principle of neutrality is the first condition of secularism”. It was seen as the corollary of the principle of equality for citizens. For this reason, the report underlined the fact that “the requirements of absolute neutrality must thus be tempered by reasonable accommodations permitting all to exercise their religious freedoms”. However, what the *Stasi Report* qualified as reasonable accommodation, or what it recommends here as such, does not correspond to the judicial concept brought forth by the jurisprudence of the Supreme Court of Canada. By reversing the concept of accommodation, the *Stasi Report* indicated in fact that: “Moderating the public expression of confessional particularities and limiting the affirmation of one's identity allow for the meeting of all

---

<sup>25</sup> *Idem*.

<sup>26</sup> See CE, 2 novembre 1992, *M. Kherouaa et Mme. Kachour, M. Balo et Mme. Kicic*, no130394 ; CE, 14 mars 1994, *Melles Neslinur et Yilmaz*, no145656 ; CE, 10 juillet 1995, *Association « Un Sysiphe »*, no162718 ; CE, 20 mai 1996, *Ministre de l'Éducation nationale*, no170343 ; CE, 27 novembre 1996, *M. et Mme. Mechali*, no172663 ; CE, 27 novembre 1996, *M. et Mme. Jeouit*, no172686 ; CE, 27 novembre 1996, *Ministre de l'Éducation nationale*, no172719 ; CE, 27 novembre 1996, *Ministre de l'Éducation nationale*, no172787 ; CE, 27 novembre 1996, *M. et Mme. X*, no170941.

<sup>27</sup> See Hanifa Cherifi, “Application de la loi du 15 mars 2004”, *Hommes et migrations*, 2005, november-december, p. 34; Carole Thomas, “Interdiction du port du voile à l'école. Pratiques journalistiques et légitimation d'une solution législative à la française”, *Politique et Sociétés*, 2008, vol. 7, no 2, p. 46.

<sup>28</sup> François Baroin. *Pour une nouvelle laïcité. Rapport*. 2003. [<http://www.voltairenet.org/rubrique506.html>]

<sup>29</sup> Jacques Chirac, Lettre de mission à Bernard Stasi, 3 juillet 2003, [[http://www.elysee.fr/elysee/elysee/francais\\_archives/interventions/lettres\\_et\\_messages/2003/juillet/lettre\\_de\\_mission\\_du\\_president\\_de\\_la\\_republique\\_a\\_m\\_bernard\\_stasi\\_president\\_de\\_la\\_commission\\_de\\_reflexion\\_sur\\_l\\_application\\_du\\_principe\\_de\\_laefcite\\_dans\\_la\\_republique.1037.html](http://www.elysee.fr/elysee/elysee/francais_archives/interventions/lettres_et_messages/2003/juillet/lettre_de_mission_du_president_de_la_republique_a_m_bernard_stasi_president_de_la_commission_de_reflexion_sur_l_application_du_principe_de_laefcite_dans_la_republique.1037.html)]

<sup>30</sup> Commission de réflexion sur l'application du principe de laïcité dans la République. 2003. *Rapport remis au président de la République*. [<http://www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-fr.pdf>]

citizens in public space. This is what Quebecers qualify as reasonable accommodation<sup>31</sup>.

The law of 15 March 2004, that stems from the *Stasi Report*, abstains from formally making a judgment of values with regards to one religion or another. Effectively, this law banned from public schools all the ostensible symbols but never defined which symbol could be considered as ostensible. Nonetheless, the *Stasi Report* previously evoked and, as such, legitimized the fact that certain interpretations regarding the wearing of the Islamic headscarf brought forth a negative image of certain practices linked to Islam, and reinforced the idea that the law which was to be adopted was only destined to regulate such practices<sup>32</sup>. Likewise, the application of a principle by which the State must allow individuals to question their beliefs by affording them the means to do so diverges from the Canadian approach. According to the French legislation of 2004, the State seems to have rediscovered itself as a philosophical emancipator of individuals by alluding to the idea that individual autonomy will only be accessible through the emancipation from religious belonging judged as incompatible with democratic values<sup>33</sup>.

With the prohibition of the wearing of religious signs in schools, France renewed the ideal-type figure of “separatist secularism”. According to sociologist Micheline Milot, this involves a type of secularism that “consists in conceiving of the management of secular principles by putting emphasis on an almost ‘tangible’ division between private life spaces and the public sphere that concerns the State and institutions relevant to governance”<sup>34</sup>. This figure of the secular is directly inspired by the thinking of John Locke, for whom “it [was] of absolute necessity to distinguish (...) that which concerns civil government from that which belongs to religion, and to mark the terminal points that separate the rights of one from those of the other”<sup>35</sup>. In this way, John Locke advocated a “dissociation between religious belonging, and civil and citizen belonging”<sup>36</sup>. In the precise case of the law of 2004, the students, who we can qualify as citizen-apprentices, must therefore follow this dissociation of their sense of belonging when they enter into a public institution such as the school.

This involves a political conception that upholds a representation of secularism as a sort of founding myth of French modernity<sup>37</sup> that is very present in “narrative secularism” since the law of 2004. We can subsequently consider a large range of narratives that advocate a “separatist secularism” in a number of public reports that, between 2004 and 2009, have treated religious pluralism in France.

If the *conseil d'État* that judicially regulates religious diversity has long emphasized compromise, it seems however that it has not remained insensitive to the echo of dominant “narrative secularism”. As legal scholar Danièle Lochak indicates, the law of 2004 characterized itself as a

---

<sup>31</sup> *Idem*.

<sup>32</sup> It is then the *conseil d'État* which introduced in the law the qualification of the symbols which can be qualified as ostensible. In three decisions dated 5 December 2007 (CE, 5 décembre 2007, *M. Chain Singh*, no 285394 ; CE, 5 décembre 2007, *M. Gurdiyal Singh*, no 285395 ; CE, 5 décembre 2007, *M. Bikramjit Singh*, no 285396), the *conseil d'État* pronounced itself on the character of a symbol – the sikh turban – which had been absent in the legislator's argumentation in 2004. The judges considered that such a symbol “could not be considered as a discreet one” and add that by wearing this religious symbol, the young Sikhs ostensibly affirmed their belonging in the Sikh religion. According to these three decisions, the Sikh turban is then an ostensible symbol *by nature* and must be banned from the public institution that is school. A fourth decision dated the same day (CE, 5 décembre 2007, *M et Mme Bessam Ghazal*, no 295671), was relative to the wearing of a bandana by a young Muslim girl. In this decision, a symbol can be ostensible not only by nature... but also *by destination*. In this case, the *conseil d'État* judged that even though the symbol was a discreet one and couldn't be considered in itself as a religious symbol, but as a secular one, its ostensible character must be deducted from the attitude of the young girl who refused to go to school with her head naked.

<sup>33</sup> See David Koussens, “Neutrality of the State and Regulation of Religious Symbols in Schools in Quebec and France”, *Social Compass. International Review of Sociology of Religion*, 2009, vol. 56, no 2, p. 202-213.

<sup>34</sup> Micheline Milot, *La laïcité*, 2008, Ottawa, Novalis, p.46 ; Jean Baubérot and Micheline Milot, *Laïcités sans frontières*, Les Éditions du Seuil, coll. La couleur des idées, p. 90.

<sup>35</sup> John Locke, *Lettre sur la tolérance*, (1992 [1686]), Paris : Flammarion, coll. « Texte intégral », p. 167-168.

<sup>36</sup> Jean Baubérot, *Les laïcités dans le monde*, Paris : Presses Universitaires de France, coll. “Que-sais-je? ”, 2007, p. 23.

<sup>37</sup> Jean Baubérot, “L'évolution de la laïcité en France : entre deux religions civiles”, *Diversité urbaine*, vol. 9, n°1, p.10.

“stiffening of French society on the secular question”<sup>38</sup>. It in effect consolidated certain representations that now legitimate the “jurisprudential stiffening”<sup>39</sup> of the *conseil d’État* in its regulation of religious diversity. The evolution of its position concerning religious signs is notably significant in a 2008 case concerning the wearing of the *niqab* in France.

From a decision made on 27 June 2008<sup>40</sup>, the French *conseil d’État* refused the approval of French citizenship to a Moroccan national who wore the *niqab*, estimating that the radical practice of her religion was incompatible with the essential values of the French community, in particular with the principle of equality between men and women. I am here conscious that the domains for intervention by the State – state schools in 1989 and 2004, and later the denial of French citizenship in 2008 – are of different natures. However, they seem to me no less important in pointing out the analogies that, in their reasoning, implied an evolution in French secularism.

In this case, a Moroccan woman tried to appeal the decision by asking the *conseil d’État* to annul an administrative document that refused her request for French citizenship on the grounds of non-assimilation. In order to establish the lack of assimilation, traditional jurisprudence of the *conseil d’État* requires clearly defined facts, which must imperatively converge with one another<sup>41</sup> in order to demonstrate that a foreigner is radically hostile to essential French values<sup>42</sup>.

In the frame of a decision made 27 June 2008, after reminding that the plaintiff was wearing “the clothing for women of the Arabian peninsula [which is] the *niqab*” and not the *burqa* as was later reported in the media, the judge in charge of the file indicated that:

while Madame Machbour speaks French well and her two children are educated at a state school, and while she was seen by a male gynecologist during her pregnancies, it remains that [...] she carries out an almost reclusive life cut off from French society: she does not receive people in her home, in the morning she occupies herself with housecleaning, as well as walks with her baby and children, and in the afternoon she goes to the home of her father or father-in-law. For her groceries, she indicates that she can do her shopping alone, but admits that she most often goes to the supermarket accompanied by her husband.

Taking these facts together, the judge deduced that:

it seems that Madame Machbour has not made the values of the Republic and in particular those of the equality of the sexes her own. She lives in total submission to men and to her family, which is manifested as much in her manner of dress as in the organization of her daily life [...] she finds this normal and even the idea of contesting this submission does not even occur to her.

The judge then concluded by rejecting the application for French citizenship. These conclusions were followed by the *conseil d’État*, which thereby judged that Madame Machbour had “adopted a radical practice of her religion, incompatible with the essential values of the French community, principally belief in the equality of sexes.” This reasoning merits three observations.

First, much like the law of 2004 was not expressly aimed at any religious sign in particular, the *conseil d’État* carefully avoids naming the religion of the plaintiff, and in only considering the decision itself, no one can doubt that the wearing of the *niqab* could be at the centre of the judges’ preoccupations. Only the conclusions of the judge in charge of the file, which have no juridical value, clarify this point. What is more, the interpretation of the meaning of religious clothing is analogous to

---

<sup>38</sup> Danièle Lochak, “Le Conseil d’État en politique”, *Pouvoirs*, vol. 4, no 123, p. 27.

<sup>39</sup> Hocine Zeghib, “La loi, le juge et les pratiques religieuses”, *Actualité juridique – Droit administratif*, 2008, no 36, p. 1997.

<sup>40</sup> Conseil d’État, 27 juin 2008, *Mme Machbour*, no 286798.

<sup>41</sup> Pierre Chrestia, “La *burqa* est incompatible avec la nationalité française”, *Actualité juridique – Droit administratif*, 2008, no 36, p. 2015.

<sup>42</sup> Philippe Malaurie, “Une pratique radicale de la religion peut fonder une opposition gouvernementale à l’acquisition par mariage de la nationalité française”, *La semaine Juridique – Édition Générale*, 2008, no 38, II, september 17, p. 35.

one that might have been developed in the Stasi report.

Second, the decision of the *conseil d'État* contributes to expanding, little by little, the field of requirements for secularism, being nonetheless a principle that should only be imposed on the state and its institutions<sup>43</sup>. The law of 15 March 2004 had already created an initial displacement by imposing, through the banning of ostentatious religious signs in state schools, a requirement of secularism on students that are users of a public service.

In the meantime, the *conseil d'État* seems to have gone even further. By pronouncing itself on the incompatibility of one “radical practice” of religion with assimilation to the French community, it has invested itself in the intimate space of individual lives and imposed this requirement of secularism to those who are not even yet French nationals. If the immigrant wishes to make a pledge of good citizenship, he must previously justify a minimal emancipation of his religious convictions and must not practice his religion outside of the norms that the majority will tolerate, that is to say in a radical form. By such a process, the *conseil d'État* indirectly makes itself the judge of the “normalcy” of religious practices in order to draw direct juridical effects of the utmost importance in conditioning belonging to the “national body”<sup>44</sup>.

Third, I raise the point that the *conseil d'État* avoids pronouncing itself on the degree of radicalism in this respect and beyond which assimilation may or may not be noted, but it may nonetheless make such pronouncements implicitly. It arose that Madame Machbour, who even said that she wore her *niqab* “more out of habit than conviction”, had assumed a whole life comparable to numerous ordinary women and it seemed difficult to affirm that the facts really converged in the sense of forming evidence of non-assimilation.

Therefore, in the spirit of the *conseil d'État*, wearing the *niqab* in and of itself implies a degree of radicality to the point where it constitutes a presumption of non-assimilation by a woman who wears it. The position of the *conseil d'État* in terms of religious signs marks a true rupture with the position that could have been adopted following the advice of 1989 when it decided that “the wearing of religious symbols by students, symbols which are worn with the intent to manifest belonging to a religion, are not in themselves incompatible with the principle of secularism insofar as they constitute an exercise in the freedom of expression and the manifestation of religious beliefs”. Now, the *conseil d'État* tends towards focusing on the nature itself of the religious clothing or sign to deduce its incompatibility with the “values of the French community”.

In this way determining a sort of republican *orthopraxis*, even more than juridically confirming a political conception of secularism, the *conseil d'État* becomes a rather accurate echo of the dominant narrative of secularism that is sensitive to a perceived threat<sup>45</sup>, whether this threat is external (i.e. Muslim terrorists) or internal (i.e. Muslim communitarianisms). In so doing, it distances itself from the figure of separatist secularism evoked higher up in favour of promoting an “antireligious secularist” figure inspired by Voltaire, where “the principle of separation (...) is invoked as a justification [and] is made, definitively, assimilationist”<sup>46</sup>. In fact, if in the figure of a separatist secularism, John Locke advocated “a clear separation of the political and the religious”<sup>47</sup>, he no less called for tolerance on the part of the State, that without being limitless, must permit the free expression of religious convictions and the free exercise of worship<sup>48</sup>. However, the 2008 decision of the *conseil d'État* ultimately forbids the wearing of certain religious signs or clothing – such as the

---

<sup>43</sup> Micheline Milot, « Neutralité politique et libertés de religion dans les sociétés plurielles : le cas Canadien », In Jean Baubérot and Michel Wiewiorka (Eds) *De la séparation des Églises et de l'État à l'avenir de la laïcité*, Paris : Les Éditions de l'Aube, p. 275.

<sup>44</sup> Hocine Zeghib, “La loi, le juge et les pratiques religieuses”, *Actualité juridique – Droit administratif*, 2008, no 36, p. 1997.

<sup>45</sup> Jean Baubérot, “L'évolution de la laïcité en France : entre deux religions civiles”, *Diversité urbaine*, vol. 9, n°1, p. 23.

<sup>46</sup> Micheline Milot, *La laïcité*, 2008, Ottawa, Novalis, p. 53.

<sup>47</sup> Isabelle Agier-Cabanes, “La laïcité, exception libérale dans le modèle français”, *Cosmopolitiques*, 2007, no16, november, p. 137.

<sup>48</sup> Jean Baubérot, *Les laïcités dans le monde*, Paris : Presses Universitaires de France, coll. “Que-sais-je? ”, 2007, p. 24-27.

*niqab* – in public spaces and therefore restrains the liberty of expression of citizens (and those who would like to become such).

We have been able to observe the important influence of the dominant narrative of republican secularism on the juridical regulation of religious diversity. But conversely, the latest decision of the *conseil d'État* also became a solid anchoring point in the development and the intensification of a republican rhetoric about the management of religious diversity. It is also this decision that provoked the important controversy on the question of the full veil in France.

After this decision, during the summer of 2008, French representatives asked the government twice to intervene and adopt a law banning the full veil from public spaces<sup>49</sup>. Their arguments displayed a deep tension between the language of human rights that a secular state should protect, and the repertoire of republican values. In these arguments, French representatives requested that French values, including a republican conception of secularism, and not merely rights, be taken into account.

In 2009, the French *Assemblée Nationale* appointed the deputy André Gerin as the head of a *Mission d'information sur la pratique du voile intégral sur le territoire national* (Gerin Mission).

By constantly referring to the *Stasi report* dated 2003, the report presented by the *Gerin mission* in January 2010<sup>50</sup> linked itself to a purely republican conception of secularism that imposes a model of identity which derives from a historical construction and the idea of the necessary emancipation of all citizens from all-encompassing doctrine. According to the report, the full veil is not only an affront to the freedom, the dignity and the equality of women, but it also reveals a willingness to deny the French value of fraternity<sup>51</sup>, that is to say to reject the principles of the social contract<sup>52</sup>.

In these narratives, secularism is not only a simple practice of regulation of religious diversity based on the recognition of individual rights, but it is a value. And when secularism is defined as a value, secularism is made instrumental because it upholds moral principles – for instance emancipation or fraternity – ignored by the principles of justice, and then prevails over these principles of justice<sup>53</sup>. In this context, when conflicting sets of values come together in the public debate, a clash is inevitable.

Within this context of opposition between the different religious or secular convictions present in society, the State is not only an arbitrator but also becomes an actor, participating in the debate through the establishment of the boundaries between what is acceptable religious practice and what is not. This legitimization by the State of certain beliefs and practices often more or less directly distinguishes what is scandalous and what is not in the public debate. And the full veil is now clearly one of these scandalous practices that the French Republic cannot tolerate. It is for this reason that, following the recommendations proposed by the *Gerin report*, the French Parliament adopted a law, dated 11 October 2010 banning the full veil in public spaces – or, to be very precise, a law “banning the covering of the face in public spaces”<sup>54</sup>. Once again, the law has effectively abstained from formally designating a religion in particular, or making a judgment of values with regards to practices

---

<sup>49</sup> See Assemblée nationale, Proposition de loi visant à interdire le port de signes ou de vêtements manifestant ostensiblement une appartenance religieuse, politique ou philosophique à toute personne investie de l'autorité publique, chargée d'une mission de service public ou y participant concurremment, 22 juillet 2008, p. 3 [[www.assemblee-nationale.fr/13/propositions/pion1080.asp](http://www.assemblee-nationale.fr/13/propositions/pion1080.asp)] ; Assemblée nationale, proposition de loi visant à lutter contre les atteintes à la dignité de la femme résultant de certaines pratiques religieuses, 23 septembre 2008 [[www.assemblee-nationale.fr/13/propositions/pion1121.asp](http://www.assemblee-nationale.fr/13/propositions/pion1121.asp)].

pion1121.asp].

<sup>50</sup> Assemblée Nationale, *Rapport d'information fait au nom de la mission d'information sur la pratique du voile intégral sur le territoire national*, 20 janvier 2010 [<http://www.assemblee-nationale.fr/13/rap-info/i2262.asp>].

<sup>51</sup> *Idem*, p. 116.

<sup>52</sup> *Idem*, p. 88.

<sup>53</sup> I developed this argument in David Koussens, “L'État français et l'expression des confessions religieuses : entre neutralité confessionnelle et neutralité référentielle”, 2010, *Politique et sociétés*, vol. 29, no 3, p. 39-60.

<sup>54</sup> *Loi no 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public, JORF n°0237 du 12 octobre 2010 p. 18344.*

linked to Islam. Two points should be quickly made.

First, this *burqa* controversy clearly questioned the legitimate limits that the secular State can impose on expressions of religiosity that come into conflict with certain moral principles current in society. Indeed, while liberal democracies are engaged in the protection of freedom of conscience and religion, secular States nevertheless find themselves constantly challenged to find moral, juridical, and political solutions that are both legitimate and viable in the face of problems brought forth by a diversity of convictions and values. However, while certain social expressions of faith are particularly shocking to public values, they must still be protected by the secular State as long as they don't threaten public order.

Second, in the passing of a law banning the full veil, Muslim women who wear it are the subject of a double discrimination. Being women, they are discriminated against in the private sphere and continue to be oppressed by an unbearable patriarchal conception of society. Being Muslim women, they are also discriminated against in the public sphere and have to endure a condition of invisibility that is not imposed on men, on the one hand, and on other religious groups whose practices are even more orthodox, on the other hand.

### **Conclusion**

In Canada, the juridical system is less susceptible to the changing moods of society than it is in France. The absence of a correlation between “juridical secularism” of recognition and a “narrative secularism” of a separatist sort in Quebec is not however without favouring certain Quebecois critiques of Canadian multicultural policies.

By contrast, in France, in permitting the equation of “juridical secularism” with a dominant “narrative secularism”, the latest jurisprudence of the *conseil d'État* is a solid anchoring point in the development of a republican rhetoric on the management of religious diversity – a republican rhetoric which found echo in the law. The treatment of the wearing of religious symbols in public spaces is therefore revealing of the contemporary deployment of a form of secularism, but it reveals only one contemporary form of a number of more pragmatic modalities for regulating religious diversity: even in France, there is not a pure form of secularism because secularism is a nonlinear and polymorphous process.



