

**M. Gérard Bouchard**

**M. Charles Taylor**

Coprésidents de la Commission de consultation sur les pratiques  
d'accommodement reliées aux différences culturelles

Gouvernement du Québec

Case postale 220, Succursale B

Montréal H3B 3J7

Montréal, le 22 août 2007

**Objet : Envoi d'un mémoire suivi de 14 recommandations**

Messieurs les coprésidents,

J'ai l'honneur de soumettre à la Commission un mémoire intitulé « Le multiculturalisme des chartes : une impasse juridique et politique au Québec » suivi de 14 recommandations sur la mise en place d'une véritable laïcité. Je conclus à l'urgence de fermer tout accès à des « accommodements » demandés sur un fondement religieux.

Bien que je sois québécoise francophone, seul le titre du mémoire et les recommandations finales sont en français, ce que je regrette. En effet, la première version de ce texte fut rédigée en anglais car j'allais expliquer et critiquer la doctrine des « accommodements raisonnables » devant un auditoire de Colombie-Britannique, en tant que Lansdowne Lecturer, en mars dernier. Je l'ai ensuite recentré et augmenté pour la Commission. Mais je n'ai pas le temps de le traduire et surtout, je souhaite qu'il soit accessible aux Anglo-Québécois.

C'est une étude qui porte certains principes et fondements en théorie politique. Je me félicite donc que les deux coprésidents que vous êtes appartiennent largement au monde de la théorie. J'ai vérifié mes traductions anglaises auprès des gens que j'ai cités : ils m'ont donné leur aval quant à l'exactitude.

Je vous prierais de bien vouloir m'adresser un accusé de réception.

Veuillez agréer, messieurs, l'expression de ma considération distinguée.

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de l'Université d'Ottawa (1981-2001)

N.B. L'original signé suivra.

**Le multiculturalisme des chartes :  
une impasse juridique et politique au Québec**

[Original English Title: Lansdowne Lecture 2007 Revisited  
«The Lost Cause of Secularism in Canada: Republican Rule versus *Chartism* »]

Mémoire présenté à la  
Commission de consultation sur les pratiques d'accommodement  
reliées aux différences culturelles

par  
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«I heartily accept the motto, --"That government is best which governs least;" and I should like to see it acted up to more rapidly and systematically. Carried out, it finally amounts to this, which also I believe, -- "That government is best which governs not at all" -- (...)»  
Henry David Thoreau, *On the Duty of Civil Disobedience*<sup>1</sup>

## I. From Charters to *Chartism*: a dispossession of the political

Two charters of rights may be too many for a society with a strong historical identity. The National Assembly of Québec has adopted its own *Charte des droits et libertés de la personne* as early as 1975, under the liberal government of Robert Bourassa. With its 49 articles, this body of hyper-legislation is more extensive in scope than the *Canadian Charter of Rights and Freedoms* which became effective as Part One of the Canada Act of 1982<sup>2</sup>. Though restricted to provincial fields of jurisdiction, the Québec charter covers not only human, civil and political rights (sections 1-38<sup>3</sup>), but economic and social rights as well (sections 39-49). It deals with the relationship between State<sup>4</sup> and citizens, as does the Canadian charter; it further regulates some specific relations between private persons which the Canadian charter does not. In its 34 sections, the Canadian charter deals with fundamental freedoms (section 2<sup>5</sup>), democratic rights, mobility rights, legal rights, equality rights (sections 3-15), and linguistic rights (sections 16-23).

### A. The Americanization of Canadian Law

It is generally understood that the adoption of such charters brings about an Americanization of the political regime. What is meant by this is that the sense of belonging relates individuals to a set of timeless ethical values (without context)<sup>6</sup>, whereas ordinary laws relate citizens to the specific struggles, circumstances and compromises which constitute the history of a nation and point to the current phase it has reached in a dynamic process. A charter produces an ethicization of law as the expression of the Good or the Virtuous with a kind of transcendent flavour that sets its values above criticism. According to the American consensus which develops Thoreau's motto, divergence (not difference) should be encouraged: it is held as the mark of tolerance, the supreme political virtue. In Canada nowadays, the only acceptable discussion of the quasi dogmas decreed by the charters seems to be confined to that of limiting its implementation. It seems impossible to reconsider the decrees themselves. Therefore, in Canadian law, there are only two avenues left to escape the rule of the charters: one is to use the infamous "Notwithstanding Clause" to bypass one of its articles temporarily (which obviously appears to be choosing vice over virtue); the other would be to abolish the charter, an option which Antonio Lamer now considers a possibility in the long term if the freedom of our Parliament is further threatened<sup>7</sup>. How are the rights and liberties of a sovereign Parliament to be protected from the centrifugal forces of an extreme liberal individualism?

This Americanization also modifies the legal global picture and how society operates: such a charter edicts rights but does not define them, assigning this task to the courts and ultimately to judges who, in Canada, are not elected. Therefore, through an act of the Parliament (the adoption of the

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\* I am greatly indebted to the English-speaking friends and colleagues who have helped me in the linguistic revision of this essay, in particular: Valerie Mollard, Sarah Richards and Michel Roussel.

<sup>1</sup> *Walden or Life in the Woods and the Essay "On the Duty of Civil Disobedience"*, New York: Milestones Editions (no date); cf. p. 295

<sup>2</sup> That is: the 1982 Constitution of Canada.

<sup>3</sup> Section 3 decrees liberty of conscience, of religion, of opinion, of speech, of peaceful assembly and association.

<sup>4</sup> With this meaning of a system of institutions representing the body of citizens and holding the public power in a democratic society, the word State will have a capital "S" for the sake of clarity in the present text.

<sup>5</sup> Freedom of conscience and religion appears in section 2.a as the first fundamental freedom, separate from freedom of thought, of belief, of opinion and expression (including the media), of peaceful assembly and of association, which are decreed in section 2.b, c and d.

<sup>6</sup> Thus generating the illusion that these values can be exported to any other context without mediation.

<sup>7</sup> Cf. Radio-Canada, "Le Téléjournal" (10:00 p.m.), April the 16<sup>th</sup>, 2007, Interview of Antonio Lamer by Patrice Roy, on the *Canadian Charter of Rights* 25 years later.

charter), it produces a limitation of the sovereignty of the same Parliament<sup>8</sup>. This transfer of sovereignty is foreign to British law and to French civil law. Moreover, because it provides for such an overlapping of the judiciary and the legislative it constitutes a departure from the fundamental Modern principle of the division of powers.

The very function of the *Canadian Charter of Rights and Freedoms* is precisely to override all other past and future federal laws. It also overrides all provincial laws including the Québec charter, even in fields of exclusive provincial jurisdiction<sup>9</sup>. As the former Chief Justice of the Supreme Court of Canada Antonio Lamer puts it<sup>10</sup>, some judges resented the new duty of having to judge laws by declaring their conformity/conflict with the charter. They soon had to judge drafts of laws written so as to satisfy some implicit and remote effects of lists of items left open in the sections of the charter. A draft is abandoned if it does not pass the test of the Charter as interpreted by the Supreme Court, even when the original legislator is still in power and able to express the intentions and spirit behind a law or a section of the Charter. Such was the case with former Prime Minister Jean Chrétien<sup>11</sup> during the first 20 years of the Canadian charter enforcement. The definition of marriage is a well-publicized case of this new function of the courts<sup>12</sup>. The changes were introduced gradually. First, the Supreme Court added "sexual orientation" to the list of prohibited grounds for discrimination. Then, in 1999, it was considered (8 to 1) a simple application of this inclusion to recognize and include the right to alimony for homosexual partners. Finally, in 2004, the Supreme Court, consulted by the federal Minister of Justice Irwin Cotler on the draft of a bill concerning same sex marriage, delivered an imprimatur to it. The next step yet to be taken by the Supreme Court will be to decide whether or not the traditional definition of marriage goes against the federal charter.

The general result is that the fundamental separation of powers which defines democracy in the British regime is affected: the courts are called to exercise legislative power while the legislative body is being juridicized by the "tyranny" of the charter(s). Canadian citizens have not been consulted on these decisive issues. The slow drift toward the American legal system is becoming more apparent now than during the first fifteen years of public life under the charters. This progressive dispossession of legislative initiative is covered by the concept of "Chartism".

#### **B. The shift from individual to collective rights**

The function of a charter of rights is to protect and defend individual liberties. It was conceived as the way to grant equality to physically disabled persons and to others whose particular needs could not be met by general regulation. But quite early in their respective lives, the Québec and Canadian charters were invoked to gain rights for minority groups. It was not done openly, as all of us remember. In the case of the turban accepted as an equivalent of the mandatory R.C.M.P. headwear, it was indirect, the Supreme Court refusing to reverse a *de facto* decision not to fire the police officer who was wearing his turban on the ground of an alleged religious obligation. The right to wear a kirpan knife in a public school was claimed for a boy by a particular Sikh family not representing anybody else. The same applies to the right to wear a headscarf at a Catholic private school granted to a girl represented by her parents on an individual basis, etc. The effect on public opinion is particularly strong when the Supreme

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<sup>8</sup> It is particularly clear in the British institutional system which was given to Canada. In the French Republican system, for instance, the people --not the Parliament-- holds national sovereignty.

<sup>9</sup> Which shows clearly that the Québec charter is not a hyper-legislation of the same type as the federal one. Since Canada is not an authentic federation of states, the lieutenant-governor of a province may exercise a privilege of reserve and defer the proclaiming to the governor-general who may refuse the motion. Even when the lieutenant-governor has already proclaimed a motion adopted by the National Assembly of Québec, making it a law, within two years, it may be disavowed by the Governor-general in Council, according to the principle of devolution. I wish to thank Jacques Robichaud for the information on this constitutional legal point.

<sup>10</sup> Cf. Radio-Canada, *Ibidem*

<sup>11</sup> Who declared to Patrice Roy, Radio-Canada, *Ibid.*, that the case for same sex marriage had taken him by surprise though we know he had taken part in the writing of the charter and led its adoption as Minister of Justice in 1982.

<sup>12</sup> Section 15, subsection 1, prohibits discrimination in particular "based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability": the Court **extended** the exclusions to this new element, sexual orientation, thus legitimizing same sex marriage. In this sense, Canadian judges now create laws, just as their American counterparts do.

Court reverses the unanimous ruling of a lower court such as the Québec Court of Appeal<sup>13</sup> for the case of the kirpan, among others. It may operate as a foreign perspective disavowing historical compromises, delicate balances and fruitful debates. If democracy is defined primarily by public deliberative experience, then a society regulated by charters of rights does not meet this condition.

Such an argument points to two opposite conceptions of political freedom: either it is considered present in individuals as humans and just requires to be protected, or it is thought of as a difficult construct inherited from the citizens' experience, one that requires conditions of exercise that the State must provide in order to improve, not shut down, public debate. The first view is the liberal view, the second is the republican.

Of course, the effects of charters-inspired court decisions (and non decisions) institute separate rights for several small segments of the population (or communities): we now face "multijuridicity" or "differentiated rights" within the same body politic. Some liberals (Will Kymlicka, Wayne Norman) and several communitarians (Charles Taylor) see in these results a democratic gain while others see only the pernicious effects of the charters in the sense that they were both unforeseen and unwanted --even counter-productive-- in terms of freedom. Is this the much-praised tolerance or is it Babel, the denial of the polity itself? The number of the claims directly invoking religious liberties is rising.

### C. A Radically different Criticism

There are mainly three avenues to consider the matter of multiculturalism. The first asks: "What are the virtues of diversity?" and answers that it is an anthropological plus and an aesthetic bonus. The second asks: "On what ground are human rights to be legitimately limited?" and finds that they are sacred, ethically primordial and should have precedence on laws. The third avenue asks: "What is a political society?" and examines what multiculturalism means in it. I hold that the three are incommensurate: they will neither add nor intersect. Anthropology, ethics and politics have distinct epistemologies. I have chosen the third avenue.

I shall submit here that this third way of understanding freedom in the public sphere has received some credit in the history of Québec. Among other signs, the writer and film director Jacques Godbout published in *Le Devoir* an argued critique of the charters multicultural policies and their pernicious effects. "Le multiculturalisme est une politique généreuse devenue discriminatoire"<sup>14</sup>. He pleads for the strict separation of the intimate realm of religious belief and the public common values of a given polity, in the best interest of all. While others wish to accomplish this through a Québec secular constitution, Godbout advocates the adoption of a third defensive charter: a *Charte de la laïcité* using a concept that I shall try to clarify. He expresses here the concern of a large group of citizens who do support the positions of le Mouvement laïque du Québec:

A "laïque" society --the one which we promote-- is one where religious liberty is the same for all. Above all, it is one where equal rights apply to all regardless of their faith. Finally, it is a society where one never has to reveal one's beliefs to receive a benefit and where it is never necessary to inquire about anyone's religion to grant the benefit in question.<sup>15</sup>

<sup>13</sup> Although the judges of the Québec Court of Appeal are appointed by the Federal Government, the Provincial Government has the competence to implement justice on its territory. The Court of Appeal therefore appears closer to the spirit of the Civil Code and to the interests of Quebecers in general than the federal higher courts are.

<sup>14</sup> "Multiculturalism is a generous policy turned discriminatory", April the 3<sup>rd</sup>, 2007

<sup>15</sup> This definition and other detailed information about the particular type of secularism that *laïcité* covers in Québec, see the website of Le Mouvement laïque québécois (founded in 1975) at [www.mlq.qc.ca](http://www.mlq.qc.ca). Other secularist movements can be located at <http://laicites.org>. On the website of the M.L.Q., it is possible to read and download its brief of March 2007 to the Minister of Education on the duty of secularism in the public schools of Québec: "L'intégration culturelle et les accommodements raisonnables en milieu scolaire", Mémoire présenté au Comité consultatif sur l'intégration culturelle et les accommodements raisonnables en milieu scolaire.

But we should keep in mind that such a provincial charter would fail the test of the Canadian Charter of Rights and of its chapter on Multiculturalism. It would be nullified. Nevertheless, the idea raised interests and even passion. Jacques Godbout, a moderate federalist and liberal-party supporter was accused of intolerance, while others praised his ideas and a third group claimed that, had Québec declared its sovereignty, all this ridiculous waste of time would have been spared. To show that the Anglo-Canadian idea of a multi-confessional public space is not the same as the idea of *laïcité* which influences the debates in Québec, I propose to go from the particular to the general and back to the particular, on a path where the so-called “universal” is another name for a certain type of culture, a particular way to look at the whole.

## II. A Narrative: Hérouxville (Québec), January and February 2007

Hérouxville : a small town of some 1 338 inhabitants<sup>16</sup>, northeast of Shawinigan, part of the Mékinac rural district, half way between Grand-Mère and Saint-Tite. I, for one, had never heard the name before last January. It is not even listed on the website of Tourisme Québec. A peaceful agricultural place, founded in 1897 (by one Jean-Euchariste Héroux, the first vicar), it has a highly homogenous population of Franco-Catholic descent. A fine high-steepled Roman Catholic church sits on the highest ground of the town, as an undisputed symbol of its tradition.

### A. An Unexpected Rise to Fame

On January the 27<sup>th</sup>, *Le Devoir*, Radio-Canada and some other media announced that on the 25<sup>th</sup>, at a special meeting, the Hérouxville municipal council had unanimously adopted a strict code of behaviour intended for improbable future immigrants. A municipal councillor, André Drouin, had written the five-page document known as “**Normes de vie**”. It made the headlines during the following two weeks. What is the content of this unusual bylaw? It is worth a close examination.

A one-page preamble states that multiculturalism in itself is positive: “(...) we believe in multiculturalism because it is an asset for a country, a province, a region.”<sup>17</sup> The problem arises from Canadian multiculturalism which has reached a point where it threatens the cohesion of Québec public culture. This “dangerous” policy is presented as forcing upon Québec culture many obviously unreasonable accommodations, for instance: it quotes police departments recommending to their female members to find a male substitute when dealing with members of Hassidic communities<sup>18</sup>. This collides directly with the non-negotiable principle of gender equality among citizens. Therefore, the document reasons, the two levels of government should consider abolishing the provision for these objectionable accommodations. Moreover, the Charters, both federal (1982) and provincial (1975) should be amended to ensure that the identity of the citizens belonging to the host culture be respected in the greatest interest of the province and that of the country at large:

If necessary, they [the federal and the provincial administrations] will have to modify the Charters of Rights and Liberties so as to set the rules in a way which will bring courts and governments to be more fair towards the host culture: the culture of all citizens of Québec and of all citizens of Canada who value their own identity.<sup>19</sup>

It follows that this Hérouxville behaviour code is not about Québec nationalism, nor about any kind of ethnic nationalism. It deals with the collective relationship to cultural otherness. It holds that the

<sup>16</sup> For description, statistics, minutes of the municipal Council, and all documents mentioned in relation to the Hérouxville case: cf. <http://municipalite.herouxville.qc.ca>

<sup>17</sup> Cf. «Normes de vie», p.1 (My translation here and elsewhere unless otherwise specified). Québec is treated here as a province: there is no evidence of a sovereigntist perspective in the document.

<sup>18</sup> This upon the request of communities leaders.

<sup>19</sup> Cf. «Normes de vie», p.1

Anglo-Canadian historical identity is also dangerously threatened and should equally be protected from the demands of intolerant immigrants identified with particular (but unnamed) cultures: «Should tolerance accommodate intolerance, [in this case] the refusal to live according to the requisites of a secular social space?»<sup>20</sup>

The last paragraph of the preamble clearly declares that immigrants are most welcome in Hérouxville: “Being tolerant, we are prepared to contribute to immigrants’ integration, but not at all costs.”<sup>21</sup> Let us insist: the document is not a rejection of foreign cultures (which would have made it devoid of interest for our purpose) but rather a tool to clarify the terms of their insertion in a given milieu. In a footnote, “Integration” is defined as “the sharing process between two cultures, i.e.: the immigrant adopts the host culture which he enriches with some elements from his own”. According to the logic of the document, the host culture has a duty to make itself known and to explain how, and on what grounds, it came to be what it is. The multiculturalist policy jeopardises this procedure of mutual recognition: the host culture is prevented from asserting its public values in the public sphere and of enforcing them according to the democratic rule of equality.

The second page asks “Who are we?” and answers that Hérouxvillois define themselves through the set of public values embodied in municipal, provincial and federal laws, and by the code of behaviour listed in the three following pages. Three paragraphs reaffirm here that immigrants are welcome and will be accepted regardless of race, colour, language, sexual orientation, religion or other belief. The document is expressly intended to clarify and facilitate the encounter, not to avoid it. That is why the case is interesting.

On the next three pages of the original document, the norms were organized according to the following headings: **Women, Children, Public Celebrations, Health Care, Leisure Activities, Safety, Work Places, Commercial Areas, Family**. It stated that:

We hold that men and women are equal and are worth the same, therefore a woman may, among other things, drive a car, vote freely, sign cheques, dance, decide [about her life] by herself, exercise free speech, dress as she wishes (in accordance with recognized decency standards and with norms of public safety), walk alone in public, study, exercise a trade or profession, own property and make free use of it. All of the above are part of our customs and acquired rights.

It follows, the document goes on, that stoning of women, genital mutilations and burning them alive is forbidden in Hérouxville. Christmas trees, carols and celebrations at the public school are to be maintained<sup>22</sup> as marks of the town’s history (not religion). But, in schools, which are all public and secular in this town, a strict *laïcité*<sup>23</sup> must be observed: no kirpan allowed in school, no prayer room provided, no niqâb tolerated in the public space, no food restriction (halal, kosher, etc.) in public institutions, etc. The citizens’ face must be visible in the public space, except on Hallowe’en day.

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<sup>20</sup> Cf. «Normes de vie», p.1 ; the last words are «...un espace social laïc» in the original.

<sup>21</sup> Cf. «Normes de vie», p.1; the document is written in a clear and polished French, describing the people often in the first person “Nous” (We) and the rules, values as well as the prohibitions in the third person. It does not say of the immigrants “They do this and we object to it” but rather “We hold that this is correct and live accordingly”.

<sup>22</sup> This happened shortly after an Ontario judge had ordered a Christmas tree not to be renamed, but to be removed from a city street, as offensive for the non Christian communities.

<sup>23</sup> As mentioned above, this is a concept without equivalent in English. It appeared in France at the end of the 19<sup>th</sup> century and was first recorded in the *Supplément* to Émile Littré’s *Dictionnaire de la langue française* (Paris: Hachette, 1883) to convey a slightly positivist anti-clerical connotation. The main denotation is: character of what is independent from religious faith, dogmas or institutions. It cannot apply to multiconfessional entities or (faith-wise) pluralist policies.

When interviewed for the *Téléjournal*<sup>24</sup> of Radio-Canada, Hérouxville's Mayor Martin Périgny recognized that these regulations were, for most, *ultra vires*, therefore carried no legal weight. But many citizens wanted to use the document to open a debate about multiculturalism and the **legal obligation** made to public and private organisations to provide reasonable accommodations for special needs. It appeared that, as in Québec and Canada, many citizens of Hérouxville mistook court-ordered cases of accommodation with out-of-court or court-mediated voluntary "arrangements", such as the famous 2006 episode of the downtown Montréal YMCA gym windows, frosted at the request of the Hassidic school next door (who paid for the procedure), or the case of the father expelled, also in 2006, from a public swimming pool where he was watching over his three-year old boy when a Muslim woman protested against his presence during hours scheduled for children, or that of the Muslim couple who asked that a film on childbirth be withdrawn from the prenatal classes, etc. One of the most commented upon cases at the time of the Hérouxville events, was that of the ambulance driver forcibly expelled in 2005 from the cafeteria of the publicly funded secular Hôpital Général Juif/Jewish General Hospital (Montréal) where he was eating his non-kosher sandwich<sup>25</sup>. With the media endlessly repeating and amplifying these and other numerous attested occurrences, the general situation was perceived from the distant standpoint of Hérouxville as a display of political confusion, *laissez-faire*, weakness and complacency, a major breach in the legitimacy of the host culture, calling for sharp criticism.

With the written support of seven other municipalities of the Mékinac rural district, Mayor Martin Périgny had sent the "Normes de vie" document, signed by all members of the Council, to the Federal and Québec Ministers of Immigration, respectively Diane Finley and Lise Thériault<sup>26</sup>, urging the revision of the law on multiculturalism and calling for "correction" of the two Charters of Rights. The policy was certainly intended to be provocative. It got more attention than it could manage.

Interventions reported and solicited by the media were intensely committed in favour and against. All political parties listened carefully and were surprised to learn of the very large support the "Normes de vie" document was getting in the public opinion, especially the issue of the revision of the charters of rights. The debate made front page news: condescendence, irony, anger, incomprehension. Seen from Montréal, there was something inherently comical in the Great Reform Design of the powerless bylaw and its *Hallowe'en* provision. It was said that this defensive behaviour code was primarily aimed at the Islamic fundamentalists, but there were no Muslim residents at all in Hérouxville and none had taken steps to move there. It looked more like a warning addressed to Québécois and to Canadians about the blurring of their cultural/political identity (the two were intermingled). Through the awkward wording of the behaviour code, the comical aspects of the warning to non-existent immigrants, the document had a moving quality to it: the defence of some common liberties inherited as citizens, not as individual human beings. The document refuses to back up on the first democratic principle: equality of treatment/identity of duties in the relations between State and citizens, without exception. This corresponds to the Greek concept of *isonomia* which has evolved into our modern notion of justice as impartiality.

The spectrum of the quasi-unanimous negative comments ranged from exposing another sign of the Québécois inbred nationalist racism, to accusations of ill-informed obscurantist xenophobia. As a result, on Friday, February the 9<sup>th</sup>, the behaviour code was amended by the Council and stripped of the most offensive acts of mutilation (actually pertaining to the Canadian criminal code)<sup>27</sup>. The new version was more polite but just as stubborn. But accusations, fits of anger and threats started to poison the intercultural channels of exchange. The usual hateful private radio stations entered the arena. An ugly scene, for sure.

<sup>24</sup> The evening National News programme on the French public network

<sup>25</sup> In February 2005, the driver, Yvon Verreault, filed a complaint at the Commission des droits de la personne et de la jeunesse du Québec. In February 2007, the Commission recommended that Verreault receive a CAN\$10 000.00 compensation, plus a formal apology: here, a member of the majority was the one to benefit from a reasonable accommodation properly speaking. The Jewish General Hospital made public the cost of the ritual purificatory ceremony required after each non kosher food that would soil its cafeteria.

<sup>26</sup> Both letters can be read on the website of Grand Québec: <http://grandquebec.com>

<sup>27</sup> It is this amended version which can be consulted currently on the Hérouxville website.

## B. Noteworthy Reactions

On February the 6<sup>th</sup>, without reference to these events, the Québec Ministers of Justice Yvon Marcoux and of Social Affairs Philippe Couillard publicly acknowledged that a revision of the laws and regulations which had led to (legal) reasonable accommodations might be necessary.

Three particular sets of reactions deserve mention for the purpose of this essay:

- **First reaction:** on Sunday, February the 11<sup>th</sup>, a group of eight well established Muslim immigrant women, university-educated, French-speaking, and for most, wearing headscarves, paid a visit to Hérouxville on a chartered bus. They sought to open a dialogue with the municipal officers and citizens of the eight towns supporting the behaviour code. They came with gifts, books, handicraft objects similar to the local Mékinac region weaving, etc. Najat Boughaba, Ph.D. in French literature and informal leader of the visitors, was asked by an unidentified and aggressive man how she dared wear a veil at this meeting; she answered that her headscarf was not the result of a reasonable accommodation. Councillor Drouin quickly intervened to put an end to the man's verbal assault, on the ground that the veiled women's faces were visible, in accordance with the bylaw.

Then Ms. Boughaba said that she expected much from this meeting and that many problems could be deflated by a direct conversation between women. An immediate success. Leila Farhat, another Muslim visitor, recognized publicly that many of the requests for accommodation were abusive. The women "sororised" easily, especially with City councillor André Drouin's wife, Luce Rivard, member of the Reception Committee, and others who were happy to be listened to seriously and calmly<sup>28</sup>. Then, at a general meeting intended to inform Hérouxvillois, the visitors began reading Coranic surats directly from the Arabic text and they were told not to exercise religious propaganda. They left their copies of the Kuran on the table, without further discussion. Nevertheless, at the end of the day, the behaviour code was maintained.

At this Sunday encounter, --aside from a few dozen people from Montréal<sup>29</sup> and other regions who came to show their support to the by then famous "Normes de vie", and the large number of domestic and foreign journalists-- also showed up Gabriel Mitchell, one of the very few immigrants to Hérouxville, having settled in the municipality thirty years ago and who has brought up his family there. A black person from La Dominique island<sup>30</sup>, he had served as elected member on the Council for twelve years in the past and came to testify that he had never met with any racist or xenophobic reaction in all those decades. "The municipal councillors wanted to ring an alarm" he said to the press; "They acted awkwardly but they pointed out to a concern we all share. Canadian multiculturalism is an illusion. One cannot see success when what we observe is non-encounter, a patchwork of different cultures."<sup>31</sup> There was a sense of loss, the perception of some suicidal mistake in his speech.

The global picture grew more complex. Political sensitivities were alarmed by the contrasting pictures of Québec published in the international press. I began receiving puzzled e—mail messages

<sup>28</sup> Cf. « Hérouxville et les musulmans : quelques pas vers le dialogue », *Le Devoir*, February the 12<sup>th</sup>, 2007.

<sup>29</sup> Dr. Clifford Blais, a physician from Montréal, had come to support the intention of the behaviour code. He declared that, in 1992, during his time as resident in gynaecology, as the only doctor on duty, he was assaulted by a Muslim husband refusing that a man assist his wife's in child delivery. Dr. Blais added that the Québec Association of Obstetricians and Gynaecologists had had to formally reject these demands and prohibit new infibulation for a woman who had been "unstitched" for child delivery, whatever the family pressure. The demands addressed to specialists still constitute a serious problem for their own safety, as we learn from other sources. Dr. Blais's intervention amounted to a call for help addressed to the State.

<sup>30</sup> A small British island situated between La Martinique and La Guadeloupe

<sup>31</sup> The interview was reported by Emmanuelle Langlois, dispatched from Paris to Hérouxville by the daily *Libération*. It was published on February the 16<sup>th</sup>. Other reporters came in person during these days, on behalf of *La Croix*, *Le Monde*, *Le Figaro* and *Le Point*, from France alone, plus one from *Jeune Afrique*, also a francophone. The Hérouxville website got 70 000 different visitors from 47 countries. On February the 15<sup>th</sup>, a Google research calling the name of Hérouxville on the internet yielded 1 200 000 items (Source: Bernard Thompson, webmaster for the Hérouxville Municipality). The official website now carries a large number of documents translated into foreign languages, of which the famous "Normes de vie" under the headline "Standards and Solutions".

from colleagues in France, Belgium, Norway, Poland, Italy, all of them inquiring about Hérouxville and its cultural policy.

- **Second reaction:** on behalf of the Canadian Islamic Congress jointly with the Canadian Muslim Forum, Mohamad Sawan announced that, unless the bylaw was cancelled and an apology presented to the Muslim community, they would file a formal complaint at the *Commission des droits de la personne et de la jeunesse du Québec* against the municipality of Hérouxville for circulating hateful and racist literature. They later decided to postpone the action until the results of the Muslim women's "mission" would be known. To my knowledge, the legal accusation is still to be filed.

- **Third reaction** in two discourses that I wish to mention because they address the malaise and tragic undertone of the agents on both sides of the controversy. On the one hand, we have an isolated essay<sup>32</sup> devoted to explaining what the Hérouxvillois actually meant but could not say: a delicate and conjectural approach which could have seemed to side with intolerance or primary xenophobia. It was expressed at the beginning of February in *Le Devoir* by Danic Parenteau<sup>33</sup>, an assistant professor of political science at the University of Ottawa. An extensive analysis and a tentative explanation of the document "Normes de vie" and of the further defence of its content volunteered by **all individual Hérouxville citizens**<sup>34</sup> interviewed by local, French and English media people, and by foreign journalists as well. Parenteau's understanding of the situation is that Hérouxvillois are defending the Republican Rule.

The question is simple: why at Hérouxville and not elsewhere? Several explanations can be put forward. But it seems to me that an answer can be found in the fact that, unlike in Canada, liberalism never became dominant in Québec. It exists only as a mixed doctrine of liberalism and republicanism (referring here to a conception of society and not to a presidential regime).

He goes on to define classical liberalism as founded on the individualist view of society: an association of free individuals pursuing their own respective interests. The post-Modern liberal State has no other legitimate end than to protect the lives and property of its members so that they can each achieve their particular goals. These liberties are precisely those guaranteed by the charters of rights. Society appears as having no essential end other than to let individuals act as they choose while respecting each other's liberties. Parenteau insists that a liberal society may not promote, conserve or favour any substantive goal or value. What happened to Hérouxville, however awkwardly formulated, is a repudiation of liberalism with a counter-assertion of the Republican Rule:

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<sup>32</sup> Among the few positive internal reactions to the "coming out" of Hérouxville, there are two articulate and strong commitments by the two co-directors of the now extinct cultural magazine journal, *Vice Versa*, Fulvio Caccia and Lamberto Tassinari ("Diversité culturelle et transculture ou Vice Versa", *Le Devoir*, 1er mars 2007) and the three co-editors (who insisted on their quality of immigrants) of the above-mentioned on-line magazine *Grand Québec* at <http://grandquebec.com/reflexions-sur-quebec/herouxville>. This line of comments followed the central thesis of Neil Bissoondath's book, *Selling Illusions. The Cult of Multiculturalism in Canada* (Toronto: Penguin, 1994): A society has the duty to assert its main values and projects in a way which allows for recognition of the majority by newcomers, especially when its identity is complex and problematic.

<sup>33</sup> « Pourquoi les Hérouxvillois ont-ils besoin de dire au monde ce que nous sommes ? », February the 7th, 2007.

<sup>34</sup> Behind this surprising unanimity, we learn that a poll had been conducted on December the 17<sup>th</sup> and 18<sup>th</sup> 2006: a sample of 196 with a validated distribution, 19 questions openly oriented to produce expected result of the following kind; no.5: Can a woman walk alone in a public area? (196 YES/ 0 NO); no.12: Do you think a woman can teach to boys? (196 YES/ 0 NO); no.13: Do you think a man can teach to girls? (196 YES/ 0 NO). We are led to understand that the statements in the behaviour code are for the most part the questions of this poll put in the affirmative voice. Therefore the citizens considered that they had been consulted and stood behind their answers. For complete data, cf. the above mentioned *Grand Québec* website.

What the Hérouxvillois have done by writing this code is to register what constitutes for them the substantive values of the Québécois society: it is clearly society as a whole that they are referring to. (...) but the Hérouxvillois have thus said aloud what a large number of Québécois think secretly: Québec exists as a global society, with its specific identity. Québec is more than the addition of the particular interests of people who happen to reside there. It has a substantive content which must be asserted and, above all, protected from those who do not recognize this identity.

According to the classical liberal doctrines, such a protective stand is absurd because the liberal State accepts no societal identity. The Hérouxville events, argues Parenteau, were determined by the accumulation of true and false "reasonable accommodations" based on the liberal definition of tolerance. But to a republican ear, they boil down to acts of submission when faced with certain claims by newcomers who want to bypass some rules and core values of Québec culture. Not just incidentally, individually or temporarily, but collectively, by principle and permanently. Therefore, the fact that Québec society is less inclined than that of other provinces to approve exceptions and accommodations should not be linked to nationalism, nor to some obscurantist pre-Modern xenophobia, even less to a primary racism. It is the consequence of a non liberal doctrine of citizenship and of the State.

On the other hand, there was also a stream of liberal comments in the press. Their paradigm of it was offered by Françoise David and Amir Khadir, co-spokespersons for the new leftist political party Québec Solidaire<sup>35</sup>:

Having arrived as immigrants from France or from England more than 300 years ago<sup>36</sup>, later from Italy or from Greece, and recently from Rwanda or Bangladesh, we have learnt to live together. (...) we have chosen the values concerning our *vivre ensemble*: democracy, gender equality, openness, *laïcité* for our public institutions, and respect for our fundamental rights as protected by the charters. (...) We reject the shocking distinction between "We" and "They" because we have chosen to live as brothers and sisters. Modern and open-minded Québec must reject the false debate between cities and regions, recent immigrants and the host society.

In this framework of "more or less recent immigration", there is no legitimacy in the historical continuity of a majority. In a synchronic equality between persons, no particular values are to be privileged.

It is clear that what we find is not a mix or republican and liberal ideas, as Danic Parenteau suggested but a tension between two separate currents with their respective variations and contradictions<sup>37</sup>.

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<sup>35</sup> « Pas de *eux* contre *nous* », *Le Devoir*, February the 12th, 2007

<sup>36</sup> Counter-factual statement

<sup>37</sup> The contrast between Québec and Canada in matters of Immigration/ accommodation/ integration is delineated in the detailed opinion poll conducted by C.R.O.P. for *L'Actualité*, (published in the May 2007 issue) and the programme "Enjeux" of the Société Radio-Canada (to be found at [www.radio-canada.ca](http://www.radio-canada.ca)). Let us consider question 21a "As host society, must Canadians accept **all** requests (from minority groups) based on religion, **some** of these requests, or **none** of them, when the requests call for changes in public institutions such as schools, hospitals, sport centers, etc.?" Compliance with **all** requests: Québec 3%, Rest of Canada 5%; compliance with **some** requests: Québec 39%, Rest of Canada 59%; compliance with **none** of these requests based on religion: Québec 55%, Rest of Canada 31%. The same contrast occurs

### C. The State's Answer: Appointing the Bouchard/Taylor Commission

Everyone knew that the liberal Premier of Québec, Jean Charest, was about to launch a general election last February of this year. He had declared earlier that the Hérouxville affair was just an isolated incident. But, Premier Charest changed his mind when he realized the large support l'Action démocratique du Québec was getting for its stands against multiculturalist policies, and specifically against accommodations on the ground of liberty of religion<sup>38</sup>.

Feeling the wind turn, Premier Charest decided to clear the electoral campaign of the painful problem of the reasonable accommodations. On February the 8<sup>th</sup>, he announced the appointment of a *Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles* (Consultative Commission on the Practices of Accommodation concerning Cultural Differences). This difficult and delicate matter was put in the hands of University of Chicoutimi sociologist Gérard Bouchard and of the philosopher Charles Taylor, emeritus professor at McGill University. These outstanding scholars are also recognized as intellectuals meaning that, apart from their undisputed excellence in their disciplines, they are citizens respected for their non-partisan public commitment to the common good. As expected by the Québec government, the appointment of this team carried the personal authority and the independence required to calm down the public scene and inspire confidence in their judgment. The Commission is expected to deliver an in-depth assessment of the obligation of accommodation in the case of a special need related to an individual person's culture, particularly to that part of culture pertaining to religion. In the meantime, the unrest has come to a halt. Notwithstanding the calibre of the two commissioners, the result has been to confiscate this major issue and remove it from the deliberative arena during an electoral campaign. It follows the logic of the charter which diverts fundamental political problems to the courts of judges<sup>39</sup>. Here the major issue of identity and coexistence as a polity is handed to two experts instead of being debated and decided by the citizens. As if there existed experts on how to deal fairly with otherness...

The Bouchard/ Taylor Commission's mandate is threefold:

- Paint a faithful picture of the current accommodations in cultural matters
- Proceed to a vast consultation throughout Québec regions on this practice
- Submit recommendations to the Government within one year to ensure that **the values common to Québécois are respected.**

The official documents instituting and justifying the task of the Commission<sup>40</sup> are surprising at a different level: they are clearly illiberal in the theoretical sense. First, the Premier states three fundamental non-negotiable values recognized and protected by the State, with which no

repeatedly in the poll results. I understand it as if the Anglo-Canadians outside Québec identified with the individual member of the minority and expressed tolerance whereas the French Québeckers identified with society as a whole and its rule of equality.

<sup>38</sup> This position is considered the cause of the A.D.Q. leap from 5 to 41 seats in the provincial election of March the 26<sup>th</sup>, 2007, making Mario Dumont leader of the opposition at the Québec National Assembly. With 48 seats obtained by the Liberals (and 36 by the Parti Québécois), Jean Charest is now at the head of a minority government. The A.D.Q. did not win one seat on the island of Montréal, as if the electoral map had been broken in two pieces.

<sup>39</sup> Some judges, especially the members of Commissions of rights, are favourable to this shift, arguing that "In spite of the reservations expressed by some concerning the «government of judges», the «judicialization» of the relations between religions and societies do not amount to an abdication of the political power. The recourse to courts supply minorities with a political forum and may be seen as a vector leading them toward citizenship, through which these groups commit themselves, more or less consciously to a process of modernization." Cf. Pierre Rosset (Research Director, Commission des droits de la personne et des droits de la jeunesse du Québec), « Le droit et la régulation de la diversité religieuse en France et au Québec : une même problématique, deux approches », in Micheline Milot, dir., « La laïcité au Québec et en France », *Bulletin d'histoire politique* 13.3 (printemps/été 2005), p.79. This is precisely the definition of what the French call "Communalism" (in French: *communautarisme*, unrelated to the Anglo-Saxon communitarian doctrine): a perversion of democracy in favour of fanatical sub-segments of society who build the sense of belonging on religious belief in the public sphere and demand recognition from a religion-blind Republic. Communalism is to be fought with the utmost energy repeated President Jacques Chirac when promoting the law against headscarves in public schools, during Spring 2005.

<sup>40</sup> They can be found on the official website of the Government of Québec.

accommodation is possible: Gender equality, Primacy of the French language, and Separation between State and religion.

The text goes on to reject the individualist a-historical perspective:

Québec constitutes a host society [in relation to its 45 000 to 48 000 annual immigrants]. Newcomers, as others before them, come to Québec to share our success, live in freedom and make a new life for themselves. They will enrich Québec with their competence and their culture, they build Québec with us. Each of them has the responsibility **to become integrated into our Nation**<sup>41</sup>. This means that they must commit themselves **to adopting our fundamental values**<sup>42</sup>. In counterpart, as host society, we also have a responsibility: we must develop an open mind toward their [cultural] differences. Our diversity is one of our greatest assets.

In this perspective, the State as *Puissance publique* must then assume a responsibility other than to witness and record what is happening between the partners. If the immigrant does not show any interest in his/her own integration which of course may take an infinity of forms and degrees, the State may apply sanctions. We find here an outline of the principle of the civic obligation implicitly accepted by the immigrant in the act of voluntarily entering another society's social contract. This view is not compatible with the liberty to opt out of the political status altogether as what is found in the strict liberal doctrines where the instrumental concept of the State is to facilitate the self-fulfillment of individuals and where voting is not a duty (as it is in some democracies like Belgium and Brasil). A true liberal State holds the private person with his/her private values as the terminal end of society, therefore of its legislation.

On the contrary, the interest of the Hérouxville case is to reveal the fact that adopting Québec fundamental values indisputably means adopting secularism. Accommodation becomes acceptable on this basis only. It appears that Premier Charest, a former federal conservative and certainly not a communitarian nationalist, nonetheless makes use of the "metabolic" theory of culture, according to which cultures have a specific span of life and each healthy culture has the finite capacity to digest and reformulate what is foreign to it, transforming itself in the process of dealing with otherness. Transforming the difference is not the same as flattening or abolishing it. This interesting dialectical movement is the motor of cultural creativity: "*Ni tout à fait le même, ni tout à fait un autre...*".

In other words, within this State communiqué, we are in a context of identities and the relations between these agents are non-symmetrical: the Nation has a greater ontological weight. It does not disintegrate into individual centrifugal otherness: on the contrary, it should attract newcomers and allow for the integration they are working for, if they are, when they are.

Should we perceive this official declaration defining the mandate of the Commission, as a new communitarian orientation triggered by the Hérouxville crisis? It does not signal a change of direction but rather a change in the understanding of what Québec defines as legitimacy in matters of culture(s) and of identity. Until now, many Québécois themselves had not yet realised what goal their State and society pursued in contrast with Canadian liberal multiculturalism. But in revisiting the official immigration policy, *Bâtir le Québec*<sup>43</sup> (adopted in 1991 under Robert Bourassa) we can see Québec already dealing with the same non-liberal conception of the relations between State and citizens. It is no insignificant paradox that a province owing its autonomy to the pluralist conception of multinational states and multiculturalism would choose to restrict the interpretation of the Charters of rights which led to the controversial duty of reasonable accommodation. In fact, after strict religious and cultural

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<sup>41</sup> My emphasis

<sup>42</sup> *Idem*

<sup>43</sup> Sponsored by liberal Minister Monique Gagnon-Tremblay, Publications officielles du Québec, 112 pp.

uniformity under the Nouvelle-France regime from 1534 to 1759<sup>44</sup>, the British colony, and later dominion, of Canada neither showed, nor pursued unity of religion.

### III. Religious Pluralism in Canada: a Fact since 1774

#### A. From the Treaty of Paris (1763) to the Confederation (1867)

Eleven years after the Treaty of Paris had given a legal status to the conquest of New France by the British, the Québec Act organized the multicultural colony. The most obvious aspect of it was religious pluralism which resulted from a negotiation between the parties. We are in the very particular perspective where **religion is considered as a component of culture**. This initial postulate is decisive regarding the continuity from religious identity to citizenship that is recognized in liberalism, where the State must have a neutral bearing while the citizens need not. The Republican Rule takes the opposite discontinuist stand where **religion is not a component of culture**, therefore it has no place in the construction of individual or national citizenship, and should not be brought into the public sphere as a source of norms.

As Micheline Milot<sup>45</sup> has shown, the Québec Act produced an arrangement more tolerant than that which prevailed in England at the time, where the King was separately head of two churches (the Anglican and the Presbyterian); in Canada, neither the Anglican, nor the Roman Catholic Churches held any direct political office: here in the colony, without theoretical debates, the State became *de facto* neutral<sup>46</sup>, blind to an illegal religion (Roman Catholicism, repressed through fines and imprisonment in the United Kingdom). The Bill of Test by which all those invested with a public office had to solemnly reject transubstantiation, the Pope's authority (and other elements of Roman Catholic theology) was also abolished in the colony by the same Act of 1774. Consequently, in the streets of London, George III's carriage was met with riots and he was accused of "Papism" by the mob. As a result, while Irish Catholic elected representatives could not sit in the Commons of London until the Catholic Emancipation Bill of 1829<sup>47</sup>, they did in the assemblies of Upper and Lower Canada<sup>48</sup>, at the same period<sup>49</sup>.

It is most unusual to grant more freedom to the colony than to mainland subjects<sup>50</sup>. The reason for this show of tolerance was that the British Crown feared its new French subjects would be attracted by the movements of independence developing south of the border<sup>51</sup>. Besides, the British army and

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<sup>44</sup> Especially reinforced after the revocation of the Edict of Nantes in 1685, with the Rule of "Une Foy, une Loy, un Roy": this was crucial as a sign of political loyalty to a monarch before the Modern unity of language began to operate as the immanent factor of national identity.

<sup>45</sup> Micheline Milot, dir., *ibid.*, cf. p.24

<sup>46</sup> Cf. *ibidem*: It follows that the so-called "priest-ridden society" of the period 1939-1959 in Maurice Duplessis' Québec was an informal non-institutional collusion between State and Church. There was no legal structure granting the Catholic Church any mandate or authority over schools or hospitals, public libraries and film censorship, orphanages or court rooms. This fact explains how the 1960 *Révolution tranquille* could shift the public values to a secularist perspective within such a short period.

<sup>47</sup> The Bill was pushed through the London Parliament by a team of "dry tories" led by the Duke of Wellington who convinced Peel to join him on this issue. For Roman Catholic subjects in the three kingdoms, the Emancipation Act restored voting rights, the right to sit in Parliament, the right to hold a public office except those of Chancellor and Viceroy. But, "the right to hold office is granted only on condition that the office holder swear an oath denying papal power to intervene in British domestic affairs, that he recognize the Protestant succession, and that he repudiate any intent to upset the established church." Cf. James Trager, *The people's Chronology*, New York: Henry Holt & Co., 1999, p. 403. In 1869, Gladstone had to clarify the situation by separating the Anglican Church of Ireland from the Irish State. Ireland thus became the only secular territory of the United Kingdom. Cf. Paul Johnson, *The Birth of the Modern. World Society 1815-1830*, New York: Harper Collins, 1991, pp.927-929.

<sup>48</sup> Instituted by the Constitutional Act of 1791

<sup>49</sup> In the United States of America, the first law protecting freedom of religion, stemming from Thomas Jefferson's *Virginia Statute for Religious Freedom* (1777) was adopted by the State of Virginia in 1786, against a loud opposition. Cf. Micheline Milot, *op.cit.*, "Les principes de laïcité politique au Québec et au Canada", p.16.

<sup>50</sup> See below: the principle of *Indigénat* applied by France to its colonies.

<sup>51</sup> The first violent revolt in the Southern colonies (over taxes and against some territorial stipulations of the Treaty of Paris and the Québec Act) degenerated into an open war in Lexington, Massachusetts, on April the 18<sup>th</sup>, 1775 and Canadians

navy were busy in Europe fighting in the Seven Years War (1756-1763) and had few spare troops to leave in the conquered territory here. This neutrality, then, was a pragmatic solution: the Bishop of Québec was not averse to accepting the position of paid Superintendent of the Cult which was offered to him personally (and not as bishop).

The arrangement worked and, despite direct encouragements to secede<sup>52</sup> and an American military invasion, the colony remained loyal to the British Crown. There were even some episodes of anti-clericalism but the Catholic high clergy was not able to have the Voltairian polemic Fleury Mesplet and his Republican sympathizers expelled from the colony<sup>53</sup>. Half a century later, Canadian public opinion was struck by the excommunication of the leaders of the 1837-1838 Rebellion of the Patriots who were fighting to establish Québec as an independent secular republic with responsible government<sup>54</sup>. The principle of a strict separation between State and Churches appears in Louis-Joseph Papineau's Constitution<sup>55</sup> which was proclaimed but, of course, never implemented. The bishop's answer was for Catholics to stay faithful to a Protestant king and pray for him. A political party emerged in the Canadian Union after the rebellion was crushed and its leaders hanged or exiled to Australia: it was a republican secularist party called "Les Rouges" (the Reds). It promoted annexation of Québec (the former Lower Canada) to the Republic of the United States of America. Heirs to Fleury Mesplet's lobby and to Papineau's party, Les Rouges were supported by the intellectuals and by the liberal merchants. Most of them –notably the free-thinking leaders and activists who were members of the *Institut Canadien*– were excommunicated by the ultramontane archbishop of Montréal (1840-1885) Ignace Bourget.

As we have seen, the first phase of neutrality of the State did not develop here against Churches or a Church in particular, but rather through a plurality of religious authorities forced to abstain

were called to join in. But Montréal Bishop Jean-Olivier Briand immediately had a pastoral letter supporting the British Rule read in all parishes.

<sup>52</sup> The French publicist/publisher/printer Fleury Mesplet (Marseille 1734 - Montréal 1794) came from Philadelphia to live in Montréal before the Canadian-American war, with the first printing press in the history of the colony. He was sent by Benjamin Franklin with the project to circulate literature promoting the Enlightenment republican ideal of freedom through rationality and universal secular values in an arrogant Voltairian style. He was the semi-official delegate of the American Continental Congress who sent him funds on three attested occasions. Apart from some pamphlets attacking the clergy, namely Bishop Hubert for acting as a Christian despot, Fleury Mesplet published two open letters in Montréal: a) for the American Continental Congress, "Lettre adressée aux habitants de la Province de Québec, ci-devant Canada", October the 26<sup>th</sup>. 1774, and b) on his own, "Lettre adressée aux habitants opprimés de la Province de Québec", 29 mai 1775. In both he calls the *Canadiens* to rebel against Church and State authority united to keep them in servitude. The Superior of the Sulpician Order (which was suzerain of Montréal), Étienne Montgolfier, prosecuted him for blasphemy, irreligion and attack on legal authorities. Mesplet was arrested for (real) sedition and put to prison in 1776 after a short judiciary procedure. He was later freed and allowed to stay in Montréal where he founded *La Gazette/The Gazette* a bilingual newspaper still publishing the daily *The Montreal Gazette* to this day. Benjamin Franklin also visited Montréal to assess the kind of support the American Revolution could count on in Canada. They both called the French-Canadian people of the colony to free themselves from the British Rule. They found that the class of merchants formed a republican bourgeoisie favourable to the American ideal and opposed to an aristocratic class of French military who would rather serve an English monarch than a new Republic built on the destruction of their hereditary privileges. The bourgeoisie won in the British Colonies of the South and lost in those of the North. Cf. Gustave Lanctôt, *Les Canadiens Français et leurs voisins du sud*, Montréal : Valiquette, 1941 (on Benjamin Franklin's visit to Montréal, p. 113 sqq.); Marcel Trudel, *Louis XVI, le Congrès américain et le Canada*, Québec : Éditions du Quartier Latin, 1949 ; Ramsay Cook et Réal Bélanger, *Dictionnaire biographique du Canada en ligne*, « Mesplet, Fleury », <http://www.biographi.ca/FR/> ; Jean-Paul de Lagrave et Jacques G. Ruelland, *L'imprimeur des libertés : Fleury Mesplet*, Montréal : Point de fuite, 2001.

<sup>53</sup> After he had renewed his attacks on the Monarchist rule, he was sent to prison a second time in 1782 on the pretext of his debts, and allowed to escape quietly. The repression was rather soft.

<sup>54</sup> The Patriots' papers show that, at this period of his life, Louis-Joseph Papineau and his friends held a higher admiration for the egalitarian politicized citizenship established by the French Revolution than for the American model: a puzzling contradiction for one who held the title of "seigneur de la Petite Nation".

<sup>55</sup> Papineau became acquainted with Republicanism as soon as 1823 through American activists. He became a supporter of Panamericanism (the same ideology which Mesplet and the American Congress promoted) but took his distances when this doctrine became flatly annexionist (of Canada to the United States). Cf. Louis-Joseph Papineau, *Histoire de la Résistance du Canada au Gouvernement anglais*, int. et notes Georges Aubin, Montréal : Comeau & Nadeau, 2001, p. 53, note 4.

from direct political power. In the second brief insurrectional period (from the American Revolution of 1776 to the crushing of the Patriots' Rebellion and the Union regime of 1840), there were episodes of anti-clerical polemical literature, newspapers, movements and public debates very similar to what was going on in France. This called for an articulate, conscious and systematic secularism in the name of modern free thinking: it promoted an egalitarian ideal. The same political and intellectual secularist climate reappeared between 1900 and 1939, in Québec, again limited to the urban elite in direct contact with France.<sup>56</sup>

### B. The British North America Act of 1867

If we turn to the **BNA Act of 1867**, the act that established the Confederation of Canada, we read in section One that the country is founded on the principle which recognizes the supremacy of God and the primacy of law. This same formulation was maintained in the Constitution of 1982<sup>57</sup>. The unspecified theism it asserts differs from the unified civic religion of the Americans. But it does not simply ignore beliefs as private matters, it mentions them as public facts. Section 93 explicitly protected the right to have denominational schools for Catholic and Protestant faiths in Ontario and in Québec<sup>58</sup>.

It excludes any association of the State, its institutions and its agencies with a particular religious denomination. This is the continued neutrality that had prevailed between 1774 and 1867. The four original provinces kept their separate status with their specific proportion of Quebeckers, Irish people and Acadians of Catholic descent, the Anglicans and the Scottish Presbyterians, plus a limited number of Jews. There were aboriginal minorities in the founding provinces: most had converted to the branch of Christianity represented by the missionaries who came to them. But outside the provinces, in the North-Western Territories which covered the largest area of the country, the majority of the natives still belonged to traditional religions.

In the terms of Will Kymlicka's theory of multicultural citizenship<sup>59</sup>, right from the British Conquest, Canada had the features of a polyethnic and of a multinational society. The conquered territory had never been brought under a unitary rule. In the constitution, Québec's protected linguistic and religious collective rights (ignoring Durham's recommendation to force the assimilation of the French minority), the aboriginal peoples and English Canada all constituted a system of differentiated and unequal citizenship<sup>60</sup>. So much different that the Registered Indians and the "Eskimos" (as they were called) were granted semi-citizenship under a tutor-State --deprived of voting rights-- which amounted to a denial of citizenship in our present terms.

Between 1867 and 1914, the Federal Government was concerned about territories beyond Ontario being too sparsely populated. To confirm Canadian sovereignty, large groups were invited to settle in these areas. Federal agents were instructed to negotiate agreements with European rural groups with agricultural expertise who had the choice between Australia, the American Western prairies and Western Canada. Several of these organized communities felt oppressed or persecuted for their archaic forms of organic religion. Whole communities of radical Christian churches such as: the Hutterites, the Mennonites, later the Doukhobors eventually settled here, while some Amish groups

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<sup>56</sup> For the personalities, clubs, cultural societies, political newspapers and books debating on secularism at the turn of the XXth century, cf. Micheline Cambron, dir., *La vie culturelle à Montréal vers 1900*, Montréal: Fides/BNQ, 2005, Annex on periodicals p.319; for direct relations between Québec and France at the time of the French laws on Separation between State and Churches, cf. Hélène Pelletier-Baillargeon, *Olivar Asselin et son temps*, Montréal: Fides, 1996, vol.3 "Le militant", ch.14 and 18.

<sup>57</sup> Not ratified by the Province of Québec but nonetheless implemented on its territory and influential in terms of legal mentality.

<sup>58</sup> By a constitutional amendment, Québec has had those rights abolished and is now in a position to practise a general "laïcité scolaire" but, for lack of a secular programme and trained teachers, the Government has extended the period of religious teaching in its public schools until 2008.

<sup>59</sup> *Multicultural Citizenship: a Liberal Theory of Minority Rights*, Oxford: Clarendon Press, 1996 (translated into French); cf. ch.9.2 "Polyethnicity and Inclusion", pp.176-181 and ch. 9.4 "The Basis of Social Unity in a Multinational State", pp. 187-192.

<sup>60</sup> In many ways, a more than problematic inequality with which we shall not deal here.

were persuaded to leave the United States for Canada. They all wished to live in isolation, away from the corruption of worldly Modern societies.

Exercising direct jurisdiction in the absence of provincial entities, the Federal Government signed agreements allowing derogations from the general law: reduction of the compulsory years of schooling, suppression of the subject matters considered useless or dangerous for the community, exemption from military service, and until the shock of 9/11, exemption from having one's photograph on one's driver's licence, etc. Here we find another type of semi-citizenship on the grounds of religious observances resulting in semi-apartheid.

Uniformity of legal status which defines justice through impartiality was not thought to be part of the democratic rule. The State did not have the means to enforce a centralist policy which had not succeeded during the Union governments (1840-1867). The federalist structure favoured decentralization. Therefore, the special type of secularism which the Canadian neutrality embodies was not the outcome of a civil war like the French Religious Wars of the XVIth Century, or a gain obtained through some heroic debate on civic freedom. It was just a reasonable, minimalist, pragmatic set of practices accepting extreme religious plurality, from the most archaic and literalist Jewish and Christian conceptions to "liberal" and secularized religious perspectives.

Such religious diversity as Canada presented in 1867 was unknown to the Western European law that engendered Canadian juridical categories, namely the British Criminal and Common law codes, plus the French *Code civil* of 1804 which Québec had borrowed from the Napoleonic regime<sup>61</sup>. This Civil Code, which was not inherited from accumulated piecemeal jurisprudence, but rather conceived anew as a logical system inspired by Roman law, reflected the categories of a centralized and strong unifying Republican Rule, one that was foreign to liberalism. It is another vector along which the multiculturalist pressures and accommodations tend to appear as nonsensical, abusive or responsible for the erosion of the social fabric. What interests us here is to understand that religious diversity in Canada generated an early awareness of liberty of conscience and of religion plus a favourable prejudice toward a pluralist society regarding other dimensions of life: decentralization and federalism appear as obvious and convenient choices under these circumstances.

### C. A Tale of One Law and Two Charters

In 1971, Pierre Elliott Trudeau, having moved away from the centralist model of the [CCF which became, after 1961:] New Democratic Party (and by personal infatuation with the Austrian Friedrich August von Hayek's liberal doctrine<sup>62</sup>), had the "**Canadian Policy on Multiculturalism**" adopted by Parliament without debate. I insist here again on the loss of the deliberative dimension in this radical transformation of the political culture of Canada: one of the many defeats of Public Reason (in the Rawlsian sense) in this country. This policy introduced a new individualist dimension, inspired by American liberalism, where it is understood that the citizen must be protected from the State because the State is abusive by nature<sup>63</sup>.

The 1975 Québec **Charte des droits et libertés de la personne** which applies to provincial fields of jurisdiction introduced a similar American individualist and anti-State bias, as if individual liberties had been reconquered from an authoritarian Leviathan which has to be watched and checked

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<sup>61</sup> Modified several times, just as the French *Code civil* which, after nine reviews, now diverges from the original common source as well as from each other: cf. Jean-Louis Baudouin, "Le Code civil français et les Codes civils québécois" in *Le Code civil 1804-2004*, Paris: Dalloz, 2004, p.629, and his "Justice, laïcité, démocratie et égalité", unpublished lecture, XVIIIes Entretiens Jacques Cartier, Lyon, 3-8 décembre 2005.

<sup>62</sup> Especially by his critique of socialism in *The Constitution of Liberty*, Chicago: Chicago University Press, 1960 and by his philosophy of law in *Law, Legislation and Liberty*, Chicago: University of Chicago Press, 3 vol. 1973-1979 which influenced directly our 1982 Charter of Rights and Freedoms

<sup>63</sup> Typical of this "Hate-of-the-State" trend is the pervasive use of "Government" instead of "State", in this country, just as "Administration" is used instead of "State" South of the border. We now read in Anglo-Canadian newspapers about Day One of the civil year when WE, the tax-payers, start earning money for OURSELVES after having worked for THEM (the part of our wages equivalent to our taxes), showing that individuals do not recognize themselves in the predator-State. This American bias is a recent post-war import into English Canada.

at all times. Hence the Charter is intended as a much-needed safeguard. But it introduced a dissonance with the republican inspired civil law which had governed the public values for more than a century. According to the cognitivist model<sup>64</sup>, in a democracy, the content of the rules of law must be “consonant” with the dominant culture to be meaningful and accepted. Any regional piece of legislation must be consistent with the global juridical framework. The Québec Charter, although introduced by Quebecers, goes against the grain.

So did, but on a smaller scale, the **Canadian Charter of Rights and Freedoms**. It mirrored a kind of American atomistic liberalism more than the spirit of British traditions. But, as pluralism seemed to accomplish the perfection of democratic rule, the Canadian Charter did not meet with any organized opposition when Prime Minister Pierre Trudeau had it accepted along with the 1982 Constitution. Section 27 incorporated multiculturalism among the fundamental principles overruling all legislation past and future. From this moment, classical Canadian nation-building became obsolete. So did Quebec national and historic identity. Ontario’s sense of legal tradition was also rendered obsolete by the Charter, as was demonstrated by the Islamic Courts crisis of 2004-2005.

At first, the Federal Charter seemed to do no more than ascribe a greater legitimacy to individual rights. It looked like adding an emphasis to existing values and implicit obligations. In its authors’ mind, it was not intended to change the direction or “spirit of the laws”. Neither the charter(s), nor the provisions on multiculturalism were supposed to create any new legal obligation. But from another perspective, it is significant that the political discourse on the promotion of Canadian unity took a new turn in parallel with the Charter. Its announced goal was to address the movement for Québec sovereignty after the 1980 referendum. But the boosting of Canadian unity turned out to also take into account the deficit of polity cohesiveness and restore it: it appeared that there was a distinct weakening of the sense of belonging to this country, showing signs such as the so-called “alienation of the Western provinces”, the ever diminishing proportion of Canadians who exercise their right to vote, the high figure of foreigners (landed immigrants) who do not hurry to acquire Canadian citizenship long after the legal time requirement of residence is met, etc.

The aim of the Charter of rights is to guarantee individual rights against the State, even if it can turn into some absurd combination of functions: section 1 of the Constitution affirms the principle of God’s supremacy but subsection 2.a of the same constitution makes it a duty for the State to guarantee the individual choice of atheism or of any established religion.

The neutrality of the Canadian State has been tested through several legal cases. As mentioned above, against the formal opposition of most Churches of different creeds, the federal Minister of Justice (Irwin Cotler) had submitted to the Supreme Court a draft of the Bill on same sex marriage. He claimed that this Charter of Rights did prohibit the State from supporting a particular religious view of marriage. In December 2004, the Supreme Court announced that the Federal Charter guaranteed the recognition of the right to contract a civil marriage for same sex couples. There was no public discussion or debate around such a major question. For those committed to the Republican model, the silence of the House of Commons amounted to another defeat of Public Reason. Here as well, government by the charters and judges seems to satisfy a large segment of the public as a safeguard against alleged arbitrariness and passions<sup>65</sup>.

In 1988, the Parliament of Canada adopted the **Law on Multiculturalism** which clarified and harmonized the 1971 Policy and the 1982 Charter.

Section 3.1.a. states that multiculturalism means freedom for individuals to maintain, enrich and share their cultural heritage.

Section 3.1.b. recognizes multiculturalism as a fundamental character of Canada.

Section 3.1.e. defines equal treatment in law implementation as the obligation for the Government to acknowledge cultural differences

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<sup>64</sup> Clifford Geertz’s theory, applied to human rights by J. Portier; cf. “Les mutations de la laïcité française: une approche cognitive” in M. Milot, *op. cit.*, pp. 34 sqq.

<sup>65</sup> Cf. Daniel Weinstock, « Compromis, religion et démocratie », in M. Milot, *op. cit.*, pp.41-52

Section 3.1.d. recognizes as positive the existence of organized cultural communities and promotes the recognition of their contribution to Canadian history.

Section 3.1.f. encourages social, cultural, economic and cultural institutions to adjust to those differences.

Section 3.2.a-f lists the obligations made to all federal agencies to collect detailed information on the cultural communities and to use public funds to promote their development through programmes.

This corpus of legislation was voted in the spirit of individualist liberalism and group-differentiated rights before any theoretical reflection by Canadians on their own situation and values had been systematically conducted. It does not mention the State by name, nor its correlative: the citizen. The word *integration* is absent from the texts. There is no longer any civic entity to be integrated in.

The debate began very late. In fact, legal scholars, sociologists of religion, political theorists and other intellectuals felt concerned *post factum*. Some attacked the folklorist reduction of the concept of culture as used by the Charter and by the 1988 law:

Implicit in this approach is the peculiar notion of culture as a commodity: a thing that can be displayed, performed, admired, bought, sold or forgotten. It represents a devaluation of culture, its reduction to bauble and kitsch<sup>66</sup>.

Others considered that these policies were openly **illiberal** because a group-differentiated citizenship violates the liberal rule of neutrality. The State should limit itself to maintain a fair cultural market place. Other rejected the multicultural stance because it violated the republican absolute equality requirement<sup>67</sup>.

Wayne Norman, Will Kymlicka and Charles Taylor did not agree. They took, each in his way the legitimation task, arguing that, in post-national democratic societies, particularisms, and especially the subjective religious identity, are entitled to receive recognition and legal protection. The private individual and the public individual are the same and, in accordance with the modern imperative of authenticity, society should apply the politics of recognition, in the words of Charles Taylor. What separates individuals from each other (religious rules, dress, family structure, public values inherited from their society of origin, language, etc.) is accentuated. The pressure in favour of Anglo-conformity (as it used to be called colloquially) is made abusive and obsolete.

#### D. The Notion of Passive Citizenship

Such new rules define an empirical **passive citizenship**<sup>68</sup>: the differentiated individuals are made comfortable to receive help and protection of their difference and if applicable, through the mediation of the cultural community they are associated with. We can find a major distortion of democratic autonomy when observing that some Arab, Indonesian, Persian or Turkish Canadians find that Muslim organizations speak in their name without checking the subjective faith factor<sup>69</sup>. In this

<sup>66</sup> Neil Bissoondath, *Selling Illusions. The Cult of Multiculturalism in Canada*, Toronto : Penguin, 1994, p. 83

<sup>67</sup> Some defenders of an abstract liberalism also advocate a strict universal equality, Cf. Brian M. Barry, *Justice as Impartiality*, who from there proceeds to criticize multiculturalism on quite solid grounds in *Culture and Equality: an Egalitarian Critique of Multiculturalism*, Cambridge: Polity Press, 2001. Barry's defence of the Greek ideal of *isonomia* as the essence of democracy converges with the views of most republicans such as Michèle Vianès, founder-director of the Centre *Regards de femmes* based in Lyon, France, which acts as a powerful watchdog of French *Laïcité*, at <http://www.regardsdefemmes.net> . For a critique of Brian M. Barry's theses, cf. Hilliard Aronovitch, "The Space for Multiculturalism: Exceptions versus Exemptions", unpublished paper, Department of Philosophy, University of Ottawa, 2007.

<sup>68</sup> There is a specific framework common to all liberal Citizenship theory on which I cannot write further here. Cf. Will Kymlicka and Wayne Norman, "Return of the Citizen: a Survey of Recent Work on Citizenship Theory", *Ethics* 104, January 1994, pp. 352-381. The two authors wrongly assumed (pp.372-374) that the requests for accommodations would tend to become fewer and fewer in the future while helping to bring groups closer to each other.

<sup>69</sup> Traditional practice within Islam --notably wahabi and salafist-- does not recognize the individual right to publicly renounce Islamic faith and declare oneself apostate. According to a strict interpretation of the Shari'a, the immediate milieu (family or mosque prayer assembly) may judge the case and apply capital punishment for apostasy. More basically, we all

context, the State-subsidized citizen is simply an extension of the “natural” family cell and of the religious beliefs it transferred to him/her. According to this liberal conception, it is legitimate to claim publicly funded denominational schools. It is also legitimate for such a citizen to invoke a religious value in a political debate where there is no self-evident argument to orient a decision<sup>70</sup>: the conception of the public sphere is not that of a conscious separate construct, where political ethics are derived from a distinct political foundation.

Multicultural citizenship, though, seems ill-equipped to engage in public discourse and actively promote a conception of the common good. Let us take the case of religious fundamentalism in a hyper- or late- or post-Modern society like Canada is. The two conceptions of public space are incommensurable. In the Western sense (which includes secular or liberal forms of the three partners in monotheism: Judaism, Christianity, Islam), the citizen does not coincide with the private person: citizenship is a **political identity** aware of societal needs and ends, separable from private or family beliefs, where the a-rationality or arbitrariness of religious faith<sup>71</sup>, is kept away from the political arena. The Enlightenment heritage of Public Reason offers the minimal condition for the converging debates based on relative values leading to decisions to which all citizens can relate. Relative values here do not mean that citizens must debate as relativists but rather that they will take an immanentist perspective<sup>72</sup> where their religious values can be translated into secular political commitments. This view cannot enter into political discussion with those who recognize only a monolithic identity: that of the believer armed with sacred transcendent values. Where religious dogmas alone constitute the full identity of the believer in the public space, basic law enforcement becomes impossible. Revelation and traditions provide all needed rules. Moreover, such an identity does not move in the direction of citizenship.

If a democracy does not offer and even impose<sup>73</sup> the means to integrate the newcomers with participation and profit into the dominant public values, centrifugal forces will prevail and cause the loss of points of reference. The concept of multicultural citizenship is based on some magical anthropology according to which all the heterogeneous identities will freely add up to a harmonious whole: the civic nation. This is supposed to happen spontaneously, peacefully, without integrative structures, as if any individual could enter into dialectical productive relations with any other individual without mediation. Or as if a post-Modern nation could altogether dispense with relations between the citizens who constitute it and continue to be a nation.

If we consider the immigrants to this country and the “cultural communities” or “minority groups” (the name itself modifies the view), their rights to difference are now “entrenched” into our laws as non-accidental, non-transitory i.e. not conditional to an integration, but inherent and permanent. Integrate to what, in truth? Identity has become self-referential. The general picture is that of a “community of

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know that there are Christian Arab Palestinians in Canada. There are also Coptic Egyptians, Lebanese Orthodox and Maronite (plus Protestant Christians), Greek Catholics, atheist Algerians, etc. among “Arab” immigrants. No one should be allowed to decide arbitrarily that all Arabs are observant Muslims.

<sup>70</sup> Cf. the very clear epistemology and large cultural scope of Jeffrey Stout, *Democracy and Tradition*, Princeton and Oxford: Princeton University Press, 2004: the author defends the doctrine of a “New traditionalism” (ch.5, pp.118-139) after having examined and rejected the immanentist stand (ch. 4 “Secularization and Resentment”, pp.92-117. Cf. also Conrad Brunck, «Religious Values in Law and Policies: is Neutrality Possible?» discussing the status of values in the case of some highly technical legislative issues on assisted procreation research and procedures, in Solange Lefebvre & Claude Charette, eds., *Intergenerational Relations in Canada: Multicultural and Multireligious Perspectives*, Montréal: Presses de l'Université de Montréal, 2000. It pleads for the recourse to some religious values under defined conditions. Both these studies deal with the issue of value in the public sphere without reference to the correlative categories of State and Citizen. They both belong to the liberal current which does not delimitate the political level as autonomous.

<sup>71</sup> In the perspective of a Kantian non demonstrability calling for a free leap of faith which cannot be imposed on anyone's free will.

<sup>72</sup> Charles Taylor does not think it possible or desirable. Cf. “The Immanent Counter-Enlightenment”, in Ronald Beiner and Wayne Norman, eds., *Canadian Political Philosophy*, Oxford: Oxford University Press, 2001, pp.386-400.

<sup>73</sup> Through compulsory schooling of children, for instance.

communities" as the famous expression coined by Robert Stanfield and Joe Clark puts it<sup>74</sup>. This last picture of Canadian identities collects ghettos unaffected by the presence of other groups, determined by their respective past and cultivating a subservient ritual memory in place of political debate, completely foreign to the sphere of Public Reason. But one must realise this basic fact: community is not political society and does not lead to it.

The substantive content of historical common values has been removed from the Canadian State, fragmented and transferred to cultural communities of old-and new-comers, **all considered on an individual basis**<sup>75</sup>. Why should an immigrant be compelled to integrate into another group of immigrants of slightly earlier installation like the English (or the French)? The norm of Anglo-conformity was then rejected as pure violence because of its arbitrariness. A culture-blind conception of justice does not operate with the same epistemology. Brian M. Barry is not prepared to abandon the abstract conception of justice as impartiality, which multiculturalism has done, perhaps naively. Neither are Hérouxvillois.

The dissolving process resulted in the liberal condemnation of "collective rights" as incompatible with democracy in Canada<sup>76</sup>. According to this socio-anthropology, a sophistic discourse came to prevail among some Anglo-Canadians: since all cultures are constitutive of the various identities and equal in value, there is no legitimacy in asking immigrants to renounce their own. This goes beyond cultural relativism: it dissolves the polity itself by rejecting the converging political identity which all citizens must achieve through their common institutions as the base for action: creating a museum, cleaning the air, vaccinating children, defending the territory militarily, conserving landmark architecture, putting a polygamous community to legal order, financing scientific research, building a bridge, operating a prison, checking on the contents of commercially sold foods, making and keeping public space safe, as 9/11 has revealed, etc.

The obligation to reasonable accommodation which became so famous for right and wrong reasons is not a piece of voted legislation. It is a jurisprudential category which emerged in the **O'Malley versus Simpson-Sears** 1985 case about a work schedule conflicting with religious practice. The Supreme Court ruled that Simpson-Sears could not raise as an objection any administrative inconvenience; it may not invoke anticipated adverse reactions of the customers nor the fear of setting a precedent. Simpson-Sears had to comply with the request on the sole basis of the **subjective** religious persuasion<sup>77</sup>. Though the imperative accommodation is not meant to generate new law or new institutions nor favour a category of citizens, but only to modify the application of the laws in existence, it affected so deeply the sense of legitimacy that it could paralyze elected office-holders.

### E. The Closing Down of Religious Courts in Ontario

It is with these changes in mind that Sayed Mumtaz Ali, a lawyer working for the Ontario Department of Justice, founded the Canadian Institute for Civil Justice, in 1995. He was also at the time the President of the Canadian Society of Muslims. In accordance with the principle of the pluralist neutrality of the Ontarian institutions, Mr. Mumtaz asked that a separate court be established to receive and judge according to "the Shari'a" cases of civil law involving family law, marriage and repudiation laws, child custody and visit rights, inheritance customs, business contracts, etc. Such religious courts

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<sup>74</sup> Joe Clark, *A Nation too Good to Lose*, Toronto: Key Porter Books, 1994. In a liberal perspective, Joe Clark defines Canadian identity through values: a conciliatory attitude, a sense of compromise, an understanding and tolerant behaviour (cf. ch. 24): the perfect qualities for family life. Clark concedes that the so-called Canadian identity is shy, discrete and somehow soft. The book is focused on the best ways to disarm Québec separatism. It does not consider the case of recent immigration though the Canadian Charter of Rights had been enforced 12 years earlier.

<sup>75</sup> As noted, all cases of court-enforced reasonable accommodations were requested by individual in their particular circumstances, but those which regarded freedom of religion had collective effects on communities.

<sup>76</sup> A very convenient thesis in the discussion of Québec political and cultural claims.

<sup>77</sup> The case of the Sukka successfully pleaded by Julius Grey where the Supreme Court, (2004) R.C.S.551, by a majority of one, reversed the unanimous judgment of the Québec Court of Appeal: cf. *Syndicat Northcrest c. Amselen* (2002), R.J.Q. 906 C.A. Where the Québec court ruled that religious symbols did not belong in the public space, it was overruled. The same sequence of decisions happened with the right to wear a kirpan to school (spring 2006).

already existed for Anglican law, Roman Catholic Canon law, Rabbinical law, Mennonite law. The parties had to agree to submit the case to such tribunals and the decisions were binding, which is to say that these religions (or particular currents of established religions) were accepted as sources of law. That is to say: the moral principles and regulations used by the officer of a given religious cult is transformed into self-validated positive law carrying executive power. This is quite different from a simple private contract insofar as it is accepted as binding within the sphere of civil and administrative law. Moreover, such religious court decisions are considered valid and binding in most countries of origin of the parties, even if later reversed through an appeal to an Ontario civil court<sup>78</sup>.

Such a status formally recognizes that the grounds and criteria applied by these courts are reputedly accepted by the State. It therefore becomes a matter interesting all citizens because it is accepted in their name, as part of their common social contract, not as a private custom<sup>79</sup> among residents of recent immigration. It is of capital importance to stress that neither the provincial State, nor the federal State have produced any tool to regulate how these courts did work: how religious judges were appointed, what theological competence was required to sit as a judge, what number and type of witnesses should attend, how the persons concerned could be heard and defended, whether a review of the judgments should be performed on a regular basis by some independent agency, etc.: all parameters well defined in Canadian and Ontarian laws are left to religious customs. The wahabi XIIth century Shari'a? or that of the Paris Grand Mosque?<sup>80</sup> The Turkish republican Islam? or the Moroccan latest (2004/2005) Family Code? On the ground of the **subjective** freedom of religion, as confirmed by the Supreme Court of Canada, the State does not provide any training in religious law; it does not examine the laws and customs themselves.

The Minister of Justice in the Ontario New Democrat cabinet, Marion Boyd, authorized the institution of the shari'a courts on a provisional basis with the obligation to review its relevance ten years later. These courts rendered judgments during ten years and came up for review in 2005. As is well known, the protests and objections against the Shari'a courts first came from inside the Muslim group, men and women, and especially from the Association of Iranian Women in Toronto (presided by Homa Arjomand), then in Montréal, also led by the Association des femmes iraniennes de Montréal (presided by Elaheh Machouf), and abroad. In October 2004, Shirin Ebadi, the 2003 Nobel Peace Prize, spoke in Toronto in favour of a strictly secular State for which she is fighting for in Tehran.

Nevertheless, in December 2004, Marion Boyd herself, who had been appointed by a liberal government to conduct the review, submitted her report recommending the Shari'a courts be permanently installed as part of the judiciary system of Ontario. Obviously, it was not a wise decision to ask the author of a provisional legislation to review the implementation of her own project: one could foresee that Marion Boyd was not going to disavow her contribution. I read the Boyd Report: it declares correctly that the Ontario Shari'a courts stand in conformity with the Federal Charter of Rights, with the Federal Law on multiculturalism and with jurisprudence. They are just one more instance of several types of religious courts, some with a century-old tradition. There is no ground on which one could deny the Muslims the right to have their own: a higher court would reverse such a decision for religious discrimination.

But the political turmoil grew louder and more confused. In Québec, the liberal Minister of Justice Jacques Dupuis closed the door on the possibility of such religious tribunals. He simply declared

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<sup>78</sup> In the case of decisions concerning child custody governed by traditional Shari'a, the children are entrusted to the father. Where an appeal to a Canadian civil court had been won in favour of the mother, the Shari'a decision prevailed for the governments of the father's country of origin in a given list of Muslim countries, such as Iran. These states made it clear that they would not prosecute the fathers who would react by child abduction and return to their native country, upon a reversal of the Canadian Shari'a court decision. Cf. Vida Amirmokri, Homa Arjomand, Éline Audet, Micheline Carrier, *Des tribunaux islamiques au Canada?*, Montréal : Sisyphe, 2005.

<sup>79</sup> The acceptability is a distinct issue, quasi impossible to solve in liberal political theory.

<sup>80</sup> On types of Shari'a and their relations to the Kuran in Arabo-Muslim countries (and minorities of Europe and America), cf. Albert Hourani, *A History of the Arab Peoples*, Cambridge, Mass.: Cambridge University press, 1991, ch..4 "The Articulation of Islam".

that Québec Civil Code recognized one source of law: the State (as imposed by the tradition of Roman law). A cultural difference. Therefore, where religious groups had organized chambers of Mediation, their decisions remained private and non binding. Two members of the National Assembly (one being a Muslim) presented a motion adopted unanimously to exclude the Shari'a courts that were already illegal and send the motion to all Provincial legislatures in Canada, a step unheard of in the past. Some thing prefiguring Hérouxville's behaviour code...

We all remember having read in the press that, on September the 8<sup>th</sup>, 2005, 48 major cities of the world held demonstrations against Shari'a law in Canada: in Paris, in London, in Amsterdam, in The Hague, in Stockholm, in Düsseldorf, in Berlin, in Copenhagen, etc., and also in Vancouver and in Victoria, as well as in Toronto and in Montréal<sup>81</sup>. The Ambassadors of Canada were embarrassed<sup>82</sup>. The Federal Government waited. Then, on September the 11<sup>th</sup>, 2005, Premier Dalton McGuinty, along with the Minister of justice, Michael Bryant, abruptly closed down all religious courts in Ontario. Without a word of justification, without a rationale which could be used in further legislation, without arguing against the Boyd Report he had found acceptable ten days earlier. Another major defeat for Public Reason.

The next day, some authoritative voices were heard in the media deploring this cold and mute abolition as a partial denial of rights: notably, those of the multiculturalist Charles Taylor, of the mitigated multiculturalist Jean-Claude Leclerc (a *Le Devoir* senior columnist), and of Amir Khadir, a socialist and avowed atheist (of Iranian origin), then president of L'Union des Forces progressistes. They all mentioned the fear that such religious sentences would continue to be pronounced but go underground, with even less control. Such an anticipation is certainly serious and alarming. But does it follow that religious courts should be maintained?

This either/or reasoning equals to giving in to a threat of violence. I do not recognize it as a democratic dilemma. Why should those who claim to be ruled by an extraterritorial religious law wish to be protected by the territorial law at the same time? All citizens have a duty to rationality, in these matters as in others. Such a regime of differentiated rights was in use in the Ottoman Empire until Mustapha Kemal Atatürk unified and reformed the legal system of Turkey in 1928, under a strict Republican Rule directly borrowed from France<sup>83</sup> in order to create by decree the integrated Modern Turkish nation. Women received the right to vote as soon as 1934 and in 1936, they represented one fourth of the students enrolled in Turkish universities.

On April the 29<sup>th</sup> 2007<sup>84</sup>, one million Turks answered the call of the opposition CHP secularist party supported by 600 associations and demonstrated in the streets of Istanbul to defend their secular State. The Turkish Army High Commanders had accused Prime Minister Recep Tayyip Erdogan of not clearly defending the secular principles of the Republic. They made it explicit that they would protect the Turkish *laïcité* actively if needed, as they had demonstrated in the past by military coups in 1960, 1971

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<sup>81</sup> For the street demonstrations in France, Michèle Vianès with the Movement *Regards de femmes* were most instrumental and efficient.

<sup>82</sup> And ill-informed since civil law and justice administration fall under provincial jurisdiction.

<sup>83</sup> With a constitution directly inspired by France's Fourth Republic, combined with adaptations of the Helvetian civil code, the Italian penal code and the German commercial code of laws. On the ruins of the decadent Ottoman institutions, Mustapha Kemal Atatürk founded the People's Republican Party and got elected President in 1923. His regime abolished the Caliphate, **closed down all Coranic schools and Shari'a courts** (1924) as part of the process which successfully secularized the Turkish State against strong resistance from the conservative milieux (brutally repressed). From then on, polygamy was prohibited, the Western dress code became mandatory, resulting in a **strict ban of headscarves and fez hats in public space, specifically in schools and universities**, but extending to the streets at large. Religious political parties were prohibited. To mark a striking discontinuity with the old Empire, Mustapha Kemal Atatürk moved his capital to Ankara and changed the Ottoman alphabet for the Latin (1928), imposing at the same time Coranic reading and studies in the Turkish language (1931). Nowadays in Turkey, every imam wishing to preach at the mosque (80% Sunni) during the Friday prayer must submit his text in advance to civil servants trained in the regulation of religions according to the separation of State and Churches: any political bias is quickly censured.

<sup>84</sup> The current essay was written before the Turkish legislative election of July the 22<sup>nd</sup> which produced a majority of 341 seats for the AKP out of 550, short of 26 to elect a president of their choice.

and 1980. This comes in the course of a presidential election campaign in which the Minister of Foreign Affairs Abdullah Gül has registered as candidate though he is known to be married to a veiled Muslim. Gül belongs to the governing Party of Justice and Development (AKP) which is openly but indirectly linked to religious movements trying to impose the headscarf and turn to Arabo-Islamic<sup>85</sup> culture<sup>86</sup>.

After 1956, Gamal Abdel Nasser did the same in Egypt as Atatürk's Turkey had done to abolish differentiated rights (and courts) not only for foreigners, but for minorities (Coptic, Jewish and from more than ten distinct branches of Christianity, some (the self-labelled Syrian-Lebanese) claiming to have resided there since the Crusades... At this cost, he was able to create the Egyptian-Syrian secular nation where all were to be treated as equal citizens of the (short-lived) United Arab Republic<sup>87</sup>. Saddam Hussein's first ten years in power were a secularist time in Iraq. The Iraqi and Syrian Ba'ath parties were ferociously secular. The case of Tunisia is an extreme: the civil regime in place before the French Rule was staunchly anti-Islamist. Tunisians supported a secular State and still have one.

What I wish to show here is that fundamentalism is (or used to be until 1980) a fringe phenomenon within large Islamic societies, and standard practice in some smaller countries like Saudi Arabia. Several predominantly Muslim countries feel humiliated and driven back to dark ages when a XIIIth century version of the Shari'a is invoked, as it is by the Talibans, by the sect of the Lost Imam (of which Iran President Ahmadinejad is a member), or by the Saudi Bedouins. The Canadian Law on Multiculturalism makes an obligation for Canada to document, maintain and subsidize all types of foreign traditions, including religions and including archaic forms of religion which do not recognize the difference between a community and a society<sup>88</sup>.

#### IV. The Republican Rule: a Paradigm neither Liberal nor Illiberal

It is a paradox to me that, in this country, when it comes to such issues as citizenship, identity, liberal models, public sphere, etc, bibliographies tend to be quite asymmetrical: in his *Multicultural Citizenship*, Will Kymlicka quotes from 193 source documents, only 6,2% of which are in French. Joseph-Yvon Thériault's books on democracy, modernity and identity present about the same proportion, but in reverse. There seems to be an invisible barrier here.

As a result, few Anglo-Saxon theorists are familiar with the Republican theory unless they have focused their eyes on it to explain it to liberals or communitarians, as does John R. Bowen's striking recent essay on *Why the French don't like headscarves. Islam, the State and Public Space*<sup>89</sup>. Bowen should be commended for a major breakthrough here and elsewhere. While often in disagreement with them (as I found myself to be), he succeeds in conveying the mute postulates of the French Republican regime. It is not the case with Leigh Oakes and Jane Warren in their recent *Language, Citizenship and Identity in Québec*<sup>90</sup> which misses the stakes by its unilateral liberal reading, allowing exclusively for blood determinism (ethnic citizenship) or empty procedural social link (civic citizenship). The Republican Rule we are looking at is neither ethnic, nor civic. It is both open to outsiders and substantial. Examined

<sup>85</sup> Returning to the Arabic text of the Kuran.

<sup>86</sup> Cf. Nicolas Cheviron, from Agence France-Presse, in *Le Devoir*, April 30th, 2007 : "Un million de manifestants clament leur refus de l'islamisme" ; *ibidem* : Jean-Claude «Leclerc, « Un affrontement qui met la Turquie à l'épreuve »

<sup>87</sup> I do not present these cases as exemplary of a sound treatment of religious minorities. It is well known that Atatürk brutally repressed revolts against his reforms in 1925 and 1930. The Coptic Egyptians were regularly persecuted for their beliefs. Saddam Hussein eradicated a series of Shi'ite villages and imams.

<sup>88</sup> On the large spectrum of the Islamic theology of free will, cf. Malek Chebel, *Islam et libre arbitre? La tentation de l'insolence*, Paris: Dervy, 2003, ch. 7 "Fondamentalisme et libre arbitre" (aussi ch. 1, 3 and 5). See also Abdelwahab Meddeb's study of the concept of *bid'a* (or blameful innovation) in *Face à l'Islam*, Paris: éd. Textuel, 2004, pp.181-194.

<sup>89</sup> Princeton/Oxford : Princeton University Press, 2007. I find it important that Bowen is not an ethicist, nor a political theorist, but a social anthropologist, inclined to look at the complete picture with coherentist axioms.

<sup>90</sup> London : Palgrave Macmillan, 2007 ; cf. ch.3 « Redefining the Quebec Nation », especially 3,1 on Fernand Dumont's theory of culture here falsely construed as an "ethnic model". On the liberal axis used by this reading which go "from an ethnic past to a civic future" (ch.2), Dumont's views are allegedly being replaced by more modern ones. In fact, Fernand Dumont's works do not in any sense define or promote an ethnic model of culture. Cf. Danièle Letocha, "Entre le donné et le construit, le penseur de l'action: sur une relecture du *Lieu de l'homme*", in Simon Langlois et Yves martin, dir., *L'horizon de la culture. Hommage à Fernand Dumont*, Presses de l'Université Laval, Québec, 1995, pp.21 à 45.

public values, deliberative political choices and historical memory, to name some elements of the republican contract, are certainly not blood given, but they are not formal either. The liberal scale of “either ethnic/or civic” is not the appropriate tool to capture its meaning and measure it. I shall make a *détour* to briefly show how the basic values of the republican polity came to be first defined in Ancient Attica. Then I shall show how French *laïcité* is understood and what contradictions it is plagued with in modern times.

In short, the ground on which the Republican Rule operates is as follows. Because it chooses and implements collective actions in a historical time frame, the Republic has the duty to address each citizen directly and encourage the convergence of all individuals toward the common good as defined through public debate. The passage from the status of natural individual to that of a free citizen involves a procedure of uprooting. This produces the necessary emancipation from unexamined beliefs (including religious beliefs and family values). The means to understand and practice the separation between the public and the private spheres are provided to all by the Republic on an equal basis. This gives access to the capacity to shape the present and the future, a capacity which the private individual does not have. It brings about the competence to exercise a right, not just hold it. Hence the importance of the “inclusion” of all in the political realm (*politicité*). From this standpoint, “exclusion” points to some failure of the Republic, unless it can be established that some individuals or groups rejected the means of emancipation (while others accepted the contract of citizenship and succeeded).

#### A. An Ancient Source of Secularism: the Athenian Polity

The republican model claims ancient ancestry. Looking at its birth, between 621 and 500 B.C., in Attica, we see the intentional destruction of the archaic Mediterranean ethnic system of the *genos* which presented itself as natural, immutable, god-given and protected by divine laws like the stars and the seasons which their institutions mirrored. After the fall of the Mycenaean palatial order at the hands of Dorian invaders<sup>91</sup>, three reformers contributed to disqualify, ruin and replace this theocratic model by the secular *politeia* or city-State. They broke down the old rules and separated Nature from Reason: what happens *kata phusin* is not what happens *kata logon*. For my purpose, I shall isolate the sequence of decisions taken and maintained to establish political freedom based on the citizen's reason and values. The most surprising factor in this development is that a small quarrelsome group of tribes could sit and think together, then maintain the cultural acquisition of each stage when entering the next in order to inaugurate a distinct model: the secular *politeia*. It is the first case of secularization we have access to, even if indirectly, the magnified actors and events having been put into written testimonies long afterwards. But the assertion of the universal right to speak openly and be protected by courts and assemblies (*parresia didona*) mark a break with earlier conceptions<sup>92</sup>.

#### 1. Draco's Reforms 621-620: Athens First Codified Laws

- He implemented the decision to put the laws in writing and make them available as an organized constitutional corpus to all citizens whereas customs had been the secret power tool of the dominant Eupatrids. The Ruler as well as the Ruled are now bound by the same objective Code of laws. Voted laws override family customs. The State is recognized as exercising the monopoly over law and over force (private force being renamed violence or crime). The caste of priests is then stripped of legal authority: individuals are equal before the voted law: this *isonomia*, a strict and blind impartiality, is what transforms them into citizens. It is the first secular empowerment of citizens in Western history. Before that, men were just beasts or barbarians. They are now Hellenes, all co-responsible for war and peace. Voting never became compulsory, though. But taking part in the legislating process was, so that every citizen would realise how much vulnerable and risky the political order had to be and why it called for constant adjustments and corrections. Imperfect and binding at the same time<sup>93</sup>.

<sup>91</sup> Athens was spared destruction.

<sup>92</sup> Cf. Jacqueline de Romilly, *L'élan démocratique dans l'Athènes ancienne*, Paris : Éd. De Fallois, 2005, pp 15-16.

<sup>93</sup> Cf. Jean Imbert, *Le droit antique*, Paris: Que sais-je?, P.U.F., 1966, pp.23-26 ; Jean-Pierre Vernant, *Les origines de la pensée grecque*, Paris : P.U.F. 1981, pp.6-36.

- He abolished private justice and endowed the State with full and exclusive judiciary power, imposing deliberative common public decisions in criminal and civil laws: justice is severed from vengeance.
- He used the model of the *agôn*, (the Attican codified armed tournament) for his conception of coexistence of the differences. This is the origin of the idea of "public sphere" with an active citizenship.

## 2. Solon's Reforms 594-560: Through a coherent constitution, Solon forces the individual's emancipation from family, from social caste, from traditional values (including private cults).

Draco had imposed his views and values through a ferocious system of enforcement. If it was conserved and maintained after his death, we must think that the Athenians have recognized themselves in them as in a consensus which appeared both just and convenient to many. There is some historical truth in what classical writers like Aristotle tells us retrospectively in his *Constitution of Athens* (III.2.4). The critical moment comes up with the constitution. Solon did much to "free" the individual from static blood identity.

- Through a constitution, he implemented a plan under the political sign of *dikè*, deepening the concept of equal justice: any citizen could enter a case against any other, even within the same family.
- He suppressed collective property and limited patriarchal powers, making women legal subjects in a passive sense: a woman could inherit property and transmit it to future sons, so as not to let an organized family line be destroyed and its property dispersed.
- Observing the social and economic dichotomy between rich land owners and poor indebted serfs, he cancelled all debts for which land or personal body had been engaged as security, and abolished such debt-bondage (by a sort of *habeas corpus*) thus creating a free peasantry who became the basis of democracy. The State wisely repaid a percentage of personal debts so as not to ruin the nobility.
- He encouraged the production of oil and wine to be exported by merchants who were granted political rights, a recognition of the merits of a bourgeoisie. In fact, Solon's audacity went as far as to invite artisans and merchants to live and work in this poor region where agriculture oscillated between poverty and scarcity. This class of merchants would soon demand and obtain rights to fight in wars along with the landowners<sup>94</sup>. Their loyalty went to the polity, not to bloodlines.
- He granted minimal rights to the metics (the non citizen artisans), because they were contributing to the common wealth: without being citizens, they could lodge a complaint against one and be paid for their services by a court decision.
- He underlined clarity and universality of rights, with the obligation made to each father to teach his son(s) how to read and write so that he could fully exercise his citizenship.
- He made the social castes opened to new citizens and created a plurality of degrees according to revenue that could be entered and left: not a destiny but a system of support. Active individual contributions to Athens well-being is the principal criterion of civic honour. The general perception is that there are only individual citizens left, all facing their State on an equal basis. A new abstract political identity.
- He rejected "tyranny", the absolute power which the peasants had offered him.

## 3. Cleisthenes' Reforms 550-500, after the Pisistratids and Hippias' episodes of consolidation:

Here again, the Pisistratids conserved and reinforced Solon's institutional heritage. Cleisthenes gave an economic and civil regime to Athens where secular, finite human construction is clearly displayed with pride.

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<sup>94</sup> Socrates, the son of a plain craftsman without land from the rural deme of Alopece, is represented as a poor man by Plato and by Xenophon who knew him in person. Having qualified as a hoplite (heavy infantryman), he had fought at the battle of Potidaea and even replaced his dead officer to command soldiers of higher and lower social classes. His further show of military courage in the battles of Amphipolis and Delion established him as a minor civic hero with some authority on the definition of the common good. The merchants were first permitted to enter the 4<sup>th</sup> class of soldiers (who did not pay for their equipment) then the third class for rich merchants who could afford expensive arms. The Athenian army was entirely composed of citizens (instead of the usual mercenaries like the Persian army they defeated), allowing for the rise to glory of the best soldiers of all social origins.

- He reformed the social divisions and totally annihilated the remnants of cosmic order in the Athenian polity. Instead of the four aristocratic hereditary tribes (mimicking the four seasons, four elements, four corners of the world, etc.), he defined ten new tribes and proceeded to harmonize all institutions in accordance with the decimal "rational" system, claiming that culture was following a higher metaphysical order, the "logos".
- He mapped Attica anew and had all citizens register in one of the 100 demes of the territory: one third of the demes for coastal people, one third for the city people and the last third of the demes for the interior. Those corresponded grossly to fishermen, merchants and peasantry.
- There were 500 members in the Assembly (*Boule*) who elected 10 strateges, maintaining ten regiments; there were 10 archons, one for each of the territorial tribes. The old sense of belonging to a bloodline and to the duty to serve its honour was by then weakened. Loyalty to the city-State of Athens could prevail. Now the whole territory of Attica was Athenian: it shows the decision to unite very different segments of population and of activities. They shared a symbolic world of abstract tools which are cultural constructs made to facilitate flexible exchange on an open basis. The invention of formal logics could serve egalitarian rational discussion between citizens<sup>95</sup> and deepen the introspective consolidation of the individual. Currency (the drachma) replaced barter. A new Attican alphabet (after the Mycenaean linear was abandoned with the old theocratic palatial culture) was borrowed from the Phoenicians and reworked to accommodate the predominance of Greek vowels. A common system of weights and measures contributed to the objectivity of the world image and to its convertibility. With these, Athenians felt pride for their culture:

Our city of Athens has so far surpassed other men in its wisdom and its power of expression that its pupils have become the teachers of the world. It has caused the name of Hellene to be regarded as no longer a mark of racial origin but of intelligence, so that men are called Hellenes because they have shared our common education<sup>96</sup> rather than that they share in our common ethnic origin<sup>97</sup>.

A strong cultural identity is an open one: it is absurd to associate the defence of culture with exclusion<sup>98</sup>.

- Cleisthenes' political genius consisted in creating a new identity through separation between private man and citizen. When forming the ten new tribes, he had the three territorial regions represented in each tribe and forced them to govern each in its turn as a team. There was no possibility for private, social or individual differences to prevail. Each tribe being representative of all three regions and interests had to negotiate and define a new socio-political common good for Athens, regardless of particularisms. All Atticans<sup>99</sup> were Athenians with the same status, the same liberties, the same responsibilities. This *politeia* marks the beginning of the Republican mental space. Of this separation, Sophocles' character of Antigone is the eloquent witness, protesting to Creon who keeps her from accomplishing her family duty. She understands fully that Creon's public duty is to defend the reason of State, and she would do the same in his place. Even the gods cannot provide an answer to such an essential conflict. No one is guilty. It is the black hole of reason, the unthinkable: the tragic, which can appear only in such a finite secular context. It later disappeared from the Augustinian City of God.

## B. Laïcité

<sup>95</sup> And even raise the question of a rational soul in slaves, as Plato shows in *Meno*.

<sup>96</sup> The word *paideia* translates more accurately as « culture » in this context.

<sup>97</sup> Cf. Isocrates, *Panegyric of Athens*, § 50, Transl. J.P. Adams, [www.csun.edu/Virtue.html](http://www.csun.edu/Virtue.html)

<sup>98</sup> Cf. My essay on Isocrates' assertion of culture as construct, distinct from blood determination: "Raison rhétorique et socialité: le cas Isocrate" in *Maritain Studies* XIII (1997), pp.155-174.

<sup>99</sup> The inhabitants of Greater Attica did not at first share the same language, the same gods, the same laws, but they decided to form one unified (and prosperous) polity.

## 1. As opposed to Religious Plurality

*Laïcité* differs in principle and in practice from our *de facto* religious plurality without State commitment to any particular denomination. It is the condition for a specific type of citizenship corresponding to a strong, unitary and substantive status<sup>100</sup>. In this context, citizenship is not of a natural competence but a learnt behaviour, a construct<sup>101</sup>. According to republican doctrine, this **active citizenship** enables all<sup>102</sup> to enter *l'espace citoyen*, the polity, and to take part in public life by arguing and persuading. Now the required convergence implies a principle of separation. This separation is the *sine qua non* condition of civic freedom<sup>103</sup>.

From the standpoint of the republican State, family determinations including religious faith, regional customs, national ideologies, etc. are unexamined acquisitions amounting to indoctrination: a restriction to freedom. They connote the private person who is off limits to the State jurisdiction. But those particular features cannot produce a citizen. They are considered dangerous because they lead to fanaticism. In particular, the closing of a community on a shared religion rejecting otherness equals to anti-republican *communalism*<sup>104</sup>, the plague of the Republic, declared President Chirac in his Address to the nation of January 2004. On public schools and the prohibition of ostentatious religious signs by staff and students, Jacques Chirac asks: what behaviour code would best ensure that, in the schools of the Republic, the emancipation from family and community values would actually take place? His answer is: one condition is the dress code imposed by the law banning all religious signs<sup>105</sup>. He was heard and approved by a large majority<sup>106</sup>. On the other hand, the liberal or neo-liberal will ask: why this intolerant regulation? The school belongs to the parents and should convey their values in all freedom. It was the predominant comment in Québec newspapers when the Stasi/Ferry law was adopted in France. The support for the Republican Rule came from the Mouvement laïque du Québec and from individual analysts. We can see that the republican sensitivity exists but as a weak and puzzled sensitivity. The rest of Canada unanimously condemned the French law for its intolerance. In short, mandatory abstention from displaying religious signs is perceived as intolerant while acceptance of a plurality of religious signs is perceived as democratic. Our interest here is to record the fact that this French law gave a rare opportunity where the republican and the democratic principles collide, showing that they belong to two distinct legal worlds. According to the Republican Rule, Canada is not in any sense a secular State. The fundamental condition for freedom of religion is not fulfilled in a legal framework like ours. The different charters of rights cannot achieve freedom either. They deal with the private individual.

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<sup>100</sup> In a book just out of press, *Accommodements raisonnables. Droit à la différence et non différence des droits* (Montréal : vlb éd., 2007), Yolande Geadah discerns three types of *laïcités*: « (...) la conception française, la conception étatsunienne et la conception turque. Ce dernier modèle est intéressant car il s'agit du seul exemple de laïcité formelle dans le monde musulman. (...) Le Québec est traversé par les deux premiers courants mais l'influence du modèle français y est plus grande à cause des affinités linguistiques et culturelles, tandis que le reste du Canada, de culture anglo-saxonne, est davantage influencé par la conception des Etats-Unis. » p. 33. Her sociologist's eye catches the contrast in political culture between Québec and English Canada, just as Danic Parenteau's reading mentioned above.

<sup>101</sup> For a comparison between France and Québec conceptions and regimes of *laïcité*, cf. Guy Durand, *Le Québec et la laïcité: Avancées et dérivés*, Montréal : Varia 2004. Durand tries to promote a middle-of-the-road practice where religion as historical tradition and religion as personal commitment to the supernatural are carefully distinguished from each other.

<sup>102</sup> Or more accurately: **claims to enable all**, the current debates revolving around its misfires. But then, it works only for those who are willing to abandon community life and enter society because they see a kind of promotion to freedom in this move toward integration. It is not the position of the extreme liberals who considers the status of citizen as a loss of liberty, a constraint. It is obviously not the fundamentalist's view either: here the contact with otherness, religious or other, is a threat to an identity already accomplished through belief.

<sup>103</sup> Guy Haarscher, *La laïcité*, Paris: Que sais-je?, P.U.F., 2004, p.79.

<sup>104</sup> In French: *communautarisme* (always associated with a withdrawal on religious unquestioned traditions)

<sup>105</sup> Adopted and implemented on March the 15<sup>th</sup> 2004 as Loi de l'Éducation Nationale 2004-228, colloquially referred to as Loi Stasi-Ferry.

<sup>106</sup> Among others, Abdelwahab Meddeb was called to express his opinion on the bill. He recommended the ban of religious signs in public schools. He states his reasons in the framework of a moderate analysis of European Islam in *Face à l'Islam, op.cit.*, pp.197-200, describing the headscarf as belonging to "vernacular Islamic practices".

To become a citizen, the individual must separate himself/herself from the intimate realm, the cultural, social, religious idiosyncrasies imprinted by the arbitrary position he/she happens to live in<sup>107</sup>. To exercise a choice, he/she must further be confronted with several sets of values (other religions and absence of religion included), sort out their essential core, learn to compare those doctrines, to alternate between the individual standpoint and that of the common good and to take part in the public debate to transform the inherited culture into a new common project relevant to the present and the future. This collective memory does not imply a cult of the past for the sake of it, nor the conservation of a fixed identity as a sacred essence. The conscious review of the common heritage may result in a revolutionary choice: the *Révolution tranquille* of the sixties in Québec illustrates the dialectics of memory and identity in a society open to newcomers who wish to join the project and modify it. Freedom means that rejection is always an option but that an ignorant withdrawal is not.

The citizen is not the natural extension of the private individual, and public space is not the extension of private space. What I hold intimately as an ethical position to judge matters in my own life cannot be the axiom of the public or common good. There is a pious naïveté in the persuasion that one can dispense with mediations and apply good intentions to political problems. Those have separate foundations and must be separated because the republic is a debate in action, and because these principles are different in essence: justice is not the extension of charity, tax contributions are not a duty to a larger family. A community cannot become a polity before it has been broken down and recomposed in a way where the common good can be rationally negotiated: that is precisely what Cleisthenes had implemented, to continue Draco and Solon.

In the same way, there is no such thing as the “compassionate conservatism” invoked by the current American Administration. Compassion is a subjective psychological state of empathic feelings for one’s concrete neighbour. Conservatism is an objective system of faceless institutional forces, on a different level of reality. Pretending to combine the two constitutes a) a category mistake, and b) a patronizing political rhetoric, intended to soften the image of closed hereditary privileges.

Why should religious beliefs be kept to the private sphere? If I come to the public debate as a believer with a sacred i.e. unconditional, non-negotiable, transcendent revealed truth in place of political principle, I can only assert it but not translate it into a common goal or action<sup>108</sup>. Therefore, for a democratic debate to exist, there has to be room for a double identity. As a member of the nation, every citizen owes to the others a suspension of situational differences like *religious beliefs as absolute values* in order to make political discussions possible. Human beings are not naturally compatible: within the Machiavellian framework, we read how the *Res Publica* makes most of them convergent and compatible under strict constraint. The “Live and let live” liberal motto does not apply to contemporary societies where more than 80% of the population is urban, in close and constant interaction. It may produce consumers; it will not produce citizens. Such a republican theory does not imply that the State is an

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<sup>107</sup> According to Philippe Portier quoting Émile Poulat, in the history of Western democracies, as soon as citizenship is defined as separable from religious belief, “We are all secular”. This cryptic expression, coming from the prominent French sociologist of religion, means that all Western societies “have established themselves on new ground through a radical break away from the reference to religious prescription [in public space]”. Cf. “Les mutations de la laïcité française”, in Micheline Milot, *op.cit.*, p. 29.

<sup>108</sup> Let me provide here a case of this dogmatic obstacle. I shall quote from the *Islamic Universal Declaration of Human Rights* written by the Islamic Council of Europe under the signature of Salem Azzam and proclaimed at the U.N.E.S.C.O. head office of Paris on September the 19<sup>th</sup>, 1981: “Within Islam, human rights are deeply rooted in the conviction that God and God alone is the Author of the Law and the Source of all human rights. Because of their divine origin, no government or leader may restrict, cancel or violate in any way human rights conferred by God. No one is entitled to question them.” Bruno Étienne, *L’islamisme radical*, Paris: Hachette, 1987, Annex 4, p.353 (my translation, my emphasis). Instead of separating the political from the religious, this document makes its absolute pseudo-political statement from within the religious sphere. A similar theological reduction inspired the Roman Catholic Church in the mid-eighties when John Paul II ordered all priests and members or religious orders to resign their mandates in representative assemblies and withdraw from political life. It was judged unacceptable that a cleric (or member of an order) would hold the Catholic dogmatic rules of morality on the one hand and, on the other hand, be seen as voting free access to birth control or abortion, for instance, as a citizen elected to consider the common good of a secular society.

absolute good. On the contrary, it is to be watched, even scrutinized at all time since its inherent tendency is to accumulate powers and controls<sup>109</sup>. It is the citizen's task to be vigilant and defend civil society through adequate laws. But it remains true that the citizen is to build his/her political identity within the framework of the State.

This idea of the citizen is an abstract universalist<sup>110</sup> construct has several consequences. The construction process is a State responsibility. Therefore, the public compulsory and free school has to be secular or at least supervised to keep religion strictly out of the curriculum and inspected by the State. In this republican school, the State has the duty of protecting the child's right **not** to believe, not even in some civic religion<sup>111</sup>. So religious, gender, economic, social and racial pluralism (*mixité*) in public space such as schools, hospitals, army or courts of justice is a necessary condition of the exercise of freedom. We can see how, from this external standpoint, our Hassidic or Amish schools are considered as inflicting a denial of citizenship upon a population for whom the State fails to fulfill its duty. "There is no freedom for the ignorant" wrote Condorcet in a typical Enlightenment perspective. There is still much of this persuasion in France today.

When compared to our constitutions of 1867 and 1982, those of 1946 and 1958 in France state as Article One: "La France est une république une, laïque et indivisible (France is a unified, secular and non divisible republic)". The public schools were first established by the Jules Ferry laws of 1883-1884 as free, secular and mandatory.

In principle, there is no such legal entity as an Arab French citizen, or a black French citizen, or a Jewish French citizen, or a Muslim French citizen. There can only be **the French citizen**, abstract and therefore unspecified<sup>112</sup>. Far from being totalitarian, this regime constantly points to the public sphere as limited. There is an outside to politics just as there is an outside to religion. In non fundamentalist spirit, the private sphere is off-limits to the State authority just as political sphere is off-limits to religious authority. Whereas our 1988 Law on Multiculturalism makes it a duty for Canadian Government institutions to collect detailed information on the residents' religion, the assertion of *laïcité* in Article One of the French Constitution mentioned earlier prohibits the State from inquiring about this intimate region of the private identity<sup>113</sup>. As a result, when violent incidents erupted in the Northern

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<sup>109</sup> What a Royal Commission of inquiry can obviously achieve in Canadian Public law, by opposing the State to itself, forcing it to account for even covert actions, like the Maher Arar affair recently showed.

<sup>110</sup> The assertion of universalism does not guarantee effective universality, as the French have come to learn about themselves.

<sup>111</sup> Notwithstanding the juridical concept of the free agency of persons, much stronger in British law.

<sup>112</sup> The meaning of the passage from the particular individual to the universal citizen is best described in Hegelian terms as follows: «But in developing itself independently to totality, the principle of particularity passes over into universality, and only there does it attain its truth and the right to which its positive actuality is entitled. This unity is not the identity which the ethical order requires, because at this level, that of division (see § 184) both principles are self-subsistent. It follows that this unity is present here not as freedom but as necessity, since it is by compulsion that the particular rises to the form of universality and seeks and gains its stability in that form." G.W.F. Hegel, *Principles of Right*, § 186 (transl. unknown), [www.marxists.org/reference/archive/hegel/works/](http://www.marxists.org/reference/archive/hegel/works/)

<sup>113</sup> Any departure from the strict norm of a religion-blind *Puissance publique* is called "Ethnicisme" by Michèle Vianès and it is a serious breach inflicted to republican freedom. Cf. "L'ethnicisme, voilà l'ennemi!" to be consulted on [www.regardsdefemmes.com](http://www.regardsdefemmes.com) It is from a feminist perspective that Michèle Vianès first views first collided with multijuridicity claims: any policy that would cover the injustices inflicted on women by Muslim religion and/or culture would be an ethnicist insult to republican equality. *Ethnicisme* is what President Chirac calls *Communautarisme* (communalism, in John R. Bowen) To teach and restore this sense of Republican citizenship, Michèle Vianès has written a forty-page pedagogical document and, with a team of media specialists and amateur actors, produced a DVD *Les dix mots qui font la France: Comprendre la citoyenneté pour vivre ensemble dans la République*, Éditions Regards de Femmes, 2007, to be used in the classroom. It has all the qualities of a typology: clarity and consistency. The present tense of the title: "...qui font la France", is very effective in conveying that a) this is the substantive content of an old and well-established, respectable identity which embodies the legitimate unity of the French nation down to them, and b) that this political heritage is most vulnerable and could collapse if not received and maintained in everyday life. But it does not imply that newcomers must adopt this national identity silently and blindly. The DVD is full of situations where young people disagree, argue, criticize: exactly what is not acceptable in public space is shown, defined, condemned. It is, for instance, the exclusion of schoolgirls from sports, the imposition of a leader through intimidation, the request for exceptions to the rules of the school on religious grounds, etc.

suburbs of Paris in November 2005<sup>114</sup>, no one had reliable statistics on the number of Muslims among the French population (estimated between five and six millions), nor on the breakdown between sunni, shi'ite, wahabi or the majority of "moderate" Muslims on the national territory. When police cornered a group of young men setting cars on fire during these riots, they cried out: "Our constitution is the Koran!". This was taken as blasphemy against the Republic and public opinion turned against them.

For anyone unable or unwilling to separate his/her intimate identity as a believer from his/her civic identity as a secular citizen, both coexisting in the same mind, there is no possibility of inclusion in the republican nation. For instance, the Muslim who assaulted Dr. Clifford Blais in Montréal because the latter had medically assisted his wife in an emergency childbirth, outside his presence (cf. my note no. 27) shows that he cannot see the competent obstetrician as separate from the male, nor the medical intervention apart from the religious prohibition. The fundamentalist of any denomination excludes himself/herself from the republican form of citizenship. But believers, free thinkers, sceptics, agnostics, atheists, dissenters of all persuasions are all equally included in this dialectical process of democratic debate where the common good is the end result of rational public deliberation.

What the State registers and regulates though is the public organized cult, the objective face of religions. The Minister of the Interior, responsible for police and public order, supervises a representative board for each established religion. In this quality of Minister of the Interior, Nicolas Sarkozy created the *Conseil français du culte musulman* in 2003, under the same law as that which covers the workers' unions or the political parties (*Loi de liberté d'association*, 1901). The CFCM, a civil institution, is presided *ex officio* by the Paris Great Mosque's Rector; it must include three women and a proportion of elected members from the Muslim confessions represented on the French territory<sup>115</sup>.

In this frame of mind, it is interesting to note that the European Human Rights Court has ruled in accordance with French Public Law that **culture does not include religion**<sup>116</sup>. A major difference between multiculturalism and republicanism. The legislator observed that among Roman Catholics, for instance, there were four century-old Catholic Chinese communities, organized groups from Macao and Sri Lanka (of Portuguese descent), South American Indians, as well as Spaniards, Italians, French people, Croatians, Scottish, etc. If all these cultures and many more could be associated with Catholicism, this religion was not a specific character of any of them. It is also the case with the Lutheran faith among Norwegians, Alsations, Prussians, Polish Pomeranians, Americans, Canadians, etc. The same case can be made for Islam with Indonesia, Sudan, Iran, Turkey, the Maghreb with its Berber segment, the United Arab Emirates, half of Black Africa, plus Islam's growing presence of 11 millions in/alongside Western Europe cultures. Is it that religion transcends culture? No. Some religions transcend some cultures. More accurately: some specific forms within universalist conceptual religions transcend some open cultures. Without these distinctions, the legal system gets paralyzed.

The essential rights found in the Canada and Québec charters of rights, like liberty of conscience, liberty of faith, liberty of religion are all asserted in the European Charter of Rights but they may not generate multijuridicity or differentiated rights<sup>117</sup>. Unlike the Canadian Supreme Court, the European Human Rights Court does not recognize any subjective feeling of religious obligation as an admissible argument. It will only admit the objective concept of a religious obligation, treating it by the

There is a right to dissent but it must be exercised from within the Republican Rule, not against it. This whole discourse exemplifies justice as impartiality, in a way clearly incompatible with our justice as reasonable accommodation. Michèle Vianès was among the first people to express understanding and support to Hérouxville upon the publication of the behaviour code.

<sup>114</sup> And soon affected most large cities suburbs and sometimes downtown districts, as it did in Lyon.

<sup>115</sup> It is significant that the CFCM was consulted on the ban of headscarves in public schools and voted an approval. It was taken as the authoritative advice about an objective religious obligation.

<sup>116</sup> Cf. Anne Saris, « L'arbitrage religieux : la revendication d'un droit différencié », Unpublished Lecture, Chaire Unesco de philosophie politique et de philosophie du droit, U.Q.A.M., Montréal, 25 janvier 2007

<sup>117</sup> The Cour d'appel de Paris therefore rejected the request presented by a condominium co-owner to keep the lights on all day on Shabbath.

same standards as a sociological fact. Therefore, for all signatory countries, the recognized religious authorities<sup>118</sup> are called to court to testify on what constitutes a religious obligation in the case of, for instance, conscientious objection, ritual slaughtering, halal or kosher diet rules, fasting, wearing a kippa or a hidjab/niqâb, etc. These recognized religious authorities also testify on the provisions embodied in their respective religious codes concerning practice **in a secular country or where their religion is in a minority situation**. In the decision-making procedures, the court considers these advices as guides, not as binding rules. The important fact here is that the court does not follow what the believer's conscience in good faith feels is compulsory, but receives only what the ministers of the cult considers required from the whole community.

As I have repeatedly stressed, the Supreme Court of Canada ruled to the contrary: in the *Syndicat Northcrest c. Amselem* (the "sukka") decision, our Court made it definite that an individual who argues on the grounds of liberty of religion does not have to establish the objective validity of his/her beliefs by invoking opinions of other believers in the same religion. Canadian Courts are forbidden to question the compulsory character of the religious obligation presented. Liberty of religion, wrote the Supreme Court, includes objective and personal conceptions, beliefs, obligations, precepts, commands, customs or rituals of religious nature as interpreted by the believer. After the Executive Board of the condominium had suggested substituting a sukka at the ground level instead of on the terrace of this luxury apartment building (and this substitute sukka having been approved by the rabbi), the court ruled in favour of the believer who erected the temporary sukka on his terrace, despite the hazardous electrical wiring, though he had signed the condominium regulation prohibiting all structures of any kind on the same terrace. Again, the only limitation is that the exercise of the right must not clash with someone else's freedom nor disrupt public order<sup>119</sup>.

Now, it is a fact that on matters of secularism such as this one, contemporary Québec courts tend to rule in the direction of the Republican Rule still present as a spectre in its *Code civil*, the rationale being that the arbitrary and absolute nature of (revealed) dogmas and (sacred) rituals should be kept in the private sphere and not be allowed to generate sub-systems of laws through religious courts, or in the Civil Service, in fact wherever citizens act as representatives of the (secular) State: public schools<sup>120</sup>, army, police, hospitals, postal service, revenue offices, tourism agencies, public museums, prisons, state-operated ferries, etc. This propensity stems from the Roman law axiom that the State is the sole source of law.

Accordingly, over the last three years, upon complaints submitted by individual city councillors, ten Québec municipalities were ordered by courts to cancel the traditional prayer opening the agenda of their meetings, even where it had been reformulated in a non denominational wording. Every challenge of the prayer has been successful. Unlike the United States of America, Québec does not legally recognize the category of a civic religion. But, the case of the crucifix on the wall of the *Assemblée Nationale*, highly visible just above the president's seat, is a more sensitive issue... At the opening of the electoral campaign, in February 2007, the new leader of the *Parti Québécois* André Boisclair declared that, in the post-Modern multicultural society we live in, this religious symbol should be removed. But the next day, having assessed the negative effect of this idea on the polls, he backtracked.

## 2. Limits and Contradictions of Republican Practice of *Laïcité* in France

In my judgment, there is an incommensurable distance between the liberal question: "How is respect for the persons best guaranteed?" and the republican question: "How do we, as a body of citizens, receive and transform our common civilization?" Whether either of the two implements its programme is another story. Secularism is not a theorem with purely logical consequences. Neither is French *Laïcité*.

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<sup>118</sup> Duly controlled by secular authorities for their training, skills and leadership among their own community: this task is performed by the *Conseil des cultes* in consultation with clergy or scholars.

<sup>119</sup> Their safety was not received as an argument by the Supreme Court though it had been by the lower Québec courts.

<sup>120</sup> And for many, all schools which benefit from tax money.

(...) *Laïcité* is a regulative principle, not an empirical reality which could be observed in its pure form. In other words, there is no "ideal" political form of *laïcité* where all ties with religion would dissolve once and for all. What we find instead is a set of variable configurations of State neutrality and of moral and religious pluralism<sup>121</sup>.

Separation and *Laïcité* are grounded in the Greek persuasion that the political contract should stand on its own feet without any transcendent justification<sup>122</sup>, an idea revived by Marsiglio of Padua in the XIVth century and by Machiavelli in the XVIth. But in fact, there have been --and still are-- a few obscure zones of historical resistance and of colonialist legal manipulation in which religions are contradicting the French Republican Rule. We just have to consider the case of the denominational public schools of today in Alsace-Moselle<sup>123</sup>, along the German border, a region then under annexation by the Prussian Reich (1870-1918) at the time when the laws of the Separation of the State from the Churches were adopted in 1905. The Catholic and Protestant clergy plus a few Rabbis (later added to respect equality of religions) act as appointed and paid civil servants, in accordance with the *Concordat* signed between Napoléon Bonaparte and Pope Pius VII in 1801, after the Revolution. The Roman Catholic bishops of Metz and Strasbourg are still being appointed by the President of the Republic, then canonically confirmed by the Pope. Among other oddities, the professors in some ancient denominational schools (Catholic and Protestant) are also paid civil servants and the faculties of Catholic and of Protestant theology of the University of Strasbourg are part of the *Universités d'État*, as exceptions. The few attempts at abolishing these exceptions and secularize Alsace-Moselle have aborted, once causing the fall of an entire cabinet (1924).

The most striking case --nowadays geographically restricted to small territories, mainly islands in the Western Indian Ocean and in the Pacific<sup>124</sup>-- is a remnant of the discriminatory regime of *Indigénat* which once applied to the French Empire at large. The word is derived from *Indigène* and can be found in the 1931 *Larousse du XXe siècle* with the following definition:

In Algeria, legal status of Muslim natives and, by extension, of natives in all French colonies; in administrative law, the *Indigénat regime* was first implemented in Algeria and later extended<sup>125</sup> to all colonies with a native population (Indochina,

<sup>121</sup> Cf. Micheline Milot, *op.cit.*, p.14.

<sup>122</sup> Which defines accurately the concept of *politicité* as used above.

<sup>123</sup> Representing 5% of mainland France population in the three departments of Haut-Rhin, Bas-Rhin and Moselle. In all, there are eight different types of accords between the Republic and religions in today's France (checked up to 2006). Cf. Guy Bedouelle et Jean-Paul Costa, *Les laïcités à la française*, Paris : Presses universitaires de France, 1998, pp.69-71 and 77-79.

<sup>124</sup> For instance in the island of Mayotte, one of the four Comoros, in the Western Indian Ocean, re-occupied by France after a private coup by the mercenary Bob Denard and Ahmed Abdallah in 1989, to separate it from the other Comoros (Grande Comore, Anjouan and Mohéli) which had declared independence from France in 1975 and been admitted to the United Nations under the highly unsecular name of La République fédérale et islamique des Comores. The French have imposed on the native population only the so-called "Visa Balladur" which created three civil statuses among the population, with distinct mobility rights. Nowadays, the prefect embodying the French authority still appoints the great Mufti and the Coranic judges. On the process which led to the partition of the Comoros, cf. *The World Guide, an Alternative Reference to the Countries of our Planet*, Oxford: New Internationalist, 2001, pp.177-178; on the controversy of differentiated rights in Mayotte, cf. [www.comores-online.com](http://www.comores-online.com). The Comoros Republic has a 99,9% Muslim population living under a strict official shari'a. It has changed its name to L'Union des Comores in 2002 to write off the Islamic character and find more allies in its fight to recover Mayotte now a "collectivité française d'outremer". I wish to thank Olivier Bergossi of the Comoros Mwezi Association for additional informations about this complex juridical situation.

<sup>125</sup> From 1889

Oceania and [black] Africa). In these colonies, legal offences which apply exclusively to native behaviour are being repressed [and punished] at the discretion of the Resident.<sup>126</sup>

In Algeria and in other Muslim countries, it meant the Shari'a Rule and Coranic courts for all Arabs and Kabyles, **Muslim or not**, and it did apply in weakened forms until 1962 when France lost its three Algerian departments in the Evian Accords. A straightforward denial of full citizenship<sup>127</sup> on the grounds of race and of religion.

It was of course impossible for the French colonial authorities to rule out Islam from vast Muslim lands of ancient tradition. A dimension of this was meant to show respect for Islam: In the 1830 treaty acknowledging the Bey of Algiers' forced abdication, the French colonial monarchy solemnly promised to respect its new Muslim subjects and to refrain from undermining their religion: a clear breach in the universalist religion-blind Republican Rule, one that was conveniently ignored by the monarchy.

How was the colonial State to prohibit polygamy among settlers and accept it *de facto* from the natives at the same time? By an apartheid based on a complex mixture of racial and religious criteria. While French settlers remained French citizens governed by French laws (namely monogamy) in Algeria, Muslim natives were covered by the *Indigénat* status without citizenship. Nonetheless, Algerian Jews and settlers from other European countries were granted full citizenship, in 1870 for the former and in 1889 for the latter. A four-tiered citizenship was enforced showing that colonialism is not compatible with the republican *isonomia*. So, a differentialist practice was installed for pragmatic reasons.

The colonial occupation turned into Indirect Rule. Soon, the Resident was given by Paris the power to exempt some "meritorious" natives from this *indigénat* and thus make them individually candidates for French citizenship as a reward for subservience: between 1865 and 1915, only 2396 Algerian Muslims were admitted to French citizenship and 1204 between 1919 and 1930, in spite of the fact that their regiments had fought with/for France during the World War I<sup>128</sup>. It was obviously intended as a tactical source of division among natives. A special group of *pseudo-indigènes* soon emerged unforeseen by the authorities: isolated members of the French Foreign Legion, meharist and spahis regiments who converted to Islam to have a second legal family in Algeria... The State found no answer to this form of religious creativity and complied.

That such a legal apartheid regime could have been established in the XIXth century is an inconsistency difficult to accept from the country that had proclaimed an exemplary charter of rights at the onset of the 1789 Revolution. But to see it maintained after the 1905 famous laws separating the State from Churches is a blatant contradiction (not to speak of the political scandal). In fact, *Indigénat* was dismantled slowly, carefully and incompletely. First, an ordinance of 1944 abolished the penal regime. Second, the Lamine Guèye law recognized full citizenship to all residents of the Algerian territory, then integrated into France. Finally, the Statute of 1947 decreed political equality and equal access to jobs in the Civil Service. But the ordinances of implementation delayed the dismantlement and made it inefficient in particular locations. It was understood that the Islamic clauses would be removed progressively, as the natives became "ready". The Algerian war decided otherwise, as did the independence of other French colonies.

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<sup>126</sup> Cf. Vol. IV, p.51. The last sentence designates the repression of anti-colonial uprisings. These arbitrary powers were transferred to the Residents (or civil administrators) in 1874.

<sup>127</sup> But is it divisible ?

<sup>128</sup> In 1919, a reform of the procedure made the access to citizenship less arbitrary just as the assertion of political Arab identity made it less desirable. For the complete figures, cf. Patrick Weil, *Qu'est-ce qu'un Français?*, Paris: Grasset, 2002; for a study of the legal, political and social dimensions of the *Indigénat* regime, cf. Sidi Mohammed Barkat, *Le corps d'exception: les artifices du pouvoir colonial et la destruction de la vie*, Paris: éd. Amsterdam, 2005.

To his surprise, John R. Bowen discovered that the genesis of the social contract is an ingredient of the citizen's identity in a republican regime like France. In the case of secularism, the French --Presidency, Government, political parties, Churches and other religious authorities-- plus a majority of citizens, held the 1905 law of separation between State and Churches (the so-called *Pacte laïque*) as a valuable national heritage to be maintained<sup>129</sup> when called to reconsider it in 2004.

That the French regime of *laïcité* is now considered as a national heritage implies that the Republican principle is not an abstract, timeless or meta-cultural idea, but rather an on-going historical process in which the citizens are responsible agents. Alan Bloom, in *The Closing of the American Mind* deplored the loss of the sense of polity in the American people:

It is possible to become an American in a day (...). It is, however, impossible, or it was until only yesterday, to become a Frenchman, for a Frenchman is a complex harmony, or dissonance, of historic echoes, from birth on. The French language, which the French used to learn very well, did not exist for the sake of conveying information, for communicating men's common needs; it was indistinguishable from a historical consciousness<sup>130</sup>.

It is true that the past is embedded in the present of the French republican model, as an inspiring reference, as a catalogue of all errors (and, at times, of some political crimes), or even as the best reason for a revolution. The relation to a strong and articulate collective memory is not a submissive one, though it may become so in a conservative ideology. Certainly, there is a style to it, just as there was an Athenian style, according to Isocrates. But there are times when memory is not sufficient to answer the new twist of a complex problem. It can act as an inescapable burden. The colonial past of France in Islamic countries maintains a love/hate climate which easily generates violence. There is a deficit of recognition which is lingering in the perception of the French of Algerian origin. It is amplified in their children, the *beur* (born in France). The difference that the fundamentalist Muslims of today want to display in the public sphere is not a difference of religion, i.e. a branch of Islam instead of a branch of Christianity; it is a difference in the relations between State and religion. They give priority to a religious identity in a secular State. A similar problem affects the secular State of Turkey with no better answer provided there.

The twenty experts appointed by President Jacques Chirac on the *Commission sur l'application du principe de laïcité dans la République* (the "Stasi Commission" after the name of its president, Bernard Stasi) handed in their report in December 2004<sup>131</sup>. With its 150 pages, it demonstrated a moderate open approach and submitted 26 recommendations to the President. One only was picked up and implemented in public schools, for staff and students alike: the prohibition of ostentatious religious signs, especially the headscarf, but also the kippa, etc. So a single negative recommendation was made into a law and implemented. The other twenty-five were shelved.

For us, from an extra-hexagonal standpoint, it is highly interesting to read three mentions of the notion of "reasonable accommodation" in the report and to learn that the Stasi Commission travelled to Québec to seek direct and complete information about it<sup>132</sup>. Suddenly, we see ourselves through their

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<sup>129</sup> Cf. The contrary opinion expressed by Jean Baubérot in his minority report as (Protestant) member of the Stasi Commission "Le dernier des Curiace: un sociologue dans la Commission Stasi" in P. Côté et I.J. Gunn, *La nouvelle question religieuse : Régulation ou interférence de l'État?*, Bruxelles : Peter Lang, 2006

<sup>130</sup> New York, Simon & Schuster, 1987, p. 53

<sup>131</sup> « Laïcité et République », La Documentation française, Paris, 2004.

<sup>132</sup> Cf. « Les mutations actuelles de la laïcité en France au miroir de la Commission Stasi », in Micheline Milot, *op.cit.*, pp.69-78.

eyes. Jean Baubérot wished the French would work out a more secular form of reasonable accommodation. But can a reasonable accommodation be secular at all?

In the same direction, a new paradigm of political philosophy seems to have gained momentum in France during the nineties precisely to transcend the limitations of the race/religion blind republic. It is described in "La question de la démocratie dans la philosophie française"<sup>133</sup> by Alain Renaut who has travelled and taught extensively in North America since 1980. Associating himself with theorists like Luc Ferry, Marcel Gauchet, Blandine Kriegel, Gilles Lipovetsky, Tzvetan Todorov, among others<sup>134</sup>, he tries to define this new thought as a more radical critique of Modernity. It could be summed up as "Identity revisited" according to the two following steps. First, to destroy the Ancien Régime hierarchies, freedom was conceived as a standardized identity or uniformity governed by the abstract concept of citizenship. This is the citizen without race or religion in the public sphere that we have met under Republican Rule. Alain Renaut criticizes this type of "equality by subtraction" (of the personal values, beliefs and commitments) and equates it to the global mediocrity predicted by Alexis de Tocqueville in *De la démocratie en Amérique* and by Benjamin Constant in his short and brilliant *De la liberté des Anciens comparée à celle des Modernes*<sup>135</sup> which announced quite pointedly the reign of the tyrannical faceless equality we must now relinquish.

The next phase, the post-Modern, is a turn toward the politics of recognition as defined by Charles Taylor. The democratic desire to apprehend otherness as similarity must be discarded. Modernity had desubstantialized difference; we must rediscover it in its resistance. This new ethics of difference must practice the recognition of concrete heterogeneous characters in human beings and invent new political forms of coexistence. Such a perspective would allow for the gathering of some information about the citizenry like religious belief, affiliation and practice. It is the only acceptable basis **for the debate that society is supposed to be, since the essence of a society is to be a debate in progress**. Is Alain Renaut telling us that we do not need much political cohesiveness anymore? Or is he just registering the thinning of private values and commitments shifting all recognition mechanisms to the public space: sexual orientation, religion, etc which used to be private? I do not see more here than a liberal "laissez faire": the juxtaposition of strong private individuals with little interest for the public sphere.

## V. Back to Secularism in Canada : Some Perspectives

Secularism by name is conspicuously absent from the Canadian constitution, from the federal Charter of Rights and Freedoms, as from the Québec *Charte des droits et libertés de la personne*. It is not a separate fundamental value in this country. Multiculturalism stands in its place as the central democratic value. Secularism as religious plurality, is not much more than a factual result which came out of history, without a need for definition or theoretical reflection.

The case is different in Québec where the Révolution tranquille (1960-1975) scrutinized clericalist power and dismantled it systematically, largely with the help of the Roman Catholic Church who was refocusing its interests on the supernatural. Secular awareness in Québec is sharper than

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<sup>133</sup> Cf. Jean-François Mattei, dir., *Philosopher en français. Langue de la philosophie et langue nationale*, Paris : Presses universitaires de France, 2001, pp.371-386.

<sup>134</sup> As gathered by Mark Lilla, ed., in *New French Thought*, Princeton: Princeton University Press (1994), a collection of texts in political philosophy previously published in French, where a shift to liberal thought is observed and commented together with the direct influence of Charles Taylor's communitarian doctrine.

<sup>135</sup> Cf. Marcel Gauchet's commented edition of this 12-page lecture read at the Paris Athénée in 1819: Paris: Poche/Pluriel, 1980. The so-called "New French Thought" has meditated on Constant's observation concerning the inescapable change from the Ancient model of liberty (the classical Greek concept as revived by the French Revolutionaries, close to the Republican Rule as defined in the current text) to the Modern model: in the former, citizens must devote their money, their time and their lives to make sure that the State is and stays free; in the latter, the State becomes instrumental and the citizen is endowed with a maximum of passive liberties. In the end, Constant wishes to find a regime where the two forms of freedom could combine but recognizes that it is an impossibility. The Modern citizen is a soft character concerned with comfort. Ancient liberties will not come back.

what it is in English Canada and can relate to a tradition of French law on the issue. After Montesquieu though without his anglophile bias, I believe that there is such a thing as *l'esprit des lois*. To a French juristic logic, it actually seems a disgrace to hold, as a single principle of law a monarch who calls for God's help, heads the Anglican Church of England, and separately, the Presbyterian Church of Scotland, was called Defender of (Catholic, then Protestant) faith, and protector of his/her subjects' liberty of conscience including the stance of atheism, **all at the same time**. Québec culture needs a rational –not a reasonable-- legal position on the status of religious obligations and cults in the public sphere. The defence of *laïcité* in the mandate of the Bouchard/Taylor Commission shows an accentuation of this political tendency.

Not only is secularism absent from our legislation, but charters support and protect the assertion of religious faith, signs and behaviour in schools, at work, in the civil service, in police corps, etc. Since charters are not going to be repealed in a foreseeable future, we can therefore logically expect a growing presence of the religious in the public sphere, in Québec as well as in Canada.

The two models of relation between State and religion(s) examined here --the liberal and the republican-- have met with some limits in their capacity to deal with differences. Their respective claims and failures have come into full light during the last two or three years but one can figure that their paralysis goes further back. I think we may say that these models are in crisis as for their integrative function. What worked in the past for the Republican Rule, namely integration of the immigrants (and of the nationals left in the margins of society) through public schools, for instance, does not work anymore in the specific case of the fundamentalist Muslims, at the same time, de-socializing a segment of the second generation among them. Ghetto schools will not work but schools applying the rule of *mixité* might. This is the decisive area where political imagination must bring about new ideas, new approaches and show rewarding results for successful convergence of diversity.

There is a world of difference between granting the right to segregate from large segments of the official school programme through a court accommodation requested on the ground of religion and, on the other hand, the type of affirmative action recently implemented in some "tough" French *lycées*. on the ground of good academic performance. A well-documented success story took place in Vaulx-en-Velin, a "difficult", predominantly Muslim suburb of Lyon, where a young Arab man had been searched out and shot dead by police a few years earlier, without trial. The place looked out of control until September 2000: one of those lawless zones. Then a new principal, Chris Laroche, was appointed to the *lycée* Robert-Doisneau. She established personal contacts with students and families, got most to sign commitments to the "Rules of Life" of the lycée, which happened to be those of the country, just like what would be done years later in Hérouxville. Chris Laroche requested and got special means of support from the State: a clean, vast and attractive building, with supplementary instructors in most fields.

Her book<sup>136</sup> chronicles the period 2000-2005 during which she, with a special elite staff, returned the situation to normal. She quietly negotiated that the best among the students, nearly all immigrants or "beurs", be admitted to the prestigious *École des sciences politiques*, in Paris, without fulfilling all the competition requisites. They had one year to meet the standards. All those admitted on this ground succeeded in getting the degree. It drew the press attention towards the positive achievements of the Vaulx-en-Velin students and changed the dynamics of the institution which I visited in 2005 with Chris Laroche. As we walked the halls and classes, labs and cafeteria, library and sports areas, she would address each student by his/her name, inquiring about exams and problems. She insisted on what it means for the State to do its full part in this process. The idea is not to apply Franco-conformity to all and then call it a "normal" situation. The best-working idea is a wide-spread tutorship system where the children of immigrants are helping younger ones (often of a different origin) in academic subjects and in sports, with their own style and accent. But the strict rule is to integrate all students into the official programme, without exceptions or exemptions. What is the effective way to

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<sup>136</sup> Chris Laroche avec Luc Rozenzweig, *Provisoire à Vaulx-en-Velin*, Paris : Plon, 2005

translate this properly **inclusive** view in our context? Perhaps our public schools which are taking a fresh start through secularisation could find an inspiration in this French experiment. A question worth discussing, as would be, in most Western democracies, the two other following questions: What are the differences between insertion/integration/assimilation? When does a newcomer cease to be an immigrant?

Here, in the case of fundamentalist Muslim children, our multicultural schools are known to accept more and more requests for exemption from biology classes, history classes (on the ground of "the lies introduced by the Jews on the Shoah and the Palestinian issues"), music (as sinful), information on sexuality and sexually transmitted disease, sport training, etc. The need for convergence in a society seems to have faded out of sight. The State has been definitely turned into a commodity to make sure individuals and lobbies get a return on their tax money.

Each of the two models has felt the need to appoint an external commission<sup>137</sup> because neither has yet found the internal resources to define a working positive answer to the problem of religion in the public sphere. The main mistake would be to try to import just any isolated republican feature into the liberal regime and vice versa. These are syntheses and must be reviewed as wholes, according to their internal logic. Patching will not work. The Hérouxvillois were correct in judging that the multiculturalism of the charters had severely eroded the citizens' consensus. Where the Ontario Government has thrown money<sup>138</sup> over the problem of the Shari'a courts to accelerate integration of Muslim immigrants, the Québec Government is willing to throw ideas through the Bouchard/Taylor Commission. Multiculturalism may override most or all of them. But at least, in the meantime, Public Reason will be allowed to speak up.

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<sup>137</sup> In France, the Commission indépendante de réflexion sur l'application du principe de laïcité dans la République, commonly known as **Commission Stasi** (after the name of its president Bernard Stasi) appointed on July the third, 2003. Its report to the Presidency of the Republic was submitted on December the 11th of the same year (cf. La Documentation française, Paris, 2003), with one abstention (Jean Baubérot filed the minority report quoted in my note 131 above).

<sup>138</sup> CAN\$118 millions

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## Recommandations

### en vue de la laïcisation de l'espace public au Québec de manière à rendre inutiles les dérogations et exceptions demandées au nom de convictions religieuses

1. Il faut supprimer la mention de la **suprématie de Dieu** dans la Constitution canadienne de 1982 qui est en vigueur au Québec (bien que l'Assemblée Nationale ne l'ait pas ratifiée).
2. Il faut de plus supprimer «**Défenseur de la foi**» dans les titres du souverain du Canada qui est souverain du Québec.
3. Il faut laïciser le serment d'office pour toutes les fonctions de l'État. De même, dans le cas d'une assermentation obligatoire, aucun citoyen ne doit être tenu de révéler ses croyances ou son incroyance pour exercer un mandat, faire valoir ses droits ou encore témoigner devant une cour de justice.
4. Pour restaurer la séparation des pouvoirs, principe fondateur de la modernité politique, il faut abolir la priorité des chartes de droits (1975 et 1982) sur les lois votées par l'Assemblée Nationale.
5. Il faut exiger la **suppression de l'article 27** de la *Charte canadienne des droits et libertés* imposant le multiculturalisme à une société qui s'y oppose majoritairement.
6. Il faut supprimer tous les signes/symboles religieux dans les lieux publics où on enseigne, où on légifère et où on rend la justice. Ni les murs, ni les agents de la puissance publique ne doivent porter de signes distinctifs manifestant l'appartenance à une religion (hidjab, croix chrétienne, kippa, turban, col romain, etc.).
7. Dans les autres lieux publics, il convient de distinguer les symboles religieux actifs des symboles religieux passifs, c'est-à-dire demeurés présents après le processus de sécularisation du Québec, mais **à titre historique ou mémorial** (par exemple, la croix sur le dôme de l'agence des services sociaux de Montréal Centre, anciennement Institut des sourdes-muettes, angle Saint-Denis et Cherrier ; la tradition du sapin de Noël ; la croix lumineuse sur les hauteurs de Gaspé, celle du Mont-Royal à Montréal et celle de Petite-Rivière-Saint-François parmi d'autres ; le calendrier civil avec ses fêtes d'origine judéo-chrétienne, etc.). Il faut supprimer les symboles actifs et conserver précieusement le patrimoine historique que constituent les seconds, en confiant leur entretien au Service des monuments historiques. La mémoire collective a droit de cité dans le paysage québécois, y compris celle des groupes religieux minoritaires d'ancien établissement qui ont contribué à construire cette culture.

8. La décision de laïciser l'école publique prise par l'État québécois doit s'appliquer dès 2008, sans dérogation, même dans le cas où le nouveau cours d'enseignement descriptif des religions établies ne serait pas prêt.

9. Le Ministère de l'Éducation doit être **seul habilité à définir et à décréter les programmes scolaires aux niveaux primaires et secondaires**. Ces programmes doivent impérativement s'appliquer à toutes les écoles publiques et privées du Québec, subventionnées ou non. Il ne doit y avoir aucune exception au programme pédagogique du Ministère de l'Éducation (telle le retrait de certains élèves des cours de musique, de biologie, d'histoire, d'éducation sexuelle, d'éducation physique, etc.) pour considération d'ordre religieux.

10. Pour éviter les ghettos scolaires et les pressions qui s'y exercent sur le fondement des religions, il faut supprimer les commissions scolaires dans l'ensemble du Québec. Une gestion centralisée, unifiée et universelle des écoles pourra assurer un cadre intégrateur progressif, étant entendu que l'école est le lieu intégrateur par excellence et que l'intégration des immigrants est l'objectif visé par la société d'accueil autant que par les immigrants eux-mêmes.

11. **L'école publique et l'école privée** doivent enseigner la langue et les valeurs communes, notamment l'histoire du Québec à tous les Québécois, de façon approfondie : histoire événementielle et continuité culturelle, en montrant les traits de la société d'accueil aux immigrants et en les invitant à s'approprier cet héritage aussi largement que possible, en gardant les engagements religieux personnels dans l'espace privé.

12. Pour assurer une meilleure intégration des immigrants, avantageuse pour eux en termes d'orientation et d'emploi, il faut rétablir les C.O.F.I. où les agents de l'État accueillaient les immigrants, les initiaient au mode de vie du Québec, à son histoire, à la langue française, aux mœurs et valeurs collectives, aux ressources du milieu, etc. Cette transition est absolument nécessaire aux femmes de cultures non occidentales pour initier les démarches d'accès à l'égalité civique, sociale, économique et politique.

13. Il faut considérer la création au Québec d'un équivalent des Conseils des cultes qu'on trouve en France **pour les religions établies**. Ils permettent une représentation équitable (par exemple en réservant des sièges aux femmes dans le Conseil français du culte musulman) et donnent une image exacte de la fréquentation des lieux de culte, de la qualité du personnel qui y enseigne la religion ainsi que de la provenance des fonds qui financent les diverses Églises. De tels conseils permettent à l'État de participer rationnellement à l'entretien de certains immeubles religieux qui font partie du patrimoine (églises catholiques romaines, églises protestantes et réformées, synagogues, églises orthodoxes, mosquées, églises maronites et arméniennes, temples, etc.). Surtout, ces conseils permettent de rejeter l'appel abusif à la **conviction religieuse subjective** qui prévaut dans notre droit.

14. Pour toutes ces considérations, et vu que **la notion d'«accommodement raisonnable» ne se trouve ni dans les chartes, ni dans les lois**, mais seulement dans une jurisprudence récente, imprudente et déraisonnable, il faut supprimer la possibilité d'accommodements juridiques sur le fondement de la religion. Il revient exclusivement à l'Assemblée Nationale et aux autres élus de fixer la place des Églises et des cultes dans l'espace public.

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