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НЕМАТЕРИАЛЬНЫЙ ОБЩЕСТВЕННЫЙ ПОРЯДОК ВО ФРАНЦУЗСКОМ ПУБЛИЧНОМ ПРАВЕ

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Общественный порядок, обеспечиваемый административной полицией, выступает в качестве основного понятия отношений между государством и отдельными лицами и традиционно определяется как материальный. Он необходим для достижения баланса между поддержанием социального мира и гарантией прав и свобод личности, особенно в тех случаях, когда речь идет о безопасности. Недавно принятый во Франции закон о чрезвычайном положении напоминает об этом. Но общественный порядок – это не только нечто материальное, ограниченное общественной безопасностью, спокойствием и здоровьем. Как классическое понятие публичного права, общественный порядок постоянно развивается. Действительно, проанализировав различные разрозненные явления можно сделать вывод о существовании нематериального общественного порядка, возникновение и использование которого обусловлено необходимостью реагировать на дисбаланс в сфере верховенства права. Допуская, в частности, защиту объективных ценностей, на основе которых строится общество, нематериальный общественный порядок направлен на восстановление равновесия отношений между коллективом и индивидом. Соответственно, это функциональная концепция. Таким образом, можно построить соответствующий нематериальному общественному порядку и правовой режим, не ограничивающий свободы в частной жизни и проявляющийся в общественном пространстве, с которым тесно связан, что снижает риски вторжения со стороны государства. Нематериальный общественный порядок можно рассматривать как автономное понятие. Такая формализация облегчает его выявление и может быть окончательно закреплена во французской правовой системе.

Ключевые слова: административная полиция; аксиологическая система; права и свободы личности; минимальные требования жизни в обществе; частная жизнь; защита общества; публичное пространство.

IMMATERIAL PUBLIC ORDER IN FRENCH PUBLIC LAW[1]

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As a central notion of the relationship between the state and individuals, public order implemented by the administrative police is traditionally identified as material. Essential to the balance between maintaining social peace and guaranteeing individual rights and freedoms, it is particularly used when security is at stake. Recent legislation (in the lato sensu) on states of emergency recalls this. But public order is not only material, limited to public security, tranquility and health. A classic notion of public law, public order is constantly evolving. It is indeed possible to draw from various scattered phenomena the existence of an immaterial public order whose emergence and use are intended to respond to imbalances that have appeared in the rule of law. Allowing, in particular, the protection of objective values on the basis of which society is ordered, immaterial

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public order aims to rebalance the relationship between the collective and the individual. In this sense, it is a functional concept. It is thus possible to define immaterial public order and to construct a legal regime adapted to it. Impotent to restrict freedoms in private life, it is expressed in the public space to which it is confined, which limits the risks of intrusion by the state. It can be seen as an autonomous notion. This formalisation makes it easier to identify immaterial public order. Above all, it suggests that it could become permanently established in the French legal system.

Keywords: administrative police; axiological system; individual rights and freedoms; minimum requirements of life in society; private life; protection of society; public space.

Introduction

In a state governed by the rule of law, what link is made between public order and individuals rights and freedoms? If the administrative police authority (regulatory power) has a duty to act in order to ensure respect for public order, i. e. ultimately the protection of society, it must do so in a necessary and proportionate manner.

In France, public order is defined by art. L. 2212-2 of the General Local Authorities Code. According to this article, which determines its components, public order consists of public security, health and tranquility. Consequently, mayors and prefects may, for example, restrict freedom of demonstration if it appears that, in the absence of action on their part, persons could be injured or equipment (shop windows, etc.) could be broken. This way of using the notion of public order as a basis for a police act led Maurice Hauriou to say that public order is «material and external», «considered as a state of fact opposed to disorder, the state of peace opposed to the state of disturbance. It is not that society does not need a moral order, it is not that the propagation of all kinds of ideas is a good thing, but it means that society is invited to protect itself here by other institutions than the state police, which is not adapted to this kind of office»[2]. Most French doctrine subsequently agreed with M. Hauriou's thesis.

Public order then makes it possible to meet both security challenges (demonstrations or terrorist acts, for example) and health challenges (pandemics such as COVID-19, for example), by giving administrative police authorities the power to limit individual rights and freedoms (house arrest, for example), even if they have constitutional rank. The notion of public order, which is known in European Union law and[3] also in conventional law[4], as in most legal systems, thus limits and protects both individual rights and freedoms, by ensuring a framework for their exercise that is conducive to their development. The relationship that public order creates is then classic: security (if we take this component as an example) is opposed to freedom, it limits it, more or less strongly, for a longer or shorter period of time, depending on the circumstances; thus, in times of high terrorist threat, the freedom to come and go can be very largely limited, so that the state becomes more secure than liberal.

However, is public order limited to the components identified by law and doctrine? Is it the same to prohibit a demonstration of yellow jackets for security reasons, as may have happened in France in 2018, as to prohibit the throwing of dwarves in a discotheque or the use of the services of a prostitute, for reasons of human dignity? An analysis of positive law allows us to answer in the negative: there are cases in which the police authority limits an individual right or freedom for reasons of public order when neither public safety, health nor tranquility are at stake. This confirms that material public order is not sufficient to meet all the challenges facing the state. Questions of culture, values and identity claims are not legally reducible to material public order. In order to be able to grasp them legally, French law has therefore gone beyond mere material considerations by adopting other notions, which are more difficult to account for insofar as they are, at best, undefined and, at worst, unnamed. This is the case of immaterial public order.

The existence of an immaterial public order

Understood as the non-material counterpart of the material public order referred to just now, the immaterial public order, i. e. the notion that makes it possible to restrict individual rights and freedoms outside any material disturbance to public safety, health or tranquility, was implicitly enshrined in the case of concealment of the face in the public space.

In the course of 2010, the French Parliament passed a law prohibiting any individual from circulating in the public space with his face masked. Art. 1 of the text

[2]*Hauriou M.* Précis de droit administratif. Paris : Sirey, 1933. P. 549 (hereinafter translation is mine. – *M.-O. P.-S.*).

[3]Para 2 of art. 4 of the Treaty on European Union: the Union «shall respect the essential functions of the State, in particular those designed to ensure its territorial integrity, maintain law and order and safeguard national security. In particular, national security remains the sole responsibility of each Member State».

[4]Para 2 of arts. 8–11 and art. 15 (though not explicitly) of the European convention for the protection of human rights and fundamental freedoms.

provides that «no one may, in the public space, wear an outfit designed to conceal his face», while art. 2 of the law defines what is meant by «public space». Penalties are also provided for in the event of noncompliance with the prohibition. Thus, art. 3 of the text stipulates that «failure to comply with the prohibition laid down in article 1 is punishable by the fine laid down for second-class contraventions. The obligation to complete the awareness training course referred to in art. 131-35-1 of the Criminal Code may be pronounced at the same time as or instead of the fine». In other words, the legislator has provided for light and pedagogical sanctions, namely a fine not exceeding 150 euro and the obligation to follow an awareness training course.

This law was submitted before promulgation to the control of the Constitutional Council by the President of the Senate and the President of the National Assembly. The referral authorities had not raised any particular grievances against the law (referred to as «white referrals»), leaving the Constitutional Council full latitude as to the standards of reference used in support of its control and the elements to be controlled. By decision No. 2010-613 DC of 7 October 2010, the Council declared the law constitutional, considering in particular that, «having regard to the objectives it has set itself and taking into account the nature of the penalty imposed in the event of breach of the rule it has set, the legislature has adopted provisions which ensure, between the safeguarding of public order and the guarantee of constitutionally protected rights, a reconciliation which is not manifestly disproportionate»[5]. Subsequently, French law was referred to the European Court of Human Rights, which validated it conventionality in its *SAS v. France* judgment of 1 July 2014[6].

The interest of this law stems from its legal foundations: it was implicitly founded by the legislator on public order. However, the legislator made no reference to public safety, health or tranquility. Material public order was of no help to it, since the practice of concealing the face did not affect any of its components. The parliamentary work on the law is revealing in this respect. Referring explicitly to the «values of the Republic» and the «living together» that the ban is intended to uphold, the reports of both deputies and senators refer to a non-material, or even immaterial, public order that would legally justify restrictions on rights and freedoms by means of a general and absolute ban. The Council of State, which had been made aware of the prohibition before the law was passed, had itself referred to the existence of a new notion of public order, which the Constitutional Council, as judge of the constitutionality of the law finally adopted, implicitly confirmed. Its decision in fact refers to art. 5 of the Declaration of the rights of man and of the citizen, and more specifically to *actions harmful to society which the law has the right to defend*. In so doing, the constitutional judge confirmed that certain actions, such as concealment of the face in the public space, could be prohibited in order to protect society. This case therefore confirmed that limits were sometimes placed on rights and freedoms – including those of constitutional rank – on the basis of a public order different from material public order.

The existence of an immaterial public order was all the more confirmed since the prohibition of concealment of the face in the public space was not the only prohibition used by the police authority. For example – to take just one example – in 1995, a mayor decided to ban a show in which, in a discotheque, participants caught a dwarf wearing protective gear and threw him like a suitcase onto a carpet. The Council of State had been informed of the legality of the municipal by-law, in particular in that it limited freedom of enterprise, and had considered that the ban on dwarf-throwing was legal insofar as it was aimed at protecting human dignity, since the individual in question, who was disabled, was treated as a mere object. The judge held that «respect for the dignity of the human person is one of the components of public order» and that «the municipal police authority may, even in the absence of specific local circumstances, prohibit an attraction that violates respect for the dignity of the human person»[7].

This is not the only example. It is in fact a whole series of observable phenomena in positive law which, sharing similarities between them, can be linked. In the various cases, the police authority justifies a general prohibition limiting individual subjective rights and freedoms without relying on a consideration of general interest or on one of the classic components of public order. On the contrary, it resorts to other elements, which are more difficult to grasp, such as public morality, the dignity of the human person and the mini-

[5]Constitutional Council Decision No. 2010-613 DC of 7 Oct. 2010. Law prohibiting the concealment of the face in the public space (considering that art. 1 and 2 of the referred law are intended to respond to the emergence of practices, hitherto exceptional, consisting in concealing one's face in the public space; that the legislator considered that such practices may constitute a danger to public safety and disregard the minimum requirements of life in society; that it also considered that women who conceal their faces, whether voluntarily or not, find themselves in a situation of exclusion and inferiority that is manifestly incompatible with the constitutional principles of liberty and equality; that by adopting the provisions referred to, the legislature has thus supplemented and generalized rules hitherto reserved for specific situations for the purpose of protecting public order).

[6]European Court of Human Rights. SAS v. France. 1 July 2014. No. 43835/11 (consequently, in particular in view of the wide margin of appreciation available to the respondent state in the present case, the court concludes that the prohibition laid down in the Law of 11 October 2010 may be regarded as proportionate to the aim pursued, namely the preservation of the conditions for «living together» as part of the «protection of the rights and freedoms of others». The disputed restriction may therefore be regarded as «necessary», «in a democratic society». This conclusion applies to both art. 8 and art. 9 of the convention. Accordingly, there has been no violation of either art. 8 or art. 9 of the convention).

[7]Council of State. Assem. Commune de Morsang-sur-Orge. 27 October 1995. No. 36727. Recl. Lebon. P. 372.

mum requirements of life in society, elements which it subsumes under the term «public order». Immaterial public order is thus present in the French legal order, although without being so called. It is therefore possible, on the basis of its manifestations in positive law, to propose a formalization of it.

Immaterial public order, a functional notion

Although unprecedented, recourse to immaterial public order is not unthinking: if the police authority takes the risk of basing its measure on elements that may appear legally fragile, it is because it is impossible for it to do otherwise. The context in which immaterial public order emerges therefore makes it possible to understand not only the approach of the police authority but also the usefulness of immaterial public order. It is then that this public order appears to be a *functional notion*: it intervenes in the context of an imbalance encountered in the rule of law, in order to respond to it. Henri Motulsky's words, according to which «since the aim of law is the achievement of social harmony, its action necessarily consists in preventing and sanctioning a disturbance of balance»[8], are thus given concrete form.

A substantial function. Several situations of imbalance can then be highlighted. One of them can be found in the thesis of the subjectivization of law. Immaterial public order fulfils a substantial function that makes it possible to respond to what Jean Carbonnier called the «pulverization of law into subjective rights»[9]. Faced with subjective individual rights and freedoms, immaterial public order in fact gives precedence to the objective aspect of certain rights and freedoms in order to justify the imposition of limits on them. The cases that have mobilized the dignity of the human person are revealing in this respect. Dignity can be understood in two opposing ways; either it is understood from an objective point of view (it goes beyond the will of the individual and imposes itself on him or her despite his or her consent), or it is understood from a subjective point of view (the individual has it, that is dignity – autonomy). In this respect, it is relevant to refer to the German doctrine. According to Günther Dürig, dignity is «a purely objective principle», which does not «create a "fundamental right" to dignity which would give it the character of a subjective public right»[10]. Of course, as Olivier Jouanjan points out, this thesis is disputed in doctrine, and the jurisprudence of the Federal Constitutional Court retains both the objective aspect of dignity and its subjective aspect[11]. But the objective conception remains recognized[12], including by the other jurisdictions. Thus, in a «Peep show» decision of 15 December 1981, the Federal Administrative Court held that «the dignity or the human person is an objective and unavailable value which the individual cannot renounce: such renunciation is without effect»[13]. Recognition of the two conceptions of dignity also takes place in France, where dignity limits both the rights of others and the rights of individuals towards themselves. But it is not these two conceptions of dignity that are targeted by public order in its immaterial dimension; only objective dignity, which «asserts itself independently of the will of the subject»[14], the one based on the preamble of the Constitution of 1946 as enshrined by the Constitutional Council[15], is concerned. Several examples in positive law, in this case case law, show in fact that the dignity on which an administrative measure for the maintenance of public order is based is taken only in its objective conception. The Council of State's judgement on dwarf throwing, cited above, is explicit on this point. This is also the case in a number of subsequent judgments, such as that arising from the Dieudonné M'Bala M'Bala show. In his order of 9 January 2014, the urgent applications judge of the Council of State based the ban on «the serious risk that serious violations of values and principles, in particular of the dignity of the human person, may once again occur»[16] to justify the ban on the show. The reference thus made to dignity is explicit:

[8] *Motulsky H.* Principes d'une réalisation méthodique du droit privé. La théorie des éléments générateurs des droits subjectifs. [S. l.] : Dalloz, 2002. 174 p.

[9] *Carbonnier J.* Droit et passion du droit sous la V° République. Paris : Flammarion, 1996. 276 p.

[10] *Jouanjan O.* La dignité de la personne humaine dans la jurisprudence de la Cour constitutionnelle de Karlsruhe // CDPC Conférence Débat sur la dignité de la personne humaine (30 Octobre 2014) [Electronic resource]. URL: https://www.revuegeneraledudroit.eu/blog/2014/11/06/la-dignite-de-la-personne-humaine-dans-la-jurisprudence-de-la-cour-constitutionnelle-de-karlsruhe/ (date of access: 20.09.2020).

[11] Ibid.

[12] On these issues, see also: *Girard Ch.* Des droits fondamentaux au fondement du droit. Réflexions sur les discours théoriques relatifs au fondement du droit. Paris : Publications de la Sorbonne, 2010. P. 68.

[13] Decision BVerwGE 64, 274 (see: *Jouanjan O.* La dignité de la personne humaine dans la jurisprudence de la Cour constitutionnelle de Karlsruhe // CDPC Conférence Débat sur la dignité de la personne humaine (30 Octobre 2014) [Electronic resource]. URL: https://www.revuegeneraledudroit.eu/blog/2014/11/06/la-dignite-de-la-personne-humaine-dans-la-jurisprudence-de-la-cour-constitutionnelle-de-karlsruhe/ (date of access: 20.09.2020)).

[14] *Tzitzis S.* La dignité dans la Déclaration universelle des droits de l'homme à la lumière de l'égalité et de la liberté // La Déclaration universelle des droits de l'homme a-t-elle encore un sens? Aspects, Revue d'études francophones sur l'État de droit et de la démocratie. 2008. Hors série. P. 21.

[15] Constitutional Council. Decision No. 94-343/344 DC of 27 July 1994. Law on respect for the human body and Law on the donation and use of the elements and products of the human body, medical assistance for procreation and prenatal Diagnosis.

[16] Council of State Order No. 374508 of 9 January 2014. Minister of the Interior v. Les Productions de la Plume Society and Mr. Dieudonné M'Bala M'Bala.

it is its objective conception. This has moreover been confirmed by the doctrine[17]. The objective aspect of the principle of dignity is therefore still the basis of the police ban. The Grasse Boulange Society[18] case, which led to an order of the Council of State, also reveals the link between the objective conception of dignity and immaterial public order. In that case, the Representative Council of Black Associations (CRAN) had challenged the refusal of the municipal police to ban pastries considered obscene and of colonialist inspiration. According to the CRAN, the pastries, which were required to be withdrawn from public display and sale, violated the dignity of the human person in that they «are part of a historical process that prioritizes the aesthetics of the human race according to racist criteria»[19]. The Administrative Tribunal of Nice had granted the application and ordered the mayor to intervene, since, according to the court, «the display in the window of the bakery in Grasse of two dark chocolate figurines called "God" and "Goddess" respectively, in the form of two colored persons represented in grotesque and obscene attitudes, in the absence of even the malicious will of their creator, undermines the dignity of the human person and more particularly that of persons of African origin or of African descent»[20]. In so doing, the Administrative Tribunal of Nice foreshadowed the existence of several dignities, since it emphasized the dignity of «persons of African origin or of African descent», thus breaking with the objective conception of dignity that does not distinguish between human beings. The council of State, however, intervened in the opposite direction. In ruling that the municipal police authority had not committed «manifest illegality infringing a fundamental freedom»[21] by not banning pastries, the Council rejected the ground of human dignity as understood by the Administrative Tribunal of Nice. The Council of State once again upheld the objective conception of dignity, which, in its view, was not at issue in this case.

Limitations on rights and freedoms are therefore justified by the prevalence of their objective aspect, due to immaterial public order. In so doing, this public order recognizes the existence of objective values that it protects, which then resist the logic of reconciling rights and freedoms with each other. Thus, instead of a conciliation being sought between the rights and freedoms restricted by the administrative police measure and public order, as is the case with material public order, immaterial public order imposes the limitation of rights and freedoms without conciliation. In this sense, this public order constitutes an instrument for rebalancing the relationship between subjective rights and objective law, and thus the relationship between the individual and the collective placed in the hands of the political authority, particularly the legislative authority. Beyond that, it promotes a system of objective values whose coexistence with the system of individual subjective rights and freedoms requires articulation.

Institutional functions. Not content to have this substantial function, immaterial public order also fulfils a function of institutional rebalancing. In particular, in that it protects objective values whose invocation must be reserved for a legitimate authority to do so. In this sense, immaterial public order restores the police authority to a central position. This position regained by the decision-making authority is then in competition with other actors. This is the case with regard to the internal judge, whose power acquired over the last few decades is, here, singularly limited. This is also the case with regard to supranational legal orders. Thus, faced with the social issues that the French state uses to protect its regulations, the legal orders of the European Union and the Council of Europe see their room for maneuver reduced, as was observed at the level of the Union with the *Omega case*[22] and at the level of the Council of Europe with the above-mentioned *SAS v. France* case. Immaterial public order acts in some respects as France's constitutional identity may do: it represents a legal argument for the member state to convince the supranational legal order to loosen the constraints it imposes on it. This applies even when their purpose is the protection of individual subjective rights and freedoms.

Immaterial public order, an autonomous notion

Far from being merely an extension of classical, material public order, immaterial public order is fully autonomous. It is in fact possible to formalize it, i. e. to define it and establish a legal regime for it. This makes it possible to provide the police authority, in particular, with concrete indications as to how to draw up standards or individual provisions that it may be required to enact. It also provides the judge with leads that may help him or her in his or her office.

Defining immaterial public order. The autonomy of immaterial public order lies, first of all, in the specificity of its definition: it brings together numerous

[17]On this aspect, see in particular: *Fontbressin de P.* À propos de l'affaire Dieudonné: le principe du respect de la dignité humaine, ciment de l'ordre public européen // Revue trimestrielle des droits de l'homme. 2014. No. 98. P. 515–524. The author considers that «the *order*... no longer places the debate on the exercise of a freedom conducive to the exploitation of a sought-after contradiction, but on that of respect for values and principles in violation of which no freedom can subsist».

[18]Council of State. Order of 16 April 2015. Grasse Boulange Society. No. 389372.

[19]Administrative tribunal of Nice. Order of 26 March 2015. Representative Council of Black Associations (CRAN). No. 1501179.

[20]Ibid.

[21]Council of State. Order No. 389372 of 16 April 2015. Grasse Boulange Society.

[22]European Union Court of Justice. Omega. 14 October 2004. Case C-36/02.

components, of which it is not possible to give an exhaustive list *a priori*. Indeed, as a functional notion, immaterial public order is a receptacle notion, capable of resolving a problem that arises. It must therefore be capable of integrating new components in the future when this is necessary for administrative police action. Consequently, its content can only be opened, which also has an impact on the determination of its legal basis. Thus, these cannot be established exhaustively either. However, this particularity does not prevent it from being useful to specify the various components which, to date, constitute immaterial public order. On the one hand, this makes it possible to provide information on the substance of this notion.

It also provides an understanding of the legal basis. Some of them have moreover been confirmed by the constitutional judge, as is the case, for example, with art. 5 of the Declaration of the rights of man and of the citizen, which served as the basis for the component of *«minimum requirements of life in society»*[23]. Finally, on the basis of the various components enshrined in positive law, it is possible to propose a criterion to guide future enrichments of immaterial public order: any new component must be able to be linked to one or more constitutional principles enshrining objective values. Consequently, although it encompasses fairly heterogeneous elements, such as the dignity of the human person, the minimum requirements of life in society[24], or the prohibition of polygamy and incest[25] (to name but a few), immaterial public order has a homogeneous legal basis: it is constitutionally anchored. As a result, the constituent and the legislator are the authorities naturally competent in its regard. Indeed, are not the constituent and the legislator the only authorities that can be responsible for determining the value system, the axiology, chosen to regulate society? The logic of the notion would tend to answer in the affirmative. However, in order for this notion to be effective and truly functional, it is necessary that the police administrative authority, especially the local one, be able to use it or even contribute to its definition. Consequently, while it is a coherent notion, immaterial public order is not and cannot be an absolute notion, otherwise it would be unusable. The theoretical aspect of immaterial public order (objective character and protection of values) must therefore give way to its practical aspect, in some respects relative.

Using immaterial public order. In spite of the difficulty that has just been noted and which requires a certain adaptation of the concept, its autonomy is confirmed when its legal regime is analyzed. The study of positive law shows that the conditions that the police authority must respect when it uses material public order are not identical to those that must be respected in the case of immaterial public order. The same is true when the police measure is controlled by the judge.

With regard to the administrative police authority, immaterial public order mitigates the scope of a well-known distinction in French administrative law that separates the general administrative police from the special administrative police. Immaterial public order is based on a disorder that cannot be qualified as material and which leads the police authority to take into account not the degree of harm that an activity causes to public order but the nature of that harm. This public order ultimately leads to a relaxation of the conditions for enacting the police measure. For example, since it is a notion designed to protect objective values, immaterial public order does not require the existence of specific local circumstances which would justify police intervention. Such a relaxation confirms that the legal regime applicable to immaterial public order is different from that applicable to material public order.

The control that the judge, administrative as well as constitutional, can exercise over the police measure reinforces this distinction between the two legal regimes and, in fact, the autonomy of immaterial public order. Indeed, whereas in matters of rights and freedoms, judicial review is based on the principles of reconciliation between rights and freedoms and public order, and proportionality of limitation, the presence of immaterial public order in litigation partially neutralizes these principles. Proportionality review is, at best, light or fictitious, at worst, non- existent. While this is logical in view of the substantial function of the notion (to ensure that objective values prevail, including in the face of individual subjective rights and freedoms), it is nonetheless likely to open up a wide field for arbitrary action by the police authority and gives rise to fears that excessive restrictions on individual subjective rights and freedoms may be introduced.

Limiting immaterial public order. A few paths can then be imagined, making it possible to oppose immaterial public order with barriers that are adapted to it. Certain limits to which it would be possible to resort would risk paralyzing the concept, which does not seem appropriate given its functional nature. They must therefore be removed. On the other hand, other avenues could be envisaged which, by merely providing a framework for immaterial public order, would limit the risks of abuses associated with it while allowing its use. One of them consists in focusing on the scope of application of immaterial public order. In this sense, the reactivation of the boundary between public space and private life constitutes an effective limit. It makes it possible to limit the potentially totalitarian

[23]Constitutional Council Decision No. 2010-613 DC of 7 October 2010. Law prohibiting the concealment of the face in the public space.

[24]Ibid.

[25]On this point, see, inter alia: Constitutional Council Decision No. 93-325 DC of 13 August 1993. Act on immigration control and conditions of entry, reception and residence of foreigners in France.

character of immaterial public order, by preventing the administrative police authority from entering the consciousness of individuals, by imposing on them a conduct within the framework of their private life.

On the other hand, and conversely, it is possible to consider the possibility of not limiting the police authority too much. Several factors contribute to the possibility of trusting the wisdom of the various legal actors competent in matters of immaterial public order. On the one hand, until now, these different actors have used this notion very sparingly; in other words, they are self-limiting. On the other hand, when they have recourse to immaterial public order, they use it only as a last resort, when no other tool allows them to legally justify their prohibition. Finally, they mobilize this notion only in respect of a prohibition that is the subject of a consensus. Consequently, just as the existence of material public order has not led to the imposition of a police state that excessively limits individual subjective rights and freedoms, the existence of immaterial public order would not lead to their disappearance in favor of a moral order. This does not, however, prevent us from remaining vigilant with regard to this public order, an autonomous notion in its own right: if it cannot be governed by the legal regime of material public order, it should be subject to a legal regime that is capable of regulating it, without paralyzing it.

Conclusion

In conclusion, it is possible to complete the formalization of immaterial public order by proposing two definitions. In a restrictive sense, it is the *notion that allows individual subjective rights and freedoms to be restricted without any material disorder in order to protect a higher requirement (objective values)*. In a broader sense, immaterial public order is a *notion that rebalances the French legal order by the prevalence and protection of an axiological system composed of objective values that cannot be exclusively regulated by the rules governing the system of individual rights and freedoms.* The formalization of this notion leads in part to raising more questions than it solves; it does, however, contribute to a better knowledge of positive law and more specifically of the notion of public order. Indeed, it enables immaterial public order to be taken out of its condition as an implicit or innominate notion. Moreover, it makes it possible to meet an objective of applied law, since, when formalized, immaterial public order is easier to grasp and use, both by the police authority and by the judge.

The formalization of this notion finally allows us to enrich the doctrinal debate on the question of the emergence of a public order other than a material one. The emergence of such a notion raises fundamental questions, insofar as there are important issues, both ideological and social, in terms of recourse to an immaterial public order. These stakes crystallize around the question: *how far can the state go in limiting rights and freedoms in order to protect society?* Such a question explains why immaterial public order is often apprehended ideologically. Indeed, it gives rise to a number of cleavages. Thus, libertarians, liberals, supporters of the existence of a strong state structure capable of regulating life in society, etc., oppose each other. It is then that, depending on the ideology defended, either the danger that a notion such as public order represents for liberties, or the abuses to which liberties can lead, are brandished with concern. In fact, these are long-standing oppositions, the expression of which is not confined to the law but has a much wider repercussion (philosophical, social, political, etc.), oppositions which are still being revived today in the area of traditional public order with the measures taken in various countries to combat the health crisis linked to COVID-19. Immaterial public order re-actualizes this fundamental debate at the same time as it renews it, by crystallizing ideological cleavages. Indeed, not only does immaterial public order reawaken fears of the domination of the individual by the state; it also reawakens fears of the domination of the individual by a moralizing state, a domination moreover based on elusive notions, *a priori* indeterminate and often rejected by jurists because of the difficulty of the right to seize them. However, this ideological burden which the immaterial public order is carrying does not prevent the choice made in this study to focus exclusively on its legal aspect from being justified. The ambition was not to take a stand for or against an ideology raising the positive or negative character of immaterial public order; it was only to contribute to a better knowledge of positive law and, more specifically, of the evolution of a classic notion of public law. Moreover, the lawyer's primary role is not to pronounce on the appropriateness of recognizing such a notion or to determine the hypotheses in which it should be used; this is a political choice that is the sole responsibility of the political authority. However, the jurist has his or her rightful place in the debate on immaterial public order, and the approach based on the observation of positive law does not prevent him or her from taking a certain height that is conducive to considering the formalization of such a notion. This is what this study wished to do.

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