Abstract:

The principle of laïcité is an integral element of the French Republic. This essay examines what the principle means for the State. Firstly, it considers the principle of laïcité as imposing a neutral position on the State with regard to religious practices. This is in line with Rousseau and Rawls’s ideas on the social contract and equality which necessitate a separation between the church and state to ensure equality and freedom of conscience. This separation is embodied in French laws and in the jurisprudence of the Conseil d’État. However, it is also acknowledged that laïcité can be used as an instrument of integration. Rousseau and Rawls both discuss, in the absence of religion, the need for a cohesive and unifying force in society. This civil religion, or public political culture, where within the public sphere the citizens are abstracted from their religious values, is fundamental to the idea of vivre ensemble. Thus, the principle of laïcité is an instrument of integration as the citizens are assimilated to the Republican values of liberté, égalité, fraternité. This can clearly be seen in the debates surrounding the neutrality of schools during the headscarf controversies. However, in recent times it has become apparent that the principle of laïcité has been used to entrench Republican values in the face of growing diversity. The public/private divide that was an essential component for Rawls has become blurred as the State has begun to regulate behaviour in the private sphere, a problem that is exacerbated by the lack of a clear definition of laïcité.

Keywords:

Laïcité, French Republicanism, Veil, Rawls, Integration

Is laïcité a principle that requires the state to assume a neutral position with regard to religious practices or is it an instrument of integration imbued with a value?

Introduction:

Although France is not alone in having pursued a secularised state it would be an oversimplification to state that the term laïcité could be reduced to ‘secularism’.

The principle of laïcité is inextricably linked to French history and specifically to the idea of the French Republic and thus cannot be considered in abstracto.¹ Hence, this

¹ The very first sentence of the Stasi report states that “La République française s’est construite autour de la laïcité.” Commission de Réflexion sur l’application du Principe de Laïcité dans la République: Rapport Au Président de la République 11 December 2003 at
essay will consider the principle of *laïcité* in light of republican thought using the ideas of Rousseau and Rawls, and it will critically examine what the principle means for the State. Firstly, this essay will discuss the State’s requirement to adopt a neutral position with regard to religious practices, secondly, it will consider whether *laïcité* may be used as an instrument of integration in order to create a shared national identity, and finally, the essay will examine whether the use of the principle of *laïcité* as an instrument of integration in recent years has exceeded its original scope and has encroached upon the private sphere.

I. Equality and freedom of conscience under the French Republic:

Since we have stated that the idea of *laïcité* is integral to French Republicanism, it is necessary to examine the philosophical thought underpinning the principle in order to understand its exigencies. The model of the French Republic, established by the revolutionaries, drew inspiration from Rousseau’s writings on the theory of the social contract, whereby legislative authority is derived from the *volonté générale* of the people. An important aspect of the social contract, as Daly notes, is that all citizens are equal. The sovereign is not permitted to make distinctions based


Both Daly, *infra* note 4, and Kahn, *infra*, notes 12, discuss Rawls’s theory of justice and his theory of political liberalism in relation to French Republicanism and the principle of *laïcité*.


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on any grounds. Thus, article 1 of the *Déclaration des droits de l’homme et du citoyen, 1789*, declared that all men are born and remained equal before the law.

However, the mere fact of equality does not in itself create a just society. It is helpful here to examine Rawls’s theory of justice as fairness which provides a framework for the legitimate use of political power. Rawls also begins with the idea of the social contract; however, the guiding idea for him is the principles of justice, which are principles “free and rational persons concerned to further their own interests” would accept in the original position of equality.\(^7\) In the original position the people are behind a “veil of ignorance” so that the principles of justice are chosen without any knowledge as to social standing, class, abilities, etc.\(^8\) According to Rawls, these principles of justice guarantee protection for equal liberties and therefore, the people in the original position will advocate for the equal liberty of conscience, to “secure integrity of their religious and moral freedom” as they do not know what moral, religious, or philosophical convictions they will have.\(^9\) This then leads to the choice of a regime “guaranteeing moral liberty and freedom of thought and belief, and of religious practice.”\(^10\) To ensure freedom, equality, and freedom of conscience the State must remain neutral with regard to religious practices; it cannot favour one religion over another. The State is an “association consisting of equal citizens” and

\(^5\) Rousseau, *supra*, note 3 p. 68.
\(^6\) Article 1, *Déclaration des droits de l’homme et du citoyen*, “Les hommes naissent et demeurent libres et égaux en droits. Les distinctions sociales ne peuvent être fondées que sur l’utilité commune.”
\(^8\) *Ibid.* p. 11.
“does not concern itself with philosophical and religious doctrines”, which are relegated to the private sphere.¹¹

Thus, freedom of conscience, associated with the principle of equality of all citizens, necessitates the separation of church and State. As Kahn states, Rawls’s ideas perfectly translate to the concept of laïcité in the French Republic.¹² In correlation with, and integral to the principle of equality in article 1, article 10 of the Déclaration des droits de l’homme et du citoyen proclaimed the right to freedom of conscience. The imposition of a neutral position on the State can be seen in the laws promulgated by the various governments after the French Revolution, but most notably during the Third Republic. Jean Rivero states that in all official documents laïcité has but one meaning: that of the neutrality of the State.¹³ The first laws sought to impose laïcité on the State institutions, including, inter alia, the military and the schools,¹⁴ finally leading to the loi sur la Séparation des églises et de l’État (9 décembre 1905).¹⁵ The principle of laïcité was eventually constitutionalised in the 1958 Constitution of the Fifth Republic.¹⁶ Article 1 states: “La France est une République indivisible, laïque, démocratique et sociale.” And it continues: “Elle assure l’égalité devant la loi de tous les citoyens sans distinction de l’origine, de race ou de religion. Elle respecte toutes les croyances.” The inclusions of the ideas of equality and the respect for all beliefs in the first article of the Constitution indicate

¹¹ Ibid. p. 186. This was also noted by Daly, supra, note 4, in relation to French Republicanism, p. 367.
¹³ J. Rivero, La notion juridique de laïcité (Dalloz: 1949) p. 30
¹⁴ Loi abrogeant celle du 20 mars 1874 sur les aumôneries militaires (8 juillet 1880); Loi Ferry rendant l’enseignement public laïc et obligatoire (28 mars 1882); Loi Goblet de laïcisation du personnel des écoles publiques (30 octobre 1886)
¹⁵ Article 1 reaffirmed the right to freedom of conscience while article 2 stated that the Republic neither recognised nor subsidised any religion.
¹⁶ Although the principle was first mentioned in the preamble of the 1946 Constitution of the Fourth Republic with regard to the secular nature of the school.
the importance the State attaches to these principles. Thus *laïcité*, and the neutrality of the State, are seen as a means to an end, as Kahn explains, the means by which there is equal liberty for all.\(^ {17}\)

The separation of the public and private sphere in relation to religious practices and the State’s strict neutrality in the public sphere has been reaffirmed by the Conseil d’État. In 1989, the Conseil was asked to consider the wearing of religious signs and its compatibility with the principle of *laïcité* as it was applied in schools. In its *avis* the Conseil considered the enunciations of *laïcité* in the law and in the Constitutions and stated that the principle necessarily implied the respect of all beliefs and thus the freedom of conscience, which must be considered one of the fundamental principles of the Republic.\(^ {18}\) In schools, the principle imposed a neutral, secular outlook on the teaching and on the teachers, while protecting the freedom of conscience of the students. As such, the Conseil held that this gave the students the freedom to express their beliefs with respect to others,\(^ {19}\) and it concluded that the wearing of religious signs in schools by students was not incompatible with the principle of *laïcité*, as long as they were not ostentatious nor did they set out to make a religious statement seeking to pressurise, provoke or proselytise other students.\(^ {20}\)

The Conseil d’État once again examined the principle of *laïcité* in its report on the possible prohibition on the wearing of the *voile intégral*.\(^ {21}\) It stated that *laïcité* could be broken down into three principles: “ceux de neutralité de l’État, de liberté

\(^ {17}\) Kahn, *supra*, note 12, p. 36.

\(^ {18}\) *Avis du Conseil d’État* 27 November 1989 No 346893.

\(^ {19}\) *Ibid.* “La liberté ainsi reconnue aux élèves comporte pour eux le droit d’exprimer et de manifester leurs croyances religieuses à l’intérieur des établissements scolaires, dans le respect du pluralisme et de la liberté d’autrui, et sans qu’il soit porté atteinte aux activités d’enseignement, au contenu des programmes et à l’obligation d’assiduité.”


As such, the Conseil reiterated that laïcité was inseparable from the freedom of conscience and the freedom to manifest one’s belief and therefore, it imposed “la stricte neutralité” of the State, emphatically stating that laïcité could not be the basis of a general restriction on the free expression of religious beliefs in the public sphere.\(^23\)

As we can see from the opinions of the Conseil d’État, the focus is foremost on the freedom of conscience, which is guaranteed by the principle of laïcité, as opposed to neutrality of the State. Laïcité is thus founded on the principle of equality and the freedom of conscience within the public sphere, as noted by the Stasi report.\(^24\)

II. The creation of a cohesive force in society:

“... la laïcité peut être le levain de l’intégration de tous dans la société.”\(^25\)

In the previous section the principle of laïcité was considered as merely imposing a neutral position on the State with regard to religious practices. This section will examine whether the principle could be used as an instrument of integration imbued with certain political values.

Firstly, we need to return to the theories of Rousseau and Rawls who each discuss the need for a cohesive social force in the absence of religion. Rousseau writes that the social contract is dependent on a unifying ‘religion’. Rejecting cohesion through the Catholic religion, however, he posits a form of civil religion in

\(^{22}\) Ibid. p. 18.
\(^{23}\) Ibid. p. 18.
\(^{24}\) Stasi report, supra, note 1, p. 13.
\(^{25}\) Ibid. p. 18.
order to instil in each citizen a love of national duty. He describes the ‘religion’ not as
dogma but as “sentiments de sociabilité”. Thus, this civil religion is not concerned
with opinions of morality but with achieving social cohesion between equal citizens.26

Rawls’s fundamental question in his theory of political liberalism is: “how is it
possible for there to exist over time a just and stable society of free and equal citizens,
who remain profoundly divided by reasonably religious, philosophical, and moral
doctrines?”27 His liberal principle of legitimacy requires that political power may only
be used in ways that all citizens may reasonably be expected to endorse.28 Political
liberalism then “looks for a political conception of justice that we hope can gain the
support of an overlapping consensus of reasonable religious, philosophical, and moral
doctrines in a society regulated by it.”29 Rawls states that there is only one source of
fundamental ideas that can by used to unify citizens and this is the society’s public
political culture. This comprises “political institutions of a constitutional regime and
the public traditions of their interpretation (including those of the judiciary), as well
as historical texts and documents that are common knowledge.”30 Thus, religious
doctrines, Rawls states, belong to the culture of the social and not the political.31

Therefore, the idea of vivre ensemble and the maintenance of a stable society
necessitates the creation of a public political culture, or of a civil religion.32 Laïcité is

26 Rousseau, supra, note 3, p. 173-174. Rousseau even goes so far as to say that whoever does
not believe in the civil religion can be excluded from the State, but not because they do not
believe, rather because they are not willing to live together with other people.
[hereinafter Rawls, Political Liberalism]
28 Ibid. p. 137.
29 Ibid. p. 10.
31 Ibid. p. 13-14.
32 While Kahn, supra, note 12, argues, using Rawls’s theory of justice as considered above,
that l’État laïque (and therefore laïcité) cannot be associated with a certain philosophy,
especially emancipatory, it is argued that Rawls’s theory of political liberalism, which
the means through which this can be achieved. While the State must retain a neutral position, within the public sphere citizens can be abstracted from their religious, philosophical, and moral values and thus be assimilated to the Republican values of, amongst others, liberté, égalité, fraternité. The Stasi report stated that laïcité is a fundamental value of the “pacte républicain” which allows for the reconciliation of diversity and pluralism with this notion of vivre ensemble. In this way, adherence to the principle of laïcité involved a rejection of communitarianism. This is demonstrated by the speech of the Comte de Clermont-Tonnere in the Assemblé Nationale in 1789. He declared that one’s relationship to the state was as an individual before the law of the State and therefore, the State could not recognise the Jewish peoples as a nation: “il ne peut y avoir une nation dans une nation.” Laïcité was therefore never reduced to the neutrality of the State.

Laïcité can therefore be an instrument of integration imbued with the values of the Republic. This integration, or “[l]’apprentissage de la citoyenneté” was to be

incorporates his theory of justice, promotes this creation of a public political culture as a cohesive force in society in the absence of any other philosophy, as this is the most legitimate unifying link available for a diverse peoples.

33 There have been many political statements regarding the integral connection between laïcité and vivre ensemble. In a speech on laïcité on the 17 December 2003 at the Palais de l’Élysée, Jacques Chirac declared that the principle was a “pilier de notre Constitution. Il exprime notre volonté de vivre ensemble dans le respect, le dialogue et la tolérance.” <http://www.lemonde.fr/societe/article_interactif/2007/05/15/les-discours-de-jacques-chirac_910136_3224_8.html#> (date accessed: 28th March 2015). [hereinafter Chirac].

34 Stasi report, supra, note 1, p. 36.

35 Comte de Clermont-Tonnere, Assemblé Nationale 23 December 1789, as cited in C. Liauzu, La société française face au racisme: de la Révolution à nos jours (Éditions Complexe, 1999) p. 28. The Comte even refers to Rousseau’s proposal and declared that if the Jewish people do not accept the principles of the State then they should leave.

36 It is clear from the history of the implementation of laïcité that the State never truly ‘washed their hands’ of religion. As Patrick Cabanel writes, the implementation of laïcité during the Third Republic involved numerous compromises with the Catholic Church. P. Cabanel, ‘Compromis historique et déceptions démocratiques: la laïcité républicaine’, in Marion Fontaine, Frédéric Monier and Christophe Prochasson, ed., Une contre-histoire de la IIIe République (Paris : Éditions La Découverte, 2013) 285.

37 Stasi report, supra, note 1, p. 18.
achieved through education.38 During the Revolution and the Third Republic, Weber notes that there was no “uniform conception of patriotism” and that these feelings had to be learned.39 Schools were thus a “great socialising agent” teaching national and patriotic sentiments.40 Jules Ferry issued a circular two years after the imposition of laïcité on public schools and he states that the religious instruction was the responsibility of the family, while the school was responsible for providing a moral and civil education.41 It was in school where citizens were to be created.42

The great importance placed on the school in creating a political national idea and the significance of laïcité in achieving this can be seen in the debates surrounding the numerous affaires des foulards and the calls for laïcité to be reinforced in schools. Jacques Chirac acknowledged this, stating in 2003 that “[l]’école est au premier chef le lieu d'acquisition et de transmission des valeurs que nous avons en partage. L'instrument par excellence d'enracinement de l'idée républicaine.”43 The Stasi report reiterated that the school was vitally important in teaching republican values.44 It concluded that the question was no longer one of freedom of conscience but of public order and deciding that there was too much religious pressure on young girls to wear

38 David Bell writes that at the time of the Revolution, the idea of creating a ‘nation’ required “the homogenisation of […] twenty-eight [million] human beings, the reduction of their tremendous diversity to a single national essence, and the overcoming of supposed mass ignorance.” David A. Bell, The Cult of the Nation in France: Inventing Nationalism, 1680-1800 (London: Harvard University 2001), p. 200.
40 ibid. p. 332.
42 Ibid. p. 241: “pour preparer à notre pays une generation de bons citoyens”
43 Chirac, supra, note 33.
44 Stasi report, supra, note 1, p. 51 and 56: “Sa mission est essentielle dans la République. Elle transmet les connaissances, forme à l'esprit critique, assure l'autonomie, l'ouverture à la diversité des cultures, et l'épanouissement de la personne, la formation des citoyens autant qu'un avenir professionnel. Elle prépare ainsi les citoyens de demain amenés à vivre ensemble au sein de la République.”
religious signs, they stated that “[l]’espace scolaire doit rester pour elles un lieu de liberté et d’émancipation⁴⁵.”⁴⁶ Despite the Conseil d’État ruling that the wearing of religious symbols in schools was not incompatible with the principle of laïcité,⁴⁷ a law was nevertheless passed in 2004 prohibiting the wearing of ostentatious religious symbols.⁴⁸

However, the affaires des foulards also raised other questions in relation to the principle of laïcité. As Baubérot notes, the debates relating to laïcité before 1989 concerned the issue of public subsidies for private schools. Since then, however, laïcité has generally been associated with issues relating to Islam. He argues that this new context led to the development of a republican ideology of laïcité where it “now became part of a consensual notion of a national identity.”⁴⁹ Siobhán Mullally states that the 2004 law “marked a further shift in the meaning of French laïcité, reflecting an ongoing preoccupation with national unity and cohesion in the face of immigration and the legacy of a colonial past.”⁵⁰ Thus, in response to an increasingly diverse society, laïcité has been used to entrench Republican values and rather than remain an instrument of integration into the public sphere has attempted to define a French way of life for the private sphere.

⁴⁵ The use of the term ‘émancipation’ is interesting here and it suggests less of concern of allowing the young girls to form their own beliefs, without familial pressures, and thus be able to express them, and more of the idea that school is the place to liberate those from oppressing religious beliefs. Pena-Ruiz cites Condorcet who, writing in L’Esquisse d’un tableau historique des progress de l’esprit humain, published in October 1793, who called for the need to emancipate the people from religious thought using the reasoned thinking of the Enlightenment. H. Pena-Ruiz, Histoire de la laïcité: Genèse d’un idéal (Paris: Gallimard, 2005), p. 51.
⁴⁶ Stasi report, supra, note 1, p. 58.
⁴⁷ Supra, note, 18.
III. The confused dichotomy between the public and the private sphere:

While it may have been possible to justify the prohibition of the wearing of religious symbols in school on the grounds of integration into the French Republican identity, the State’s actions since the 2004 law have been more questionable. The dichotomy between the private and the public sphere, an integral aspect of Rawls’s theories, has become blurred as the State has attempted to regulate behaviour in the private sphere, justified in order for everyone to be able to *vivre ensemble*. While the discourse appears to have changed somewhat, so that the State is now focussed on the idea of *vivre ensemble*, rather than specifically referring to the principle of *laïcité*,\(^{51}\) it is argued that *laïcité*, in both imposing a neutral position on the State with regard to religious practices, and allowing integration into the French Republican identity, is integral to the idea of *vivre ensemble*.\(^{52}\) The changing discourse merely demonstrates the main failing of the principle, the fact that *laïcité* has no agreed-upon definition. Baubérot states that *laïcité* “s’est trouvée utilise de façon très polysémique.”\(^{53}\) Kahn discusses the principle using Hegel’s idea of an “empty universal” which can encompass many diverse values.\(^{54}\) Bowen states that *laïcité* is a “politically useful”\(^{55}\)

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\(^{51}\) The Gerin Report stated that the wearing of the *voile intégral* in public spaces did not offend the principle of *laïcité*, as it was not intended to regulate the manifestation of religious opinion in the social sphere and the relationship between people. It relied instead upon the idea of *vivre ensemble*. *Assemblé Nationale*, ‘Rapport D’Information Sur La Pratique Du Port Du Voile Integral Sur Le Territoire National’ 26 January 2010 p. 93

\(^{52}\) While in *SAS v. France*, [GC], no. 43835/11, ECHR 2014 [hereinafter *SAS*], the European Court of Human Rights accepted that the prohibition on the concealment of the face in public was justified by this idea of *vivre ensemble* (para. 140-142), it should be noted, however, that the idea of *vivre ensemble* was criticised in the dissenting opinion of Judges Nussberger and Jäderblom. They stated that they could not share the opinion of the majority as it “sacrifices concrete individual rights guaranteed by the Convention to abstract principles” and that the “concept seems far-fetched and vague”. *SAS*, dissenting opinion of Judges Nussberger and Jäderblom, at para. 1-5.


\(^{54}\) Kahn, *supra*, note 12, p. 30.

concept because of this and it has been utilised by the far left\textsuperscript{56} as well as the far right, with Marine Le Pen of the Front National stating that France had to reaffirm its principles of \textit{laïcité}, assimilation and the rule of law when combating Islam.\textsuperscript{57} Thus, the principle has been manipulated to include certain values to suit those who are seeking to reinforce a controlled idea of French identity.

This can be seen in the 2008 decision of the Conseil d’État in Mme \textit{M}.\textsuperscript{58} Mullally describes how the Conseil upheld the decision to deny citizenship to Mme \textit{M} as they found that her ‘radical’ practice of Islam was incompatible with essential French values, specifically gender equality.\textsuperscript{59} She had failed to satisfy the test of assimilation required for the grant of citizenship, despite the fact that she spoke French, her children were French citizens and attended public school. It was noted that she had maintained very strong connections with her culture of origin and this included wearing a \textit{niqab}. The Commissaire de Gouvernement seemed to place great weight on the fact that Mme \textit{M} had worn her \textit{niqab} to her citizenship interview and was wearing it in a public building. Furthermore, she noted that Mme \textit{M} lived a very reclusive life away from French society and seemed to fully obey all the men in her life.\textsuperscript{60} Thus, her private life was used to demonstrate an absence of attachment to

\textsuperscript{57} Marine Le Pen speech, 5\textsuperscript{th} February 2015, <http://www.theguardian.com/world/2015/feb/05/marine-le-pen-front-national-oxford-union-university-speech-delayed-protesters>
\textsuperscript{58} Decision du Conseil d’État 27 June 2008 no. 308591.
\textsuperscript{59} Mullally, supra, note 50 at 40-41.
\textsuperscript{60} Conclusions de Mme Prada Bordenave, Commissaire du Gouvernement, 27 June 2008 N° 286798 pp. 3-4.
fundamental French values. As Vakulenko states this ruling “purports to inculcate the values of laïcité and sex equality well beyond the public sphere.”

As Kahn and Daly note, the inclusion of ‘gender equality’ as a fundamental French value is dubious. It was not until 1944 that women had the right to vote in France and it was only in the preamble of the Constitution of the Fourth Republic in 1946 where equality under the law for all men and women was recognised. In 2010, gender equality and the idea of vivre ensemble were once again used to justify the prohibition of the concealment of the face in public spaces. The European Court of Human Rights, however, rejected the French Government’s submission in SAS v. France that the law was a justified interference to ensure respect for equality between men and women. However, as noted by Daly, it has nevertheless been associated with laïcité and with integration. In a 2005 speech during the UMP Convention on Immigration, Nicolas Sarkozy stated that the French are proud of their Republican values, “de l’égalité entre les hommes et les femmes, de la laïcité, de l’idéal français d’intégration.”

62 Kahn, supra, note 12 at p. 30; Daly, supra note 4 at p. 374
63 Preamble, Constitution 1946, “La loi garantit à la femme, dans tous les domaines, des droits égaux à ceux de l’homme.”
64 Loi No 2010-1192, 11 October 2010.
65 SAS, supra, note 52. It held that while a State could invoke gender equality if they wanted to prohibit anyone from forcing women to conceal their face, as this would fall within the aim of the “protection of the rights and freedoms of others” as per articles 8(2) and 9(2) of the Convention, the State could not to use it in order to ban the wearing of the veil where it was being defended by women invoking their rights in the Convention, at para 118.
66 Daly, supra, note 4.
Conclusion:

As stated above, there is no clear definition of the principle of *laïcité*. While it does impose a neutral obligation on the State with regard to religious practices, it is also used to create a public political culture and to integrate all citizens into that culture. In recent years, however, the discourse surrounding *laïcité* has changed, so that *laïcité* is no longer merely an instrument of integration to create a just and stable society, but an instrument of integration that permeates all aspects of life: the public-private divide has become obscured. Unity has been prioritised over the respect for diversity, as demonstrated by Nicolas Sarkozy when he stated that “il faut être plus volontariste et exigeant en matière d’accueil et d’intégration. Le contrat d’accueil doit être obligatoire et le contenu des formations plus dense.” Indeed in 2007, the Haut Conseil à l’Intégration proposed a “Charte du vivre ensemble” described as a “règle de vie républicain.” The integrationary aspect of *laïcité* now overshadows the State’s obligation of neutrality.

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