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Conference: Laïcité in Comparative Perspective

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LAÏCITÉ IN COMPARATIVE PERSPECTIVE PANEL DISCUSSION

DEGIROLAMI: Good afternoon. It's a pleasure to welcome you all back to the second of our panels, "Laïcité in Comparative Perspective." Let me take a moment to introduce the three panelists that we are fortunate to have. First is Professor Nina Crimm, St. John's University School of Law; second will be Professor Javier Martínez-Torrón of Universidad Complutense de Madrid; and third up will be Professor Elisabeth Zoller of Université Panthéon Assas, visiting at Maurer School of Law (Indiana University-Bloomington).

We will follow the format from earlier today. Each panelist will speak for between fifteen and twenty minutes, after which we will open it up to questions from the floor.

So with that, Professor Crimm, please get us started.

CRIMM: Thank you for including me in this conference.

In preparing for this panel on "Laïcité in Comparative Perspective," I was struck at how fitting it is to be here in Paris to share some comparative perspectives on France's and the United States' religious freedom principles and policies and their application to government aid to religion. In particular my focus today is on such aid in the form of tax accommodations. In spite of quite disparate political histories, different religious and cultural traditions, and an ocean dividing the two countries, the national legislatures of the two republics only weeks apart in 1789 approved legal texts containing the strongest guarantees of freedom of religion on

either side of the Atlantic. The French National Assembly adopted the French Declaration of the Rights of Man and Citizen and the first U.S. Congress approved what became the First Amendment to the United States Constitution. Both documents guaranteed freedom of religious conscience, but unlike the First Amendment, the French Declaration did not guarantee nonestablishment of religion. As I will discuss, the laws of France over time evolved to essentially disestablish religion. The initial distinctions in the two countries' approaches were reflected in the political governance structure of each country, which through the years has impacted the manner of national governmental financial aid to religion, exhibiting increasing similarities and yet sustaining differences.

The strength of the guarantees of religious freedom and the close time frames of the First Amendment and the French Declaration were not entirely coincidental. Thomas Jefferson was connected to each. Jefferson, who had authored the 1786 Virginia Act for Establishing Religious Freedom, was the United States Minister Plenipotentiary in Paris from 1785 through the summer of 1789. Jefferson is reported to have advised the Marquis de Lafayette on specific provisions of Lafayette's drafts of the French Declaration. From Paris, Jefferson contemporaneously corresponded with James Madison, the principal architect of the First Amendment, and other congressmen about supplementing the U.S. Constitution with a Bill of Rights and including a strong guarantee of religious freedom.

Yet, despite the Jeffersonian connection, as well as the profound Judeo-Christian influences of the same philosophical writings of Baruch Spinoza, John Locke, Jean-Jacques Rousseau, and Baron de Montesquieu on the framers of the two documents, the principles and language regarding political power and religion embodied in them stand in contrast to one another. They also are different from the legal frameworks and ideologies at the

core of other European church-state relationships, including those based on separation—such as in Holland, Ireland, and Turkey—systems based on separation along with aspects of cooperation with religion—such as Germany, Austria, Belgium, Spain, Portugal, and Italy—and mixed systems of states with official churches—such as England, Scotland, and Sweden.

The religious histories of these various nations differ and are significant in their formulations of church-state relations. But today my focus is purely on the United States and France. So, I'll begin with a brief discussion of the relevant historical legal documents of the United States and France. Then I will discuss their core principles, comparing their modern-day applications in the context of government aid to religion in the forms of tax-related benefits.

Colonial America was a rich conglomeration of settlers from the Old World. Virtually all colonists were Christians and the overwhelming majority were Protestants. But, colonial America was a frontier for those religious minorities, including Jews, Catholics, Mennonites, and others, considered dissenters and heretics in the Old World. Religion was an essential foundation of personal morals and also was connected inextricably with civil government in those colonies having an officially established church, all Protestant and none the Roman Catholic Church.

As disestablishment took hold in the states, eleven of the thirteen state constitutions contained some type of religious liberty protections when the U.S. Constitution was ratified in 1788. But the U.S. Constitution itself had been written without protections of states' rights and individual liberties, including religious freedom, and many Anti-Federalists exerted pressure to set forth such safeguards. This agitation led to our Bill of Rights.

The First Amendment's Religion Clauses provide, "Congress shall make no law respecting an

establishment of religion, or prohibiting the free exercise thereof.”¹ As a general matter, the Establishment Clause prohibits government from “aid[ing] one religion, aid[ing] all religions, or prefer[ring] one religion over another.”² Excessive government entanglement with religion poses the danger of “advancing or inhibiting religion” by endorsing or placing “an imprimatur on one religion, or on religion as such, or to favor [any] sect or religious organization.”³ Some suggest that the Establishment Clause demands strict separation of church and state, but over time the Supreme Court has held that it generally “mandates governmental neutrality [and equality or evenhandedness] between religion and religion, and between religion and nonreligion.”⁴ The Free Exercise Clause aims to guarantee freedom of religious conscience and belief, as well as conduct, both of individuals and religious institutions. So, as a foundational matter, those clauses are understood as governing church-state relations and their formulation was intended generally as limitations on the federal government’s powers. And, as of the 1940s, the Religion Clauses were understood to also limit the powers of states.

The unique history of the struggles between, and relationships of, the Catholic Church and French monarchs and other political officials undergirds France’s approach to church-state relations. Briefly, Roman Catholicism dominated the religious life of France as early as the late fifth century when it was part of Gaul. Despite the strong roots that Protestantism had established in France by the mid-sixteenth century, the French government remained closely connected with the Catholic Church into the nineteenth century. In the interim, many religious battles interrupted the general pattern of Catholic religious dominance.

¹ U.S. CONST. amend. I.

² *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

³ *Gillette v. United States*, 401 U.S. 437, 450 (1971).

⁴ *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

After the French Revolution, Catholicism was favored only sporadically by several monarchs, but even that favoritism lasted only a short time.

The legal framework constructed immediately after the French Revolution set up two modes of thinking about religion, which led to great tensions. First, the French Declaration established the right of each individual to follow his or her own religious conscience in private while governing the expression of religion manifest in the public sphere. In particular, article 10 provided that “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.”⁵ Second, it intended a strong state, while maintaining the importance of a national, public religion. In other words, within a Gallican paradigm, the Catholic Church was recognized as part of the “public order.”⁶ Thus, non-establishment of religion was not mandated, and there was no right to form associations that the State would recognize officially.

As the years progressed, tensions escalated between the French Republic and the Catholic Church, whose clergy demanded varying levels of political, moral, and social authority. These mounting strains sparked further propagation of secularization. The importance placed on state protections for individuals’ private exercise of religious faith and conscience or their non-religious convictions intensified. At the same time, the state officially recognized religions within the public order to include not only Roman Catholicism, but also Calvinism, Lutheranism, and Judaism, thereby expunging distinctions between these organized religions.

⁵ Declaration des Droits de l’Homme et du Citoyen [Declaration of the Rights of Man and of the Citizen] art. 10 (1789) (Fr.).

⁶ See JOHN R. BOWEN, WHY THE FRENCH DON’T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE 22 (2007).

Laïcité further materialized as a unifying concept without formally being employed as a term in new laws. That would wait until adoption of the French Constitution of 1958. In the intervening years, Parliament passed the Law of 1901, which formally provided the right of citizens to form officially recognized associations, and the Law of 1905, entitled the “Law on Separation of Churches and State,” which has assumed a stature similar to that of the First Amendment. The latter law provides measures intended to implement church-state separation, including the revocation of recognition of Catholicism, Calvinism, Lutheranism, and Judaism as official religions. It also reaffirms the guarantees of religious conscience in the French Declaration by providing, “The Republic ensures the liberty of conscience. It guarantees the free exercise of religion, under restrictions prescribed by the interest in public order.”⁷ Together the laws of 1901 and 1905 implemented a redefined vision of religions as part of civil society. Now, approximately one hundred years later than in America, disestablishment took place in France.

So let’s turn to how these similar principles in the U.S. and France as applied in the contexts of tax accommodations.

Briefly, let’s return historically to the American colonies. As a practical matter, only established churches, as state agents, were *not* taxed by civil authorities in the American colonies. Because dissenting churches were considered private organizations, not state agents, local legislation generally did not exempt them from taxation. So, taxes were collected from dissenting churches were distributed to a colony’s established church, as were taxes collected from colonists. As the Revolutionary War began, however, a

⁷ Loi du 9 décembre 1905 concernant la séparation des Églises et de l’État [Law Concerning the Separation of the Churches and the State] art. 1 (enacted Dec. 9, 1905) (Fr.) [hereinafter Law of 1905], *translated at* www.concordatwatch.eu/showkb.php?org_id=867&kb_header_id=849&kb+id=1525.

disestablishment movement accelerated. The movement challenged exemptions from ecclesiastical taxes for church properties.

After the Revolutionary War, disestablishment spread among the states. Jefferson and James Madison rigorously opposed governmental subsidization of religion. In order to protect religion as a purely spiritual matter for individuals and to safeguard against a governmental establishment of religion, they were proponents of placing taxation in support of religion and religious teachings beyond the reach of state and federal legislatures. Perhaps Madison's influence on the design of the U.S. Constitution can be seen in its Article I conferral on Congress of authority to tax all secular and religious entities.

Despite this constitutional authority, as early as the Civil War, Congress imposed an income tax only on corporations that had shareholders, presumably to reach solely those entities perceived as profiting their wealthy investors. Based solely on their institutional structures and lack of profit motive, houses of worship and other religious organizations, along with educational and charitable nonprofits, were not subject to that tax. By 1875, our country had experienced significant Catholic immigration and anti-Catholic sentiments had grown. Catholic institutions were purported to have accumulated substantial wealth and power, which disturbed President Ulysses Grant. He supported Speaker of the House of Representatives, James G. Blaine, in an unsuccessful bid to pressure Congress into amending the Constitution to expressly prohibit the use of public funds for private parochial schools and other religious institutions, and to proscribe tax exemptions for religious organizations. As time moved forward and the Sixteenth Amendment to the Constitution was ratified in 1913, Congress was empowered to impose income taxes on all entities, including religious organizations. But Congress continued to follow its Civil War income tax approach of exempting religious organizations

(along with some secular nonprofits) from taxation. That same year, it enacted what is now section 501(c)(3) of our federal tax code (“Internal Revenue Code” or “I.R.C.”), which also exempts seven categories of secular organizations.

Tellingly, Congress has never justified the tax exemption for religious organizations on the basis of religion per se, that is, as a result of their religious nature, function, or activities, nor on grounds of the First Amendment. As the U.S. became a social welfare state, the explanation always has been grounded in the economics of religious organizations not having income to tax after providing social welfare services to the public, services which also alleviate some governmental burdens. So, the U.S. has an entrenched tax exemption for houses of worship and other religious entities, even though Supreme Court precedent suggests that, within certain limitations, an exemption from taxation is not compelled, but is permitted, by the First Amendment.

The Internal Revenue Service (“I.R.S.”) is charged with initially determining whether an organization qualifies for distinct tax treatment because it is a “religious” entity or, more specifically, a “church.” But as a special tax accommodation, houses of worship are presumed automatically to be tax-exempt under I.R.C. section 501(c)(3) without filing an application with the I.R.S.,⁸ although by refraining from filing an application their donors are not assured a contribution deduction under I.R.C. section 170. Where such a religious institution does file an application or its entitlement to tax-exempt status is later challenged, the I.R.S. relies on a fourteen-category family resemblance test for determining whether the entity is a “church.” Nonetheless, the I.R.S. generally has taken a position that “in the absence of a clear showing that the beliefs or doctrines under consideration are not sincerely held by those

⁸ I.R.C. § 508(c)(1)(A) (2006).

professing or claiming them as a religion, the Service cannot question the ‘religious’ nature of those beliefs,”⁹ because too much searching could result in violation of the Establishment Clause. Consequently, groups such as Scientologists and Jehovah’s Witnesses, treated by some European countries as cults, are treated as religions for tax purposes in the United States. Furthermore, once a religious organization is defined as a “church,” such houses of worship uniquely are presumed automatic tax-exempt status without filing an application with the I.R.S.¹⁰

In 1917, to spur giving to section 501(c)(3) religious and secular entities, Congress added section 170 to our tax code, which permits contributors to claim an income tax deduction for donations to these organizations. Pursuant to Supreme Court precedent, gifts deductible under section 170 are limited to “unrequited payments,” that is, those for which the transferor receives no measurable benefit in return and thus denotes some altruistic or donative intent. Year after year, donors give the largest proportion of their contributions to religious entities and not to secular section 501(c)(3) organizations.

Finally, as a general matter, the Supreme Court has upheld the constitutionality of tax exemptions for religious organizations while acknowledging they are functionally and economically the equivalent of direct government grants or economic subsidies.¹¹ Because of this functional equivalence,

⁹ I.R.S. Gen. Couns. Mem. 36,993 (Feb. 3, 1977) (finding that witchcraft qualified as a religion); *see also* I.R.S. Gen. Couns. Mem. 38,827 (Mar. 23, 1982) (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

¹⁰ I.R.C. § 508(c)(1)(A). The caveat for a house of worship refraining from filing an application is that their donors are not assured of entitlement to the I.R.C. section 170 contribution deduction.

¹¹ *See* *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 674–75 (1970) (property tax exemption); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 11 (1989). Nonetheless, as Justice William Brennan noted in his concurrence *Walz*, there may be a distinction between a tax exemption and a subsidy for purposes of constitutional analysis of the propriety of the exemption or subsidy itself. *Walz*, 397 U.S. at 690–91 (Brennan, J.,

in turning now to France, I will discuss not only tax matters but also certain grants beneficial to religion.

The Law of 1901 formally provided the right of official association status. So, post-enactment, although associations in France can be freely formed, only those secular and religious associations approved by the State are entitled to legal personhood, which permits ownership of real property and the receipt of cash legacies.

This State approval and various attributes of aid to religion appear ostensibly incongruent with article 2 of the Law of 1905, which provides, “The Republic does not recognize, finance, or subsidize any religious group.”¹² Indeed, the Bureau of Religious Affairs (*Bureau des Cultes*), a division of the powerful French Ministry of the Interior, is charged specifically with substantively reviewing the purposes and activities of groups claiming to be an organized religion. It alone determines whether a group qualifies specifically as an organized religion, as opposed to a cult, and whether it deserves treatment as a religious association. There currently are two categories of associations of State approved organized religions: first, *associations diocésaines*, or Catholic associations, and second, *associations cultuelles*, which include Protestant, Jewish, and Muslim associations.

The Bureau’s determination can affect the tax benefits a group receives under tax laws. *Associations cultuelles* and *associations diocésaines* have been accorded tax-exemption on cash donations received. By contrast, the Bureau has not recognized the Jehovah’s Witnesses as an organized religion and considers that group to be a cult. So, after the French tax authorities recently levied taxes amounting to millions of euros on the group’s receipt of cash contributions, the group

concurring). This point was later echoed by Justice Antonin Scalia, joined by Justice Anthony Kennedy, in *Texas Monthly*, 489 U.S. at 43 (Scalia, J., dissenting).

¹² Law of 1905, *supra* note 7, art. 2.

brought a lawsuit, claiming the levying of the tax inappropriate. The Court of cassation, France's highest civil court, agreeing with the lower courts, ruled that the tax authority had the power to impose the tax even though it had never previously been imposed on other religious organizations.¹³ None of the courts commented on whether, under the French Constitution, the tax violated any rights of the group to practice their religion or whether the tax had been levied in a discriminatory manner.

In addition to the tax-exemption for *associations cultuelles* and *associations diocésaines*, other forms of State and local government aid to religion might appear in conflict with article 2 of the Law of 1905. Nonetheless, other portions of that same Law actually allow for such financial support. Pursuant to articles 2 and 3, the State nationalized the existing buildings of the former recognized religions. Thus, those cathedrals, churches, and synagogues, schools, abbeys, monasteries, and other structures built before adoption of the Law became property of the State, and the State turned over many of those buildings, other than cathedrals, to municipal governments.¹⁴ Yet, under article 13 of the Law of 1905 the State may permit—and it does permit—the Catholic Church (or other previously official religion) the use of the

¹³ Cour de cassation, Oct. 5, 2004, Bull. civ. IV, No. 178, at 58 nn.95–96 (imposition of the sixty percent tax amounted to \$20 million).

¹⁴ Parenthetically, when the Law of 1905 was adopted, the Alsace-Moselle region in eastern France was under German occupation, and the treatment of this region would remain under the German model. This was a remnant of the Franco-Prussian War of 1870–1871. After World War I, the region was reunited with France, but in an agreement, the Law of 1905 would not be applied to the Alsace-Moselle region. This agreement would differentiate the treatment of religious buildings and activities; their management would remain under the German model. Also, because the prohibition in the Law of 1905 on financing or subsidizing religion does not apply, the constraints that I now proceed to discuss regarding aid to religious institutions throughout the rest of France do not apply in Alsace-Moselle. CE, Apr. 6, 2001, No. 219,379 (Fr.) (upholding this practice and affirming that state support for religious education in Alsace-Moselle does not violate the principle of secularism).

nationalized religious buildings.¹⁵ Interestingly, in an attempt to equalize or neutralize the treatment of Islam after an influx of Muslims, in 1920, Parliament voted to spend 500,000 French francs to construct the Grand Mosque of Paris, and the city of Paris donated the land. At least under general U.S. tax law principles, the Catholic Church's, Islamic, or other organized religion's use of these buildings at below fair market value, if untaxed, would be considered essentially the functional equivalent of a beneficial income tax exemption.

Finally, similar to the U.S. contribution deduction, France provides to donors, up to five percent of their taxable income, a "tax credit" of forty percent of the amounts contributed to approved *associations cultuelles* and *associations diocésaines*. Nonetheless, in contrast to Americans, French citizens' philanthropic giving is reported to be quite low, including to religious institutions, presumably partly due to the deep-rooted secularist culture.

It is clear from these short portraits that the different political, religious, and cultural histories of the United States and France significantly have influenced in nuanced ways how their guarantees of religious freedoms were formulated and implemented. Despite the two countries' sharing the value of strongly guaranteeing religious liberties, the countries' approaches have been quite distinct. *Laïcité* assumes a strong State, as opposed to religious governance in political and cultural matters, which the French historian Jean Baubérot describes as "Nation, constitution, [and]

¹⁵ Moreover, pursuant to article 19 of the Law of 1905, the Catholic Church is not responsible for financing repairs and restoration of those buildings. That responsibility is the State's, although its funding may be supplemented by collections from religious groups, tourists (such as in the case of the Cathedral of Notre Dame) and others. These provisions apparently have not been challenged in French courts.

law, became ‘sacred things.’”¹⁶ By comparison, the U.S. Supreme Court has described the First Amendment’s Religion Clauses as limiting government so that it cannot excessively interfere with religion. Despite these contrasting policies, when we compare the countries in 1789 as a starting point with their contemporary places in the context of government financially supporting religion through tax and grant benefits, it appears that while they maintain distinct characteristics, they have moved toward more parallel positions, prominently sharing some aligned features.

DEGIROLAMI: Thank you, Professor Crimm. Professor Martínez-Torrón.

MARTÍNEZ-TORRÓN: Let me first thank Mark Movsesian, Dean Simons, and all of the organizers of this event for providing me the opportunity and the honor to be here. Also, thanks to the rest of the people at St. John’s University for their hospitality.

My purpose here is to talk about a Spanish example which is related to a subject which is emerging in this meeting in different shapes—and for me, that subject is very important—and that is the conception, and the limits, of state neutrality when regulating the public sphere. I would say that the Spanish example demonstrates an effective way to ruin a good idea through a bad practice. That’s how I would describe the Spanish situation.

The good idea was education for democratic citizenship as a school subject. We had “civic education” in the past in Spanish schools, under Franco’s regime. Nobody paid much attention to it, fortunately, but we did have it, in theory, for many years. This subject disappeared long ago from our education system but reemerged in 2006, following,

¹⁶ IAN BURUMA, *TAMING THE GODS: RELIGION AND DEMOCRACY ON THREE CONTINENTS* 111 (2010) (citing JEAN BAUBÉROT, *HISTOIRE DE LA LAÏCITÉ EN FRANCE* (2000)).

apparently, a recommendation by the Council of Europe that both private and public school curricula should encompass “education for democratic citizenship.”¹⁷ This recommendation was, to a large extent, responding to the rapid and huge enlargement of the Council of Europe to the countries of Eastern Europe, which lacked a truly and well established democratic tradition. The Council was also responding to increasing Muslim immigration in many European countries. The idea was, in short, to try to identify European civic values and to educate the youth as to these values.

Currently the Spanish law requires that this school subject, which is known as “education for citizenship,” must be introduced in all public and private school curricula for pre-university education—elementary, secondary, and high school. The main statute and its subsequent regulations went into effect in 2006.¹⁸ It is interesting to note that, even before the law was actually implemented, it generated a very strong and contrary reaction in Spanish society. As of today, approximately eighty-thousand families

¹⁷ Recommendation Rec (2002) 12 of the Committee of Ministers to Member States on Education for Democratic Citizenship (Adopted by the Committee of Ministers on 16 October 2002, 812th meeting of the Ministers’ Deputies), *available at* <https://wcd.coe.int/wcd/ViewDoc.jsp?id=313139&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

¹⁸ The new school subject was introduced by the Organic Law on Education, Organic Law 2/2006, 3 May 2006 (B.O.E. 5 May 2006). In Spain, the name of “organic laws,” *leyes orgánicas*, is given to some statutes of particular significance that must be approved by absolute majority in the Parliament (Cortes). The 2006 Organic Law on Education was developed by some subsequent regulations, in particular the Royal Decree 1513/2006, 7 December 2006, with respect to primary education (B.O.E. 2006), the Royal Decree 1631/2006, 29 December 2006, with respect to secondary education (B.O.E. 2007) and the Royal Decree 1467/2007, 2 November 2007, with respect to baccalaureat (B.O.E. 2007).

have signed a written statement in opposition to this new subject.¹⁹ Which were the reasons of this remarkable social reaction against the law?²⁰

Sometimes, the reaction against the new curriculum has been presented as a sort of ultra right-wing opposition to educating youth in democratic values. No doubt, some of the people opposing the curriculum may be of this orientation, but the huge bulk of the opposition has nothing to do with ultra conservative people. Rather, it has to do with parents who understand that the law, and its implementation, has gone far beyond the purposes of the Council of Europe's recommendations. In other words, the reason of this social reaction is not a disagreement with education on human rights and civic values like respect, equality, solidarity, tolerance, et cetera. The actual reason is the clear understanding that some aspects of the new subject, as developed in its curriculum, were interfering with the rights of parents to decide the philosophical and religious orientation of their children's education. An

¹⁹ It is difficult to obtain precise figures, for conscientious objections are normally alleged at the local level. Let me add that the number of eighty-thousand families probably means much more in Spain than, for instance, in France, where there is a long tradition of brave spirit of protestation against public authorities. Many Spaniards are still reluctant, out of fear, to put their name in writing to express opposition to a particular governmental project.

²⁰ Among Spanish legal literature on this new school subject and the conflicts of conscience that it has created in a number of parents, see the critical studies of Mercedes Serrano Pérez, *La Objeción de Conciencia a Educación para la Ciudadanía en el Marco Constitucional de la Libertad Ideológica*, REVISTA GENERAL DE DERECHO CANÓNICO Y DERECHO ECLESIASTICO DEL ESTADO, May 2010; Ángel López-Sidro, *La Objeción de Conciencia a la Educación para la Ciudadanía ante los Tribunales Superiores de Justicia*, REVISTA GENERAL DE DERECHO CANÓNICO Y DERECHO ECLESIASTICO DEL ESTADO, May 2008; Lourdes Ruano Espina, *Objeción de Conciencia a la Educación para la Ciudadanía*, REVISTA GENERAL DE DERECHO CANÓNICO Y DERECHO ECLESIASTICO DEL ESTADO, May 2008; Carmen Garcimartín, *Neutralidad y Escuela Pública: A Propósito de la Educación para la Ciudadanía*, REVISTA GENERAL DE DERECHO CANÓNICO Y DERECHO ECLESIASTICO DEL ESTADO, May 2007; José María Martí Sánchez, *La 'Educación para la Ciudadanía' en el Sistema de la Ley Orgánica de Educación*, REVISTA GENERAL DE DERECHO CANÓNICO Y DERECHO ECLESIASTICO DEL ESTADO, Feb. 2006. From a very different perspective, in total support of the government's proposal, see Dionisio Llamazares, *Educación para la Ciudadanía, Laicidad y Enseñanza de la Religión*, 6 LAICIDAD Y LIBERTADES: ESCRITOS JURÍDICOS 219 (2006).

interference that sometimes is derived from the program itself and other times from practical abuses in its implementation in some schools.

Which aspects are these? On the one hand, a percentage of the recommended content of the new curriculum, and sometimes the mandated content, has to do with—and I'm quoting almost literally the words used by the Spanish regulations—the world of emotions, feelings of people, human relationships, the world of human affectivity, the need to construe a critical and autonomous conscience, as well as other issues related to human sexuality, different family models, reproductive health, sexual orientation, et cetera. The mere presence of these contents was considered by many parents, and by some religious communities—very clearly the Catholic Church, but other religious communities in the country as well—as implying a risk, in practice, of transmitting moral views at school that were in contradiction with the moral views of the parents, and therefore with their right to guarantee the education of their children according to their religious or philosophical convictions. In other words, the subject “education for citizenship,” as it was conceived, created the risk of moral indoctrination of young students in Spanish schools, against the Spanish Constitution²¹ and against the well-established case law of the European Court of Human Rights—especially *Kjeldsen*, in 1976, and *Folgerø* and *Zengin*, in 2007.²² According to the people opposing the law, this risk would not be only a consequence of the door that the program of the new subject opened for practical abuses. It was also the consequence of a certain trivialization of subjects with a very important moral dimension under the guise of “objective and scientific treatment”—ignoring the

²¹ CONSTITUCIÓN [C.E.] art. 27 (Spain).

²² See *Kjeldsen, Busk Madsen & Pedersen v. Denmark*, 7 Dec. 1976 (Apps. No. 5095/71, 5920/72 & 5926/72); *Folgerø v. Norway*, 29 June 2007 (App. No. 15472/02); *Zengin v. Turkey*, 9 Oct. 2007 (App. No. 1448/04).

moral dimension of subjects as, for instance, “sexuality” or “the world of emotions” entails in itself a certain moral indoctrination.

On the other hand, there was another part of the curriculum that was considered to be offensive for the parents’ rights, and not just because of the risk of potential abuses but rather because the mere description of some contents was itself inappropriate. For example, the curriculum described human rights and democratic values as the “ultimate and maximum source of morality.” These are strong words to be taught at school. One thing is to say that, in the public sphere, or in the civil society, we agree on certain common values that are our point of reference in organizing social or civic life, and a different thing is to teach the students what the ultimate and maximum source of morality is for themselves as persons—not as citizens, but as persons. Here, there is some confusion between what constitutes the private sphere and what constitutes the public sphere in the life on individuals. States can teach values that are valid for the public sphere but cannot teach what we must or must not believe in our private sphere, for this is something that belongs to the exclusive realm of each individual’s choice and is protected by the freedom of religion or belief (it is the realm of what the European Court of Human Rights has called the *forum internum*, on which no limitation can be imposed by the State).

The irony is that a curriculum that was supposed to transmit commonly shared civic values has created a strong social divide and an awkward situation in Spanish education. And allow me to reiterate that the negative reaction generated by the new school subject has not been impelled by ultra-conservative forces, but by parents who are very concerned about the fact that their children could be indoctrinated with moral views that, respectable as they may be, are in strong disagreement with their beliefs. In other words, the reaction against “education for citizenship,” as it has been designed, is caused by the fact that the

State—and this would be my main point in this presentation—is invading aspects of education that should be reserved to the realm of the family. This is not purely speculation or conjecture. It was very revealing, for example, that some of the well-known authors of the content of the new school subject actually preached the need for a “reeducation of the morals of Spanish youth.” That is, again, a very strongly worded statement. It oversteps, in my opinion, the State’s role with regard to education.

In the short time that “education for citizenship” has been implemented, there has been a number of practical abuses with a various degree of significance. Most of them involve the trivialization of issues that, for many people, have an important moral dimension. The mere fact that these issues are presented in class as not having any moral dimension is a type of moral indoctrination of the youth. We have had also a few gross abuses—fortunately not many. Allow me to be a little specific on this. When masturbation techniques are taught in class, under the subject of education for citizenship, this has nothing to do with democratic citizenship at all. When a teacher invites eleven year old students to experiment with their bodies and with the bodies of their classmates, of both sexes, and then to discuss in public their reactions and emotions—what has it to do with democratic citizenship? Other times, the students have been asked to explain in public their religion, their beliefs, their sexual orientation. All this reveals that there is much confusion about what education for citizenship means in the European context—or much deliberate misuse of the subject as a tool for “moral engineering.” In any event, quite a few teachers have actually overstepped the margins of what could be reasonably understood as civic education.

These gross abuses, together with other less gross, but still important abuses, have persuaded the opponents to the introduction of the new school subject that they were right in their analysis of the

flaws of the government's project and in their predictions about what could happen in practice. I should add that the implementation of education for citizenship has been very dependent on each region's authorities. Competence on education is mostly decentralized in Spain. In some regions, especially those governed by the Socialist Party, the authorities have often acted in a lenient way with respect to practical abuses. This has led many parents to declare themselves as conscientious objectors on behalf of their children—conscientious objection has therefore been a sort of last resource to prevent the moral indoctrination of their children. And this fact has led to a different type of abuse. In many schools, students whose parents objected to the curriculum have been publicly stigmatized and identified as ultra conservatives or not good citizens. Sometimes lists with the objector students' names have been published at the school. These are terrible things, especially at certain levels of education. This is certainly not an ideal scenario and explains what I affirmed at the beginning of my presentation—that “education for citizenship” in Spain can be taken as a counter-example, an example of how to ruin a good idea.

As could be expected, the new school subject has led to frequent litigation in Spanish courts. Currently, there are approximately three-hundred cases pending in different Spanish jurisdictions. Sometimes, this litigation arises from practical abuses. Other times it is the legal framework itself what has been challenged in the courts—and I would like to focus on this latter approach. The argument is that the legal framework of “education for citizenship” contains so many deficiencies that it permits and facilitates school administrators and teachers to distort this type of education, so that abuses can easily happen. In other words, the legal framework itself, and not only the practical implementation of the school subject, is the problem. Plaintiffs have relied on article 2 of the First Protocol to the European Convention, which provides that the State must respect the right of

parents to ensure that the education and teaching that their children receive is in conformity with their own religious and philosophical convictions,²³ and on the equivalent language in the Spanish Constitution, which is even more protective of parents' rights.²⁴

The Spanish Supreme Court issued some significant decisions on these claims in 2009.²⁵ It is not my intention to summarize here these decisions but four points are worth mentioning—in addition to pointing out the fact that these decisions were taken by a strongly divided court. First, the court declared that conscientious objection was not a permissible way to respond to potential abuses. The position of the court was, basically, that neither the students nor their parents had the right to opt out unless it were specifically granted by legislation. I think this is a wrong interpretation of the Spanish Constitution and the case law of the Spanish Constitutional Court on conscientious objection—the Constitutional Court held in 1985, with the occasion of a case regarding abortion, that the right of conscientious objection derived from the fundamental right to religious freedom and could be exercised directly, irrespective of legislative recognition in specific cases. On the other hand, as many scholars commenting on this decision have observed, the Supreme Court's position may prove to be impracticable. If the only way parents have to avoid the indoctrination of their children in school is to challenge directly the legislation or its regulations in court—or actual, concrete abuses by teachers—that will take time. Should their children suffer this indoctrination in their

²³ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.

²⁴ CONSTITUCIÓN [C.E.] art. 27, para. 3 (Spain).

²⁵ See STS 340/2009 (recurso no. 948/2008), Feb. 11, 2008; STS 341/2009 (recurso no. 1013/2008), Feb. 11, 2008; STS 342/2009 (recurso no. 905/2008), Mar. 4, 2008. For a detailed account and a critical view of these decisions, see Lourdes Ruano Espina, *Las Sentencias del Tribunal Supremo de 11 Febrero 2009 Sobre Objeción de Conciencia a EpC*, REVISTA GENERAL DE DERECHO CANÓNICO Y DERECHO ECLESIASTICO DEL ESTADO, May 2009.

education for years, until they finally obtain a just solution from the courts? It is certainly difficult to accept the idea of experimenting with children's education.

Second, the Supreme Court declared that two important decisions from the European Court, *Folgerø v. Norway*, in 2007, and *Zengin v. Turkey*, also in 2007, were not applicable to the issue of Spanish law on civic education. You are probably familiar with these decisions. Very briefly, in these cases, some families successfully challenged systems of religious education in their respective countries; these systems were supposed to be neutral but in practice they were not. The Spanish Supreme Court affirmed that *Folgerø* and *Zengin* did not apply because they related to religious instruction, not civic education.

I was astonished when I read this in the court's opinion, because the *Folgerø* and *Zengin* decisions explicitly affirm—following the European Court's doctrine established in *Kjeldsen*—that the protection of the parents' rights granted by article 2 of the First Protocol to the European Convention applies to all subjects of education and school curricula—indeed, it applies to the entire setting of the school. Actually, article 2 was used in 1983 in *Campbell & Cosans v. United Kingdom*, a European Court's decision relating to physical punishment in public schools in Scotland—the court recognized the parents' right to refuse that type of punishment for their children.²⁶ The main reason I can see for the Supreme Court's statement is that *Folgerø* and *Zengin* implicitly affirmed that, when you have a legal framework for a specific type of education with a high moral profile, and that framework can lead to practical abuses that amount to indoctrination of students, there should be an expeditious way to deal with this problem in practice, in particular the recognition of a right to opt out—the lack of practicable ways to opt out was

²⁶ *Campbell & Cosans v. United Kingdom*, 25 Feb. 1982 (Apps. No. 7511/76 & 7743/76).

one of the reasons why the European Court declared that the Norwegian and Turkish programs of religious instruction, which had the appearance of not being completely neutral, were in violation of parents' rights under article 2 of the First Protocol. This is something that the Supreme Court of Spain was probably not prepared to accept.

The third point I would like to mention is that the Spanish Supreme Court specifically said—and I find it very reasonable—that the State may promote ethical values that are implicit in or derived from human rights and basic constitutional principles. This is, no doubt, a sort of moral indoctrination by the State, because human rights and certain constitutional principles are clearly based on moral values. When, for example, we preach equality of legal treatment for all individuals, irrespective of their religion, race, sex, national origin, et cetera, we derive that principle from a particular moral conception of human beings, namely the equal moral dignity of human beings. The State can—and probably must—promote the teaching of these values in school, although the State cannot require internal adherence to those values, or base students' grades in these subjects on students' internal adherence. Students should have total freedom of choice with respect to what they believe or not believe. And parents should be free to indoctrinate their children in values different from those values that the State thought were grounded in, or derived from, "human rights and constitutional values." This is part of what the European Court has called the *forum internum*, an aspect of religious freedom that the State has no power to limit.

The fourth point is that the Supreme Court took an interpretive approach to the law and regulations on "education for citizenship." The court found that the deficiencies of some legal provisions could lead to practical abuses, but, instead of declaring them void, explained what the right interpretation of these provisions was. Many scholars have

criticized this approach of the court. In Spanish practice, the Constitutional Court has sometimes adopted this type of interpretive approach—when a vague statute or a statutory provision may lead to unconstitutional practices or consequences, instead of declaring it directly unconstitutional, the court has affirmed that the relevant statute or statutory provision is constitutional exclusively when interpreted in a specific way; any other interpretation would be unconstitutional. It is unclear if the Supreme Court can also adopt this interpretive approach. The Supreme Court is the highest court within the ordinary judiciary, while the Constitutional Court is a totally different thing—it is the supreme interpreter of our Constitution.

Leaving aside the Supreme Court's decisions in 2009, there have been other criticisms with respect to the government's attitude in the design and development of this new school subject, and with respect to the training of teachers that should implement it. We may understand these criticisms better in the light of a very interesting document, prepared by a group of OSCE experts, which contains guiding principles for neutral teaching about religion or belief in public schools.²⁷ Among other things, this document explains that, in order to establish a system of neutral religious instruction in public schools—which is a very difficult thing to do—it is important to set up an inclusive procedure to guarantee the actual neutrality of teaching and avoid the indoctrination of students. A detailed and careful process of dialogue with civic society should be followed. Nothing like this was done by the Spanish government, neither in the preparation nor in the implementation of the law. Indeed, the sharp division of society on this subject has been of no

²⁷ See OSCE/ODIHR ADVISORY COUNCIL OF EXPERTS ON FREEDOM OF RELIGION OR BELIEF, TOLEDO GUIDING PRINCIPLES ON TEACHING ABOUT RELIGIONS AND BELIEFS (2007), http://www.osce.org/publications/odihr/2007/11/28314_993_en.pdf. This document deals with the difficulties of this type of religious education and contains detailed recommendations to make it efficient and actually neutral.

concern to the government. That, I believe, was a grave mistake. When you see that something that is supposed to build citizenship is in fact doing the opposite, you should be asking yourself, have we done something wrong? In my opinion, the government should have dealt with the real problem and initiated an open dialogue with the stakeholders that are entitled to have a say on this matter. In addition, the government refused to accept the mere possibility of including any provision for opt-out rights as a way of dealing with practical abuses and protecting students from excesses by teachers—this is something particularly relevant in a mandatory school subject that has many moral implications and whose real neutrality raises many doubts. Finally, the government did not establish an appropriate procedure to guarantee the qualification and training of teachers of these subjects, which are essential in subjects like this.

I wish I could be more specific in these points but I am already out of time. Allow me just to mention briefly what are, in my view, the two most significant issues that the case of education of citizenship in Spain has raised.

First, which are the limits of the state's moral indoctrination of the youth? We have this principle in the case law from Strasbourg: the State educational system may not indoctrinate students against the parents' wishes. But, at the same time, it seems logical that the state can require the teaching of civic values that are embedded in human rights and in fundamental constitutional values. This is, in my view, a sort of moral teaching—that is, indoctrination—and a very legitimate one, irrespective of whether parents agree or not. However, the State can never go beyond that—it can never require internal adherence to those moral values, because freedom to believe, and freedom to choose the subject of our own beliefs, is absolute.

Second, is it really possible to deal at school, from a

purely scientific and objective perspective, with certain subjects that may have many and profound moral implications—such as, for instance, civic education, religious education, et cetera? In my opinion it is possible; difficult but possible. However, real objectivity requires that teachers point out that those subjects, for many people, have a very important moral dimension, and in this moral dimension it is not for the State to supplant the role and competences of the family. Therefore, teachers must remark, with all clarity, that it is not for the State to say anything on the moral component of those issues, for this belongs to the realm of personal choice. Teaching those subjects without pointing out their moral dimension would not be objective. The mere fact of ignoring their moral dimension would be a trivialization that would entail a moral indoctrination—passive moral indoctrination, perhaps, but still moral indoctrination. All this shows that this sort of teaching requires a very high professional and moral qualification in teachers, which takes time and is not easy to achieve. Neither improvisation nor haste are good companions on this trip.

This has been the case of “education for citizenship” in Spain. It is an interesting but very difficult project. Ignoring the difficulties has been probably the reason why the effect has been, until now, the opposite of what the authors of this educational project declared—social division instead of social cohesion around certain civic values.

Thank you.

DEGIROLAMI: Thank you, Professor Martínez-Torrón. Professor Zoller.

ZOLLER: Good afternoon. First of all, I would like to thank Professor Movsesian for having invited me to this panel, and also Professor DeGirolami for giving us such good directions as to what we should talk about this afternoon. My understanding is that we

should talk about *laïcité* in a comparative perspective, right? So, this is what I intend to do, but from a very modest viewpoint.

My presentation will deal with the following question: what is the place of *laïcité* in the debate on President Sarkozy's proposal to ban the full veil? How do we relate *laïcité* to the ban on the full veil in the French Republic? I will focus mostly on a very interesting, very rich, comprehensive study of the subject by the Conseil d'État. Let me start by giving you the context of that report, the Conseil d'État being, as you know, a crucial institution in the French Republic.

Last January, the French Prime Minister requested an advisory opinion from the Conseil d'État on a possible ban of the full facial veil. In his letter of mission, the Prime Minister said that the female garment known as the burqa, or niqab, was "at odds with the Republican conception of life in society" and raised the question of "whether there are possible legal grounds for preventing social practices of this kind in a democratic society." The Conseil d'État's advisory opinion, titled "Study of Possible Legal Grounds for Banning the Full Veil," held that "no incontestable legal basis can be relied upon in support of a ban on wearing the full veil as such."²⁸ In other words, there is no solid legal ground for a total prohibition of all facial masks, whatever they may be, including a complete mask of the face, such as the niqab. Unless an undisputable legal ground for the ban could be found, a ban of the full veil would be unlawful.

Among the various possible legal grounds for the ban, the Conseil d'État considered *laïcité*—see, in

²⁸ CONSEIL D'ÉTAT, STUDY OF POSSIBLE LEGAL GROUNDS FOR BANNING THE FULL VEIL 19 (2010) [hereinafter CE STUDY], available at http://www.conseil-etat.fr/cde/media/document/RAPPORT%20ETUDES/etude_voile_integral_anglais.pdf.

particular, pages 17–18 in its opinion.²⁹ These two pages give witness to important changes in the French approach to laïcité. This is the point I will comment upon from a comparative perspective. My main argument is that the Conseil d’Etat, in a few sentences, has brought laïcité, the French version of secularism, very close to the conception of religious freedom as enshrined in the First Amendment. It has changed the nature as well as the effects of the traditional French principle.

The key passage in the Study by the Conseil d’Etat is at page 17. I will give the French quote and then provide the official English translation: “Même si le port du voile intégral peut être regardé par ceux qui s’y livrent comme ayant une connotation ou une finalité religieuse, il ressort des travaux menés par la mission de l’Assemblée nationale sur la pratique du port du voile intégral que la question des justifications religieuses de cette tenue ne fait pas l’objet d’un consensus.”³⁰ Which means, in English: “Even if the full veil is regarded by those who wear it as having a religious connotation or purpose, it has emerged from investigations by the parliamentary mission into the practice of wearing the full veil that there is no consensus on its religious significance.”³¹ Concretely, if wearing the full veil may usually be regarded as motivated by religious reasons, in practice we are unsure that religion is always the sole motive for wearing it. For example, conscientiousness in one’s appearance could explain wearing the full veil. Some women may think that being completely hidden behind a black veil makes them look more mysterious, therefore more attractive, more desirable, and sexier. And, therefore, the Conseil d’Etat goes on, laïcité cannot be retained as a legal foundation for a total ban.

²⁹ CONSEIL D’ÉTAT, ETUDE RELATIVE AUX POSSIBILITÉS JURIDIQUES D’INTERDICTION DU PORT DU VOILE INTÉGRA 17–18 (2010) [hereinafter CE ETUDE], available at http://www.conseil-etat.fr/cde/media/document/avis/etude_vi_30032010.pdf.

³⁰ CE ETUDE, *supra* note 29, at 17.

³¹ CE STUDY, *supra* note 28, at 19–20.

What does that statement mean? It means that wearing the veil is no longer the expression of a religious creed, but rather the expression of an opinion. The full veil is speech, symbolic speech. Its legality should therefore be governed by freedom of speech, not by freedom of religion. If the full veil is just speech, the principle of *laïcité* indeed becomes irrelevant.

This is a major change in the approach to *laïcité*, insofar as it implies that religious practices are to be accepted in the public sphere as long as they may be regarded as speech. But that is precisely what *laïcité* precludes or, more exactly, what it used to preclude. In the traditional French approach to *laïcité*, religion is not just speech; it is religion and subject to a special regime. And that brings us to the second point that I would like to develop here a little more at length. The position of the Conseil d'État implies a change in the consequences of *laïcité*.

According to the Conseil d'Etat, "Le principe de *laïcité* impose ainsi la *stricte* neutralité de l'Etat et des collectivités publiques vis-à-vis des pratiques religieuses."³² Because of the adjective, "stricte," neutrality of the State means that the State must be indifferent to religious practices; it must pay no attention to religious outfits and respect religious freedom, which is not severable from freedom to speak one's mind. Freedom of conscience goes hand in hand with freedom of expression. Both freedoms are protected by the French Constitution and the European Convention of Human Rights.

It follows from this approach to neutrality that the Conseil d'Etat has adopted a mild or soft version of *laïcité*, a noncombative approach that brings that concept closer to the American concept of religious freedom. French exceptionalism in religious

³² CE ETUDE, *supra* note 29, at 18 (emphasis added). The English version reads: "The principle of secularism thus requires a strictly neutral attitude on the part of the state and public authorities towards the practitioners of a religion and vice versa." CE STUDY, *supra* note 28, at 20.

matters is dead; laïcité is no longer dramatized and amplified. Religious freedom is the rule and religion may be expressed freely in the public sphere. Separation between church and state does not mean or, rather, no longer means, banning all religious expressions from the public domain. This is precisely what the United States Supreme Court recently held in *Salazar v. Buono*: “The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm.”³³

When is the State entitled not to be neutral? The Conseil d’Etat mentions two situations: first, when the functioning of the *service public*—the public administration—is at stake, which is the case, for instance, with the 2004 statute prohibiting head scarves for little girls at schools; it is an exception justified by the context; and, second, when the religious practice or speech implies “non compliance with the common rules governing the relations between public communities and private individuals.” Here, the Conseil d’État relies on the decision by the Conseil Constitutionnel.³⁴ Save for the narrow exception regarding the functioning of the public service, the Conseil d’État’s position is very close to that of the United States Supreme Court in *Employment Division v. Smith*: a religious practice may not go against and a fortiori breach a “valid and neutral law of general applicability.”³⁵ And that’s all.

Such is the case with religious practices or principles that go against the principles of the Civil code. But that is not germane to the French Republic. With respect to some Islamic principles—the sharia, in particular—the European Court of Human Rights said, in the case of *Refah Partisi* (dealing with Turkey), “It is difficult to declare one’s respect for democracy and

³³ *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010).

³⁴ CC decision no. 2004-505DC, Nov. 19, 2004, Rec. 173, para. 18.

³⁵ *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.”³⁶

So, where does that bring us? It brings us to this. Laïcité cannot provide legal foundation for a total prohibition against the display of any religious beliefs in the public space and, therefore, could not justify a total ban of full facial veils in the public space. Laïcité comes into play in the relations between public persons and religions only, and it may not be imposed on the civil society save within the context of some public administrations—as is the case with public schools.

I would even go so far as to say this. Laïcité is no longer viewed as a civil religion that could replace religious values. The tone was set on December 20, 2007, when President Sarkozy said that “the school master will never replace the priest or the pastor,” because, in his opinion, “he [the schoolmaster] will always miss the experience of sacrificing his own life and lack that charisma which flows from a commitment carried by hope.”³⁷ President Sarkozy elaborated on positive laïcité and negative laïcité, explaining that the former should replace the latter.

The Study of the Conseil d’Etat goes in that direction. Laïcité as a fighting device against Catholicism is no longer necessary; it has fulfilled its historic mission, which was to put an end to Catholicism as the dominant religion in social life

³⁶ *Refah Partisi v. Turkey*, 37 Eur. Ct. H.R. 1, 44 (2003).

³⁷ *Allocution de M. le Président de la République Française*, PRÉSIDENTE DE LA RÉPUBLIQUE, Dec. 20, 2007, <http://www.elysee.fr/president/les-actualites/discours/2007/allocution-de-m-le-president-de-la-republique.7012.html?search=Latran>. The official French version reads: “[L]’instituteur ne pourra jamais remplacer le curé ou le pasteur . . . , parce qu’il lui manquera toujours la radicalité du sacrifice de sa vie et le charisme d’un engagement porté par l’espérance.” *Id.*

and to replace it with republican values. That does not mean that the burqa will not be banned on French territory. The bill may go forward and be eventually adopted. But laïcité is not likely to be its legal foundation. It will be, maybe, the dignity of women, or, maybe—this would be my position—citizenship. But it will no longer be laïcité. And that is a major development in the evolution of that quintessentially French constitutional principle.³⁸

Thank you very much.

DEGIROLAMI: Thank you very much, Professor Zoller. We have some time now for questions and answers. If you would just signal to me that you have a question, I will put you in our queue. And maybe I will exercise the moderator's privilege of asking the first question, which is to Professor Zoller. Just the last thing that you said, Professor Zoller, that citizenship ought to be the legal ground for the ban of the burqa. Would your position then entail that the ban shouldn't be effective for noncitizens?

ZOLLER: Foreigners? In theory, they should be entitled to wear the burqa. This is my position, my personal position, and it has, of course, no legal weight other than my opinion, that's all. We do not tell foreigners the way to dress. This would be absurd. But, French citizens, yes. Yes, we could. Or, to put it better, we should.

Citizenship is a very meaningful value. The traditional French approach to citizenship, particularly among constitutional lawyers, is to reduce it to the right to vote. I think that it is much more than that. I must confess that my position is strongly influenced by American case

³⁸ On October 7, 2010, the Constitutional Council handed down its decision in the so-called integral veil case. CC decision no. 2010-613DC, Oct. 7, 2010, J.O. 18345. It validated the bill on several grounds, which are listed in the third paragraph of its opinion. Most of them are drawn from the Declaration of 1789. One is taken from the Preamble of 1946. Article 1 of the French Constitution of 1958, which embodies the principle of laïcité, is conspicuously absent.

law and the position of the Supreme Court on citizenship in that wonderful case of *Brown v. Board of Education*,³⁹ which I find of profound implication, profound importance on the meaning of citizenship. Citizenship means to have relationships with each other. Just as a statute cannot legitimately segregate people, as the Jim Crow laws used to do, you cannot segregate yourself from others. Sure, you can segregate yourself by living at home, living in your castle, and seeing nobody. And that is, absolutely, your fundamental right. But when you are participating in social life, can you behave in a way totally disconnected from other people?

Look, we have in the penal code the obligation to save someone's life if it's in danger. But such an outfit, I mean, the burqa, could preclude you from fulfilling your civic duty. In French law, you have the obligation to try to save a person who is drowning, if it poses no danger to you, if it's completely harmless. Suppose there is a pole right there on the wharf and you see somebody drowning. You must take the pole and hand it to the person. If you do not save the person, you can be punished under the penal law. This is a duty of citizenship. That concept implies that people cannot be segregated from one another. This is my position.

DEGIROLAMI: Rosemary?

SALOMONE: Yes, Javier, your presentation resonated for me in so many ways, in terms of looking at education for democratic citizenship. I have a comment and a question. There seems to be something ironic here. I think you suggested that the parents are invoking the U.N. Convention on the Rights of the Child. Is that what you said?

³⁹ 347 U.S. 483 (1954).

MARTÍNEZ-TORRÓN: The European Convention on Human Rights, article 2 of the First Protocol.

SALOMONE: Ah.

MARTÍNEZ-TORRÓN: It recognizes, in the context of the right to education, that the parents have the right to ensure the education of children in conformity with their religious and philosophical convictions. The wording of the Spanish Constitution looks a little different. It includes this right, but it may go even beyond that.

SALOMONE: In the United States, religious fundamentalists have opposed U.S. ratification of the U.N. Convention on the Rights of the Child for exactly that same reason, that it would contravene their rights to direct the education of their children. And, for that reason, it's just us and Somalia who have not ratified the U.N. Convention—and Somalia has no government.

So, in terms of education for democratic citizenship, it seems—I'm a little bit familiar with the Council of Europe and their effort to develop a sense of European citizenship. That's what I think they're really trying to do. But it seems to me that the Spanish program has a much more comprehensive definition of citizenship. It's not as comprehensive as the French definition, but far more comprehensive than we would ordinarily understand. Was there another agenda here?

MARTÍNEZ-TORRÓN: That's the fear of many people. And a part of the problem is this idea that has been described as "social or moral engineering"—the idea that the government—an allegedly "enlightened" government—can dictate to the population what the population should believe with regard to morals. Personally, I think that the people behind this educational project actually lacked the self-restraint that would have allowed them to distinguish between, on the one hand, the realm of public morals and citizenship, that is, the realm of public life, and, on the other hand, a

different dimension in which every person must make his or her own choices. And, while children are minors, those choices are made by parents. No one can substitute families in that role. My impression is that the actual intention of some of these people was to replace the role of families because they thought that families are wrong with regard to how they educate their children—so they could be thinking: we are going to educate their children instead of them “in the right way.” This is the fear, I would say, of most of the families behind the opposition to the project. And some of the opposition has to do with the fact that a substantial part of the curriculum would be totally unnecessary from the perspective of the Council of Europe recommendations. Those subjects shouldn’t be in the curriculum. But once they are in the curriculum, because they have a moral dimension, the alternative is this: either that moral dimension is treated by teachers with extreme care or there is indoctrination of the youth beyond the state’s legitimate competence.

SALOMONE: They go so far beyond the Council of Europe recommendations, but they were presented as a response to the recommendations.

MARTÍNEZ-TORRÓN: Right.

DEGIROLAMI: Okay, thanks very much. Next up is Nathalie.

CARON: Thank you. Thank you to all presenters for their papers. Elisabeth, your paper was a nice complement, I found, to what I said about the three different approaches to laïcité today: positive laïcité on the one hand, *laïcité en mouvement*, on the other hand, and *laïcité de combat*, by the more militant. And you indeed said that the Conseil d’État has a noncombative approach to the problem.

However, Jean Baubérot, the historian of laïcité, who is a proponent of *laïcité en mouvement*, is also against the ban on the burqa, and he is not close to President Sarkozy. So, when you say that French

exceptionalism is a thing of the past in terms of laïcité, that laïcité is no longer combative and that we have something which is close to President Sarkozy's way of looking at things, well, I wonder if you're not overlooking this other approach, defended by people like Baubérot and others who are against the ban on the burqa without necessarily being in favor of positive laïcité the way President Sarkozy sees it. Do you know what I'm saying?

ZOLLER: Yeah, absolutely. The advisory opinion by the Conseil d'État is extremely important because of the place of the Conseil d'État as an institution and what it represents and the way it works. And we know that what it does is usually carefully combed and screened and studied and discussed and debated, so we can be sure that all arguments have been weighed with great care, including probably *laïcité en mouvement*.

CARON: Can I have a follow-up question?

DEGIROLAMI: You may.

CARON: You said, Elisabeth—and this is also a reaction to what Rosemary said. About the 2004 law, Elisabeth reminded us that it was about girls being prevented from wearing the veil. But, again, the law is not about the veil. It's about conspicuous religious signs. It's also about crosses and also about the kippah, right? And Rosemary, earlier on, said that the reasons for the ban on the veil had nothing to do with public safety. You said something like that. And what I wanted to bring up here is the issue of anti-Semitism. We haven't mentioned it yet today, but I wonder if—well, this is something which we don't talk about a lot in France because there is some kind of taboo here about this. But I remember when we had this big debate over the veil in 2003 and 2004, there was this thing about the fact that in schools there might be fights between kids, between Jews and Arabs—and all Arabs here are expected to be Muslims.

So, I wonder how that plays out in the debate. We don't talk about it, but maybe we should remember that there is some anti-Semitism, again. That is an issue here, isn't it? When you say that it has nothing to do with public safety, I don't know, maybe there was something there. We focused on the veil, we focused on young girls and hijabs, but we didn't say a word, or we said hardly a word, about the kippah. But it was also about the kippah.

SALOMONE: Perhaps I'm wrong, but the kippah issue preceded the 1989 expulsion of the girls over the veil. I believe that was the case. So, that started percolating before the veil issue even began.

ZOLLER: Yeah, but the rationale of the 2004 statute, which addresses, as you said, all religious artifacts or devices, I mean, the cross, the kippah, the veil, anything conspicuously visible.

SALOMONE: Turbans.

ZOLLER: Turbans, yes, anything. The rationale for this is that a young child has no capacity to choose freely what he or she wants to believe. A young child does not have what we call in French, *libre-arbitre*, that is to say, the full ability to think as a rational person. This is the key reason for the 2004 statute. And in that sense, yes, it was supported by *laïcité*—yes, in that sense. It's a statute that was definitely supported by *laïcité*, on the ground that, until a certain age, we are not sure that the person has really chosen to wear that religious artifact, or garment, or whatever.

SALOMONE: Well, can I just make a quick response to that—

DEGIROLAMI: Sure, sure.

SALOMONE: The assumption there, though, is that the parents cannot make their choice for them. I mean, what you're talking about the capacity—

ZOLLER: Absolutely.

SALOMONE:—of the child to make those independent judgments. In U.S. culture, we would assume that the parents have—

LAYCOCK: The parents, yeah.

SALOMONE:—the parents can make that choice.

LAYCOCK: You could take the problem from a different viewpoint and say, well, after all, the parents could make the choice for the children just by sending their children to the private schools.

DEGIROLAMI: Let me interject that we have a few more people in the queue, as interesting as this discussion is. Mark, you're next up.

MOVSESIAN: Thank you very much. I enjoyed all of the presentations. I have two quick questions, one for Elisabeth, one for Javier.

Elisabeth, I very much enjoyed your talk, especially your relating *laïcité* specifically to Catholicism. As an outsider reading the history, that seems very much the case. Even the word “*laïcité*” suggests a contrast with something—“clericalism,” maybe? The laity versus the Catholic clergy, right? And I understand your point that that particular fight is now over, largely. And yet, people are still using the word “*laïcité*” to talk about other religions, too. And I wonder, is this an instance of “the song is ended, but the melody lingers on?” What explains the fact that people are still talking this way about *laïcité*?

And, for Javier, I wonder about the nature of the exit option in Spanish society. For example, in the United States—and Doug knows more about these cases than I do, I'm sure—most of the time, parents who are upset about similar things in the public schools lose, ultimately, and are told, “Well, that's how it is; this is the public school.” And, oftentimes, they seek to exit. And, especially in America, now, particularly among Evangelical Christians, there is the concept of homeschooling,

in which you just—you educate your kid at home. There are certain exams that the kids have to take, I believe, but they're educated by the family at home. So, there is an exit option. And I wonder what the nature of that is in Spanish society.

DEGIROLAMI: Maybe Elisabeth can go first.

ZOLLER: I think you're right. It may bubble up a little more in the public debate, but certainly not with the same background and consequences as before. It may also mean—this combative *laïcité*—that religion should be out of the public sphere. Maybe that's what it means for certain people. It's certainly not the position of the Conseil d'État. *Laïcité* also survives in the sense that it has become very difficult to be indifferent to religion in the public sphere. In that sense, yes, *laïcité* survives. Indifference—you know, “we don't care”—is difficult, because of this history and this fight against Catholicism as the dominant religion. So, this is how I would explain it.

MARTÍNEZ-TORRÓN: I thought that the main subjects that have been raised in your country related to the dispute between creationism and evolutionism. I think there is a different story behind that dispute, because of the social and religious context of the dispute. Also, when you teach science, it is possible to stick to the facts that have been proved by the state of science at a given time. You don't need to make moral judgments. If you do, then you are indoctrinating people. If some teachers do, then you have every right to complain.

I think that the Spanish situation is different because it relates directly to questions of morality. It's not just that the program allows for isolated abuses by a few teachers. It's that it creates an atmosphere in which teachers can say whatever they want and are entitled to replace the role of parents in certain areas. For example, to put it more clearly, some of the classes refer to the use of contraceptives. You can trivialize that issue because, for some people, it is a trivial thing. For

some families, though, it is a serious thing. It would be as if, one day, for the sake of self-defense, teachers start explaining how to use a gun. If you trivialize the use of a gun, you are touching a very sensitive, moral dimension of human life. And, for some families, the use of contraceptives is exactly the same.

About the exit option, in Spain we don't have this sort of easy alternative. In Spain, we have public schools, which cover approximately two-thirds of the entire education system, and private schools, most run by Catholic institutions, that cover one-third. We don't have a homeschooling system. And, actually, this is a very interesting subject, because the issue has been raised by some families in isolated parts of the country. We don't have any tradition about homeschooling, though. It's not forbidden, as it is in some European countries, but it is not regulated, either. There is basically a void in the legislation.⁴⁰

But the presumption, I would say, is that homeschooling is not permitted, and therefore the alternative parents have is either to move the kid to another school or to take the kid to a private school. Very often, this entails an economic burden. Our system is not as generous as other European systems with regard to the financing of private education. It depends on the regions. Each region makes its own choice about how and when to fund private education. And the tricky part of it is that private schools only receive approximately half the money per student as public schools do. Which means in practice, curiously, that a student in a public school is worth double the student in a private school. At the same time private schools are prohibited from demanding additional money from parents. It is certainly a bizarre situation.

⁴⁰ In a recent decision, the Spanish Constitutional Court held that the legislator is entitled both to legalize and illegalize home schooling without infringing the constitutional rights of parents or the state's constitutional obligations in the realm of education. *See* STC 133/2010, Dec. 2, 2010.

DEGIROLAMI: Our last question of the day is from Brett Scharffs.

SCHARFFS: My question is for Elisabeth. I agree with Nathalie that your presentation was a really interesting counterpart to hers. I wish you had been here this morning, because I got very different impressions of the social debate about laïcité from your two presentations. So, Nathalie, maybe I'm looking for a response from you, as well.

Elisabeth, if I understood you correctly, you were describing a situation in which laïcité, as a singular conception, as a uniquely French conception, was in a state of decline, in which the concept had been domesticated. And, if I am correct, I detected an air of sadness that laïcité was becoming a little bit more like the United States' conceptions of religious freedom—

ZOLLER: Everybody knows here that I am a great friend of the United States. Absolutely nothing to be sorry about; on the contrary—

SCHARFFS: —Well, be that as it may, from Nathalie's presentation this morning, I got a little bit of a different picture, that there was on the ascendance a conception of laïcité that was a little bit more militant, a little bit more hard-line, a little bit more, not just anticlerical, but antireligious, that was a little bit more hostile to religion per se and to Islam in particular. And I must say that, viewed from outside, as a distant and not particularly attentive observer, that sounds a little bit closer to the truth. I mean, we see the 2004 law as one step in the direction of trying to further displace religion from public life and as an expression of, if not Islamophobia, at least a certain view about what the headscarf means as a symbol and who gets to decide what it means as a symbol. And the recent proposals in the Winter and Spring of this year about the full ban, I think, are viewed by many as a continuation of that trend, as the next step down this same road. And that would be viewed as a part of this reenergization of a

muscular conception of laïcité, perhaps a secularism rather than a secularity. And I would perceive a further divergence of U.S. and French conceptions. I wish I could agree with your description, but it feels quite the opposite of what I'm sensing in the direction of the two debates.

ZOLLER: I think the two laws, the currently pending bill and the 2004 law, do not have common ground. They are not the same thing, if only because the ban of the full veil, or the full mask, actually—interestingly enough, they had to refer to a “mask” and not a “veil,” because otherwise it would have been obvious that the bill discriminates against a specific religion and is especially targeted against one religious group. But article 1 of the French Constitution says that the law cannot discriminate among people on the basis of race, national origin, and religion. We are exactly like in the United States in that respect. In the 2004 law, no religious group in particular is targeted. It is, in fact, as Nathalie said. Absolutely no religion in particular is targeted. All religions are covered.

In addition, the 2004 law defends the role of the State as a public educator, and is consistent with the philosophy of Condorcet and the Enlightenment, that the first mission of public education is to open minds, to give people the tools to create themselves, to find by their own judgment their place in the universe, not being taught by external groups what they have to think. It is the philosophy of giving people the capacity, without any outside constraints, to make the choices that they want. For me, maybe because I am so close to the United States, I find that we have so much more in common than you believe, so much more in common. You know, when Justice Kennedy talks about the right of every individual to have his or her own conception of the mystery of life,⁴¹ it's

⁴¹ For an illustration of the common inspiration in Justice Kennedy's views, see, for example, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (“the right to define one's own concept of existence”), and *Laurence v. Texas*, 539 U.S. 558, 562 (2003) (“autonomy of self”).

exactly the same thing in the French Republic, exactly the same thing. The 2004 law is based on that philosophy. Also, after all, the public schools are the only place where we integrate young kids from immigrant backgrounds. That is absolutely crucial—and the Supreme Court had exactly the same idea regarding the role of public schools in the states, exactly the same philosophy. So, I would not say that there is a continuum between the 2004 statute and the current pending bill. And, in fact, the Conseil d'État, in its opinion on laïcité, said it very clearly.

DEGIROLAMI: Nathalie, last word.

CARON: Thank you. I agree with Elisabeth that we have many points in common that we're not necessarily aware of. So, that's one thing. And, to respond to Brett, well, actually, the people I spoke about this morning are reacting to what Elisabeth described, this change in the interpretation of laïcité, and they are worried about it. Among the other examples I gave, I spoke about the *Le Monde Diplomatique*. I think that these people in particular, the people that I spoke about this morning, are not necessarily in favor of the ban on the burqa. They don't talk a lot about the burqa, as I said, but I am not sure that they all favor the ban on the burqa. We have to take the whole political context into account. I don't know if you realize, we have had a lot of new legislation in France since President Sarkozy was elected. And there is a reaction to the fact that, each time that something goes wrong, we have a new law. And, personally, I'm not sure I would like to see this law passed. Because, okay, you forbid people from wearing a burqa, are you then going to forbid what, women from wearing miniskirts or, I don't know what? So, I think we have to be careful.

DEGIROLAMI: Okay, great. Let's wrap it up there.