State and Religion in France (Part 2)

FRANCIS MESSNER[*]

ABSTRACT: *French law governing the relations between the State and religious bodies is complex. In many ways it is misrepresented both inside and outside France, as it is believed to base its treatment towards religions on principles of absolute separation and indifference. But the reality of French law is actually quite different. Continuing insight discussion on the relatioship between the State and Religion in France, in part 2, the author deals with these following topics: The Status of Religious Ministers and of People Employed by Religious Bodies; The Financing of Religious Bodies and Activities; Education; Religious Minorities.*

5. The Status of Religious Ministers and of People Employed by Religious Bodies

a) Religious Ministers

- The appointment of religious ministers

According to the principle of neutrality, the State does not intervene in the choosing of religious ministers. The competent authorities within the various churches and religious groups freely appoint their leaders and ministers. However, in France there exist a number of exceptions to this rule. These exceptions concern the bishops and chaplains whose status is defined by the law of 9 December 1905, the ministers of

[*]. The paper had been presented at the international academic conference of "Beginning the Conversation: Religion and Rule of Law in Southeast Asia" held in Hanoi, 8-9 September 2006. **Francis Messner** is Director of *PRISME – Societe, Droit et Religion en Europe*, a research unit of the *Centre national de la recherche scientifique* and of the *Université Robert Schuman*. *PRISME* gathers specialists in law, politics and sociology of religions, and deals with the comparative study, at the European level, of juridical status and the institutional and cultural situation of religions. He also serves as Director of *DEA Droit canonique et Droit Européen comparé des religions* and *Centre Société, Droit et Religion en Europe.*

the Catholic church in the département of Guyane, and the ministers of the four recognized religions of the départements of Bas-Rhin, Haut-Rhin and Moselle.

Firstly, the State must be consulted concerning the appointment of the diocesan bishops of the Catholic church, which is under the law of separation of Church and State of 9 December 1905. The Catholic church agreed to grant this prerogative to the French State in a notice handed in May 1921 by the Cardinal secretary of state to the special representative of the French government to the Holy See. This notice states that the Cardinal secretary of state has the responsibility of asking the French ambassador if the French government has anything to say, from a political point of view, against the clerics that the Holy See has chosen to become diocesan bishops in France. Currently, the question is asked by the papal nunce in Paris to the French Ministry of Foreign Affairs. This does not mean that the French government has a right of veto on appointments; it only means the French government must be consulted, and the Holy See is not bound by the answer it receives.

Secondly, the appointment of chaplains in prisons, hospitals, the army and secondary schools, under the law of separation, can only take place after an agreement between religious authorities and public authorities. The appointment cannot be maintained if the agreement ceases. Different hiring procedures are applied to the different categories of chaplains. Military chaplains are appointed by a decision of the Minister of Defence, after a proposal from the head chaplain of the concerned religion; the head chaplain is himself appointed by the Minister of Defence among candidates put forward by each religious group, in accordance with the group's internal rules of organization (Décret du 16 Mars 2005). There are posts for Muslim chaplains in hospitals, prisons and the army.

The ministers and the administrative staff of recognized religions (Catholic dioceses, Reformed, Lutherans, Jews) in the local law of Alsace-Moselle are either directly appointed by the French President (Catholic diocesan bishops) or by the Prime Minister (the chairperson of the Lutheran church – the EPCAAL), or approved by a ministerial decision following an appointment by religious authorities (Catholic priests, Protestant pastors, Jewish rabbis), or freely appointed by religious authorities (Catholic vicars, administrative staff, the chairperson of the Reformed church – the EPRAL).

- The status of religious ministers in general law

A labour contract can be formally concluded between religious authorities and people exercising religious activities. In such a case, the labour code comes into application. The Catholic church and the Jewish religion have chosen this solution for the employment respectively of lay people exercising pastoral duties and of rabbis.

When the juridical relation between an employee (namely a religious minister) and a religious authority is not formally defined, jurisprudence considers that religious activity based on spiritual commitment cannot as such be regarded as a labour contract. A pastor or a priest do not conclude a formal contract of employment with respectively a religious association or a bishop to perform their spiritual functions (Arrêt Cour de Cassation, Ch civ 23 avril 1913 et 24 décembre 1912). In this case a judge who respects the principle of neutrality will not define the labour relations resulting from the constitution of the concerned religion, since the objective and subjective elements of a work contract are lacking: the minister is not a subordinate, his activity is not that of a profession, he is not paid for a measurable amount of work, and finally he and his employer themselves wish to define his activity in terms other than a labour contract, because of the spiritual nature of the employment.

- Their status of religious ministers in the local law of Alsace-Moselle

In the local law of Alsace-Moselle, religious ministers are paid by the State. A local law of 15 November 1909 has defined their status; they are not considered as State officials ("fonctionnaires") but as public agents of the State.

b) "Enterprises based on commitment"

The lay people who are employed and paid by religious bodies are defined by legal doctrine as employees of an "enterprise based on commitment" ("entreprise de tendance", "entreprise affinitaire"). This phrase is used mostly in legal doctrine, and it appears in this form neither in the labour code nor in legislative or statutory texts, except in the codified law of 31 December 1959, which deals with the "particular nature" of private schools which are under contract with the State. As for jurisprudence, it mentions "enterprises with an ideological commitment" and the fact that enterprises can have a special purpose. The purpose of committed enterprises is to defend and promote a philosophical, political or religious doctrine or ethic. Some commercial firms can also fall within this category, such as shops selling religious

articles or religious restaurants. "Enterprises based on commitment" promote things that are in accordance with their ideological goals.

Jurisprudence in those matters has been evolving in recent years. In 1978, in the Dame Roy case, concerning a teacher in a Catholic private school who had been dismissed by her employer (the Association Sainte-Marthe) because her marital status was not in accordance with the Catholic doctrine of marriage, the plenary assembly of the Court of Appeal ruled that "when the Association Sainte-Marthe concluded a contract with Dame Roy, her religious convictions had been taken into consideration and this element of the contract, which usually remains outside labour relations, was intentionally included into the contract, of which it became an essential and determining part" ("lors de la conclusion du contrat par lequel l'Association Sainte-Marthe s'était liée à Dame Roy, les convictions religieuses de cette dernière avaient été prises en considération et cet élément de l'accord, habituellement en dehors des rapports de travail, avait été incorporé volontairement dans le contrat, dont il était devenu partie essentielle et déterminante") (Cass. ass. plén. 19 mai 1978 : D. 1978, p.541, concl. R. Schmelk note Ph. Ardant).

This particular obligation was also restated in 1986 in the Fischer case, involving a woman lecturer who had been dismissed from a protestant theology faculty. On this occasion, the Social Chamber of the Court of Appeal considered that the litigant had been taken in employment "to perform a task implying that she should be in communion of thought and belief with her employer, and had not taken into account the obligations resulting from this commitment" ("pour accomplir une tâche impliquant qu'il soit en communion de pensée et de foi avec son employeur, méconnaît les obligations résultant de cet engagement") (Cass. soc., 20 novembre 1986, Delle Fischer c/ Unacerf JPCG, 1987, II, 20798, note T. Revet).

This obligation has been strongly criticized by legal doctrine, notably because it imposes on employees some duties outside their workplace, for instance when employees are forbidden to cohabit without being married, or to remarry after a divorce, or to have a homosexual lifestyle. A ruling by the Social Chamber of the Court of Appeal of 17 April 1991 (Painsecq c/Assoc. Fraternité Saint Pie X) tends to protect more the private lives of the employees of "enterprises based on commitment". It states that when an employee behaves in private in a way that is contrary to the "commitment" of the enterprise, namely the regulations of a religious group, this is not necessarily a sufficiently strong basis to justify the dismissal of the employee. Only clearly obvious behaviour creating a serious disturbance within the

enterprise can become a basis for dismissal. The Court of Appeal tends not to consider any more the behaviour of an employee in his/her private life as a valuable ground for firing him/her.

Besides, jurisprudence establishes a hierarchy between the employees of a committed enterprise; the functions of some employees do not justify that they should share the thought and beliefs of their employer. This is the case of employees whose tasks are only material, and who thus have no direct contact with the faithful of the religious group, and so cannot influence them.

6. The Financing of Religious Bodies and Activities

a) In general law

As regards the financing of religious bodies, article 2 of the law of 9 December 1905 states that "the Republic does not recognize or subsidize any religion, nor does it pay the ministers of any religion… " ("La République ne reconnaît, ne salarie ni ne subventionne aucun culte... "). This goes directly against the former law of 18 germinal an X - 1802, which provided for public subsidies for religious institutions.

The State is forbidden to pay salaries to religious ministers and leaders. Ministers such as Catholic priests, Protestant pastors, Jewish rabbis and Muslim imams, as well as leaders such as Catholic bishops, the chairpersons of the Protestant churches, the chairman of the Jewish central consistory and head imams in Islam receive no salary whatever from the State for their religious activities, in the territory that is under the law of separation between Church and State. The law is different concerning the départments of Bas-Rhin, Haut-Rhin and Moselle, the overseas department of Guyane, and other overseas dependencies.

However, France's highest administrative court, the Council of State ("Conseil d'Etat") does not consider that the ban on State subsidies for religious groups has the value of a constitutional law. In its jurisprudence, the Council of State has ruled that "the constitutional principle of 'laïcité', which implies, on the part of the State and of regional and local authorities, a neutral attitude towards religions, and equal treatment for religious groups, in itself does not ban some public subsidizing of religious groups, for the general interest or for the interests of territories under regional or local authorities, provided that this be done respecting the conditions

defined by law" (Conseil d'Etat, 16 mars 2005, Ministre de l'Outre-mer c/ Gouvernement de la Polynésie française).

The principle of no subsidizing, stated in the law of 1905, contains some exceptions. Some of these are provided for in the law of 1905 itself. Paragraph 2 of the above-mentioned article 2 says that the State shall provide for the expenses of chaplaincies: "there will be the possibility of including [in the public budget] the expenses related to services of chaplaincy and aimed at furthering the free exercise of religious practice in public institutions such as lycées, secondary schools (Décret n° 60-391, 22 avril 1960) and primary schools, hospitals (Circulaire ministérielle du 19 janvier 1976), asylums and prisons (Code de procédure pénale, art. D 433)" ("pourront être inscrites les dépenses relatives à des services d'aumônerie et destinées à assurer le libre exercice des cultes dans les établissements publics tels que lycées, collèges, écoles, hospices, asiles et prisons", Loi du 9 décembre 1905, Article 2, Paragraphe 2). Army chaplains are provided for by specific texts (Décret modifié n° 64-498 du 1er juin 1964, et Instruction du Ministre de la Défense du 9 mars 1981).

Moreover, article 19 of the law of 1905 states that "the sums allocated for the repairing of historical monuments are not considered as subsidies" ("ne sont pas considérées comme subventions les sommes allouées pour réparation aux monuments classés"). The law of 13 April 1908 adds a new sub-paragraph to article 13 of the 1905 law: "The State, the départements and the local authorities will be free to meet the expenses for the upkeep and the conservation of the religious buildings of which they are the lawful owners" ("L'État, les départements et les communes pourront engager les dépenses nécessaires pour l'entretien et la conservation des édifices du culte dont la propriété leur est reconnue par la loi").

Another law, the law of 25 December 1942, allows public subsidizing of work done on religious buildings belonging to religious associations, whether these buildings are registered as historical monuments or not.

What is more, the public owner of a religious building that has been destroyed or damaged can be led to participate in its reconstruction. Local authorities are under the obligation to rebuild a church building that has been destroyed by a fire, if it has received compensation from an insurance, and this compensation cannot be used for other projects (CE, 19 juin 1914, Vital-Pichon: Rec. CE 1914, p. 726). In wartime, local authorities also received war damages which they had the duty to use for the rebuilding of destroyed religious buildings (L. 20 févr. 1932: DP 1932, 4, p. 136). Beside those cases when it is compulsory for public authorities to provide for

reconstruction, public authorities are free to participate, on their own or in partnership with churchgoers or with religious trusts, in the financing of the reconstruction of a religious building that has become derelict following a disaster or due to lack of maintenance. Those works of reconstruction are just considered as repair works of a more thorough kind. In that way it cannot be said that a new building is being put at the disposal of religious worship; rather, a part of the local heritage has simply been restored, and in such a case public financing is not illegal.

A local authority is in fact free to participate financially in the construction of a new church building, in partnership with the believers, but only within the limits of what the authority would have been required to give by law for the restoration of the former building (CE ass., 22 janvier 1937, Ville de Condé-sur-Noireau: Rec. CE 1937, p.87).

Beside those instances of reconstruction, there is another legal instrument which allows public authorities to participate in financing the setting up of new religious buildings. It is called the "Cardinal's Building Works" ("Chantiers du Cardinal") and it makes it possible for public authorities to lease to religious associations building sites where they can set up worship places. This scheme brings many advantages to religious associations: it lasts for 99 years, for a payment of one French franc per annum (before the adoption of the Euro), and the piece of land and the buildings are returned to the public authorities at the end of the leasing period. The status of this building at the end of the lease will be somewhat uncertain. If it was built after the law of 1905, it will not be automatically attributed by law to religious purposes. But neither will it be possible to integrate it into the public property of the local authority (F. Messner, P.-H. Prélot, J.-M. Woehrling, dir., *Traité de droit français des religions*, préc. n° 2017 à 2024).

Various texts allow local authorities to meet some of the expenses of religious worship. The minister can receive from the local authority some financial compensation for the upkeep of the religious buildings that he performs, because in doing this he serves the interests of the local authority who owns the building (Cire. min. int., 3 mars 2003). In the same way, local authorities can pay for religious services that have been requested by the mayor. The lodgings of the ministers of the formerly recognized religions, which according to general law are part of the private property of the municipalities, have not had a specific juridical status since the law of 1905. In some cases, they are still set apart as lodgings for the priests, who have been considered as common law tenants since 1905. Usually the priests pay a small rent to

the local authority who is the owner (JO Sénat Q, 11 octobre 1984, p.1651). Finally, because the health insurance funds, maternity funds, disability funds and old age pension funds of religious ministers and members of religious congregations (established by the law of 2 January 1978) suffer constant deficit, the law of 30 July 1987 (art. L. 381-17) provides that the expenses can be met by a financial contribution from the general system of health and maternity insurance. The principle of demographic compensation had already been adopted in 1978 for old age pension funds.

b) In local law

In the département of Guyane, the ministers of the Catholic religion (bishops and priests) are paid on the département's budget, as well as the expenses for the upkeep of church buildings and presbyteries, in accordance with article 36 of the ordinance of 27 August 1828. In the same way, the ministers of the four recognized confessions (Catholic, Reformed, Lutheran, Jewish) of the départements of Bas-Rhin, Haut-Rhin and Moselle receive a salary from the State. A modified decree of 10 July 1948 defines their grades and salary scale. The salaries and additional expenses are paid by the Ministry of the Interior; the sum total paid in 2002 amounted to 32 528 677 euros. In the French overseas territories, where the law of 9 December 1905 has never been introduced, the territorial authorities can pay the salaries of religious ministers. This is the case for instance in St-Pierre et Miquelon.

Moreover, municipal authorities in the local law of Alsace-Moselle have a duty to provide lodgings for religious ministers and to make up for possible deficits in the budgets of public religious institutions at local or parish levels (Catholic "fabriques", Lutheran and Reformed presbyteral councils, and Jewish consistories).

Since the law of 9 December 1905, including its article 2, has never been introduced in the départements of Bas-Rhin, Haut-Rhin and Moselle, there is no legal ban against public funding for religious groups. So, local public authorities, and in some cases the State, can offer economic support to religious confessions, whether these are statutory (in that case the funding is not compulsory and comes in addition to compulsory funding) or non-statutory, that is, organized as associations within the framework of private law.

c) The Subsidizing of Humanitarian, Cultural and Educational Activities

The subsidizing of humanitarian, cultural and educational activities performed under the aegis or the responsibility of religious organizations is not considered by French legal texts as being part of what defines a religious institution or activity. Catholic and Protestant parishes, and Jewish consistories, and even more often groups stemming from those institutions, have created hosts of humanitarian, cultural, educational and sports associations which public authorities are legally entitled to subsidize, just as they do with non-religious associations pursuing the same goals. Religious associations also run choirs, musical societies, sports unions, funds for widowed people, holiday camps, libraries, day-care centres, parish schools, emergency funds, homes for the homeless. All these can be legally subsidized by public authorities. Diocesan or other religious associations can also benefit from a whole range of financial exemptions and tax allowances (as regards turnover tax, property tax, residence tax, professional tax, VAT, registration fees for the sale of buildings, transfer rights, sponsorship). Public authorities can moreover grant investment subsidies to private education (90% of which is run by the Roman Catholic church). Those subsidies are free and unlimited for technical and agricultural teaching and for general higher education.

7. Education

a) Religious Education in the Public Education System

Religious education with a confessional dimension is one of the components of freedom of belief and of practising one's religion, which is a principle carrying constitutional value in French law. The constitutional principle of "laïcité" (Article premier, Constitution du 4 octobre 1958) does not ban public authorities from facilitating religious education within the framework of the public education system. According to Jacques Robert et Jean Duffar, "respecting the principle implies that public education should allow the pupils to freely practise their religious obligations" (« … le respect du principe implique que l'enseignement public se prête au libre exercice par les élèves de leurs obligations religieuses » (Jacques Robert et Jean Duffar, *Droits de l'homme et libertés fondamentales*, Paris, Montchrestien, 1996, p. 588). In the same way, the duty of the State to provide a secular education at all levels, as reaffirmed in the preamble to the Constitution of 1946, "Organizing free and secular public education at all levels is a duty of the State" (« … L'organisation

de l'enseignement public gratuit et laïque à tous les degrés est un devoir de l'Etat », Constitution du 27 octobre 1946, Préambule) does not imply a ban on the organizing of religious activities in public educational institutions. In this respect, French public primary schools under general law are subjected to a state of exception that can no longer be justified.

- In general law

Religious education for primary school children cannot be given inside school buildings. This is implied *a contrario* from the dispositions of article 2 of the law of 28 March 1882 : "In addition to Sunday, public primary schools will be closed on another day of the week, so that parents, if such is their wish, can have their children be given religious lessons outside school buildings".

However, the juridical status of secondary school chaplaincies is more liberal. It is based on the first article of the law of 31 December 1959, which says that "the State shall take all necessary measures to guarantee freedom of worship and religious education for pupils in the public school system". A decree dated 22 April 1960, a decision dated 28 August 1960, and an administrative notice dated 22 April 1988 define the conditions and procedures for the setting up and the functioning of school chaplaincies.

The setting up of a chaplaincy in a secondary school is always preceded by a request from parents addressed to the school head. This request is compulsory in boarding schools, and optional in other schools. In the latter case, the setting up of a chaplaincy falls within the competence of the rector of the education district ("recteur d'académie"), on the basis of the parental requests transmitted to him by the school head, accompanied by the opinion of the school council. If the rector turns down the request, he must state the grounds for his refusal.

According to article 2 of the decree of 8 August 1960, religious education must be given by a person who has been appointed by a religious authority and approved by the rector of the education district. The chaplaincy is free to organize its own activities and has no organic link with the public school.

- In the local law of Alsace-Moselle

Unlike what happens under general law, in the local law of Alsace-Moselle, religious education is available in public primary and secondary schools for the pupils belonging to one of the recognized religious confessions (Catholic, Protestant,

Jewish), following article 23 of the law of 15 March 1850 (for the primary schools) and the ordinance of 13 July 1873 as rewritten in the ordinance of 16 November 1887 (for the secondary schools). (Those rules are clearly maintained by article L. 481-1 of the Code of Education). Religious education in Alsace-Moselle is part of the school curriculum. Public authorities have a duty to organize religious education classes. However, the pupils are allowed not to follow these classes: official texts make it possible for pupils who are over the majority age of 18, and to the parents (or people bearing parental responsibility) of pupils who are under 18, to ask for an exemption from religious education classes. This exemption is granted automatically. In practice, at the beginning of the year each pupil receives an application form, on which he/she (for the over 18's), or his/her parents or people with parental authority (for the under 18's), can express the wish to follow religious education classes or to be exempted from them. This procedure ensures complete equality between parents to freely decide whether their child will follow or not the religious education classes.

Besides, the French teacher training colleges (IUFM - Instituts universitaires de formation des maîtres) in the départements of Bas-Rhin, Haut-Rhin and Moselle give some training in religious education to future primary school teachers, and to the religious education teachers of secondary schools.

Finally, within the framework of the Université Marc Bloch of Strasbourg, the State maintains a Faculty of protestant theology, a Faculty of Catholic theology, and an autonomous centre for teaching Catholic theology at the University of Metz.

- Teaching about religion

Following the Debray Report on "Teaching about the phenomenon of religion in the framework of the secular school system" (Rapport Debray sur « L’enseignement du fait religieux dans l’école laïque », handed to the Minister of Education in 2002, special training has been set up in the IUFM's for history, philosophy and literature teachers, on the subject of teaching about religion as a fact, in a non-confessional perspective. As can be seen, the study of religion is not considered as a specific subject in the curriculum, and there are no specialized teachers on this subject; it is only considered as additional information to be taught within existing history, philosophy or literature classes.

b) The Case of Private Education

Private education, whether confessional or not, is organized under the Code of education, which has codified the modified law n° 59-1557 of 31 December 1959 on

the relations between the State and private education institutions, as well as the subsequent texts.

According to the Code of education, private primary and secondary schools under a simple contract or under a contract of association with the State can benefit from public subsidies. The salaries of all the teachers of private schools that are under a contract with the State are paid by the State. Private schools that are under a contract of association with the State receive extra subsidies to pay for their running expenses.

However, under general law investment expenses of private primary schools can only be paid by the schools themselves and not by the State, according to a law dating back to 1886. Private secondary schools may receive financial support from the State to pay for up to 10% (and no more) of their planned investment expenses (Article 69, Loi du 15 mars 1850).

Article 2 of the law of 1886 has not been introduced into the local law of Alsace-Moselle (Conseil d'Etat, 28 mai 1937). This allows territorial authorities in Alsace-Moselle to subidize the investment expenses of private primary schools with no limitation. However, the rule established by article 69 of the law of 1850 called "Loi Falloux" must be applied (Avis de Conseil d'Etat du 16 octobre 1956) concerning private secondary schools and Catholic ecclesiastical schools ("petits séminaires"). For the time being, there exist no private Muslim schools under contract with the State in metropolitan France.

8. Religious Minorities

The concept of "minority" does not exist in French law. The French government has constantly refused to recognize minorities. This position is clearly expressed in the declaration of the French government concerning article 27 of the United Nations' International Convention on Civil and Political Rights, which guarantees protection for ethnic, religious and linguistic minorities: "taking into account article 2 (that has become article 1 in the meantime) of the Constitution of the French Republic…, article 27 does not apply in the French Republic".

This position was reaffirmed by the Council of State, whose general assembly in 1995 stated that the French fundamental law refuses to recognize any category other than the French people, with no distinction of origin, race or religion between

individuals (Section des finances n° 357/466, 10 juillet 1995, EDCE. This is a notice of advice given in relation with the Convention for the Protection of National Minorities drawn up by the Council of Europe). In the same way, the Constitutional Council, in its ruling concerning the European Charter of Regional or Minority Languages, made clear that the fundamental principles of the unity of the Republic and of the unicity of the French people "stand against the recognition of collective rights to any group defined by its origin, culture, language or belief" (Décision n° 2004-505 DC du 19 novembre 2004). This position was confirmed by a more recent decision of the Constitutional Council about the Treaty establishing a Constitution for Europe: this decision states that the principles contained in the first article of the Constitution, by affirming that France is a secular ("laïque") republic, forbid "anybody to put forward his religious beliefs with the aim of avoiding to obey the common rules governing the relations between public authorities and individuals" (Décision n° 99-412 DC du 15 juin 1999).

In principle, French law only recognizes individual freedom. The rights of social groups, among which minorities, is not only considered superfluous, but also considered as opposed to individual freedom. This very theoretical position is partly contradicted by the effective contents of French law applying to religious minorities. Religious freedom, and notably one of its aspects, freedom of worship, possesses a collective dimension which is recognized by law. Individual citizens can set up associations, some of which can become frameworks for the organization of religious minorities. In this respect, the law of 9 December 1905 even created a specific category of associations: associations with a religious purpose ("associations cultuelles"), with have their own specific statutes and rights.

Moreover, institutions representing the most important religious minorities have an almost official status in front of the public authorities (French Council of the Muslim Religion -Conseil français du culte musulman ; Central Consistory of French Jews - Consistoire central des israélites de France ; Buddhist Union of France - Union bouddhiste de France ; Protestant Federation of France - Fédération protestante de France). And finally, those minorities are granted permissions aimed at facilitating their religious practices (concerning ritual slaughtering, cemeteries, religious festivals…)

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