LABOR LAW AND RELIGION

François Gaudu†

The relationship between French labor law and religion is an armed peace; therefore, the main issue that attracted the attention of jurists up to now has been the status of the clergy—especially the Catholic clergy—regarding social law. As a subordinate to the bishop, is the priest an employee? Is his religious status overruled by the law regulating contracts? It is understandable that these questions were the subject of a passionate concern although their economic effect is limited; this is because they reflect in fact a conflict between various orders.[1] For similar reasons, French law was reluctant for a certain period of time to admit the existence of employment contracts between husband and wife,[2] in order to avoid confusing the obligations resulting from the status of persons and that stem from the family order, with the relationship of subordination created by the employment contract.

The religious order and the order of labor and social security law (a matter of public policy *par excellence* in France) had accordingly to curb their reciprocal ambitions. Nevertheless, the religious inspiration of French labor law cannot be ignored;[3] however, this is barely recognized, at least since World War II. Undoubtedly, the reasons are complex; one can find them in the prevailing trade unionist tradition, anarcho-syndicalist in nature, which is not quite compatible with religion. It is also possible to explain

† Professor of Law, University of Paris I/Pantheon Sorbonne, France.

1. *See* P. Coulombel, *Le droit privé français devant le fait religieux depuis la séparation des Églises et de l'État*, REVUE TRIMESTRIELLE DE DROIT CIVIL 1 (1956); D. Laszlo-Fenouillet, *La conscience*, thesis, pref. G. Cornu, *Bibliothèque de droit privé*, 235 LIBRARIE GENERALE DE DROIT ET DE JURISPRUDENCE [LGDJ] (1993); G. Dole, *"La liberté d'opinion et de conscience en droit comparé du travail,"* thesis, pref. J.-C. Javillier, *Bibliothèque de droit social*, 25 LGDJ (1997); SECRET, RELIGION, NORMES ÉTATIQUES (J. Flauss-Diem ed., Presses Universitaires de Strasbourg 2005); E. Tawil *"Norme religieuse et droit français,"* thesis, pref. M. Ventura, (Presses Universitaires d'Aix-Marseille 2005); Elsa Forey, *"État et institutions religieuses,"* thesis, (Presses Universitaires de Strasbourg 2007).

2. ANDRÉ ROUAST & PAUL DURAND, PRÉCIS DE DROIT DU TRAVAIL 320 (1957); A. BRUN & H. GALLAND, DROIT DU TRAVAIL II-18 (1958); SAVATIER RIVERO, DROIT DU TRAVAIL 347 (4th ed. 1966).

3. V.P. Pic, *Traité élémentaire de législation industrielle*, 37 LGDJ 49 (1908); Alain Supiot, *À propos d'un centenaire: la dimension juridique de la doctrine sociale de l'Église*, DROIT SOCIAL 916 (1991).

the effacement of the Church's social doctrine by the dominant role played by the secular Republic (often anti-clerical) in the development of labor law. However, the policy of integrating the working class did not begin with Waldeck-Rousseau[4] and Millerand. It is even possible to refer it to the "liberal Empire," mainly with the repeal of Le Chapelier Law in 1864.[5]

There is an obvious similarity between the liberal Empire and the social policy of Gaullism. The parallel between Louis-Napoleon Bonaparte and de Gaulle would be the moment where Maurras met revolutionary trade unionists such as Georges Sorel.[6] In all likelihood, France has witnessed—in addition to the purely conservative trend—two opposed Catholic social policies rather than a single one: on the one hand, there is the social doctrine of the Church issued by the encyclical letter *Rerum novarum*[7] with its attachment to intermediary groups and to the "principle of subsidiarity"; on the other hand, in France, there is a "State Jansenism" using labor and social security law—similarly to Bismarck but in another context—in order to assemble social classes. After World War II, this second trend becomes quite powerful in the context of the implementation of the National Council of Resistance (*Conseil National de la Résistance*) program. The high-ranking Gaullist civil service and magistracy, even among Catholics, often differ from Christian democrats. Fully assuming the role of the State, they do not disagree with a secularization of social law and the abolition of religious influences in order to achieve national unity.

One of the founding actions of the government of National Unity after the end of World War II *Libération* was to issue the decree of February 22, 1945,[8] that gave the management of plant benefits (*oeuvres sociales*) to workers' councils instead of their previous management by the heads of enterprises. Thus, a huge portion of the employers' paternalistic policies in which the Christian employers had played a huge role was virtually expropriated. The values held by social Christians become blurred within a movement that will paradoxically reach the peak with the Auroux Acts (1981–1982) developed by legislators who were aware of the Church's social doctrine. Initially responsible for promoting "cooperation" between

4. Initiator—as minister of Interior in the government of Jules Ferry—of the Act of 1884 about the freedom of trade unions.

5. Le Chapelier Act (1791), which is the French equivalent of the British Combinations Acts, did forbade strikes as well as trade unions of employees and employers.

6. V.S. GIOCANTI, CHARLES MAURRAS, LE CHAOS ET L'ORDRE 234 (Flammarion ed., 2006). But Maurras remained close to the ideas of La Tour du Pin and kept his distance; regardless of the fact that the Maurras' Christian faith was questionable.

7. A solemn letter addressed by the Pope to bishops all over the world to be forwarded to all the believers.

8. *Ordonnance*.

employees and management,[9] the mission of workers' councils was therefore redefined.[10]

The impact of religion on labor law did not disappear, but regressed (Section I). However, ideologies that promised "a better world" also entered an acute crisis. The withdrawal of religious denomination from labor law has left an unexpected void: the opposition between two opposing conceptions of public interest has yielded ground to deconstruction (Section II).

I. REGRESSION OF RELIGIOUS IMPACT

Each one of the two orders, i.e., the religious order and the order of labor law, has adopted a neutral attitude toward one another. The priest is not an employee in a religious institution; and a secular enterprise does not inquire about the religion of its employees. Overall, religion is ignored by labor law (Section A); things are only different in a specific type of enterprise that has a religious character or provides civil services that call for reinforced requirements of commitment or neutrality (Section B).

A. Religion Ignored by Labor Law

Isn't "hierarchy" the holy power of priests? The submission of a clergyman to his superiors is a legal subordination; however, this does not hold the quality of an employment contract. Thus, the purely religious function avoids the application of labor law. As it ignores all religious activity, labor law submits quite naturally the enterprise to the principles of secularism (*"laïcité"*).

1. The Priest is Not an Employee[11]

The debate derives from the fact that the identification of an employment contract is a matter of public policy in French law, and therefore concerned parties are not legally entitled to avoiding it. Once this employment contract is recognized by facts (prevailing in the articles of the contract), the relations between the concerned parties are submitted to labor law, either with regards to remuneration, minimum salary, obligation to pay social security, etc., or to the conditions of employment—powers of management, discipline, nature of the services requested from a subordinate, etc. Therefore, there are two distinctive aspects: an economic

9. Rouast & Durand, *supra* note 2, at 120, 130.

10. Art. L.2323-1 C. TRAV.: "The role of the workers' council is to implement a collective expression of employees allowing their interests to be permanently taken into account."

11. *See* G. Dole, *La qualification juridique de l'activité religieuse*, DROIT SOCIAL 381 (1987).

aspect (i.e., how much the Church will have to pay in order to employ a clergyman?), and a "political" aspect: is the religious status—that does not exist in secular State law—going to be affected by the State's labor law?

This question was first raised with the law of April 5, 1910, about workers' retirement pensions. In many poorly motivated decisions,[12] the *Cour de cassation* asserted that neither the Catholic priest nor the Protestant minister is bound by an employment contract. Since the fees that they receive do not have the quality of wages, it is not compulsory to grant them social protection. The same solution was maintained and even applied to religious persons mandated to teach in an educational institution,[13] which led Professor Jean-Jacques Dupeyroux to refer to this practice in 1972 as "an enormous tax fraud at the expense of the Social Security treasury system." Things are different when the concerned persons have explicitly concluded a "direct agreement"[14] with the institution where they work.[15]

It has always been true that a priest can conclude an employment contract; however, the recognition of this contract used to obey two distinct systems of evidence: in one case, the employer belongs to the same faith as the priest, which would require the establishment of an explicit "direct link" between the employer and the priest;[16] in the other case, the institution is purely secular and the employment contract can be established according to the usual clues.[17] This is at least the precedent applicable to the Catholic Church[18] and to the reformed Church in France. When it comes to cults where the notion of hierarchical authority is less acute, which do not have a clergy or that can use laymen as officiants, courts tend more easily to admit the existence of an employment contract.[19]

The issue of social protection for clergymen reached a solution[20] with the Act of January 2, 1978, that established a special system of social

12. Cass. civ. Dec. 24, 1912; Cass. civ. Apr. 23, 1913; Cass. civ. Dec. 23, 1913, *Dalloz Périodique* 1918, I. p. 81, comment L. Sarrut.

13. Cass. ass. plén. Dec. 17, 1965 (2 decisions), Bull. civ. n.4 & 5; DALLOZ 97 (1966), comment. A. Rouast; Cass. ch. mixte. May 26, 1972, 533 comment. Dupeyroux, JCP 171 (1972), concl. Lindon.

14. Example: a nun signs a form called "employment contract" with a Catholic hospital.

15. Cass. ass. plén. Dec. 17, 1965, quoted above; Cass. ch. mixte, May 6, 1972; CPAM du Tarn c. dame Bardy, J.C.P. 17221 (1972), quoted above, 1st case; Cass. soc. Jan. 1, 1978, Bull. civ. V, No. 40.

16. Cass. soc. Jan. 21, 1981, Bull. civ. V, No. 49.

17. Management and effective monitoring of the work, determination of working hours or working place by the alleged employer, etc.

18. However, the Catholic Church could refer to the Act of Feb. 18, 1950, indicating that "the minister of the Catholic cult is not considered by Labor and Social Security legislation as a professional activity."

19. Cass. soc. Mar. 6, 1986, Bulletin des arrêts de la Cour de cassation, 5e part, n° 81 (imam responsible in addition to serve as groom and usher in a Mosque); Paris, May 7, 1986, LA SEMAINE JURIDIQUE 2071 (1987), comment. T. Revet (simple officiate, not entitled rabbi, recruited by a community).

20. However, some difficulties can remain when a clergyman officiated outside France. *See* Cass. soc. Jan. 11, 1989, Bulletin des arrêts de la Cour de cassation, 5e part, n° 14; DROIT SOCIAL 751 (1989), comment. G. Dole.

security for "ministers of religion and members of religious congregations and collectivities."[21] Therefore, the debate moved toward the "political" ground of the master/servant relationship. Therefore, the judges attempted to define an area of religious power that does not fall under labor law.[22]

The minister of cult does not always agree with his condition and might claim the status of employee. This was the case of two Protestant ministers who were judged in 1986: the first claimed to obtain the minimum legal salary and the other wanted to benefit from dismissal statutory law.[23] The *Cour de cassation* that judged to the detriment of the first and in favor of the second established a distinction between the two cases: the first practiced as a pastor while the second was senior lecturer in a private faculty of theology. The function of teaching can be ruled by labor law, because it is not part of the pastoral ministry, of the religious mandate; on the contrary, the practice of this ministry is not ruled by labor law because of its own specific nature. Therefore, it is no longer the relationship of ecclesiastical authority that justifies disregarding the employment contract. Only the spiritual and religious "reserved domain" can escape from the conclusion of an employment contract.[24] Outside this domain, labor and social security law apply.[25]

However, it is necessary to include in the "reserved domain" the religious communities targeted by the Act of 1978 that are outside the scope of labor law (unlike secular organizations even if they are linked to a cult). Thus, one of the nuns from the "Assumption" congregation who practiced as a nurse and social worker in a medical center organized by her congregation was unable to subscribe for some retirement employees' benefits because her activities served only this specific congregation.[26] Therefore, one must distinguish among the external activities of a clergyman between two types of activities that both could be commissioned by the ecclesiastic authority: the activities undertaken for the account of a

21. Now art. L. 382-15 s. Social Security Code. *See* G. Dole, *La protection sociale du clergé*, LGDJ 81 (1980).

22. For example, a nun in a Catholic hospital versus a nun in her convent. The fact that one of the first Court decisions in the 1980s is related to the establishment of lists in order to elect the workers' representatives (in a Catholic kindergarten) shows that it is a matter of power. Cass. soc. Jan. 30, 1985, Bull. civ. V, No. 66.

23. Cass. soc. Nov. 20, 1986, Bull. civ. V, No. 415, 420; DROIT SOCIAL 357 (1987), comment. J. Savatier; see also the first case, Douai May 30, 1984, II LA SEMAINE JURIDIQUE 2028 (1986), comment. T. Revet.

24. Cass. soc. June 20, 1991, Bull. civ. V, No. 318 (chaplain of an hospital); Cass. soc. July 12, 2005, DROIT SOCIAL 1035 (2005), comment. Savatier (pastor of a cultural organization).

25. Thus, when Catholic priests provide services in a Catholic university, they have to be affiliated to the general system of Social Security without the necessity to inquire about the existence of a "direct link" with this university. Cass. soc. Dec. 20, 1990, Bull. civ. V, No. 704.

26. Cass. plén. Jan. 8, 19 93, DROIT SOCIAL 391 (1993), report Y. Chartier; J.C.P. 1993, II 22010, concl. Jeol, comment. Saint-Jors.

congregation or a religious community (unwaged unless there is an explicit employment contract[27]), and the activities undertaken for a secular employer not linked—or even linked—to a cult (system of the usual rules to establish evidence of employment contract[28]).

However, the distinction remains fragile: how should the "spontaneous" religious communities that are not recognized by the mainstream established religions or were developed outside these religions be treated? The principle of secularism (*laïcité*) forbids the judges from making a distinction between religions, i.e., they cannot treat differently established religions from sects. The same principle applies to enterprises.

2. The Enterprise Has to Abide by Religious Neutrality

In French law, religious freedom is of constitutional value. The employer has to respect this freedom even if by virtue of the classical concept expressed by the Dean Counselor Philippe Waquet, it is suitable to "confine oneself to a positive secularism that respects religious beliefs but keeps them limited to the personal life of the employee."[29]

The law interferes here (article L. 1132-1 of the Labor Code) first to forbid discrimination based on "religious beliefs," if this discrimination occurs either at the time of hiring or firing an employee, or for any other measure adopted during the course of a contract. The jurisprudence is clear but scarce: usually, a legal ruling of the *Cour de cassation* issued on October 17, 1973,[30] is quoted. This decision condemns an employer who discharged a *prêtre-ouvrier*[31] who had not revealed his status of priest at the time of hiring. It is possible to assume that fear of leftism rather than the rejection of a clergyman motivated the firing (these priests used to be generally quite committed in the trade union movement).

In addition, the ruling indicates that the inquiries undertaken by the employer at the time of hiring was limited by the law: according to article L. 1121-6 of the Labor Code, the requested information should hold a "direct and necessary relationship with the proposed job or with the evaluation of the professional capabilities." Beliefs or the religious status

27. Provided this contract corresponds to a real subordination. Cass. soc. Apr. 23, 1997, J.C.P. 1997, II 22961; DROIT SOCIAL 642 (1997) comment. Savatier.

28. Orleans, Sept. 13, 2007, SERVICE DE DOCUMENTATION DE LA COUR DE CASSATION, No. 06/03234: the activity for the benefit of a private society of worshipers, distinct from the religious community, can be considered an employment contract. In the opposite direction, Limoges, Jan. 16, 2007, DROIT SOCIAL 742 (2007), comment. J. Mouly; Toulouse, Oct. 10, 2007, SERVICE DE DOCUMENTATION DE LA COUR DE CASSATION, No. 06/04470.

29. "*La vie personnelle du salarié*," "*Droit syndical et Droits de l'homme à l'aube du XXIe siècle," Mélanges Verdier*, DALLOZ 2000.

30. J.C.P. 1974, II, 17698, comment. Saint-Jours.

31. Priest who chooses to live as an industrial worker.

represent elements that the employee has the right not to reveal, and the questions related to these convictions—either under the form of a questionnaire or during a job interview—are illegal in principle. This is why the High Authority for the fight against all forms of Discrimination and in favor of Equality(HALDE)[32] considered as irregular an Internet Web site allowing job seekers to publish a "profile" on line including an important amount of irrelevant information notably related to religious affiliations. Moreover, according to the jurisprudence, an employee does not have the right to refer to his religious beliefs in order to escape from the obligations stipulated in his contract.[33] Besides civil sanctions, in case of illegal discrimination, employers incur criminal sanctions (articles 225-1 and following articles of the Penal Code).

The employer is also bound by the law to keep some self-control in the practice of his prerogatives. If the employer has managerial and disciplinary powers, restrictions on personal rights as well as individual and collective freedoms should be "justified by the nature of the task to be accomplished" and "proportionate to the targeted objective." This general disposition of article L. 1121-1 of the Labor Code is repeated in article L. 1321-3, 2° of the same Code related to the internal regulations of enterprises. Thus, the *Conseil d'État* has considered that one of the clauses of an internal regulation forbidding political and religious discussions among employees inside the enterprise was an excessive attack against personal rights, and is therefore illegal.[34] Reversely, there is no doubt that if an enterprise attempted to impose upon employees' spiritual or religious practices in order for example to reinforce the "home-spirit," this would be considered as an illegal attack against their individual freedom of belief. This would be at least the case with standard enterprises without religious purposes. The situation might be different in an *entreprise de tendance*.

B. Enterprises with Reinforced Requirements

French doctrine has borrowed from German law the notion of *entreprise de tendance* (in German *Tendenzbetrieb*). Actually, the conclusion of an employment contract with such an enterprise can oblige the employees to fulfill specific duties in order to allow the enterprise to achieve its own aims. Reversely, as the secularism (*laïcité*) of the State is also a constitutional principle, the expected neutrality of the public service creates constraints for civil servants, with which workers in the private sector do not have to comply.

32. Deliberation No. 2007-115 of May 14, 2007; on HALDE, *cf. infra* 525.
33. *See infra* 525.
34. D.P. III, Jan. 25, 1989, REVUE DE JURISPRUDENCE SOCIALE 5 (1989), No. 423.

1. The Enterprise de Tendance

After the issue of priests' wages, the second issue related to the relationship between religion and the labor law, which should have been investigated by a student in the late 1970s is the following: has a Catholic educational institution the right to fire one of its teachers because she remarried after a divorce?

Actually, civil divorce has no effect for the Catholic Church; and it is the second marriage, despite the first religious marriage, that represents an offense. It is also important to point out that the vast majority of the French religious educational institutions are linked to the State by a "contract of association" obliging them, despite their "specific acknowledged nature" to respect a series of norms adopted by the National Education system. The same contract enables them to benefit from a huge public support under the form of public subsidies and the provision of teachers by the State.

The legal ruling, studied by all French law students, delivered by the *Assemblée plénière de la Cour de cassation* on May 19, 1978,[35] is related to a teacher who remarried after she divorced. This is the reason for her dismissal by the School Sainte-Marthe. The fired teacher claimed a compensation for unfair dismissal,[36] lost before the Court of Appeal, and saw her appeal to the *Cour de cassation* rejected. This decision might have relied on a decision delivered by the *Conseil constitutionnel*[37] on November 23, 1977,[38] stating that "teachers in charge of teaching in private institutions linked with the State by an association contract are bound to respect the specific nature of this institution." The freedom of marriage—another freedom protected by the Constitution that cannot normally be restricted by employers[39]—is overridden by the obligation to respect the specific religious character of the institution. Therefore, the internal regulations of a private educational institution can impose on their employees the respect of the specific character of this institution.[40]

However, the school Sainte-Marthe was only linked to the State by a simple contract (not a "contract of association"). Therefore, the ruling of 1978 goes beyond the institutions linked by the contract of association

35. Bull. civ., No. 1; DALLOZ 541 (1978), concl. Schmelck, comment. Ardant. *See also* Cass. ch. mixte, Oct. 17, 1975, Bull. civ., No. 5, cassation in same case, before transfer to the Court of Appeal which ruling was subject of the 1978 case.

36. *Licenciement sans cause réelle et sérieuse*.

37. French constitutional Court.

38. ACTUALITÉ JURIDIQUE DROIT ADMINISTRATIF 565 (1978), comment. Rivero.

39. Celibacy clauses in employment contracts are normally void.

40. CE Sect., July 20, 1990, DROIT SOCIAL 862 (1990), concl. Pochard; CE Sect., July 23, 1993, DROIT SOCIAL 842 (1993), concl. Pochard. About this issue in general, *cf.* Jean Savatier, *L'application du droit du travail dans les rapports entre les maîtres et les établissements privés d'enseignement*, DROIT SOCIAL 439 (1992).

targeted by the decision of the *Conseil constitutionnel*. Since then, jurisprudence applied to enterprises holding the most diverse religious orientations.[41]

In committing himself to an enterprise whose activities have religious aims, the employee restricts his personal freedom to a certain extent. In principle, the employer is not allowed to sanction or discharge an employee for facts related to his personal life that are external to the working relations. However, in the tendency enterprise, the employer can rely in exceptional cases on such facts. "Article L. 122-45 of the Labor Code, stipulating that no employee can be punished or fired because of his religious beliefs, is not applicable when the worker, who was hired to achieve a task implying that he shares the beliefs and faith of his employer, ignores the obligations resulting from this commitment."[42]

In the *enterprise de tendance*, the religious orientation is part of the framework of agreement, at least for part of the employees.[43] Similarly, provisions from Article L. 1132-1 of the Labor Code are related both to hiring and dismissing: the fact that religion becomes part of the contract framework implies that the employer should take into account the religious beliefs of the employee or his attitude toward religion when the contract is concluded.

However, once hiring takes place, this does not mean that the enterprise is free to behave with employees in a discriminatory way. It is only possible to take into account a fact related to the personal life of a worker in an employer's decision to fire him when this element has caused a very clear disturbance inside the enterprise.[44] Reversely, an employee in a private educational institution can sue for discrimination in his career's development.[45] Ultimately, the *entreprises de tendance* remain enterprises and are therefore submitted to the labor regulations.[46]

41. Cass. soc. June 29, 1983, Bull. civ. V, No. 365 (a pastor from the "Universal Church of God," employed as a translator, but who has established a rival "Francophone Organization of the Church of God" and is contesting his firing from the job of translator).

42. Cass. soc. Nov. 20, 1986, DROIT SOCIAL 379 (1987), comment. Savatier.

43. Thus, it can be argued by the employee against the employer. Paris, May 25, 1990, DALLOZ 596 (1990), comment. J. Villaceque: justification of non-authorized absence of the ritual supervisor of a casher restaurant, the employer being "bound by the contract to respect the Jewish requirements."

44. Cass. soc. Apr., 17, 1991, DROIT SOCIAL 489 (1991), comment. J. Savatier (unfair firing of a homosexual sacristan from a fundamentalist Catholic parish).

45. Deliberations of the HALDE No. 2007-170 of July 2, 2007.

46. Cass. crim. Jan. 14, 2003, REVUE DE JURISPRUDENCE SOCIALE 4 (2003), No. 472 (a plant established by the Witnesses of Jehovah is submitted to hygiene and security regulations; after an accident, the manager incurs criminal prosecution).

2. Reinforced Neutrality Expected from Civil Servants[47]

As we know, France has witnessed public discussions for a long time before adopting the law forbidding students in the primary and secondary schools to exhibit ostentatious signs of their religious beliefs.[48] However, there is one point that did not emerge in any debate because it was already settled by a wide consensus in French society: the fact that teachers, as well as people working in public educational institutions, cannot wear religious symbols during the practice of their functions. When some teachers began to give lessons wearing *kippas*[49] or Islamic scarves, heads of the institutions forbade them immediately to appear wearing this headgear in front of their students.

The *Conseil d'État* had initially recognized the discretionary authority of the minister to refuse the participation of a priest in a competitive recruitment examination for civil service.[50] Undoubtedly, such a decision is against the principle of equal opportunity to all employment in the civil service stipulated by Article 6 of the 1789 Human Rights Declaration. However, in the context of the conflicts in France following the adoption of the Act of 1905 that established the separation between the Church and the State, it appeared to some that a priest was not fit to occupy a public teaching job according to the principle of secularism (*laïcité*). On the contrary, such a decision is no longer justified in a period of appeasement. Since then, the *Conseil d'État* has strengthened its arbitration and abolished—on the basis of legal error—several decisions refusing on principle the access of teachers to public educational institutions because of their religious beliefs or because they had studied in a religious institution.[51]

The balance reached today is summarized as follows by Counselor Schwartz[52]

> In principle, administrations may refuse the access of public functions to candidates whose the manifestation of their religious beliefs would reveal the inability to practice the public functions they are applying for. Extremist manifestations or expressions incompatible with the republican principles would certainly be a target. However, it does not mean that a candidate who was or currently is a priest is unable to respect the obligations related to the neutrality required by all civil servants.

47. V.R. SCHWARTZ, UN SIÈCLE DE LAÏCITÉ (2007).
48. Act No. 004-228 of Mar. 15, 2004.
49. Skullcaps worn by practicing Jews.
50. CE Sect., May 10, 1912, Abbé Bouteyre, Rec. Lebon 553, concl. Helbronner.
51. CE Sect., July 25, 1939, Delle Beis, Rec. Lebon 524; CE Sect., Dec. 8, 1948, Demoiselle Pasteau, Rec. Lebon 464; CE Sect. July 7, 1954, Janine.
52. *See supra* note 47.

Therefore, access to public employment is widely open now, provided that the concerned person wears religiously neutral clothes, and more widely respects the principle of neutrality.

This issue was recently tackled by a recommendation about litigation from the *Conseil d'État*.[53] This recommendation confirms that all civil servants (and not only teachers) are forbidden to exhibit their religious beliefs during the exercise of their duties. Accordingly, the fact of wearing a sign showing their belonging to a religion represents a breach in the obligations of civil servant, a fact that could lead to disciplinary measures.[54]

As long as the civil servant respects the principle of neutrality in the context of his job, he benefits from protection against discrimination based on religious beliefs, and enjoys full freedom of religious expression outside work.

The classical questions mentioned above resemble a denial; actually, while entire aspects of labor law are influenced by the social doctrine of the Church, a sort of "Yalta agreement" between State and Church has been implemented: Churches get ecclesiastic discipline and religious schools but, the private enterprise is secular (*laïque*) and the civil service even more.

Maybe this consensus and denial was a form of political wisdom although it did not prevent the real impact of the Church on labor law. As the impact of the Church on labor law is disappearing, labor law itself seems to be threatened.

II. DECONSTRUCTION OF THE RELIGIOUS IMPACT

Does secularization lead to progress? Many people believed it was a progress when the second French trade union, the *Confédération Française des Travailleurs Chrétiens* (CFTC), decided to get rid of its Christian reference as well as its religious affiliation to become the *Confédération Française Démocratique du Travail* (CFDT) and sought joint action with the *Confédération Générale du Travail* (CGT).[55] However, the decline of Christian doctrines may have been part of a more global downfall of the foundations of labor law. Is it not labor law's purpose to establish some

53. Opinion responding to a legal question rose by an Administrative Court seized of a case: CE Sect., May 3, 2000, Demoiselle Marteaux, Rec. Lebon 169, concl. Schwartz.

54. V. Cour Administrative d'Appel [CA Admin.] Versailles, Feb. 23, 2006, No. 04VE03227, for a city employee fired for refusing to cease wearing the Islamic scarf; CA Admin. Orleans, March 4, 2008, No. 06BX01925, for a nurse who had—obviously for religious reasons—expressed her doubts to the mother of a hospitalized person about a therapeutic abortion. The sanction was abolished by enforcement of the Amnesty Law of 2002, but the misconduct was noticed.

55. Confédération Générale du Travail, the oldest and presumably the first by the number of its members of French trade unions, formerly influenced by the Communist Party.

sort of balance between the weak and the strong? Or is its purpose to create an equitable competition between all employees? Undoubtedly, both requirements are legitimate, and therefore they do not have to be incompatible alternatives. However, religious doctrine can tend toward one of the two possibilities, either by justifying the protective intervention of the State, or by supporting all efforts to make secular institutions—i.e., the State and the enterprise—endure practices prescribed by religious communities through a demanding concept of the fight against discrimination.

The classical jurisprudence was both firm and cautious toward the issue of discrimination. The emergence of the HALDE led to new solutions. The secularization of labor and social security law (Section A) is accompanied by a revision of the traditional compromise between religious freedom and labor law (Section B).

A. Secularization of Labor and Social Security Law

1. The Decline of Christian Doctrines

Are students today still taught Marc Sangnier?[56] If we look at some contemporary textbooks about labor law, such as those of Professors Gerard Couturier,[57] Antoine Mazeaud,[58] or Bernard Teyssié,[59] none of the three authors talk about the impact of social Christianity on the development of labor law. Quite naturally, the "*Précis Dalloz*" (handbook) published by Professors Pélissier, Jeammaud, and Supiot does not mention the Christian influence either, as it is an update of Camerlynck and Gerard Lyon-Caen's book: the latter was in favor of a Marxist concept of labor law, and had mainly fought against the "institutional theory of enterprises" adopted by Paul Durand.[60] In the Dalloz handbook, we note the following title: "*1936-1974: the golden age of Labor Law*." And yet, this era—for those who are aware of the doctrines relating to labor law—was to a great extent that of the "institutional" theory of enterprises as we can see with the works: 1938 (Legal and Brèthe de la Gressaye published "*Le pouvoir disciplinaire dans les institutions privées*"); 1943 (publication of the first edition of the Dalloz handbook by Rouast and Durand); 1946 (Georges Ripert publishes "*Aspects*

56. Mentor of Christian social doctrine before World War II.

57. DROIT DU TRAVAIL, 1/ LES RELATIONS INDIVIDUELLES DE TRAVAIL (3d ed. 1990).

58. DROIT DU TRAVAIL (4th ed., 2004).

59. DROIT DU TRAVAIL, T.1, RELATIONS INDIVIDUELLES (2d ed. 1992). The notion of "social Christian" appears only in one (important) bibliographic note. Oddly, the classical sentence of Abbot Lacordaire ("between the strong and the weak, between the rich and the poor, between the master and the servant, freedom oppresses and statutory law makes free), considered near to the socialist doctrines, is not attributed to its author (No. 18).

60. One of the main Christian social authors on legal issues. *See infra* 519.

juridiques du capitalisme moderne"); 1947 (The Luxembourg Congress of the Capitant Association; publication of the first volume of the Treatise of Labor Law by Paul Durand and Jaussaud); 1956 (publication of Despax' thesis about "*L'entreprise et le droit*"); 1958 (publication of the "Labor Law" textbook by Brun and Galland); 1968 (last update of Brun and Galland). It is true that the opposing view was expressed in the same period in Gerard Lyon-Caen's handbook (1955) and then since 1965 the new Dalloz handbook of Camerlynck and Lyon-Caen. However, if we refer to a citations index, it appears obvious that the institutional theory was dominant during the "*Trente Glorieuses*" from 1945 to 1974.

Yet, the institutional theory presents a "community" concept of the enterprise according to the expression used by Professors Rivéro and Jean Savatier, and is thus one of the most elaborate versions of the Catholic Church's social doctrine.

Paul Durand borrows from Maurice Hauriou, among others, the notion of "institution" used in public law to justify how the rights and duties of the civil servant can be modified without his approval. The State is an "institution," i.e., a source of rights and duties representing an alternative to the contract. In a latter phase, some will apply the concept to the family: thus, belonging to a family is a source of rights and duties that do not result from a contract. Finally, the enterprise is considered an institution, a community, a *Gemeinschaft*. Affiliation to the enterprise grants the worker the protection of labor law. It also submits the worker to the powers of the head of the enterprise: regulatory power, disciplinary power, etc. However, the head of the enterprise that holds these powers for the benefit of the enterprise, regarded as a community, may be controlled by judges in his decisions in view of the interests of the said community. "As a hierarchical community . . . the enterprise has to ensure the common wellbeing of all its members . . . these notions are the basis of the prerogatives of the entrepreneur as well as those of the collectivity of workers and define the limits of these prerogatives."[61]

The institutional theory of enterprise has been practically abandoned today. It is true that the expression "the interest of the enterprise" is often used by judges, specifically regarding the firing regulations. However, analysis shows that when the judge writes that a decision was taken in "the interest of the enterprise," he is very often trying to achieve a "balance of interests" by applying the principle of proportionality. In other words, he does not define a "community" interest that would overcome the interests of the employer and the employee, but rather making sure that there is no disproportion between the losses encountered by the employee as a result of

61. Rouast & Durand, *supra* note 2, at 104.

the firing decision and the advantage gained by the enterprise from such a decision.

If the institutional theory is no longer prevalent, this might be due to the fact that Marxist and progressive doctrines won against social Christian doctrines. The great importance given to the employment contract during the 1990s (as well as its related impact on labor law through a renewed "contractual *solidarism*") did not leave room for any theory minimizing the contract.

Finally, the paternalistic enterprise (often of medium size) that might have been perceived as a community has been progressively replaced by the corporate governance enterprise based on merging and acquisitions. If the human links that are created between employees and heads of enterprises are permanently questioned by financial power, the institutional theory loses its sociological foundation. The reason for the decline of the institutional theory is due to the market as much as to Marxism.

2. From Secularization to Deregulation

In a 1991 article devoted to the centenary of the Encyclical letter *Rerum novarum*,[62] Professor Alain Supiot relates the social doctrine of the Catholic Church to three types of assumptions: "the common Good requires an Outside Authority to define it when faced with the diversity of the private interests . . . which necessitates the existence of intermediary groups to implement it . . . and whose ultimate corollary is to acknowledge human dignity."

The "Outside Authority" is primarily the State and its public policy legislation. However, the public policy of Christian inspiration seems to be in crisis, either in its most traditional form or in its contemporary variation developed by the "Second Left."

a. The Traditional Form

Secular (*laïcs*) trade unions had adopted the principle of Sunday as a day of rest in order to secure the possibility for husbands and wives to have their day off together. This institution is constantly under attack although there is no proof that its suppression would result in a real economic benefit.[63]

A significant sign of the fall of the Christian impact is the case called "the Pentecostal Monday": an Act dated June 30, 2004, introduced a new

62. DROIT SOCIAL 916 (1991), previously quoted.

63. Refer to the recent draft of Act Maille "aiming at renewing the dispensation from Sunday's rest," LIAISONS SOCIALES QUOTIDIEN, Apr. 24, 2008.

article in the Labor Code (L. 212-16), establishing a "day of solidarity" in order to finance the autonomy of aged people and the handicapped. For employees, this means an extra unpaid day, and the lengthening of the yearly duration of work; as for employers it entails the payment of a contribution. Under the initiative of a Prime Minister belonging to the French Democratic Union (UDF)—a party specifically born from the Christian democracy—Parliament decided that this extra day will take place on the Pentecostal Monday that was previously an official holiday where most employees did not work. The Christian Trade Union (CFTC) attempted an emergency procedure against the governmental instruction applying of this Act, based mainly on the freedom of religion,[64] and predictably lost the case.

The institutions that sought to secure reinforced protection for women are declining as well; the specific protection of women conflicting here with the principle of gender equality, strongly promoted by European Union law. Thus, condemned by the EU Court of Justice (CJCE),[65] France had to renounce to the prohibition of night shifts for women with an Act of May 9, 2001.[66] With the exception of the benefits related to motherhood, all benefits that were previously granted only to women have been consecutively granted to men.[67]

Policies related to the family are undergoing similar changes: the priority of employment that was previously granted to male heads of households is no longer included in the Labor Code. Family allocations presented by Professors Rivero and J. Savatier as an innovation of the Christian employers, adopted later and generalized by the statutory Law, are diminishing.[68] Either considered positive or negative, these changes indicate a trend toward the deregulation and the weakening of the religious impact.

b. The Contemporary Form

The doctrine of the "jobs sharing," one of the "second Left's" main campaign ideas—the Christian, Catholic, or Protestant left that joined the Socialist Party after May 1968—could be considered an *aggiornamento* of

64. CE Stat., *référés*, May 3, 2005, n° 27999.

65. CJCE, Mar. 13, 1997, REVUE DE JURISPRUDENCE SOCIALE 4/1997, n° 493.

66. *See also* former art. L. 222-2 of the Labor Code (regarding the abrogation of the prohibition of adult women to work during legal holidays).

67. *See, e.g.*, CE Stat., June 7, 2006, 280126 (considering as illegal one of the clauses of the statute concerning the personnel of electric and gas industries, granting for retirement pensions only to mothers additional scores of age and service by child).

68. *Cf.* the reduction of family allowances by virtue of decrees No. 2008-409 and 2008-410 dated April 28, 2008. JOURNAL OFFICIEL, Apr. 29, 2008.

social Christianity. This new version mainly stems from two sources: research conducted precisely by the research center "*Travail et société*" headed then by Jacques Delors in the 1970s;[69] and at the trade unionist level, from the program of the CFDT. The religious connotation included in the expression "*sharing*" is obvious.

The doctrine of the job sharing was implemented through the two Acts of 1998 and 2000 about the thirty-five hour work week. A lot can be said about the highly controversial impact of these laws on employment as well as about the subtle way the statutory law was used to deregulate working hours. The political result, i.e., that of the presidential elections of 2002, was clear: never since its renewal at the Convention of Épinay (1971) had the Socialist Party obtained worse results among blue collar workers. Job sharing is behind us, even if the legislation keeps a formal reference to the "35 hour week."

c. As the Christian Inspiration of an "Outside Authority" is Regressing, What Happens with the Intermediary Groups?

As indicated before, the community vision of the enterprise has lost ground. What remains is the other intermediary body represented by Christian trade unionism. Yet, the evolution of the law regarding trade union legislation does not promise a bright future for that kind of unionism.

When the CFTC (Christian trade union) decided to abandon all religious references in 1964, a minority decided to keep the previous label. The decision of the minister of labor to consider this body as one of the representative trade unions at the national level and for all professions was attacked before the Administrative Court. It took the *Conseil d'État* a huge amount of courage to justify its rejection of the case when the impact of the new trade union was obviously quite limited.[70]

For reasons that cannot be developed here, the power of minority trade unions to conclude collective agreements is now generally questioned. This is why the outcome of collective bargaining that the government wanted, and that corresponds to the wishes of the CGT and the CFDT, was adopted on April 9, 2008, by several trade unions of employers and employees. According to this joint position, employee trade unions must, in future, obtain 10% of the votes at the professional elections in order to conclude a collective agreement. Since the French Christian Confederation of Workers

69. *Cf.* the special issue of *Droit social* about the *partage du travail* (job sharing). II DROIT SOCIAL (Jan. 1980). Seminar organized by the research center "*Travail et société*" (Work and Society) of Paris IX-Dauphine University, concl. by J. Delors, then associate Professor at the Paris IX-Dauphine University.

70. Council d'État Stat., Apr. 17, 1970, DROIT SOCIAL 368 (1970).

does not reach this result very often, it will have to merge with another trade union in order to pursue its activities. This would mean the disappearance of the autonomous organization of Christian trade unionism.

Regarding the acknowledgement of human dignity: is it possible to combine the social Christian message about humanizing work and acknowledging its role in the blossoming of human beings with the rise of religious individualism?

B. Calling into Question the Traditional Compromise Between Religious Freedom and Labor Law

As noted by Dean Counselor Philippe Waquet, one of the factors contributing to giving the issue of religious freedom an acute dimension from the perspective of the labor law is "the growth of fundamentalist trends affecting one way or the other all religions. Some believers reject the rules of a healthy secularism, wanting to impose their beliefs and practices to everybody, and in all cases seeking to expose and practice them in the professional life."[71] While the *Cour de cassation* and the *Conseil d'État* adopted balanced solutions, the HALDE's recent positions seem to differ.

1. The Jurisprudence

As we already saw, neither civil not administrative jurisprudence accept that a measure would be taken against an employee because of his religion. If the employer hires—with full knowledge of the facts—a worker who exhibits in a very visible way his religious observation, he cannot change his mind unless objective elements far from any discrimination and linked to the interests of the enterprise justify this decision. Thus, the Paris Court of Appeals abolished the dismissal of an employee who was wearing the Islamic veil since the first interview of recruitment.[72] Reversely, when the very obvious nature of the religious signs could harm the interests of the enterprise, or *a fortiori* compromise the security of individuals, the employer is entitled to order the worker modify to the related elements, or even fire him in case of refusal. For example, a female working in a shop selling feminine fashion products might be asked to stop wearing clothes covering her from head to foot.[73]

71. *See supra* note 29.

72. CA Paris, June 19, 2003, DALLOZ 175 (2004), comment. Pousson; REVUE DE JURISPRUDENCE SOCIALE 10 (2003), No. 1116; conf. of *Conseil des Prud'hommes*, Paris, Dec. 17, 2002, DROIT SOCIAL 354 (2004), comment. Savatier.

73. CA Saint Denis de la Réunion, Sept. 9, 1997, DALLOZ 546 (1998), comment. S. Farnocchia. *Id.*; CA Paris, Mar. 16, 2001, service de documentation de la Cour de cassation, No. 1999/31302; REVUE DE JURISPRUDENCE SOCIALE 11 (2001), No. 1252, 2d case (female seller wearing an Islamic scarf); *Conseil des Prud'hommes de Lyon*, Jan. 16, 2004, DROIT SOCIAL 354 (2004), comment. J.

Under the condition of presenting an objective justification, the employer is entitled to give instructions to the employee related to his physical appearance or clothing. He is also allowed to request the implementation of the employment contract under the agreed upon conditions without the right for the employee to use the pretext of his religious beliefs in order to avoid these conditions.

At the level of the jurisprudence, the question that emerged was about the non-authorized absence of a female employee the day of the *Aïd*. Being fired accordingly, the *Cour de cassation* rejected the employee's claim to compensation for damages, but turned down the accusation of serious misconduct.[74] Technically speaking, the application for an authorization of absence is considered as an application for a holiday whose dates are decided by the employer, unless they result from a collective agreement.[75] Could the fact that employees have *a priori* to work during a day of religious feast be considered as "an attack from the employer on individual freedoms" according to article L. 1121-1 of the Labor Code? This thesis is quite controversial because the obligation does not result from a decision of the employer, but from the contract. By concluding a contract, the employee submits himself to the collective discipline of the enterprise that quite predictably forces employees to work on some religious holidays.

However, the employee can present to the employer a request for authorization of absence in view of a religious holiday. As Professor Jean Savatier claims,[76] the employer should deal with this request in good faith; this means to agree with the request if this is feasible with regards to the requirements of the enterprise. In the opposite case, the religious reason does not grant the employee the right to impose upon the employer a modification of the conditions of employment.[77]

This issue was settled in the clearest way by the ruling of March 24, 1998, of the Social Chamber of the *Cour de cassation*.[78] A Muslim

Savatier. If the CA Versailles (decision No. 6VE02005) abolishes the discharge of a city agent, who refused to shave his beard and was then unable to wear a protection mask against the toxic products he had to manipulate, it is because the mayor did not follow the disciplinary procedures required when firing relies on a guilty refusal to obey.

74. Cass. soc. Dec. 16, 1981, Bull. civ. V., No. 968.

75. Art. L. 3141-13 Labor Code.

76. *Liberté religieuse et relations de travail*, *Mélanges Verdier*, *supra* note 29, at 455. The solution is the same in the civil service statute: assuming it is compatible with service necessities, the civil servant can obtain absence authorizations to participate religious holidays. Council d'État Stat., Feb. 12, 1997, *Henny*, REVUE DE JURISPRUDENCE SOCIALE 5 (1997), No. 618. This ruling is remarkable because the concerned person was Catholic and benefited from formal holidays and Sundays already. Moreover, reversely from the refusal of the private employer, the refusal of the hierarchical civil service authority should be formally motivated as well as any other administrative refusal decision.

77. Thus, the request of a Muslim worker to obtain an allocation for meals because he was fasting during the month of Ramadan, while the employer used to offer free meals, was rejected. Cass. soc. Feb. 16, 1994, Bull. civ. V, No. 58.

78. DROIT SOCIAL 614 (1998), comment. J. Savatier.

employee hired as butcher realizes suddenly that he is in contact with pork meat and requests his transfer. The employer refuses, the worker stops working and claims a compensation for damages for having been fired without a real and serious reason. According to the Court "if it is true that the employer has to respect the religious beliefs of his employee, these beliefs—unless under a specific clause—are not part of the employment contract framework, and the employer does not commit any mistake in asking the worker to implement the task he was hired to execute as long as this task is not contradictory with a rule regarding a matter of public policy." Regarding the absence of the appropriate clause, the request of the employee was rejected.

2. The HALDE's Positions

Established by the Act of December 30, 2004, the HALDE is an independent administrative authority, partially inspired by the American "Equal Employment Opportunity Commission." This body responsible for fighting against all forms of discrimination, is composed of a board of eleven members nominated by the highest authorities of the State. Any individual who considers himself a victim of discrimination can submit the violation to the HALDE who in turn is entitled to act upon any form of discrimination that comes to its attention. Once a case is submitted, the HALDE can undertake enquiries and request explanations from the concerned parties. The HALDE helps victims of discrimination establish their file, and can initiate a mediation process. It is also entitled to submit to the *Procureur de la République* (DA) the violations it has observed. Since its powers were strengthened by the Act of March 31, 2006, the HALDE is also able to propose a transaction to the guilty party of civil and criminal nature, and in case of refusal, to activate a public prosecution.[79]

When a case is brought before the HALDE, it is entitled to deliberate in order to formulate including "recommendations"; these deliberations do not result in a constraining power *per se*; however, considering the powers conferred to the High Authority, these recommendations are compelling. They are becoming a "jurisprudence" whose contents differ clearly from the orientation adopted by Courts until now, regarding legal content as well as rules of evidence.

In terms of legal content of rules, the most typical case corresponds to the deliberation n° 2008-10 of January 14, 2008.[80] This deliberation is

79. *Cf.* D. No. 2006-641 of June 1, 2006.

80. *See also* deliberation 2007-123 of May 14, 2007. The access permits for two brothers who were working for a sensitive military area who were removed following an unfavorable report issued by a military authority. The two brothers lived together, and one of them was "known by the services to be

related to an association in charge of a learning program by the seaside. Since the deliberation concerns an enterprise without religious aims, this association can be one of the alternatives used by the public school system in order to implement their extra-curricular activities. The association requested that their monitors take their meals with the children and not just supervise them. It is understandable that in a learning program where seafood is an important part of what the children are meant to discover, the monitors were expected to share meals. Thus, the person in charge of recruiting for the association had "solicited the candidate's opinion regarding religious dietary obligations and asked him if he ate meat during meals with the children," a fact that no one seems to have denied.

The HALDE begins by saying that this question should not have been addressed. In the balance observed until now by the Courts, the following conclusion is logical: the employer should not ask about the religion of the candidate; and the employee cannot avoid the tasks commissioned by the employer unless explicitly inserted in a clause of the contract, i.e., manipulate pork meat in the ruling of the 1998 *Cour de cassation*; or in this case eating with children. However, in the deliberations of 2008, the HALDE goes a step further by questioning the definition of the tasks decided by the employer:

> [I]f it seems justified to ask monitors in summer and leisure camps to participate in the meals and taste the food, mainly with young children, things are different when employers impose a diet by sharing meals with children in strictly identical conditions. This rule results in a specific disadvantage for people who wish to follow a diet due to their religious beliefs or to their health.

If we apply this concept to the ruling of 1998, it would lead to the following: by refusing to distinguish the handling of pork meat from the other activities of the butcher's shop, the employer has disadvantaged butchers unwilling to deal with pork meat because of their religious beliefs.

in contact with persons implicated with Islamist groups, namely because of his participation in the pilgrimage and his participation in meetings-debates with people known by the police." For this brother, the HALDE "considers that there are clues that seem to constitute a sufficient basis for the decision of the military authority." The HALDE "invites his president to question the Minister of Defense about the sole family link as a motive for the decision concerning the second brother." In similar cases concerning access permits to airport zone granted by civilians authorities, administrative jurisdictions use a normal control, which means that the legal basis of the decision is fully controlled. CAA Versailles, Dec. 17, 2007, 05VE01548. However, the removal of a permit of access to a zone of secret-defense is subject to a limited control (Nancy, May 27, 2004, 98NC01480), as well as decisions regarding the promotion of soldiers. CAA Nov. 4, 2005, 262952. In another decision, No. 2006-242 dated Nov. 6 2006, the HALDE accepted the firing of an animator working in an association for autistic children, who refused to swim with children in a swimming pool and remove her Islamic scarf, because her refusal was against the security requirements. However, the decision seems to consider that the requirement of employee's secularism is not justified, since the organization did not fall within the scope of the 2004 Act. Yet, if there are "tendency enterprises" with religious aims, nothing seems to forbid the recognition of secular "tendency enterprises," mainly in the field of education and organizations linked to educational system.

There is no doubt that the HALDE has reached an opposite conclusion than the *Cour de cassation*.

Regarding evidence, it is worth mentioning the deliberation n° 2007-301 dated November 13, 2007, about the authorizations of absence for religious holidays. The innovation here is that the HALDE asserts that the employer has to justify his refusal to grant such authorization on the ground of non-discriminatory objective criteria.

Yet, according to article L. 1132-1 of the Labor Code, in case of alleged discrimination "the employee . . . presents facts leading to assume discrimination"; and only then, after the partial evidence supplied by the employee, the employer has to provide an objective justification. For the HALDE, this phase does not seem necessary. The refusal itself of an authorization of absence for religious holiday requires a justification from the employer and thus there is a kind of assumption of discrimination. No doubt the HALDE is, by restricting the employer's right to refuse an employee's absence, attempting to modify statutory and jurisprudential rules.[81]

Some people will object that the HALDE has made controversial decisions in matters other than religion, and that this is due to the growing pangs of its recent existence. Others will be delighted to see the end of the theory of "the employer as the sole judge." The obsession with discrimination is likely to achieve what the institutional theory of the enterprise failed to do, i.e., to submit the managerial decisions of the employer to a jurisdictional monitoring.

However, the rationale that is emerging is not exempt from danger. It does not carry any kind of solidarity that was the basis of labor and social security law: neither the great solidarity among workers of the socialist trend, nor the community solidarity dear to the social Christians. If individualistic religious requirements that are no longer linked to a project of social cohesion can prevail over managerial requirements, won't they soon override labor law? Can there be conscientious objection to the power of trade unions? Can employment stability be accused of being discriminatory?[82] What happens then to the "Common Good"?

81. A fact that is certainly understood by the HALDE, since its deliberation proposes to the government a modification of the related articles of the Labor Code.

82. It is one of the arguments of the "Green Paper" proposed by the EU Commission in November 2006. Modernizing Labor Law to meet the challenges of the twenty first century," COM(2007) 627 final. And of the French theory of the "*contrat de travail unique*." *Cf.* PIERRE CAHUC & FRANCIS KRAMARZ, DE LA PRÉCARITÉ À LA MOBILITÉ: VERS UNE SÉCURITÉ SOCIALE PROFESSIONNELLE (2004).