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## SOVEREIGNTY AND LAÏCITÉ

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Just as every bachelor is unmarried, every State is sovereign, because sovereignty is precisely the defining characteristic of the State. But the State is not defined by its relationship to religion. Indeed, States have very different religious policies and some claim to have none. Some States seem to be dominated by religion. Others dominate over religion. Still others are secular and separate themselves from religion. Furthermore, these relationships change over time. Some States that have been dominated by religion may become strictly secular or vice versa. Thus, it may seem foolish to try to derive some theory regarding the manner in which some political entity treats religion from the mere fact that that entity is a State.

However, because sovereignty is defined as the power of an authority that has no superior and is superior to all others, this implies that this power has no limits. It may regulate every type of human activity, from war to education to religion. This does not mean that the sovereign State always effectively regulates all those activities, but simply that it may do so. But while sovereignty always implies the power to regulate religion, this power can be exercised in various manners. For instance, complete separation of State and religion is one form and domination over religion is another; in both cases, the organization of a religion or its autonomy is regulated by laws enacted by the sovereign.

This becomes apparent when we consider the two seemingly opposite examples of Egypt and France. Article 1 of the French Constitution of 1958 reads: “France shall be an indivisible, secular, democratic and social Republic.” On the other hand, 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).”

Yet, in both cases we find that the State—instead of subordinating its laws to Islamic Jurisprudence, as could be expected in Egypt, or refraining from interfering with religious practices, as could be expected in France—does regulate religious practices, sometimes in very similar

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ways. One striking example is the prohibition of the Islamic veil in public schools in both countries.

Let us consider Egypt first. One possible interpretation of article 2 of the constitution was that legislation that runs counter to the sharia is unconstitutional. However, the Supreme Constitutional Court of Egypt developed a two stage argument.<sup>1</sup>

First, it refused to review legislation prior to 1980 because article 2 is not retroactive. This implies that sharia is only binding because of article 2, that it derives its force not from religion but from the constitution, *i.e.* from the will of the constituent power. It also implies that it is part of the constitution, and therefore, interpretation of sharia will be done not by religious authorities but by the court.

Second, in 1993, a law adopted later than 1980 was referred to the court, which could not avoid reviewing it on the basis of its conformity to the sharia. It decided, following its own interpretation of article 2, that the legislative power is only prohibited from going against principles whose values are absolute because such principles are not subject to interpretation and cannot change over time. On the other hand, there are other principles that are relative and change with time and place. Following that distinction, 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 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 was not considered unconstitutional. It is a well known fact that a similar prohibition was enacted in France ten years later.<sup>2</sup>

Thus, in two very different countries—one ruled by the sharia, Egypt, and another, France, governed by the principles of freedom of religion and religious neutrality of the State—we find the State prohibiting the same type of religious behavior.

The reason is that when the State imposes a religious rule, it does so by means of its own law and thus immediately translates the religious rule into a secular one that will be interpreted and applied as such. Being sovereign, the State necessarily rules every field or, in Hans

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<sup>1</sup> I rely on Nathalie Bernard-Maugiron and Baudouin Dupret. “[L]es principes de la sharia sont la source principale de la législation.” Nathalie Bernard-Maugiron & Baudouin Dupret, “*Les principes de la sharia sont la source principale de la législation*”: la Haute Cour constitutionnelle et la référence à la Loi islamique, in 2 DROIT ET POLITIQUE DANS L’ÉGYPTTE CONTEMPORAINE, ÉGYPTTE/MONDE ARABE: LE PRINCE ET SON JUGE 107-26 (CEDEJ 1999); NATHALIE BERNARD-MAUGIRON, LE POLITIQUE À L’ÉPREUVE DU JUDICIAIRE: LA JUSTICE CONSTITUTIONNELLE EN ÉGYPTTE (Bruylant 2003).

<sup>2</sup> LOI n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics, 65 JO 5190 (2004), available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000417977&dateTexte=>.

Kelsen's words: "Just as everything King Midas touched turned into gold, everything to which the law refers becomes law."<sup>3</sup> Thus the State always holds power over religion, but we should keep in mind that what we are talking about is not real political or social influence, but merely of legal power. Even if a particular State decides not to exercise an influence on religion, it always has the power to exercise it.

The apparently opposite case of the French principle of "*laïcité*" illustrates the same idea. *Laïcité* cannot be completely defined by the usual idea of an absence of influence of religion on the State or, as it is sometimes said, by a separation between State and religion. But it can also be characterized as an attitude of the State towards religion, decided unilaterally by the State. Indeed, most authors, when defining *laïcité*, use other characters, such as freedom of religion, tolerance or neutrality. Thus, they characterize not a mutual attitude or the relationship between religion and the State, but only the attitude of the State towards religion, because even the decision not to interfere with religious matters is a sovereign decision.

There are other reasons not to be satisfied with the usual characterization of the relationship between the State and religion as an influence of the State over religion, an influence of religion over the State, or an absence of mutual influence.

The first reason is the impossibility to give a good account of French positive law by merely saying that it means absence of influence of religion on the State. French law includes the two principles of sovereignty and *laïcité*. To understand their meaning in the law, one must start not from political theory, but from all the rules that are considered consequences of these principles and those that are viewed by the courts as compatible with separation of Church and State or with *laïcité*. Even a quick look at French law will show that a very strong influence of the State on religions is considered compatible with *laïcité*. For instance, subsidies to religious schools, prohibitions on wearing religious signs, paying salaries to ministers of three religions in parts of the country, the presence in the cabinet of a Minister of the Interior who also holds the title of "minister of religions," or ownership by the State of religious buildings—all of these facts are considered compatible with *laïcité*, thus demonstrating that this principle is not sufficiently characterized by an absence of influence of religion on the State and may imply at least some interference by the State over religion.

The second reason is the fact that, whereas we understand easily what an absence of influence of religion on the State or on the public State can be, we need a more precise definition of what constitutes an influence, or an absence thereof, of the State on religion. Tolerance and

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<sup>3</sup> HANS KELSEN, GENERAL THEORY OF LAW AND STATE 161 (Anders Wedberg trans. 1945).

neutrality may not be sufficient because these principles can be equally satisfied, for instance by a State that subsidizes all religions and by a State that subsidizes none.

It would not even suffice to conclude from the two examples of Egypt and France that because of sovereignty every relation between State and religion is characterized by the domination of State over religion. True, every sovereign State necessarily makes laws regarding religion. But there is nothing special about religion in this respect, because in every other field every single policy is also expressed by laws enacted by the sovereign (just as the opposite policy is). On the other hand, the connection here is between the sovereign State and laws regarding religion, not with a specific religious policy of the State.

In order to show a specific relationship such that not any religious policy, but some particular policy is connected to sovereignty, we must consider not sovereignty itself but conceptions of sovereignty. While we use a notion of sovereignty that is the same for every State, we can see that, in different political and legal systems, there are different conceptions of sovereignty. And while any sovereign power will necessarily have a religious policy, just as it has a military or an economic policy, and while there is no connection between sovereignty itself and one specific policy, it is conceivable that some specific conception of sovereignty is linked to some type of policy.

I will consider here the following hypothesis: the French conception of sovereignty has been closely related to French religious policies, since the beginning of the 17th century to the present day, and *laïcité*—far from representing a break from the religious policy of the ancient monarchy—can best be understood as the modern expression of the French conception of sovereignty.

Two further remarks are in order: First, I will consider sovereignty and *laïcité* from a purely descriptive point of view, without making any attempt to look for the way in which they should best be understood—I am merely trying to tell how these concepts are being used in actual discourse. Second, the discourse that I will describe is not the language of philosophy or political theory, but only the legal discourse—the language of positive law, that of statutes, of court opinions or of legal scholars dealing with positive law.

The link between a conception of sovereignty and a general attitude of the State toward religion can be perceived in the French case. It has two aspects. On one hand, the power of the State over religion in France is not just a consequence of a preexisting doctrine of sovereignty; it is also constitutive of sovereignty, in the sense that the doctrine of the sovereign State has been conceived from the beginning as an instrument of a religious policy. On the other hand, a particular religious policy, *laïcité*, is still considered in the discourse of French

courts as a core element of the very definition of sovereignty. I will therefore analyze first the role played by the need to confront religious issues in the process of constructing the French conception of sovereignty, then the role of *laïcité* in the defense of sovereignty by the French courts.

#### I. THE ROLE OF THE STATE'S POWER OVER RELIGION IN THE CONSTRUCTION OF SOVEREIGNTY

In the continental tradition, sovereignty has several meanings. Raymond Carré de Malberg draws a distinction between three meanings of the word sovereignty in the French language or three concepts of sovereignty.

In the original sense, the word "sovereignty" refers to the supreme character of the State's power. In a second sense, it refers to the whole range of the powers included in the State's authority and it is therefore synonymous with that authority. Thirdly, it is used to characterize the position occupied within the State by the highest organ of the State's authority and in that sense, sovereignty is the same thing as the power of that organ.<sup>4</sup>

Carré de Malberg stresses that the French language is poor in that it contains only one word for the three concepts of sovereignty. The same could be said of English. However, the German language has three words, one for each of these senses. *Souveranität* corresponds to sovereignty in the first sense, *i.e.* the supreme character of the State on the international as well as on the domestic level. *Staatsgewalt* is the power of the State in the second sense. *Herrschaft* is the power of domination *Souveranität* by an organ.

All three concepts are important for the analysis of the relationship between the State and religion: *Souveranität* because it means that the State is independent from any other power, either an external power such as the Emperor or the Pope, or a domestic power such as a religious organization; *Herrschaft* because the highest authority in the State is not appointed by a religious authority and cannot be dismissed by one. However, I will mainly concentrate here on the third concept, *Staatsgewalt*, which is the totality of the powers possessed by the State, even though it does not exercise them all.

If one looks at the construction of the doctrine of sovereignty in France, one sees what it owes to the necessity of justifying the exercise of power over religion.

It is a well-known fact that the necessity of a doctrine of

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<sup>4</sup> RAYMOND CARRÉ DE MALBERG, CONTRIBUTION À LA THÉORIE GÉNÉRALE DE L'ÉTAT 79 (1962).

sovereignty arose from the horrors of the religious wars of the 16th century. As a result of these conflicts, rulers felt that there must be a sovereign who would be stronger than any of the religious factions and who would be able to use force in order to keep peace and security. It was also quite obvious that sovereignty would need to be justified by religious doctrine; thus the divine right of kings.

On the other hand, a doctrine of the divine right of kings could 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,<sup>5</sup> 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.<sup>6</sup> 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.

If the king's power did not depend on the Catholic Church, it was therefore 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. Sovereignty therefore also would not depend upon the personal virtue of the king, but rather upon the essence of the monarchy.

In theory, only purely spiritual matters escaped the king's power, although he retained in his jurisdiction decisions regarding what was spiritual and what was temporal.<sup>7</sup> In practice, many questions that might be deemed spiritual were considered temporal during that period. For instance, in 1753 one commentator wrote that it is for the Church to decide whether one should pray silently or aloud, but the State may have an interest in deciding when one should pray in public or privately, and, if prayer is done in public, when it should be conducted by a priest or a body of men, and what body. The king's power thus functionally extended over religious matters. As historian Marcel Gauchet writes, "absolutism is the demand that collective authority be placed in a pre-eminent position such that that authority could legitimately subordinate

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<sup>5</sup> *Salic* law was a rule that prohibited women from ascending to the throne.

<sup>6</sup> Marie-France Renoux-Zagamé, *Du juge-prêtre au roi-idole. Droit divin et constitution de l'État dans la pensée juridique française à l'aube des temps modernes*, in *LE DROIT ENTRE LAÏCISATION ET NÉO-SACRALISATION* 143-86 (Jean-Louis Thireau ed., 1997).

<sup>7</sup> See generally DOMINIQUE LE TOURNEAU, *L'EGLISE ET L'ETAT EN FRANCE* (2000).

the sacred to itself.”<sup>8</sup>

This concept, called “gallicanism,” was the basis for the king’s attitude towards religion: he summoned councils, appointed bishops, decided on the age of marriage, etc.<sup>9</sup> In a 1631 treaty of rights and freedoms of the Gallican Church, scholars Pierre and Jacques Dupuy enunciated several principles: (1) the temporal power is distinct from the spiritual power and is independent of it; (2) the Pope cannot legislate for the French Church except with the consent and confirmation of the King; (3) the King can exercise surveillance over religious orders (it is by virtue of this principle that in 1764 the dissolution of the Jesuits was announced); and (4) the King can intervene in doctrinal matters, as he did, for example, in the Jansenist affair.<sup>10</sup>

One important aspect that would be remembered in the future was that the properties of the Church really belonged to the king. As Louis XIV said: “The kings are absolute lords and have the full and free disposition of every single property, to use in their wise economies, that is according to the needs of their State.”<sup>11</sup>

This doctrine is not specific to the French conception of sovereignty. One finds it also in Hobbes when he writes that in order to decide whether a miracle has happened:

We are not every one to make our own private reason or conscience, but the public reason, that is, the reason of God’s supreme lieutenant, judge; and indeed we have made him judge already, if we have given him a sovereign power to do all that is necessary for our peace and defence.”<sup>12</sup>

Or Pufendorf, who places among the “*partes potentiales*” of sovereignty “the right to decide what doctrines ought to be taught within the State.”<sup>13</sup> The argument is double: if sovereignty is the absolute power to decide on everything, then the power to decide over religious matters is obviously part of it; on the other hand it is perfectly justified because it is the only way to keep peace or public order. Indeed the latter

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<sup>8</sup> *Absolutisme: exigence de placer l’autorité collective dans une position d’éminence telle qu’elle soit fondée à se subordonner les choses sacrées*, MARCEL GAUCHET, LA RELIGION DANS LA DÉMOCRATIE 34 (1998).

<sup>9</sup> See generally LE TOURNEAU, *supra* note 7.

<sup>10</sup> See generally DALE K. VAN KLEY, THE RELIGIOUS ORIGINS OF THE FRENCH REVOLUTION: FROM CALVIN TO THE CIVIL CONSTITUTION, 1560-1791 (1996).

<sup>11</sup> “Les rois sont seigneurs absolus et ont naturellement la disposition pleine et libre de tous les biens, tant des séculiers que des ecclésiastiques, pour en user en tout temps comme sages économies, selon les besoins de leur État.” MARCEL MARION, DICTIONNAIRE DES INSTITUTIONS DE LA FRANCE: AUX XVIII ET XVIII SIÈCLES 491 (1923).

<sup>12</sup> THOMAS HOBBS, LEVIATHAN 201 (2d ed. 1886).

<sup>13</sup> SAMUEL VON PUFENDORF, LES DEVOIRS DE L’HOMME ET DU CITOIEN, TELS QU’ILS LUI SONT PRESCRITS PAR LA LOI NATURELLE 288-89 (Jean Barbeyrac trans. 1707) (traduits du latin de feu Mr. le baron de Pufendorf, par Jean Barbeyrac, avec quelques notes du traducteur).

argument, which is permanent—it can be found in an official report commissioned in 2006 by the French government<sup>14</sup>—will later be reinforced. Citizenship is not natural but needs to be constructed by both the State itself and religion—not necessarily an organized religion, but the teaching of common values is one of the tools for this construction.

Although later regimes in France pursued very different policies, going from the creation of a concordat to a system of the so-called separation between the State and the Church, the power of the State to organize and police religion has been exercised with different intensities but has never been denied.

For one thing, it was widely held from the time of the French Revolution that there can be no citizenship without shared values, and that religion played an important role in the shaping of these values. Jean-Jacques Rousseau had eloquently developed this idea, arguing that there is a “purely civil profession of faith of which the Sovereign should fix the articles, not exactly as religious dogmas, but as social sentiments without which a man cannot be a good citizen or a faithful subject.”<sup>15</sup> In other words, although the State should not interfere with the private consciences of citizens, it cannot remain completely indifferent to the existence of religious feelings and religious organizations. In 1790, the first attempt was made in France to follow this model, by organizing religion as a public service structured on the model of other public administrations. Under this structure there would be a bishop in every department, and priests would be elected by parishioners. This legislation was one of the factors of a long civil war between those who accepted and those who refused this new status and who sided with the monarchists.

Napoleon ended the civil war and abolished some aspects of that legislation which were most repugnant to Catholics, but negotiated with the Holy See a concordat that would remain in force for a century and was based on similar ideas.<sup>16</sup> According to the concordat, priests would be civil servants, the State would pay their salaries, and the Pope would

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<sup>14</sup> “Qu’il puisse être question des ‘relations entre les cultes et les pouvoirs publics’ dans un régime de séparation des Églises et de l’État ne saurait surprendre. La République, en effet, ne peut ignorer le fait religieux qui, comme fait social, intéresse forcément les responsables de l’ordre public. L’histoire même de la laïcité en France contredit l’idée d’une étanchéité absolue entre les deux sphères.” COMMISSION DE REFLEXION JURIDIQUE SUR LES RELATIONS DES CULTES AVEC LES POUVOIRS PUBLICS, MINISTÈRE D’ÉTAT, MINISTRE DE L’INTERIEUR ET DE L’AMENAGEMENT DU TERRITOIRE L’AMENAGEMENT DU TERRITOIRE 7 (2006).

<sup>15</sup> JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT book IV, ch. 8 (1762), available in English at <http://www.constitution.org/jjr/socon.htm> (chapter entitled “civil religion”).

<sup>16</sup> See Concordat of 1801, Concordat Watch, [http://www.concordatwatch.eu/showkb.php?org\\_id=867&kb\\_header\\_id=826&order=kb\\_rank%20ASC&kb\\_id=1496](http://www.concordatwatch.eu/showkb.php?org_id=867&kb_header_id=826&order=kb_rank%20ASC&kb_id=1496).

ordain bishops only after the government had appointed them. Buildings, which had been confiscated during the Revolution, were not returned to the Church and remained property of the State or of local authorities, although the Church could use them. Religion was part of the curriculum of public schools.

Napoleon also undertook to organize other religions, the Protestant and the Jews, on the same model. It was impossible to enter into a negotiation with Protestant and Jewish organizations similar to that which had been conducted with the Vatican due to the lack a hierarchical structure, so Napoleon organized these two religions into institutions called consistories.<sup>17</sup> Protestant pastors and Jewish rabbis then received a salary from the State, which allowed the government to integrate and control them. For instance, it became illegal to undertake a religious marriage without having had first a civil marriage. The various governments that followed Napoleon—the constitutional monarchy, the Second Republic, and the Second Empire—kept this same organization and policy until 1848.

Although the famous act of 1905 introduced a dramatic change in the substance of the relationship between State and religion, it does not really depart from the idea that it is the State that organizes religion.

Not only is the separation of State and religion a unilateral decision by the State, but the separation is far from complete. It could not be a complete separation because the State has to regulate the use of public space, such as streets or city squares, to authorize or prohibit religious activities, to decide whether there can be chaplains in the military, in prisons, public hospitals or public schools. But in France, there were other reasons that constrained (and still constrain) the State to regulate religion. One was the fact that, since the Revolution and Napoleonic legislation, religious buildings, such as churches, temples or synagogues, were public property. And to this day, those that are older than 1905 remain public property. The State therefore could not avoid regulating the use of those buildings. Various statutes have thus decided that they are left at the disposal of various religious institutions, but the State and local authorities may—and sometimes must—pay for maintenance. Also, the mayor has the power to keep order within the buildings.

Another reason is the persistence of the idea that one of the State's most important missions is public education, not only because it is a public service, but because it is a key factor in the shaping of citizenship. This was an important argument in favor of several laws that regulate private schools, the majority of which are Catholic. These schools can enter into contracts with the State, whereby the teachers are

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<sup>17</sup> See DAVID FEUERWERKER, *L'ÉMANCIPATION DES JUIFS EN FRANCE: DE L'ANCIEN RÉGIME À LA FIN DU SECOND EMPIRE* (1976).

paid by the State and some other costs are covered by local authorities, but on the condition that the teachers hold the same degrees as teachers in public schools and that the basic curriculum is the same.

A third reason that constrains the State to intervene in religious affairs is the large number of Muslims in France. According to some, the constraint comes from the need to facilitate their integration in French society and the attempt to avoid the development of Islamic fundamentalism. Others think that such interventions are required by the principle of equality because in 1905 there were no Muslims in the country and of course no publicly owned mosques. Thus, while Catholics, Protestants, and Jews enjoy the free use of public buildings, Muslims can only pray in their own private mosques. On the other hand, the State has constantly been an actor in its relationship to religion—for example, Protestant and Jewish religious institutions remain organized to a large extent according to laws enacted by Napoleon, and bishops are appointed by the Pope but always with the advice of the French government—and there is a need to enter into a similar relationship with the Muslims. The Minister of the Interior, who is also the minister of religions, has made several attempts to organize Islam in France and to find ways, without changing the act of 1905, to legally and financially facilitate the building of new mosques. What is remarkable is that these attempts have been made by ministers from the left as well as from the right.

A fourth manifestation of the idea that sovereignty allows for State intervention even with a “separation” is the situation in three departments of Alsace-Lorraine, which were German in 1905 and where the legal regime of the concordat was reinstated when they were returned to France after World War I. Thus, in these departments, ministers from the three religions still receive salaries from the State.

What must be stressed is that all these features—public ownership of religious buildings, subsidies to religious schools, attempts to organize Islam, and other examples—which might seem to be exceptions to the principle of *laïcité* have, on the contrary, been considered as compatible with it or as an interpretation of that principle.

We have seen that this interpretation is the product of the French conception of sovereignty. But it is more than that: it is a key element in the definition of sovereignty, as we can see from the jurisprudence of the Constitutional council on the relations between the European and the domestic legal systems.

## II. POWER OF THE STATE IMPLIED BY THE HIERARCHY OF NORMS

As all other powers, the power of the State to regulate religion

depends on the hierarchical level of the norms that make use of that power. As a matter of fact, although this level has varied over time, it has always been and remains the highest, so that this power is truly supreme.

In the past, the most important norms dealing with religion were statutes. Since there was no judicial review of the constitutionality of statutes, acts of Parliament were supreme, according to the traditional presumption that they are the expression of the general will, a presumption established by Article 6 of the Declaration of the Rights of Man that could not be challenged.

True, some constitutional provisions dealt with religion, like Article 10 of the same Declaration of the Rights of Man: “No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law,” or Article 1 of the Constitution of 1946: “*France is an indivisible, secular (laïque), democratic and social Republic,*” a provision that has been reproduced in Article 1 of the Constitution of 1958.

However, since these provisions could not be used as a basis to challenge the validity of statutes, for lack of judicial review, they really could not be said to be superior and they could be contradicted. Thus, statutory rules enjoyed the highest authority and could not be challenged. This situation was in perfect harmony with the French doctrine of sovereignty, whereby statutes are the expression of the general will, *i.e.* the will of the sovereign.<sup>18</sup> Therefore, whatever the substance of the statutes, there was an absolute presumption that they were constitutional and thus compatible with the principle of *laïcité*.

Some change happened after the Constitution of 1958 created a Constitutional Council, and especially after that authority started in 1971 to review the validity of statutes. From that moment, a rule can only be said to be supreme if it is at the constitutional level.

This means that statutes contrary to the principles of religious freedom or *laïcité* could be declared unconstitutional by the Council. What is included in these principles, however, is not perfectly clear, and the Council has not had an opportunity to decide, for instance, whether *laïcité* implies a constitutional prohibition to subsidize religions or conversely a permission to subsidize them all provided that they are treated equally.<sup>19</sup> That prohibition has been expressed in the act of 1905. Therefore, one could hold two different views: first, one could say that, since the act of 1905 is a statute, it could be derogated by a

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<sup>18</sup> DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 6 (Fr. 1789).

<sup>19</sup> However, it has decided that the constitution—the principle of *laïcité* is not mentioned *expressis verbis*—does not prohibit subsidizing private schools, including religious schools. CC decision no. 77-87DC, Nov. 23, 1977, J.O.

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new statute or it could even be held to be contrary to the present constitution; alternatively, one could decide that although the prohibition is expressed in a statute, it is one of the “fundamental principles recognized by the laws of the republic” that have constitutional value.

In any case, what is important here is not the precise substance of the principle, but the fact that the power of the State to regulate religion is authorized at a constitutional level. One could argue, for instance, that an act of Parliament forbidding some religious practices is contrary to the principle of religious freedom, not that Parliament has no jurisdiction in this matter.

The fact that this power now stands at the constitutional level is particularly important. The importance lies not only in the fact that statutes—and also other domestic norms, such as regulations—can be challenged before the Constitutional Council, but also in the Council’s interpretation of Article 55 of the Constitution of 1958. According to that interpretation, since treaties prevail over statutes, statutes that contradict an international treaty can be challenged before any court. However, treaties do not prevail over constitutional norms, so norms that are constitutional are supreme.

Yet, recent developments in the relationship between European law and domestic law could have jeopardized this principle and thus the sovereign power of the State over religion. This is the reason why a new doctrine of the Constitutional Identity of France has emerged.

This doctrine is the result of considerable developments in the relationship between domestic law and European law and has been made necessary by a claim, made by the European Court of Justice since 1964, that European law prevails over domestic law, even constitutional law.<sup>20</sup> Moreover, this claim has been formalized in Article 1-6 of the Constitutional Treaty:

The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.

Although the treaty has not been ratified, the substance of Article 1-6 is still considered part of European law because of the jurisprudence of the court and because it has been reproduced in a declaration annexed to the Treaty of Lisbon.

Therefore, a French court wishing to avoid acknowledging the supremacy of European law must use another argument than the fact that some principle of French law is a constitutional norm. This is where “constitutional identity” comes into play. Without going into details, let me mention that the Constitutional Council started in 2004 to

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<sup>20</sup> CJEC *Costa c. ENEL*, July 15, 1964.

develop a two-stage argument.<sup>21</sup>

1) The source of the obligation to apply European law is to be found not in the treaties but in the constitution. Therefore, European law prevails over the constitution to the extent that the constitution prescribes that European law prevails over itself.

2) The constitution could not, without contradicting itself, decide to submit to a European rule that would go against its own express provisions or the principles that shape the constitutional identity of France. Therefore, it has implicitly protected such provisions or principles, and European law cannot have primacy over them. Only the French constituent power could derogate those principles.

This doctrine was finally expressed in a 2006 decision: “[T]he transposition of a directive may not run counter to a rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto.”<sup>22</sup> What is striking in the formulation by the Constitutional Council is the extraordinary step taken to preserve the sovereignty of the national State: in case of a conflict between European law and the French constitution, European law prevails, except when the conflict is between European law and a principle inherent to the constitutional identity of France. On the other hand, these principles do not bind the constituent power, which remains truly sovereign, to the extent that it can always expand or restrict the limits of the power of Parliament to pass statutes.

The expression “constitution identity” has been taken from the constitutional treaty (art. 1-5) and from the Treaty of Lisbon.<sup>23</sup> It is obviously extremely vague, as was the phrase “express provisions.” It is generally assumed that what the Constitutional Council had in mind was precisely *laïcité*, although one could argue that other principles as well could be protected in the same way.

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<sup>21</sup> CC decision no. 2004-496DC, June 10, 2004, J.O. “Considérant qu’aux termes de l’article 88-1 de la Constitution: ‘La République participe aux Communautés européennes et à l’Union européenne, constituées d’Etats qui ont choisi librement, en vertu des traités qui les ont instituées, d’exercer en commun certaines de leurs compétences’; qu’ainsi, la transposition en droit interne d’une directive communautaire résulte d’une exigence constitutionnelle.” *Id.*

<sup>22</sup> CC decision no. 2006-540DC, July 27, 2006, J.O. “[L]a transposition d’une directive ne saurait aller à l’encontre d’une règle ou d’un principe inhérent à l’identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti.” *Id.*

<sup>23</sup> Treaty on European Union, art. 3a, para. 2, Feb. 7, 1992:

The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

## CONCLUSION

The State being sovereign, no subject matter escapes its power. Thus, influence over religion falls within the competence of the State, even the most secular one or even the State that apparently submits to religious law. The importance of that particular power is revealed by the hierarchical level of the rules that regulate religion and the fact that they stand above every other norm, even those that otherwise prevail over the constitution and that they can be changed only by the only authority to be truly sovereign, the constituent power.