

French secularism and the fight against separatism

From the 1905 *laïcité* of separation to the 2021 *laïcité* of surveillance

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Abstract

Meant to fight separatism, the French Act to strengthen the respect of principles of the Republic of 2021 transformed the *laïcité* of separation into a *laïcité* of surveillance. This article discusses the historical roots and conceptions of laicity underlying the 2021 reform, according to which religion seems to be viewed as a possible enemy, separating the citizen from the Republic and impairing universalism of rights. The article focuses on the impact on religious organisations resulting from the state's greater control over religious groups' activities, places of worship and foreign funding. It closes by reflecting on the way forward for defenders of religious freedom.

Keywords *laïcité*, France, religious associations, religious minorities, secularism, separatism.

1. Introduction

In France, the Act to strengthen the respect of principles of the Republic,² commonly known as the “Law to fight separatism,” was promulgated on 24 August 2021. Enacted in less than a year through an accelerated parliamentary procedure, this Act shakes the status quo regarding *laïcité*. It thoroughly amends the historic and symbolic law of 9 December 1905 on the separation of religions and the state, both in its letter and its spirit, with specific impact on religious organisations. The 1905 Act, which provides the legal framework for religious organisations in France, has been profoundly amended to enable greater control of religious groups' activities, places of worship and foreign funding. The 2021 Act also amends other statutes in addition to the 1905 Act in several areas that have consequences for religious freedom, particularly freedom of education with the requirement of prior authorization for homeschooling (article L. 131-2 of the code of education), as well as a legal requirement of neutrality in the workplace for people working for public services

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² Loi confortant le respect des principes de la République du 24 août 2021. Available at: <https://bit.ly/36q1tvL>.

(article 1 of the 2021 Act). It also adds some restrictions to freedom of expression regarding “online hatred” through the creation of the offence of endangering the lives of others by disseminating information relating to private, family or professional lives online (article 223-1 of the criminal code). Moreover, there are now additional obligations for online providers (Loi sur la confiance en l’Économie Numérique). However, the most immediate impact on religious freedom is related to the changes in the legal framework of religious organisations, which demonstrate the emergence of a new *laïcité* of surveillance (van de Tol 2020).

Indeed, the entry into force of the new legislation opens the field to a new type of relation between the French state and religions. What was known, since 1905, as a *laïcité* of separation has been transformed into a *laïcité* of surveillance, through the reinforcement of state control of religious activities.

This article explores the genesis of the Act to strengthen the respect of principles of the Republic. It briefly outlines the new law’s historical and political roots in the “*nouvelle laïcité*” (Hennette-Vauchez and Valentin 2014) as well as the favourable circumstances that enabled the French government to succeed in amending the 1905 Act. In particular, it argues that French *laïcité* has conceptually turned from separation between state and religions to the fear of separation between state and citizens by religion. Religion now seems to be seen as a threat to French universalism. As the recognition of minority groups in French law seems impossible. This new issue of separatism in France is revealed as the sad consequences of both the fear of communitarianism and the trauma of the 2013 and 2015 Islamic terrorist attacks, which put security at the forefront of political actions and designated religion as a potential enemy of the Republic.

The fear that religions cause separatism has clearly led the way to a shift in the life of French *laïcité*. A new era of *laïcité* of surveillance has begun, involving restrictions of fundamental freedoms, in particular freedom of religion. This article brings to light the method used to enhance the state’s control over religious organizations, including the specific role of the prefect at the departmental level, and the overall potential detrimental effects on freedom of religion in France. It provides an overview of the specific changes in the legal framework for religious activity in France and their possible impact on religious freedom. Finally, it reflects on this new era of *laïcité* of surveillance, the implications for religious organizations, and the way forward to guarantee religious freedom in the future.

2. Genesis and principles of the “law on separatism”

The 2021 Act to strengthen the respect of principles of the Republic may be seen as the epitome of recent developments on *laïcité*, as various conceptions of *laïcité* have emerged in the French debate and have been fuelled by France’s troubled history of

the relation between the state and religion. In 2020, the time was ripe to crystallize this movement into action so that the French government could legitimately launch a bill against separatism and win a majority in Parliament. As a result, the 2021 Act, among other measures, substantially amended the symbolic 1905 Act and reformed the legal status of religious organisations in France.

As presented by Jean Baubérot (2015), seven conceptions of French *laïcité* coexist, various ones being dominant at different times. These include the anti-religious conception; the Gallicane conception, with a high level of state supervision of religious activities and organisations; the strict separatist conception; the separatist conception; the inclusive and separatist conception; and the identity conception, resting on a certain idea of Frenchness, and the conception based on the Napoleonic Concordat of 1801. The Gallicane doctrine, according to Baubérot (2021) gives the political authority the right to intervene in religious affairs. Hence the king or the Parliament was entitled to intervene in the affairs of the French Catholic Church, in particular in order to limit the influence of Saint Siège, viewed by the king as a foreign sovereign.

Whereas the 1905 Act clearly rejected the anti-religious, the Gallicane and the identity conceptions of laicity and embraced the separatist view, the 2021 Act seems to find inspiration in the Gallicane conception and to a certain extent in the Concordat. The 2021 shift towards greater surveillance of religious activities through the prefect's control of religious organisations, places of worship, religious speech and the financing of religious activities, with a specific focus on foreign funding, shows the emergence of a *laïcité* of control, based in particular on a fear that religion in France could be subversive as a counterpower to the state or could undermine French sovereignty through foreign influence. Giving an historical perspective, Mariëtta van der Tol explains that the 2021 Reform that has led to this "laïcité of control" finds its origin in the reminiscence of Napoleonic interferences with the Catholic Church and with Protestant and Jewish minorities (van der Tol 2020).

The issue of religion in the public sphere has been controversial in France over the last decades, amounting to the emergence of a "new laicity" as described by Stéphanie Hennette-Vauchez et Vincent Valentin (2014). This new *laïcité* has transformed the 1905 paradigm (which included freedom of conscience and religion, religious neutrality of the state, and political neutrality of religion) into an uncertain concept of extended neutrality (not only a duty of the state but also of the citizens, with a decreasing place for religious organisations in civil society). Hennette-Vauchez and Valentin have described this movement as a "reconfiguration of the principle of laicity" and suggested that it "would thus run counter to the original philosophy of secularism-separation of 1905." They add that the new *laïcité* is "not congruent with the meaning of the legal principle of secularism as it was forged throughout the 20th century. On the contrary, it attempts to subvert it: from a principle guaranteeing freedom of worship, it makes the basis of restrictions

on religious freedom. In so doing, the New Secularism limits not only the action of the State but also the freedom of individuals” (Hennette-Vauchez and Valentin 2014:29).

According to Hennette-Vauchez and Valentin, “the reconfiguration of the principle of *laïcité*” started in 2003 with the Baroin Report³ and then developed with the laws of 2004 on the wearing of religious symbols in schools, colleges and high schools, and of 2010 on the prohibition of the full veil in public spaces. The 2014 Babyloup case⁴ illustrates a prominent symbol of the new *laïcité* and the French debate over the legitimacy of neutrality requirements as imposed on a worker in a day care unit of a private association. Confirming the political tension underlining the issue of religion in France, the authors allege that “the religious issue is ... a question on which tensions are global today. It seems, however, that it is posed in France in specific forms, where any discourse on secularism is, simultaneously, a discourse on the Nation. ... Secularism constitutes a question that is indissociably legal and political” (Hennette-Vauchez and Valentin 2014:17). For decades, the new *laïcité* has shaken the 1905 principles and has opened the door to a new era where *laïcité* could be thoroughly redefined. However, until 2021, a reform of the 1905 Act was impossible for political reasons. The symbolic 1905 Act has remained almost unmodified (except for some details) since its original passage, and no previous government succeeded in any substantial reform. There has been no legal redefinition.

In 2021, the transformation of French *laïcité*, not only in the perception of society but in the law, was made politically possible by the new rhetoric of separatism and the severity of security issues. Beginning in 2018, the French government worked on proposals to modify the legal framework of religious associations with the aim of encouraging French Muslim communities to resort to the 1905 Act to create religious organisations (*associations cultuelles*) as most of them had resorted instead to the status of a non-specific type of organisations (under the Act of 1 July 1901 on freedom of association). The second aim was to allow the state

³ The Baroin Report was presented in 2003 to the French Prime Minister by M. Baroin in his quality of vice president of the French national Assembly. The title of the report was “for a new *laïcité*”. It argued that *laïcité*, as a core value of French identity, was questioned and contested, particularly by the “Muslim world”. It identified an evolution from religious issues to cultural and identity challenges for French *laïcité*, because of “multiculturalism and communautarism.”

⁴ The Babyloup case (Cass., ass. plén., 25 juin 2014, n° 13-28.369 P) involved a worker at day care unit who was fired because she wore a Hijab. The Cour de cassation ruled in favour of the day care unit considering that the decision to fire the employee was not a violation of the freedom to manifest religion. The Court considered that *laïcité* was not to be applied to the private sector but that, in this case and under Labour Law, limiting the right to manifest religion of the employee was duly justified by the aim to protect children and to promote gender equality in the day care unit. The Babyloup case, a very controversial case, led to the passing of the “El Komry Act” (loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels). This act amended French labour code, adding the possibility for the employer to impose neutrality in the internal rules (Article L1321-2-1 of the French Labour Code).

to monitor foreign influences on religions in France through the control of funding of religious activities. Because of the various events that shook France (the Yellow Jackets Movement from October 2018 on, the mobilization against the reform of pensions in December 2019, and the COVID-19 pandemic since March 2020), the reform of the symbolic Act of 1905 was postponed. It finally crystallized in fall 2020.

During his speech in Les Mureaux on 2 October 2020,⁵ highlighting the problem of Islamist radicalization, President Macron called for a fight against separatisms, in particular Islamist separatism, and for a strict application of secularism. He announced a series of measures to restore secularism in different areas so as to re-establish the stability of the Republic in places where political Islamism was gaining ground. On 16 October 2020, France was under the shock of the assassination of professor Samuel Paty in Conflans Saint Honorine, a horrifying act of Islamist terrorism. The issues of communitarianism, terrorism and the threat to the Republic came together, encouraging the President to call for a strong political and legal initiative. The bill to strengthen the respect of republican principles, intended to address the whole “separatist” issue, was symbolically presented to the Council of Ministers on 9 December 2020, the anniversary of the 1905 Act of separation of religions and the State, the founding act of French *laïcité*. Examined in accelerated procedure before the Parliament to arrive at final adoption on 23 July 2021, with few reservations in the decision of the Constitutional Council on 13 August 2021,⁶ the Act strengthening the respect of the principles of the Republic was promulgated on 24 August 2021 and came into force the next day.

Regarding freedom of religion, the Act includes the measures announced in 2018 for the reform of the legal framework of religious organisations, in its Title III, ironically named “To guarantee the free exercise of worship.” It actually reinforces state control over the exercise of worship, to which all exclusively or partially religious organisations will have to adapt from now on.

Control over the decisions of local authorities that would seriously undermine secularism or neutrality in a public service (e.g. school cafeterias, sports facilities, public subsidies) is strengthened. The prefect (the representative of the state at the county level) will be able to refer a violator and request the suspension of the decision to the administrative judge, who will have 48 hours to decide.

A new offence of separatism (Art. 433-3-1, Criminal code) protects elected officials and public servants against the use of threats or violence to obtain an exemption or a different application of the rules of public service.

Associations or foundations that ask for a public subsidy will have to commit themselves to respecting the secular character and the principles of the Republic

⁵ The presidential speech is available at <https://bit.ly/3xBh3jf>.

⁶ The decision of the Constitutional court (Décision n° 2021-823 DC du 13 août 2021) is available at <https://bit.ly/3uTrIEI>.

(equality between men and women, human dignity, fraternity) in a “contract of republican commitment” (article 10 of Act 2000-321 of 12 April 2000 regarding the rights of citizens in their relations with government administrations, and Decree 2021-1947 of 31 December 2021). If they violate this obligation, the subsidy must be reimbursed. The respect for the contract becomes a condition for obtaining an approval or the recognition of public benefit.

Additionally, the Act restricts parents’ ability to teach their children through home schooling (article L. 131-2 of the code of education).

Before we examine in further detail the changes made to the 1905 Act regarding religious organisations, it is worthwhile to explore the additional reasons for the changes in the spirit of the separation between state and religion. The process clearly reveals a shift of concerns from separation between state and religions to the fear of separation between state and citizens by means of religion.

3. From separation between state and religions to the fear of separation between state and citizens by religion

In 2020, “separatism” arose as a new rhetorical term in public discourse to designate new enemies of the Republic. In France, the term “separatism” stands out as the opposite of a fundamental concept: universalism. French law remains attached to the republican universalism affirmed in its Constitution, which lays down the principle of equality before the law for all citizens, regardless of their origins or affiliations. Secularism and the indivisibility of the Republic imply that community affiliations are not to be taken into account. Hence, French law does not recognize the qualification of “minorities.” According to Daniele Lochack, “the notion of minority as a group is ignored in French law for political and ideological reasons” (Lochack 1989). The attitude of the French revolutionaries towards minorities is summarized in this famous sentence of the Count of Clermont-Tonnerre about the Jews:

We must refuse everything to the Jews as a nation and accord everything to Jews as individuals. . . . We must refuse legal protection to the maintenance of the so-called laws of their Judaic organization; they should not be allowed to form in the state either a political body or an order. They must be citizens individually. (Clermont-Tonnerre 1789[1996]:88)

As a consequence, France has not signed the additional protocol of the European Convention of Human Rights on the rights of minorities (collective and individual rights) or the Framework Convention of the Council of Europe for the Protection of National Minorities (8/02/1991), despite the recommendations of the UN Economic and Social Council in 2008. The political theory of the French nation is based

on republican universalism, i.e. a nation understood as one and indivisible, with universal values which apply to all its members, regardless of their origin, race, gender or social class. The law should be applied equally by and to all citizens.

From this perspective, “separatism” and “separatists” undermine the Republic as they challenge universalism and the individualistic conception of law and human rights when they seek to apply different sets of rules to their communities. This reasoning may apply to religious communities. Consequently, when religion is designated as a cause of separatism, there are direct effects on *laïcité* and on freedom of religion.

The 1905 Act (article 4) did recognize the autonomy of religious organisations (the right to draft their own internal constitutions, and by-laws), which amounts to a certain degree of independence for religious groups. However, this right does not equate to the concept of a minority group entitled to specific rights for the preservation of its distinct nature. Religious organisations may choose some of their rules according to their religious doctrines. However this freedom is limited, since the 2021 Act imposes a stricter legal framework for religious organisations. For instance, the newly amended article 19 of the 1905 Act imposes democratic rules among religious organisations since specific decisions (on admission of new members, transactions on real property, choice of religious ministers, and modification of statutes) can be taken only by a deliberative body (i.e. the general assembly of members) of the religious organisation.

More precisely and building on the idea that minorities are a concern under the 2021 Act, van der Tol alleges that the 2021 Act:

[P]re-emptively casts suspicion on religious minorities as potential threats to public order, Frenchness and the principles of the Republic, and it attaches to this suspicion an assertion of control backed by the force of administrative and criminal law. In this assertion of control, the 2021 law is reminiscent of the rationale of the oversight imposed by Napoleon Bonaparte on Catholic, Protestant and Jewish communities – a structure which remained in place for all of the nineteenth century and from which religious minorities were emancipated by means of the 1905 Separation Act. From this perspective, the development of *laïcité* in the 2021 law embodies an historical regression in the protection of religious minorities. (van der Tol 2020:68)

Consequently, it appears that the French state is in serious tension with religious minorities due to two emphases: the impossibility of recognizing minority groups as such in the face of universalism and the need for greater control over minorities as they inspire suspicion and pose a possible threat to the nation.

French *laïcité* is often referred to as a model of balancing freedom of religion for all, the neutrality requirement of the state regarding religions and religious affairs, and equality or pluralism. However French republicanism reveals itself as in ten-

sion with religious freedom when religion becomes a “force between the state and the individual,” leading to restrictions of religious freedom.

Describing French secularism, Heiner Bielefeldt and Michael Weiner point out:

[T]he French Republic traditionally understands itself as the guarantor of the rights of each individual citizen. This is the reason why the custodians of French republicanism wish to ensure that no political forces stand between the state and the individual, with possibly restrictive implications for the manifestations of religious life in public institutions. Well-known examples include the strict headscarf ban in public schools and more recently the general prohibition of the face veil in public life. (Bielefeldt and Weiner 2020:117)

From 1905 to 2021, the French state has progressively shifted from fear of the interference of religions in the state affairs in 1905, resulting in the separation of state and religions (with the state standing in favour of neutrality), to the fear of the separation of state and citizens, with religions as a possible separating factor or actor and the neutrality requirement resting on all citizens in a secularized country.

This fear of the potential separating impact of religions finds its roots, among other causes, in another concept known as communitarianism. In France, the word appeared in the 1990s to describe any form of practice, whether of an ethnic or a religious nature, that would value the differences between a group and the rest of society, with the effect of isolating a community, according to Jérémy Guedj. *Communautarisme* is a complex concept that has been studied and discussed at length, some arguing that it is used in political rhetoric to promote the interest of the majority (Taguieff 2005) and others explaining that it has now been replaced by “separatism.” (Carballet et al. 2020). As Jean-Marie Woerhling and Pierre-Henri Prelot explain in a comment on the decision by the Constitutional Council of 19 November 2004 on the Constitutional Treaty for Europe:

[T]he decision of the constitutional council also clearly shows that secularism constitutes a limiting principle of freedom of religion. It concerns individuals in their relations with public authorities in order to exclude that the convictions of the former can have an impact on the latter and in order to guarantee that the common rules prevail over personal beliefs. This decision clearly highlights the shift in concerns from the institutional state-church relationship to the fear of communitarianism, that is, the temptation of religious groups to escape the common law. In a certain sense, it is no longer a question of promoting separation but of avoiding it. (Woerhling and Prelot 2010:436)

Hence, in the 2000s, the fear of communitarianism shed a new light on religions as a possible threat to national cohesion and to one of the pillars of republicanism, the

principle of equality before the law. Rightly or wrongly, religions and religious organizations have been seen as a potential force standing between the state and the citizens. This was part of the rationale behind the headscarf ban in public schools (article L.141-5-1 Code of Education, Law of 15 March 2004), prohibition of the face veil in public life (Law of 11 October 2010), the multiple Charters of *laïcité* (in schools, hospitals and public services)⁷, and the new neutrality requirements established in the workplace by internal regulations (articles L. 1321-1 and following of the French Labour Code). In 2014, Emile Poulat, after describing four types of *laïcité* (political and structural *laïcité*, replacing Catholicity, and being inclusive as “giving a place under the sun to everyone”; legal *laïcité*, grounded in freedom of conscience for all; historical *laïcité*, the fruit of religious wars and the current peace; and philosophical *laïcité*, grounded in the emancipation of the spirit by reason), noted in philosophical *laïcité* a conception that “may lead to designating religion as an enemy – the Catholic Church before, Islam nowadays” and “to exciting minds by legislating in a manner contrary to the public expression of faith” (Poulat 2014:74, 75). Then, in the 2010s, security issues became an additional cause of suspicion of religion.

While discussing the most recent developments regarding *laïcité*, Philippe Portier and Jean Paul-Willaime (2021:235) mention “a dual inclination, recognition and security” (“*reconitifet securitaire*”). Throughout French history, the relation between the state and religions has been in constant evolution. Different phases may be delineated to highlight the regulation of religious organisations and life by the French state over the three last centuries. First came a regime of dissociation without separation, beginning with the Napoleonic Concordat of 1801 until 1880-1910; a separatist regime based on the 1905 Law with the end of public funding of religions and religious ministers; and a regime of recognition starting in the 1960s, acknowledging the need for religions in civil society and accepting a certain cooperation with the state to ensure integration. Then, in the wake of Islamic terrorist attacks, in particular since the Charlie Hebdo attacks in 2013 and the Bataclan attacks in 2015, the security dimension grew in importance alongside the concern that religion could divide the Republic. The political and religious dimensions of terrorism have created a new level of suspicion on religion, in particular towards Islam, in France. Religion has started to be conceived as possibly incompatible with security, public order, national cohesion, equality and the principles of the Republic, therefore deserving not only separation from the state but even surveillance by the state. In other words, religion was designated as a new enemy of the Republic.

Although such surveillance could have been limited to a narrow target by identifying specific groups threatening national unity and security and to the strict dimension of protection of public order, it was instead extended to all religions, equality

⁷ Available at: <https://www.gouvernement.fr/chartes-de-la-laicite>.

before the law being a leading principle. Therefore, the 1905 Act has been substantially amended with a serious impact on all religious communities, most of which have nothing to do with separatism or security issues. The *laïcité* of separation has been converted into a *laïcité* of surveillance, introducing a new era for the relation between the state and religions in France.

4. From separation between the state and religions to surveillance by the state over religions: the case of religious organisations

The surveillance of all religious activity by the state according to the 2021 law is a profound modification of the initial spirit of the 1905 Act.

The restrictions on religious activities require in practice a real transition for the French religious world. Indeed, the new administrative and accounting obligations may be considerable for small or medium-sized religious organisations. Compliance requires quasi-professional capacity of boards of religious organisations. So minority groups might suffer more from the reform than long-established religious groups with greater administrative capacity and legal support.

The new law applies immediately to all associations, except for the provisions subject to implementing decree and transitional measures (for organisations constituted before 25 August 2021). Organisations established prior to the enactment of the Act to strengthen the respect of principles of the Republic will benefit from a period of time to comply with the law, which should run until the beginning of 2023 at the latest. The year 2022 will therefore be the year of transition and compliance.

The implementing decrees⁸ specify the conditions of application of certain articles (specifically, statutory obligations, declaration of religious status, declaration of funds and benefits from abroad, and obligation to certify accounts). A summary of the new obligations concerning the exercise of worship in France already reveals a comprehensive evolution of the legal framework. The associations that engage in worship must now do the following:

- (1) opt for an exclusive exercise of worship by constituting themselves as a religious association and file a declaration for religious status at the prefecture (which was not required before). This declaration is mandatory and renewable every five years. The prefecture can oppose the application if the association does not respect public order or does not meet the legal criteria.

⁸ Décret n° 2021-1844 du 27 décembre 2021 relatif aux associations culturelles régies par la loi du 9 décembre 1905. Décret n° 2021-1789 du 23 décembre 2021 pris pour l'application de la loi du 2 janvier 1907 concernant l'exercice public des cultes.

The association's statutes must provide for a deliberative body to be competent to manage the admission of members, changes to the statutes, the transfer of real estate and, where applicable, the recruitment of ministers of religion.

The accounting obligations are reinforced (annual accounts, separate book-keeping of benefits and resources coming from abroad, inventory of movable and immovable property, accounting certification in the case of resources coming from abroad according to a threshold defined by decree, contribution treaty annexed to the accounts, accounting documents and provisional budget to be transmitted to the prefecture at its request).

The list of places of worship must be provided to the prefecture. The prefecture must be informed of any project to build a place of worship, as local authorities have an obligation to provide information (construction, administrative long lease, loan guarantee).

Benefits and funds coming from abroad in excess of 50,000 euros per year are subject to declaration to the prefecture and entail an obligation of accounting certification (with a possible cost of 3,000 to 4,000 euros per year for a six-year mandate of the auditor).

(2) Alternatively, if they wish to remain mixed (with both non-religious activities and public worship), organisations can be constituted as associations under the law of 1 July 1901 and clearly state the religious purpose in their statutes (under the control of the prefecture). The notion of mixed association will be specified by decree. Mixed associations cannot be those that exercise public worship in an exceptional way or in a manner that is strictly accessory. Mixed associations will be subject to a number of obligations of the 1905 law and to additional obligations: annual accounts, management of the exercise of worship in a separate functional unit, having a bank account, submission to the rules of public appeal to generosity, and obligation to certify accounts when there are funds or resources coming from abroad or issuance of tax receipts or public subsidies.

The tax authorities will have to receive an annual declaration of the total amount of donations and the number of tax receipts issued by the associations (article 222 bis of the Tax Code).

On a more positive note, the law provides for a certain harmonization of the regime for the exercise of worship in French territories, including Alsace-Moselle, a reduction in the minimum number of members to form an association exercising worship to seven adults, and the possibility of public subsidies for the accessibility of places of worship. Another positive measure is the new possibility of income from buildings acquired free of charge by religious organisations, limited to 50 percent of the organisation's total income.

- The exercise of worship, whatever its form (even on an individual basis from the point of view of freedom of assembly – house churches, for example), is subject to the provisions of the 1905 Act relating to the *police des cultes* (policing of worship), with increased penal sanctions for ministers of worship or association leaders: prohibition of political meetings and electoral operations, prohibition of incitement to subversion or violation of the law, and temporary measures to close a place of worship or its dependent premises by the prefect, if speeches inciting hatred or violence are observed. Eric Dupont Moretti, French Minister of Justice, in a circular of 22 October 2021⁹ insisted on the “special influence that religious ministers may have on attendees in places of worship,” which justifies that any speech or act that would question the institutions of the republic in the name of religious principles may be criminally sanctioned. Therefore, higher surveillance of religious speech and acts in places of worship may be expected. State control takes place through the new power that is given to the representative of the state at the departmental level (prefects, or police prefects in Paris) or in the overseas territories, since the representative of the state is responsible for these functions: examining the declaration of religious status of religious associations
- checking the statutes of associations practicing worship
- controlling the declaration of funds or resources coming from abroad by religious and mixed associations; the prefect can oppose them in case of real and sufficiently serious threats affecting a fundamental interest of the society
- the option to oppose a donation from abroad
- the ability to temporarily close a place of worship in case of violent or hateful speech
- receiving information from the local authorities regarding a construction project at a place of worship, an administrative lease (*bail emphytéotique administratif*) or a loan guarantee granted for the construction of a place of worship; the prefect must receive a list of places of worship from the associations practicing the religion

This new role of surveillance by the prefect over religious organisations explains why the new FORIF (Forum de l’Islam de France),¹⁰ initiated in 2022 to enable a new dialogue between the French state and the representatives of Muslim communities in France, will be instituted at both the national and the departmental level. Finally, for associations receiving public subsidies, a contract of republican

⁹ Présentation des dispositions de droit pénal et de procédure pénale de la loi n°2121-1109 du 24 août 2021 confortant le respect des principes de la République, Circulaire du 22 octobre 2021, CRIM 2021 12/H3 - 19.19.2021.

¹⁰ “Forum de l’islam de France: une nouvelle étape dans le dialogue entre les pouvoirs publics et le culte musulman”. 5 February 2022. Available at: <https://bit.ly/3MdjlsZ>.

commitment, the content of which is defined by the Decree of 31 December 2021,¹¹ will have to be signed to guarantee the association's respect for the principles of the republic (i.e. liberty, equality, fraternity and dignity of the human person) as well as the symbols of the Republic, promising "not to call into question the secular character of the Republic" and "to refrain from any action that undermines public order." According to the parliamentary debates, denominational associations (without religious activities but claiming a religious affiliation) should be entitled to sign this contract, while respecting freedom of association.

5. Conclusion: Preserving religious freedom in France in this new era of laïcité of surveillance

A new era of laïcité began on 24 August 2021. To what extent will freedom of religion in France be preserved?

One may share the serious concerns that Mariëtta van der Tol expressed recently:

[I]n the context of this law, laïcité ceases to be just an organisational principle of the state. Laïcité has become a tool of state control, used generally, pre-emptively and (most importantly) irrespective of the absence or presence of any real, concrete and tangible threat to public order within a specific context of space and time. The 2021 changes thus create a dangerous precedent for legal control over religious minorities, taking liberties beyond the confines of constitutional logic and thus eroding the protection of the freedom of religion in France. (van der Tol 2020:78)

Well aware of these concerns, French defenders of freedom of religion have been active and will remain so in the future.

During the parliamentary debate on the bill to strengthen the respect for the principles of the Republic, the French Conference of Bishops,¹² the Protestant Federation (Fédération Protestante de France 2021) and the National Council for French Evangelicals (Conseil National des Évangélique de France 2021), along with other religious and non-religious representatives, voiced their concerns about the bill and its detrimental effects on freedom of religion or freedom of association. (Conference of INGOs 2021; Kossonogow and Benaceur 2021) In particular, the concerns were focused on ensuring the survival of small and medium-sized religious associations through the proportionality of the measures, the need for clarification of the notion of worship. Also, with regard to mixed associations, there were

¹¹ Décret n° 2021-1947 du 31 décembre 2021 pris pour l'application de l'article 10-1 de la loi n°2000-321 du 12 avril 2000 et approuvant le contrat d'engagement républicain des associations et fondations bénéficiant de subventions publiques ou d'un agrément de l'Etat.

¹² Décision n° 2021 - 823 DC: liste des contributions extérieures. Available at: <https://bit.ly/3ErnlhF>.

questions about the scope of the measures. Additionally, proposals were made to target more precisely the worrying situations linked to funds coming from abroad. Few of the many remarks offered by these representatives were taken into account in the final Act. Some advocates noted that “the law against separatism could paradoxically weaken the Republican principles it claims to strengthen” (Khemilat 2021) since it will undermine freedom of worship for communities which already feel threatened or under stigma, in particular French Muslims.

Although it was raised in the parliamentary debate, the issue of public manifestation of religion did not find its way into the 2021 Act. In that regard, there has been no legal change regarding the public display of religious signs or religious events in the public square. However, secularisation and the new pressure on religious organisations could have a deterrent effect on the exercise of the right to manifest one’s religious convictions in public.

“French secularism has in more recent times often (wrongly in my view, as I have argued) reacted to fears of Islamic radicalisation by the relegation of religion to the private sphere and an assertion of national common values in the public sphere, itself broadly construed” stated Myriam Hunter-Henin (2020:57). In 2021, a new questionable reaction is the enhanced state control over religious organisations, based on the suspicion that religion fosters separatism. In the long term, this restrictive view of freedom of religion could put the French *vivre ensemble* in jeopardy, as French *laïcité* departs from an inclusive ideal type of secularism, defined by Dieter Grimm as one” (Grimm 2014:6).

Therefore, in the years to come, the impact of the new legislation on religious freedom will need to be closely monitored as the decrees are applied and the new legal arrangement is applied, in particular by the prefectures. The weight of state control over religious denominations will require regular assessment. Since, in Decision number 2021-823 DC of 13 August 2021,¹³ the Constitutional Council refrained from reviewing the constitutionality of the articles of Title III of the 2021 Act, dedicated to religious organisations, it has left the field open for questions of constitutionality during administrative litigation, for instance in the case of a prefectural decision that would be contrary to freedom of worship. After the exhaustion of internal legal remedies in France, a request to the European Court of Human Rights, based on article 9 of the European Convention of Human Rights, would be another way to challenge the new legislation if it resulted in the stifling of religious organisations. Undoubtedly, the French government will eventually need to demonstrate and defend the impact of this comprehensive legislative reform on freedom

¹³ Available at: <https://www.conseil-constitutionnel.fr/decision/2021/2021823DC.html>.

of religion, equality before the law and freedom of association, whether before the UN Human Rights Committee or at the Universal Periodic Review.

This new phase for French *laïcité* does not send a positive signal for freedom of religion, as other states might find inspiration in the French arsenal of new ways to control religious activity and organisations. However, French *laïcité* is a living instrument and there is hope for reasonable implementation of the new framework by the French government or for further changes in the future. In any case, freedom of religion and belief requires attention even in the oldest Western countries such as France, as this freedom is one of the foundations of a democratic society¹⁴ and of a harmonious *vivre ensemble*.

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¹⁴ Kokkinakis c Greece Series A n 260, 17 EHRR 397; Application no 14307/88, judgement of 25 May 1993.

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