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On French laicity in Combat

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Abstract In recent years, due to some cases on Muslim clothing, “laicity,” as a principle of the French Constitution, has been criticized upon its restriction of religious freedom. But behind these criticisms, there is a misunderstanding of the purpose of French laicity, equating it with the separation of church and state.. French laicity is more embodied as a combative principle, so it is different from the relationship between church and state in the United Kingdom and United States and other European countries.. In the French Third Republic, when laicity was formed, the government took all kinds of legislative measures to diminish the political influence of the Catholic Church, hence defending the newly born republican regime and individual freedom against church. After laicity became a constitutional principle in 1946, it serves as a constraint on the power of the state and ensures the state’s neutrality; for instance, it recognizes the disciplinary power of teachers in public schools over students who wear religious signs. This paper argues that the key issue of the current disputes emerges from the circumstance where the society as a whole refuses the representation of religion, where laicity becomes a part of the national identity and where the church as formal social institutions is absent.

Keywords France, laicity, republicanism, Third Republic, Muslim

1 Introduction

At a conference on religions in April 2016, General Secretary Xi Jinping pointed out that religious issues had always been the major issues that the

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Communist Party of China (CCP) must deal with in governing the country, and religious work was of special importance in the overall work of the CCP and the state. Xi also proposed to build active and healthy religious relations including the relations between the CCP and government, and religion.^① In the United States, the principle of “separation of church and state,” which allows religious authority and secular power to co-exist and to respect each other, is the main mode of dealing with the relationship between the church and state. France, by contrary, has adopted another mode of political power overriding religious authority, and the scope of religious activities, the organization and management of churches and individual beliefs are defined by the state. Chinese academia has paid more attention to the former and less to the latter.^② In fact, the latter may be more in line with and of more reference value for China’s current institutional goal of “improving the level of legalization of religious work,” “standardizing through the law the behavior of the government in the management of religious affairs” and “regulating with the law the various social relations involving religion.” The paper intends to analyze the connotation of the laicity principle, which was formed in the history of France and is different from the separation of church and state, so as to supplement the study of religious relations in China. The paper argues that French laicity is neither the separation of church and state, nor freedom of religion. A series of institutional practices undertaken in the name of laicity are mainly manifested by the state’s restrictions on religious organizations, and thus having an important combative aspect.

At present, the main problem facing the laicity principle is the tension between the law of the French Republic and Islam. On the one hand, Article 1 in Preamble of the Constitution of the Fifth French Republic declares that “France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion.” On the other hand, over the last ten

^① Xi Jinping, “Comprehensively raise the level of religious work under the new situation”, http://news.xinhuanet.com/politics/2016-04/23/c_1118716540.html, Accessed 6 Oct. 2016.

^② Peng, X. *Journal of Peking University (Philosophy and Social Sciences)* (北京大学学报(哲学社会科学版)), (6): 100–109 (2010).

years, litigations on the individual religious practices of Muslims and the value of the Republic have been frequent in France and have prompted questions about laicity and the implementation of legal equality, among which the latest three cases are particularly representative, namely the Baby Loup nursery case (*Affaire de la crèche Baby Loup*),^① which has been appealed from the lower court to the Court of Cassation; the burkini ban case,^② which attracted a lot of attention in the summer of 2016; and the less well-known Faiza's case.^③ The core work of jurists is to determine the meaning of the law in specific cases. Therefore, litigation related to the three cases naturally touches on many legal technique issues. At the same time, however, the conflict among different values is also reflected in the judicial arena, so that it cannot be allowed to hide behind the legal techniques. This paper believes that an accurate understanding of the above-mentioned litigations requires a retrospect of the practice history of the laicity principle in France.

Google Ngram's frequency analysis of "laicity" and "laicization" shows that the word "laicization" appeared in the French literature all of a sudden in the 1870s when it was first used on the newspaper *La Patrie* on November 11, 1871. The frequency of the use of "laicization" reached its peak during 1885–1890; after a brief decrease, it quickly rose and reached a climax again during 1905–1910 and then fell rapidly. After the end of World War II, the frequency of the use of "laicization" in French rose again and kept rising after reaching the previous same record in the late 1970s. The frequency of the use of "laicity" illustrates a slightly different pattern: it emerged in 1940 and increased slowly till around 1960, and then rose together with "laicization" in the 1970s, with a slower growth rate than the latter though. The analysis of the use of language shows an important distinction between concepts: "laicization," as a process, plays a more meaningful role in history than "laicity," as a state description.

The frequency analysis of the word "laicization" also shows that 1905 is

^① Cour de cassation, Chambre sociale, 19 mars 2013, n° 11–28.845; Cour de cassation, Assemblée plénière, 25 juin 2014, n° 13–28.369.

^② Conseil d'État, ordonnance du 26 août 2016, n° 402742, 402777.

^③ Conseil d'État, 2^{ème} et 7^{ème} sous-sections réunies, 27 juin 2008, n° 286798.

not the most decisive moment of French laicization. The 1905 French law on the Separation of the Churches and State (loi du 9 décembre 1905 concernant la séparation des Églises et de l'État) is only a phased achievement in the establishment of a secular republic since the 1880s. Hence, 1905 represents neither the realization of laicity, nor the end of laicization, given that laicity is not equivalent to the separation of the churches and state. Article 1 of the Constitution of 1946, which firstly defined France as a “secular Republic,” revitalized the cause of laicization. This long-standing article has also become the focus of a series of controversies after the establishment of the Fifth Republic in 1958. Immediately following the “May 1968 events,” the frequency of the use of the word “laicization” began to increase rapidly again.

There was a period of time from the beginning of World War I to the first decade of the establishment of the Fifth Republic when laicization and laicity were under rather mild discussion. It consists of two periods, during which laicization showed different “manifestations.” The laicization before 1914 was mainly manifested in repression and deprivation of the Catholic Church by the Republic; while after 1958, it was manifested in the form of contradictions between different social groups. Regardless of the different manifestations, however, the core and constant issue was nothing more than the issue of how organized intermediate groups exist in the Republic. The simplest and most concise argument on this is that the practice of republicanism refuses to accept any social life organized around intermediate groups since the establishment of the Third Republic, because in social life, the inherent and eternal freedom and rights of an individual may be infringed by intermediate groups.^① It is on the issue of intermediate groups (churches, trade unions, industry associations and other self-organized social groups) that laicity shows its dual aspects: its purpose is to defend individuals and the state against the influence of intermediate groups, while its means is to restrict intermediate groups. Therefore, it can be said that there are two aspects of laicity: liberal laicity

^① Jean-Pierre Rioux et Jean-François Sirinelli, *Histoire culturelle de la France: Le temps des masses, Le vingtième siècle*, Paris, Seuil, 2005, Vol. IV, p. 13.

(laïcité libérale) and combative laicity (laïcité combative),^① which, in turn, can be seen as the two different aspects of French laicity.

If focusing only on the liberal aspect of laicity, people incline to overlook the fact that in order to establish a secular republic in a society with deep Catholic roots, the combat between the Republican and the Catholic Church was very intense. The current series of discussions in France on the relationship between the secular government and religious organizations should be understood in the historical context in which the Republic was committed to eliminating the power of social organizations in the process of laicization. The comparison between the two different periods, before 1914 and after 1946, will prove the above assumption. However, before the comparison, it is necessary to start with the latest few cases, so as to explain that the current contradiction must be explained under the premise of understanding the combative aspect of laicity.

2 Laicity in judicature: a case study on religious clothing

In 2008, Faiza, a native Moroccan woman, insisted on wearing the all-enveloping *burqa* when going to a town hall. The Council of State then determined that her religious practice was too extreme and not consistent with the basic values of the French Community, the value of gender equality in particular,^② and believed that the government, in accordance with the original Article 21-4 of the Civil Code, had the right to refuse her application for citizenship for a reason of “failure of integration.” A similar situation occurred in Aberkane’s case in 2003. M’hammed Aberkane, who is of Algerian origin, was rejected when applying for French nationality after marrying a French, because the Council of State held that the

^① Cf. Géraldine Muhlmann et Claire Zalc, “La laïcité, de la III^e à la V^e République”, *Pouvoirs*, 2008, Vol. 126, no 3, p. 101; Emmanuel Dockès, “Liberté, Laïcité, Baby Loup: de la très modeste et très contestée résistance de la Cour de cassation face à la xénophobie montante”, *Droit Social*, mai 2013, n° 5, p.388; Jean Rivero, “De l’idéologie à la règle de droit: la notion de laïcité dans la jurisprudence administrative”, in *Centres d’études supérieures spécialisés*, Université d’Aix-Marseille. Centre de Sciences politiques de l’Institut d’études juridiques de Nice (dir.), *La laïcité*, Paris, Presses Universitaires de France, 1960, p. 263–283; David Kessler, “Laïcité: du combat au droit”, *Le Débat*, janvier 2011, n° 77, p. 84–89.

^② Conseil d’État, 2^{ème} et 7^{ème} sous-sections réunies, 27 juin 2008, n° 286798.

appellant's materials proved that he refused to accept the basic values of French society, especially the gender equality, thus the authorities' judgment on his "failure of integration" had a legal basis.^①

On August 5, 2016, the government of Commune de Villeneuve-Loubet of Nice in southern France issued a city ordinance to ban the "burkini," a type of full-body swimsuit specially designed for Muslim women, on public beaches. Human rights groups filed a suit asking for withdrawing the decision in the administrative court, and the case was then appealed to the Council of State. The Council of State held that the local magistrate could only restrict individual freedom for the purpose of avoiding the disturbance of the public order within an "appropriate, necessary and proportionate" limit and that the restrictions must be made in the event of real danger. However, no evidence had ever proved that wearing burkini on the beach would disturb the public order. In addition, related orders also constituted "serious and obviously unlawful violation of freedom of movement, freedom of religion, freedom of person and other basic freedoms."^② The Council of State therefore suspended the execution of the ordinance.

Fatima Afif, from the Baby Loup case which has been widely discussed in French society, had worked in the private nursery Baby Loup since 1992 and became an assistant director. She took her consecutive maternity leave and parental leave (congé parental d'éducation) between 2002 and 2008, during which she received a notice from the director, informing that she could no longer wear the veil at work in accordance with the internal regulations which took effect in 2003. On December 9, 2008, Afif received a warning from the nursery when she went to the workplace wearing a veil as usual, and on December 18, after repeatedly insisting on wearing the veil at nursery, she finally received a dismissal notice for violating the principle of laicity and neutrality of the association in terms of personnel management. With the support of anti-discrimination organizations, Afif filed a lawsuit to the local labor court. The court held that although the

^① Conseil d'État, 2^{ème} et 7^{ème} sous-sections réunies, 27 novembre 2013, n° 365587.

^② Conseil d'État, ordonnance du 26 août 2016, n°s 402742, 402777.

nursery was a private institution, it undertook the function of public services, thus the laicity principle should be applied, and as a result affirmed the dismissal decision. The Court of Appeal of Versailles, although disagreeing with the reasons given by the local labor court, believed that the internal management measures implemented by the private institution for the purpose of achieving its own objectives could limit the individual freedoms of the employees as long as they did not violate purposiveness and proportionality.^① Nevertheless, the Court of Cassation (Labor Division) overturned the judgment of the Court of Appeal of Versailles in 2013 because the court held that the laicity principle, enshrined in Article 1 of the Constitution, does not apply to the employment relationship in private laws, thus should not hinder the realization of the rights of the employees conferred by labor law, and the restriction contained in the internal management was, as Article L1321-3 of Labor Code defined, a general, imprecise restriction, and thus, the dismissal constituted a discrimination.^② The case was then sent to the Court of Appeal of Paris for retrial.

The Court of Appeal affirmed the first instance verdict and, for the first time, put forward the concept of “enterprise by conviction” (*entreprise par conviction*). The court argued that although Baby Loup was a private nursery, its purpose was to provide good care and education for children from socially and economically disadvantaged families and to provide employment opportunities for women of different backgrounds and beliefs, hence, it actually served the public interests. Under such circumstances, the nursery must provide an equal environment in which there was no prejudice against any religion for the growth of all children. Thus, it is legitimate that its employees are subject to the principle of laicity and neutrality.^③ In the end, the case was again appealed to the Court of Cassation. Although the Plenary Assembly (*Assemblée plénière*) of the Court of Cassation denied the concept of “enterprise by conviction” proposed by the Court of Appeal of Paris, it ruled that the dismissal was

^① Cour d’appel Versailles, 27 octobre 2011, n° 10/05642.

^② Cour de cassation, Chambre sociale, 19 mars 2013, n° 11–28.845.

^③ Cour d’appel Paris, 27 novembre 2013, n° 13/02981.

lawful, for a principal reason that in a nursery that has only 18 employees and can establish a direct relationship with parents, the internal rules that make clear restrictions on the freedom of religion of the employees are merely for the purpose of achieving the special objective of the organization. They are not general, and precise enough, and thus are both lawful and proportionate.^①

The commonality of above litigation cases is that they are all directly caused by the attire of Muslim women, but differ in terms of their contentious point at law. It is evident that in the “denial of naturalization” cases, the correctness of the decision of the Council of State depends on whether the understanding of “failure of integration” in Article 21-4 of the Civil Code is correct. In the “burkini ban” case, the correctness of the Council of State’s suspension of the administrative decision of the local government depends on whether the understanding of the scope of power of the local government to exercise police action is correct. In the “Baby Loup nursery” case, the correctness of the decision of the Plenary Assembly of the Court of Cassation is dependent on whether the understanding of Article L1321-3 (description of internal rules) and Article L1121-1 of Labor Code (conditions of restricting individual rights and freedom) is correct. It is safe to say that the issues can be perfectly resolved in specific cases through legal techniques. However, it is also evident that in the cases of denial of naturalization, the administrative judge relied on “the basic values of French society,” and in the case of burkini ban, the administrative judge relied on “freedom of belief and freedom of person,” while the labor court, the Court of Appeal of Versailles, the Court of Appeal Paris and the Labor Division of the Council of State believed that the understanding of laicity is the root cause of the problem.^② Moreover, the Plenary Assembly of the Court of Cassation’s interpretation of an internal management rule applicable to all the employees of private institutions as “not general” is the replacement of an

^① Cour de cassation, Assemblée plénière, 25 juin 2014, n° 13–28.369.

^② Cf. Eoin Daly, “Laïcité in the Private Sphere? French Religious Liberty After the Baby-Loup Affair”, *Oxford Journal of Law and Religion*, Vol. 5, No. 5, 2016, pp. 211–229.

explanation of political understanding for the legal understanding.^① All these arguments regarding value judgment indicate that all the litigation concerns the understanding of “laïque” referred to Article 1 in Preamble of the Constitution of the Fifth French Republic, behind a sophisticated net of law knitted by various legal techniques. Similar legal disputes cannot completely avoid the issue of laicity, namely, the challenge faced by French laicity principle since 2000, regardless of whether it is applicable and how to apply the principle.^②

3 Understanding laicity

The precedents mentioned above reveal that both public authorities and private institutions attempt to restrict, in the name of laicity, the behavior of individuals to express their religious identity. The liberal aspect of laicity is aimed at protecting individual freedom of religion through restricting religious institutions from social operation, while the combative aspect intends to suppress religious groups which serve as social-political organizations. If some people find it difficult to legitimize, with the laicity principle, a series of legislations and precedents that limit religious practice, the reason lies in either they believe that laicity has only the liberal aspect, or that the combative aspect can be completely replaced by the liberal aspect. In fact, the combative aspect occupies a position not inferior to liberal aspect in the institutional practice of laicity. Before exploring any further, there is a need to give a simple explanation of the author’s understanding of laicity.

The laicity/laicization (laïcité/laïcisation), which is discussed in the field of law and politics, is different from the secularization (sécularisation) discussed by religious sociologists. Simply put, the secularization the religious sociology refers to means the marginalization of religion in cultural and social life. The mix use of secularization

^① Cf. Isabelle Meyrat, “Épilogue incertain de l’affaire Baby-Loup: l’obligation de neutralité dans une entreprise investie d’une mission d’intérêt general”, *Le droit ouvrier*, Février 2014, n° 2, pp. 73–78.

^② Cf. Stéphanie Hennette-Vauchez et Vincent Valentin, *L’affaire Baby Loup ou la nouvelle laïcité* Issy-les-Moulineaux, LGDJ, 2014, p. 116.

(sécularisation) and laicity/laicization (laïcité/laïcisation) in the same text can easily lead to confusion. A simple suggestion is to translate the noun “laïcité” into the “separation of the churches and state” and use it as the original meaning of the word. Then why does this paper still use the word “laicity”? Because if this suggestion is adopted, there are potential risks: firstly, the suggestion implies that “laïcité” is equivalent to the law on Separation; secondly, it obscures the major differences between the French-specific concept and the Anglo-American separation of the churches and state; thirdly, it assumes that a political-legal term has a definite connotation, which ignores the complex implication added to the term by the political practice undertaken in a given historical period.

The following passage discusses reasons for supporting the translation of the “separation of church and state.” According to the explanation of an authoritative dictionary of legal terms, the adjective “laïque” used in the Constitution of 1958 means “independent of all beliefs.”^① The laicity of the state, on the other hand, refers to the “neutrality of beliefs” which was derived from the law on Separation of 1905 and declared in the Constitution of 1946 of the French Republic.^② It might as well stop the analysis of laicity here and consider it equivalent to the neutrality of the state in religious affairs, which can be further equivalent to the separation of the churches and state. However, the dictionary further points out that this concept refers to the following aspects: (1) the non-theocratic nature of the French government; (2) all public authority is concentrated in the state sectors and no religious authority is involved; (3) respect the freedom of belief and religion under the circumstance of no threat to public order; (4) respect the diversity of opinions and beliefs.^③ It seems that the distinction between laicity and the separation of the churches and state is still not clear enough if we focus only on the explanation, which seems to be different expressions of the same meaning.

However, one question to consider when understanding a

^① Gérard Cornu, “Laique (ou laïc)”, in *Vocabulaire juridique*, Paris, Presses Universitaires de France-PUF, 2009, p. 594.

^② Cf. Ibid.

^③ Cf. Ibid.

constitutional concept is whether treating it as a Weberian ideal type or even a doctrine, or focusing on what people can do when using it in a specific context. The two stances correspond respectively to so-called Rorty's "rational reconstruction" and "historical reconstruction."^① It is undoubtedly important academic work to consider how to interpret a norm from the norm per se to best reflect the good will of people and to maintain the system and coherence of the constitutional order. Nevertheless, it should also be noted that this is not a dominant stance and it is still important to study "what happened"^② when people used a certain concept in history: (1) each group may emphasize different aspects when using the same concept. Taking laicity as an example, traditional churches may emphasize the non-intervention of the state, and anti-clericalists may emphasize the state's immunity to religious forces, while minority denominations may stress respect for diversity;^③ (2) the precedents discussed above have raised controversy in French society, which demonstrates that resorting to the original idea of a concept in modern political theory alone may not be able to bring about a full understanding of the various possibilities in the legal order; (3) the multiple possibilities arising from the practice of a constitutional concept may result from the practices of the concept in history. Therefore, this paper suggests that it is necessary to clarify the history of the practices of a concept before rationally reconstructing the original idea of the concept and using it to criticize the existing judicial practice.

In fact, the controversy over the judgment on the Islamic clothing in the legal circle is partly due to the dogmatic understanding of the original idea of the concept and the underestimate of the complexity added to the concept by practices. Some jurists criticize the judiciary for making the principle which symbolizes individual liberation an excuse for xenophobia

^① Cf. Richard Rorty, "The Historiography of Philosophy: Four Genres", in Richard Rorty, Jerome Schneewind and Quentin Skinner eds., *Philosophy in History: Essays on the Historiography of Philosophy*, Cambridge: Cambridge University Press, 1984, pp. 49–76.

^② John Pocock, *Political Thought and History: Essays on Theory and Method*, Cambridge, Cambridge University Press, 2009, p. xiv.

^③ Cf. Jean Baubérot, "Sécularisation, Laïcité, Laïcisation", *Empan*, 2013, Vol. 90, n° 2, p. 31.

and Islamophobia.^① Others advocate that the point lies in the tension between individual freedoms of expression and religion, and laicity.^② The above views are proposed by respectable scholars in the field of social law or social history; however, it seems that they have idealized and romanticized the history of laicization so that they fail to correctly understand the laicity in French context. In short, they regard the liberal aspect as the only aspect of laicity, thus treating the issue of laicity as a simple matter of the boundary of individual freedom or the protection of fundamental rights. Under the interpretation framework of liberalism, laicity means a state, governed by a political power that is completely separated from the churches, is religiously neutral and does not advocate any religious principles.^③ Only if the state has no religious tendency can individual freedom of religion be protected.^④ Pope Pius IX, who had no interest in freedom of religion, refuted, in *Syllabus of Errors*, the view that “the state must be separated from the churches and vice versa” and proved that liberal interpretation was a guarantee of freedom of religion and tolerance.^⑤ It is a threat to and intolerance of individual freedom of religion if a certain behavior based on the religious belief is denied in the name of laicity.

However, the laicity principle is neither a necessary condition for individual freedom of religion, nor is it equivalent to freedom of religion. The laicity of public authority is not a logical prerequisite for freedom of religion, otherwise it must be advocated that countries where there is a concordat (such as Spain, Italy, Poland and Brazil), and countries that have established the state religion (such as the United Kingdom, Norway, Sweden and Denmark) do not protect freedom of religion. Such a conclusion is apparently too arrogant. Hence, the laicity principle, as a

^① Cf. Emmanuel Dockès, “Liberté, laïcité, Baby Loup”, op. cit.; Haoues Séniguer, “La laïcité à l’épreuve de l’islam et des musulmans: le cas de la France”, *Revue d’éthique et de théologie morale*, février 2012, n° 254, p. 63–96.

^② Cf. Jean Mouly, “L’affaire Baby-Loup devant l’Assemblée plénière: quelques accommodements avec les principes”, *Droit Social*, octobre 2014, n° 10, p. 811.

^③ Cf. Géraldine Muhlmann et Claire Zalc, “La laïcité, de la IIIe à la Ve République”, op. cit.

^④ Cf. Emmanuel Dockès, “Liberté, laïcité, Baby Loup”, op. cit.

^⑤ Pius IX, *Appendix Syllabus Errorum*, *Quanta cura*, 1864, p. 55.

legal norm, should be separated from freedom of religion.

It is tantamount to self-deception that emphasizing Article 9 of the European Convention on Human Rights while ignoring the laicity principle derived from the Constitution of 1946. As long as laicity is still regarded, in liberal view, as a synonym for separation of the churches and state as well as a protector of freedom of religion, then even if people have a better understanding of the boundary of freedom of religion through the above precedents, they still cannot explain why laicity is controversial at present, let alone answering the question that plagues not only the scholars, but also the public: the laicity principle has justified a series of legislations and has appeared many times in judicial practice, but why are almost every time the restrictions on Muslims that account for only about 5% of the population?^① The following part explains that the combative laicity is more important than the liberal laicity in the historical process of laicization, and then it points out the tension between social transformations and the laicity principle.

4 Law of combat (1870–1914)

The 40 years between the establishment of the Third Republic and World War I witnessed the first climax of French laicization movement and might as well be perceived as the foundation age, during which the republican government adopted a series of legislations in order to make France a secular state. During the foundation age, laicization, in most cases, was not the protection of individual freedom, but the suppression on the intermediate groups by the state, and thus might become a threat to individual freedom.

In 1869, on the eve of the Franco-Prussian War, voters in Belleville

^① France prohibits census based on religion, race and ethnicity, so there is no accurate statistics that reflects the percentage of the population who believes in a particular religion. Thus, the number can only be estimated based on baptism, religious weddings and other representational behaviors. With regard to the Muslim population, the estimate is between 3% and, as exaggerated by right-wing politicians, 10%. The figure used in this paper includes all the population “from the Muslim region and culture.” France Prioux et Arnaud Régnier-Loilier, “La pratique religieuse influence-t-elle les comportements familiaux?”, *Population et Sociétés*, Juillet-août 2008, n° 447, p. 1–4.

presented the Belleville Program (Programme de Belleville) to their representative, Léon Gambetta, who enjoyed the reputation of “the founding father of the Third Republic.” The Program defined the principles of equality, laicization, democratic politics, republicanism and so forth, which later became the foundation of the Third Republic. Article 7 of the Belleville Program was refined, in the decree of the Paris Commune on April 1, 1871, into detailed provisions such as the separation of the state and Catholic Churches, the abolition of the budget from the state to churches, and church property applying to the general civil law. The above-mentioned political documents, which can be regarded as a precursor to the laicity principle, laid the foundation for a systematic and sustained laicization policy of the Third Republic.

“Clericalism? It is the enemy!” (Le cléricalisme? Voilà l'ennemi!). On May 4, 1877, Gambetta used such a sonorous and powerful sentence to conclude his speech in the National Assembly.^① If this excellent opportunist had any political beliefs, anti-clericalism was certainly one of them.^② Other republican politicians who established the Third Republic were also convinced that a republic can only be established after completely removing clericalism and other factors associated with the old regime.^③ In this regard, the author has the same feeling that Anglo-American religious liberalism tends to protect individuals from state intervention, while the French-style hopes to protect both individuals and the state, because it is inclined to believe that the religious

^① Cf. Jacqueline Lalouette, “Laïcité, Anticléricalismes et Antichristianisme”, *Transversalit é*, janvier 2013, n° 108, p. 69–84. It seems difficult to translate this sentence properly. Shen Heng, who translated chapter 25 of *Histoire de France des origines à nos jours*, translated the sentence into “Clericalism is the enemy!” ([France] Duby, G. *Histoire de France des origines à nos jours*. Lyu, Y. (trans.) Beijing: The Commercial Press, 1155 (2010)), while professor Peng Xiaoyu translated it into “Clericalism? This is our enemy!” Peng, X. *Journal of Peking University (Philosophy and Social Sciences)* (北京大学学报(哲学社会科学版)), (6): 100–109 (2010). Both are acceptable translations, which are provided together for reference. It is important to note that Gambetta did not use “an enemy” or “our enemy,” but that if there is only one enemy, the enemy of all, then it is clericalism, and all other enemies are negligible.

^② Cf. Herbert Fisher, *The Republican Tradition in Europe*, New York and London: G. P. Putnam's Sons, 1911, p. 299.

^③ Cf. Roger Magraw, *France, 1815–1914: The Bourgeois Century*, Oxford University Press, 1983, p. 212.

organizations that are ready to fight back in politics are hidden behind individual freedom of religion and thought.^① As a consequence, the reforms carried out in the name of laicity throughout the Third Republic were comprehensive and profound. Legislation in education, family and social organization can all be the evidence.

The first is the field of education. A series of reforms carried out by Jules Ferry when he served as the minister of education and chairman of the board of education excluded the religious curriculum from the curriculum of elementary education. His successor continued his idea and further removed the clergy from public education. The republican government aimed at not only expelling the church from social life through a variety of legal norms, but also changing people's mind. As a result, the achievements of Gaulish civilization were exaggerated at great length in the textbooks used by elementary schools, and Clovis I who converted to Catholic Churches was described as a "barbarian," thus emphasizing the foreign origin of Catholicism. There was also a large portion of the textbooks devoted to presenting the history of the Catholic Church persecuting heresy and suppressing scientific rationality.^② The time when more than half of the pupils were able to receive religious education by the clergy was gone. Although the cross was retained in elementary school classrooms for fear of large-scale opposition, the Republic's official ideology was brought in front of almost every child in mountainous villages by the teachers who received the education of enlightenment, positivism and republicanism in normal schools.^③ The promotion of science and progress, instead of religious morality, became the dominant spirit of textbooks.^④ The proctors elected by the republican

^① Géraldine Muhlmann et Claire Zalc, "La laïcité, de la IIIe à la Ve République", op. cit.

^② Cf. Christian Amalvi, "La littérature de vulgarisation historique, support de propagande d'un anticléricalisme populaire de 1789 à 1914", in Hélène Berlan, Pierre-Yves Kirschleger, Joël Fouilheron et Henri Michel (dir.), *L'anticléricalisme de la fin du XVIIIe siècle au début du XXe siècle: discours, images et militances*, Michel Houdiard Éditeur, 2011, p. 193–204.

^③ Cf. Francine Muel-Dreyfus, "Les instituteurs, les paysans et l'ordre républicain", *Actes de la recherche en sciences sociales*, Vol. 17, n° 1, 1977, p. 37–61; Laurent Frajerman, "L'engagement des enseignants (1918-1968)", *Histoire de l'éducation*, n° 117, janvier 2008, p. 57–96.

^④ Cf. Sudhir Hazareesingh, "La fondation de la République: histoire, mythe et contre-histoire", in Marion Fontaine, Frédéric Monier et Christophe Prochasson (dir.), *Une contre-histoire de la IIIe République*, Paris, Découverte, 2013, p. 243–256.

government appeared in university classrooms to monitor the quality and content of the lectures, with a special attention to whether there was a speech supporting clericalism.

Private life was not exceptional. The validity of marriage was no longer based on religious rituals. According to Article 57 of the Civil Code, it is the notarized birth certificate instead of baptism that can prove a person's birth, name and parents. The validity of marriage had long been dependent on whether making a vow in the city hall instead of religious rituals. Léon XIII once commented that when the society was laicized through expelling God from its heart, people will eventually want to allow divorce through the law.^① His worry quickly became a reality. Equally for the sake of anti-clericalism, divorce by mutual consent and divorce by litigation which were introduced into the Civil Code in 1804 and later abolished, eventually returned to civil law in 1884, which further reduced the church's control over secular life.^②

More radical measures were on the provisions for the regulations over the management of religious groups. Before the freedom of association became a freedom protected by positive law, Ferry had signed a decree to expel the Jesuits from France and claimed that all other religious orders could only exist when their application for authorization was passed. However, most of the religious orders, in support of the Jesuits, did not apply for authorization from the government, so they were expelled together with the Jesuits in the 1880s. Most of them went to Spain,^③ while some Jesuits went to the Far East with the wealth they had amassed and were deeply involved in the modernization of East Asian law. A similar story happened in 1901 when the law that confirmed freedom of association did not recognize the right of association of the clergy; instead, it demanded the unauthorized religious orders be dissolved.^④ The

^① Léon XIII, *Arcanum Divinae* (1880).

^② Cf. Jean-Louis Halpérin, *Histoire du droit privé français depuis 1804*, Presses Universitaires de France, 2001, p. 206.

^③ Cf. Patrick Cabanel, "Le grand exil des congrégations enseignantes au début du XXe siècle. L'exemple des Jésuites", *Revue d'histoire de l'Église de France*, 1995, Vol. 81, n° 206, p. 207–217.

^④ Cf. Durand J.-D. et P. Cabanel (dir.), *Le grand exil des congrégations religieuses françaises 1901-1914*, Paris, Cerf, 2005; Jean S'évillia, *Quand les catholiques étaient hors la loi*, Paris, Tempus Perrin, 2006.

government had weakened the management of social groups while stepping up control over Catholic groups.

In addition, the name of the 1905 French law on the Separation of the Churches and State conceals its substance of expanding the state power. Hidden behind Article 1 that declared the protection of freedom of belief and religion, the detailed arrangements of other provisions on church property and personnel were stipulated, in order to ensure that the church could no longer serve as a social organization in coexistence with the state. As stated in Article 4, movable and immovable property of menses, factories, priests' councils, presbyteries and other public institutions of worship shall be transferred by the legal representatives to associations operated in compliance with the rules of organization that ensure the practice of worship. The original religious institutions operating religious affairs were replaced by the institutions established by the state, and the dioceses were re-divided as well. Under such circumstances, the state, under the banner of the separation of the churches and state, acting as a protector of freedom of religion, legislated flagrantly for the organization and operation of the church. In other words, the state unilaterally determined the relationship with the church.

Table 1 The main legislations and decrees of laicization of the Third Republic

Time	Name	Main Content
1880	Two decrees of expulsion of religious orders	Expelled the Jesuits from France, and demanded that all other religious orders apply within three months for authorization, otherwise they would be dissolved.
1882	Jules Ferry laws	All children aged 6–13 must receive free and laic mandatory education in public schools; religious education in schools was changed to civic and moral education; religious education could only be carried out outside the school and on the one day off per week.
1884	Naquet Law	Reintroduced in the Civil Code the divorce system which was abolished in 1816.
1886	Goblet Law	Forbade clergymen to teach in public schools.
1901	Association Law	Religious orders might exist only if they applied for authorization in 1902; schools belonging to religious orders must apply for special authorization.
1904		Forbade religious orders to teach under any circumstances.
1905	Law on the Separation of the Churches and State	The state did not subsidize any clergyman; confiscates church property; churches became state property

Note: the table was made by the author.

The liberal laicity of the Third Republic means the liberty of individuals in the private sphere, rather than the liberty of religious organizations in public domain. On the contrary, the church in society was the object of a series of laicized legislations. Republicans argued that the destruction of the Catholic Church was the only way to protect the Republic in a special context where the Catholic Church was deeply rooted in French society. The above decrees and laws dramatically reduced the space in which the church was able to continue to exercise its public functions. In the meantime, the streets named after the Christian saints were renamed, and the government systematically promoted anti-clericalists. The decree of 1880 resulted in the expulsion of more than 5000 religious people (not including the clergymen expelled from hospitals by the anti-clerical authorities).^① In the early 20th century, over 30,000 religious people chose to exile overseas because of the laws against religious orders.^② Seminaries of universities were shut down since 1885 and replaced by a variety of religious sciences which studied the religion as a matter of fact. In 1903, more than 10,000 schools closed before the start of the new semester, simply because the religious orders did not apply for authorization as demanded in the Association Law.^③ Religious organizations were impacted significantly.

It is thus clear that the process of laicization has always been accompanied by the republican's anti-clericalism. In political discourse, laicization itself is a means of realizing anti-clericalism. In the view of anti-clericalists, the church was deeply involved in secular life and capitalized on the public authority as a tool to achieve its purposes.^④ Although the series of laws before 1905 did not interfere with individual freedom of belief, still, they greatly hit the church serving as a social organization. It is not difficult to see that the liberal aspect of laicity at this point means no more than liberating atom-like individuals from the

^① [France] Duby, G. *Histoire de France des origines à nos jours*. Lyu, Y. (trans.) Beijing: The Commercial Press, 1157 (2010)

^② Jean Baub érot, *Histoire de la laïcité en France*, Paris, Presses Universitaires de France, 2013, p.23.

^③ *Ibid.*, p. 21.

^④ Cf. Jacqueline Lalouette, "Laïcité, anticléricalismes et antichristianisme", *op. cit.*

authority of the Catholic Church, even without considering the more complicated military service system and the profound changes in family structure through a series of arrangements with civil law techniques. A person's life including birth, education, marriage and even death would no longer have any relationship with the church. However, the individual who escaped the church would immediately find himself/herself facing the ubiquitous state authority. In this sense, even if the Republic succeeded in guaranteeing individual freedom, the guarantee was achieved through the combat with the church.

5 Combat in law (since 1946)

The above demonstrates that the history of the birth of the laicity principle is actually the history of the state's discipline on the church. However, in the cases of denial of naturalization and Baby Loup, it is the Muslim women as an individual rather than the Islamic church who took the negative consequences. Similarly, in the case of burkini ban, the municipality would rather take direct police action against women who wore burkini on the beach. Therefore, it can be concluded that for now, the combative laicity is still an important aspect of institutional practice, though the object of the combat has changed. The root cause of such a change is that the laicized law has succeeded in transforming the religion of the French society from a strong organizational force into a cultural phenomenon that only exists in an individual's private life. As a result, the state, failing to find a visible organized church as its object when it is combating with the laicity principle, had no choice but to put all the stress on individuals. It is precisely in this sense that the legal practice of the laicity principle of the Fifth Republic, with the absence of a church that is powerful enough to form a competitive social order outside the state, shows a different attitude towards the native Catholicism and other foreign religions.

The two world wars and the normalization of the relationship between France and Curia prompted the Republican government to slow down its

pace of laicization between 1914 and 1946.^① The laicity principle became a constitutional principle of the Fourth Republic in 1946 and has been retained until today owing to the Constitution of 1958. Jurists would like to analyze laicity as a legal concept, whereas its combative meaning remains in legal practice and has become the keynote of laicity again since 1995.

Jurists attempt to find a legal interpretation of laicity which serves as a constitutional principle. A good interpretation should give sufficient attention to the unique status of the laicity principle in the order of law, without contradicting it with other basic principles. In 1959, Guy Mollet, who was the Secretary General of the French Socialist Party (leftist), commented on the new Constitution that laicity meant three principles: freedom of belief, separation of the churches and state and respect of all faiths.^② Whereas in recent years, the Council of State argue that the laicity principle includes three aspects, namely, “no subsidy for religion, no designated official religion, and neutrality of the state.”^③ Jurists attempt to maintain a delicate balance among various aspects associated with laicity, including freedom of religion, freedom of expression and manifestation of faith, respect of others’ thoughts and beliefs and protection of public order—no matter how the context changes, the mission is always the same.^④ It is not difficult to see that although the historical connection between the laicity principle and freedom of religion and belief has continued since the Third Republic, the understanding of it has changed. Jurists admit that laicity per se does not mean freedom of religion, instead, it contains various claims that may make different demands on the state, the individual and society, and thus it is necessary to make reconciliation. In addition, the Fifth Republic is more stable than the Third Republic and the Catholic Church is no longer a power against

^① Cf. Jacques Maritain, “Religion and Politics in France”, *Foreign Affairs*, Vol.20, No.2, 1942, pp. 266–281.

^② Cf. Jean Cornec, *Laïcité*, Paris, Sudel, 1965, pp. 246–247.

^③ Rémy Schwartz, “La jurisprudence de la loi de 1905”, *Archives de philosophie du droit*, Vol. 48, 2005, p. 75–83.

^④ Yves Gaudemet, “Quelques réflexions sur la laïcité”, *Archives de philosophie du droit*, Vol. 48, 2005, p.141–142.

the Republic in secular society; therefore, the radical anti-clerical position is not necessary any more. In consequence, “balance” has become the main tone of the legal practice of the laicity principle since the establishment of the Fifth Republic. It can also be said that the combative laicity has been incorporated in the liberal laicity.

Jean Rivero, who was regarded as the founder of the French public law after World War II, argued that laicity was a “notion” defined by the administrative judge, rather than a “dogmatic and aggressive” ideology. A case in point is that the Council of State attempted to curb the obvious anti-Catholic tendency of the administrative organs in a series of judicial precedents after 1938.^① The Council of State also argued that in the places of schools, prisons and hospitals, if the exercise of freedom of religion was premised on the presence of clergymen, then the public institutions could reserve the priest instructors. Rivero stated, by this precedent, that the laicity which was once against Catholicism had evolved into “positive neutrality”—the state ensured that everyone was able to exercise freedom of religion with positive measures.^② However, the so-called “positive neutrality” was not without doubt, considering the priest instructors were actually public servants working in relevant public institutions, whose wages and costs were paid by the state. It seems only an exception to the laicity principle.^③ Nevertheless, the exception has gradually become a common practice due to the judgment of the Council of State that the government can build a place of worship in college towns, and schools must allow students to comply with the provision of their religious belief on the rest day. In other words, “positive neutrality” has gradually become the mainstream interpretation of laicity in special disciplinary places such as hospitals, schools and prisons.

However, even when the liberal aspect takes the dominant place in the laicity principle, the combative aspect is not completely eliminated. Moreover, the restrictions on religious groups in the past have changed to

^① Cf. Jean Rivero, “La notion juridique de la laïcité”, *Recueil Dalloz*, Vol. 33, 1949, p. 137.

^② Cf. Jean Rivero, “De l’idéologie à la règle de droit: la notion de laïcité dans la jurisprudence administrative”, *op. cit.*

^③ Rémy Schwartz, “La jurisprudence de la loi de 1905”, *op. cit.*

coercive measures against individuals nowadays. It is safe to say that while the state affirms that laicity should not restrict individual freedom of religion, it uses laicity to limit the freedom of individual behaviors. The neutrality of public institutions requires a correction demand in the precedent of the Administrative Court of Nantes that religious symbols (such as crosses) cannot appear in public buildings that are not used for religious purposes.^① With the increase of the number of students who believe in Islam at the stage of compulsory education, the focus of the issue has shifted to whether the neutrality of public institutions include the prohibition of public school students wearing headscarves. In the 1989 advisory opinion, the Council of State held that there was no reason to prohibit the wearing of religious symbols in public schools, taking into account the “French mission in the international community” and “the freedom of students to express their views in school.” It was affirmed by following precedents.^② Wearing religious symbols itself is recognized freedom of expression of students within the framework of laicity and neutrality of the public institutions, as long as the purpose is not to spread religious beliefs or interfere with the internal order of schools.^③

The balance was broken in 1995, when the Council of State took the position of the previous government speaker in a precedent. The Council of State held that the school had the right to require students to remove ostensible or provocative (provoquant) religious signs.^④ Article L141-5-1 of the Code of Education which was adopted in 2004 absorbed precedents into legislation. Apart from whether it is reasonable to interpret “ostensible” and “provocative” as “visible” (visibilité), the change in precedents brought at least two explanatory issues: (1) under the interpretation of liberal laicity, the neutrality used to restrict the public officials, in particular prohibiting them from treating the users of public services on an unequal basis for religious reasons, has in turn granted

^① Cour administrative d’appel de Nantes, 3^e chambre, du 4 février 1999, 98NT00207.

^② Conseil d’Etat, 4/1 SSR., du 2 novembre 1992, n° 130394; Conseil d’Etat, SSR., du 27 novembre 1996, n° 172787.

^③ Cf. Jean Baubérot, “Les avatars de la culture laïque”, *Vingtième Siècle.Revue d’histoire*, 1994, Vol. 44, n° 1, p. 51–57.

^④ Rémy Schwartz, “La jurisprudence de la loi de 1905”, op. cit.

public officials (teachers) disciplinary authority over non-public officials (students); (2) the laicity used to guarantee individual freedom of belief by restricting the freedom of religious groups and clerics, has been used to directly limit individuals today. Of course, the disciplinary authority mentioned above may not be equivalent to restrictions on freedom of religion. Whether regarding the Muslim girls wearing headscarves and the Jewish boys wearing kippahs as the sacrifices of the internal norms of their own groups and social pressures, or as the complete rational entities of wholehearted belief in certain religions, the fact is that they cannot freely determine their appearance under the existing law. In 2009, the French Parliament convened a number of jurists to discuss whether it would be possible to ban the enveloping Islamic burqa in public places in the name of laicity, and the consensus was that laicity demanded the state to remain neutral, while protecting individual beliefs and freedom of belief, and therefore the ban could not be considered as the requirement of the laicity principle. However, the law which banned the burqa in public places was still passed in the name of protecting “public order” rather than of laicity in 2010. Although there were often accusations of religious discrimination in the name of laicity, the orders of Islamic priest instructors were still established in schools, hospitals and prisons according to Article 1 of the law on Separation.

In the Fifth Republic, the courts, especially administrative courts, play the most important role in the practice of laicity as a legal principle. How do we evaluate the practice of the laicity principle of the Fifth Republic in the light of the three principles proposed by Mollet? In terms of the protection of individual freedom of belief, the state even uses public funds to establish religious facilities in specific institutions. With regard to the national neutrality, the precedents of the administrative courts do rigorously regulate details such as the clothing of civil servants. Then what about the equal treatment of all religions?^① In practice, Muslim girls, Jewish boys and Sikhs are indeed deeply influenced by the precedents and

^① Even so, when the Pope visited France in 2002, the use of public funds by French government for reception aroused criticism from many radical secular groups. Cf. Jacques-line Lalouette, “Laïcité, anticléricalismes et antichristianisme”, op. cit.

subsequent legislations regarding religious symbols worn by students. It is not entirely unreasonable that the liberal laicity has been said to become discriminatory and exclusive laicity in recent years.^① Although, from the perspective of the combative laicity, it might as well be that the discriminatory laicity is precisely resulted from the elimination of the conflict between the state and churches, which occupied the stage center of laicity of the Third Republic. When the public order of the Republican is challenged, the jurists of the Fifth Republic can only choose between the state and the individual, ignoring that the religious organization is the object of confrontation. In the Third Republic, even the liberal laicity was realized through the state's confrontation against the churches to guarantee individual freedom. In an era when the combative aspect of laicity is less prominent, people see only the state's authority over individuals. People living in the Fifth Republic are more like atomic, rational and abstract citizens that the Third Republic wished to create. However, it is not wise to ignore the existence of different churches in society simply because the Catholic Church no longer has the power to confront against the state. It is also unwise to ignore the possibility that individuals may choose to wear "ostensible" signs under the social pressure of the group, assuming that everyone has the freedom to choose what to wear and the ability to achieve this freedom.

The change of the object of combat from organized churches to individuals is, in fact, the proof of the walk-off of the original dominant religion from society. The laicized laws since the end of the 19th century, marked by the law on Separation of 1905, have cleared all religious dimensions in national identity.^② In as early as 1958, René Raymond stressed that the religious identity of Catholics simply could not play any substantive role in their political choice.^③ In the Fifth Republic, especially after the "May 1968 events," the French society as a whole abandoned the sermons of Catholic Churches. In short, a "religious culture" that used to regulate all aspects of social life has been transformed into a "religious

^① Emmanuel Dockès, "Liberté, laïcité, Baby Loup", op. cit.

^② Cf. Jean Baubérot, "Sécularisation, laïcité, laïcisation", op. cit.

^③ Cf. René Rémond, "Droite et gauche dans le catholicisme français contemporain", *Revue française de science politique*, 1958, Vol. 8, n° 3, p. 529–544.

belief”—religion is merely a secondary cultural system that depends entirely on personal choice.

Religion has become a cultural element in society, while laicity has become a part of the new national identity of France that used to be known as the “eldest daughter of the Church.”^① Although on the day of the centennial of the 1905 law, the *Le Monde* published the *Universal Declaration on Laicity in the 21st Century* (*Déclaration universelle sur la laïcité au XXIe siècle*), signed by over 200 scholars from more than 30 countries, which presented laicity as a “universal value” to readers, French laicity is still unique. The drafters defined laicity in Article 4 as: (1) respect for freedom of conscience and its individual and collective practice; (2) the autonomy of politics and civil society with regard to particular religious and philosophical norms; (3) Non-discrimination (direct or indirect) against human beings.^② However, the drafters did not realize that the second point indicates that opinions based on religious or specific philosophical beliefs cannot appear in public political debates, which is precisely the main reason why the Anglo-American political convention believes the French laicity principle is too radical.^③ Therefore, in the view of the public authorities (and perhaps of most French), people who reject the concept of gender equality or insist on wearing burqas in public places are reluctant to discard specific religious positions, thus being unready to be French and unfold social life with other French people.

The de-religionization of the society is not without dark side. The paradox is that when things related to Catholicism remain as “cultural” rather than “religious” elements in civil society, all things related to groups from Muslim culture—decoration, clothing and behavioral norms—become “religious,” and thus they can only exist in the private space. In social debates, the issue of customs and habits has quickly changed into a challenge to the social order based on the peaceful

^① Cf. Guillaume Sibertin-Blanc et Laëtitia Boqui-Queni, “La laïcité répressive”, op. cit.

^② “Déclaration universelle sur la laïcité au XXIe siècle”, *Le monde*, le 9 décembre 2005.

^③ Cf. Amandine Barb, “Incompréhensions transatlantiques: le discours américain sur la laïcité française”, *Politique américaine*, n° 23, décembre 2014, p. 9–31.

coexistence, which then becomes a “Muslim issue.”^① There is no doubt that any doctrines, regardless of religious or cultural, that insist on the inequality between people or disrespect individual beliefs cannot be compatible with the modern society ruled by law. What should also be removed are the behavioral patterns serving as the carrier of such kind of doctrines.^② The problem is that: (1) the doctrines and behavioral patterns are invisible and what truly live in society is the individual; (2) Islamic religious organizations are not affiliated to formal institutions as the Catholic Church of the Third Republic. Hence, combating for laicity in society can only result in putting individuals, the victims of the doctrines that are incompatible with the modern society, under pressure. A former minister and diplomat wrote in her blog that laicity is the “daily combat and today’s combat,”^③ which precisely reflects that the combative laicity existed in society cannot determine the object of combat after the obedience of the Catholic Church to the state.

To sum up, the laicization in the legal-political field of the Third Republic succeeded in weakening the power of the church. The postwar society experienced further self-laicization. More and more people believe that religious arguments should not be the basis for public discussions in civil society. This is also reflected in law by the decreasing number of norms based on the Catholic morality, among which the norms of family, sexuality and gender relations have seen most changes. On the surface, the combative laicity in society expands, step by step, the scope of individual freedom, whereas what under the surface of “combat for freedom” is the same substantive consequence as in the legal field—individuals rather than groups become the object of combat. In other words, the issue of the combative laicity in society is also the challenge to the combative laicity. The reason for legitimizing the combative laicity has long been the

^① Cf. Guillaume Sibertin-Blanc et La fitia Boqui-Queni, “La laïcité répressive”, op. cit.

^② Ironically, in the colonial era, in order to strengthen their colonial rule in North Africa, French republicans cooperated with the church to combat traditional religious forces. Cf. Perrine Simon-Nahum, “La République et les républicains, adversaires du religieux et des religions”, in Marion Fontaine, Frédéric Monier et Christophe Prochasson (dir.), *Une contre-histoire de la IIIe République*, Paris, Découverte, 2013, p. 189–200.

^③ Valérie Fourneyron, “La laïcité: un combat au quotidien, un combat d’aujourd’hui”.

protection of the individual's freedom in the face of the authority and pressure of the group, but now the religious authority itself is an invisible part of the society. How to deal with it?

6 Conclusion

With the knowledge of the combative aspect of the French laicity principle, it is possible to have a better understanding of the series of judgments mentioned above. The laicity principle not only restricts the state's interference with citizens' freedom of belief, but also authorizes the state to regulate the church and citizens. This explains why the Court of Cassation explicitly denied the applicability of the laicity principle to private nurseries and took a "detour" to make an unsatisfactory interpretation of the Labor Code. It also explains why the Council of State held that it was unjustified to take police action against people wearing burkini on the beach on the ground of public order. These are the applications of law that is determined by the liberal aspect which laicity cannot deny. At the same time, however, laicity that has been internalized as part of the new national identity also allows the public authorities to reject those who are reluctant to forgo a particular religious position to obtain French citizenship. Perhaps even more importantly, the history of a word helps people to better understand the issues of today's laicity principle and answers the questions raised by social jurists ("why a principle of freedom becomes an excuse for discrimination"). Firstly, the liberal aspect of laicity was achieved through its combative aspect in history, and was accompanied by discrimination against part of French citizens at the outset. After all, it is hard to say that priests and orders that lost the right to teach publicly were treated "non-discriminatorily." Secondly, individuals, rather than organized churches, have become the object of combat.

Nonetheless, the work of jurists should not end in understanding as that of sociologists; on the contrary, jurists should try to contribute to a legal interpretation of the laicity principle. All the study of science of legal history will inevitably face the question of "how do results make sense of positive law and the practice of law." With regard to the objective of legal

interpretation, there have always been two competing theories—“subjective doctrine” that advocates interpreting in accordance with the objective of the legislator and “objective doctrine” that emphasizes respect for the objective of the system in the present society. It seems that only when the interpreter tolerates, to a certain degree, the “subjective doctrine”^① is it possible to acknowledge that the origin of the concept of laicity makes sense of the present interpretation. The preceding parts of the paper criticize that regarding laicity as the guarantee of religious freedom or even the synonym is incorrect as it imposes fundamental rights and concepts of the era of universal human rights on the legal concepts born in the era of legislative supremacy. However, we, after all, live in an era of rule of law, and we cannot and do not want to return to a regime with legislative supremacy. In this regard, interpreting laicity as religious freedom might as well be an attempt to renew outdated legal-political concepts in the new era.

Such a liberal interpretation can be a useful attempt, but cannot escape the fate of failure.

Firstly, it confuses two basic principles that coexist in the positive law system. The purpose of laicity principle is to eliminate well-organized religious institutions so that the church cannot be an obstacle when the state faces individual citizens, whether the state is violating or protecting the rights of citizens, or whether citizens are seeking protection from the state or fighting against public authority. The basis for the argument can certainly be provided if considering that the republican understanding is out of date and needs to be abandoned and that it is necessary to regard laicity as a synonym for religious freedom in interpretation. However, from the standpoint of positivism, the idea of the state described in Article 1 of the Constitution of the Fifth French Republic by all means cannot be easily ignored in legal interpretation. In other words, the renewal of laicity requires interpreters to face a heavier burden of argument, rather than

^① With regard to subjective doctrine and objective doctrine, please see Lei, L. *Global Law Review* (环球法律评论), (6): 39–54 (2010). About originalism, please see Hou, X. *Law and Social Development* (法制与社会发展), (5): 128–137 (2008).

simply advocate that laicity is equivalent to the neutrality of the state and the protection of religious freedom.

Secondly, the reasons why jurists circumvented the laicity principle in precedents in recent years can only be understood by the fact that laicity, although experienced a change “from combat to law,”^① is still a concept of “combat for the right.” If the restriction of religious freedom has to be constrained by the principle of purposiveness and proportionality so as to provide the judge with more room for argument, then laicity is a Pandora’s box. With regard to the elimination of religious symbols in secular life, the practice of the government that bans religious clothing in public places, of the local government that forbids all public institutions from providing halal and kosher food (food that fulfills the requirements of Islamic and Jewish dietary laws) and of the private organization formed based on a special belief that systematically excludes another special belief, can be legitimized with laicity. To distinguish religious freedom from laicity is precisely to prevent the combative laicity from completely suppressing religious freedom.

Whichever is adopted, the subjective or objective doctrine, the following two conclusions are reasonable: (1) the object to be laicized is religious organizations and laicity is realized through restricting the political-social influence of religious organizations. People supporting subjective doctrine can therefore deduce that the laicity principle should be interpreted as restricting the activities of religious groups in order to protect individual beliefs and religious freedom. Those in favor of objective doctrine, on the other hand, may argue that from the perspective of religious sociology, the way a few religions exist today has been very different from that of the Catholic Church in the past. The understanding of individual rights and political freedoms also differs from that of the late 19th century. Therefore, the past tough attitude of combat needs to be abandoned; instead, we should empower individuals so that they are able to resist families, communities and religious groups. In any case, an attempt to impose restrictions on individuals and force them to combat

^① David Kessler, “Laïcité”, op. cit.

against specific religious practices without equipping them with corresponding laws as tools, is more likely to push individuals to the religious groups that the state intends to restrict.^① (2) The freedoms of religion and belief under the laicity principle is certainly a political freedom which, however, only belongs to the field of personal life. In other words, opinions on public affairs should not be based on specific religious or philosophical positions. Both objective doctrine and subjective doctrine have no dissent in this regard. Even though burqas and other “ostensible” religious symbols may offend equal political expression, it is still hard to imagine why the individual’s choice of diet would be something that needs to be educated by the state in the name of laicity. As can be seen in the development of the 1960s, once religion truly entered the field of private life, the authority of the church’s doctrines in public life would be diminished, so would the church’s political influence. Precedents of laicity in recent years show that the boundary between the public sphere and the private sphere is not as impermeable as people think,^② and it is in family law, a private law which is the core of the private sphere, that the development of history shows the role of political consciousness and the involvement of public authority. However, the maintaining of dichotomy of the public and private on notions will protect, at least within a certain limit, the freedom of the individual, as well as political power from religious influence.

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^① Guillaume Sibertin-Blanc et Laëtitia Boqui-Queni, “La laïcité répressive”, op. cit.

^② Cf. Daly, “Laïcité in the Private Sphere?”.