Faith in public debate: an inquiry into the relationship between freedom of expression and hate speech pertaining to religion and race in France, the Netherlands and European and international law

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Chapter 4 – FRANCE
### ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>AGRIF</td>
<td>L’Alliance Générale contre le Racisme et pour le respect de l’identité Française et chrétienne</td>
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<tr>
<td>Bull</td>
<td>Bulletin of judgments of the French Supreme Court</td>
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<td>Bull Crim</td>
<td>Bulletin of judgments of the criminal chamber of the French Supreme Court</td>
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<tr>
<td>Cons. Con.</td>
<td>Constitutional Council</td>
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<tr>
<td>CA</td>
<td>Court of Appeal</td>
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<tr>
<td>CESDIP</td>
<td>Centre de recherche sociologique sur le droit et les institutions pénales</td>
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<tr>
<td>civ.ch.</td>
<td>Civil chamber</td>
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<tr>
<td>CJFI</td>
<td>Courrier Juridique des Finances et de l’Industrie</td>
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<tr>
<td>CNCDH</td>
<td>Commission nationale consultative des droits de l’homme</td>
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<tr>
<td>CNRS</td>
<td>Centre national de la recherche scientifique</td>
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<tr>
<td>CCE</td>
<td>Communication Commerce électronique</td>
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<td>crim.ch.</td>
<td>Criminal chamber</td>
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<tr>
<td>D</td>
<td>Recueil Dalloz</td>
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<tr>
<td>Dr. pén.</td>
<td>Droit pénal (éditions techniques)</td>
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<tr>
<td>GP</td>
<td>Gazette du Palais</td>
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<td>JCP G</td>
<td>Juris-Classeur périodique, La Semaine Juridique, Édition Générale</td>
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<td>JO</td>
<td>Journal officiel – French law gazette</td>
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<td>JORF</td>
<td>Journal officiel de la République Française – French law gazette</td>
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<tr>
<td>JP</td>
<td>Jurisprudence</td>
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<tr>
<td>LDH</td>
<td>Ligue des Droits de l’Homme</td>
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<td>LICRA</td>
<td>Ligue Internationale Contre le Racisme et l’Antisémitisme</td>
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<td>LPA</td>
<td>Les petites affiches</td>
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<td>MRAP</td>
<td>Mouvement contre le racisme et pour l’amitié entre les peuples</td>
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<tr>
<td>RLDI</td>
<td>Revue Lamy droit de l’immatériel</td>
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<tr>
<td>RSC</td>
<td>Revue de sciences criminelles et de droit pénal comparé</td>
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<td>RTDH</td>
<td>Revue trimestrielle des droits de l’homme</td>
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<td>RUDH</td>
<td>Revue universelle des droits de l’homme</td>
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<tr>
<td>TGI</td>
<td>Tribunal de Grande Instance</td>
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<td>Trib. Corr.</td>
<td>Tribunal correctionnel</td>
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Introduction

This chapter gives an in-depth examination of the relationship between freedom of expression and restrictions to hate speech at national level in France. The chapter provides an analysis of the content and scope of the existing French hate speech bans, their underlying rationales and their relationship with freedom of expression on the basis of their drafting history, their application by the judge, their embedding in French law, and on the basis of primarily French literature. Furthermore, particular attention is paid to the interplay between the different actors in the determination of the restrictions to hate speech: the French legislator, the public prosecution, the judge and the victims of hate speech and anti-racism and other civil society associations. The chapter provides the reference points for the comparison with Dutch law and the approach under the European Convention of Human Rights (ECHR) which is assessed in Chapter 6 – on the basis of the four factors of the analytical framework of Chapter 2, i.e., Actions versus Opinions; Public Debate versus Other Types of Expression; Facts versus Value judgments; and Race versus Religion.

The current chapter has a distinctive structure and is divided into three parts. This three-partition is based on the devise of the French Republic ‘Liberté, Égalité, Fraternité’ (‘Freedom, Equality, Brotherhood’) that inspires French public law682 and is also understood to reflect three pillars of the democratic constitutional state.683 The chosen structure thereby enables the discussion of French law in relation to hate speech against the background of the French conception of democracy. In fact, the French hate speech laws may be regarded as a corollary of the French devise; the French legislator frequently invoked the devise, notably the principle of brotherhood, to justify the adoption of the Pleven Act of 1 July 1972 concerning the fight against racism that created the main French hate speech laws. It was stated: ‘From 1789, France has launched into the world its message of brotherhood (...) Those who raise their voice to insult, defame and humiliate men, women or even children on account of their race or religion risk to strike a mortal blow to the prestige of our country (...) We want a France faithful to its devise of freedom and brotherhood.’684

For a good comprehension of the French law on hate speech, it is thus essential to firstly understand the origin, historical evolution and the legal implications of the French Republican devise. From the beginning of the French Revolution in 1789, the triad Freedom, Equality, Brotherhood played an important

role in the emergence of the French Republic. Although the triad figures amongst numerous invoked slogans, many revolutionists adopted it as a reference to democratic principles and a symbol to advance their Republican ideal. During the course of the nineteenth century the triad, developed from being a ‘principle’ of the Second Republic referred to in the preamble of the Constitution of 1848 to the official devise of the Fourth Republic referred to in the Constitution of 1946. Subsequently, the current Constitution of 1958 – of the current Fifth Republic – proclaims the triad as the Republic’s official devise in Article 2. This suggests that the three terms are consubstantial to the democratic Republic and, taken together, inspire its laws.\footnote{Borgetto 1997, p. 65-66.}

The influence of the thoughts of Jean-Jacques Rousseau on the conceptualization of the Republican devise cannot be neglected. Rousseau attributed no other goal to the legislator than the accession of the two ideas of \textit{freedom} and \textit{equality} into political society. Rousseau established an indissoluble link between \textit{freedom} and \textit{equality} by making freedom the first and fundamental good to conquer and equality the instrument conditional to its existence; in his eyes, freedom can only be acquired and maintained if all associates are equal, because then no one can be submitted by the will of others, nor can anyone submit the will of others to his own.\footnote{Rousseau, J.-J., \textit{Du contrat social} (1762), book II, chap. XI.} In addition, Rousseau at least enables the adjunction of the idea of \textit{brotherhood} with these two terms by attributing an eminent place to the idea of ‘Patrie’ or \textit{Homeland}, the laws of which guarantee the common liberty of citizens who learn to cherish each another as brothers.\footnote{Rousseau, J.-J., \textit{Discours sur l’économie politique} (1755), sec. II. Furthermore, the freemasons are also said to play a role in the development of the devise and the movement of 1789 on account of the new sociability they pursue. In fact, the notion of brotherhood occupies a central place with the freemasons, indicating both their institution or Order (a Brotherhood) and its members (who are all brothers). It is argued that the freemasons have contributed to the introduction of the notion of brotherhood, associated with religious discourse (we are all brothers because we are all children from one God), into the strictly political discourse. See : Borgetto 1997, p. 14-17.} The bond of brotherhood can thus be considered to be a political one founded on belonging to the same political collectivity.\footnote{Borgetto 1997, p. 26.} The Republic then may be designated as the privileged space of freedom, equality and brotherhood in the sense that it \textit{postulates} the first two and \textit{implies} the third.\footnote{Borgetto 1997, p. 20-27.}

The constitutional principles of freedom, equality and brotherhood can thus be considered to be interdependent and interrelated in the sense that one cannot be acquired or maintained without the others. In order for the principles to have legal force, they must, however, be translated into concrete legislation. It is generally accepted that the principles of freedom and equality can each form a direct ground for rights and obligations susceptible of sanction under the law that protects individual and public liberties, respectively assuring equality

\textsuperscript{685} Borgetto 1997, p. 65-66.  
\textsuperscript{686} Rousseau, J.-J., \textit{Du contrat social} (1762), book II, chap. XI.  
\textsuperscript{687} Rousseau, J.-J., \textit{Discours sur l’économie politique} (1755), sec. II. Furthermore, the freemasons are also said to play a role in the development of the devise and the movement of 1789 on account of the new sociability they pursue. In fact, the notion of brotherhood occupies a central place with the freemasons, indicating both their institution or Order (a Brotherhood) and its members (who are all brothers). It is argued that the freemasons have contributed to the introduction of the notion of brotherhood, associated with religious discourse (we are all brothers because we are all children from one God), into the strictly political discourse. See : Borgetto 1997, p. 14-17.  
\textsuperscript{689} Borgetto 1997, p. 20-27.
before the law. Contrarily, it can be argued that ‘brotherhood’ cannot, in itself, be enforced by the law and directly ground certain legal norms to that effect. However, brotherhood can be said to obtain a legal significance in connection with freedom and or equality. It has often been suggested that the term ‘brotherhood’ should be replaced with the term solidarity, because ‘brotherhood’ would have too much of a religious connotation. The French legislator has frequently invoked brotherhood/solidarity as a justification for the adoption of legislation aimed at eliminating inequalities in the social domain.  

As an idea of solidarity, the principle of brotherhood also has a particular vocation in the fight against forms of racism, xenophobia and intolerance. In fact, former republicans understood freedom and brotherhood to consist of an active participation in civil and political rights and collective power rather than a peaceful enjoyment of individual independence. The particular role that the French legislator has afforded to French anti-racism and other civil society associations in the enforcement of the hate speech bans may be placed in this light. Brotherhood in the sense of solidarity can more in general be said to ground the actions of certain French anti-racism associations themselves, such as SOS-Racisme that operates under the slogan ‘touche pas à mon pote’, LICRA, which advanced ‘50 propositions pour une France plus fraternelle’ during the presidential elections in 2012, or MRAP, which stands for ‘Mouvement contre le Racisme et pour l’Amitié entre les Peuples’.

Against this background, Part One on Freedom discusses the central characteristics of the protection of freedom of expression of opinion in French law. Part Two on Equality discusses the hate speech bans as restrictions to freedom of expression of opinion in French law. Part Three on Brotherhood discusses the shared role of the French government, anti-racism, and civil society associations in the enforcement of the hate speech bans in French law. While the first and third part of the chapter forms an introduction, which is respectively complementary to the second part, the latter forms the body of the chapter and consists of several paragraphs. The paragraphs are always completed with a conclusion. This differs from the layout of the chapter as a whole, which does not culminate in a final conclusion. To avoid unnecessary repetitions, chapter 6, the last chapter of this study, provides in a joint further analysis and synthesis of the consistency of restrictions to hate speech in French

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692 http://www.sos-racisme.org/  
693 http://www.licra.org/fr/50-propositions-pour-france-plus-fraternelle . It included several propositions in the field of racism and discrimination, such as the creation of an independent national observatory of hate speech on the Internet with the capacity to act in court.  
694 http://www.mrap.fr/
and Dutch law, followed by a comparison with the approach under the ECHR, on the basis of the four factors of the analytical framework (Chapter 6, para. 1 infra).
I LIBERTÉ: FREE EXPRESSION OF OPINION IN FRENCH LAW

‘Les individus doivent jouir d’une liberté d’opinion soit intérieure, soit manifestée, aussi longtemps que cette liberté ne produit pas des actions nuisibles. Lorsqu’elle en produit, elle se confond avec ses actions et doit être à ce titre réprimée et punie. Mais l’opinion séparée de l’action doit rester libre. La seule fonction de l’autorité est de la renfermer dans son domaine propre, la spéculation et la théorie.’

Benjamin Constant, Principes de politique applicables à tous les gouvernements

1. History and fundamentals: free expression of opinion or abuse by punishable acts

In France, the right to the free expression of an opinion is constitutionally protected (1.1). The restrictions to this right based on the content of expression are determined on the basis of the concept of the ‘délit d’opinion’ (1.2) and are incorporated in a specific law; the 1881 Press Act (1.3). The determination of the restrictions to freedom of expression is to a significant extent influenced by the primacy in French law of the legislator in relation to the judge (1.4) and can be understood in light of the French conception of rights as rights through the state (1.5). These particular characteristics explain the somewhat strenuous relation of the French law with the international law, notably the case law of the European


696 For an English translation see: Constant, B., Principles of politics applicable to all governments, Hofmann, E. (ed.), O’keef, D. (trans.), Book XVII: On the True Principles of Freedom, ch. 1 On the inviolability of the true principles of freedom, Indianapolis, Indiana: Liberty Fund 2003, p. 383, available at: http://files.libertyfund.org/files/861/0452_LFe8k.pdf; ‘Individuals must enjoy complete freedom of opinion either private or public, as long as that freedom does not produce harmful actions. When it does produce such, it becomes identified with them, and under this heading it must be repressed and punished. Opinion separated from action, however, must remain free. The only function [460] of the government is to confine it to its proper domain, speculation and theory.’
Court of Human Rights (ECHR) (1.6). The analysis results in a general conclusion about the free expression of opinion in France law (1.7).

1.1 Constitutional protection of the free expression of an opinion

The French Constitution itself contains no human rights catalogue. In France, human rights do, however, have constitutional value and are protected through the Déclaration des droits de l’homme et du citoyen of 1789 (DDHC); the Constitution’s preamble contains a reference to human rights as enshrined in the Declaration and to the preamble to the Constitution of the Fourth Republic (1946-1958) of 1946 that refers to the human rights and principles as enshrined in the Declaration. The preamble to the Constitution of 1946 further declares that ‘tous être humain, sans distinction de race, de religion, ni de croyance, possède des droits inaliénables et sacrés’. The preamble to the Constitution of 1958 declares that ‘Le peuple français proclame solennellement son attachement aux droits de l’homme et aux principes de la souveraineté nationale tels qu’ils ont été définis par la Déclaration de 1789, confirmée et complétée par le préambule de la Constitution de 1946’. The Constitutional Council has established that the preamble to the Constitution of 1958 has constitutional value and that the Declaration of 1789 forms part of French positive law and the entire body of French constitutional provisions, which are collectively also called ‘le bloc de constitutionnalité’.

Article 1 of the 1789 Declaration declares: ‘Les hommes naissent et demeurent libres et égaux en droits’. Subsequently, Article 4 defines a general principle of liberty that is not absolute, but relative: ‘La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui: ainsi l’exercice des droits naturels de chaque homme n’a de bornes que celles qui assurent aux autres membres de la société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la loi.’ This liberty is thus inspired by the classic maxim ‘one person’s freedom ends where another person’s freedom begins’. Between the dispositions of the Declaration of 1789 and the preambles of the Constitutions of 1946 and 1958 no hierarchy exists: they all have the same constitutional value. When one norm competes with another, a French judge must not introduce a certain hierarchy between the norms, but must instead try to conciliate them. In other words, the liberties are not absolute and can be restricted by law in the interest of the protection of another liberty, i.e., the general interest or the public order. The restrictions imposed by the French

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699 Code constitutionnel commenté 2012, p.11.
700 Code constitutionnel commenté 2012, p.11.
legislator must not result in the complete negation of the liberty in question or
the interdiction of its exercise, which would violate Article 5 of the Declaration
of 1789, which requires that the law can only interdict ‘actions nuisibles’. The
Declaration of 1789 thus holds a concept of limited ‘liberté individuelle’, which
is also denominated as ‘liberté personnelle’. 701

Freedom of opinion is protected in Article 10, which reads : ‘Nul ne doit être
inquiété pour ses opinions, mêmes religieuses, pourvu que leur manifestation ne
trouble pas l’ordre public établi par la loi.’ The article connects the freedom of
opinion with the freedom of conscience, but does not clearly define these
freedoms. Rivero defines freedom of conscience as ‘la possibilité pour l’homme
de choisir ou d’élaborer lui-même les réponses qu’il entend donner à toutes les
questions qui lui pose la conduite de sa vie personnelle et sociale, de conformer
à ces réponses ses attitudes et ses actes et de communiquer aux autres ce qu’il
tient pour vrai.’ 702 Defined as such, freedom of conscience appears to be the sum
of a series of liberties, being freedom of opinion, freedom of religion, freedom of
communication, and freedom of education. 703 Indeed, although freedom of
conscience is essentially linked in the constitutional provisions with religion 704,
the French Constitutional judge has afforded freedom of conscience a much
broader meaning by detaching it from the texts that afford rights and liberties
without distinction on the ground of religion and declaring it to be a
fundamental principle recognized by the laws of the French Republic. 705

Freedom of opinion, as defined by Rivero, signifis ‘la possibilité
donnée à chaque homme de déterminer par lui-même ce qu’il croit vrai dans
quelques domaines que ce soit.’ 706 Freedom of opinion and freedom of
conscience as protected in Article 10 are essentially internal, but form an
indispensable condition to all expression of thoughts and opinions. Article 10
must be understood to recall that the opinion and conscience of an individual
cannot be used against him as long as he exercises his freedom in respect of
public order. 707

701 Code constitutionnel commenté 2012, p.11.
France 2003, p.126.
703 Rivero 2003, p.127.
704 Such as in paragraph 5 of the preamble to the Constitution of 1946 that declares that
no person can be violated in his a work or job on the ground of his opinions or beliefs
and; in paragraph 16 of the preamble to the Constitution of 1946 that envisions France
and the French overseas departments as a union based on equal rights and duties
without distinction on the ground of religion; and in Article 1 of the Constitution of 1958
that assures the equality of all citizens before the law without distinction on the ground
of religion and the respect by the State of all beliefs.
706 Rivero 2003, p.129.
Freedom of opinion and conscience can be combined with the ‘laïque’ character of the French Republic, the neutrality of the State towards religion. The parliamentary debates about the 1789 Declaration essentially concerned religious questions. Had the Declaration been placed under the invocation of God or the Supreme legislator of the Universe? Finally, in the Declaration reference was made to the Supreme Being, an expression that would not shock persons who did not adhere to any religion. More importantly, the Declaration did not recognize Catholicism as the official religion of the State. These parliamentary debates are reflected in the redaction of Article 10, the aim of which appears to be to limit the religious question to opinions ‘mêmes religieuses’. Hence, the manifestation of religious opinions falls under the freedom of opinion that protects religious and non-religious opinions on equal footing. Although the freedom of conscience forms an aspect of freedom of religion, the Declaration of 1789 thus does not protect this latter freedom in a separate article. In French law, the ‘libertés des cultes’, being the freedom to practice a religion individually and collectively, is essentially regulated in the Act of 1905 (para.2.5 infra).

Freedom of opinion and conscience in Article 10 are intrinsically linked to the following article; Article 11 protects the free communication of thoughts and opinions and reads: ‘La libre communication des pensées et des opinions est un des droits les plus précieux de l’homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l’abus de cette liberté dans les cas déterminés par la loi’ [curs. EHJ]. Read together, Articles 10 and 11 protect the manifestation and communication of all kinds of opinions – philosophical, ideological, religious and non-religious – on equal footing.

Thus, French law does not refer to the freedom of expression, but to the freedom of communication. Nevertheless, the Article subsequently only cites acts of expression and not activities to receive such acts. While in 1789 communication meant to speak, write and print, the scope of Article 11 has nowadays been extended to all modern forms of communication, comprising audiovisual and electronic communication, as well as the press. On several occasions the Constitutional Council has defined the purport of the freedom, being a fundamental freedom: ‘d’autant plus précieuse que son exercice est une condition de la démocratie et l’une des garanties essentielles du respect des autres droits et libertés’. With regard to all forms of communication, the French Constitutional Council considers the principle of pluralism to be a common, indispensable element in order to effectively exercise this freedom. In order to assure the free choice of the receiver of communication in receiving trends in thoughts and opinions, the State must respect, next to pluralism of communication organs (journals or channels), the existence of different

contents.\textsuperscript{710} These objects of constitutional value are protected in Article 34 of the Constitution of 1958 that regulates ‘la liberté, le pluralisme et l’indépendance des médias’ and Article 4, which guarantees pluralist expression of political opinion and equitable participation of political parties at the democratic life of the French nation.

The French vision on free expression of opinion has a long tradition, which originates in articles 10 and 11 of the 1789 Declaration. The French legislator has protected the freedom of opinion in a negative form by the suppression in criminal law of all ‘délits d’opinion’. In the vision of the French legislator, the public manifestation of an opinion alone cannot be criminally repressed and considered as an offence. The criminalization of an opinion as such would constitute a ‘délit d’opinion’. For this reason, in the vision of the French legislator, present French criminal law does not comprise any ‘délits d’opinion’. Nevertheless, what do exist in present French law are offences penalizing the abuses of the freedom to manifest and communicate an opinion.\textsuperscript{711} The Constitutional Council has indicated that two objectives of constitutional value must be conciliated with the freedom of communication: on the one hand the protection of the rights of others, and on the other hand the public order.\textsuperscript{712}

In 1994, the Constitutional Council elevated the respect of human dignity to a principle of constitutional value (para.9.4 infra).\textsuperscript{713} When determining the abuses of the free expression of an opinion, the French legislator can be inspired by the desire to protect either the rights of others, human dignity or the public order.

With regard to freedom of expression, the Constitutional Council has more so generally considered that ‘les atteintes portées à l’exercice de cette liberté doivent être nécessaires, adaptées et proportionnées à l’objectif poursuivi’,\textsuperscript{714} a consideration that suggests a certain influence of the European law.\textsuperscript{715} However, confronted with a question about the constitutionality of a particular speech offence, neither the Constitutional Council nor the French Supreme Court have applied this proportionality test, but have instead reviewed whether the offence complied with the principle of criminal legality or of the

\textsuperscript{711} Vgl. Rivero 2003, p.130.
\textsuperscript{713} Cons. Con. 27 July 1994, n°94-343/344 DC.
\textsuperscript{714} Cons. Con. 20 May 2011, n°2011-131 QPC ; Cons. Con. 28 February 2012, n°2012-647 DC.
normativity of the law.\footnote{De Lamy, B., La Constitution et la liberté de la presse, Les Nouveaux Cahiers du Conseil Constitutionnel, Dossier La liberté d’expression et de communication, Dalloz n°36-2012, p. 19-29; Carcassonne, G., Les interdits et la liberté d’expression, Ibid., p. 55-65.} This will be discussed later in this chapter (Part II, para. 9.4 and 9.7 infra).

1.2 The concept of the ‘délit d’opinion’

1.2.1 Definition of a ‘délit d’opinion’ in French legal doctrine

In French legal doctrine no coherent and unambiguous definition of a ‘délit d’opinion’ exists. French legal scholars firstly disagree on the question as to what constitutes a ‘délit d’opinion’, subsequently, on the question as to whether French law contains or has in the past contained ‘délits d’opinion’, and finally, on the question as to which existing press offences must be suppressed and which should not.

Hauriou distinguishes a general ‘délit d’opinion’ that is inadmissible in light of the principle of freedom from more specific offences, which are sufficiently described and circumscribed by law and are perfectly admissible.\footnote{Hauriou, M., Précis de droit constitutionnel, Paris: Sirey 1929, p.662.} A justification for such ‘délits d’opinion’ can be found in the possibility, from a philosophical and moral perspective, to distinguish between good and evil. However, as positive law is unable to precisely define such offences, an absolute freedom of opinion is preferable in the hope that the press is capable of moralizing itself.

For Fauvel, it is equally its imprecision that discerns a ‘délit d’opinion’ from a press offence.\footnote{Fauvel, L., Le délit de tendance et le délit d’opinion dans les lois sur la presse, (diss.) Paris: Librairie nouvelle de droit et de jurisprudence 1912, p.29.} The ordinary press offences are those offences that amount to the impairment of a right. They leave no room for any arbitrary interpretation. Contrarily, the former ‘délit de tendance’ and ‘délit d’opinion’ that existed in former French law do not criminalize a precise harmful act committed through the press, but a series of articles or an article that contains an attack of established institutions without impairing any particular right, any determined interest. They thus leave more room for arbitrary criminalization.

From 1810 onwards, Benjamin Constant enounced the principle, according to which: ‘Les individus doivent jouir d’une liberté d’opinion soit intérieure, soit manifestée, aussi longtemps que cette liberté ne produit pas des actions nuisibles. Lorsqu’elle en produit, elle se confond avec ses actions et doit être à ce titre réprimée et punie. Mais l’opinion séparée de l’action doit rester
libre. La seule fonction de l’autorité est de la renfermer dans son domaine propre, la spéculation et la théorie.\(^{719}\)

Rolland provides a definition of a ‘délit d’opinion’ that closely resembles the principle of Constant and the vision of the French legislator of 1881 (para.1.3.2 infra): ‘interdire l’expression d’une opinion sans autre circonstance que le fait d’être jugée mauvaise par les pouvoirs publics ou le juge’.\(^{720}\) He strictly excludes from the definition the opinion considered as dangerous. As a democracy is constituted by the free expression of opinion, to interfere with an opinion that is either good or bad, is to interfere with the fundament of democracy itself. In order to protect it, without violating the freedom of opinion, a precise and fine distinction must be made between actions and opinions. The key question thus becomes: what is the nature of the link between the expression of an idea and a following reprehensible act?\(^{721}\)

Droin derives three characteristics of the ‘délit d’opinion’ from the discussion in French legal doctrine.\(^{722}\) Firstly, contrary to the press offences, the ‘délit d’opinion’ does not form the object of a precise qualification by the French legislator. Secondly, it does not determine the specific right or interest with which it interferes: it criminalizes a simple opinion, and not the support of a criminal or punishable act. Thirdly, its arbitrary prosecution and sanction constitutes a danger to the free expression of an opinion.

1.2.2 Le délit d’outrage à la morale publique et religieuse

An example ‘par excellence’ of an offence that is generally regarded as a délit d’opinion in French legal doctrine forms the former ‘délit d’outrage à la morale publique et religieuse’, created by the Act of 17 May 1819 and abolished by the 1881 Press Act (para.1.3.2 infra), which marked the end of the criminalization of religious offences in France.

From early on, next to canon law, ancient French law had sanctioned the offence of blasphemy, which was often punished with the death penalty. Pursuant to a declaration of 16 April 1757, authors and editors who were responsible for a publication that was aimed at attacking a religion were decapitated.\(^{723}\) During the Ancien Régime (15th-18th Century), next to the offence of blasphemy, the offence of sacrilege was created in case law that aimed to sanction writings that attacked and therefore constituted a danger to the public

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\(^{723}\) Droin 2009, p.431.
religious order. The philosophers of the Enlightenment denounced the public religious morality of the eighteenth century and the sanctioning of blasphemy in civil laws. During the French Revolution, in 1791, the offences of blasphemy and sacrilege were abolished. It was during the Restoration, in 1825, that Charles X and the ‘ultra-royalistes’ reintroduced a certain form of blasphemy into civil law. The Act of 20 April 1825 sanctioned the sacrilege with the death penalty. The Act was, however, not applied and was abolished during the July Revolution, on 11 October 1830.

In 1819, le Comte de Serre, Minister of Justice at the time, deposed a draft Act concerning the repression of offences committed through the press, comprising of its Article 8 ‘tout outrage à la morale publique ou aux bonnes mœurs par l’un des moyens énoncés en l’article 1er, sera puni d’un emprisonnement d’un mois à un an et d’une amende de 16 francs à 500 francs’. With this offence, De Serre aimed to re-establish moral principles. In order to protect religion against the excesses of freedom of expression, an amendment added to the words ‘morale publique’ the words ‘et religieuse’. In its final version, the adopted article 8 thus sanctioned the ‘outrage à la morale publique’, the ‘outrage à la morale religieuse’, and also the ‘outrage aux bonnes mœurs’, which was already provided for in the Penal Code of 1810.

The Act of 25 May 1822 extended this offence to the ‘outrage à la religion’. Article 1 read ‘quiconque par l’un des moyens énoncés en l’article 1er de la loi du 17 mai 1819 aura outragé ou tourné en dérision la religion de l’Etat, sera puni d’un emprisonnement de 3 à 5 ans et d’une amende de 300 à 6000 francs’. The same sanctions applied in relation to other religions that were officially recognized in France. Compared to article 8 of the Act of 1819, the penalties of this article 1 were much more severe.

The Acts of 1819 and 1822 thus strongly reinforced the legislation protecting religious convictions. Due to their redaction, the scope of the two offences was particularly broad, as per the intention of the legislator. Obscene publications, publications that contested certain truths as established by the religions recognized by the State, and public manifestations of atheism were all condemned on the grounds of the articles.

Under the Second Republic (1848-1852) and the Second French Empire (1852-1870), the offence of ‘outrage à la morale publique et religieuse’ was excessively applied. It formed the ground for many prosecutions of authors

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724 Ibid.
726 Droin 2009, p.432.
727 Parliamentary archives, XXIII, assembly of 17 April 1819, House of Representatives, p.668; p.676.
728 Generally see: Gaultier, J., Un délit d’opinion: le délit d’outrage à la morale publique et religieuse, 1819-1881, (diss.) Caen, 1924.
729 Ibid.
whose literary works form part of the literary movement of Realism that shocked the existing morals. Flaubert was prosecuted on the ground of article 8 of the Act of 1819 for his novel Madame Bovary. The novel tells the story of Madame Bovary, the wife of a doctor in the French countryside, who dreams of a life in the city, seeks refuge in the reading of romantic novels to escape from boredom and commits adultery. On 7 February 1857, the criminal tribunal of the Seine acquitted Flaubert. According to the tribunal, the prosecuted passages were in bad taste, but it nevertheless concerned a serious novel that did not aim to incite to debauchery.  

In the same year, Baudelaire, who formed part of the literary movement of Symbolism, was also prosecuted on the ground of article 8 of the Act of 1819 for his volume of poetry Les Fleurs du Mal. The themes of these poems related to decadence and eroticism. In contrast to Flaubert’s acquittal, Baudelaire was condemned. However, in its decision of 20 August 1857, the criminal tribunal of the Seine distinguished between the ‘outrage à la morale publique’ and the ‘outrage à la morale religieuse’. While the latter offence was not established, the judge considered that the poems necessarily incited the senses through their gross realism that offended the chastity and therefore constituted an ‘atteinte à la morale publique et aux bonne mœurs’. Subsequently, for many years, this important classic volume of poems in French literature could not be published, until the French Supreme Court, in a decision of 31 May 1949, revised the condemnation and rehabilitated Les Fleurs du Mal. The ‘outrage à la morale religieuse’ was particularly enforced. In 1858, Proudhon was prosecuted for his work De la Justice dans la Révolution et dans l’Eglise. In this work, he declared God useless and qualified religion as an immoral mission. On 2 June 1858, the criminal tribunal of the Seine condemned Proudhon to an imprisonment of three years on the ground that his expressions offended in the most hurtful manner the religious convictions for which the law commanded respect. The suspects prosecuted on the ground of article 8 of the Act of 1819 varied from pamphleteers, to priests and magistrates. Due to the many condemnations, the suppression of article 8 of the Act of 1819 had been requested within the legislative bodies during the end of the Second Empire and the beginning of the Third Republic (1870-1940). However, one had to wait for the new Press Act of 1881 in order for the article to be truly suppressed.

730 Tribunal corr. de la Seine, 7 February 1857, La Gazette des tribunaux, 9 February 1857.
731 Tribunal corr. de la Seine, 20 August 1857, La Gazette des tribunaux, 21 August 1857.
733 Droin 2009, p.435.
734 Tribunal corr. de la Seine, 2 June 1858, La Gazette des tribunaux, 5 June 1858.
735 Droin 2009, p.435.
The 1881 Press Act (para.1.3 *infra*) abandoned all offences of religion. Reporter of the draft in the House of Representatives, Eugène Lisbonne, affirmed that the ‘outrage à la morale publique et religieuse’ could no longer be preserved: ‘Défis d’opinion s’il en fut, délits insaisissables au point de vue de l’intention, délits stériles au point de vue l’effet qu’ils peuvent produire’. As the offence had been principally applied to sanction those who had offended God himself, Lisbonne considered ‘c’est une étrange manie que celle des hommes qui prétendent se constituer les vengeurs de la divinité. Les anciens qui n’avaient pas le Bonheur de connaître le vrai dieu, avaient dans leur philosophie mondaine une maxime plus large […] il faut laisser aux dieux le soin de se venger eux-mêmes’. While the House of Representatives accepted the suppression of the offence, in the Senate a reintroduction of the ‘outrage à la morale religieuse’ was proposed. This amendment was considered to revive the ‘délit d’opinion’ and for this reason was finally rejected by the Senate. And so, the ‘délit d’outrage à la morale publique et religieuse’ was suppressed from French law. What remained was the existence of ‘le délit d’outrage aux bonnes mœurs’ in the French Penal Code of 1810. Due to the press freedom afforded by the new 1881 Press Act, during the Third Republic (1870-1940), much anticlerical and anti-religious expression in the form of violent cartoons was published in anticlerical magazines such as *La Calotte, L’Assiette au beurre, Les Corbeaux*.

1.3 The 1881 Press Act

1.3.1 The liberal aim of the 1881 Press Act

The freedom of expression and communication of thoughts and opinions constitutionally protected in Articles 10 and 11 DDHC are further regulated in the French Press Act of 29 July 1881 that broadly regulates the freedom of the press. In France, the history of the regulation of freedom of opinion is intrinsically connected with the history of the regulation of freedom of the press. The fight for freedom of the press by the Liberals in the Eighteenth century was directed against the political power; against the strict regulation of the occupations of the printing press and bookshops, and especially against the royal censorship exercised on literary or scientific works, which was accompanied with severe criminal sanctions. Between 1789 and 1881, with the

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737 *Ibid*.
738 JO, Parliamentary debates, 12 July 1881, the Senate, p.1008; p.1106.
739 Boulegue 2010, pp.18-19.
741 Rivero 2003, p.171.
succession of different regimes, a strict authority with regard to the press was sometimes alternated by relative liberalism and a liberal conception of the regulation of the press evolved. The legislator of the Third Republic (1870-1940) desired a complete reform of all articles that regulated the press and were spread out over more than twenty different texts. A special commission designed a draft of a complete new Press Act that was proposed to the parliament by Member of Parliament Eugène Lisbonne on 5 July 1880. The central idea of the Press Act was to form a privileged legal regime favourable to the Press.

Firstly, the aim of the Press Act was to repress every preventive regime and to provide for freedom of the occupations of the printing press and bookshops, which entailed the suppression of censorship, the requirements of preliminary authorization and deposit. Article 1 therefore declares ‘l'imprimerie et la librairie sont libres’. Article 5 further specifies: ‘Tout journal ou écrit périodique peut être publié, sans autorization préalable et sans dépôt de cautionnement, après la déclaration prescrite par l'article 7.' The Act comprises further norms concerning ‘l'imprimerie et la librairie’; ‘la presse périodique’ and ‘l'affichage’.

Secondly, the aim of the Press Act was to suppress all ‘délits d’opinion’ and to incorporate into the act only the abuses of the manifestation of an opinion on strictly circumscribed terms in specific press offences. The Press Act lists all press offences in Chapter IV concerning ‘crimes et délits commis par la voie de la de presse ou par tout autre moyen de publication’.

Thirdly, the aim of the Press Act was to precisely determine the persons criminally responsible for the violation of the press offences. The Act (article 42 et seq.) distinguishes between the responsibility of the primary author and the responsibility of an accomplice. As primary author, the ‘directeur de publication’ or ‘éditeur’ (chief editor or editor) is responsible. In his absence, the ‘auteur’ (author of the publication) is prosecuted as a primary author. If the latter two escape from prosecution, the ‘imprimeur’ (printer) is principally responsible, and in last instance, the ‘vendeur’, ‘distributeur’ and ‘afficheur’ (salesman, distributor and displayer) is held to be responsible. This system is called the ‘responsabilité en cascade’. When the ‘directeur de publication’ is prosecuted, the author and salesman or distributor can be prosecuted as an accomplice, while the printer cannot. A safe harbour has been created in 2009 for the ‘directeur de publication’ for User Created Content (UCC) published online.742

Fourthly, the aim of the Press Act was to create a specific regime for the prosecution and repression of the press offences, comprising of strict procedural rules that derogated from the French code of criminal procedure. The prosecuting party must comply with these strict procedural rules, often under

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penalty of nullity. Examples of this can be found in Articles 65, 53 and 50 of the Press Act. The prescriptive period of three months in accordance with Article 65 has always been considered as one of the essential elements of the regulation of freedom of expression. Pursuant to Article 65, formal charges against an offender of the provisions of the 1881 Press Act have to be pursued within 3 months (as opposed to 3 years for ordinary crimes), under penalty of nullity. However, the prescriptive period applicable to the criminal prosecution for press offences related to racism (24-8; 24bis; 32-2; 33-3) has been extended to one year pursuant to Article 65-3. The Constitutional Council has ruled that Article 65-3 is in conformity with the Constitution, because the difference of treatment that results from it depending on the nature of the offence is not disproportionate in relation to the pursued objective.743 However, since 2011, a legislative proposal is being prepared to align the prescriptive period of the offences of defamation, insult and provocation on the grounds of sex, sexual orientation or handicap with that of the offences of defamation, insult and provocation based on race etc.744

Article 53 requires that the content of the summonses uses the correct legal definition of the acts, that is, the exact qualification of the criminal act and the applicable article, under penalty of nullity. If the indictment is incorrect, the prosecution is invalid and the court cannot find the existence of a different offence, as it may in ordinary criminal cases. As a consequence, the prosecuting party must make a clear choice as to the ground of the prosecution. Article 50 requires that if the public prosecution makes a request for information, it must use in its requestor the correct legal definition of the acts, that is, the exact qualification of the criminal act and the applicable article, under penalty of nullity.

1.3.2 The press offences of the 1881 Press Act

The offences that existed before the adoption of the 1881 Press Act and that of the legislator of 1881 considered as ‘délits d’opinion’ comprised amongst others ‘l’outrage aux religions reconnues par l’État’, ‘le délit d’attaque contre la liberté des cultes’ and ‘le délit à troubler la paix publique en excitant le mépris ou la haine des citoyens les uns contre les autres’.743 The parliamentary debates about

744 Proposition de loi n°3794, relative à la suppression de la discrimination dans les délais de prescription prévus par la loi sur la liberté de la presse du 29 juillet 1881, déposé le 5 Décembre 2011. For the status of the legislative procedure see: http://www.senat.fr/dossier-legislatif/pp11-122.html#block-timeline. See also Proposition de loi n°265, visant à porter de trois mois à un an le délai de prescription des propos injurieux ou diffamatoires à caractère homophobe, transphobe, sxsiste ou à raison du handicap, déposé le 16 Janvier 2013 au Sénat.
745 The complete list, as cited in Droin 2009, pp.11-12, is: ‘l’outrage aux religions reconnues par l’État; le délit d’attaque contre la liberté des cultes; le délit d’attaque à la
the adoption of the 1881 Press Act formed a fundamental discussion about the distinction between the new press offences and offences penalizing an opinion.\footnote{For a thorough analysis see: Droin 2009, p.19 et seq. More generally see: Blin, H.; Chavanne, A.; Drago, R., \textit{Traité du droit de la presse}, Paris: Librairies techniques 1969.} The drafters of the Act held that the press offences in reality constituted punishable acts. Lisbonne, reporter of the draft, considered ‘la nouvelle loi […] supprime tous les délits d’opinion, tous les délits de doctrine, tous les délits de tendance. Elle ne retient que ce qui constitue des actes criminels ou délictueux, des actes portant atteinte à la sécurité publique ou à la liberté d’autrui’\footnote{Parliamentary debates, \textit{JO} 25 January 1881, French national assembly, p.34.} and ‘La répression […] ne s’attache qu’aux actes que le rédacteur de l’exposé des motifs de la loi du 17 mai 1819 considérait comme des délits de droit commun. Ce sont les actes inspirés par l’intention de troubler l’ordre social, c’est à dire de nuire à la sécurité de la collectivité des citoyens, de porter atteinte à l’intérêt privé, actes que le droit commun incrimine, abstraction faite des moyens à l’aide desquels leur auteur a pu les accomplir. Le projet laisse par conséquent libre carrière aux opinions. Il ne donne asile, dans ses dispositions nouvelles, à aucun délit de doctrine, de tendance, à aucun délit purement politique…’\footnote{Report of Eugène Lisbonne of 5 July 1880, \textit{JO} 18 July 1880, French national assembly, annex n°2865.} In the vision of the French legislator, the Press Act thus criminalizes acts and not opinions. The justification of the creation of the press offences formed the link between the expression of an idea and the reprehensible act.

Chapter IV of the Press Act, which concerns ‘felonies and misdemeanours committed through the press or any other means of publication’, is subdivided into five paragraphs, penalizing the ‘provocation to felonies and misdemeanours’; ‘misdemeanours against the public cause’; ‘misdemeanours against persons’; ‘misdemeanours against the Head of State and foreign diplomatic agents’; and ‘prohibited publications and immunities of defence’. In these five paragraphs in Chapter IV, the Press Act cites general press offences that can be aggravated by particular grounds, when so stipulated in the sub-paragraphs of the relevant article. A determinant criterion of all press offences is the publicity of the expression. According to the famous maxim of

\begin{quote}
Constitution, au principe de la souveraineté du peuple et du suffrage universel; le délit d’excitation à la haine et au mépris du gouvernement; le délit à troubler la paix publique en excitant le mépris ou la haine des citoyens les uns contre les autres; le délit d’attaque contre le respect dû aux lois et à l’inviolabilité des droits qu’elles ont consacrées; le délit d’apologie de faits qualiﬁés de crimes ou de délits par la loi; le délit d’enlèvement ou de dégradation des signes publics de l’autorité opéré en haine ou au mépris de cette autorité; le délit d’exposition, dans les lieux ou réunions publics, de distribution ou de mise en vente de tous signes ou symboles propres à propager l’esprit de rébellion ou à troubler la paix publique; le délit de port public de tous les signes extérieurs de ralliement non autorisés par la loi ou par des règlements de police’.\footnote{\textit{Traité du droit de la presse}, Paris: Librairies techniques 1969.}
\end{quote}
Barbier, ‘C’est la publication qui fait l’acte’. Subsequently, Article 23 describes the means of publication by which the press offences can be committed, being ‘des discours, cris ou menaces proférés dans des lieux ou réunions publics, soit par des écrits, imprimés, dessins, gravures, peintures, emblèmes, images ou tout autre support de l’écrit, de la parole ou de l’image vendus ou distribués, mis en vente ou exposés dans des lieux ou réunions publics, soit par des placards ou des affiches exposés au regard du public, soit par tout moyen de communication au public par voie électronique’. In fact, the press offences of the 1881 Press Act constitute all public speech offences in French law, either committed in the printed press, the audiovisual media or on the Internet. In this study, I will, however, use the terminology of the French legislator and speak of press offences, not public speech offences.

The basic liberal principle of the Press Act of 29 July 1881, according to which an opinion is only punishable on the ground of its link with a following reprehensible act, brought the French legislator of 1881 to include in the paragraph concerning ‘provocations’ only direct provocations to felonies and misdemeanors. It was this link that also formed an argument to preserve many existing speech offences, such as the ‘provocations non suivi d’effet’ or the ‘cris et chants seditieux proférés dans des lieux ou réunion publics’, while the opposition in parliament argued that this constituted offences that criminalized an opinion. Over time, the French legislator has introduced many new prohibitions of the manifestation of an opinion, both within and outside of the framework of the 1881 Press Act. Since 1881, the Press Act has thus been modified and supplemented by many new press offences or new sub-paragraphs. The French legislator has introduced into the paragraph concerning ‘provocations’ the ‘apologies of felonies and misdemeanors’, as indirect forms of provocations. The Act of 1 July 1972 created the offences of racial defamation; racial insult and racial provocation; the Act of 13 July 1990 created the offence of Holocaust denial; the Act of 30 December 2004 enlarged the scope of the offences of group defamation, insult and provocation to the discriminatory grounds of sex, sexual preference and handicap. These press offences have not, during their drafting, been submitted to the Constitutional Council for a constitutional review except for the draft act that sought to create the offence of the denial of genocides (para.9.7 infra).

Despite the basic liberal principle of the 1881 Press Act, its contemporary evolution incontestably tends towards an increasing restriction of

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750 Parliamentary debates, JO 1 February 1881, French national assembly, p. 98;
freedom of expression. The requirement of a link between the expression of an idea and the reprehensible act as a justification for the creation of a press offence seems to be diluted; could it be either replaced or supplemented by other rationales? Mathieu and De Bellescize point out that since the Third Republic (1870-1940) and the creation of the 1881 Press Act, the limitations to freedom of expression have been aimed at the protection of the public interest through the protection of the regime and the authorities, but that they have been followed by limitations that aim to protect individuals considered in their differences and singularities and even limitations stemming from an ideology or Communautarism.\textsuperscript{752} De Bellescize concludes that the definition of a ‘délit d’opinion’ has evolved over time.\textsuperscript{753}

1.3.3 The primacy of the 1881 Press Act

The relationship between French press law and civil responsibility remains ambiguous.\textsuperscript{754} For a long period, the French case law has resisted the tendency of the intrusion of the civil responsibility of the wrongful act – of Article 1382 of the Civil Code\textsuperscript{755} – in the field of press law. Whenever a wrongful act disguised an offence provided and repressed by the 1881 Press Act, such as defamation or insult, the tribunals requalified the prosecuted facts and applied the short prescriptive period of Article 65 (para.1.3.1 supra). The introduction of Article 1382 CC was not intended to permit the circumvention of this procedural rule of the 1881 Press Act. Contrarily, Article 1382 CC could be applied outside this closed legal world. Multiple wrongful acts have thus been developed parallel to the 1881 Press Act in order to limit the violation of concurring interests suffered as a result of the exercise of freedom of expression, such as the infringement of religious beliefs (para.5.4.1 infra).\textsuperscript{756} As the boundary between the press offences and the principle of civil responsibility was increasingly blurred, the French Supreme Court has specified the criteria for application of 1382 CC in press law cases.

In its four famous decisions of 12 July 2000, the plenary assembly of the French Supreme Court considered that ‘les abus de liberté d’expression prévus et réprimés par la loi du 29 juillet 1881 ne peuvent être réparés sur le fondement

\textsuperscript{752} Ibid.
\textsuperscript{755} Article 1382 CC provides that ‘Tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer’.
de l’article 1382 du Code civil.’ [curs. EHJ] 757 As a result of this judgment, Article 1382 CC can be applied in the event that an expression cannot be qualified as a violation of the 1881 Press Act. A second step can be seen in a decision of 29 March 2001, in which the French Supreme Court further specified that ‘les abus de la liberté d’expression prévus et réprimés par la loi du 29 juillet 1881 ne peuvent être poursuivis sur le fondement de l’article 1382 du Code Civil’ [curs. EHJ]. 758 Here, the Court does not only refuse to repair any action instituted on the grounds of one of the press offences in accordance with article 1382 CC, but actually prohibits the institution of a proceeding on the ground of article 1382 CC, if the conduct can be qualified as a violation of the Press Act. In a decision of 25 September 2005, the French Supreme Court went even further and considered with regard to 1382 CC: ‘les abus de la liberté d’expression envers les personnes ne peuvent être poursuivis sur le fondement de ce texte.’ 759 Here, the French Supreme Court completely excludes the application of Article 1382 CC to any abuse of freedom of expression. Only precisely contoured penal or civil provisions could limit freedom of expression.

After this latter radical and criticized solution, the French Supreme Court has applied more moderate formula. In a decision of 29 November 2005, the Court considered ‘les abus de la liberté d’expression prévus et réprimés par la loi du 29 juillet 1881, tels que l’injure, ne peuvent être réparés sur le fondement de l’article 1382 du Code civil’ [curs. EHJ]. 760 Contrarily, in a decision of 6 October 2011, the French Supreme Court adopted its most radical solution and considered ‘les abus de la liberté d’expression ne peuvent être réprimés que par la loi du 29 juillet 1881.’ 761 The Supreme Court no longer affirms the prevalence of the 1881 Press Act where there is a concurrence of qualifications, but seemingly consecrates an absolute monopoly of the 1881 Press Act to sanction the abuses of freedom of expression. It remains unclear as to whether and if so

to what extent the French Supreme Court has aimed to leave any residual domain to Article 1382 CC.\textsuperscript{762} In a decision of 10 April 2013, the French Supreme Court even found a civil condemnation on the basis of Article 1382 CC with regard to certain publications on the Internet that violate Article 10 of the European Convention of Human Rights, because even though they were lies they did not fall under any specific restriction determined by the law.\textsuperscript{763} The Supreme Court, therefore, apparently considers Article 1382 CC to be neither a restriction to freedom of expression as prescribed by law or necessary for the protection of the reputation or rights of others in accordance with article 10(2) ECHR. Contrarily, the ECHR has itself on several occasions decided that the identical equivalents of Article 1382 CC in Belgium and Luxembourg complied with the requirements of foreseeability pursuant to Article 10 (2) ECHR.\textsuperscript{764}

Despite these ambiguities, settled case law of the French Supreme Court has shown that in French press law, criminal and civil law is unified to a high extent.\textsuperscript{765} Originally, the 1881 Press Act has in essence been an act of penal nature, but it has developed into a hybrid act that also applies in civil cases. In a number of judgments, the French Supreme Court gradually established that in press law cases the norms of the 1881 Press Act take priority over the general norms in civil law. Civil proceedings concerning expression that can be qualified as one of the offences of the 1881 Press Act cannot be based on Article 1382 CC, which prohibits wrongful acts or Article 809 Code of Civil Procedure\textsuperscript{766}, but must be based on the press offences of the 1881 Press Act. The articles do not thus form a guideline in civil proceedings based on Article 1382 CC, but form independent legal grounds. The strict procedural rules of the 1881 Press Act equally apply in civil proceedings. For example, the French Supreme Court has ruled that Article 53 of the Press Act must also be applied in civil cases\textsuperscript{767} and the Constitutional Council has decided that this does not violate the right to an

\textsuperscript{762} Lécuyer, G., Responsabilité civile et droit de la presse: le tumulte permanent, annotation at: French Supreme Court, civ.ch. I, 6 October 2011, n°10-18142, Bull. 2011 I, Légipresse n°290, January 2012, p.33 et seq.


\textsuperscript{764} ECtHR 29 March 2001, n°38432/97, Thoma v. Luxembourg; ECtHR 24 February 1997, n°19983/92, De Haes and Gijssels v. Belgium.

\textsuperscript{765} See further: Dreyer, E., Responsabilités civile et pénale des médias, 3\textsuperscript{rd} edition, Paris: LexisNexis 2011, p. 3-24.

\textsuperscript{766} Article 809 CCP affords the summary judge a special competence, according to which ‘Le président peut toujours, même en présence d’une contestation sérieuse, prescrire en référé les mesures conservatoires ou de remise en état qui s’imposent, soit pour prévenir un dommage imminent, soit pour faire cesser un trouble manifestement illicite’.

\textsuperscript{767} French Supreme Court, Plenary Assembly, 15 February 2013, n° 11-14637, Légipresse n° 303 March 2013, p. 152-164, annotation P. Guerder.
effective judicial remedy. The primacy of the 1881 Press Act guarantees that the specific solutions adopted in the Act in order to protect freedom of expression have a comprehensive effect.

1.4 Relation between the legislator and the judge

The previously discussed central characteristics of freedom of expression of opinion in French law can be understood in light of the general principles anchored in the constitutional texts that express the objective of the law to protect the rights of citizens and the democratic principle on which in fine the French constitutional order is founded; the normativity of the law and the separation of powers.

Article 16 DDHC affirms that the rights of citizens are guaranteed by the French State. From this article, the principle of legal certainty is created, in accordance with which the law must be sufficiently clear and accessible for citizens to whom it is addressed. Rights are not assured if legal norms are imprecise or ambiguous, as in the case of the délit d’opinion. A law that edicts an uncertain rule is not only susceptible of unequal application, but also breaches individual freedom by not precisely determining the restrictions that can be posed to this freedom. Hence, legal certainty thus guarantees the exercise of fundamental rights, in casu freedom of expression of opinion.

This is equally true of the principle of the normativity of the law that is created as a result of Article 6 DDHC, which reads: ‘la loi est l’expression de la volonté générale’. As a result of this article, the law has the vocation to create rules and therefore must have a normative character. According to the Constitutional Council ‘vouloir n’est pas expliquer, souhaiter, considérer, désirer, estimer ou constater’. We will see that certain legislation concerning the denial of genocides is at odds with this principle (para.9.7 infra). Before the Fifth Republic (1958-present), the French legislator was, however, competent to deliberate on any subject and to create rules of any character and in any field. The 1958 Constitution limited the power of the National Assembly by

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769 Being the strict distinction between free opinions and punishable acts made by the French legislator, the rationale of the existence of a link between an opinion and a following reprehensible act for the creation of specific and precise press offences in order to avoid the creation of a ‘délit d’opinion’ and the primacy of the 1881 Press Act over general civil norms and of the press offences over Article 1382 CC in civil press law cases.


772 Cons. Con. 29 July 2004, n°2004-500 DC.
determining in its Article 34 the fields of competence of the National Assembly. The definition of the law is no longer merely formal, but also substantial. The law is not determined by the legislator, but by the Constitution. The Constitutional Council, created by the 1958 Constitution, supervises the French legislator to ensure that it does not create laws that fall outside the competences assigned to it by the Constitution. It follows that ‘La loi n’étant l’expression de la volonté générale que dans le respect de la Constitution.’

The French Constitution can said to be ‘rigid’ in the sense that it can only be amended following a special procedure and there are certain substantive limitations to its revision. Article 89-4 of the Constitution prohibits any proposal to abandon the republican form of government. The article can, however, be interpreted in different ways. If this prohibition merely signifies the interdiction to re-establish the Monarchy or the Empire, the limitation it poses on the Constituent power to revise the Constitution is small because the risk of such a re-establishment can itself be regarded as small. If this prohibition signifies, on the other hand, the obligation to respect the values and principles that shape a regime’s ‘republican form’, for example ‘la laïcité, l’égalité, la fraternité, la dignité humaine’, the freedom of the Constituent power is strongly reduced. The efficacy of these limitations is highly problematic, because it is always possible to amend the revision clause of the Constitution itself. Moreover, although the Constitution poses the limitations to its revision, the control of the respect thereof is not assured; in 2003, the Constitutional Council decided that it lacked jurisdiction to review constitutional amendments.

The principle of the normativity of the law is closely connected to the separation of powers between the legislature, the executive and the judiciary, guaranteed in Article 16 DDHC. According to the traditional case law of the Constitutional Council, uncertain or ambiguous legislation would ‘reporter sur des autorités administratives ou juridictionnelles le soin de fixer des règles dont la détermination n’a été confiée par la Constitution qu’à la loi’. This perspective, which takes into account the risk of free judicial interpretation subscribes to the classic vision of the function of the judge as the ‘bouche de la loi’. It is the task of the legislator to seek the general interest by passing laws and it is the task of the judge to ensure compliance with the laws thus adopted. The principle of the separation of powers places the judge in second position relative

773 Mathieu 2007-II.
777 Cons. Con. 26 March 2003 n° 2003-469 DC.
778 Mathieu 2007-II.
to the legislator. This explains why the French judge, as we will see (para.1.6.1 and part II infra), treats press offences as ‘closed entities’ and is reluctant to, in their strict application, accommodate or ‘import’ the Article 10 case law of the ECtHR that sets standards concerning the general interest of a public debate.

The principles as mentioned above underlie the principle of the legality of criminal offences and sanctions guaranteed by Article 8 DDHC. The article primarily ensures that the judiciary do not create laws, but that they strictly interprets criminal law, which is also provided in Article 111-4 of the French Penal Code that reads ‘La loi pénale est d’interprétation stricte’. It interdicts the penal judge to give an analogous interpretation, because he is not allowed to bridge eventual lacunae in the law. It does not, however, impose a literary interpretation nor does it interdict a teleological interpretation in order to produce the full effect of a provision. Finally, as a result of the article, it is necessary for the legislator to define the criminal offences in sufficiently clear and precise terms.

The ensemble of these principles explains why the French judge has given priority to the 1881 Press Act over the general civil norms and why, as we will see (part II infra), the French legislator is reluctant to abrogate the press offences to the benefit of the open, civil norm of the wrongful act (1382 CC).

1.5 Rights through the state and not against the state

The previously discussed central characteristics of the free expression of opinion in French law and of the French Press Act can furthermore be understood in light of the particular conception of rights in French legal culture as defined by French scholars as rights through the state and not as rights against the state. The idea that rights are primarily against the state can be connected to a particular form of liberalism. According to this view, the guarantee of rights lies in a strict limitation of the power of the State and of the lawmaker. This view is, however, said to have never been part of French legal culture. Contrarily, the State has primarily been perceived not as a threat, but as a protector of rights. This might in itself already explain the somewhat paternalistic conception of freedom of expression in France.

This conception of the nature of rights and the state goes back to the French Revolution. The National Assembly that adopted the Declaration of

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779 Mathieu 2007-II.
782 Bermann & Picard 2008, p. 16.
784 Mbongo, B., Hate speech, extreme speech and collective defamation in French law, in: Hare & Weinstein 2009, p. 221-236.

210
Rights of Man and Citizen of 1789 did not consider the need to create rights, but instead merely declared the ‘natural, unalienable, and sacred rights of man’ that were supposed to have pre-existed both the state and society. Men had entered society in order to have these rights protected against any authority or person that might threaten them. According to Article 2 DDHC, the purpose of society is therefore the ‘preservation’ of these rights. The latter can, however, not be absolute, because then they will conflict with the rights of others. It is only because statutes define the limits to the exercise of the natural rights that the rights can be preserved (Articles 4 and 5 DDHC). These limitations can then be considered to define at the same time both the rights they restrict and the rights of others, thus the rights of citizens against other citizens. These rights are thus not rights against the legislative power, but rather they are rights through statutes, i.e. the legislative power, defined erga omnes, i.e. against the executive and against other individuals. This is particularly clear in the case of freedom of expression; Article 11 DDHC defines this freedom as the right to be punished only according to the law, thus as the right to do what the law permits. It is argued that this does not signify that statutes may limit freedom of the press, but rather that there is no freedom of the press that can be conceived outside of statutes.

Furthermore, the concept of a state as a public entity endowed with legal personality, separate from civil society and limited by way of rights is said to be absent from French legal culture. The purpose of the Revolution was precisely to abandon this concept, which was present in the Ancien Régime by abolishing the separation between citizens and the state or between the state and society. Articles 16 and 6 DDHC therefore express the sacred right of man to live in a society where there is a separation of powers and where the law, i.e. statutory law, expresses the general will. From this perspective, the relation between state and citizens is not hierarchical but horizontal. And legislation is the only genuine source of law. The convergence of criminal and civil law in French Press law and the hybrid nature of the French press offences that form the legal ground in both criminal and civil cases can be placed in this light. In fact, as we will see, the law permits civil parties to set in motion both criminal and civil cases on the basis of the hate speech bans of the French Press Act (para. 10 infra). One could therefore even imagine the French hate speech bans as ‘subjective rights’ distributed by the French legislator to citizens in political society against other citizens.

Finally, the French conception of rights as rights through the state erga omnes and not as rights against the state also explains why French legal doctrine lacks a ‘third party effect’, ‘horizontal effect’ or ‘indirect effect’ doctrine of

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785 Bermann & Picard 2008, p. 16.
786 Troper 2005, p. 120.
787 Troper 2005, p. 121.
788 Ibid.
fundamental rights. After all, pursuant to the above, the French Constitution recognizes rights that are indistinctly vertical and horizontal and empowers the legislature to define and institute them.\textsuperscript{789} One may argue that this distinction vanishes precisely when statutory law restricts fundamental rights in their core. This is notably also the case with the press offences, which restrict the right to freedom of expression at its core. The fact that an appeal for freedom of expression against the application of the press offences by the judge is not referred to as a ‘horizontal effect’ of the right does, however, not signify that the right cannot de facto function as such or that freedom of expression is necessarily less protected. The latter could, on the other hand, be a possible consequence of too rigid an application of the press offences by the judiciary as a result of the strict separation of powers.

1.6 Relation to international law: ‘l’exception française’

1.6.1 A ‘nationalistic’ defence-reflex towards international law

Relevant treaties and conventions comprising norms concerning freedom of expression that France has signed and ratified are the ECHR and the ICCPR. France has a monist system. Pursuant to Article 55 of the French Constitution, treaty law takes precedence over national statutes, both earlier and subsequent. The ECHR can therefore directly be relied upon before all French courts.\textsuperscript{790}

In conformity with the requirements of the case law of the ECHR, the French courts must assure case-by-case that any restriction imposed on freedom of expression is strictly ‘necessary’. However, the judgments by the French Supreme Court or lower courts often contain stereotypical motivations. Generally put, the French courts confine themselves to affirm that the restriction to the freedom of expression in question, being either the press offence itself or its application, has the objective to guarantee one of the interests mentioned in Article 10 (2) ECHR and that its necessity is therefore incontestable. For example, the Douai Court of Appeal considered in one single phrase that the Act that criminalized the insult on the ground of sexual orientation was necessary to protect homosexuals and that ‘les articles 24, alinéa 3 et 6, 24 bis et 33, alinéa 4 de la loi du 29 juillet 1881, entrent dans les exceptions prévues à l’alinéa 2 de l’article 10 de la Convention européenne des droits de l’Homme et des libertés fondamentales et dès lors ne sont pas contraires à l’alinéa 1er du même article [curs. EHJ].’\textsuperscript{791}

According to Beignier, De Lamy & Dreyer, this superficial motivation seems to dissipate a ‘nationalistic’ defence-reflex of the French laws.\textsuperscript{792} With

\textsuperscript{789} Troper 2005, p. 123.  
\textsuperscript{790} Code constitutionnel commenté 2012, p.742.  
\textsuperscript{791} Cited in: Beignier, De Lamy & Dreyer 2009, p.127.  
\textsuperscript{792} Beignier, De Lamy & Dreyer 2009, p.127.

212
regard to the French Supreme Court, Dreyer notes ‘le premier réflexe de la Cour de cassation a été de considérer que la loi du 29 juillet 1881 réalisait en elle-même un équilibre suffisant entre liberté d’expression, garantie à l’article 10 (1) de la Convention, et intérêts protégés en vertu du paragraphe 2 du même texte.’\textsuperscript{793} With regard to the three-step-test of Article 10 (2) ECHR, Dreyer notes that often only the first two steps – the control of the legality of the norm that interferes with the right, and of the legitimacy of the aim pursued by the norm – appear in the motivation of decisions by the French courts. The courts omit to take into account the predominant question of whether or not the measure is necessary. The proportionality of a measure is deduced from the legitimacy of the legal text that is applied. Often French courts thereby determine in abstracto whether a requested sanction does not constitute an excessive infringement of freedom of expression.\textsuperscript{794}

Hence, due to the very legalistic, even rigid French legal system, in which expression constitutes either a free opinion or a punishable act and in which the French legislator must a priori determine the abuses of freedom in strict circumscribed terms, the French courts have for long time refrained from effectively balancing the conflicting norms in every case. In reality, the courts do not perform an act of conciliation in concreto between the right to freedom of expression and the rights and interests that oppose its free exercise, as required by the ECHR for the examination of the necessity of every restriction.\textsuperscript{795} Conte explains ‘la jurisprudence européenne déplace l’argumentation juridique du terrain de la légalité à celui de l’opportunité (...) là où notre tradition juridique nous conduit à vérifier si les composantes d’une qualification sont réunies dans les conditions que fixe la loi, les juges de Strasbourg s’interrogent sur l’opportunité d’une décision, ce qui relève d’une autre culture juridique.’\textsuperscript{796} As a result, France has in the past been condemned many times by the ECHR for violations of Article 10 ECHR.

1.6.2 France before the ECHR

Between 1959 – 2012, France has been condemned 28 times by the ECHR for violations of Article 10. It has the third highest score with regard to violations of Article 10 amongst all member states; Turkey currently leads with 215 violations followed by Austria with 33 violations.\textsuperscript{797} Many of these cases concern the 1881

\textsuperscript{793} Dreyer, E., Voies de recours. Contrôle exercé par la Cour de cassation: JCL. Communication, Fasc. 3100, n°59.


\textsuperscript{795} Beignier, De Lamy & Dreyer 2009, p.128.


\textsuperscript{797} Statistics by States and table of violations accessible on: http://www.echr.coe.int .
Press Act. These cases can be divided into cases in which the ECtHR a) criticized the existence of a particular press offence as such and b) criticized the application of one of the press offences of the 1881 Press Act by the French judge. 798

The cases Ekin v. France799 800 and Colombani v. France801 802 are two noteworthy historical cases, in which the nature of the article of the Press Act itself, respectively Article 14 that gave the French Minister of Interior powers to impose general and absolute bans throughout France on the circulation, distribution or sale of any document written in a foreign language or of foreign origin and Article 36 that criminalized the ‘offense à chef d’état étranger’, was

798 For an analysis of cases since the nineties, see: De Bellescize, D., La France et l’article 10 de la Convention européenne de sauvegarde des droits de l’homme, RTDH 61 2005, pp.225-259.
799 ECHR 17 July 2001, n°39288/98, Association Ekin/France. On the basis of Article 14, the Minister had interdicted the work Euskadi en guerre written with the participation of several Basque universities, for its alleged encouragement to separatism. The ECtHR considered the interference with freedom of expression unnecessary in a democratic society, underlining the lacunae of the text of the article that did not state the circumstances in which the power may be used and gave no definition of the concept of “foreign origin” nor any indication of the grounds on which a publication deemed to be foreign may be banned.
800 Although those gaps had gradually been filled by the administrative courts’ case-law, the application of those rules had, in certain cases, produced results that are at best surprising and in some cases verge on the arbitrary, depending on the language of publication or the place of origin. See: ECHR 17 July 2001, n°39288/98, Association Ekin/France, para. 60. Such legislation appeared to be in direct conflict with the actual wording of paragraph 1 of Article 10 of the Convention, which provides that the rights set forth in that Article are secured “regardless of frontiers”. See: ECHR 17 July 2001, n°39288/98, Association Ekin/France, para. 62.
801 ECHR 25 June 2002, n°51279/99, Colombani and others/FRANCE. On the basis of Article 36, the French journal Le Monde and Colombani, its director of publication, had been condemned in relation to two articles, in which were at issue Maroc as the first export country of cannabis in the world and the first supplier of cannabis on the European market and the involvement of the authorities around the Moroccan King Hassan II therein, despite their statements to take measures against drugs trafficking. The article was based on a confidential report drafted by the European Union. The ECtHR criticized the fact that the applicants were not able to rely on a defence of justification – that is to say proving the truth of the allegation – to escape criminal liability on the charge of insulting a foreign head of State. The inability for a suspect to plead for a justification was a measure that went beyond what was required to protect a person’s reputation and rights, even when that person was a head of State or government. See: para. 66.
802 According to the Court, the effect of Article 36 was to confer a special legal status on heads of State, shielding them from criticism solely on account of their function or status, irrespective of whether the criticism was warranted. That amounted to conferring on foreign heads of State a special privilege that could not be reconciled with modern practice and political conceptions. Such a privilege exceeded what was necessary for that objective to be attained. See: para. 68.
up for discussion rather than its application in the given circumstances and in which France was severely and unanimously condemned by seven judges of the ECtHR. Although the ECtHR did not openly request France to abrogate the articles in question, the decisions amounted in practice to the annihilation of any possibility to apply them. Under the influence of the decisions of the ECtHR the French legislator reluctantly abrogated Articles 14\textsuperscript{803} and 36\textsuperscript{804} of the 1881 Press Act for being contrary to freedom of expression.\textsuperscript{805}

The second type of cases are, however, of more interest to this study due to the fact that they notably concerned a suspect’s right to prove the truth of his or her statement or good faith in defamation cases, which is why I will discuss them in the paragraph concerning defamation (para.4.4.3 \textit{infra}). However, the case Eon/France\textsuperscript{806} is a noteworthy recent case, in which the ECtHR decided with 6:1 votes that the application of Article 26 of the Press Act that criminalizes the ‘offense au Président de la République’ amounted to a violation of freedom of expression. The case concerned the conviction of Eon for waving a small placard reading ‘casse-toi, pov’con’ (get lost, you sad prick) during a visit to Laval by the President of France as the President’s party was about to pass by. Eon was thereby making an allusion to a phrase, which the President himself had uttered in response to a farmer, who refused to shake his hand, an event that had been largely diffused by the media.

The ECtHR considered ‘criminal penalties for conduct such as that of the applicant in the present case are likely to have a chilling effect on satirical forms of expression relating to topical issues. Such forms of expression can themselves play a very important role in open discussion of matters of public concern, an indispensable feature of a democratic society’.\textsuperscript{807} Dreyer questions whether the ECtHR thereby does not step into the same pitfall as the French jurisdictions. In fact, the Court reproaches the latter of having a too theoretical appreciation of the concerned interests, and thus to disregard the circumstances of the case. But in this case the Court itself seemed to legitimize a type of discourse rather than to look at the actual words concerned.\textsuperscript{808} This comment fits into the general criticism of French scholars on the case law of the ECtHR. Hereunder follows a brief sketch of the reaction of French legal scholars to this

\begin{footnotesize}
\begin{enumerate}
\item Decree n°2064-1044 of 4 October 2004 abrogating Decree-law of 6 May 1939 concerning the control of foreign press.
\item Act of 9 March 2004 concerning the adaptation of justice to evolutions of criminality, ‘Loi Perben 2’.
\item De Bellescize 2005, pp.243-259.
\item ECtHR 14 March 2013, n°26118/10, \textit{Eon v. France, Légipresse} n°305 May 2013, 304-13, annotation E. Dreyer.
\item \textit{ibid.}, para. 61.
\item Annotation E. Dreyer at: ECtHR 14 March 2013, n°26118/10, \textit{Eon v. France, Légipresse} n°305 May 2013, p. 293.
\end{enumerate}
\end{footnotesize}
European case law in order to underscore the French vision on freedom of expression.\(^{809}\)

In French legal doctrine, condemnations of France by the ECHR have been variously received. For some scholars, the condemnations show that the French traditional conception of freedom of expression is too restrictive. Beignier, De Lamy & Dreyer opine that the French supreme jurisdictions, from a fear of installing a ‘gouvernement des juges’, have systematically refused to fundamentally reflect on the necessity of the numerous restrictions posed to freedom of expression since the vote of the ‘grande loi libérale de 1881’ that can, without doubt, be historically justified, but pose real problems to freedom of expression.\(^{810}\) In their view, for a long time, the French case law has, in a systematic manner, given priority to the right of reputation and the right to privacy over freedom of expression and has severely determined the limits to political debate without taking into account whether or not the expression in question formed a matter of public interest. Beignier, De Lamy & Dreyer therefore welcome an increasing influence of the case law of the ECHR on French case law.\(^{811}\) Bellescize argues that, while the ECHR has sometimes overstepped the margin of appreciation of French judges by imposing an interpretation of texts that is susceptible to criticism and the Court has censured certain provisions of the 1881 Press Act, the ECHR has implicitly or explicitly recognized the compatibility of most of its provisions.\(^{812}\) According to Bellescize, in fine, if the European judge oblige the Press Act to adapt and to correct its imperfections, freedom of expression will benefit from it.\(^{813}\)

For many scholars, however, the ECHR holds an excessively liberal conception of freedom of expression that does not match the French legal tradition to search for a conciliation or balance between rights that appear to oppose each other. Derieux & Granchet state that the case law of the ECHR concerning Article 10 ECHR (‘qu’elle interprète à sa façon!’) generally appears to be very favourable to freedom of expression and seems to give it a value superior to all other freedoms, considering the fact that interferences, restrictions


\(^{810}\) Beignier, De Lamy & Dreyer 2009, p.132.

\(^{811}\) Beignier, De Lamy & Dreyer 2009, p.132.

\(^{812}\) The court recognized the compatibility of the regime of defamation implicitly in the Colombani case, and explicitly in the cases Radio France and Chauvy et autres, and the compatibility of the offence of Holocaust denial with Article 10 ECHR in the cases Lehideux et Isorni and Chauvy et autres.

\(^{813}\) De Bellescize 2005, pp.258-259.

1.7 Conclusion

In French law, Articles 10 and 11 of the 1789 Declaration constitutionally protect the manifestation and communication of all kinds of opinions – philosophical, ideological, religious, and non-religious – on equal footing. The existence of plurality of thoughts and opinions forms an object of constitutional value. In order to conciliate the free expression of opinion with the rights of others, human dignity or the interest in the protection of the public order, the French legislator must determine the abuses of the freedom. According to the principle that the manifestation of an opinion as such cannot be criminalized, in the vision of the French legislator, present French criminal law does not comprise any ‘délits d’opinion’.

Although no one single, clear definition of the ‘délit d’opinion’ exists in French legal doctrine, Drioin points out three common characteristics [Drioin 2009]. Firstly, contrary to the press offences, the ‘délit d’opinion’ does not form the object of a precise qualification by the French legislator. Secondly, it does not determine the specific right or interest with which it interferes: it criminalizes a simple opinion, and not the support of a criminal or punishable act. Thirdly, its arbitrary prosecution and sanction constitutes a danger to the free expression of an opinion. An example ‘par excellence’ of an offence that is generally regarded as a délit d’opinion in French legal doctrine is the former ‘délit d’outrage à la morale publique et religieuse’, as created by the Act of 17 May 1819 and abolished by the 1881 Press Act, which marked the end of the criminalization of religious offences in France.

In French law, the freedom of expression of opinion is essentially regulated by the French Press Act of 29 July 1881, the rationale of which was to establish a
liberal regime for the printed press. The Act suppressed all preventive regimes and censorship and established norms for the printing press and bookshops, journals, and placards. It replaced all ‘délits d’opinion’ with specific press offences and determined the persons criminally responsible through a ‘responsabilité en cascade’. Finally, the principle of freedom of expression is assured by the establishment of very strict procedural rules for the prosecution of the press offences that derogate from the French code of criminal procedure.

In its Chapter IV concerning ‘felonies and misdemeanours committed through the press or any other means of publication’, the 1881 Press Act cites all public speech offences in French law. In the vision of the French legislator, the offences merely criminalize the abuses of the freedom of opinion, not opinions as such. For the French legislator of 1881, the justification for criminalization formed the link between the expression of an idea and the following reprehensible act. The new press offences, created by the 1881 Press Act, increasingly protect, individuals considered in their differences and singularities and not the authorities; the requirement of the existence of a link between the expression and the reprehensible act seems to be diluted.

Originally, the 1881 Press Act has in essence been an act of penal nature, but has developed into a hybrid act that also applies in civil cases. In press law cases the norms of the 1881 Press Act take priority over the general norms in civil law. This primacy of the 1881 Press Act guarantees that the specific solutions adopted in the Act in order to protect freedom of expression have a comprehensive effect and equally apply in civil cases.

The central characteristics of freedom of expression of opinion in French law can be understood in light of the general principles anchored in the constitutional texts that in order to protect the rights of citizens guarantee the normativity of the law and the separation of powers. According to these principles, the legislator determines the general interest by voting laws that contain precise and unambiguous norms and the judge occupies second place relative to the legislator; he functions as the 'bouche de la loi' and must, in his application of the law, give a strict interpretation.

The French legalistic legal system poses real problems for the accommodation or ‘importation’ of the Article 10 case law of the ECHR that sets standards concerning the general interest of a public debate. The priority lies with the French legislator who a priori has to determine the abuses of freedom of expression. The French courts have for long time refrained from effectively balancing the conflicting norms in every case and have not performed an act of conciliation in concreto between the right to freedom of expression and the rights and interests that oppose its free exercise. Due to the condemnations of France by the ECHR, France has reluctantly abrogated provisions or adapted regimes in the 1881 Press Act in order to offer greater protection to freedom of expression. According to many French legal scholars, however, the liberal
conception of freedom of expression of the ECtHR does not match the French legal tradition to conciliate or balance conflicting rights.
II  Egalité: Hate Speech Bans in Accordance with the French Press Act

‘(...) Une liberté aussi fondamentale que la liberté de la presse s’exerce très naturellement dans le cadre de la loi qui l’organise. (...) Au raciste, la loi refuse la liberté de provoquer à la discrimination raciale. C’est qu’en réalité, exprimer une opinion est une chose, provoquer à la discrimination en est une autre (...)’\(^{818}\)

‘Mais je me refuse à nommer opinion une doctrine qui vise expressément des personnes particulières et qui tend à supprimer leurs droits ou à les exterminer. (...) L’antisémitisme ne rentre pas dans la catégorie de pensées que protège le droit de libre opinion.’

J.-P. Sartre, Réflexions sur la question juive\(^{819}\)

This section begins with a characterization of the French notion of equality as it has developed from relevant French law and policies (2). Against this setting, the background and purport of the Pleven Act of 1 July 1972, which introduced the main hate speech bans into French law, are examined (3). Subsequently, the three following paragraphs analyse the main French hate speech bans and their application by the French judge, respectively the offences of ‘racial defamation’ (4); ‘racial insult’ (5); and ‘racial provocation’ (6). The French Supreme Court uses these terms to refer to the offences in their entirety. French legal doctrine further distinguishes between racial defamation; insult or provocation, i.e. on the basis of a person’s origin and membership or non-membership of an ethnic group, nation or race, and religious defamation; insult or provocation, i.e. on the ground of religion. This chapter adopts these approaches. The three paragraphs are followed by a discussion of the modifications of the Pleven Act since its adoption (7). The attention then shifts to the background and purport of the Gayssot Act of 13 July 1990, which introduced the offence of Holocaust denial


into French law (8). The section ends with an analysis of the offence of Holocaust denial and its application by the French judiciary (9).

2. The French notion of equality

The notion of equality forms a central characteristic of the French Republic (2.1). The strict or abstract understanding of the notion explains the non-recognition of minorities under French law (2.2) and also influences the French immigration and integration policy (2.3), but does not prevent the existence of a lively practice of consultation between the French government and religious and anti-racism associations representing minority interests (2.4). However, the accommodation of religious practices in the public domain runs counter to la laïcité, French State neutrality, which can be regarded as a subset of freedom and equality (2.5). The analysis results in a general conclusion about the French notion of equality (2.6).

2.1 Equality as a central characteristic of the French Republic

The principle of equality is mentioned in several reprises in the Constitution of 1958 and in the texts it refers to in its preamble. Equality is a recurrent principle that has been affirmed since 1789. In the 1789 Declaration the term is used in Article 1, which affirms the equality of men in general. Article 6 provides for equality before the law, from which results the equal access to public occupations: ‘La loi est l’expression de la volonté générale. Tous les citoyens ont droits de concourir personnellement, ou par leurs représentants, à sa formation. Elle doit être la même pour tous, soit qu’elle protège, soit qu’elle punisse. Tous les citoyens étant égaux à ses yeux sont également admissibles à toutes dignités, places et emplois publics, selon leurs capacité; et sans autre distinction que celle de leurs vertus et de leurs talents.’ Article 13 provides for the equal distribution of public charges.

The first paragraph of the preamble of the 1946 Constitution affirms the principle of non-discrimination by referring to the absence of distinction on the grounds of race, religion or belief. Article 1 of the Constitution of 1958 refines the principle of non-discrimination specifying that equality before the law comprises the absence of a distinction on the ground of origin and provides ‘La France est une République indivisible, laïque, démocratique et sociale. Elle assure l’égalité devant la loi de tous les citoyens sans distinction d’origine, de race ou de religion. Elle respecte toutes les croyances ...’. Article 2 of the 1958 Constitution uses the term in the devise of the Republic: ‘La devise de la République est “Liberté, Égalité, Fraternité”’. Equality thus forms a central characteristic of the French Republic. The rather abstract ideal of equality influences the French approach towards minorities.
2.2 Non-recognition of minorities under French law

The French approach to minorities is strongly influenced by the ideology of French Republicanism. According to the traditional French Jacobin understanding of the state, the mission of the state is to guarantee the general interest above all other interests of individuals and groups and forms the sole representative of the people in order to act in the name of the collective will for the collective good. The spirit of the French Revolution was to suppress all intermediary bodies between the citizens and the state, fearing the development of factions that would distort the general will. Individuals must thus be regarded as citizens, who have a direct link to the state. The development of groups defined by race, religion, ethnicity, culture or any other common characteristic would constitute ‘communautarisme’. France opposes any creation of what can be regarded as a ‘nation within a nation’. This would undermine the constitutional principles of the indivisibility of the French Republic, the equality before the law and the unicity of the French people. The French Republic is founded on a social pact, which precisely transcends all differences; and to which every individual can willingly adhere, regardless of his or her biological characteristics or personal convictions. The affirmation of one’s identity is a personal choice, not one based on criteria that can, a priori, be used to define a particular group.

According to the case law of the Constitutional Council, it follows from the constitutional principle of equality before the law without distinction of origin, race or religion, that the recognition of national ‘minorities’ is not possible in the French constitutional order. The constitutional principle is opposed to affording any group defined by a common origin, culture, language or belief, collective rights on the grounds of its common characteristics. France has therefore made an exemption to the only legally binding text of a universal nature, which refers specifically to minorities, Article 27 ICCPR. Article 27 provides: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” In its initial and second periodic report submitted to the Human Rights Committee (HRC) under Article 40 of the ICCPR, France explained: “Since the basic

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823 Cons. Con. 15 June 1999, n°99-412 DC.
principles of public law prohibit distinctions between citizens on grounds of origin, race or religion, France is a country in which there are no minorities and, as stated in the declaration made by France, Article 27 is not applicable as far as the Republic is concerned.\textsuperscript{824}

Likewise, France has not ratified the European Charter for Regional or Minority Languages that recognizes the right to use a regional language both in the private and public sphere.\textsuperscript{825} The Constitutional Council has confirmed the position of the French Government, i.e. that ratification of the charter is contrary to Article 2 of the 1958 Constitution, which provides ‘La langue de la République est le français’, considering that a linguistic unity appears to be an indispensable corollaire of the constitutional principle of the unity of the French people of Article 1 of the 1958 Constitution.\textsuperscript{826} The constitutional reform of 2008 inserted into the 1958 Constitution Article 75-1, which provides ‘Les langues regionales appartiennent au patrimoine de la France’.\textsuperscript{827} This reform aimed to meet France’s international obligations, but it does not seem to alter the fact that, for the first time, France, which has nevertheless signed the charter, cannot ratify it for being contrary to the Constitution.\textsuperscript{828}

On the ground that the French Constitution merely acknowledges the French people, composed of all French citizens without distinction of origin, race or religion, the Constitutional Council equally found the reference by the French legislator in the Act on the statute of the territorial unit of Corsica – concerning the legal status of Corse – to the ‘peuple corse, composante du peuple français’, thus to the specific characteristic of French citizens being Corse, to be unconstitutional.\textsuperscript{829}

The abstract ideal of equality explains why since 2002 several legislative proposals have been made to suppress the term ‘race’ from the French Constitution and or French legislation.\textsuperscript{830} These proposals have been motivated by the allegedly profound legal ambiguity of the term ‘race’. Historically, the term has served as a ground for racial discrimination; in the 17\textsuperscript{th} century it implicitly underlay the ‘code noir’ of the French colonial legislation and during the Vichy-Regime it formed an explicit legal category in the French anti-Semitic

\textsuperscript{825} Code constitutionnel commenté 2012, p.353.
\textsuperscript{826} Cons. Con. 15 June 1999, n°99-412 DC.
\textsuperscript{827} Code constitutionnel commenté 2012, p.1049.
\textsuperscript{828} Code constitutionnel commenté 2012, p.353.
\textsuperscript{829} Cons. Con. 9 May 1991, n°91-290 DC.
\textsuperscript{830} For an overview see: Rapport n°989 fait au nom de la commission des lois constitutionnelles sur la proposition de loi n°218 ‘tendant à la suppression du mot ‘race’ de notre législation’, Assemblée Nationale, 24 avril 2013, p. 13-14.
legislation. It is thought that its presence in current French legislation, even to prohibit discrimination, would also amount to implicitly admitting the existence of races as far as the law is concerned. However, the proposals have always been rejected by a majority of the National Assembly, because the term would be an indispensable legal instrument for an effective fight against racism.\footnote{ibid.}

During the presidential campaign in 2012, the ambition to suppress the term ‘race’ in the French Constitution was once again expressed by Hollande, who stated ‘il n’y a pas de place dans la République pour la race’. Subsequently, on 16 May 2013, the National Assembly adopted in its first reading, a legislative proposal ‘tendant à la suppression du mot ‘race’ de notre législation’.\footnote{Proposition de loi ‘tendant à la suppression du mot ‘race’ de notre législation’, texte adopté n°139, Assemblée Nationale, 16 mai 2013. For the discussion in Parlement see: http://www.assemblee-nationale.fr/14/crit/2012-2013/20130240.asp .} It was considered to be unnecessary and inopportune to first omit the term ‘race’ from Article 1 of the 1958 Constitution. After certain amendments to the initial proposal,\footnote{Proposition de loi n°218 ‘tendant à la suppression du mot ‘race’ de notre législation’, Assemblée Nationale, 26 septembre 2012 ; l’ Proposition de loi n°218 ‘tendant à la suppression du mot ‘race’ de notre législation’, texte de la Commission, Assemblée Nationale, 24 avril 2013.} the proposal now envisions the omission of the term ‘race’ and certain derivatives of ‘race’, such as ‘racial’, from French legislation entirely and to replace these terms with ‘legally neutral’ terms. In the hate speech bans of the French Press Act, the words ‘une race’ are replaced by ‘ou pour des raisons racistes’.\footnote{In French law, the term race or its derivatives appear in 9 legal codes and 13 non-codified laws; in total it concerns 59 articles.}

Given the fact that the proposal by no means aims to alter the substance of the legal provisions containing the term ‘race’, it can be understood to primarily have a political symbolical significance; indeed Article 1 of the proposal states ‘La République française condamne le racisme, l’antisémitisme et la xénophobie. Elle ne reconnaît l’existence d’aucune prétendue race’. The aim of the amendments is precisely to prevent the existence of legal gaps, which would reduce the effectiveness of the fight against racism, and to assure the compatibility of the proposal with international and European law.\footnote{Derieux, B., Des incidences de la suppression du mot “race” sur l’efficacité de la législation reprimant les comportements racistes, Légipresse n°306 June 2013, p. 327; Jouanneau, B., Oui, on peut supprimer le mot “race” de la loi, sans dommage!, Légipresse n°307 July/August 2013, p. 387.} French legal scholars, however, disagree on whether the new legally neutral terms ‘ou pour des raisons racistes’ in the French hate speech bans will have the negative effect of requiring a more subjective appreciation by the French judge for the determination of the offence.\footnote{This would not benefit legal certainty.}
The prevailing conception of equality is indissolubly linked to the image of the French Republic as a social, unitary, uniform, and homogenous body; differences are not only prohibited or denied, but also repressed in case they pose a threat to the unity of the nation.\footnote{Lochak, D., ‘Les minorités et le droit public français : du refus des différences à la gestion des différences’, in: Fenet, A. and Soulier, G. (ed.), Les minorités et leur droits depuis 1789, Paris : L’Harmattan 1989, p. 125-128.} This equally explains the fact that French law does not permit the census to count those who are defined as ‘minorities’ as well as the French reticence towards any politics of quota, even as a means of fighting discrimination.\footnote{In 2012, the CNCDH advised not to permit in order to fight discriminations the gathering of data based on ethnicity, but only data based on ‘origine’, i.e. nationality, ‘notamment en matière de logement, d’accès aux biens et services et d’accès aux soins.’ See: CNCDH, Avis sur les statistiques ‘ethniques’, 22 March 2012.} The use of statistics based on categories of ethnicity and race would be based on an ethno-racial analysis of society, which would contribute to the actual construction of ‘races’ and ‘ethnicities’ as political actors against the ensemble of the republican principles.\footnote{Haute Conseil à l’Intégration, La France sait-elle encore intégrer les immigrés? Les élus issus de l’immigration dans les conseils régionaux (2004-2010), Paris: la Documentation Française 2011, p. 98.}

Hence, in 2007 the Constitutional Council found the provision designed to allow processing of personal data ‘indicating, directly or indirectly, the racial or ethnic origins’ of persons for the carrying out of studies of diversity of origin, discrimination and integration in the law concerning the control of immigration, integration and asylum to be unconstitutional. Such studies may only be conducted on the ground of ‘objective data’.\footnote{Cons. Con. 15 November 2007, n° 2007-557 DC.} In its annual report \textit{La lutte contre le racisme et la xénophobie}, the French National Human Rights Consultative Commission (\textit{la Commission Nationale Consultative des Droits de l’Homme – CNCDH}) publishes the annual statistics on the prosecution of offences penalizing acts of discrimination, including the French hate speech bans as created by the Pleven Act of 1 July 1972.\footnote{Lochak, D., Les références à la “race” dans le droit français, in: Decaux, E. (ed.), \textit{Le droit face au racisme}, Paris: Éditions A. Pedone 1999, p. 37 et seq. The Pleven Act 1 July 1972 was the first Act that introduced provisions prohibiting and penalizing racial discrimination into French law. See: Lochak 1989, p. 116.} These statistics are confined to the three categories of racism, anti-religion and anti-semitism and thus lack the category of ‘ethnicity’.

Precisely because of the non-recognition of ethnic minorities under French law, the French State does not officially engage in ‘affirmative action’ or ‘positive discrimination’ in order to advance the fortunes of groups to remedy past discrimination. In France, the principle of equality is interpreted as ‘égalités des chances’ thus the focus is on equality of opportunities rather than equality of end results. The principle of equality is notably assured by repressive criminal
laws penalizing forms of discrimination and labour laws (para. 3.3.3 infra). Individuals belonging de facto to a certain minority group are thus protected against discrimination on the ground of their specific common characteristics. French law, however, protects individuals ‘minoritaires’ and not groups ‘minorités’ and does not afford individuals the right to be different, but rather protects the right of indifference towards an individual’s specific characteristics. The French hate speech bans can be understood as an elaboration of the French ideal of abstract equality and a means of social integration; in the French Republic individual and equal citizens are not to be addressed on the basis of their specific characteristics. However, the difficult position of de facto existing minorities in French society was one of the rationales of the act (para.3.3.1 infra).

The failure to include specific rights of minority groups in French law appears to be an after-effect of the individualistic conception of rights and human rights dominant at the age of the French Revolution. However, international human rights bodies such as CERD and ECRE have put growing pressure on the French authorities to communicate their statistics based on ethnic origin in order to monitor the existence of discrimination in France. In response to this pressure, the French authorities aim to find a formula that will enable the State to develop ethnic and racial categories to gather statistics, pursue studies, and recommend legislation. The new term that is often used is ‘visible minorities’. In order to promote the equality of opportunities and to fight discrimination, the different sections of society, notably the workplace, the media, and politics, must give an adequate reflection of the ‘diversity’ of the French population that can be pursued on the basis of economic and social criteria or people’s nationality or the birthplace of one’s parents. Furthermore, affirmative action has equally been developed on the basis of ‘objective criteria’, for example, by targeting spatial concentrations for education policy (ZEP)’s or by designating sensible urban districts (ZUS), but not by targeting specific ethnic groups.

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843 Lochak 1989, p. 113-119.
845 Lochak 1989, p.112.
846 Schain 2012, p. 87.
849 Schain 2012, p. 82.
2.3 Immigration and integration policy

French Republicanism thus influences French immigration and integration policy. France is the epitome of a nation-state: unitarian, universalist and egalitarian. Citizenship is regarded as the best means to integrate into French society. Social cohesion can be best preserved by underlining national identity and not personal characteristics.\textsuperscript{850} The French model of integration is based on the assimilation of individuals who have made a political choice to become citizens; assimilation forms a basis for equality.\textsuperscript{851} The expectation of public institutions is that immigrants will conform to French cultural and legal norms and that there is an acceptance of a common public space that is separate from religious faith and expression, where the principle of ‘raison publique’ reigns.\textsuperscript{852} Immigrants can obtain French citizenship on the basis of \textit{jus soli}, territorial birth.\textsuperscript{853} Those who are born on French soil to parents born outside France have a right to French citizenship.\textsuperscript{854} Since 1945, the French Civil Code (Articles 21-24) determines that no one can be naturalized without demonstrating his ‘assimilation to the French community’ through knowledge of the French language. The French Government has the power to refuse French citizenship to a person by fault of assimilation.\textsuperscript{855}

Historically, France has been a country of immigration and has generally welcomed immigrants as being necessary for the labour market. In the twentieth century, France experienced four waves of immigration; first Italian and Belgian immigration, followed by Polish and Algerian immigration during WWI, after WWII immigration from Spain and Portugal. Since the 1960s, there has been notable Muslim immigration from the former French colonies of North Africa (the \textit{Maghreb}) and sub-Saharan Africa, such as Algeria, Morocco and Tunisia, but also from Turkey.\textsuperscript{856} The war of Independence of Algeria\textsuperscript{857} in the 1950s had left a very negative connotation with Islam; the bloody acts of

\textsuperscript{852} Schain 2012, p.15.
\textsuperscript{854} Schain 2012, p. 77.
\textsuperscript{855} Since 1998, young people can claim French citizenship starting at age 16. If they fail to do so, French nationality is attributed to them at age 18, provided that they do not explicitly decline it. This emphasis on an active request for citizenship has resulted in an increased number of declarations of and claims to French citizenship.
\textsuperscript{856} Schain 2012, p.39.
\textsuperscript{857} Algeria was conquered by France in 1830 and became independent on 5 July 1962.

228
terrorism by the Algerian terrorist group Front de libération nationale (FLN) were partly inspired by Islam. After Algeria’s victory in 1962, many traumatized pied-noirs, French colonists, and harkis, allied soldiers of Algerian origin in the French army, fled to France.\(^{858}\)

Originally, Muslim labour immigrants did not intend to stay and commuted between their countries of origin and France. Because of their temporary stay in France, they did not openly practice Islam; they instead did so in improvised facilities.\(^{859}\) However, in 1974, in reaction to the oil crisis and mass unemployment, France suspended labour immigration from non-European countries and terminated its generally open policy. Subsequently, Muslim immigrants decided to stay out of France for fear of losing their residency status. By the 1980s the largest component of immigration thus became family reunion. This raised the question of their integration and the accommodation of their religious practices in a predominantly Catholic France.\(^{860}\)

Subsequently, the French Government has tightened the requirements for family reunification, naturalization and citizenship and has facilitated expulsions of undocumented immigrants.\(^{861}\) Since 2003, immigrants must demonstrate their knowledge of the rights and duties of French citizens. Immigrants must sign The Reception and Integration Contract (CAI), a document that offers them free language courses and civic education. Since 2007, adherence to this contract is a condition for obtaining a long-term visa. Moreover, the CAI is required for all family unification and the evaluation of ‘language competence and knowledge of the values of the Republic’ takes place before permission is granted to enter France.\(^{862}\) However, in 2006, Minister of Internal Affairs, Nicolas Sarkozy proposed a politics of ‘immigration choisie’ that focuses on acceptable forms of immigration, such as the attraction of highly qualified manpower to France, instead of ‘immigration subie’ that focuses on the termination of immigration.\(^{863}\) In its report La France sait-elle encore intégrer les immigrés?, which was published in 2011, the Haut Conseil à l’Intégration advised the continuation of the Republican model of ‘une ardente obligation d’intégration’.\(^{864}\) In a previous report in 2005, the conseil rejected the notions of

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858 Fetzer, J.S. & Soper, J.C., Muslims and the State in Britain, France and Germany, New York: Cambridge University Press 2005, p. 64.
859 This became known as ‘cellar Islam’.
862 Schain 2012, p. 86.
863 Haute Conseil à l’Intégration, La France sait-elle encore intégrer les immigrés?, Paris : La Documentation Française 2011, p. 42.
assimilation or communautarisme and advanced the republican tradition of political integration, which did not entail ethnic integration.  

The increasingly strict immigration and integration policy can be partly explained by the politicization of the issue by the extreme right winged political party National Front (le Front National – FN) since the 1980s. Public opinion has always been more negative about Muslim immigrants from the Maghreb, notably Algeria, who are seen by many Frenchmen as fundamentally ‘unassimilable’, in relation to European immigrants. According to an ethnocentric reading of French Republicanism, Muslims could never become true French citizens, because all authentic French people are (Catholic) Christians. However, immigration did not form an electoral issue. After its electoral breakthrough in 1983, the FN reframed the issue of immigration from a need for manpower to a concern for ethnic balance and a danger for French identity. In 2002, former leader of the FN Jean-Marie Le Pen received 18 percentage of the French votes. In reaction to the popularity of Le Pen, established political parties used a strict immigration policy as a tool to undermine the ability of the FN to frame and define the issue.

The polarization of the debate on immigration re-emerged in 2012, most notably during the campaigns of the presidential elections, in which current leader of the FN Marine Le Pen also received approximately 18 percentage of the French votes. In its 2012 annual report, La lutte contre le racisme, l’antisémitisme et la xénophobie, the CNCDH observes that, in line with the tendencies of the political discourse, in public opinion the fear of a loss of French identity, the fear of religious fundamentalism, the perception that integration has failed, the sentiment that there are too many immigrants in France, criticism of Islamic and Muslim practices increased significantly; the extremely negative image of Roma migrants even more so. According to the statistics of the Ministry of Interior Affairs, the Ministry of Justice, as well as the contributions from several anti-racism associations published in the report, the acts of violence and discrimination and expressions of hate speech against Muslims also increased significantly. This development is said to have been fuelled by several events, including the ‘Affaire Merah’ and demonstrations held by Muslims against the

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866 Fetzer & Soper 2005, p. 67; Schain 2012, p. 73.
867 Fetzer & Soper 2005, p. 95.
868 Schain 2012, p. 103.
870 CNCDH report 2012, p. 95 et seq; 241 et seq; 385 et seq.

230
publication of the Mohammed cartoons by the magazine *Charlie Hebdo* and the film *Innocence of Muslims*.

Schain points out, however, that social research shows that the idea that Muslims do integrate well is actually more strongly held in France than in other European countries. French Muslims themselves are by far the most integrative in their orientation and the least conflicted between their Muslim and national identities. They are the most positively oriented toward ‘national customs’, as well as the most accepting of Christians and Jews in their societies. On the other hand, the idea of ‘national customs’ and citizenship is certainly the strongest in France. Schain cites Lamont, who analyses:

‘French social scientists often argue that the French political culture of republicanism produces a low level of racism because it delegitimizes the salience of ascribed characteristics in public life, hence facilitating integration of racial minorities. In contrast, my analysis suggests that republicanism has a contradictory impact: it delegitimizes one form of racism, but also strengthens another by drawing a clear distinction between those who share this universalistic culture (citizens) and those who do not (immigrants). This boundary is reinforced by traditional anti-Muslim feelings found in Christian France, by a lasting historical construction of French culture as superior and by a caste-like relationship of the French with members of their former colonies.’

2.4 Representation through and consultation with religious and anti-racism associations

Before WWII the most powerful instruments to integrate minority groups into French society were through ‘universal’ organizations such as trade unions and the Communist party. In 1958, the Fonds d’Action Sociale (FAS) was created to finance associations that could defend the rights of immigrants, notably North Africans. The activism of French anti-racism associations, such as MRAP and LICRA, can be traced back to the associational boom of the 1970’s, in the wake of ‘new socialist movements’. The anti-racism associations aimed to defend human and fundamental social rights and the rights of immigrants; the ‘sans’, such as

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871 CNCDH report 2012, p. 129. In the Merah affair Mohammed Merah, an Islamic terrorist, killed several persons with a gun in the streets of Toulouse and Montauban while driving a scooter.
872 Schain 2012, p. 18.
the ‘sans-emploi, sans-logis, sans-papiers’. In 1981, the prohibition on foreigners to form associations was abrogated in French law. Since 1980s, the French Government became increasingly involved in the development of ethnic organization. This was related to the problem of urban riots and violence in the suburbs of large cities such as Paris and Lyon between the local youth and French law officials, which started after the death of two young men of North African origin who were pursued by the police. This unrest continued for more than two decades. State authorities were desperately searching for – local – interlocutors for the ‘second generation’. In 1984, one year after the first national anti-racism manifestation ‘la marche des beurs’ in France in 1983, the association SOS Racism was created with the devise ‘Touche pas à mon pote’, which symbolized its advocacy of ‘fraternité’, ‘multiculturalisme’ and the ‘integration’ rather than ‘assimilation’ of immigrants.

The French State has established very strong and solid relationships with associations in areas where it is difficult to differentiate between public and private interests. The State does not reject their inclusion in policy-making as long as they are defined as representative and act in consultation, due to the fact that any form of protestation or mobilization goes against republican values. Such practice seems to conflict with the traditional Jacobin understanding of the State (para.2.5 supra). The inclusion of anti-racism associations by the French State could, however, be interpreted as an attempt to reinforce its hold on civil society (top down) rather than a characteristic of France as a ‘participatory and associative democracy’ (bottom up). As a follow up to its 2011 report in its report Investir dans les associations pour réussir l’intégration of 2012, the Haut Conseil à l’Intégration advised the State to invest in less numerous and more professional associations, to financially support them and to conclude partnerships with them to assist immigrants towards ‘citizenship’, notably in the context of the CAI.

In fact, the historical process of the legitimization of associations in France since 1901 can be characterized as one of canalization, domestication and

876 Loi n° 81-909 abrogated Title IV ‘Des associations étrangères’ from the Loi du 1er juillet 1901, relative au contrat d’association.
878 Schain 2012, p. 81.
879 ‘Beur’ is French slang for ‘Arab’.
880 http://www.sos-racisme.org/
881 Barthélémy 2002.
control – notably of religious congregations.\textsuperscript{883} It is precisely because of the rich history of tensions between religion and the State that France has a well-established approach to dealing with organized religion. Moreover, French Republicanism recognizes people’s religious identity rather than their ethnic identity, deals with integration through rules and regulations on religion rather than on ethnicity and has a tradition of dealing with ethnic groups through religious interlocutors.\textsuperscript{884} Hence, Islamic immigrants from Turkey or the Maghreb are seen as one Muslim group regardless of their ethnic background, while they might not see themselves as such.\textsuperscript{885}

In 2003, the \textit{Conseil Français du Culte Musulman} (CFCM) was created as a representative body of the Muslim community, parallel to comparable organizations of Catholics, Protestants and Jews, as a contact point for the French Government.\textsuperscript{886} Such institutionalized consultation was initiated in order to help undermine the rise of Islamic fundamentalism and the construction of a moderate French Islam. Prior to this, many other Muslim associations already existed that were represented by the \textit{Union des Organisations Islamiques de France} (UOIF).\textsuperscript{887} On 17 June 2010, the Minister of Internal Affairs signed a framework convention with CFCM, in which parties agreed to exchange statistics on hate crimes (‘actions’) and hate speech (‘menaces’) against Muslims in order to better measure intolerance against the Muslim community in France and to effectively fight this phenomenon. Pursuant to the framework convention, parties meet and supply information once every trimestre and evaluate the data annually.\textsuperscript{888} To that effect, CFCM has created \textit{L’Observatoire National contre L’Islamophobie}.\textsuperscript{889} The statistics are published in the annual reports of the CNCDH, which observes a significant increase of ‘actions et menaces antimusulmanes’ in 2012 compared to

\textsuperscript{883} For a long time, France has been considered as a ‘civic desert’. The legal recognition for associations was only to arrive in 1901. The law of 1901 defines associations broadly as the contract by which two or more people put together their knowledge or their activity, for ‘another purpose than profit’. See: Saurugger, S., Democratic ‘Misfit’? Conceptions of Civil Society Participation in France and the European Union, \textit{Political Studies}, 2007, vol. 55, p. 390.

\textsuperscript{884} Schain 2012, p. 86.


\textsuperscript{886} http://www.lefcfm.fr/

\textsuperscript{887} http://www.uoif-online.com/v3/


\textsuperscript{889} http://www.lefcfm.fr/?page_id=3517

233
previous years. This evolution is confirmed by the reports of Collectif Contre l’Islamophobie en France (CCIF).

The limited political influence of Muslim minorities on other Islam related policies has been ascribed, not to a lack of representative associations or the French assimilationist model of integration, but to the incompatibility of religious accommodations with the particular French notion of ‘Laïcité’.

2.5 ‘Laïcité’ as a subset of freedom and equality

The unitarian, universalist and egalitarian ideal can be connected with another characteristic of the French Republic; la laïcité, the French State neutrality and indifference of the French State towards religions and cults. This principle is without doubt the most particular characteristic of the French Republic. Of all Western states only the French Constitution refers to the principle that is said to be untranslatable in any other language. For these reasons ‘la laïcité’ is also called ‘une exception française’, although this idea is controversial. The principle appeared for the first time in the Constitution of 1946 and features in Article 1 of the 1958 Constitution. Numerous previously discussed constitutional provisions specify the purport of ‘la laïcité républicaine’; while Article 1 of the 1958 Constitution provides that the French Republic assures the equality before the law of all citizens without distinction of religion and the respect of all beliefs, other provisions protect citizens against discrimination on the ground of religion. Hence, ‘la laïcité républicaine’ can be understood in terms of equality and religious freedom.

The process of ‘laïcisation’ dates back to 1789. For a long time, the Catholic faith functioned as the official religion of France, until the Revolution of 1789 caused a schism. During the Revolution, freedom of religion was laid down in the Declaration of the Rights of the Man and Citizens. Although the Concordat concluded by Napoleon and the Catholic Church in 1801 acknowledged that ‘the Catholic faith is the faith of the majority of the French population’, it assumed at the same time a certain religious pluralism and a separation of civil regulations and religious prescriptions (for example the notion of the civil state). The Restoration did not reinstate the Catholic faith as

891 CCIF was created in 2003 and in 2011 became a consultative member of ECOSOC (UN). [http://www.islamophobie.net/rapport-annuel](http://www.islamophobie.net/rapport-annuel)
892 Fetzer & Soper 2005, p. 95; 126.
the official religion of France. During the course of the nineteenth century, the battle between the church and the state focused in particular on education. ‘La Loi de Jules Ferry’ of 28 March 1882 introduced obligatory free public education. Following this ‘laïcisation’ of education other social institutions, such as hospitals, were soon ‘laïcised’. One speaks of ‘les grandes lois de laïcisation des années 1880’.896

These developments resulted in the Act of 1905 that forms the key to ‘la laïcité’897 and is still central to the relation between the church and the state in France. Article 1 regulates freedom of religion and reads: ‘La République assure la liberté de conscience. Elle garantit le libre exercice des cultes sous les seules restrictions édictées ci-après dans l’intérêt de l’ordre public.’ Article 2 regulates the separation of the church and the state and reads: ‘La République ne reconnaît, ne salarie ni ne subventionne aucun culte.’ The Act of 1905 subsequently cites offences that specifically protect freedom of conscience and freedom of religion. Article 31 criminalizes the coercion of a person to exercise or abstain from exercising a cult. Article 32 criminalizes the obstruction, delay, or interruption of the exercise of a cult, i.e. every religious act performed by a clergyman in the interest of his congregation.

The principle of laïcité thus expresses the neutrality of the state, which is seen as a pre-condition for freedom of religion that has a place in the private sphere and the public sphere, but not in the domain of public institutions. According to the Council of State, it is a fundamental principle recognized by the laws of the Republic and it results from the constitutional texts that the laic character of the State applies to the ensemble of public services;898 Community services are therefore prohibited from directly subsidizing any religious association, even with regard to interreligious manifestations, or to indirectly subsidize a religious association by putting, at its free disposal, a presbytery belonging to the community.899

The principle of laïcité is of particular importance in the field of public education. The Preamble of the 1946 Constitution provides ‘l’organisation de l’enseignement public et gratuit et laïque à tous les degrés est un devoir de l’État’. However, this does not prevent the existence of private education, or even the granting of state support in private education under the conditions defined by the law.900 In 2004, the French legislator reinforced the principle of laïcité in public education by amending the French Code of education and

899 Code constitutionnel commenté 2012, p.349.
prohibiting the conspicuous wearing of religious symbols and dress – comprising the headscarf – in French public primary and secondary schools.  

‘Laïcité’ can thus be considered as the underlying principle to all laws that regulate the position of religion in the French public sphere. However, certain areas of the French Republic, i.e. the Alsace and Moselle departments, have remained under the regime of the Concordat of 1801. In these territories the Act of 1905 concerning the separation of the church and the state does not apply; priests, pastors, and rabbis are state officials, religious education is obligatory in primary and secondary schools and a community service can give a financial contribution to the functioning of a cult in order to satisfy a general interest objective.

The constitutional requirement of ‘laïcité’ is not a fixed concept and has been the subject of further interpretation and elaboration since 1905. It is the subject matter of a continuous discussion that nowadays obviously focuses on the accommodation of practices of Islamic faith. In its 2000 report, L’islam dans la République, the Haut Conseil à l’Intégration concluded that the introduction of Islam in France gives occasion to redefine and contribute to the enrichment of the principle of ‘laïcité’, but that Muslims must assume the requirements that result from it. In 2010, the French Penal Code was amended in order to prohibit the covering of the face, which included the wearing of the burqa and the niqab in public areas, defined as the public road and places open to the public or intended for public services. Furthermore, legislative proposals

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902 Code constitutionnel commenté 2012, p.344.
903 On 29 April 2008, the MP for the UMP, Jacques Myard, deposed at the parlement a bill (n° 843) of constitutional reform ‘visant à interdire à un parti politique de se réclamer d’une religion ou d’une ethnie’, because Article 4 of the French Constitution enumerates as sole limitations to the values or ideologies political parties may refer to, ‘the respect of the principles of national sovereignty and democracy’. The proposal is under examination of the ‘commission des lois constitutionnel’.
904 In September 2011, a ban came into effect on the public worship in the streets practised in Paris, Nice and Marseille by French Muslims unable to find space in mosques. See: Interview Guéant: ‘Les prières dans la rue doivent cesser’, Le Figaro 14 September 2011; Le gouvernement déterminé à faire cesser les prières de rue, Agence France Presse, 16 September 2011.
are being prepared concerning the respect of religious neutrality in enterprises and associations in general908 and in private organizations charged with childcare in particular.909 The traditional, dominant, political conception of ‘laïcité’ that focuses on state neutrality is, however, criticized for completely banning religion from the public sphere, replacing religion by a ‘civil religion’ and constituting ‘republican fundamentalism’.910 Bauberot elaborates a more social conception of ‘laïcité’ that permits a more flexible relation between the state, religions and individuals.911

From the principle of laïcité, the freedom to manifest and express religious convictions also emerges.912 Although the absence of an offence of blasphemy in French law is not a feature exclusive to the French laic Republic, the abrogation of the ‘délit d’outrage à la morale publique et religieuse’ by the French legislator of 1881 can be understood in light of the ongoing process of ‘laïcisation’ at that time. Such an offence does not fit into the laic principle that resulted in the Act of 1905. As the repression of blasphemy supposes the recognition of the existence of God, laic states that primarily France cannot provide for such a criminalization.913 It constitutes an unequal treatment by the laic State of religious and other philosophical convictions and violates freedom of conscience, expression and religion (para.5.4.1 infra; para.1.2.2 supra). In the Alsace and Moselle departments, where the Act of 1905 does not apply, a regional legislation has survived from the German period of 1871 to 1918 that criminalizes ‘le blasphème public contre Dieu’. This particular legislation is based on the German criminal code of 1871 and has been validated by the Act of 17 October 1919 and the Decree of 25 November 1919. Article 166 reads ‘Celui qui aura causé un scandale en blasphémant publiquemment contre Dieu par des propos outrageants, ou aura publiquement outragé un des cultes chrétiens ou un communauté religieuse [...] ou les institutions et cérémonies de ces cultes [...] sera puni d’un emprisonnement de trois ans au plus’. However, as a single conviction on the ground of this offence cannot be found in the national judicial

908 Proposition de loi n°998 relative au respect de la neutralité religieuse dans les entreprises et les associations, deposited at the National Assembly 24 April 2013.
909 Proposition de loi n°61 visant à étendre l’obligation de neutralité aux structures privées en charge de la petite enfance et à assurer le respect du principe de laïcité, deposited at the National Assembly 2 July 2012.
2.6 Conclusion

The principle of equality is mentioned at several reprises in the Constitution of 1958 and in the texts it refers to in its preamble. Equality is a recurrent principle that has been affirmed since 1789 and forms a central characteristic of the French Republic.

The prevailing conception of equality is indissolubly linked to the image of the French Republic as a social, unitary, uniform and homogenous body. It follows that it is not possible in the French constitutional order to afford any group defined by a common origin, culture, language or belief collective rights on the grounds of its common characteristics. This does not signify that French law does not protect individuals belonging de facto to a certain minority group on the grounds of their specific characteristics. To the contrary, the Pleven Act of 1972 that created the French hate speech bans can be understood as an elaboration of the French ideal of strict equality and a means of social integration; in the French Republic individual and equal citizens are not to be addressed on the grounds of their specific characteristics.

The French ideal of strict equality can be connected with another characteristic of the French Republic; la laïcité, the strict separation of the church and the state and the indifference of the French State towards religions and cults. The Act of 1905, that regulates ‘la liberté des cultes’, forms the key to ‘la laïcité’ and is still central to the relation between the church and the state in France. ‘La laïcité’ can, however, be considered as the underlying principle to all laws that regulate the position of religion in the French public sphere. Numerous constitutional provisions, such as the principle of respect for all beliefs and the prohibition of religious discrimination, specify the purport of ‘la laïcité républicaine’ that can thus be understood in terms of equality and religious freedom. From the principle of laïcité equally springs the freedom to manifest and express religious convictions. Although the absence of an offence of blasphemy in French law is not a feature exclusive to the French Republic, such an offence does not fit into its laic principle and constitutes an unequal treatment by the State of religious and other philosophical convictions and violates freedom of conscience, expression and religion. The abrogation of the ‘délit d’outrage à la morale publique et religieuse’ by the French legislator of 1881 can be understood in this context.

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3. The Pleven Act of 1 July 1972

With the adoption of the Pleven Act of 1 July 1972, France implemented the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) (3.1). Before the adoption of the Pleven Act, hate speech was regulated by the Decree-law Marchandieu of 1939 (3.2). The Pleven Act introduced a number of new prohibitions of forms of hate speech and discrimination and provisions about their prosecution (3.3). The analysis results in a general conclusion about the background and purport of the Pleven Act (3.4).

3.1 Adhesions and reservations made to ICERD

France adhered to ICERD on 28 July 1971915 and implemented this convention by adopting the Pleven Act of 1 July 1972, concerning the fight against racism.916 The French Government was of the opinion that French law already largely complied with the Convention and therefore made four reservations.917 918 With regard to Article 4 ICERD, France declared: ‘En ce qui concerne l’article 4, la France tient à préciser qu’elle interprète la référence qui y est faite aux principes de la Déclaration Universelle des Droits de l’Homme ainsi qu’aux droits énoncés dans l’article 5 de la même Convention comme délimitant les Etats parties de l’obligation d’édicter des dispositions répressives qui ne soient pas compatibles avec les libertés d’opinion et d’expression, de réunion et d’association pacifique qui sont garanties par ces textes’.919 The declaration does not take the form of an

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916 Foulon-Piganiol, J., La lutte contre le racisme, Commentaire de la loi du 1er juillet 1972, D 1972, Chronique XL, pp.261 et seq.
918 The reservations comprised a reservation made to article 6 ICERD concerning the access to court. The French Government declared to regulate the matter under norms of general law. Furthermore, France did not sign the facultative declaration of article14 ICERD that empowered the CERD- committee to receive and examine communications by individuals complaining of a violation of ICERD by the Member State. According to the French government, French law afforded sufficient guaranties to protect individuals. The system of communications was therefore super fluent and could form a pretext to abusively interfere with internal affairs. Finally, France did not assent to article 15 ICERD that referred to the Declaration on the granting of independence to colonial countries and peoples by the General Assembly of the United Nations (G.A. res. 1514 (XV), 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961). According to the French Government, the UN was not to intervene with the conduct of non-autonomous territories in respect of the principle of non-interference with internal affairs.
explicit reservation, but has been interpreted as such. However, in reaction to a question of the General Secretary of the United Nations, the French Government has further clarified ‘l'intention du Gouvernement français n'est pas de réduire la portée des obligations prévues (...) mais seulement de consigner son interprétation dudit article’.

Initially the French Government held that French law was largely compliant with the ICERD and that as such no new legislative measures were necessary for the application of the Convention. This was contradicted by the Reporter of la Commission des lois constitutionnelles in Parliament, Terrenoire, and many representatives, namely of the Communist and the Socialist groups, during the parliamentary debates. They argued that, at the time of the adoption of the Pleven Act, racist manifestations existed and threatened to poison public opinion; the French government had allowed the public gatherings of the fascists movement ‘Ordre Nouveau’ – a forerunner of the extreme right French political party le Front National – and had not taken any measures against the hate campaigns conducted by the weekly *Minute*. Immigrant workers coming from North Africa and the French Overseas Departments, as well as Jews and Gipsies suffered from violent attacks and discrimination. These racist manifestations could not be countered, because of the lacunae existent in French law. The National Assembly, notably the Communist group had therefore submitted many proposals to reinforce anti-racism and discrimination laws since 1959.

3.2 The situation prior to the adoption of the Pleven Act: the Decree-law Marchand fearful

The original 1881 Press Act did not comprise of any press offences with a racial character. The first act that had provided an offence of collective defamation was the Act of 25 March 1822 that punished in accordance with Article 10 whoever ‘aura cherché à troubler la paix publique en excitant le mépris ou la haine des citoyens contre une ou plusieurs classes de citoyens’. The term ‘classe’ signified: ‘toutes personnes prises collectivement, soit qu’on les désigne par le lieu de leur origine, la religion qu’elles professent, les opinions qu’on leur attribue, le rang qu’elles occupent dans la société, les fonctions qu’elles remplissent, la profession qu’elles exercent ou de toute autre manière.’ As a result, everyone was free to

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920 Korman 1989, 3404.
form classes, including noble men, priests, journalists and bakers.\textsuperscript{925} The Act of 9 September 1835 sanctioned the ‘provocation à la haine entre les diverses classes’ and the Decree of 11 August 1848 repressed writings seeking ‘à troubler la paix publique en excitant le mépris ou la haine des citoyens les uns contre les autres.’\textsuperscript{926} These provisions were, however, barely used in an age of ardent individual liberalism.\textsuperscript{927} The Press Act of 1881 thus abandoned all protection of the honour of a collectivity. The absence of such an offence was beyond discussion; the draft project did not include it, nor did any amendment seek its insertion.\textsuperscript{928}

It was the Decree-law of 21 April 1939, known as ‘Decree-law Marchandieu’, that finally inserted, in the general offences of defamation (Article 32) and insult (Article 33), a paragraph that criminalized defamation and insult ‘envers les personnes qui appartiennent par leur origine à une race ou à une religion déterminée... lorsqu’ elles auront eu pour but d’exciter à la haine entre les citoyens ou habitants’.\textsuperscript{929} The Decree-law Marchandieu had been created under the pressure of menaces of war, manifestations of anti-Semitism and Nazi-propaganda. Its aim was the reinforcement of the national unity. With the insertion of Articles 32-2 and 33-3, the French government intended to counter the racist and mostly anti-Semitic activities that troubled the public order, infringed national unity and were contrary to French traditions and the principles of liberty, tolerance and fraternity, inscribed in the Declaration of Human Rights of men and citizens.\textsuperscript{930} Without doubt, this context explains why the terms are more restrictive than those of the 1848 Act. The offence resembles the offences of provocation of Article 23 and following articles of the 1881 Press Act, but these texts were considered as insufficient to permit the repression of a racism that had become contagious.\textsuperscript{931} The reporter of the Decree explained: ‘En l’état de la jurisprudence, il est donc permis de dire que l’excitation publique à la division entre les citoyen ou la diffamation accomplie dans ce but contre un groupe de personnes, peuvent être difficilement poursuivies (...) mais ce n’est pas proprement leur intérêt qui est en jeu sous ce rapport, c’est bien plutôt celui de la collectivité nationale. Tout ce qui la divise l’affaiblit. Tout ce qui favorise son union la rend plus forte. Elle est donc directement engagée à voir réprimer

\textsuperscript{925} Beignier 1995, p.249.  
\textsuperscript{927} Beignier 1995, p.250.  
\textsuperscript{928} \textit{Ibid.}  
\textsuperscript{929} Racial and religious defamation was sanctioned with an imprisonment of one month to one year and a fine of 300 to 300.000 Francs. Racial or religious insult was sanctioned with an imprisonment of five days to six months and a fine of 150 to 150.000 Francs or only one of these two penalties. Blin, Chavanne & Drago 1969, p.336  
\textsuperscript{931} Blin, Chavanne & Drago 1969, p.335.
toute tentative de dissociation et de discorde, toute excitation à la haine entre Français.\footnote{Cited in : Beignier 1995, p.250.}

The Decree-law Marchandieu was abrogated by Pétain during the Vichy regime, but reinstalled during the Liberation. Moreover, the offences of the Decree-law Marchandieu appeared to be very difficult to apply, because of the several conditions that had to be met in practice.\footnote{Foulon-Pignaniol, J., Réflexions sur la defamation raciale, Eléments constitutifs du délit et imperfections du texte actuel, D 1970, Chronique XXIX, pp. 133-136.} In order to preserve freedom of opinion, the offences have been applied with prudence in case law. Firstly, proof of the existence of defamation as defined by law was required. Hence, the Paris Court of Appeal refused to apply Article 32-2 to a publication that showed certain distrust against Jews, opposed to the prosecution of this form of racism and advocated an ‘antisémitisme raisonnable’.\footnote{CA Paris 26 March 1952, D. 1953, J, 342. Cited in: Blin, Chavanne & Drago 1969, p.335.} According to Blin, freedom of the press signified that the thresholds for the repression of speech should be very high, and that the publication of immoral and dangerous texts should be allowed.\footnote{Blin, Chavanne & Drago 1969, p.335.} What is more, it was required to prove that the author of the expression had had the desire to incite to hatred. This requirement of malicious intent was impossible to prove; it gave way to too much subjectivity. The Paris Court of Appeal went as far as to exclude the application of the article in the event that the author of a defamation had not incited violence, because the offence no longer comprised ‘le mépris, le détournement de clientèle, ni l’antipathie, ni l’aversion, mais l’excitation à la haine, c’est-à-dire le soulèvement de passions, génératrices de troubles, de désordres sociaux et raciaux et d’agitations, en un mot de violences’.\footnote{CA Paris 9 April 1951, GP 1951, I, 417. Cited in: Blin, Chavanne & Drago 1969, p.335.} However, the French Supreme Court recalled a strict interpretation of the Decree by considering that hatred did not necessarily require violence. Hatred can generate violence, but does not constitute violence. An incitement to hatred was therefore sufficient.\footnote{French Supreme Court, crim.ch., 26 June 1952, D. 1952, J, 641. Cited in: Blin, Chavanne & Drago 1969, p.336.}

Finally, the Decree-law only protected the group against defamation or insult on the ground of his or her race or religion, and not certain members of the group individually. The French Supreme Court decided that an incitement to hatred, which was grounded neither on race or religion, but on nationality or profession, did not fall under the scope of the article. Hence, the Court refused to apply the article to a publication that aimed to rouse the Africans from Dakar against the Lebanese and Syrian bakers and merchants in this city.\footnote{French Supreme Court, crim.ch., 12 January 1956, Bull. Crim. 1956, n°52. Cited in: Blin, Chavanne & Drago 1969, p.336.} Likewise, nationalism did not fall under the scope of the offence. Furthermore, the

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\begin{enumerate}
  \item \footnote{Cited in : Beignier 1995, p.250.}
  \item \footnote{Foulon-Pignaniol, J., Réflexions sur la defamation raciale, Eléments constitutifs du délit et imperfections du texte actuel, D 1970, Chronique XXIX, pp. 133-136.}
  \item \footnote{Blin, Chavanne & Drago 1969, p.335.}
  \item \footnote{CA Paris 9 April 1951, GP 1951, I, 417. Cited in: Blin, Chavanne & Drago 1969, p.335.}
\end{enumerate}
defamation had to be committed against a group and not an individual, who disposed of Articles 31 and 32 of the 1881 Press Act for protection. Article 32-2 afforded a collective protection under the condition of the existence of personal and direct prejudice. Incitement to racial or religious hatred could nevertheless be committed through defamation against one single person. According to the French Supreme Court, this was, however, not the case when Minister Pierre Mendès was insulted because he was Jewish; then the ordinary offences of the 1881 Press Act, which protect members of the Government, applied.

Before its creation by the Plenier Act of 1 July 1972, the offence of provocation to racial discrimination, hatred or violence did not exist. Several proposals to create a similar offence had been made. Notably, in 1959, a draft act seeking to ‘assurer la répression de la provocation à la haine ou à la violence en raison de la race ou de la religion’ remained without effect. Subsequently, in 1968, the draft act of Robert Ballanger, representative of the communist party, ‘tendant à réprimer la provocation à la haine raciste et à rendre plus efficace la législation sur la répression des menées racistes et antisémites’ and the draft act of representative Edouard Charret, ‘tendant à la répression des discriminations raciales et de la provocation à la haine raciste’. The latter envisioned the creation of the offence of provocation to racial hatred, which would comprise of an attempt to provoke racial hatred and at the same time the suppression of the offence of racial defamation. The substitution of the offence of racial defamation was desired, because it was considered to be insufficient in the fight against racial discrimination. The proposals, however, remained without effect.

Article 48 of the 1881 Press Act explicitly provided that public prosecution on the ground of the French hate speech bans could be set in motion at the request of the affected party, who subsequently constituted a civil party, even when the public prosecutor had not taken the initiative to prosecute. However, the

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942 Draft Act deposed on 9 November 1959, National Assembly I, parliamentary documents, n°358.
943 National Assembly, IV n°313, annex to P.V. of the séance of 3 October 1968.
944 National Assembly, IV n°293, annex to P.V. of the séance of 3 October 1968.
945 The offence reads: ‘Ceux qui, par l’un des moyens énoncés dans les art. 23 et 28, auront provoqué ou tenté de provoquer à la haine ou à la violence à l’égard de citoyens ou habitants considérés, soit individuellement, soit collectivement, comme se rattachant par leur origine à une race ou religion déterminée, seront punis d’un emprisonnement d’un mois à un an et de 500 F à 10.000 F d’amende ou de l’une de ces deux peines seulement’. Foulon-Piganiol, 1970-II.

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dominant interpretation of the Decree-law Marchandeau rendered the article void; as the Decree-law Marchandeau concerned anti-discriminatory press offences only against a group of people on the ground of their race or religion, the case law had generally concluded that an individual person, even when he or she belonged to the group, had to be declared inadmissible. Only a group that was very restricted in number was admissible, because only then the honour of every individual person belonging to that group could be violated. For an anti-racism association, the situation was not much better if it could not demonstrate a sufficient link with the target group it claimed to represent. In practice, only the public prosecutor could initiate criminal proceedings and only the anti-racism associations that were directly affected by a publication could set in motion public prosecutions and constitute as a civil party. As governmental orders were not issued, the public prosecutors remained inactive and the request for public prosecutions by anti-racism associations and their constitution as a civil party was systematically declared inadmissible for not having been – personally – attacked in the publication in question.947

Due to these difficulties, the Decree-law Marchandeau in practice entailed the anti-racism association Le mouvement contre le racisme, l’antisémitisme et pour la paix (MRAP). MRAP had tried to convince the French Government of the necessity of the drafting of new anti-racism laws since 1957 and had begun to prepare a draft. The proposals made by MRAP were adopted in the previously discussed draft acts. In addition, MRAP tried to demonstrate the inactivity of the public prosecution by persisting in the engagement of prosecutions in the knowledge that they would be declared inadmissible. The possibility to take legal action in order to defend the collective interests they aimed to defend was at stake.948

3.3 The merit of the Pleven Act

3.3.1 Rationale of the Pleven Act of 1 July 1972

The Pleven Act of 1 July 1972 was adopted unanimously by the General Assembly and the Senate.949 As a result of the drafting history and the debates in the National Assembly and the Senate, large consensus existed in relation to the question as to what was the central rationale of the Pleven Act; the protection of the human dignity and the equality of French inhabitants. As these notions

948 Secondi-Nix, M., Lutte contre le racisme et justice pénale, Rôle des associations, CNRS, CESDIP, October 1996, p. 34.
formed central characteristics of the French Republic, the Act aimed to assure, at the same time, the Republican values and social peace in and the unity of the French nation itself. As one member of Parliament stated: ‘Nous aurions voulu que la France, où le racisme apparaît comme une insulte à sa culture, à son humanisme, s’associât plus réellement à ce combat international pour la dignité de tous les hommes.’\(^5\) Before the Senate, the reporter of the commission des lois constitutionnelles, Mailhe, described the Pleven Act as a result of the fight against ‘ce qu’il y a de plus abominable dans les rapports humains: la négation du concept de dignité et l’absence de tout élan fraternel.’\(^6\)

The French Minister of Justice at the time, Pleven, considered ‘... rien n’est plus étranger à l’authentique tradition française et aux sentiments profonds de notre peuple que le racisme ou la xénophobie.’ (…) ‘cette tradition, qui est aussi celle du peuple français, vous a toujours fait donner en toutes choses la priorité au respect de la personne humaine.’\(^7\) According to Pleven, the danger of racism lied in its contagiousness, ignorance, irrationality and intolerance: ‘Car le racisme est une lèpre sans cesse renaissante et très vite contagieuse. Les préjugés raciaux, parce qu’ils trouvent leur source dans les profondeurs de l’inconscient, parce qu’ils se nourrissent de l’ignorance, de la crainte, de l’envie, parce qu’ils ne cèdent ni devant le raisonnement ni devant l’évidence des faits, parce qu’ils sont une manifestation de ce que comporte d’animalité la nature humaine, sont particulièrement redoutables.’ ‘N’être pas raciste, ce n’est pas seulement respecter un texte de loi ou même un code de conduite ; c’est un état d’esprit, un état d’esprit que nous dicte le cœur mais aussi la raison. L’intolérance est le poison dont meurt une société ; le racisme est la forme la plus pénicicue de cette intolérance.’\(^8\)

The protection of the public order in relation to the prevention of immediate violence between different groups in society did not form an explicit rationale of the Pleven Act – exclusive of the general rationale to prevent a repetition of the horrors of the Second World War. During the drafting, Pleven held on to the Government’s position, i.e. that French law was largely compliant with the ICERD and sufficient to counter racism, because in France racist acts did not frequently occur and, if they did, the public prosecutors did engage in proceedings. However, Pleven agreed that France was a nation with considerable immigration figures, in which ethnic or national minorities lived that could in particular be victims of racism. Therefore, ‘il n’est pas inutile de

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\(^6\) Senate, séance du 22 Juin 1972, Lutte contre le racisme, Adoption d’une proposition de loi, JO 23 Juin 1972, para. 5, p.1172.

\(^7\) Senate, séance du 22 Juin 1972, Lutte contre le racisme, Adoption d’une proposition de loi, JO 23 Juin 1972, para. 5, p.1180.

\(^8\) Assemblée Nationale, débats parlementaires, séance du 7 Juin 1972, Lutte contre le racisme, Discussion des conclusions d’un rapport, JO 8 Juin 1972, p.2291.
prévoir à l’encontre de ces agissements une répression plus ferme et de caractère plus spécifique, afin de se prémunir par avance contre tout danger de contagion raciste, quand bien même un tel danger n’apparaît pas immédiat.”954

3.3.2 The hate speech bans

The Pleven Act of 1 July 1972 did not create, for the implementation of article 4 ICERD, an independent offence that criminalized the ‘diffusion of ideas based on racial superiority or hatred’. Korman concludes that the French legislator has not implemented Article 4 ICERD completely and must therefore create an independent ‘délit de propagande raciste, le fait de justifier ou d’encourager toute forme de haine et de discrimination raciales’.955 However, it can be argued that it results from the traditional French conception on freedom of opinion that the criminalization of the manifestation (diffusion) of ‘ideas based on racial superiority or hatred’ would signify the criminalization of an opinion that seeks its adoption by others merely on the basis of its reprehensible content (an opinion) and not for reasons of its direct link with a reprehensible act. From this strand of thought, Droin concludes that the French legislator has rightly avoided the creation of a ‘délit d’opinion’.956 The declaration made by the French government with regard to article 4 ICERD can be interpreted in this light.

The Pleven Act of 1 July 1972 did create three distinct press offences of a racial character, being ‘diffamation raciale’, ‘injure raciale’ and ‘provocation à la discrimination, à la haine ou à la violence’.957 The French legislator thought that defamation and insult were not the only means through which the public order could be violated by inciting hatred between citizens. Expressions that lacked a

954 Assemblée Nationale, débats parlementaires, séance du 7 Juin 1972, Lutte contre le racisme, Discussion des conclusions d’un rapport, JO 8 Juin 1972, p.2291. Before the Senate, Pleven recapitulated: ‘Pour construire une société plus juste et plus humaine, pour avancer dans la voie d’une nouvelle société, il s’efforce de lutter contre les injustices ou les inégalités matérielles qui subsistent dans notre pays ; il cherche à donner à chacun de nos concitoyens sa chance d’épanouissement humain et professionnel ; mais il veut aussi donner à chaque Français, à chaque habitant de notre pays, le sentiment de sa dignité, l’assurance qu’elle est protégée et qu’il est lui-même pleinement intégré à la communauté nationale ou accueilli sans réticence dans notre pays. La loi que vous allez voter apportera à la construction de cette société nouvelle une contribution importante et marquera, au-delà de la solidarité matérielle ou financière de la nation, une solidarité plus importante encore : la solidarité de cœur et d’esprit entre tous les habitants de notre patrie.’  Senat, séance du 22 Juin 1972, Lutte contre le racisme, Adoption d’une proposition de loi, JO 23 Juin 1972, para. 5, p.1180.

955 Korman 1989, 3404.

956 Droin 2009, p.147.

957 For an evaluation of their application the last fourty years see: Les apports de la loi de 1972 en matière de droit de la presse, Actes de colloque, Légipresse n° 300 December 2012, p. 686-699.
defamatory element could still have an offensive character. It therefore convened to maintain the offences of racial defamation and insult and to create a new offence that would be better adapted to the multiple faces of racism that fell outside the scope of the offence of defamation, which was regarded as too narrow and outdated.\footnote{Assemblée Nationale, séance du 15 avril 1971, Convention international sur l'élimination de la discrimination raciale, JO. 16 avril 1971, para. 6, p.1117; Assemblée Nationale, débats parlementaires, séance du 7 Juin 1972, Lutte contre le racisme, Discussion des conclusions d'un rapport, JO 8 Juin 1972, p.2282-2283.}

The Pleven Act of 1 July 1972 amended the existing offences of racial defamation and racial insult. It removed all references ‘au but d’excitation à la haine entre les citoyens et les habitants’. The case law had laid much emphasis on the imperative character of this condition. The rationale of the former offences was more to establish harmony between citizens than to protect their honour or reputation. Contrarily, the Act of 1 July 1972 created the offences of racial defamation and racial insult as such.\footnote{Poulon-Pigniol 1972.} Furthermore, the Act of 1 July 1972 enlarged the application of the existing articles; it added the discriminatory grounds of origin, and the membership or non-membership of an ethnic group and nation, and allowed for the protection of, next to a group of persons, a single person. The fact that the ICERD concerned racial discrimination and that Article 4 ICERD did not require the insertion of the category of religion that already existed since the Decree-law Marcheaud did not raise any discussion during the drafting as to what extent criticism on a certain religion or religious behaviour or practices would fall in or outside the scope of the offences.

During the lecture of the article ‘provocation à la discrimination, à la haine ou à la violence’ in Parliament, the question was addressed as to whether the article would apply to the multiple disqualifications in the press of French citizens coming from the island Corsica – and French citizens from the Over Seas Departments, or whether, next to the categories of ethnic and national origin, the category of provincial origin needed to be inserted. The Minister of Justice opined that, although the matter was to be decided by case law, the article certainly permitted the sanctioning of such expression, as the term ‘ethnic origin’ had a different signification than the term ‘race’.\footnote{Assemblée Nationale, débats parlementaires, séance du 7 Juin 1972, Lutte contre le racisme, Discussion des conclusions d’un rapport, JO 8 Juin 1972, p.2292.}

La Commission des lois constitutionnelles had initially proposed the use of both verbs of ‘provoquer’ and ‘inciter’ in the offence of ‘provocation raciale’, because the latter verb would have a supplementary meaning to the first. During the parliamentary debates, it was argued that the verbs were synonyms and the Government decided to delete the verb ‘inciter’. According to the Minister of Justice, instead of using the term ‘provocation directe’, a term that was commonly used in the Press Act of 29 July 1881, the Government would use
the term ‘provocation’ without using ‘direct’ or ‘indirecte’, and hence ‘le Gouvernement donne au mot ‘provoquer’ son sens plein lequel couvre certainement l’action du verbe ‘inciter’’. The verb ‘provoke’ in the offence of provocation raciale is therefore neither larger nor smaller in scope than the verb ‘incite’ used in Article 4 ICERD.

The offences of racial defamation and racial insult were inserted into the second and third subparagraphs (Articles 32-2 and 33-3) of the general offences of defamation (Article 32) and insult (Article 33) in the third paragraph of Chapter IV concerning ‘misdemeanours against persons’. The offence of racial provocation was inserted into the sixth subparagraph of Article 24 as one of the forms of provocation to felonies and misdemeanours not followed by effect in the fourth paragraph of Chapter IV concerning ‘provocation to felonies and misdemeanours’. De Lamy raises the question as to why the anti-racism offences have not been classified under the paragraph concerning the infractions ‘contre la chose publique’, considering the danger of racism for society, although this was not an influence in their regime. According to Mathieu, the rationale of offences is rather the protection of the values – existent or supposed – of the French Republic, than the protection of public order. Indeed, the drafting history shows that the offences principally aimed at the protection of human dignity and equality of French citizens that form inherent characteristics of the French Republic and not the protection of the public order in relation to the public authorities or the prevention of immediate disturbances of the peace.

\[\text{961} \text{ Parliamentary Debates, National Assembly, séance of 7 June 1972, JO 8 June 1972, p.2293.}\]

\[\text{962} \text{ De Lamy 2000, p.328. Paragraph 2 concerning ‘Délits contre la chose publique’ comprises article 26 that sanctions ‘L’offense au Président de la République’ and article 27 that sanctions ‘La publication, la diffusion ou la reproduction, par quelque moyen que ce soit, de nouvelles fausses, de pièces fabriquées, falsifiées ou mensongèrement attribuées à des tiers lorsque, faite de mauvaise foi, elle aura troublé la paix publique, ou aura été susceptible de la troubler,’ and ‘la publication, la diffusion ou la reproduction faite de mauvaise foi sera de nature à ébranler la discipline ou le moral des armées ou à entraver l’effort de guerre de la Nation’.}\]

\[\text{963} \text{ Mathieu 2007-I, p.321 et seq.}\]
3.3.3 The criminalization of discrimination

The Pleven Act of 1 July 1972 created two articles that repressed racial discrimination; Article 187-1 of the French Penal Code that criminalized discrimination on the ground of origin, and the membership or non-membership of a determined ethnic group, nation, race or religion by public officials and citizens charged with public services and Article 416 of the French Penal Code that criminalized discrimination on those grounds in the field of employment and the supply of goods and services. The articles have been renumbered and supplemented with new discriminatory categories. The current French Penal Code defines discrimination in Article 225-1, inserted in section I of Chapter V concerning ‘offences against the dignity of persons’, as ‘any distinction applied between natural persons by reason of their origin, sex, family situation, physical appearance or patronymic, state of health, handicap, genetic characteristics, sexual morals or orientation, age, political opinions, union activities, or their membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion. (…).’

The article does not have an independent significance and does not criminalise discrimination in general, but explains the criminalization of the acts of discrimination in Article 225-2, consisting of the refusal to supply goods or services; obstructing the normal exercise of any given economic activity; the refusal to hire, to sanction or to dismiss a person; subjecting the supply of goods or services to a condition based on one of the factors referred to under article 225-1; subjecting an offer of employment, an application for a course or a training period to a condition based on one of the factors referred to under article 225-1; refusing to accept a person onto one of the courses referred to under 2° of article L.412-8 of the Social Security Code.

Article 225-3 gives evidence of the relative weight of the different grounds of discrimination; it excludes the application of Article 225-2 to discrimination based on one’s state of health, when it consists of operations aimed at the prevention and coverage of the risk of death, of risks for the physical integrity of the person, or the risk of incapacity to work or invalidity; discrimination based on a person’s state of health or handicap, if it consists of a refusal to hire or dismiss based on a medically established incapacity; and recruitment discrimination based on gender when the fact of being male or female constitutes the determining factor in the exercise of an employment or

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965 The article continues: ‘Discrimination also comprises any distinction applied between legal persons by reason of the origin, sex, family situation, physical appearance or patronymic, state of health, handicap, genetic characteristics, sexual morals or orientation, age, political opinions, union activities, membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion of one or more members of these legal persons.’
professional activity. No such exclusions exist in relation to discrimination based on ethnic group, nation, race or religion.

Complementary to the two offences penalizing acts of discrimination, the Pleven Act of 1 July 1972 furthermore inserted into the Act of 10 January 1936 concerning combat and vigilant groups, an article that permitted the pronouncement of the dissolution by decree of any association that ‘soit provoqueraient à la discrimination, à la haine ou à la violence envers une personne ou un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée, soit propageraient des idées ou théories tendant à justifier ou encourager cette discrimination, cette haine ou cette violence.’

During the parliamentary debates, it was argued that associations and groupings could openly be constituted with the aim to propagate racist myths and that their existence was perfectly legal as long as they did not attack the republican order. This was considered to be a lacuna in French law, because ‘Peut-on être sûr que l’ordre républicain serait considéré comme menacé si ces milices prônaient le racisme? L’attitude du Gouvernement à l’égard de certains groupes de combat d’extrême droite permet d’en douter.’ While the French Government did not thus create an independent press offence penalizing every ‘propagande raciste, le fait de justifier ou d’encourager toute forme de haine et de discrimination raciales’, such ‘opinions’ were repressed if they formed part of a larger discriminatory practice or ‘act’.

Furthermore, the French Penal Code has been amended in order to create so-called ‘hate crimes’ by making a racist motive an aggravating factor in specific common criminal offences. In 2003, the Loi Lellouche created Article 132-76, which mandates more severe penalties for crimes of violence committed on the basis of the victim’s actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion. Criteria for the determination of the motivation of the offence include the use of ‘spoken or written words, images, items, or acts of any kind that are injurious to the honor or esteem of the victim, or group of persons including the victim, by virtue of their actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion.’ Subsequently, a new Article 132-77 was added that extends the provisions on aggravating circumstances to include bias on the basis of sexual orientation. These two articles apply, amongst others, to the offences of

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966 Senat, séance du 22 Juin 1972, Lutte contre le racisme, Adoption d’une proposition de loi, JO 23 Juin 1972, para. 5, p.1181.
968 Korman 1989, 3404.
wilful homicide, torture and barbarous acts, violence inadvertently resulting in death, violence resulting in permanent disfigurement or disability, violence entailing nine or more days of sick leave from work, violence entailing up to eight or fewer days of sick leave or no sick leave, damage to private property and damage to private property caused by dangerous means. Since 2004, these articles equally apply to the criminal offences of threats, thefts and extortion. The specific common criminal offences stipulate specific aggravated penalties for racist and homophobic bias.971

3.3.4 The right of anti-racism associations to set in motion public prosecutions

The Pleven Act of 1 July 1972 inserted a first paragraph into Article 48 of the 1881 Press Act (Article 48-1) that expressly authorized associations that according to their statutes have the objective of combating racism to exercise, in the field of racial defamation, racial insult, and racial provocation, the rights afforded to the civil, affected party in his or her place. The Act also inserted a first paragraph into Article 2 of the French Code of Criminal Procedure (Article 2-1 CCP), which expressly authorized associations that have the objective of combating racism to exercise according to their statutes, in the field of acts of racial discrimination, the rights afforded to the civil, affected party in his or her place. The Pleven Act thus allowed for the public prosecution of the French hate speech bans to be set in motion at the request of anti-racism associations that subsequently constituted as a civil party, even when the public prosecutor had not taken the initiative to prosecute (para.10.3.1 infra). These articles were the most debated and innovating provisions of the new legislative text.

Pleven stipulated that in order to afford an association that has not directly suffered harm from a violation of the law, but according to its statutes has the objective of combating racism, the right to intervene before the court signified a derogation from the fundamental rules in French law.972 La Commission des lois constitutionnelles had therefore at first advised limiting the capacity to intervene before a court to associations that had been afforded a recognition of public utility by the French authorities, which would be in conformity with the Decree-law Marchandieu. It was, however, argued both in the National Assembly and in the Senate, that such a requirement would undermine the importance of the role that existing anti-racism associations lacking such a recognition played in the fight against racism, such as MRAP and La Ligue internationale contre l’antisémitisme (LICA), which would become La

971 Law 2004-204 of 9 March 2004. For example, the aggravated penalties for both racist and homophobic crimes include life imprisonment instead of 30 years for murder, and fifteen rather than ten years of imprisonment for violent attacks leading to permanent disability. See: Articles 221-4 and 222-10 of the French Penal Code.
Ligue internationale contre le racisme et l’antisémitisme (LICRA) in 1979. In fact, it was notably these two anti-discrimination associations that played a determinant role in the creation of the Act of 1 July 1972, as well as the possibility to exercise the rights of the affected party with regard to the press offences with a racist character; the Act is inspired for a large part on their suggestions and years of preparatory work.

During the parliamentary debates it was argued that affording these rights to anti-racism associations ‘Cela permettra à des hommes, qui ne se rendent pas toujours exactement compte du sort qui leur est fait … d’être défendus, même lorsqu’ils ne connaissent pas l’étendue de leurs droits dans notre pays de liberté et d’égalité des citoyens par des associations qui, partageant ces responsabilités avec nous, avec le Gouvernement, avec le Parlement, sachent rendre leurs droits à chacun de ces hommes, nos égaux.’

And ‘Il est important d’encourager toutes les associations qui tendent à resserrer les liens de fraternité entre les individus vivant dans une même société.’ And ‘La justice est encore couteuse ; la solliciter c’est aller au-devant de soucis, de dérangements. Aussi suis-je persuadé que les associations ayant mission de défendre les victimes du racisme ne se multiplieront pas dans le seul but d’aller devant le juge. Celles qui existent n’agissent qu’à bon escient. Les associations à venir feront de même. Elles auront conscience qu’agir sans discernement, abuser du droit d’action serait une manière de fortifier le camp des racistes (...) Oui, dans notre lutte antiraciste les associations sont nos alliés naturels.’

It was, however, also feared that anti-racism associations would become too powerful in the field of instituting proceedings. One representative remarked: ‘chacun a ses racismes et ses anti-racismes, que l’opinion se saisit de manière très sélective des problèmes qu’elle juge urgents et de ceux qu’elle néglige. Il est vrai aussi que les combattants de la lutte antiraciste, quelque infatigables qu’ils soient, se sont parfois un peu spécialisés et ont pu oublier

975 Assemblée Nationale, débats parlementaires, séance du 7 Juin 1972, Lutte contre le racisme, Discussion des conclusions d’un rapport, JO 8 Juin 1972, p.2281.
quelques problèmes nouveaux. As a compromise, the requirement of
recognition of a public utility was replaced by the insertion of several other
requirements. Firstly, associations, that according to their statutes combat
racism, have to be regularly declared at least five years before the occurrence
of the criminal offence. This would prevent ‘associations circonstancielles’ from
being created after a violation of a specific hate speech ban, with the mere aim of
engaging a prosecution. Another fear was that a divergence of opinion could
exist between the association and the victim. Article 48 was therefore completed
with a second paragraph 48-2 that requires the association to obtain the consent
of an individual person in order to engage a proceeding, if the hate speech
offence is committed against that particular person considered individually.

3.4 Conclusion

France has implemented ICERD by the adoption of the Pleven Act of 1 July 1972
concerning the fight against racism. France made a declaration to Article 4
ICERD that can be interpreted as expressing the position of the French
Government, i.e. that the criminalization of the diffusion of ‘ideas based on
racial superiority or hatred’ would be contrary to the French traditional
conception of freedom of opinion. The Pleven Act signified a reinforcement of
the anti-racism and discrimination laws in order to more effectively protect
primarily the human dignity and equality of French citizens as a central
characteristic of the French Republic, not the protection of the public order and
the prevention of disturbances of the peace. The merit of the Pleven Act was
threelfold: the creation of next to the offences of racial defamation and insult as
such, the creation of the new offence of racial provocation; the criminalization of
acts of discrimination; and the right of anti-racism associations to set in motion
public prosecutions on the grounds of these offences and constitute as a civil
party. The anti-racism associations le MRAP and LICRA have played a
determinant role in the creation of the Pleven Act. In the vision of the French
legislator such associations share a responsibility with the French Government
to protect the fraternity between French citizens and are indispensable actors for
an effective fight against racism and discrimination.

4. Racial defamation

The offence of racial defamation is characterized by a number of elements, being
defamation (4.1), intent thereto (4.2) and the designation of a group on the basis
of race or religion (4.3). The justifications for the offence of racial defamation

978 Assemblée Nationale, débats parlementaires, séance du 7 Juin 1972, Lutte contre le
racisme, Discussion des conclusions d’un rapport, JO 8 Juin 1972, p.2290.
979 Sénat, séance du 22 Juin 1972, Lutte contre le racisme, Adoption d’une proposition de
loi, JO 23 Juin 1972, para. 5, p.1175.
allowed by the law are limited to the proof of good faith (4.4). However, in the application of the offence, the French judge does – to a certain extent – take into account the context of expression (4.5). The analysis results in a general conclusion about the offence of racial defamation in French law (4.6).

4.1 The criminalization of defamation

In 2008, the report of the ‘Commission Guinchard’ recommended ‘la dépénalisation de la diffamation à l’exception des diffamations présentant un caractère discriminant (raciste, sexiste …). Ainsi seule le voie civile … sera possible’, and suggested the decriminalization of defamation – and insult – against individuals to the benefit of civil law and civil responsibility as an only recourse.980 The report has been variously received by French legal scholars. Most scholars have criticized the proposition for taking away the fine balance that the 1881 Press Act, with its specific press offences and procedural law, aims to strike between freedom of the press and the rights of victims of defamation and insult.981 For example, Malaurie cites Carbonnier, according to whom ‘Dans la théorie pénale de la diffamation et de l’injure, elle [la jurisprudence] trouvait une philosophie toute élaborée, le produit de réflexions sèculaires sur les bienfaits et les méfaits de la langue des hommes, sur les aveuglements respectifs de l’envie et de l’amour-propre, etc., tandis que l’article 1382 ne pouvait lui offrir qu’un schéma sec, dépouillé (…)’.982

Decriminalization would signify the disappearance of ‘un droit de délits spéciaux et un monde judiciaire clos’ and the offences of defamation and insult would fall under ‘l’obscur clarifié qui tombe de l’article 1382’.983 Derieux is more favourable to the proposal for two main reasons. Firstly, with right the proposal is inspired in particular to circumvent the strict procedural rules of the 1881 Press Act that form a real obstacle for victims of defamation in the prosecution; while these procedural particularities might have been justified in 1881 in order to assure press freedom, in the context of today they do not have the same

raisons d’être. Secondly, the proposal would solve certain difficulties related to the offence of defamation itself. While the criminalization of racial defamation is justified, because it notably aims to protect society against elements causing social disorder, this does not hold true to the same extent for the criminalization of defamation against individuals that is rather based on the protection of personal interests than on the prevention of social disorder. Other motives in favour of the decriminalization of defamation concern problems related to its definition and – with regard to its possible justifications – the compatibility of the French notion of a suspect’s good faith with the European notion of a free public debate on a matter of general interest; later on these issues will be discussed in more detail to the extent that they are relevant in the context of ‘racial defamation’. The recommendation of the Commission Guinchard has, however, not been implemented.

Ancient French law did not distinguish between defamation and insult, but made a distinction between oral insults, the ‘outrage par paroles’, and written insults, the ‘libelle diffamatoire’. The French Penal Code of 1810 introduced the distinction between ‘la calomnie’ and ‘l’injure’. Article 367 of the Penal Code defined the calomnie as the imputation against an individual of facts that ‘s’il existaient, exposeraient celui contre lequel ils sont articulés à des poursuites criminelles ou correctionnelles ou même l’exposerait seulement au mépris ou à la haine des citoyens’ [curs. EHI]. In literature, the calomnie has also been described as expression ‘qui suppose ce qui n’est pas’, as opposed to ‘la médisance, qui objecte ce qui est’, which was not repressed in the Penal Code of 1810. The Act of 17 May 1819 abrogated the offence of calomnie of Article 367. The offence was thought to be of no importance whether or not the posed facts existed and were true. Instead, the Act introduced an offence of defamation that did not make such a distinction and comprised la médisance. The 1881 Press Act abrogated the Act of 17 May 1819, but adopted its definition of defamation in Article 29 that reads ‘Toute allégation ou imputation d’un fait qui porte atteinte à l’honneur ou à la considération de la personne ou du corps auquel le fait est imputé est une diffamation.’ While Article 32-1 of the 1881 Press Act sanctions

985 Derieux 2011, pp.75-76.
989 The 1881 Press Act also abrogated the Act of 22 March 1822 that had created other offences of public ‘outrages’ against citizens, ‘outrages diffamatoires ou injurieux’. Contrarily, Articles 222 – 227 of the French Penal Code have been preserved.
the public defamation of private individuals (also called the ‘diffamation simple’).990 Article 32-2 sanctions the defamation of a person or a group of persons on the ground of their origin, membership or non-membership of an ethnic group, nation, race or religion with a fine of up to € 45.000, or imprisonment of up to one year.991 In the absence of publicity, racial defamation of a person or a group is a petty offence criminalized in Article R. 624-3 of the Penal Code.992

Defamation supposes, as a constituent element of the offence, an allegation or an imputation of a specific fact. In literature, the allegation has been defined as ‘l’énonciation d’un fait, sur la foi d’autrui, ou l’assertion qui se produit sous l’ombre du doute’, while the imputation has been defined as ‘l’affirmation personnelle de celui qui parle ou écrit’.993 This distinction remains purely theoretical, as both terms are used interchangeably in case law.994 After giving a definition of defamation, Article 29 continues: ‘La publication directe ou par voie de reproduction de cette allégation ou de cette imputation est punissable, même si elle est faite sous forme dubitative ou si elle vise une personne ou un corps non expressément nommés, mais dont l’identification est rendue possible par les termes des discours, cris, menaces, écrits ou imprimés, placards ou affiches incriminés.’ Subsequently, the French Supreme Court has on several occasions established that defamation ‘sous une forme déguisée, ou dubitative ou par voie d’insinuation’ can equally constitute the offence.995

The French Supreme Court has furthermore established that ‘pour être diffamatoire, une allégation ou une imputation doit se présenter sous la forme d’une articulation précise de faits de nature à être, sans difficulté, l’objet d’une preuve et d’un débat contradictoire.’996 When the allegation or imputation does not thus concern a specific fact that is susceptible of proof and the object of a

990 with a fine of up to € 12.000,–.
991 According to the last paragraph of Article 32, the tribunal can order the public display or dissemination of the decision taken in accordance with Article 131-35 of the French Penal Code.
992 Article R.624-3 reads : La diffamation non publique commise envers une personne ou un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance, vraie ou supposée, à une ethnie, une nation, une race ou une religion déterminée est punie de l’amende prévue pour les contraventions de la 4e classe ; Est punie de la même peine la diffamation non publique commise envers une personne ou un groupe de personnes à raison de leur sexe, de leur orientation sexuelle ou de leur handicap.
contradictory debate, it can only be deemed as constituting the offence of insult, which is sanctioned less severely. The French judiciary must interpret expression according to its nature and not according to the motive of the suspect: ‘le caractère légal des accusations diffamatoires s’apprécie non d’après le mobile qui les a dictés mais selon la nature du fait sur lequel elles portent.’

What is more, the judiciary can take into account, next to the direct context of the publication, ‘des éléments extrinsèques de nature à donner à l’expression incriminée son véritable sens et à caractériser l’infraction poursuivie’. The broader context of an expression outside the publication can even render a simple interrogation punishable.

Defamation furthermore supposes, as a constituent element of the offence, the violation of a person’s honour or consideration. During the drafting of the offence of defamation, a distinction between the two notions was made: the consideration ‘se rattache à l’idée que les autres ont de vous’, while the honour ‘se rattache davantage à l’idée que vous tenez à en conserver vous-même’. However, the notions have never been defined in case law. According to Bigot, a person’s honour is violated when expression constitutes an accusation of a violation of the law, such as the commitment of a crime or lesser offences, or even conduct contrary to ‘moral duties’, while a person’s consideration is violated when the expression violates a person’s good name or damages his or her reputation. The French Supreme Court has established that for the interpretation of the notions neither the subjective opinion of the person concerned nor the public opinion is determinant; the judge must objectify the notions: ‘pour déterminer si l’allégation ou l’imputation faite porte atteinte à l’honneur ou à la considération de la personne à laquelle le fait est imputé, les juges n’ont pas à rechercher quelles peuvent être les conceptions personnelles et subjectives de celle-ci concernant la notion de l’honneur et de la considération; qu’ils n’ont pas, non plus, à tenir compte à cet égard, de l’opinion que le public a de cette personne, que les lois qui prohibent et punissent la diffamation protègent tous les individus, sans prévoir aucun cas d’exclusion fondé sur de tels éléments.’

4.2 Intent and the presumption of bad faith

Being an ‘infraction intentionnelle’, the intention of the author to defame forms a constituent element of the offence of defamation. The author must thus have the

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1000 Bigot 2004, p.67.
intention to defame. This ‘intention coupable’ is characterized by the *dol generalis* and consists of ‘la volonté ou la conscience de porter atteinte à l’honneur et à la considération d’autrui’. In case law, sometimes reference is made to the authors ‘intention de nuire’ that is characterized by the *dol specialis*. As the intention to harm is not required by law, it would form a supplementary condition to the offence of defamation. According to Dreyer, this supplementary condition has no practical effect, because in order for the offence of defamation to be constituted the intention of the author does not have to be proven. Indeed, the French Supreme Court has established that, as the author of defamation is necessarily conscientious of the fact that his expression violates the honour or the consideration of the person he targets, the existence of the author’s intention must be presumed. In other words, from the moment the judge has established the defamatory character of the expression, he does not have to demonstrate explicitly the authors ‘bad faith’. This ‘presumption of bad faith’ is of great influence to a suspect’s position of defence, because it shifts the burden of proof towards the suspect. A suspect cannot, however, counter this ‘presumption of bad faith’ by proving the absence of his intention to defame. The French Supreme Court has established that the presumption of bad faith can only be countered by presenting justifying facts that are sufficient to admit the suspects ‘good faith’ (para.4.4.2 infra). The 1881 Press Act explicitly refers to the notion of bad faith in Article 35 *bis* that reads ‘toute reproduction d’une imputation qui a été jugée diffamatoire sera réputé faite de mauvaise foi, sauf preuve contraire par son auteur’ and aims to prevent the re-publication of defamatory statements in journals with a large public readership that have originally been published in magazines with a small audience, which is why a condemnation would be useless.

4.3 The designation of a group

4.3.1 Racial groups

Article 29 specifies that the offence of defamation is constituted even if a person is ‘non expressément nommée mais dont l’identification est rendue possible’. The French Supreme Court has established that it is his task to ‘contrôler le sens et la portée des écrits incriminés’ and ‘l’identification de la victime de

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l’infraction’.\textsuperscript{1007} With regard to racial defamation, the courts have for a long time considered it necessary for the defamatory expression to be aimed at the group in its entirety. For example, in early 1991, the Paris Court of Appeal considered the imputation that young ‘beurs’ – slang for ‘arabes’ – are arrogant, benefit from impunity and privileges, and had behaved violently during a manifestation not to aim at ‘les jeunes d’origine maghrébine dans leur globalité: les prévenus ont donc en l’espèce, été relaxés du chef de diffamation envers un groupe de personnes en raison de leur appartenance à une race.’.\textsuperscript{1008} Nowadays, this is no longer required. According to established case law, it suffices, in order for the offence of racial defamation to be constituted, that the expression is aimed at a group of people, regardless of its size, on the ground of its membership of one of the protected grounds. Hence, in 2004, the French Supreme Court considered the imputation ‘de jouer du tam-tam toute la nuit et de vivre de prestations sociales’ against ‘Africains d’Afrique noire’ in France and not to the African people in their totality to constitute a racial defamation.\textsuperscript{1009}

Contrary to the offence of racial provocation (para.6.3 infra), the French Supreme Court has given a restrictive interpretation of the discriminatory grounds of origin, nation or ethnic background with regard to the offence of defamation. According to the French Supreme Court, defamatory expression concerning ‘étrangers’ is too vague to refer to a category of people on the ground of their membership of a nation.\textsuperscript{1010} Likewise, the French Supreme Court has considered that the Corsican community, as a community within the French territories, does not form a group of people on the grounds of origin or ethnic background that is protected by Article 32-2.\textsuperscript{1011} Contrarily, during the drafting of the Eleven Act of 1972 the French legislator considered the Corsican community to constitute a group in the sense of Article 24-8.

In any event, an imputation or an allegation must be made against a group exclusively on the ground of their origin, membership or non-membership of an ethnic group, nation, race or religion, and not for other reasons. Hence, in 2009, the French Supreme Court considered that the qualification of the ‘Harkis’ – persons of North African origin that have served in the French army in Algeria from 1954 until 1962 – and their descendants as ‘traîtres à la patrie’, because of their political choice during the Algerian war, did not constitute the offence of defamation on the ground of ethnic background, nation or religion. And, as the ‘Harkis’ do not constitute a group for the purposes of Article 32-2, the prosecuting associations could not act in their defence on the ground of Article 48-1 and had to be declared inadmissible, even

\textsuperscript{1009} French Supreme Court, crim.ch., 6 January 2004, n°02-87803, unpublished.
though Article 5 of the Act of 24 February 2005 interdicts any insult or defamation against a person or a group on the ground of the actual or supposed qualification as harki and declares that the State must assure the respect of this principle in the context of the laws in force. Derieux rightly criticizes the judgment, arguing that even though this latter provision is not equipped with any sanction, the rights it affords to the Harkis should not be deprived of all significance.

4.3.2 Religious groups

With regard to religious defamation, the French Supreme Court has, on several occasions, demarcated the punishable imputation of a specific fact against a designated religious group from the free opinion concerning religious practices. In 1998, the French Supreme Court found a publication under the title 'Pèlerinage intégriste Chartres-Paris ... 100 kilomètres à pied, ça use les fumiers' of drawings and legends, in which the march made by Catholic pilgrims at the occasion of Pentecost was compared to a military parade made by the Nazis and Catholic pilgrims were qualified as ‘nazis en culottes courtes’ and ‘nazillon polonais’, not to constitute a defamation, because it did not impute any specific fact and the terms ‘nazis’ or ‘nazillon’ constituted mere insults.

Equally in 1998, the French Supreme Court evidently found the expression ‘secte abominable’ used to define the Christian community very pejorative, but the equation of this community to a sect could not, in itself, constitute a defamation, ‘en raison de l’imprécision du concept de secte qui n’a jamais été défini de manière précise... L’absence de législation spécifique pour lutter contre les sectes a permis aux juges de justifier leur décision en considérant que l’expression incriminée ne comporte pas l’imputation d’un fait déterminée.’

Likewise, in 1999, the Douai Court of Appeal had found the qualification of the religious movement of the Jehovah witnesses as a sect and its equation to an ‘association de malfaiteurs’ made by a father during a television interview concerning his book that narrated the drama experienced by his family since his daughter had become a Jehovah witness to be pejorative, but to constitute an opinion on the movement of the Jehovah witnesses, which had been recognized as a sect in a parliamentary report, in the context of a debate on the harmful consequences of sects. In 2002, however, the French Supreme Court

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annulled this judgment considering that the expression constituted a punishable defamatory expression, because it was susceptible of proof and a contradictory debate.\footnote{1017}

The question as to the demarcation of a group appears to be extremely sensible with regard to the discriminatory ground of religion. The case law of the French Supreme Court concerning the distinction between expression concerning a religion and expression concerning a religious group might cause some confusion in relation to how to interpret the following example in relation to the previously discussed case. In 1999, the French Supreme Court considered the qualification of the religious movement of Jehovah witnesses as ‘une secte, l’une des plus dangereuses, qui a, à son bilan, un grand nombre de suicides’, because of its methods of indoctrination and rupture with family and original background and abstention from any participation in public life, did not constitute a determined religious group on the ground of its religion, because the expression was not aimed at the common belief that united the members of the organization, but brought up for discussion the manner in which the group, of which these individuals formed part of, functioned.\footnote{1018}

In any event, it will suffice, as with the offence of racial defamation in order for the offence of religious defamation to be constituted, that the expression is aimed at a religious group, regardless of its size. Hence, in late 1991, the French Supreme Court considered the imputation against American Jews to exploit ‘the legend of the Holocaust’ to constitute a punishable defamation of a group of people on the ground of their religion.\footnote{1019}

Two cases from 1993 show that not only the question of the demarcation of a group but also whether an association can act on behalf of a group on the ground of Article 48-1 are particularly relevant factors with regard to religious groups (para.10.3.1 \textit{infra}). In the first case, the French Supreme Court found the imputation against ‘les églises catholiques de l’Est’ to often be racist or anti-Semitic, and as such constituted a defamation against Christians on the ground of their religion, because these defamatory imputations aimed at ‘...les communautés chrétiennes des pays de l’Est, accessoirement à leur localité géographique, en raison de leur obéissance catholique et du comportement prêté à leurs membres’. The Court annulled the decision of the Court of Appeal, which had considered that the statements ‘ne visaient pas l’église catholique dans son université mais des entités religieuses des pays de l’Est désignées comme institutions géographiquement localisées et non pas à l’ensemble de la communauté catholique ... qu’aucun groupe de personnes pris à raison de son appartenance à une religion n’est visé, mais seulement les groupements que

constituent les Églises de l’Est’. In the second case, the French Supreme Court found a ‘jeu de mots’ concerning the installation of the Carmel of Auschwitz that associated Catholic adherents with both the war crimes committed by French war criminal Paul Touvier during the Nazi regime and the drug crimes committed by French war criminal Klaus Barbie as part of the Colombian ‘cartel of Medellin’ to constitute a punishable imputation of criminal behaviour against not only the congregation of Auschwitz as a legal personality, but also its individual members and even all religious adherents that are susceptible of being associated with this behaviour, on the ground of their adherence to a religion. In both cases, the anti-racism association AGRIF could act in the name of religious adherents, even though it had not received the explicit consent thereto of ‘les églises catholiques de l’Est’, respectively the Carmel of Auschwitz.

4.4 Justifications

4.4.1 The exception of truth and the excuse of provocation: exclusion in the field of racial defamation

Pursuant to Article 35 of the 1881 Press Act, truth is a defence to an allegation of defamatory. It allows for a person charged with defamation to prove the truth of his or her defamatory statements and cites the situations in which such proof is not possible. In case law this possibility to prove the truth of defamatory

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1021 The article entitled ‘Ce qu’il faut jeter d’ici l’an 2000’ and ‘A vos poubelles’ comprised the phrases ‘En priorité, je jette le cartel de Medellin, et le carmel d’Auschwitz. A moins que ce ne soit le contraire: le cartel d’Auschwitz et le carmel de Medellin! Souvenons-nous, Klaus... était en Colombie, il s’est occupé de la drogue, alors que Touvier, son adjoint, était planqué dans un couvent!’
1023 Article 35 cites the following situations: a) Lorsque l’imputation concerne la vie privée de la personne; b) (Abrogé); c) Lorsque l’imputation se réfère à un fait constituant une infraction amnistée ou prescrite, ou qui a donné lieu à une condamnation effacée par la réhabilitation ou la révision. The French Constitutional Council has however declared the unconstitutionality of Article 35c, because it ‘vise sans distinction, dès lors qu’ils se réfèrent à un fait constituant une infraction amnistée ou prescrite, ou qui a donné lieu à une condamnation effacée par la réhabilitation ou la révision, tous les propos ou écrits résultant de travaux historiques ou scientifiques ainsi que les imputations se référant à des événements dont le rappel ou le commentaire s’inscrivent dans un débat public d’intérêt général ; que, par son caractère général et absolu, cette interdiction porte à la liberté d’expression une atteinte qui n’est pas proportionnée au but poursuivi ; qu’ainsi, elle méconnait l’article 11 de la Déclaration de 1789.’ Cons. Con. 7 June 2013 n° 2013-319, QPC, para. 9. Furthermore, the French Constitutional Council has also declared the unconstitutionality of Article 35-5 that excludes the proof of the truth for statements made more than ten years previously. Cons. Con. 20 May 2011, n° 2011-131,
expression has always been excluded with regard to the offence of defamation of a person or a group of persons on the grounds of origin, membership or non-membership of an ethnic group, nation, race or religion. In 1972, the French Supreme Court considered 'Lorsque la diffamation entre dans les prévisions de l'article 32 alinéa 2, de la loi du 29 juillet 1881, la preuve de la vérité des imputations diffamatoires ne serait être admise.' The possibility to deliver the truth of imputations or allegations that attribute facts to people exclusively on the ground of their race or other characteristics does seem to be contrary to the core of anti-discriminations laws. This was certainly the opinion of the Paris Court of Appeal that considered in 1995: ‘... pour être exonératoire, le fait justificatif de la vérité du fait diffamatoire invoqué par les prévenus devrait établir non seulement que des jeunes maghrébins ont commis des actes de vandalisme et de violence etc., mais aussi que c’est en raison de leur appartenance à la communauté des immigrés maghrébins qu’ils ont eu ce comportement. Un tel débat se révèlerait à l’évidence contraire au but poursuivi par le législateur de 1972: lutter contre toutes les sortes de discriminations et notamment contre les préjugés raciaux et apparaîtrait contraire à l’ordre public, en excitant ‘la haine entre les citoyens’.”

Furthermore, ‘l’excuse de provocation’, the excuse that a suspect has been provoked to defame a person or a group by a defamation previously committed against his own person, which is permitted as a justifying fact in the field of insult (para.5.3 infra), is excluded in the entire field of defamation, including racial defamation. According to the French Supreme Court, the excuse of provocation ‘ne supprime pas l’intention coupable, en matière de diffamation et n’empêche pas les poursuites.’

4.4.2 The demonstration of good faith

The ‘presumption of bad faith’ (para.4.2 supra) is of great significance in relation to the possible defence of a suspect of defamation. In fact, it shifts the burden of proof towards the suspect. Although the exception of truth and the excuse of provocation are excluded in the field of racial defamation, a suspect of a racial defamation can prove that he or she has acted in good faith, ‘sa bonne foi’. The demonstration of a suspect’s good faith is not evidence that a suspect did not have the intention to defame, i.e. the proof of an absence of intention, but forms

QPC. See also: Mallet-Poujol, N., Diffamation et amnistie: l’étrange sacrifice du filtre de la bonne foi, Légipresse n° 309 October 2013, p. 531-537.
a justification with regard to the fact that a suspect has uttered defamatory statements. In other words, a suspect who willingly and consciously imputes or alleges a specific fact against a person that violates his honour or consideration can, as a justifying fact, demonstrate his good faith.

This demonstration of good faith is not required by any provision and its criteria are developed in case law. The French Supreme Court discerns four elements, being: ‘le but légitime d’informer le public, l’existence d’une enquête sérieuse, la prudence et l’objectivité du propos, l’absence d’animosité personnelle’.1027 According to the Court, these elements are cumulative, which signifies that ‘l’absence de l’un de ces éléments conduit le juge à exclure le prévenu du bénéfice de ce fait justificatif’.1028 The subjective opinion of the suspect with regard to the existence of these criteria is irrelevant and the suspect’s good faith thus cannot result from his personal belief in the accuracy of his expression.1029

De Lamy argues that, just like the exception of truth, the demonstration of a suspects good faith should not be permitted in the field of racial defamation, because ‘il ne peut y avoir un bon raciste’.1030 Indeed, the suspect’s good faith as a justifying fact is often rejected in French case law concerning racial defamation. In essence, French judges attach importance to the right to freedom of expression, when they qualify expression either as the imputation of a fact, or as an opinion or value judgment, thus at the level of the statutory elements of the offence and not after they have qualified expression as a punishable imputation as a possible means to justify defamatory expression.1031 French judges have, however, had difficulties with making the correct distinction between facts and opinions or value judgments and France has been condemned several times by the ECtHR for violation of Article 10 ECHR, because it had not drawn the correct line between, on the one hand, punishable defamations and, on the other hand, a free debate of ideas or the right to freely criticize.

4.4.3 The influence of the case law of the ECtHR on the notion of good faith

The notion of good faith, as it has been interpreted by the French jurisdictions, has proved to be too strict to meet the European standards of freedom of expression.1032 On several occasions, the ECtHR has criticized the particular

1027 Bigot 2004, p.83
1028 French Supreme Court, crim.ch., 27 February 2001, no 00-82557, unpublished.
rigour with which the French jurisdictions interpret expression, which is
difficult to reconcile with the right to respect of freedom of expression.\textsuperscript{1033} Confronted with an interference of freedom of expression, the ECtHR has
exercised control over the application by the French jurisdictions of the four
criteria of good faith. With regard to the criteria of the prudence and objectivity
of the expression, the ECtHR has challenged the rejection of good faith by the
French judge exclusively on the ground that the expression lacked a moderation
in the words used, because in a public debate of a general interest a certain
exaggeration or provocation must be allowed.\textsuperscript{1034} With regard to the criteria of
the existence of a serious research and a verification of sources, the ECtHR has
found that information originating from a serious context does not have to be
verified before it can be further distributed or used.\textsuperscript{1035} With regard to the
criteria of the absence of personal hostility, the ECtHR has considered that
criticism of the behaviour of politicians does not have to be devoid of all
personal hostility and that this is especially the case if both parties have shown a
certain personal hostility in their expression.\textsuperscript{1036} When interpreting the
proportionality of the interference with freedom of expression, the ECtHR has
consistently advanced the criterion of the legitimate aim to inform the public of
matters of a general interest, which is imperative to ‘transcend’ the French
criteria of the good faith.\textsuperscript{1037}

Previously in this chapter, a certain resistance in French doctrine against
the influence of European case law on French press law and the difficulties for
French courts to integrate this European case law into their decisions has been
discussed (para. 1.6 supra). However, in light of the case law of the ECtHR, the
French Supreme Court has reevaluated the notion of good faith. According to
Wachsmann, the French Supreme Court grants a certain priority to the criterion
to inform the public of a matter of public interest over the other criteria of
good faith.\textsuperscript{1038} According to Monfort’s analysis, the criterion of the ‘subject of general
interest’ is appreciated in the field of good faith, but does not remove the
defamatory character of the expression, which is analyzed in an autonomous
manner at a previous stage. The exact purport for reference to the general
interest of the treated subject and its articulation with the traditional criteria of
good faith, remain unclear.\textsuperscript{1039} In the words of Ader, the French Supreme Court
has introduced a proportionality test in relation to the weighing of the criteria of

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\textsuperscript{1033} Beignier, De Lamy & Dreyer 2009, p.491.
\textsuperscript{1034} ECtHR 7 November 2006, n°12697/03, Mamère/France.
\textsuperscript{1035} ECtHR 30 March 2004, n°53984/00, Radio France/France.
\textsuperscript{1036} ECtHR 22 December 2005, n°54968/00, Paturel/France; ECtHR 14 February 2008,
n°20893/03, July/France.
\textsuperscript{1037} Beignier, De Lamy & Dreyer 2009, p.491.
\textsuperscript{1039} Monfort 2012, pp.24-25.
\end{flushright}
good faith by the French judiciary. According to Bigot, this proportionality test enables the judge to better adapt the juridical response to the sociological reality and in doing so, assure justice. One must however be careful not to turn the general interest, being an eminently subjective or even ideological concept, into a purely moral notion aimed at judicially defining what constitutes good press as opposed to bad press. The contours of ‘information of general interest’ must be defined, because ‘il ne faut pas se cacher que le juge se trouve devant une montagne.’

One case in which the French Supreme Court required the right to freedom of expression to be balanced more in concreto with the reputation or the rights of others concerned the allegation against the politician Le Pen of committing acts of torturing during the Algerian war. In a decision of 24 November 2000, the French Supreme Court considered that the protection of the reputation of the politician Le Pen had to be reconciled with the free discussion on his suitability for his political functions. According to the Court, as the allegations concerned Le Pen’s public activities and did not form an attack on his private life and were expressed in the context of a political debate, they were justified by the author’s good faith. In another case concerning a conviction for defamation with regard to the imputation against a French general as being an accomplice in the genocide of Rwanda in 1994, the French Supreme Court, however, decided that the benefit of good faith could not be accorded to the applicant without examining whether the alleged imputation, even if it concerned a subject of general interest, relied on a sufficient factual basis. The interpretation of the notion of good faith by the French jurisdictions also appears to vary according to the specific context of the expression. De Lamy discerns a strict interpretation made by judges with regard to racist expression or expression in the context of a historical debate from a broader interpretation made by judges with regard to expression in a political context or in a humoristic context. This equally follows from an analysis of the case law concerning racial and religious defamation.

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1044 De Lamy 2000, pp.192-216.
4.5 Racial or religious defamation in context

4.5.1 The imputation of a specific fact on the ground of race or a value judgment in the context of a political debate: the Edgar Morin case

In the field of racial defamation, the Edgar Morin case forms an excellent example of the difficulties French jurisdictions have in distinguishing the punishable imputation of a specific fact on the ground of race from a free opinion or value judgment in the context of a political debate. The case concerned the publication of an article entitled ‘Israel-Palestine: Le Cancer’ in Le Monde of 4 June 2002 by the famous sociologist Edgar Morin and two co-authors, the writer Danièle Sallenave and European parliamentarian Sami Nair. The article imputed the Jews of Israel and Jews in general of humiliating, despising and persecuting the Palestinians, just as the Jews themselves had been treated by the Nazis. 1045 Two associations assigned the authors, the editor of the journal and the director of the publication before the civil judge. While the TGI de Nanterre rejected the demand against each defendant to pay €15,000 in damages, the defendants were condemned by the Versailles Court of Appeal on the ground of racial defamation to pay one euro in damages. According to the Court, the passages ‘par l’imputation outrancière des faits précis rappelés se distinguent du reste de l’article qui renferme l’expression des convictions personnelles des auteurs dans le cadre d’un débat politique dont le caractère grandement polémique se justifie par la nature même du conflit [Israel-Palestine, EHJ]’. The Court rejected the defendant’s good faith, because the defamatory passages could not be justified by the necessity to inform the readers and considered: (the passages) ‘ne contiennent pas la critique virulente de la politique israélienne, ne trouvent pas de justification dans le paradoxe invoqué de la mise en comparaison des comportements subis par les juifs et des comportements qui leur sont imputés’, but they constituted ‘un constat péremptoire de la nation juive’. 1046

In its decision of 12 July 2006, the French Supreme Court annulled this judgment, because contrary to the Court of Appeal, it opined that the passages did not constitute an imputation of a specific fact, and were not, therefore, a

1045 The article comprised the passage: ‘On a peine à imaginer qu’une nation de fuyittifs, issus du peuple le plus longtemps persécuté dans l’histoire de l’humanité, ayant subi les pires humiliations et le pire mépris, soit capable de se transformer en deux générations en peuple dominateur et sûr de lui et à l’exception d’une admirable minorité, en peuple méprisant ayant satisfaction à humiliier ; Les Juifs d’Israël, descendants des victimes d’un apartheid nommé ghetto, ghettoïsent les Palestiniens. Les Juifs qui furent humiliés, méprisés, persécutés, humiliant, méprisent, persécutent les Palestiniens. Les Juifs, victimes de l’inhumanité montrent une terrible inhumanité. Les Juifs, boucs émissaires de tous les maux, “boucs émissaires” B... et l’Autorité palestinienne, rendus responsables d’attentats, qu’on les empêche d’empêcher’.

punishable defamation, but a free opinion. The Court considered: ‘les propos poursuivis, isolés au sein d’un article critiquant la politique menée par le gouvernement d’Israël à l’égard des palestiniens, n’imputent aucun fait précis de nature à porter atteinte à l’honneur ou à la considération de la communauté juive dans son ensemble en raison de son appartenance à une nation ou à une religion, mais sont l’expression d’une opinion qui relève du seul débat d’idées’.\textsuperscript{1047}

The desire of the Supreme Court in this case has without doubt been to preserve freedom of expression, which has been approved by French legal scholars. Its motivation has, however, received strong criticism. Firstly, Tillement points out that, as good faith as a justifying fact is generally rejected in the field of racial defamation, the judge can only rely on the constituent elements of the offence, in order to demonstrate the impunity of defamatory expression. According to Tillement, in the field of racial defamation it is, however, impossible to require the same precision of a specific fact that is susceptible of proof as in the field of defamation against an individual, because the accusations often spring from ‘l’imaginaire raciste le plus délirant’\textsuperscript{1048}. Indeed, in the Morin-case, the specific facts imputed against the Jews of Israel seem sufficiently precise to qualify as defamation: to humiliate, despise and persecute the Palestinians, especially if we compare them to imputations that have been found punishable in previously discussed cases: the imputation against American Jews to ‘exploit the legends of the Holocaust’ and the imputation against North Africans to ‘live on social security benefits and play the drums all night’ (para.4.3.1 supra).

Tillement concludes that the rejection of good faith as a justifying fact has resulted in an incoherent case law concerning the constituent elements of the offence of racial defamation: the distinction between imputations of specific facts and free opinions.\textsuperscript{1049} Drioin regards the notion of good faith as interpreted by the French courts as the root of the problem.\textsuperscript{1050} Both scholars argue that judges should more explicitly consider the context of the debate of a matter of general interest by referring to Article 10 ECHR, instead of dissimulating the importance they attach to freedom of expression when qualifying expression under the offence.\textsuperscript{1051} However, the admission of a justifying ground in the interest of freedom of expression for expression that in first instance can be qualified as defamation seems to be difficult to introduce into a French system that strictly

\textsuperscript{1049} Tillement 2006, p.225.
\textsuperscript{1050} Drioin 2009, p.495.
\textsuperscript{1051} Tillement 2006, pp.226-228; Drioin 2009, p.495.

268
distinguishes free opinions from punishable acts. The reference to Article 10 ECHR by the courts is often limited to the consideration that freedom of expression, as guaranteed by Article 10-1 ECHR, can be submitted to certain restrictions in the interests enumerated in Article 10-2 ECHR and that ‘tel est l’objet de l’article 32 alinéa 2, de la loi susvisée, dont il a été fait application en l’espèce’.1052

4.5.2 The imputation of a specific fact on the ground of religion or a value judgment in the context of a historical debate: the Paul Giniewski case

In the field of religious defamation, the Paul Giniewski case is a famous example of the difficulties French jurisdictions have in distinguishing the punishable imputation of a specific fact on the ground of religion from a free opinion or value judgment concerning a religion that might hurt religious sensitivities in the context of a historical debate. The case concerned the publication in Le quotidien de Paris of 4 January 1994 of the article ‘L’obscurité de l’erreur’ by journalist, sociologist and historian Paul Giniewski, which was a reaction to the publication of the papal encyclical ‘Veritatis Splendor’. In the article, Giniewski criticized the position of the Pope and held that certain principles of the Catholic religion tend towards anti-Semitism and have favoured the Holocaust.1053 The association AGRIF considered the article defamatory of Catholics and initiated judicial proceedings. The criminal tribunal of Paris condemned Giniewski to a fine of 6000 francs and 1 euro in damages, because Giniewski had imputed the Catholic Church or even Catholics themselves of being partly responsible for the atrocities carried out by the Nazis. The tribunal rejected Giniewski’s good faith, because by using outrageous terms he had shown a personal hostility towards the Christian community. Contrarily, the Paris Court of Appeal considered that the article contributed to the ongoing theological and historical debate on the origins of the Holocaust. According to the Court, the thesis held by Giniewski exclusively entered into a doctrinal debate and did not constitute an imputation of a specific fact that was possible of defamation.1054 On 28 April 1998, the French Supreme Court annulled this decision, because the expressions ‘imputaient à la communauté catholique une incitation à l’antisémitisme et la

1053 The article contained the following passage: ‘The Catholic Church sets itself up as the sole keeper of divine truth... It proclaims clearly the fulfillment of the Old Covenant in the New, and the superiority of the latter.. Many Christians have acknowledged that anti-Judaism and the doctrine of the “fulfillment”.. of the Old Covenant in the New lead to anti-Semitism and prepared the ground in which the idea and implementation.. of Auschwitz took seed’.
responsabilité des massacres commis à Auschwitz’. Giniewski’s expression as constituting a defamatory imputation of a specific fact and, as the tribunal had done, rejected the good faith of Giniewski, because of the virulent general tone of the article and the use of terms like ‘doctrine de l’accomplissement’ et ‘l’accomplissement d’Auschwitz’. Giniewski was ordered to pay the symbolic amount of one franc in damages and the costs for the publication of the verdict in a newspaper. On 14 June 2000, The French Supreme Court rejected a new appeal, considering that the court had rightly rejected Giniewski’s good faith.

Giniewski filed a complaint with the ECtHR that unanimously decided that the measures constituted a violation of Giniewski’s freedom of expression, thus Article 10 ECHR. The ECtHR considered that by considering the detrimental effects of a particular doctrine, the article contributed to the discussion of the various possible reasons behind the extermination of the Jews in Europe, which the Court considered to be a question of indisputable public interest in a democratic society. According to the Court, the article did not contain attacks on religious beliefs as such, but a view that Giniewski wished to express as a journalist and historian. It was essential in a democratic society that a debate on the causes of acts of particular gravity amounting to crimes against humanity should be able to take place freely and it formed an integral part of freedom of expression to seek historical truth. The article was not gratuitously offensive and did not overstep a limit, because it was not intentionally insulting or defamatory, nor did it incite to hatred or disrespect. Contrarily, it entered into a free historical debate on a matter of public interest, which is essential in a democracy, and the conviction to publish the verdict in a newspaper was therefore disproportional.

The judgment of the ECtHR has been variously received by French legal scholars. Derieux finds the appreciation by the ECtHR that the expression was not gratuitously offensive and did not incite to disrespect or hatred very subjective and even contestable. According to him, the expression did form an imputation of a specific fact, but Giniewski lacked good faith. According to Docquir, the ECtHR rightly qualified Giniewski’s expression not as an attack of

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1057 French Supreme Court, crim.ch., 14 June 2000, n°99-80043, unpublished.
1058 ECtHR 31 January 2006, n°64016/00, Giniewski/France, §51.
1059 Derieux, E., Contestation de la doctrine Catholique et bonne foi, annotation at ECtHR 31 January 2006, n°64016/00, Giniewski/France, Légipresse n°230, April 2006, p.49.

270
religious convictions as such, but Dreyer disagreed with the ECHR that Giniewski’s expression entered into a purely historical debate, rightly because it formed a reaction to the recently published papal encyclical. In my view, the ECHR has rightly corrected the French jurisdictions that had interpreted an opinion or value judgment as an imputation of a specific fact – the criticism of a religious doctrine as a defamation against the entire Catholic community – and the ECHR has rightly given priority to a purely historical debate of a general interest, whereas the French jurisdictions had narrowly applied Giniewski’s good faith as a justifying fact.

4.5.3 The imputation of a specific fact on the ground of religion or criticizing a religion in a humoristic context: Charlie Hebdo

The French judges have on several occasions afforded a right to ridicule a religion in order to criticize its institutions and considered that the ridiculing of a religion forms part of a free debate of opinions. Because of the strict criteria of the offence of religious defamation, many cases concerning the ridiculing of a religion have, however, been dealt under the offences of religious insult in Article 33-3 and provocation to religious hatred or discrimination in Article 24-8 (para.5.2.2; 5.4 and 6.5.1 infra). In cases initiated on the ground of religious defamation, the motivation is centred – again – around the question in relation to the qualification pursuant to the offence and not around the question as to whether a suspect has proven his good faith or whether the interest in a free debate of opinions can form a justification of the expression: such expression simply lacks the allegation of a specific fact against a determined religious group. Hence, in a case concerning an article ridiculing the Pope published in the famous French openly anticlerical and grossly satirical journal Charlie Hebdo, the French Supreme Court endorsed the decision of the Court of Appeal that had considered: ‘ces propos ne sont pas révélateurs de la diffamation poursuivie en l’absence d’allégations de faits précis pouvant être

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1062 Passages of the article read: "Viens inverser le cours du temps qui passe, à coups... de messages d’amour imprégnés comme des éponges du sang des hommes de la liberté"... "Tu es l’allié de tous ceux qui voient dans la misère des uns la bonne affaire des autres. Depuis deux mille ans...", "Débarque avec ton bœuf : tissus de non-sens sanctifiés, miracles pour handicapés mentaux, fables pour paumés, répression de la joie de vivre, haine du plaisir, censure de la connaissance, passion du pouvoir, déguisements de carnaval, ordre soi-disant moral pour maintenir les consciences dans un sous-développement propice à l’acceptation de l’assermentation, antisémitisme sournoisement doctrinal"; "Tu as fait cause commune avec les intégristes musulmans. Vous êtes d’accord sur l’essentiel du programme : mort à la liberté, mort à l’émancipation, mort à la connaissance, mort à la culture, mort à l’égalité".
imputés à un groupe religieux déterminé et de nature à porter atteinte à l’honneur et à la réputation de celui-ci, qu’il s’agit non d’attaques contre les fidèles d’une religion mais de critiques dont la virulence ne peut être appréciée qu’au regard du caractère ouvertement anticlérical et grossièrement satirique du journal Charlie hebdo, et qui, portant sur le rôle et les positions à travers l’histoire de l’Eglise catholique, en tant qu’institution représentée par le pape, relèvent d’un débat d’opinions qu’il n’appartient pas aux tribunaux d’arbitrer’. ¹⁰⁶³

4.6 Conclusion

In French legal doctrine, the criminalization of racial defamation and insult is beyond discussion, because its aim is to protect a society against elements causing social disorder and the rights of others. Racial defamation consists of willingly and consciously imputing or alleging a specific fact, susceptible of proof and a contradictory debate, against a person or a group exclusively on the grounds of their origin, membership or non-membership of an ethnic group, nation, race or religion. On the one hand, the discriminatory grounds are restrictively interpreted; a group must be precisely designated and foreigners, Corsicans or Harkis do not form a group for the purposes of Article 32-2. On the other hand, expression does not have to be aimed at a group in its entirety; a group is designated regardless of its size. A suspect’s intention to defame does not have to be proven, but is presumed. A suspect can only counter this presumption of his bad faith by demonstrating his good faith as a justifying fact; the justifying facts consisting of the exception of truth and the excuse of provocation are excluded in the field of racial defamation.

As the French notion of good faith has proven to be too strict to meet the European standards of freedom of expression, the French Supreme Court has reevaluated it in light of the case law of the ECtHR and requires that judges balance freedom of expression more in concreto with the reputation or rights of others. In the field of racial defamation, the suspect’s good faith is however often rejected. Judges rather attach importance to a suspect’s right to freedom of expression by strictly discerning an imputation of a fact from a free opinion or value judgment, when qualifying expression under the offence, than seeing it as a justification for defamatory expression, which has resulted in an incoherent case law concerning the distinction between imputations of specific facts and free opinions. Legal scholars have suggested that French judges should refer more explicitly to freedom of expression as a justifying fact. However, this practice matches the French traditional vision on freedom of opinion that strictly distinguishes free opinions from punishable acts. As a result of the case law concerning racial and religious defamation, French jurisdictions do take into


272
account the context in which the expression is uttered, whether political, historical, or humoristic.

5. Racial insult

The offence of racial insult is characterized by a number of elements, being insult and intent thereto (5.1) and the designation of a group on account of race or religion (5.2). The justifications for the offence of racial insult allowed by the law are limited to the excuse of provocation (5.3). In a special series of case law, the French judiciary has clearly demarcated religious insult from the offence of religious feelings (5.4). In the application of the offence, the French judge takes – to a certain extent – into account the context of expression (5.5). The analysis results in a general conclusion about the offence of racial insult in French law (5.6).

5.1 Insult and intent

Article 375 of the French Penal Code of 1810 criminalized ‘expressions outrageantes’ that consisted of ‘l’imputation d’aucun fait écrit mais celle d’une vice déterminé’. The Act of 17 May 1819 reorganized the repression of l’injure and distinguished between the imputation of a vice, ordinary public insults and non-public insults.\textsuperscript{1064} The 1881 Press Act suppressed all distinction between an ordinary insult and the imputation of a vice, but adopted the definition of the insult of the Act of 1819 in Article 29-2 that reads ‘Toute expression outrageante, termes de mépris ou invente qui ne renferme l’imputation d’aucun fait est une injure’ and admitted ‘l’excuse de provocation’. While Article 33-2 of the 1881 Press Act sanctions the public insult of private individuals, if it has not been preceded by provocations (also called the ‘injure simple’),\textsuperscript{1065} Article 33-3 sanctions, under the same conditions, the insult of a person or a group of persons on the grounds of their origin, membership or non-membership of an ethnic group, nation, race or religion fine of up to € 22.500, or imprisonment up to 6 months.\textsuperscript{1066} In the absence of publicity, racial insult of a person or a group is a petty offence criminalized in accordance with Article R. 624-4 of the Penal Code.\textsuperscript{1067}

\textsuperscript{1064} Beignier, De Lamy & Dreyer 2009, p.492.
\textsuperscript{1065} with a fine of up to € 12.000,-.
\textsuperscript{1066} According to the last paragraph of Article 33, the tribunal can order the public display or dissemination of the decision taken in accordance with Article 131-35 of the French Penal Code.
\textsuperscript{1067} Article R.624-4 reads : L’injure non publique commise envers une personne ou un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance, vraie ou supposée, à une ethnie, une nation, une race ou une religion déterminée est punie de l’amende prévue pour les contraventions de la 4e classe ; Est punie de la même peine l’injure non publique commise envers une personne ou un
Insult supposes as a constituent element of the offence an outrageous expression, a term of contempt or an invective, terms that can serve as a useful guideline for the French judge when qualifying expression as an insult. In case law, an outrageous expression has been defined as ‘tout propos qui, sans contenir l’imputation d’un fait précis, est de nature à porter atteinte à l’honneur ou à la délicatesse de celui auquel il s’adresse’, while a term of contempt has been defined as ‘un terme ne respectant pas la dignité de celui auquel s’adresse en le rabaisant publiquement’.  

166 This distinction remains pure theoretical, because all three categories of insult are used in case law and have the common characteristic to constitute excessive language that constitutes a deliberate aggression of the person. 166 It falls outside the scope of this research to give a comprehensive overview of expression that has been found to constitute a punishable insult against individuals. 167 Examples comprise the terms ‘voleur’, 1671 ‘dangereux salaud’, 1672 ‘manipulateur, menteur, bonimenteur’ and terms associating a person with the war crimes committed by the Nazis, such as the epithet ‘crematoire’ to designate a Minister, 1674 or the statement that a political person or his political party is surrounded by a perfume of ‘Zyklon B’. 1675

Insult is defined negatively in relation to defamation, thus in relation to an imputation of a specific fact that is susceptible of proof and the object of a contradictory debate. The French Supreme Court generally holds that if expression lacks such qualities ‘il ne peut s’agir que d’une injure’. 1676 For example, the French Supreme Court found the term ‘neo-nazi notoire’ to constitute the expression of an opinion that could not have the effect as to ‘donner à un propos injurieux un caractère diffamatoire’. 1677 The relevance of the distinction between the two offences lies in the fact that the offence of insult is sanctioned less severely and the offence of defamation cannot, contrary to the offence of insult, be justified by the excuse of provocation. Dreyer, however, questions the opportunity of the distinction between racial defamation and racial insult, because in the field of racial defamation the exception of truth is

groupe de personnes à raison de leur sexe, de leur orientation sexuelle ou de leur handicap.

166 Cohen 2003, p.182.

167 Bigot 2004, p.106.

167 For an overview, see : Beignier, De Lamy & Dreyer 2009, p.493-494.


1675 French Supreme Court, crim.ch., 19 June 2001, n°00-86167, unpublished.


excluded, which could justify the creation of one single broader offence of ‘offense raciale’, which in turn would diminish the risks of mistakes in the qualification of the offence.  

Pursuant to Article 53 of the 1881 Press Act, one unique fact cannot be prosecuted at the same time on the ground of defamation and insult. In order for the suspect to know exactly what he is accused of and to prepare his defence, the prosecuting party must uniquely and definitively qualify the facts in the summons from the beginning (para.1.3.1 supra). A cumulative qualification would create uncertainty with the suspect as to the object of the prosecution. Hence, the French Supreme Court has established that when certain expression constitutes defamation, but at the same time consists of insulting comments of the impugned facts, those insulting terms are indivisibly and directly linked to the defamatory facts and are therefore dependent on them. In the event of such an ‘indivisibilité entre l’injure et la diffamation’, the insult is absorbed by the defamation and the expression must be qualified as defamation. The French Supreme Court has considered: ‘lorsque les expressions outrageantes ou appréciations injurieuses se rattachent directement à une imputation diffamatoire, le délit d’injure s’absorbe dans celui de diffamation et ne peut être relevé seule.’  

A certain text can, however, also contain multiple allegations that contain both defamatory words and insulting words that do not refer to the impugned fact constituting defamation. In such an event, an accumulation of qualifications remains possible and a suspect can be declared punishable on the grounds of both defamation and insult.  

A prosecution and condemnation solely on the ground of insult remains possible, however, if the insult refers to expression lacking a defamatory character. In a decision of 24 November 2009, the French Supreme Court rejected an appeal against the condemnation of the famous French television host Arthur on the ground of insult with regard to his qualification of the humourist Dieudonné famous for his anti-Semitic statements as ‘la dernière des pourritures’ and the statement that ‘même les mecs du Front National ont honte que Dieudonné soit venu les voir’ during a radio interview. As this latter statement could not be considered as a defamatory allegation of anti-Semitism, the Court of Appeal had rightly qualified the expression as an insult that was not absorbed by defamation.  

Choosing the wrong qualification has the far-reaching consequence that the French judge must annul the entire prosecution and acquit a suspect, 

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because it is not permitted for the French judge to requalify the facts under another offence – again in order to assure a suspect’s possibilities of defence. Tillement, however, advocates the introduction of the possibility for the French judge to requalify the facts under the offence of racial insult. With regard to a prosecution on the ground of racial defamation, for which neither the exception of truth or a justification of good faith exists, contrary to the prosecution on the ground of defamation of an individual – such requalification will not put the rights of the defendant in danger. The Morin case (para. 4.5.1 supra) perfectly shows how difficult it can be to rightly qualify expression either as an imputation of a specific fact, or as an opinion or value judgment that might constitute an insult if it is deliberately uttered in excessive terms.

Like the offence of defamation, the offence of insult is an ‘infraction intentionelle.’ The author of an insult must have the intention to insult, the existence of his intention must be presumed and the judge does not explicitly have to establish a suspect’s intention. According to the French Supreme Court, ‘les expressions outrageantes, termes de mépris ou invectives sont réputés de droit prononcés avec une intention coupable’ and ‘seule l’excuse de provocation est de nature à leur ôter leur caractère punissable.’ Thus, contrary to the offence of defamation, in order to counter this presumption of bad faith, the author of an insult cannot prove his good faith, because with regard to the offence of insult only the excuse of provocation is allowed as a justifying act (para. 5.3 infra). The French Supreme Court exercises strict control over the qualification of the expression by the lower judges under the elements of the offence that they extract from the expression itself and the context in which it is uttered. Thus, in the words of Dreyer, the French judiciary takes the intention of the author of an insult into account, not to establish its presence or absence, but to determine the actual sense and purport of the expression. The French judge notably considers the use of strong racist terms of contempt, invectives and outrageous expression to constitute an intentional insult. In 2011, the famous designer John Galliano was convicted of racial insult due to his remarks ‘fucking ugly jewish bitch’; ‘fucking Asian bastard’; and ‘dirty jewish face’ uttered to several persons, while sitting on a terrace of a Parisian café. Although Galliano was drunk and could not remember the event, his intent was established because he was conscious of the effect of his addictions.

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1083 French Supreme Court, crim.ch., 10 May 2006, n°05-82971, unpublished.
1085 Dreyer 2002, n°329.
1086 TGI de Paris 17e Ch. 8 September 2011, Légipresse n° 287 October 2011, 287-14, p. 529.
5.2 Designation of a group

5.2.1 Racial groups

Like the offence of racial defamation, a racial insult must be made against a group exclusively on the grounds of their origin, membership or non-membership of an ethnic group, nation, race or religion, and not for other reasons. The French Supreme Court has given a restrictive interpretation of the discriminatory grounds. Hence, in 2000, the French Supreme Court considered that the qualification of the ‘Harkis’ and their descendants as ‘traitres à la patrie’, because of their political choice during the Algerian war, did not constitute the offence of insult on the grounds of ethnic background, nation or religion.\textsuperscript{1087} Agostinelli argues that the fact that the element of the racial group could not be constituted does not remove the insulting character of the expression. However, as the expression was not aim at one particular person, the expression could not be prosecuted on the ground of the offence of insult against an individual. Agostinelli therefore questions the added value of the offence of racial insult, when interpreted as such.\textsuperscript{1088} As with the offence of racial defamation, the French judiciary seems to rather attach importance to a suspect’s right to freedom of expression, when qualifying expression under the offence, this time by strictly interpreting the notion of a group on the ground of origin, than seeing it as a justification for insulting expression concerning a specific group. One could, however, argue that although the Harkis do form a determined, designated group, the judge simply desired to preserve freedom of expression on this particular topic.

Contrarily, an example of a case in which the judge seems to have simply thought the expression to overstep the limits of freedom of expression, but in which the designation of the group seems questionable, forms a condemnation of the humourist Dieudonné by the tribunal correctionnel de Paris and the Paris Court of Appeal with regard to a performance at the Zénith stadium in Paris in 2008. During the performance, Dieudonné had declared his desire to surpass the accusation made by Bernard-Henri Lévy and the media in general that Dieudonné organized anti-Semitic meetings and for this purpose had invited former professor and notorious revisionist Robert Faurisson on stage. After Faurisson appeared on stage, a technician disguised as a deported Jew, with a yellow star on his chest awarded Faurisson a prize of insolence: a grotesque chandelier covered with fruit. Subsequently, Dieudonné and Faurisson presented themselves as victims of the memorial laws and accused the ‘affirmationnistes’ of mistaking revisionism for negationism.

\textsuperscript{1087} French Supreme Court, crim.ch., 12 September 2000, n°99-82281, unpublished.

\textsuperscript{1088} Agostinelli, X., Provocation à la discrimination, diffamation et injure raciales, Légicom 2002/3, n°28, pp.54-55.
The courts considered that although the expression was not formally aimed at a determined group, the elements of the performance had given the expression its true sense: the mentioning of the word ‘Juif’ on the yellow star, the chandelier caricaturing the menorah and the sole presence of a notorious negationist were sufficient to conclude that Dieudonné aimed at the Jewish community on the ground of their origin or religion. Moreover, Dieudonné had invited his audience to participate ‘à une œuvre collective de glissage de quenelle’. ‘Glisser un quenelle’, an expression invented by Dieudonné, consists of stretching out one arm and hand towards below and placing the other hand on one’s shoulder, by some interpreted as a symbol of fistiging the system and notably the media, by others interpreted as a reversed Nazi Salute and an anti-Semitic geste. Given the context of the rest of his show, Dieudonné had clearly aimed to ‘glisser une quenelle’ at Jews as a group and not the system or the media.

With regard to Dieudonné’s freedom of expression, the Court of Appeal considered that in this case the respect for human dignity prevailed over the freedom of artistic and humorous expression, because the sketch could be characterized as a political meeting rather than a performance. According to annotator Lefranc, the performance could only be considered as a political meeting, if the audience was aware in advance of its political nature, but this was uncertain. The judgment wrongly afforded a larger scope of freedom of expression in an artistic context than in a political context, because artists and politicians have in common in addressing sensible issues. If Dieudonné, who was also known for having actual political aspirations, could not appeal on the basis of his freedom of expression, it was simply because he had clearly overstepped its limits.

Indeed, in subsequent cases the French judge considered that the right to humorous expression finds its limit in the violation of the respect for people’s human dignity and in personal attacks, both in the event that the expression was uttered in an artistic context and a professional context. In 2012, the former president of the French parfum company Guerlain was convicted of racial insult with regard to his joke ‘Pour une fois, je me suis mis à travailler comme un nègre. Je ne sais pas si les nègres ont toujours tellement travaillé, mais enfin …’

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1090 http://www.metroneyws.fr/info/photo-polemique-de-mamadou-sakho-gu-est-ce-que-la-quenelle-de-dieudonne/mmik!PldbRjwCs!lo6/.
1093 Lefranc 2011, p.432.
during a television interview about his profession.\textsuperscript{1094} Later that year Dieudonné was again convicted of racial insult for having mocked the deportation and extermination of Jews by the Nazis in WWII in a satirical video placed on the Internet. The video showed Dieudonné, dressed up as a Jewish deportee with a pineapple in his hands, singing ‘Shoah ananas tu me prends par la Shoah je te prends par l’ananas’ and ‘Shoah ananas Allez on bouge le cul’, a parody of the song ‘Chaud Cacao’ by Annie Cordy.\textsuperscript{1095} After numerous convictions, in January 2014, the French government even decided to ban Dieudonné’s recent theatre show ‘Le Mur’ (The Wall) after it was held in the Théâtre de la Main d’Or in Paris for being anti-Semitic (para. 9.4 infra).\textsuperscript{1096}

5.2.2 Religious groups

It is exactly the requirement established by the French Supreme Court of the designation of a group, however, that distinguishes the punishable insult of a religious group from free opinion concerning a religion that might hurt religious feelings, which can be demonstrated by another famous Dieudonné-case (see further para. 5.4 infra). In its issue n°360 of 23-29 January 2002, the journal Lyon Capitale published an interview with the famous French humourist Dieudonné who at that time ran as a candidate for the presidential elections. In response to the question posed by a journalist ‘que pensez-vous de la montée de l’antisémitisme parmi certains jeunes beurs?’, Dieudonné had answered: ‘Le racisme a été inventé par Abraham. Le peuple élu c’est le début du racisme. Les musulmans aujourd’hui renvoient la réponse du berger à la bergère. Juifs et musulmans pour moi ça n’existe pas. Ce sont deux notions aussi stupides l’une que l’autre. Personne n’est juif ou autre tout le monde. Je ne comprends rien à cette histoire. Pour moi les juifs c’est une secte, une escroquerie. C’est une des plus graves parce que la première. Certains musulmans prennent la même voie en remaniant des concepts comme la guerre sainte etc …’. Pursuing to a complaint by the association l’Union des étudiants juifs de France (UEFJ), the public prosecutor prosecuted Dieudonné on the grounds of racial insult and racial provocation with regard to the phrase ‘Pour moi les juifs c’est une secte, une escroquerie. C’est une des plus graves parce que la première’ and four associations – UEFJ, LICRA, the Consistoire central and l’Union des Communautés Juives de France – constituted as a civil party.

\begin{itemize}
\item[\textsuperscript{1094}] TGI de Paris 17\textsuperscript{e} Ch. 29 March 2012, Légipresse n° 294 May 2012, 294-12, p. 284, annotation J-M Delas at p. 316.
\item[\textsuperscript{1095}] TGI de Paris 17\textsuperscript{e} Ch. 27 November 2012, Légipresse n° 303 March 2013, 303-21, p. 142-143.
\item[\textsuperscript{1096}] The show included a sketch, in which the humorist mimed urinating against a wall. He then revealed that it was the Wailing Wall in Jerusalem. He also uttered salvos of abuse at prominent French Jewish performers, including radio presenter Patrick Cohen, concluding: ‘Gas chambers … a shame.’
\end{itemize}
The tribunal correctionnel de Paris acquitted Dieudonné and rejected the demands of the civil parties. In appeal, the Paris Court of Appeal confirmed this judgment, considering that the terms ‘secte et escroquerie’ taken in isolation are very shocking, but placed in the context of the article, Dieudonné appeared to reject the idea of Communautarism and promoted the universality of man and by criticizing other religions, notably the Catholic and Muslim faith, in equally vivid terms he had merely manifested ‘son hostilité au principe même du fait religieux et que ces invectives ne s’adressaient pas à la communauté juive en tant que telle’. On 15 March 2005, the French Supreme Court annulled this decision with regard to the offence of racial insult, because ‘alors que les propos litigieux mettaient spécialement en cause la communauté juive, présentée comme “une des plus graves escroqueries” parce que “la première de toutes”, les juges n’ont pas tiré les conséquences légales de leurs propres constatations.’

After referral, however, another section of the Paris Court of Appeal persisted in the interpretation made by the tribunal and the Court of Appeal and confirmed their judgments considering that the terms ‘les juifs c’est une secte, une escroquerie’ replaced in their context ‘relèvent d’un débat théorique sur l’influence des religions et ne constituent pas une attaque dirigée contre la communauté juive en tant que communauté humaine’. Against this decision, the associations Le Consistoire central and Union des communautés juives de France filed a request in cassation, which was submitted to the plenary assembly of the French Supreme Court.

According to the Advocate-General in the Supreme Court Mouton, Dieudonné had designated the Jewish community as a group of people on the ground of their origin by using the words ‘les juifs’. Subsequently, he had qualified this community, not a religion as such but as a ‘secte’ and a ‘escroquerie’, which are terms of an undisputable downgrading, outrageous and insulting character. What is more, Dieudonné had associated Jews with fraudulent money, which over decades has often been done by anti-Semites. The A-G attached importance to the fact that Dieudonné had previously been condemned several times for having uttered racist expression; it did not concern an isolated case. Despite his profession as a humourist, Dieudonné had not made his statement in a humorous context, which could have removed the insulting character of the expression, but in his capacity as an election candidate. This political context did not remove the insulting character of the expression,

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because Dieudonné had not uttered it in an electoral polemic, a situation of debate or direct confrontation, which might elicit ill-considered expression. As the French Supreme Court had established: ‘la circonstance qu’une injure s’est produite dans un contexte électoral ne saurait en modifier le caractère’.\(^\text{1101}\) In fine, Mouton considered the expression to be gratuitously offensive and a condemnation on the ground of racial insult in conformity with Article 10 ECHR.\(^\text{1102}\) On 16 February 2007, the plenary assembly of the French Supreme Court endorsed this advice and again annulled the decision of the Paris Court of Appeal, considering that the phrase ‘ne relève pas de la libre critique du fait religieux, participant d’un débat d’intérêt général mais constitue une injure visant un groupe de personnes en raison de son origine, dont la répression est une restriction nécessaire à la liberté d’expression dans une société démocratique.’\(^\text{1103}\)

### 5.3 Justifications: the excuse of provocation

Pursuant to Article 33-2, an insult is not punishable, if it is preceded by provocations: one is entitled to insult a person as a counter attack against an insult previously committed against one’s own person coming from that same person. The excuse of provocation has an absolute character in the sense that it exempts a suspect from a penalty, but it does not ‘neutralize’ his criminal responsibility like a justifying fact would do – such as the demonstration of good faith by the suspect of defamation.\(^\text{1104}\) The French Supreme Court has adopted a restrictive notion of the excuse of provocation by considering that a provocation can only result from ‘de propos, d’écrits injurieux, et de toutes autres actes de nature à atteindre l’auteur de l’infraction, soit dans son honneur ou sa considération, soit dans ses intérêts pécuniaires ou moraux.’\(^\text{1105}\)

Furthermore, there must be a ‘relation directe entre provocation et l’injure’.\(^\text{1106}\) What is more, such a direct link must concern the content of the insult and supposes that the insult is uttered within a reasonable time after the provocation and is proportionate to the tenor of the provocation.\(^\text{1107}\)

These criteria can be clarified by the decision of 13 April 1999 of the French Supreme Court, in which the Court rejected an appeal against a


\(^{1104}\) Beignier, De Lamy & Dreyer 2009, p.504.

\(^{1105}\) French Supreme Court, crim.ch., 10 May 2006, n°05-82971, unpublished.


condemnation of Le Pen on the ground of racial insult for having called the president of the anti-racism association SOS Racisme a ‘Gros zebu fou’ during a press conference. The Court of Appeal had erated the appeal made by Le Pen on the excuse of provocation due to the fact that the day before the president had publicly imputed Le Pen of having ‘du sang sur les mains’. The Supreme Court endorsed the motivation of the court that had considered ‘d’une part, qu’eu égard à la teneur et au caractère racial de l’injure incriminée, il n’y a pas de proportionnalité entre l’attaque et la riposte, et d’autre part, que cette injure, proposée lors d’une conférence de presse organisée par le prévenu, sur un sujet précis, n’est pas une riposte immédiate et irréfléchie aux propos diffamatoires du protagoniste.’

5.4 The special case of the protection of religious feelings

5.4.1 The development of the right to respect for religious feelings pursuant 1382 CC and 809 CCP

With the abolishment of le délit d’outrage à la morale publique et religieuse, the 1881 Press Act erased the last traces of the offence of blasphemy in French law. According to the French legislator of 1881 and the overall consensus in French legal doctrine, such an offence constitutes a délit d’opinion and is contrary to the concept of laïcité (para.1.2.2 and 2.5 supra). However, in the eighties and nineties of the previous century associations that defended religious interests increasingly sought recourse to the civil judge in legal actions against expression alleged to have hurt religious feelings. In these civil cases grounded on Articles 1382 CC and 809 CCP, the French judiciary have developed a right to respect for religious feelings, by referring to the fundamental principle enounced in Article 1 of the 1958 Constitution, according to which the French Republic respects all beliefs. The French civil judge, who has tried to conciliate the right to free criticism of a religion with the principle of respect of beliefs, is highly criticized in French legal doctrine, most notably for having reintroduced a prohibition of blasphemy into French law.

The first ‘blasphemy’ case was the Ave Maria case in 1984. The Catholic association La Fraternité Saint-Pie-X and several other Catholic associations


282
requested the prohibition of the big billboards of the film *Ave Maria* by Jacques Richard in summary proceedings before the TGI de Paris. The film tells the story of a young woman in a village, who is persecuted by its pious inhabitants who formed part of a religious sect. The poster in question showed the actress Isabelle Pasco, covered only with a blouse around the hips, with her arms and feet tied to a cross. The judge prohibited the poster; he considered that the representation of the cross in a provocative advertisement campaign that was forced on the public in a space of public passage constituted an aggressive and gratuitously offensive infringement of the deepest intimate convictions of those who freely use the public highway and do not search for any contact with a certain work, but who are necessarily unwillingly confronted with disputable, misleading and commercial advertising.\textsuperscript{111} The commercial and public nature of the expression and its forced cognition by the public formed important factors of what in essence constituted a manifest unlawful disturbance on the ground of 809 CCP; the infringement of the deepest intimate convictions of religious adherents. The judge thus decided to protect a religious community in their religious feelings and did not distinguish between criticism of a religion that might offend religious feelings and the insult of a group of people on the ground of their religion.

In the two following cases *Je vous salue Marie* and *La Dernière Tentation du Christ*, which were both grounded on Article 809 CCP, the French Supreme Court seemingly adopted a more liberal attitude by endorsing the refusal of the lower jurisdictions to prohibit expression alleged to hurt religious feelings. Again, an important factor in these cases was the degree of publicity of the expression. Contrary to the *Ave Maria* case, the expression in question was not of a public nature and not forced on the public. However, the French Supreme Court either implicitly or explicitly affirmed the existence of the right to respect for religious feelings and left room for a possible prohibition of the expression, if uttered more publicly.

In 1985, AGRIF and la Confédération nationale des associations familiales catholiques requested the prohibition not of the poster, but of the running of the film *Je vous salue Marie* by Jean-Luc Godard in the French cinema and subsidiarily, the suppression of certain passages of the film that offended religious feelings of Catholics before the TGI de Paris. The film is a modern narration of the birth of Christ, in which Joseph is a taxi driver and Maria an employee of a gas station who loves to play basketball. What is more, in search of a way to unify her body and spirit, Maria actively explores her sexuality. Not surprisingly, the film was highly controversial, caused global protests and even caused blockades of cinemas by opponents of the film.

In three instances, the request by the associations was denied. While the associations argued before the lower courts that the film infringed the right to

\textsuperscript{111} TGI de Paris, 23 October 1984, GP 1984, p.722; D. 1985, p.31, annotation R. Linden.
respect for the religious feelings of the faithful they represented, the lower courts considered that, while certain aspects of the film could shock the religious sensitivities of the adherents of the associations, the film was not reprobated unanimously by all Catholics and that the effect of the film was attenuated and could be avoided as the film was merely distributed in cinemas. The infringement to religious feelings made by the offensive aspects of the film was limited to those spectators that had taken the initiative to go to the cinema.\(^{1112}\)

The associations filed an appeal against the decision of the court of appeal, arguing that it had wrongly required that the expression caused a manifestly unlawful disturbance ‘to a certain degree’ and had wrongly founded its judgment on the advice of the religious French journal La croix and certain religious representatives of the Catholic Church, while the expression caused an ‘objective’ manifestly unlawful disturbance against the Catholic community in its entirety. In 1990, the French Supreme Court rejected the appeal, considering that ‘la cour d’appel, qui n’a pas dit que le trouble devait dépasser un certain degré d’ampleur pour pouvoir donner lieu aux mesures sollicitées, a relevé que, si certains aspects du film pouvaient choquer la sensibilité religieuse des adhérents des associations appelantes ou intervenantes, il n’en résultait pas pour autant l’existence d’un trouble manifestement illicite, seul de nature à limiter la liberté d’expression, dès lors que la réprobation n’était pas unanime chez les catholiques pour une œuvre qui, de compréhension difficile et achevant sa carrière dans l’indifférence, n’avait eu qu’un impact très limité.’\(^{1113}\)

In 1988, AGRIF and several other associations requested a prohibition, again not of the film poster, but of the running of the film The Last Temptation of the Christ by Martin Scorsese in French cinemas. The film tells the story of Christ who tries to resist the temptations of life on earth, including the sin of lust. The love scene between Maria Magdalena and Christ provoked a lot of protest and even arson attacks in cinemas. Many Christians had difficulties with the tone of the film: the face of Christ was too human and Christ was in too much doubt as to whether to choose between his earthly life and his divine vocation. The violent protest against the running of the film moved the cardinals and archbishops of Lyon and Paris to issue a statement against the running of the film emphasizing that anyone’s freedom is based on the respect of others.

In three instances, the request of the associations, who argued that the film infringed the sensibility of Christians and presented a misconceived image of their religion, was rejected. Instead, the courts demanded that the defence circulate a communiqué that informed the spectator about the objections of the associations and to insert at the beginning of the film and on the film poster a warning clarifying that the film was not an adaptation of the gospel, so as to prevent anyone from being offended in his deepest convictions when

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unexpectedly confronted with certain scenes, due to insufficient information as to the content of the film.\footnote{114} In 1990, the French Supreme Court rejected an appeal, according to which the manifestly unlawful disturbance was constituted by the ridiculing and misrepresentation of a religion as such and the violation of religious feelings resided not only in the running of the film in cinema, but also in the publicity surrounding the film in the media; the ‘objective’ disturbance of the catholic community in its entirety had to be taken as a starting point, not the subjective personal disturbance of the individual spectator. The Supreme Court considered that ‘le principe de la liberté d’expression, notamment en matière de création artistique, d’une part, comme, d’autre part, celui du respect dû aux croyances et le droit de pratiquer sa religion étant d’égale valeur, il appartenait aux juges du fait de décider des mesures appropriées à faire respecter ce nécessaire équilibre’. The Paris Court of Appeal could have struck a balance between these two interests as it did, using the avoidance of infringement of deepest convictions and the unexpected confrontation in a public space as a guiding criterion.\footnote{115} Despite the favorable outcome for freedom of expression, the Supreme Court thus explicitly affirmed that the respect for beliefs formed a legitimate restriction to freedom of expression, while it is not prescribed by the 1881 Press Act or any other law.

By placing emphasis on the degree of publicity of the expression the civil judge, however, often circumvents to explicitly decide on the core question as to whether expression about a religion that hurts the religious feelings of religious adherents, who experience such expression as an insult to them as a religious group, constitutes an unlawful indirect insult of a religious community on the ground of their religion. For example in 1989, the Paris tribunal decided against the party that requested the prohibition of \textit{The satanic verses}, the famous controversial novel by Salman Rushdie ruling that ‘personne ne se trouve contraint de lire un livre’.

In the \textit{VSD} case in 1993, the balance between the right to freedom of expression and the right to respect for religious feelings of religious adherents was explicitly found in favour of the latter interest. The association AGRIF initiated a civil case on the ground of 1382 CC with regard to a cover of the magazine \textit{VSD} that represented a naked women crucified on a cross entitled ‘Pourquoi Dieu n’aime pas les femmes’. In two instances the judges considered that the

expression did not form defamation or provocation to hatred, but did constitute a wrongful act in accordance with 1382 CC; although the question as to the place of women in religions formed part of a free debate of ideas in which VSD was free to participate, because of its incongruous and slutty presence the image of a naked women associated with the symbol of the crucifix offended the religious feelings of a certain number of religious adherents.\textsuperscript{1117}

In the \textit{Larry Flint} case in 1997, the French jurisdictions continued to base their reasoning from the premise of the existence of a right of respect of religious feelings, as it had been affirmed by the French Supreme Court. The case concerned the poster of the film \textit{The people vs Larry Flint} by Milos Forman, over which people from all over the world cried shame. The poster depicted Woody Harrelson, the actor who played the role of porn tycoon Larry Flint, in the position of the crucified Christ covered only with a loincloth of the American flag against the background of the lap of a woman in bikini bottoms. In France, in Paris the original poster was placed on the walls of a building at the beginning of the Christian holidays. AGRIF requested the removal of the poster in summary proceedings. In appeal, AGRIF was joined by the episcopate. As a result of this, the American film company decided to replace the poster with a less offensive version.

In two instances, the judge decided that, considering the current status of social development, the poster did not constitute an obvious insult to the religious feelings of AGRIF. Because of the American flag and the cheerful expression of the actor, the poster did not remind one of a traditional depiction of Christ. The image did not even show a real cross! The poster could certainly be considered as intentionally provocative and a sign of bad taste, but that did not make it an attack on a religion or its adherents. The poster was not prohibited. Again, despite the favorable outcome for freedom of expression, the judge merely decided that the expression did not constitute an unlawful attack on a religion or its adherents. It results \textit{a contrario} that if the poster did insult religious feelings, it could have been unlawful. What is more, the judge attached much importance to the fact that the Catholic Church hierarchy had not considered it necessary to take the matter to court.\textsuperscript{1118} Leclerc notes that the judge thus used the opinion of the church hierarchy as the starting point for his decision, although, the French Republic does not acknowledge the hierarchy of any service.\textsuperscript{1119}

\begin{thebibliography}{1119}
\bibitem{1118} TGI de Paris, 20 February 1997, \textit{Légipresse} April 1997, p.49, annotation \textit{Liberté d'expression et respect des croyances}.
\end{thebibliography}
In order to be able to insult a religious group in its convictions, an expression must therefore constitute an obvious abuse of the traditional iconography. An expression may not be gratuitously offensive. According to the ensemble of case law developed since the Ave Maria case, an expression will be gratuitously offensive when the expression has a commercial character and when the public is forced to take note of the expression. Unexpected confrontation in a public space should be distinguished from the conscious choice for a closed medium. While intrusive billboards in public places increase the offensive effect, the closed cinema reduces it. The same goes for books, as these are also held to be a closed medium by the judiciary. The case law shows that by emphasizing these criteria and not explicitly referring to the offences of the 1881 Press law and their constitutive elements, the judge does not always explicitly decide on the core question as to whether offensive criticism of a religion can constitute an unlawful indirect insult of a religious community on the ground of their religion.

Massis concludes that the ensemble of case law developed since the Ave Maria case has rightly derived from the constitutional principle of respect for beliefs that figures alongside the principle of human dignity in the 1958 Constitution an autonomous and fundamental personality right of respect of religious feelings, which would ‘résulte de la combinaison du principe de liberté de conscience, d’une part, et d’autre part, de la liberté d’aller et de venir sans risqué d’agression et d’outrage.’

According to Beignier, the French judiciary has, however, not aimed to protect God, but to protect its religious adherents and has wisely tried to conciliate conflicting interests by safeguarding free expression in religious domains by avoiding general and absolute interdictions and only prohibiting aggressions against a religion, blasphemous expression or sacrileges in the public sphere; ‘L’incroyant doit respecter le croyant, et le croyant, l’incroyant.’ The case law is evident of great wisdom and is inspired by a true spirit of equity, being equality in rights. While the protection of religious feelings has no legal sanction in France, the case law effectively assures it.

However, prohibiting blasphemous expression from the moment it becomes public on the ground of the civil offence of religious feelings created by the French civil judge in case law pursuant to 1382 CC or 809 CCP that has no equivalent in the 1881 Press Act has without doubt a chilling effect on the free debate concerning religion and approaches what the French legislator of 1881 itself considered to constitute a délit d’opinion. The value of the free expression

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1121 Beignier 1995, p.335.
of opinion does not merely reside in the freedom to express and to receive opinions in a publicly accessible place but also in a private place.

5.4.2 The right to respect for religious feelings weakened by the priority of the press offences

The civil prohibition of offence of religious feelings and the right to respect for beliefs created by the civil judge has been weakened by the principles established by the French Supreme Court in its decisions of 12 July 2000. According to these principles, in the field of the press, the 1881 Press Act has priority over general civil norms and Article 1382 CC cannot be used if the facts constitute one of the press offences of the 1881 Press Act and a legal action cannot be repaired on the ground of Article 1382 CC if the facts do not constitute one of the press offences of the 1881 Press Act (para.1.3.3 supra). In a 2001 decision, the French Supreme Court applied these principles in a civil case initiated by AGRIF against expression ridiculing the Pope on the ground of Article 24-8 of the Press Act, subsidiarily Article 1382 CC (para.6.5.1 infra). The French Supreme Court rejected an appeal against the decision of the Court of Appeal that had rejected the demands of AGRIF. The Supreme Court considered that due to the fact that the expression did not constitute an incitement to discrimination, hatred or violence in accordance with Article 24-8, no wrongful act on the ground of 1382 CC could be retained. In other words, in the absence of a provocation in accordance with Article 24-8, the French Supreme Court refused to sanction the offence to a religion or religious feelings on the ground of Article 1382 CC.\(^{1124}\)

In the *Amen* case in 2002, the summary judge applied these principles and in doing so revised the case law and weakened the right to respect for beliefs that had been developed since the *Ave Maria* case. AGRIF requested the prohibition of the poster of the film *Amen* by Costa-Gavras on the ground of 809 CCP and explicitly referred to the definition of defamation in Article 29 and the offence of religious defamation in Article 32-2 of the 1881 Press Act. The poster depicted the Christian cross prolonged by the swastika, a catholic clergyman and a Nazi officer. While AGRIF considered the poster to be defamatory of the catholic population, because it would wrongly suggest that Catholics had approved of Nazism, the defence argued that the film poster concerned a debate on the Holocaust that had taken place in the ignorance or even with the approval of those represented by AGRIF today. The French judge considered ‘le principe de légalité exige que toute restriction apportée à la liberté d’expression soit inscrite dans le droit positif ; seule l’existence d’une diffamation au sens de la loi sur la

\(^{1124}\) In the same sense : Droin 2009, p.443.

288
presserait susceptible de caractériser le trouble allégué.\textsuperscript{1125} Hence, in casu, if the expression offended a religion or religious feelings, it could only be condemned on the ground of the offence of defamation and if the facts of the case did not constitute the elements of the offence, the same facts could not be condemned on any other ground of civil responsibility.\textsuperscript{1126}

According to the French judge, the poster did not constitute defamation and was held it to be permissible. The poster did not represent the Catholic cross extended by the swastika. By no means was the mix obvious: whatever the intention of the author had been, strictly speaking, the swastika was not a real swastika, because it looked incomplete and one arm had been unfolded downwards. The judge thus rejected the interpretation of both parties and assessed the poster himself in light of the film and the history that the film evoked: the judge set his ‘lecture ouverte’ against the interpretation of AGRIF that showed a ‘lecture fermé’. With this open reading of the poster one could see the intention to replace the connotation of the swastika as a symbol of totalitarianism with a humane connotation.

According to Tricoire, the motivation of the judge is too far-reaching and dangerous. A judge should refrain from giving a value judgment, as well as from founding his decision on subjective criteria. According to Tricoire, the poster should have been considered to be ‘l’œuvre d’un auteur’, a fictive representation subject to multiple interpretations.\textsuperscript{1127} What is more, the judge attached much importance to the fact that l’Eglise de France had admitted that the silence that the bishops had kept in relation to the atrocities of the Nazis had been wrong and that l’Eglise de France had failed in her mission to educate consciences. Leclerc notes that, again, the judge relied in his decision on a position taken by the Church.\textsuperscript{1128}

Massis denounces this revision of case law for not respecting the fundamental right of respect for beliefs. According to Massis, the specific character of the Press Act must not override this right of constitutional value that protects the human person. For Massis ‘la faute civile est caractérisée par l’offense aux sentiments religieux. Ainsi par une voie détournée, il a été mis à l’écart un droit fondamental à valeur constitutionnelle. Il y a là un appauvrissement de notre droit.’\textsuperscript{1129} However, the position of the French Supreme Court and the lower


\textsuperscript{1126} In the same sense : Droin 2009, p.444.


\textsuperscript{1128} Leclerc, H., Vinci et le code, annotation at : CA Paris, 8 April 2005, Légipresse n°223

judges seems to rather be in conformity with the aim of the French legislator of 1881, who abrogated all délits d’opinion, comprising the ‘délit d’outrage à la morale publique et religieuse’. By applying the principle of the primacy of the Press Act, the French Supreme Court and the lower judges thus merely seem to refuse to reintroduce into French law a délît d’opinion consisting of the offence to religious feelings on the ground of civil responsibility. From this strand of thought, Mallet-Poujol stipulates that while the ridiculing of one of the officially recognized religions in France used to be condemned on the ground of the ‘délit d’outrage à la morale publique et religieuse’ or the ‘outrage aux religions reconnues par l’Etat’, ‘la faute civile ne saurait alors les rétablir et l’article 1382 CC ne saurait être instrumentalisé en ‘cheval de Troie’ pour la défense d’un certain ordre moral.’

5.4.3 The distinction between a religion and its adherents safeguarded by the French Supreme Court: the cases of Girbaud and Sainte Capote

After the solution offered in the Amen case in 2002 based on the case law of the French Supreme Court, the French judge has nevertheless in several proceedings on the merits condemned criticism of a religion that offended the religious feelings of its adherents on the ground of the offence of insult of a group of people on the ground of their religion criminalized in Article 33-3. Examples can be seen in the cases of Sainte Capote and Girbaud, in which the lower judges equated an insulting expression of a religion with the insult of a group of people on the ground of their religion and thereby seemed to disregard the aim of the French legislator of 1881 to suppress the ‘délit d’outrage à la morale publique et religieuse’ and the rationale of the Pleven Act of 1972 to protect people against discrimination and not religious beliefs. However, in both cases the distinction between a religion and its adherents was safeguarded by the French Supreme Court who annulled the condemnations by the courts of appeal.

The Sainte Capote case concerned a prospectus that had been handed out by the organization Aides Haute-Garonne in order to announce an informative evening about the prevention of HIV entitled ‘La nuit de la Sainte-Capote’ (the night of the Holy Condom). The prospectus contained an image of the bosom of a religious woman wearing heavy pink make-up who – apart from a headscarf and a necklace with a cross – was naked. On her right there are two pink condoms. The picture was accompanied by the text ‘Sainte Capote protège-nous’. In the case initiated by AGRIF the Toulouse Court of Appeal considered that the expression constituted a provocative amalgam of bad taste and created the idea of a certain anticlericalism; this image could legitimately have been


\[1131\] In the same sense: Droin 2009, p.463.
experienced by at least certain Catholics as an offence of them on the ground of their beliefs and practices.\footnote{\textsuperscript{1132}}

In 2006, the French Supreme Court annulled the decision of the Court of Appeal, considering ‘si le tract litigieux a pu heurter la sensibilité de certains catholiques, son contenu ne dépasse pas les limites admissibles de la liberté d’expression.’\footnote{\textsuperscript{1133}} Firstly, the image was possibly provocative, definitely in bad taste and probably offensive to the Catholic community, but did not overstep the limits to freedom of speech. The ‘jugement de gout’ issued by the lower judges was contrary to the principle of a strict interpretation of criminal law. Subsequently, the Supreme Court considered that ‘L’injure devait être objectivement établie à l’égard d’un groupe précis et déterminé, l’excès de sensibilité d’une fraction de croyants ne saurait rendre indisponible dans l’espace public la représentation d’une religieuse associée à la lutte contre le sida sous le vocable “Sainte Capote protège-nous”\footnote{\textsuperscript{1134}} and thereby seemed to refer to the objective of AGRIF, i.e. to defend the case of religious extremists or fundamentalists. The sensitivity of such a fraction of the faithful should not manifest itself in the French neutral public space. Finally, the organization was humoristic and had good intentions. Even within the Catholic Church, different opinions exist as to the question of whether or not the use of condoms is allowed. The representation thus entered into a free political discussion.

In 2005, the famous Giraud case attracted a lot of media attention in France. The subject of argument was a billboard of Marithé François Giraud, a brand of women’s clothing. The billboard, which was 40 meters long by 11 meters wide, was placed on a building on the Avenue Charles-de-Gaulle in Neuilly-sur-Seine in March 2005. The poster depicted a parody of the Last Supper by Leonardo da Vinci, in which the apostles and Christ were replaced by women wearing clothes by Marithé and the only man of the group was the person on Christ’s right side. A hand holding a dove, the traditional symbols of the Father and the Holy Ghost, figured between the women’s legs. The poster was a wink to the novel The Da Vinci Code by Dan Brown that expounds the theory that on the painting the person on Christ’s right side is Mary Magdalene. La Conférence des évêques de France considered the poster to be a gross insult to religious feelings and the Catholic faith and its public display to constitute a manifestly unlawful disturbance and therefore requested – in the capacity of L’Association Croyances

\footnote{\textsuperscript{1132} CA Toulouse, 12 January 2005, Légipresse 2005 n°222-1, p.17.}
et Libertés – the prohibition of the poster in summary proceedings on the ground of 809 CCP together with 29-2 j 33-3 of the 1881 Press Act.

The judge’s reasoning is almost identical to the reasoning in the Ave Mariacase that contrarily was merely grounded on Article 809 CCP. According to the judge, the poster constituted an insult to Catholics that was disproportionate to its commercial nature. It was beyond discussion that the poster was ‘une oeuvre de création’, but ‘because of its nature – merely intended to promote the selling of clothes – the poster did not, like a literary or cinematographic work would do, form part of a debate of ideas, was gratuitously offensive and thus insulting.’ The judge thereby applied the 1881 Press Act in light of the Otto Preminger case, in which the ECtHR had adopted the right to respect for religious feelings as a legitimate restriction to freedom of expression, and more importantly, in light of Article 1 of the French Constitution and considered that the poster infringed the respect for religious beliefs; its placement was prohibited in all public spaces.¹¹³⁵

The decision was upheld in appeal. The judge placed the application of the 1881 Press Act in light of the laic character of the French Republic and the Act of 1905, considering that the separation of the church and the state did not obstruct the application of the law when a religion is insulted, because the 1881 Press Act criminalizes the insult of a group of people on the ground of their religion. As in first instance, the judge equated an insulting expression of a religion with the insult of a group of people on the ground of their religion and gave a particularly large interpretation of religious group insult criminalized in Article 33-3. Again, the commercial nature and the forced cognizance of the expression formed important criteria. In addition, according the judge, the choice to publish the poster just a week before Easter increased its insulting character.¹¹³⁶

Pierrat argues that in the Girbaud case, the judge has reintroduced the offence of blasphemy and, therefore, in the future even publishers of literary books should be on alert.¹¹³⁷ Contrarily, Rolland agrees with Beignier (para.5.4.1 supra) and is of the opinion that an offence of blasphemy would only have been reintroduced if the judge had prohibited all means of distribution of the poster: from a religious point of view, blasphemy exists regardless of the public nature of the expression, but, from a legal point of view, what makes blasphemy an offence is its publicity. He approves the restriction brought to mere commercial expression in the spirit of tolerance towards religious adherents.¹¹³⁸ Tricoire takes a completely opposite position, opining that the right to criticize a religion results from freedom of expression and the only restriction to this freedom

should be the attack of persons.\textsuperscript{1139} Indeed, the solution in the \textit{Girraud} case seems to be contrary to the rationale of the Pleven Act of 1 July 1972, i.e. to protect people against discrimination on the ground of religion, and not religious convictions, dogmas, rituals or other sacred matters. Leclerc clearly articulates the false premises from which the judges reasoned; contrary to the vision of Massis (para.5.4.1 \textit{supra}), Article 1 of the French Constitution does not contain a right to respect, but a characteristic of the French Iac Republic that concerns both the freedom to believe and the freedom not to believe. He reproaches the judges for a lack of tolerance.\textsuperscript{1140} According to Leclerc, the starting point for the assessment of offensive expression is the nature of the words, not the feelings of the victim or the opinion of religious authorities. The decisions, however, show that on this subject it is not easy to preserve the serene neutrality that the judiciary of the Republic is required to exhibit.\textsuperscript{1141}

In 2006, the French Supreme Court annulled the condemnation by the Court of Appeal, considering ‘les articles 29 alinéa 2 et 33 alinéa 3 de la loi du 29 juillet 1881 ne réprimenter pas l’ impiété ou l’ outrage à la religion dont les fidèles sont les victimes indirectes, mais les expressions outrageantes pour la considération de chacun lorsqu’elles sont exprimées directement contre la personne d’hommes ou de femmes afin d’en faire publiquement un sujet d’aversion de mépris à raison de leur obéissance religieuse, ce qui doit être apprécié d’après le contenu effectif et non équivoque de la publication; qu’en retanent que l’utilisation d’un thème sacré à des fins de publicité constituait une injure au sens des articles précités dès lors que ‘c’est la religion qui est outragée’ et qu’elle ferait outrage à la foi des catholiques, la cour d’appel a violé les textes susvisés.’\textsuperscript{1142} According to the Supreme Court, the parody merely represented the Last Supper in a different form and was not intended to insult Catholics or offend their honor. The poster did not constitute an insult, because it was not a personal and direct attack on a group of people on the ground of their religion. In this decision, the French Supreme Court thus clearly established that the insult of a religion cannot constitute an indirect insult of a religious group and thereby put a definitive end to the development of the right to respect for religious feelings in case law.

In 2007, the French Supreme Court confirmed its position in the \textit{Christ en Gloire} case. The case concerned the publication in the daily newspaper \textit{Libération} of a

\begin{footnotesize}
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\item[\textsuperscript{1140}] Leclerc, H., \textit{Vinci et le code}, annotation at : CA Paris, 8 April 2005, \textit{Légipresse} n°223 July/August, p.149.
\item[\textsuperscript{1141}] Leclerc, H., \textit{Vinci et le code}, annotation at : CA Paris, 8 April 2005, \textit{Légipresse} n°223 July/August, p.147.
\end{itemize}
\end{footnotesize}
cartoon by the famous cartoonist Willem. The cartoon depicted a naked Christ wearing a condom, who is observed by a group of bishops, amongst whom a white bishop says to a black bishop: ‘Lui-même aurait sans doute utilisé un préservatif!’ AGRIF filed a complaint considering that the cartoon insulted the Catholic population, but in three instances drew a blank. The French Supreme Court ruled that the court of appeal had rightly decided that the drawing may have shocked the sensitivity of some Christians or Catholics, but it illustrated the debate amongst cardinals about the necessity to protect against HIV and was aimed at calling the attention of the reader to the HIV plague in Africa; the cartoon therefore did not overstep the limits of freedom of speech. \(^{1143}\)

5.4.4 Affirmation of the free criticism of a religion: the Mohammed cartoons case

It was just one month before the decision by the tribunal in the famous French Mohammed cartoon case that the plenary assembly of the French Supreme Court rejected an appeal against the condemnation in the Dieudonné case (para.5.2.2 supra). The French Supreme Court ecarted Dieudonné’s appeal to a free debate of religions in a laic and democratic society and to the absence of a délit d’outrage à la moral religieuse in French law, because his particularly gross insult of Jews on the ground of their religion and origin even constituted the strict interpretation of the offence of religious group insult. The Mohammed cartoons affair shows more resemblances with the case brought against the French author Michel Houellebecq in 2002 by four Muslims associations\(^{1144}\) on the ground of Articles 24-8 and 33-3 of the 1881 Press Act with regard to, amongst others,\(^{1145}\) his expression during an interview about his new novel Platforme published in the French magazine Lire, ‘La religion la plus con, c’est quand

\(^{1144}\) La Mosquée de Paris, in the capacity of the French Muslim association La société des habous et des lieux saints de l’Islam, l’Association rituelle de la Grande Mosquée de Lyon, la Fédération nationale des musulmans de France, la Ligue islamique mondiale.
\(^{1145}\) With regard to the two remarks equally made by Houellebecq ‘Oui, oui, on peut parler de haine’ and ‘La lecture du Coran est une chose dégoûtante. Dès que l’islam naît, il se signale par sa volonté de soumettre le monde. C’est une religion belligique, intolérante, qui rend les gens malheureux.’, the tribunal considered ‘M. Houellebecq exprime dans cet extrait non plus un sentiment intime mais des opinions personnelles présentées comme relevant successivement des domaines de l’analyse littéraire, historique et théologique. Ces jugements peuvent bien évidemment être désapprouvés, discutés ou refusés. Il est aisément compréhensible que ces propos aient pu heurter les musulmans, compte tenu, notamment, de l’adjectif “dégoûtant” pour qualifier la lecture du Coran. Ces propos ne sont cependant accompagnés d’aucun appel à en tirer des conséquences discriminatoires à l’égard de quiconque. Les personnes se réclamant de l’islam sont au contraire présentées comme les victimes de la religion à laquelle elles appartiennent et font l’objet d’une commisération qui n’apparaît teintée ni d’ironie ni de mépris. L’expression de ces jugements de valeur portés sur une religion au travers de son texte saint, de son développement historique et de ses caractéristiques doctrinales, ne renferme ainsi aucune incitation à la haine, à la violence ou à la discrimination envers le groupe des fidèles musulmans eux-mêmes.’\(^{1145}\) Cited in : Boulelarge 2010, pp.82-83.

294
mêmes l’islam. Quand on lit le Coran, on est effondré.’ The tribunal acquitted the author, considering ‘l’utilisation du superlative...démonstre cependant qu’aux yeux du prévenu, toutes les religions... méritent d’être affublées de ce qualificatif, mais à des degrés différents. L’appréciation ainsi portée concerne donc uniquement une religion considérée comme système de pensée et comparée à d’autres. Dans ces conditions, écrire que ‘L’islam est la religion la plus con’ ne revient nullement à affirmer ni à sous-entendre que tous les musulmans devraient être ainsi qualifiés. Ce propos ne renferme aucune volonté d’invective, de mépris ou d’outrage envers le groupe de personnes composé des adeptes de la religion considérée.’

1146 It is exactly this development in case law in favor of free criticism of a religion, as affirmed by the French Supreme Court in the cases Girbaud and Sainte Capote that was upheld by the lower judge in the affair of the Mohammed cartoons.

In September 2005, the Danish newspaper *Jyllands-Posten* published twelve satirical cartoons about Islam.1147 One of the cartoons depicted the prophet Mohammed carrying a bomb in his turban. Another cartoon showed Mohammed standing on a cloud trying to stop terrorists with the words ‘Stop, stop, we ran out of virgins!’ The cartoons caused a scandal, as they offended many Muslims around the world. The decision in Denmark not to prosecute the newspaper for the publication of the cartoons was followed by demonstrations and boycotts of Danish products in Arabic countries. In western countries, several newspapers and magazines supported the Danish newspaper by republishing the cartoons.

Similarly, in France the managing director of *France soir* had published the cartoons in his newspaper of 1 February 2006, a choice that cost him his job. In solidarity, the French satirical weekly *Charlie Hebdo* released a special issue, in which, apart from the Danish cartoons, many French cartoons about Islam were published. The front cover of the magazine with the heading ‘Mohammed débordé par les intégristes’ showed a cartoon by the famous French cartoonist Cabu depicting the prophet Mohammed covering his eyes with his hands and roaring ‘C’est dur d’être aimé par les cons’.1148 After a request for seizure of the edition in summary proceedings had failed, *La Mosquée de Paris* – in the capacity of the French Muslim association *La société des habitants et des lieux saints de l’islam* – initiated a legal action against Philipe Val, chief-editor of *Charlie Hebdo*, on the ground of Article 33-3 and was joined by several other Muslim associations.1149

1148 The cartoons in *Charlie Hebdo* are available at: [www.parijsblog.nl](http://www.parijsblog.nl).
1149 Amongst others the associations *L’Union des organisations islamiques de France* and *la Ligue islamique mondiale.*
The associations restricted their complaint to the two previously mentioned Danish cartoons and the cartoon on the front cover by Cabu.

In March 2007, the tribunal acquitted the chief-editor and rejected the demands of the civil parties.\textsuperscript{1150} Primarily the judge recalled the fundamental principles according to which: ‘en France, société laïque et pluraliste, le respect de toutes les croyances va de pair avec la liberté de critique les religions quelles qu’elles soient et avec celle de représenter des sujets ou des objets de vénération religieuses ; que le blasphème, qui outrage la divinité ou la religion, n’y est pas réprimé, à la différence de l’injure dès lors qu’elle constitue une attaque personnelle et directe contre une personne ou un groupe de personnes à raison de leur appartenance.’ With regard to the function of caricatures, the tribunal considered ‘toute caricature s’analyse en un portrait qui s’affranchit du bon gout pour remplir une fonction parodique, que ce soit sur le mode burlesque ou grotesque; que l’exagération fonctionne alors à la manière du mot d’esprit qui permet de contourner la censure, d’utiliser l’ironie comme instrument de critique sociale et politique, en faisant appel au jugement et au débat’.\textsuperscript{1151} The tribunal affirmed that the caricature as a literary genre falls under the scope of freedom of expression of opinion and one must take into account ‘de l’exagération et de la subjectivité inhérentes à ce mode d’expression pour analyser le sens et la portée des dessins litigieux, le droit à la critique et à l’humour n’étant cependant pas dépourvu de limites.’\textsuperscript{1152}

Starting from these principles, the tribunal analyzed the three cartoons separately. The tribunal considered the image of Mohammed on a cloud and the image of Mohammed on the front cover not to be insulting to Muslims, because in these images only the fundamentalists were ridiculed and not Islam or the entire group of its adherents. These cartoons, therefore, did not constitute a personal and direct attack on Muslims as a whole. Contrarily, the tribunal considered that the cartoon showing Mohammed with a bomb in his turban insinuated that terrorist violence is inherent in the Muslim community. The cartoon, if examined in isolation, therefore formed an insult to the entire Muslim community. However, the context of the publication of the cartoon removed Charlie Hebdo’s intention to insult; the affair of the Danish cartoons had evoked a political and public debate and Charlie Hebdo had published the cartoon in a critical manner.\textsuperscript{1153} The tribunal concluded ‘en dépit du caractère choquant, voire blessant de cette caricature pour la sensibilité des musulmans, le contexte

\textsuperscript{1150} TGI de Paris, 22 March 2007, Légipresse n°242 - June 2007, p.123 et seq., annotation H. Leclerc, Caricatures, blasphème et défi.
\textsuperscript{1151} TGI de Paris, 22 March 2007, Légipresse n°242 - June 2007, p.123 et seq., annotation H. Leclerc, Caricatures, blasphème et défi.
\textsuperscript{1152} TGI de Paris, 22 March 2007, Légipresse n°242 - June 2007, p.123 et seq., annotation H. Leclerc, Caricatures, blasphème et défi.
\textsuperscript{1153} TGI de Paris, 22 March 2007, Légipresse n°242 - June 2007, p.125, annotation H. Leclerc, Caricatures, blasphème et défi.
et les circonstances de sa publication dans le journal Charlie Hebdo apparaissent exclusifs de toute volonté délibérée d’offenser directement et gratuitement l’ensemble des musulmans; que les limites admissibles de la liberté d’expression n’ont donc pas été dépassées, le dessin litigieux participant du débat public d’intérêt général né au sujet des dérives des musulmans qui commettent des agissements criminels en se revendiquant de cette religion et en prétendant qu’elle pourrait régir la sphère politique.»\footnote{1154} According to Droin, by referring to a ‘volonté délibérée d’offenser’ the judge required the proof of a \textit{dol specialis}, while the chief-editor without doubt had consciously taken the risk to offend Muslims, which should have been sufficient to establish the \textit{dol generalis}.\footnote{1155}

The association \textit{L’Union des organisations islamiques de France} filed an appeal, arguing that the cartoon of Mohammed with a bomb in his turban constituted an insult to Muslims, because it assimilated their prophet with terrorism. While in March 2008 the Court of Appeal confirmed the judgment of the tribunal, with regard to this latter cartoon it took a different approach, considering ‘La troisième caricature, si elle peut choquer et susciter l’émoi comme en ont témoigné plusieurs personnes...ne peut être comprise qu’à la lumière de l’ensemble du contenu du journal qui porte un regard critique non pas sur la communauté musulmane mais sur certains de ses membres.’\footnote{1156} Hence, even the cartoon showing Mohammed with a bomb in his turban referred to a fraction of all Muslims, being the fundamentalists, and not to the Muslim community as a whole. In the vision of the court, no confusion could exist about the fact that all cartoons formed a legitimate contribution to the public debate on terrorists and fundamentalists and did not express any opinion on Islam or the Muslim community.\footnote{1157}

On the one hand, the \textit{Mohammed cartoons} case clearly reflects the development in French case law in favor of free criticism of a religion, according to which, in order for expression to constitute a religious group insult it must constitute a personal and direct attack against a group on the ground of their religion. On the other hand, the \textit{Mohammed cartoons} case clearly reflects the influence of the case law of the ECtHR on the decisions of the French judges, according to which, in the core the cartoons critical of Islam form part of the public debate of a general interest.

\footnote{1154}{\textit{TGI de Paris, 22 March 2007, Légisipresse n°242 - June 2007, p.125, annotation H. Leclerc, Caricatures, blasphème et défi.}}
\footnote{1155}{\textit{Droin 2009, p.475.}}
5.5 Conclusion

Racial insult consists of uttering an outrageous expression, a term of contempt or an invective that does not constitute an imputation of a specific fact that is susceptible of proof and the object of a contradictory debate about a person or a group of persons exclusively on the ground of their origin, membership or non-membership of an ethnic group, nation, race or religion. Like the offence of racial defamation, a suspect’s intention to insult must be presumed, but, contrary to racial defamation, the author of a racial insult cannot prove his good faith, because with regard to the offence of racial insult only the excuse of provocation is allowed as a justifying fact, if a direct link exists between the content of the insult and its previous provocation and if the insult is uttered within a reasonable time after the provocation and is proportionate to the tenor of the provocation. In order for the suspect to know exactly what he is accused of and to prepare his defence, one unique fact cannot be prosecuted at the same time on the ground of racial defamation and racial insult. In the event of indivisibility between a racial insult and a racial defamation, the racial insult is absorbed by the racial defamation and the expression must be qualified as racial defamation. The relevance of the distinction between the two offences lies in the fact that the racial insult is sanctioned less severely and the offence of racial defamation cannot be justified by the excuse of provocation. However, the actual distinction between the offences of racial defamation and racial insult is relative, because in the field of racial defamation the exception of truth is excluded and an author’s good faith is often rejected. This could justify the creation of one single broader offence of ‘offense raciale’ or the possibility for the judge to requalify the facts.

As with the offence of racial defamation, the French judge attaches importance to a suspect’s right to freedom of expression, when qualifying expression under the offence of racial insult, and does not regard it as a justification for insulting expression, this time notably by interpreting the discriminatory grounds restrictively. On the one hand, expression does not have to be aimed at a group in its entirety; a group is designated regardless of its size. On the other hand, a group must be precisely designated and Harkis do not form a group in the sense of Article 33-3. The French judge has been criticized for creating an incoherent case law concerning the requirement of the designation of a group, dependant on the question as to whether or not he desires the preservation of freedom of expression concerning a specific topic. It is, however, exactly this requirement that has enabled the judge to distinguish the punishable insult consisting of a direct and personal attack of a religious group from a free opinion concerning a religion that might hurt religious feelings.
6. Racial provocation

The offence of racial provocation is characterized by a number of elements, being provocation and intent thereto (6.1), discrimination, hatred or violence (6.2) and the designation of a group (6.3). The law allows no justifications for the offence of racial provocation (6.4). In the application of the offence, the French judge takes into account – to a certain extent – the context of expression (6.5). The analysis results in a general conclusion about the offence of racial provocation in French law (6.6).

6.1 Provocation and intent

The Pleven Act of 1 July 1972 inserted the current Article 24-8 into the 1881 Press Act that sanctions (ceux qui) ‘par l’un des moyens énoncés à l’article 23, auront provoqué à la discrimination, à la haine ou à la violence à l’égard d’une personne ou d’un groupe de personnes à raison de leur origine ou de leur appartenance ou non appartenance à une ethnie, une nation, une race ou une religion déterminée’ with a fine of up to € 45,000 and or imprisonment of up to one year. As the redaction of Article 24 with regard to the numbering of the paragraphs is unclear and new paragraphs have been inserted, over time the offence is confusingly referred to in case law as Article 24-5, 24-6 or Article 24-8. The general secretary of the French Government therefore issued a circular that provided for a re-enumeration and brought the offence under Article 24-8. In the absence of publicity the provocation to discrimination, hatred or violence against a person or a group constitutes a petty offence criminalized in Article R.625-7 of the French Penal Code.

The statutory elements of the offence of racial provocation derogate in several respects from the offence of direct provocation to felonies and misdemeanours

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1158 The tribunal can order the public display or dissemination of the decision taken in accordance with Article 131-35 of the French Penal Code and can deprive the offender of his right to be elected and his right to hold a judicial office, or to give an expert opinion before a court, or to represent or assist a party before a court of law for a maximum period of five years (Article 131-26 para. 2 and 3 French Penal Code).
1160 Article R.625-7 of the French Penal Code reads: La provocation non publique à la discrimination, à la haine ou à la violence à l’égard d’une personne ou d’un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance, vraie ou supposée, à une ethnie, une nation, une race ou une religion déterminée est punie de l’amende prévue pour les contraventions de la 5e classe. Est punie de la même peine la provocation non publique à la haine ou à la violence à l’égard d’une personne ou d’un groupe de personnes à raison de leur sexe, de leur orientation sexuelle ou de leur handicap, ainsi que la provocation non publique, à l’égard de ces mêmes personnes, aux discriminations prévues par les articles 225-2 et 432-7.
followed by effect in Article 23 of the 1881 Press Act and the offences of direct provocation to felonies and misdemeanours not followed by effect in Articles 24-1 – 24-4 and 24-6 of the 1881 Press Act.

Firstly, the wording of the offence of racial provocation does not, like articles 23 and 24-1 - 24-4 and 24-6, explicitly require that the provocation must be direct. With regard to these latter offences of direct provocation, the French judge must demonstrate that the expression contains a precise, explicit call to commit a determined fact.\textsuperscript{1161} According to traditional case law concerning the direct provocations of articles 23 and 24-1, 24-4 and 24-6: ‘Attendu que les articles 23 et 24 précités exigent, pour qu’il y ait lieu à répression pénale, qu’il y ait eu provocation directe à commettre les délits et crimes spécifiés, c’est-à-dire qu’il y ait une relation incontestable entre le fait de la provocation et les crimes ou délits auxquels elle se rattachée par un lien étroit.’\textsuperscript{1162} And ‘la provocation non suivie d’effet doit être une incitation directe, non seulement par son esprit, mais par ses termes, à commettre des faits matériellement déterminés, eux-mêmes constitutifs d’un crime ou d’un délit’.\textsuperscript{1163} Doctrines and opinions therefore fall outside the scope of the articles.

The same holds true for an expression that merely evokes in the public a feeling of excitement or a passion.\textsuperscript{1164} In 1954, the French Supreme Court considered that the distribution of tracts calling the French and Algerian population to show their solidarity with the Tunisian population with regard to their accession to independence did not constitute a direct provocation to substract the authority of France from part of its territories, because the tracts simply were aimed at evoking ‘un mouvement d’opinion, ce mouvement devant susciter un état d’esprit, lequel à son tour serait propre à permettre la naissance de cette entreprise’.\textsuperscript{1165} Likewise, in 2005, the Versailles Court of Appeal considered that the response of actress Ophélie Winter ‘non, je pense qu’il faut tuer Raël’ to the question, during an interview, as to whether human cloning is the future, did not constitute a direct provocation to commit such a crime against her colleague actor mister Vorilhon, because this humorous metaphor aimed rather at the project of human cloning, in which Vorilhon was engaged under the pseudonym ‘Räel’, than to his person.\textsuperscript{1166}

The French legislator deleted the term ‘direct’ in Article 24-8, in order to bring the ‘incitement’ under the scope of the offence of racial provocation.

\textsuperscript{1161} Beignier, De Lamy & Dreyer 2009, p.510.
\textsuperscript{1163} CA Versailles, 30 June 2005, Légipresse n°228, January/February 2006, annotation B. Ader, pp.19-20.
\textsuperscript{1164} Beignier, De Lamy & Dreyer 2009, p.510.
\textsuperscript{1166} CA Versailles, 30 June 2005, Légipresse n°228, January/February 2006, annotation B. Ader, pp.19-20.

300
(para.3.3.2 supra). The offence is generally referred to by legal scholars as the ‘indirect provocation’.

Indeed, the wording of the offence of racial provocation does not exclude the possibility that discriminatory discourse consisting of ambiguous and insidious expression that does not constitute an explicit call to act, but creates an ambiance, a context, that favours the passage to the act, can fall under its scope.\textsuperscript{1168} The French judge has further specified in case law that the racial provocation must take the form of ‘non pas forcément une exhortation, mais un acte positif d’incitation manifeste à la haine, à la discrimination, ou à la violence, ce qui n’exige pas un appel explicite à la commission d’un fait précis tendant à susciter un sentiment d’hostilité ou de rejet’.\textsuperscript{1169}

This signifies that, in order to be punishable, racial provocations do not always have to be that clear, but can also take more implicit or disguised forms. One tribunal considered that the offence constituted, because the suspects ‘se sont laissés entraîner dans la voie d’un racisme latent, quotidien, en fin de compte plus dangereux, car plus insidieux, qu’un racisme déclaré’.\textsuperscript{1170} Beyond the literal sense of the expression, the aim of the author then may become a determinant factor that can be deduced from the humoristic or artistic context. It is argued that this evolution of the notion of provocation compensates the absence of the offence of blasphemy in French law by influencing the criminalization of the provocation to hatred on the ground of religion (para. 6.5.1-6.5.2 infra). It is said to assure, in any event, that French law complies with the obligations of ICERD, even though it does not formally criminalize the ‘diffusion of racist ideas’.\textsuperscript{1171}

Secondly, the offence of racial provocation does not explicitly require that the expression provokes others to commit a determined, punishable act under French law (para.6.2 infra). Contrarily, Articles 24-1 to 24-3 of the 1881 Press Act sanction the direct provocation not followed by effect to a limitative list of infractions.\textsuperscript{1172} These infractions comprise ‘les atteintes volontaires à la vie, les atteintes volontaires à l’intégrité de la personne et les agressions sexuelles, définies par le livre II du Code pénal’ and ‘les vols, les extorsions et les destructions, dégradations et détériorations volontaires dangereuses pour les personnes, définies par le livre III du Code pénal’. Article 24-4 adds to this list

\textsuperscript{1167} Beignier, De Lamy & Dreyer 2009, p.515 et seq.
\textsuperscript{1168} Agostinelli 2002/2003, p.56.
\textsuperscript{1169} TGI de Paris, 18 February 2011, Légipresse no282, p.240, annotation E. Derieux.
\textsuperscript{1171} Dreyer 2011, p. 151.
\textsuperscript{1172} With a fine of up to 45.000 Euros or an imprisonment of up to five years. Article 61 provides for a supplementary penalty, being the confiscation of the published expression and the suppression or destruction of all exemplars that are for sale, have been distributed or are exposed to the public. This penalty is however not applicable to the provocations to the ‘crimes et délits portant atteinte aux intérêts fondamentaux de la nation’ and to the ‘actes de terrorisme’.

301
the direct provocation to ‘crimes et délits portant atteinte aux intérêts fondamentaux de la nation prévus par le titre Ier du livre IV du Code pénal’. Article 24-6 criminalizes the direct provocation to ‘actes de terrorisme prévus par titre II du livre IV du Code pénal’.

Thirdly, Article 121-7 of the French Penal Code considers the provocation to a felony or a misdemeanour by means of a gift, promise, threat, order, or an abuse of authority or powers as a form of complicity to that felony or misdemeanour. Likewise, Article 23 of the 1881 Press Act criminalizes as accomplices to a felony or misdemeanour those who, through certain means of publicity, shall have directly provoked the perpetrator(s) to commit the punishable action, if the provocation has been followed by effect. Pursuant to the second paragraph, the same applies if the provocation is merely followed by an attempt to commit a felony. Judges must therefore equally demonstrate that a felony, an attempt thereto, or a misdemeanour, has been committed. Subsequently, they must demonstrate that a causal link exists between the object of the expression and the infraction committed.

Contrarily, the offence of racial provocation and the offences of direct provocation of Article 24 do not require that the provocation is followed by effect. The offences do not concern provocations that have reached their goal, but concern provocations that ‘merely’ put others in danger.\textsuperscript{1173} The judge can therefore only demonstrate the punishable character of these provocations by assessing the expression. The difficulty in qualifying the provocation to discrimination, hatred and violence consists of the characterization of the causal link between the expression and acts of discrimination or violence or the existence of hatred as a following effect. The French Supreme Court exercises a strict control over the question as to whether or not ‘tant par son sens que par sa portée, le texte incriminé tend à inciter le public à la discrimination, à la haine ou à la violence’, thus whether or not the expression charged can be qualified under Article 24-8, and can take into account the full context in which the expression is uttered, being ‘tous les éléments, même extrinsèques aux dessins ou au propos incriminés, lui permettant d’en apprécier le sens et la portée’.\textsuperscript{1174}

According to Cohen, since the creation of the offence by the Act of 1 July 1972 the French Supreme Court has shifted from the requirement of a direct link between the expression and its following effect that is determined on the basis of a literal, textual interpretation to admitting a less strong link that is determined on the basis of a broader context outside the mere literal, textual context, which has enabled French courts to bring under the scope of the offence and criminalize more disguised forms of racist and discriminatory expression.\textsuperscript{1175} The French Supreme Court has decided that in order to establish this link, the

\textsuperscript{1173} Beignier, De Lamy & Dreyer 2009, p.508.
\textsuperscript{1174} French Supreme Court, crim.ch., 24 October 1995, no94-83666, D. 1996.
\textsuperscript{1175} Cohen 2003.
French judge must demonstrate, not that the expression is capable, but merely
that it is likely to provoke others to discrimination, hatred or violence.\textsuperscript{1176}

Contrary to the offences of racial defamation and racial insult, where the bad
faith of the author is presumed, in the field of racial provocation the intention of
the author must be demonstrated by the prosecuting party.\textsuperscript{1177} The subjective
intention of the author is, however, of limited importance; the objective
intention must be derived from the expression itself that must leave no doubt
about the authors’ intention. It is argued that this approach permits to put aside
the reproach sometimes made that the offence of racial provocation reintroduces
the ‘délit d’opinion’ into French law; the provocation to dangerous behaviour is
criminalized rather than an author’s motives.\textsuperscript{1178} In 1997, the French Supreme
Court endorsed the condemnation by the Court of Appeal of humorist Patrick
Sébastien, who during an emission on television had intended to caricaturize the
extreme right winged politician Jean Marie Le Pen with regard to his anti-
immigration opinions. Disguised as the politician, Sébastien had sung ‘Casser
du noir’, a parody of ‘Casser la voix’, a song by Patrick Bruel, containing the
phrases ‘Casser du noir’ and ‘Allumez les briquets, on va leur foutre le feu!’\textsuperscript{1179}
According to the Court of Appeal, the text taken literally constituted a call to
hatred against a group of people on the ground of their race or ethnic
background. Nothing had been done in order for the viewer to have any other
interpretation.\textsuperscript{1180} Therefore, the author could not rely on his good faith and the
justification of constituting humour was excluded.

In order for an expression to constitute a racial provocation punishable on the
ground of Article 24-8, it must constitute a message addressed to the public that
incites the latter, thus others and third parties, to discriminate, use violence, or
to hatred against a person or a group. In 1995, the French Supreme Court
overruled the condemnation by the court of appeal of an airplane official for
having said ‘Si je vous avais connue il y a 60 ans à Vichy je vous aurais cramée’
towards a security post at the airport. The Court of Appeal considered that the
presentation of a person as a person to be physically eliminated on the ground

\textsuperscript{1177} TGI de Paris, 15 October 2002, Légipresse n°197, I, p.155.
\textsuperscript{1178} Dreyer 2011, p. 159.
\textsuperscript{1179} A passage of the song reads: ‘J’peux plus voir les étrangers même en peinture. J’suis pas là
pour leur fabriquer un pays, m’en veux pas si ce soir j’ai envie d’casser du noir; les bronzes, les
marrons qu’on tolère et qui restent, qui vous prennent pour des cons et puis qui vous détestent; les
magasins brûlés à la moindre colère... et les journal qui traînent dans la boue mes amis, ça m’goût
tellement la haine que ça m’éveille la nuit. Casser du noir. Casser du noir... Allumez les briquets,
\textsuperscript{1180} French Supreme Court, crim.ch., 4 November 1997, n°96-84338, Dr. pén., 1998,
annotation M. Veron.
of race or religion constitutes the offence of incitement to racial hatred. The expression was uttered in public and overheard by several persons. The Supreme Court considered ‘Qu’en prononçant ainsi, par des motifs qui n’établissent pas que le propos tendait, tant par son sens que par sa portée, à provoquer autrui à la discrimination, à la haine ou à la violence, la cour d’appel a fait une fausse application de l’article 24, alinéa 8, de la loi du 29 juillet 1881.’\textsuperscript{1181} [curs. EHJ]

Contrary to the offences of racial defamation and racial insult, (para.4.1 and 5.1 supra), one fact can be prosecuted at the same time on the ground of racial defamation or racial insult and racial provocation. When expression does not meet the strict criteria of the offence of racial defamation and thus cannot be qualified as such, this does not hinder its qualification as racial provocation.\textsuperscript{1182} In a final decision of 18 February 2011, the Paris TGI condemned journalist Eric Zemmour, who during a television debate had uttered ‘la plupart des trafiquants sont noirs et arabes, c’est comme ça, c’est un fait’, on the ground of the offence of provocation to racial discrimination, but acquitted him on the ground of racial defamation. The racial defamation was not established, because the expression neither affirmed nor supposed the existence of a causal link between the origin or the skin colour of the groups and their alleged overrepresentation among the drugs travellers; Zemmour had confined himself to present his assertion as an acquired fact. Contrarily, the provocation to racial discrimination was established, because ‘En justifiant de la sorte des contrôles discriminatoires, le propos d’Eric Zemmour, tant par son sens que par sa portée, incite clairement à la discrimination à l’égard d’un groupe de personnes, défini comme les noirs et les Arabes en général, et ce à raison de leur origine ou de leur appartenance à une ‘race’ au sens de la loi, seuls critères de choix sur lesquels les contrôles en cause se pratiquent.’\textsuperscript{1183} Derieux questions whether the distinction between the two offences is so obvious that the decision is justified or whether the judge merely aimed at satisfying both parties; on the one hand the suspect and on the other hand the anti-racism associations constituted as a civil party.\textsuperscript{1184}

Likewise, when expression cannot be qualified as a racial provocation, this does not hinder its qualification as racial insult. In the Dieudonné-case (para.5.2.2 supra), the French Supreme Court considered that the humorous context did not remove the insulting character of the expression ‘(...) les juifs,
C'est une secte, une escroquerie (...'). The Court, however, did confirm the acquittal on the ground of 24-8 by the Court of Appeal that considered 'que ces propos ne sont assortis d'aucune exhortation ou incitation adressée à des tiers en vue d'en tirer des conséquences discriminatoires ou de violence'.

6.2 Discrimination, hatred or violence

French doctrine generally holds that the desire of the French legislator was to criminalize in Article 24-8 the provocation to punishable acts of discrimination in accordance with Article 225-2 and Article 432-7 of the French Penal Code that criminalizes a public authority or public service official, who, in the exercise of his or her function, refuses the benefit of a right conferred by the law or hinders the normal exercise of any given economic activity to a natural or legal person, although Article 24-8 itself does not explicitly refer to these articles. In 1976, the French Supreme Court indeed considered that the provocation to racial discrimination implies the provocation to facts defined and criminalized in the French Penal Code. This considerably limits the scope of the offence.

When the French legislator extended the scope of the offence of provocation to discrimination, hatred or violence to the discriminatory grounds of sex, sexual orientation, or handicap, he inserted in the new paragraph – current Article 24-9 – after the term discrimination the words 'provided in Articles 225-2 and 432-7 of the Penal Code', in order to prevent the existence of any argument on this point. In order to be punishable, the fact that expression has a 'sexist or homophobic' character thus does not suffice. A link must instead be established between the expression and such forms of discrimination (para. 7.2 infra). It is argued that if the French Supreme Court does not align the regime of Article 24-8 with that of 24-9, in order to be punishable, provocations on the ground of race may be indirect, but must be direct when on the ground of sex or sexual orientation.

The scope of the offence of provocation of discrimination is, however, much more limited than the scope of the definition of discrimination itself; Article 225-1 cites several other discriminatory grounds, being 'la situation de

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1188 Article 24-9 reads : Seront punis des peines prévues à l’alinéa précédent ceux qui, par ces mêmes moyens, auront provoqué à la haine ou à la violence à l’égard d’une personne ou d’un groupe de personnes à raison de leur sexe, de leur orientation sexuelle ou de leur handicap ou auront provoqué, à l’égard des mêmes personnes, aux discriminations prévues par les articles 225-2 et 432-7 du code pénal.
1189 Dreyer 2011, p.154.
famille; la grossesse, l’apparence physique, le patronyme, l’état de santé, les caractéristiques, les mœurs, l’âge, les opinions politiques, l’activité syndicale’.

The term ‘violence’ equally refers to acts of violence that are criminalized in French law and signifies ‘toute atteinte volontaire à la vie ou à la l’intégrité physique’. A certain overlap therefore exists between Article 24-8 and Article 24-2 that criminalizes, amongst others, the direct provocation to infractions of ‘atteintes volontaires à l’intégrité de la personne’ in the sense that they both criminalize provocations to acts of violence. It is argued that ‘la provocation à la violence ne constitue qu’un supérieur dans la provocation à la haine’. However, incitement to hatred can exist without any call to violence.

Contrary to the terms ‘discrimination’ and ‘violence’, the French Penal Code neither defines nor criminalizes the term ‘hatred’. The French judge regards hatred rather as a sentiment than a determined act and has equated the term hatred with ‘un sentiment d’hostilité ou de rejet’. It is argued that ‘la haine n’est pas reprehensible en tant que telle’, because criminal law ‘ne peut obliger les gens à s’aider’, but ‘le droit répressif peut empêcher les paroles ou les écrits qui entendent faire naître ces sentiments d’hostilité’. The provocation to hatred can thus be considered as an ‘illicit incitement to a licit fact’. According to Mémeteau, the incitement to licit acts is repressed when such acts are considered as reprehensible on the basis of their immorality or lack of responsibility and because their multiplication would violate the public order or morals. Indeed, during the drafting of the article much emphasis was placed on the danger of the contagiousness of racism.

Article 24-8 thus does not require that the expression provokes an act that is precisely defined by an infraction, but merely requires that it provokes discriminatory behaviour, violent conduct or a manifestation of hatred. Nevertheless, the French Supreme Court has considered that Article 24-8 is defined in clear and precise terms and, therefore, is not incompatible with Article 7 ECHR, which incorporates the legal principle of *nullum crimen, nulla poena, sine lege*. An analysis of the case law concerning article 24-8 shows that

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1190 For example: Articles 222-7 – 222-12-2 and Articles R.624-1 and R.625-1 of the French Penal Code.
1192 Droin 2009, p.168.
1193 Foulon-Piganiol, J., La lutte contre le racisme, D 1972, p. 272.
1197 Droin 2009, p.169.
1198 French Supreme Court, crim.ch., 13 June 1995, n°93-82144, *Bull. Crim.* 1995, n°217, p.591. Furthermore, the French Supreme Court has rejected to transmit a QPC about the compatibility of Article 24-8 and 24-9 of the French Press Act with Articles 8 and 11 of the
the imprecision of the offence, however, brings the French judge to criminalize and qualify expression rather as a provocation ‘à la discrimination, à la haine ou à la violence’ than as a provocation ‘à la discrimination’ or ‘à la haine’ or ‘à la violence’ and does not require expression to explicitly contain a description of a precise, determined act of discrimination, violence or a manifestation of hatred to which it seeks to provoke others to commit.

The French Supreme Court categorically confirms condemnations on the ground of provocation to feelings of fear and hostility, thus hatred, against the Jewish community, with regard to clearly anti-Semitic expression, even when such expression does not explicitly call others to act or feel in a certain manner and does not explicitly refer to the Jewish community. Examples can be found in an article reproducing two stickers with the text ‘Rapport Leuchter, fini les chambres à gaz?’ and ‘les coupeurs de verge à la grande vergue’ that imputed the Jewish community to lie about the existence of gaz chambers;\(^{1199}\) an article entitled ‘Souvenez-vous de l’Internationale juive’ that suggested that the Jewish community maintained an international lobby for world domination;\(^{1200}\) an article entitled ‘Refusons le bâillon’, ‘Contre l’inquisition cosmopolite, contre l’oppression, contre l’imposture’, in which the Jewish community was presented as ‘mafia cosmopolite’ and ‘une association de malfaiteurs’ that aimed to dominate the French;\(^{1201}\) or the publication on the Internet of the phrase ‘France Culture est une radio qui appartient pratiquement à la communauté juive et qui diffuse en permanence sur la Bretagne sa propagande à la gloire des juifs et pour le remplacement physique des Européens (...)’.\(^{1202}\)

Furthermore, the French Supreme Court has on several occasions endorsed condemnations on the ground of Article 24-8 with regard to criticism of the politics of the State of Israel that the lower courts considered as a disguised form of provocation to discrimination or hatred against Israeli or the Jewish community as a whole. An example of this is a drawing of an Israeli soldier and officer who shouted towards a group of Palestinian citizens ‘les hommes à Gaza, les femmes à Jéricho’ that imputed the Jewish community to practice in Israel a politics of deportation identical to the one the Nazis had practiced against themselves.\(^{1203}\) Another example is the reproduction on the

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DDHC. According to the Supreme Court, Articles 24-8 and 24-9 violated neither the principle of precision of criminal law nor the right to freedom of expression. See: French Supreme Court, crim. Ch., 16 April 2013, n° 13-90008/13-90010, Légipresse n° 306 June 2013, p. 337-338.


\(^{1202}\) French Supreme Court, crim.ch., 22 June 2010, n°10-82337, unpublished.

\(^{1203}\) French Supreme Court, crim.ch., 24 October 1995, n°94-83.666, unpublished.
Internet of the expression of a mayor, who had indicated during a meeting, to have requested the restaurant to boycott products of Israel in protest against the politics of the Sharon government towards the Palestinians. The mayor had incited the restaurant to take into account the origin of the products and thereby had hindered the economic activity of Israeli producers. Whether such political criticism on the State of Israel via the call to boycott Israeli products constitutes a punishable provocation to discrimination may be contestable. In 2011, the French Supreme Court, however, refused to transmit a ‘Question Prioritaire de Constituationalité’ (QPC) concerning the application of Article 24-8 to the call to boycott Israeli products to the Constitutional Council, because the request evidently aimed at contesting the qualification of the expression, which is not the goal of the QPC (see further para.9.4 infra).\footnote{French Supreme Court, crim.ch., 28 September 2004, n°03-87450, unpublished.}

The French Supreme Court has clarified, to a certain extent, the limitations to the free political and public debate concerning the problems related to the immigration and integration of foreigners. Criticism of certain undesirable behaviour or practices of immigrants or foreigners, apart from their race or origin, does not fall under the scope of Article 24-8. In 1980, the French Supreme Court rejected an appeal against an acquittal with regard to an article criticizing in strong language the presence of many door-to-door salesmen of African origin in a city, because of the sales methods they used. Such criticism did not constitute a punishable provocation to discrimination, hatred or violence against the Senegalese salesmen on the ground of their race or nationality.\footnote{French Supreme Court, crim.ch., 7 June 2011, n°10-88315, \textit{Crim. Bull.} 2011, published.}

The Court draws a line when the criticism attributes undesirable behaviour or practices to immigrants or foreigners, precisely because of their race or nationality, portrays them exclusively as harmful to French society and seeks to convince the reader to reject their presence in France and favour their departure. In 2001, the French Supreme Court rejected an appeal against a condemnation concerning a tract criticizing the behaviour of immigrants, because ‘les juges retiennent, par motifs propres et adoptés, que le tract en cause présente les immigrés sous un jour exclusivement nuisible, en les rendant responsables de l’insécurité, du chômage et de l’accroissement de la charge fiscale; qu’ils ajoutent que l’écrit instille, dans l’esprit du lecteur, la conviction que la sécurité passée par le rejet des immigrants et que l’inquiétude et la peur, liées à leur présence en France, cesseront à leur départ.’\footnote{French Supreme Court, crim.ch., 3 March 1980, n°78-91949, \textit{Bull. Crim.} 1980, n°74.}

The French Supreme Court generally considers expression that attributes criminal behaviour to a certain group on the ground of its race, ethnic background or national origin, to constitute a punishable provocation to hatred. In 1995, the French Supreme Court found punishable the publication of an...
article which included a drawing that showed young black and North African people brandishing knives and clubs, with the caption ‘L’insécurité est souvent le fait des bandes ethniques’, because ‘le but recherché est de créer un lien entre les communautés noires et maghrébines et la criminalité; que cette association, compte tenu de la puissance émotive du dessin, est de nature à susciter des réactions d’hostilité et de rejet vis-à-vis de ces communautés’.\textsuperscript{1208}

Likewise, in 1996, the French Supreme Court considered an article that cited the President of the French Republic as having said that ‘la nation française ressent profondément l’utilité de la présence d’immigrés chez nous’ to constitute the offence, because the article subsequently ascribed various incidents involving foreigners from North and black Africa and the gypsy community to their membership of a particular ethnic group, race or religion. Such juxtaposition had given the text a particular force and ‘a été de nature à susciter immédiatement chez le lecteur, contre les personnes visées comme les auteurs de tels agissements et les vecteurs principaux des formes les plus répréhensibles de la délinquance’, des réactions de rejet, voire de haine et de violence’.\textsuperscript{1209}

However, in a recent decision of 7 June 2011, the French Supreme Court established that severe problems related to the integration of a particular group can form a matter of public interest that can even justify the denomination of that group as criminal. The Court annulled a conviction of a former foreign service officer for his harsh criticism of the Roma community during a political television talk show entitled ‘Délincuance, la route des Roms’ dedicated to the integration of the Roma population into French society. The Court of Appeal had considered that the officer ‘s’est livré, par des affirmations péremptoires et des constats lapidaires et non étayés, à une dénonciation sans appel ni réserve de la communauté rom qu’il a désignée comme particulièrement criminogène et donc dangereuse, pratiquement inassimilable et finalement susceptible de déferler en masse sur le territoire français; (...) que le sujet de l’émission exigeait, à tout le moins, qu’il fasse prévue d’un pessimisme raisonné et argumenté;’ Contrarily, the French Supreme Court held that the difficulties with regard to the integration of the Roma community concerned a question of public interest; the expression, therefore, did not overstep the admissible limits to freedom of expression.\textsuperscript{1210}

\textsuperscript{1208} French Supreme Court, crim.ch., 7 September 1995, Dr. pén. 1995, 280, annotation M. Véron.
\textsuperscript{1210} Without referral, the French Supreme Court acquitted the officer. French Supreme Court, crim.ch., 7 June 2011, n°10-85179, Légipresse n°287, October 2011, pp.550-554, annotation N. Verly.
6.3 The designation of a group

French doctrine generally holds that it is not required that the group being the victim of a racial provocation is identified with the same precision that is required with regard to the offences of racial defamation and racial insult.\textsuperscript{1211} However, to preserve the principle of freedom of expression, the French Supreme Court has traditionally held onto the requirement that in order for expression to constitute a provocation to discrimination, hatred or violence ‘against a group on the ground of their origin, ethnic background, nation, race or religion’ the expression must undisputedly have a racist and discriminatory purport in the sense that it expresses an absolute rejection of a determined group for reasons exclusively of their belonging to a specific origin, ethnic background, nation, race or religion.\textsuperscript{1212} The French Supreme Court found a rap comprising the phrases ‘La France est une garce, n’oublie pas de la baiser’ and ‘La France est une de ces putes de mères qui t’a enfanté’ not to stigmatise any particular group of the French nation, but rather to be deliberately and uniquely aimed at the French State. It therefore did not incite to hatred against the French as a whole.\textsuperscript{1213}

For a long time, the French Supreme Court opined that expression about immigrants or foreigners can not constitute a provocation to racial discrimination punishable under Article 24-8, because immigrants and foreigners do not constitute any of the determined categories of origin, ethnic background, nation, race or religion. According to the French Supreme Court, ‘la seule crainte du racisme ne saurait priver les citoyens de la liberté de pensée et d’expression, dans la mesure où le débat se déroule de bonne foi et sans but de discrimination au sens de l’article 24 de la loi du 29 juillet 1881’.\textsuperscript{1214} This consideration of the Court is often cited as a defence by suspects prosecuted on the ground of Article 24-8.\textsuperscript{1215}

In 1994, the French Supreme Court upheld an acquittal concerning a tract denouncing the high concentration of immigrants in the northern quarters of Colombes, considering ‘que le texte et le dessin ne font que refléter une réalité locale résultant de la politique de la municipalité et ne tendant qu’à protester précisément contre la discrimination dont feraient l’objet les Français de souche; qu’on ne peut tenir sans abus d’interprétation que ce tract serait dirigé contre une race ou une ethnie particulière, cependant que le dessin, aux dires mêmes des parties civiles, vise des ressortissants étrangers de plusieurs races ou ethnies manifestement pris en leur qualité d’immigrés et non en leur appartenance

\begin{itemize}
  \item[\textsuperscript{1211}] Robert, J-H., \textit{JCI Communication}, ‘Apologies et provocations de crimes et délits’, n°22.
  \item[\textsuperscript{1212}] Beignier, De Lamy & Dreyer 2009, p.517.
  \item[\textsuperscript{1213}] French Supreme Court, crim.ch., 3 February 2009, n°08-85220, \textit{unpublished}.
  \item[\textsuperscript{1214}] French Supreme Court, crim.ch., 17 May 1994, n°91-82129, Dr. pén. 1994, 258.
  \item[\textsuperscript{1215}] French Supreme Court, crim.ch., 3 February 2009, n°06-83.063 08-82.402, \textit{Ball. Crim.} 2009, n°25.
\end{itemize}
raciale ou ethnique étant observé que c’est le problème de l’immigration qui est en question et que les immigrés ne constituent aucune catégorie ethnique, ni raciale, ni confessionnelle’.  

In a decision of 24 June 1997, the French Supreme Court altered this case law and extended the notion of a group. The Court rejected an appeal against the condemnation of a French local politician for an election pamphlet making a commitment to fight immigration fiercely, calling for the ‘envahisseurs’ to be driven out immediately, denouncing French officials as accomplices or collaborators with the ‘occupants de notre sol’, and demanding the expulsion of ‘des étrangers irrespectueux et nuisibles’. According to the Court of Appeal, these accusations ‘induisent une notion d’agression, et tendent à susciter un sentiment de haine ou des actes de discrimination envers les immigrés, considérés comme un groupe de personnes, et visés à raison de leur non-appartenance à la communauté française’. The French Supreme Court confirmed ‘Qu’en effet, les étrangers résidant en France, lorsqu’ils sont visés en raison de leur non-appartenance à la nation française, forment un groupe de personnes au sens de l’article 24 alinéa 6 de la loi du 29 juillet 1881’.  

It is argued that this approach permits the repression of expression that is the most dangerous to public order, but also that it may deprive the notion of a ‘group’ from its relevance. The boundary between criticism of non-individualized persons and the free discussion of abstract ideas becomes minimal. The offence then less concerns the protection of particular communities than the dignity of the human person, the status of which must not depend on any personal characteristic. This may entail the risk of repressing simple opinions.

6.4 No justifications

The perpetrator of a provocation to discrimination, hatred or violence cannot benefit from a justifying fact. The excuse of provocation, the possibility for a suspect to demonstrate that he or she has been provoked to utter his or her expression by a previous attack that is admitted in the field of insult, cannot justify a provocation to discrimination, hatred or violence. The same holds true for the exception of truth, i.e. the possibility for a suspect to prove the truth of his statement that is permitted in the field of defamation. The possibility for a suspect to demonstrate his good faith as a justifying fact that is generally

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1218 French Supreme Court, crim.ch., 14 May 2002, n°01-85482, unpublished.
admitted in the field of provocations not followed by effect is equally excluded in the field of provocation to discrimination, hatred or violence. \textsuperscript{1220} Veron however criticizes the decision by the French Supreme Court concerning the ridiculing of Le Pen with the song ‘Casser du noir’ notably for completely interdicting an author to prove his good faith, which would go far beyond the presumption of bad faith that ‘merely’ shifts the burden of proof of his intention towards the suspect and which would be contrary to Article 121-3 of the French Penal Code that reads ‘il n’y a point de délit sans intention de le commettre’. \textsuperscript{1221}

Freedom of expression or the interest of a public debate can also not form a general justification for the offence of racial provocation. The French Supreme Court has on several occasions declared the offence of provocation to discrimination, hatred or violence compatible with Article 10 ECHR. In one case the Court considered ‘que, d’autre part, le texte précité entrant dans les restrictions prévues au paragraphe 2 de l’article 10 de la Convention européenne des droits de l’homme, la méconnaissance du principe de la liberté d’expression affirme par le paragraphe 1er dudit article ne saurait être invoquée’. \textsuperscript{1222} And in another case the Court considered that according to the second paragraph of Article 10 ECHR freedom of expression ‘peut être soumis à certaines formalités, conditions, restrictions ou sanctions, prévues par la loi, qui constituent, dans une société démocratique, des mesures nécessaires notamment à la protection de la morale et des droits d’autrui; que tel est l’objet des articles susvisés de la loi du 29 juillet 1881’. \textsuperscript{1223}

The case law concerning Article 24-8 shows that the French judge attaches importance to the interest of freedom of expression by narrowly interpreting and strictly circumscribing the statutory elements of the offence of racial provocation (‘incitation manifeste’ and ‘groupe parfaitement designé’). However, once the French judge has established that an expression constitutes a punishable provocation to discrimination, hatred or violence in the sense of Article 24-8, it is impossible for him/her to make any further act of balancing with the freedom of expression.

\textsuperscript{1221} French Supreme Court, crim.ch., 4 November 1997, n°96-84338, \textit{Dr. pén.}, 1998, annotation M. Véron.
\textsuperscript{1222} French Supreme Court, crim.ch., 14 May 2002, n°01-85482, \textit{unpublished}.

312
6.5 Provocative expression concerning a religion in a humoristic or political context

6.5.1 The ridiculing of the Catholic faith

The French Supreme Court has established in several judgments that in order for expression to constitute a punishable provocation to discrimination, hatred or violence, it must not merely evoke negative feelings with third parties towards the targeted religious person or group or merely hurt the feelings of the targeted religious person himself or group itself. As a general rule, the Court endorses acquittals concerning expression that ridicules the Christian or Catholic religion, its convictions, symbols, rites and practices and therefore hurts the sensibility and religious feelings of Christians or Catholics, but, considering its humorous context, does not constitute a ‘incitation manifeste’ against a ‘groupe parfaitement designé’.

In 1993, the French Supreme Court rejected an appeal against an acquittal with regard to an article entitled ‘Confessions en direct: déguisés en curés, nous avons recueilli vos péchés’ published in a monthly magazine. The article narrated the adventures of two reporters who – dressed as a priest and a religious woman – had approached passengers on the street and asked them to take confession in a car bus equipped with a big cross, which had been converted into a confessional box. The article was accompanied by two photos and comprised the phrase: ‘Au top 50 des péchés avoués celui de l’adultère est numéro un. Comble de la rigolade pour nos deux reporters qui, entre les traditionnels Pater, durent conseiller à plusieurs reprises les préservatifs...’

The Paris Court of Appeal had considered that ‘... s’il tendait à tourner en dérision la confession en usage dans l’Eglise catholique, l’article incriminé ne suscitait aucun sentiment d’hostilité envers les adeptes de cette religion (..), le dit article n’est pas de nature à inciter à la haine, à la violence ou à la discrimination envers des citoyens de religion catholique’.

Again in 1993, the French Supreme Court confirmed an acquittal concerning the caricature ‘Christ en croix gonflé’ published on the cover of the December 1989 issue of the magazine Fluide glacial. It depicted a religious woman standing in front of a Christmas tree surrounded by Christmas presents, busy inflating her Christmas present with a bicycle pump: an inflatable crucified Christ. The Court considered ‘Attendu qu’après avoir admis que le symbole religieux utilisé en page de couverture, ainsi que les images et propos de la

1224 Other phrases were: ‘Bien, va en paix, tu mentiras moins et réciteras 87 Pater et 54 Ave...’; ‘Peine extrêmement sévère. Mais facile à purger, ce pécheur connaissait ses Pater et ses Ave sur le bout de ses doigts impurs...’; ‘Terriblement excité par la cornette de notre conseur, un noir splendide succombe à la tentation du confessionnal...’; ‘Un client raconte sa vie, prenant le confessionnal pour le cabinet d’un psy...’

bande dessinée, tendaient incontestablement à tourner en dérision les religieuses représentées sous des traits grotesques, et étaient de nature à heurter la sensibilité des catholiques, comme le respect qu’ils portent aux religieuses, l’arrêt énonce, pour relaxer le prévenu et débouter la partie civile, que ces faits ne constituent cependant pas le délit prévu par l’article 24, alinéa 6, de la loi du 29 juillet 1881, et que ce texte ‘suppose une provocation délibérée à la discrimination, à la haine ou à la violence à l’égard de personnes à raison de leur appartenance ou non-appartenance à une religion déterminée, ce qui n’est pas le cas en l’espèce, faute d’incitation manifeste, d’instigation ou d’exhortation à ces sentiments’.1226

Likewise, in 2001, the civil chamber of the French Supreme Court considered several caricatures and texts ridiculing the Catholic faith – comprising a picture of a bedridden patient with the text ‘...– Nouveau spectacle – Je suce était son nom —...’ concerning the theatre play ‘Jésus était son nom’; a picture of the Pope being sodomized by a transvestite with the title ‘Le pape chez les travelos’; a drawing entitled ‘Les Kgistes recyclés en prêtres’ picturing a priest plunking a child in a baptism shell and declaring ‘On a les moyens de te faire parler, sale gosse’ – as mere parodies and therefore rejected an appeal against an acquittal. The Court considered ‘que tous les dessins en cause tourment en dérision la religion catholique, les croyances, les symboles et les rites de la pratique religieuse, mais n’ont pas pour finalité de susciter un état d’esprit de nature à provoquer à la discrimination, la haine ou la violence, et ne caractérisent pas l’infraction prévue par l’article 24, alinéa 6, de la loi du 29 juillet 1881.’1227

6.5.2 The political and public debate about Islam, ‘islamization’, and Muslim-immigration

The French Supreme Court has on several occasions judged the criminality of criticism of Islam, the ‘islamisation’ of French society or the financing of mosques by the French State on the ground of the offence of provocation to discrimination, hatred, or violence. According to the Court, such expression generally enters into a free political or public debate about the place of Islam in

1227 French Supreme Court, civ.ch. II, 8 March 2001, n°98-17.574, Bull. 2001 II n°47, p.32. In the same sense, concerning several publications in issues of the satirical magazine Charlie Hebdo: French Supreme Court, crim.ch., 8 June 1999, n°98-83.461, unpublished (drawings and texts that denounced the actions taken by anti-abortion commandos and invited the reader to create ‘commandos anti bon dieu’) and French Supreme Court, crim.ch., 15 March 2011, n°10-82.809, unpublished (the qualification of the Gospel of Saint Marcus as a pornographic work that demonstrated that Christ was a gross pig and a paedophile and the phrase ‘on redonne les chrétiens à bouffer aux lions!’).
French society, in which the laic character of the French Republic plays an important role.

In 1992, the French Supreme Court rejected an appeal against an acquittal concerning the distribution of a pamphlet by the extreme right winged political party Le Front National entitled ‘Non à l’Islamisation de Saint-Nazaire’ during a council meeting of Saint-Nazaire, containing the phrases ‘Dans vingt ans c’est sûr la France sera une République islamique’ and ‘Le refus de s’intégrer: L’organisation en France de communautés étrangères soumises à la loi islamique (la ‘charria’) incompatible avec nos mœurs et nos traditions’. The Court of Appeal considered ‘si les expressions employées et les images volontairement forcées pourrait engendrer un sentiment de peur, de crainte, voire même de refus d’une situation décrite comme alarmante, force est de constater qu’aucun des termes employés, si déplaisants puissent-ils être estimés, ne comporte une exhortation ou une provocation caractérisée à la discrimination, à la haine ou à la violence à l’égard de la communauté islamique’.

Likewise, in 2007, the French Supreme Court rejected an appeal against an acquittal concerning the distribution by two regional politicians of Le Front National of a pamphlet entitled ‘Pas de cathédrale à la Mequée, pas de mosquée à Strasbourg’ denouncing the financing of the construction of a Mosque in Strasbourg and appealing to the public to protest against it. The Court of Appeal considered ‘(...) qu’il ne critique pas la religion musulmane en elle-même ni ceux qui la pratiquent; que le dessin qui l’assortit relève de la dérision; qu’il peut choquer les membres de la communauté musulmane mais n’incite pas à leur égard à la discrimination, à la haine ou à la violence; (...) que la critique porte sur la décision de financer un lieu de culte mais n’a pas pour objet de stigmatiser ceux qui pratiquent ce culte, de manière à les exposer à la haine d’autrui; (...).’ and had thereby justified its decision, as the expression did not exceed the limitations admissible to freedom of expression for the purposes of Article 10 ECHR.

1228 The full passages read: ‘Dans vingt ans c’est sûr la France sera une République islamique (Hussein Moussawi chef Hezbollah 11 septembre 1986); 1989; a centre culturel islamique s’édifie au Cœur de votre ville (passage Paul-Perrin près de la gare); 1999; le centre est devenu mosquée. Les nazariens vivent à l’ombre du minaret, au rythme des appels du muezzin; 2009; les nazariennes portent le tchador, l’alcool est prohibé, le Coran fait loi; La France est devenue une République islamique; Est-ce cela que vous voulez? Pour vous, pour vos enfants? Non! Le refus de s’intégrer: L’organisation en France de communautés étrangères soumises à la loi islamique (la “charria”) incompatible avec nos mœurs et nos traditions; La transformation du quartier: Boutiques, école islamique, reconnaissance d’un clergé dont les pouvoirs iront croissant. Demain il sera trop tard. Pour défendre vos intérêts, les intérêts du peuple français soutenez le Front National avec Jean-Marie Le Pen.’


However, when such criticism of Islam, the ‘islamisation’ of French society or the financing of mosques is coupled with an explicit disqualification of Muslims by placing them opposite to French native citizens and portraying them as a danger to the French society, the French Supreme Court generally found that the offence of provocation to discrimination, hatred, or violence was constituted. Such was the case in relation to a pamphlet entitled ‘Stop à l’immigration (...) trop d’immigrés, la France aux Français (...)’ that suggested that Muslims imposed their laws, customs, religions, and morality, abused social security and governmental financial support to the disadvantage of French native citizens and caused an augmentation in diseases and delinquency.\textsuperscript{1231} publications on the Internet site \textit{Riposte laïque} containing the phrase ‘Occupation – Bien sûr que les prières dans la rue, les violes, le halal, et les mosquées sont des symboles d’occupation et de conquête!’;\textsuperscript{1232} a pamphlet depicting the Mayor of the city of Menton as a Calife and his wife as Shehérazade (mille et une nuit), the city of Menton as an oriental city, and the city’s church as a mosque in order to oppose to the plan of the Mayor to place in the old hospice of the city an institute of political science destined to Arab and Muslim students;\textsuperscript{1233} an article in an informative magazine distributed to the students of a secondary school and their parents that warned for the ‘debarkation of hordes of Muslims unable to assimilate’;\textsuperscript{1234}\textsuperscript{1235} and a communiqué denouncing in harsh terms the ‘slaughtering’ of the French identity by the exercise of religious practices by Muslims in France, such as ritual slaughtering (‘On égorge femmes, enfants, nos moines, nos fonctionnaires, nos touristes et nos moutons, on nous égorgera un jour et nous l’aurons bien mérité. La France musulmane avec une Marianne maghrébine pourquoi pas, au point où on en est’).\textsuperscript{1236}

The context of a political debate concerning the place of Islam in French society is sometimes regarded by lower courts as a particular context that permits expression that would otherwise constitute a punishable provocation on the ground of Article 24-8. Based on this reasoning, in 2011, the criminal tribunal of Nanterre acquitted the extreme right winged politician Le Pen, who had distributed a campaign poster entitled ‘Non à l’islamisme’ depicting a woman in

\textsuperscript{1231} French Supreme Court, crim.ch., 30 January 1990, n°88-86.549, \textit{unpublished.}
\textsuperscript{1232} TGI de Paris (17\textsuperscript{th} ch.), 23 March 2012, Ministère public c/P.Cassen et a., \textit{Légipresse} n°295 June 2012, p. 346.
\textsuperscript{1233} French Supreme Court, crim.ch., 11 September 2007, n°07-80783, \textit{unpublished.}
\textsuperscript{1234} The article comprised the passage: ‘les illusionnistes n’avaient pas prévu qu’en échange de la fuite éperdue de ces maudits français d’Afrique du Nord, des hordes musulmanes inassimilables débarqueraient et investiraient les plus reculés de nos cantons; ils sont aujourd’hui cinq millions, construisant partout des mosquées et quand ils parlent de mettre les voiles ... ne vous réjouissez pas trop, ce n’est qu’à leurs sales gamines arrogantes’.
\textsuperscript{1235} French Supreme Court, crim.ch., 7 September 1999, n°98-85177, \textit{unpublished.}
\textsuperscript{1236} French Supreme Court, crim.ch., 25 January 2000, n°98-87278, \textit{unpublished.}
burqa next to a map of France covered by an Algerian flag plus several minarets in the form of rockets, during regional elections in February 2010 and on the Internet.\footnote{1237}

The French Supreme Court has, however, established that within the context of a political debate concerning a matter of public interest, the freedom of expression of a representative has the same scope as the freedom of expression of any other citizen. In 2002, the Court endorsed a condemnation by the Court of Appeal on the ground of provocation to religious hatred and violence with regard to the expression ‘le peuple colonisé par 80 % de musulmans est devenu une terre d’Islam!, les 20 % de yougoslaves sont martyrisés sur leur sol, il est demandé aux habitants de Villefontaine de méditer sur cet exemple pour éradiquer la ghettoisation, lorsqu’ils auront changé de maire’. The Court of Appeal considered: ‘un élu a la possibilité de s’exprimer sur les sujets de sociétés et notamment sur l’insécurité, il n’en demeure pas moins, aux termes de la loi et d’une jurisprudence constante, que ce droit de libre expression reconnu à tout citoyen (l’élu étant un citoyen comme les autres) comporte des limites imposées par la loi, qu’elle soit nationale ou européenne, et que l’article 10 de la Convention européenne des droits de l’homme prévoit expressément dans son second paragraphe, que l’exercice de la liberté d’expression comportant des devoirs et des responsabilités, peut être soumis à certaines conditions, restrictions ou sanctions prévues par la loi, qui constituent des mesures nécessaires dans une société démocratique, notamment dans la protection des droits d’autrui, ce qui est l’objet de l’article 24, alinéa 6, de la loi du 29 juillet 1881’.\footnote{1238} [curs. EH]

As a result of the case law of the French Supreme Court, political proposals can constitute a punishable provocation to religious discrimination, when it remains unclear whether the politician aims to directly provoke voters, the public, third parties to themselves discriminate against – certain – Muslims or whether a politician aims to gain political power in order to install such discriminatory measures himself. For example, the Court rejected an appeal against a condemnation on the ground of provocation to religious discrimination of a cantonal election candidate for having diffused among the

\footnote{1237} TGI de Nanterre, 5 April 2011, Légipresse n°286, September 2011, p.465. The tribunal considered: ‘l’affiche en cause a été diffusée dans le cadre d’une campagne électorale, et qu’il s’agit par conséquence d’un contexte particulier dans lequel des propos qui ne seraient pas tolérés autrement sont proférés sur un mode d’exagération, voire caricatural, et s’inscrivent dans un débat qui peut être passionné. Celui-ci énonce que, de plus, la place de l’islam dans la société française prend place actuellement dans le débat politique français. (…) l’affiche, même si elle procède d’un amalgame entre l’islamisme et l’Algérie, n’incite pas directement à la haine contre la communauté algérienne résidant en France, mais plutôt au rejet d’une pratique extrême de la religion musulmane. Celui-ci en déduit qu’on ne peut retenir que l’affiche incriminée incite à la discrimination ou à la haine mais exprime plutôt un refus des opinions et pratiques engendrées par une vision minoritaire de l’islam qui s’inscrit dans le débat démocratique.’

\footnote{1238} French Supreme Court, crim.ch., 14 May 2002, n°01-85482, unpublished.
voters a tract entitled ‘Islamistes dehors, remettons de l’ordre en France’.\textsuperscript{1239}

6.5.3 Jean-Marie Le Pen and Le Front National

The extreme right winged politician Jean-Marie Le Pen and his extreme right winged political party le Front National have been convicted for their political discourse with an anti-Semitic or racist purport on the ground of racial defamation, racial insult or provocation to racial discrimination, hatred or violence in two dozen cases, several of which have been discussed in previous paragraphs. For their part, Le Pen and le Front National have initiated several defamation cases against allegations of racism and anti-Semitism, in several of which the French judge has acknowledged the racist character of their expression.\textsuperscript{1240} On one occasion, with regard to the accusation that Le Pen’s expression constituted a permanent ‘incitation au racisme, avec pour résultat très clair une élévation moyenne du niveau de racisme dans le pays’, the Court of Appeal considered that an objective correlation between expressions by Le Pen and adherents of le Front National and an recrudescence of racist sentiments in public opinion was sufficiently established.\textsuperscript{1241}

A famous case against Le Pen that has been brought before the ECHR concerned a statement made by him: ‘d’autant que quand je dis qu’avec 25 millions de musulmans chez nous, les français raseront les murs, des gens dans la salle me disent non sans raison: ‘mais monsieur Le Pen, c’est déjà le cas maintenant’’, which he uttered during an interview published in the journal Rivarol. In this case, the Paris Court of Appeal that condemned Le Pen eloquently summarized the criteria for Article 24-8 as they have been established in French case law. In 2009, the French Supreme Court rejected an appeal by Le Pen against the judgment of the Court that had considered:

\begin{quote}
‘qu’à travers les propos poursuivis, Jean-Marie X..., qui ne conteste pas en être l’auteur, explique sans détour qu’alors qu’il se contente lui-même, en sa qualité de président du Front national, de faire valoir aux « gens » qu’une forte croissance de la communauté musulmane constitue une menace pour les français qui seront dominés, humiliés et victimes de violences, ceux-ci, qui, au-delà de ses électeurs et du lectorat de Rivarol, forment le peuple français, lui disent que, d’ores et déjà, en présence de musulmans, ils doivent se tenir à distance d’eux et faire preuve de soumission à leur égard; que ce faisant, le prévenu oppose les « français » aux « musulmans », les « gens » de France, dont les réactions vont bien plus loin que ses propres propos condamnés, à une communauté étrangère présentée comme une multitude envahissante, et tend à susciter, par le sens et la portée qu’il donne à son message, et à celui des « gens », qu’il fait
\end{quote}

\textsuperscript{1239} French Supreme Court, crim.ch., 2 March 2004, n°03-82549, unpublished.
\textsuperscript{1241} Ibid.
finalement sien, un sentiment de rejet et d’hostilité envers la communauté musulmane; que
son propos instille dans l’esprit du public la conviction que la sécurité des français passe par le
rejet des musulmans et que l’iniquité et la peur, liées à leur présence croissante en France,
cesseront si leur nombre décroît et s’ils disparaissent;
qu’une fois caractérisé, le délit prévu et réprimé par l’article 24, alinéa 6, de la loi du 29
juillet 1881 ne peut constituer une violation de la liberté d’expression protégée par l’article 10
de la Convention européenne de droits de l’homme, dès lors que ce texte a réservé la
possibilité de restrictions légales, telle la protection des droits et libertés d’autrui,
lorsqu’elles constituent des mesures nécessaires dans une société démocratique; qu’en
l’occurrence, s’il était légitime, dans le cadre du débat politique, pour Jean-Marie X..., leader d’opinion, de faire connaître son point de vue sur la question de l’immigration ou
celle de la place des religions, sa liberté d’expression ne peut justifier des propos comportant
une provocation à la discrimination, à la haine ou à la violence envers un groupe de personnes
»[curs. EHJ]

6.6 Conclusion

In order for expression to constitute the offence of provocation to racial
discrimination, hatred or violence, it must take the form, not necessarily of an
exhortation, but of a positive act of manifest incitement to discrimination, hatred
or violence, which does not require an explicit call to commit a precise
determined fact that is punishable under French law. The expression must not
be capable, but merely likely to provoke others to discrimination, hatred or
violence. The objective intention of the author to provoke must be derived from
the expression itself. The expression must undisputedly have a racist and
discriminatory purport in the sense that it expresses an absolute rejection of a
specific designated group for reasons exclusively of their belonging to a specific
origin, ethnic background, nation, race or religion, or of their not belonging to
the French nation (immigrants). Both the textual and broader context of the
expression can be taken into account in order to assess its punishable character.
No justifications exist for the provocation to discrimination, hatred or violence.
The French judge attaches importance to the interest of freedom of expression by
narrowly interpreting and strictly circumscribing the statutory elements of the
offence of racial provocation, but once he has established that an expression
constitutes a punishable provocation to discrimination, hatred or violence for
the purposes of Article 24-8, no further act of balancing with freedom of
expression can be made. On the basis of these principles, the French Supreme
Court has established that expression that merely hurts religious feelings of a
particular religious group, such as the ridiculing of the Catholic faith, does not
constitute a punishable provocation to discrimination, hatred or violence against
that group. The same applies to the political and public debate about the place of
Islam in French society, the islamization of France or Muslim-immigration, in

2009, n°25.
which the preservation of the laic character of the French Republic plays an important role and in which the scope of freedom of expression of a representative is equal to the freedom of any other citizen. The interest in a free political debate on a matter of public interest can, however, not remove the punishable character of expression that disqualifies in harsh terms a determined group by depicting it as criminal or dangerous for French society exclusively on the ground of their race or religion and therefore constitutes an offence pursuant to Article 24-8.

7. Modifications of the Pleven Act

After the adoption of the Pleven Act in 1972, several draft proposals to criminalize racist propaganda and the diffusion of racist ideas have failed (7.1), while the hate speech bans have successfully been extended to the discriminatory grounds of sex, sexual preference and handicap (7.2). The analysis results in a general conclusion about the evolution of the Pleven Act of 1972 and the criminalization of hate speech in French law (7.3).

7.1 Draft proposals to modify the Pleven Act in order to criminalize racist propaganda or the diffusion of racist and xenophobic ideas

It results from the French vision of freedom of expression of opinion that racist propaganda or the diffusion of racist and xenophobic ideas as such that do not exhibit any link to an act of racial discrimination against a specific designated group do not fall under the scope of the French hate speech bans. In 1989, the TGI Paris considered that the simple manifestation of a preference for ideologies that refuse ‘the mixing of races’ without manifestly inciting to commit one of the acts criminalized by law did not constitute a provocation to discrimination in the sense of Article 24-8. In order to – more effectively – fight such racist propaganda or diffusion of racist and xenophobic ideas, several draft proposals to modify the Pleven Act have been made.

In 1993, a draft proposal sought the insertion of an offence penalizing racist propaganda, defined as ‘the effort to promote racism as such’ into the French Penal Code that would complement the 1881 Press Act in order to tackle the problem in a more permanent manner and to circumvent the strict procedural rules of the 1881 Press Act. The proposal was inspired by the suggestions made by LICRA. According to La direction des Affaires criminelles et des Grâces, however, the offence was unclearly demarcated and would overlap with the offences of racial defamation and insult in the 1881 Press Act.

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Act. It therefore preferred a fusion of the offences of racial defamation and insult into one single and broader offence that would be inserted into the Press Act.\textsuperscript{1245}

Subsequently, in 1994, a draft proposal concerning ‘la lutte contre la diffusion d’idées racistes ou xénophobes’ proposed to fuse the offences of racial defamation and insult into one offence and sought the insertion of an Article 25 into the 1881 Press Act penalizing ‘la diffusion d’idées racistes ou xénophobes’, for which derogatory procedural rules would apply.\textsuperscript{1246} The \textit{Commission nationale consultative des droits de l’homme} (CNCDH), however, advised changing the title of the proposal in ‘la lutte contre la propagation du racisme et de la xénophobie’ and to maintain the two distinct infractions of the Pleven Act.\textsuperscript{1247} After this text, no further legislative action was taken.

In 1996, the expression by Le Pen ‘Je crois à l’inégalité des races’ during a summer university of the extreme right winged political party Le Front National caused a scandal and revived the debate concerning the necessity of law reform. The Minister of Justice, Jacques Toubon,\textsuperscript{1248} proposed a draft proposal ‘renforçant la répression de la diffusion de messages racistes ou xénophobes’. The draft proposal proposed the replacement of the offences of racial defamation, racial insult and provocation to racial discrimination, hatred or violence with a new offence penalizing ‘le fait de diffuser, par quelque moyen que ce soit, un message portant atteinte à la dignité, l’honneur, ou la considération d’une personne ou d’un ou plusieurs groupes de personnes en raison de leur appartenance ou non-appartenance, vraie ou supposée, à une ethnie, une race ou une religion, qu’elle soit ou non déterminée ou non déterminée’.\textsuperscript{1249} As the new offence enabled the prosecution of expression that was merely offensive according to its tenor and no longer required that expression to be defamatory, insulting or provocative and directly addressing a person or a group, this offence encompassed most racial and anti-religious expression. The draft was more far-reaching than previous proposals in the sense that it envisioned a complete removal of the offences with a racial character from the 1881 Press Act and the insertion of the new offence in the French Penal Code. In so doing, the prosecution of all racist expression would no longer be bound by the strict procedural rules of the 1881 Press Act.

The associations LICRA, MRAP and SOS Racisme declared that they were in favour of such reform in light of an effective prosecution, while the association la Ligue des Droits de l’Homme (LDH) advocated the preservation

\textsuperscript{1245} Secondi-Nix, M., \textit{Lutte contre le racisme et justice pénale, Rôle des associations}, CNRS, CESDIP, October 1996, p.60 et seq.

\textsuperscript{1246} De Lamy 2000, p.326.

\textsuperscript{1247} Avis concernant un avant-projet de loi relative à la ‘lutte contre la diffusion d’idées racistes ou xénophobes’, CNCDH 3 November 1994, accessible at: www.cncdh.fr.

\textsuperscript{1248} Member of the political party RPR (Le Rassemblement pour la République) that merged into the UMP in 2002.

of the press offences and the mere amendment of their procedural rules.\textsuperscript{1250} The CNCDH, however, advised that the legal arsenal against racism within the framework of the 1881 Press Act be maintained and that a new Article 25 that criminalizing the ‘atteinte à la dignité à caractère raciale’ should be introduced.\textsuperscript{1251} As the CNCDH feared that the draft proposal would be too general and would establish a moral regime, it excluded all reference to a religion.\textsuperscript{1252} Derieux has criticized the draft proposal, arguing that it would be better to revise the strict procedural rules of the 1881 Press Act altogether.\textsuperscript{1253} The proposal received considerable media attention, where it has notably been criticized for being prompted by the circumstances and uniquely directed against the expression of Le Pen.\textsuperscript{1254} The project has finally been abandoned and was never discussed before Parliament. In 1998, the Aix-en-Provence Court of Appeal acquitted Le Pen considering that the expression ‘Je crois à l’inégalité des races’ merely constituted an opinion and not a provocation to racial hatred.\textsuperscript{1255}

7.2 The Act of 30 December 2004: extension of the scope of the Pleven Act to the discriminatory grounds of sex, sexual preference and handicap

The Act of 30 December 2004 concerning ‘la Haute autorité de lutte contre les discriminations et pour l’égalité’, primarily created an independent

\textsuperscript{1250} Secondi-Nix, M., La lutte contre le racisme et justice pénale, Rôle des associations, CNRS, CESDIP, October 1996, pp.62-63.
\textsuperscript{1251} Avis portant sur un projet de loi renforçant la repression de la diffusion de messages racistes ou xenophobes, CNCDH 26 September 1996, accessible at: www.cncdh.fr ; Bernard, P., La commission consultative veut une réécriture du projet Toubon ; Elle en approuve le principe, estimant la législation antiraciste inadaptée, Le Monde 28 September 1996.
\textsuperscript{1252} Boulegué 2010, pp.73-74.
\textsuperscript{1253} Derieux 1996, p.122.
\textsuperscript{1255} CA Aix-en-Provence 9 March 1998, JCP 1999, IV, n°2764.
administrative authority for the fight against discriminations (la HALDE),\textsuperscript{1256} that has since been brought under le Défenseur des droits, the French Ombudsman, created by the Act of 23 July 2008 concerning the modernization of the institutions of the Fifth Republic (1958-present).\textsuperscript{1257} Furthermore, the Act of 30 December 2004 modified the 1881 Press Act and extended the scope of the Pleven Act by inserting into the 1881 Press Act offences penalizing sexist and homophobic expression. While the Act of 15 June 2000 suppressed the penalty of imprisonment from the press offences that they had provided for until then,\textsuperscript{1258} the penalty of imprisonment had been preserved with regard to the press offences of a racist and discriminatory nature, being the offences of racial defamation, racist insult, racial provocation, and the offence of Holocaust denial in accordance with Article 24bis (para.9 infra). The legislator of 2004 adopted the same approach with regard to the repression of sexist and homophobic expression.

The modifications that the Act of 30 December 2004 brought to the 1881 Press Act were threefold. Firstly, the Act created the offences of defamation and insult on the ground of sex, sexual orientation or handicap that resemble the offences of racial defamation and racial insult. It inserted Articles 32-3 and 33-4 into the Press Act that sanction defamation and insult against a person or a group ‘à raison de leur sexe, de leur orientation sexuelle ou de leur handicap’, with a year imprisonment and a fine of €45,000 and six months imprisonment and a fine of €22,500 respectively (both with the supplementary sanction of the publication of the decision).

Secondly, the Act created the offence of provocation on the ground of sex, sexual orientation or handicap that differs from the offence of racial provocation. It inserted Article 24-9 into the Press Act that sanctions the provocation to discrimination ‘prévues par les articles 225-2 et 432-7 du Code pénal’, hatred and violence against a person or a group ‘à raison de leur sexe, de leur orientation sexuelle ou de leur handicap’ with a year imprisonment and a fine of €45,000. Contrary to Article 24-8, Article 24-9 thus specifies that expression must provoke discrimination consisting of the refusal to supply goods or services; obstructing the normal exercise of any given economic activity; the refusal to hire, to sanction or to dismiss a person; subjecting the supply of goods or services to a condition; subjecting an offer of employment, an application for a course or a training period to a condition; or the refusal of the benefit of a right conferred by the law or hindering the normal exercise of any given economic

\textsuperscript{1257} Article 71-1 of the La loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la V° République.
\textsuperscript{1258} Loi n° 2000-516 du 15 juin 2000 renforçant la protection de la présomption d’innocence et les droits des victimes.
activity to a natural or legal person the public authority or public service official. On this point the offence is thus more restrictive.\textsuperscript{1259}

Thirdly, with regard to these press offences of a sexist or homophobic character, the Act created rules for the engagement of proceedings by the Public Prosecution and associations that resemble those in the field of racial discrimination. In Article 48, sub-paragraph 6, it extended the possibility for the Public Prosecution to take the initiative to prosecute in the field of defamation and insult of a sexist or homophobic character against a group of persons, without the need to request the consent of the victim thereto. Contrarily, when sexist or homophobic expression concerns one person individually, a prosecution cannot be engaged without the victim’s consent thereto. With regard to these French hate speech bans on the grounds of sex, sexual orientation and handicap, in Articles 48-4 – 48-6, it conferred on associations the rights afforded to the civil parties and permitted associations to set in motion the public prosecution, in the event that the Public Prosecution remained inactive. This right to institute legal proceedings can only be exercised by associations that have been declared five years before the occurrence of the facts and that according to their statutes have the objective of combatting violence and discrimination based on sex, sexual orientation and handicap. What is more, when sexist or homophobic expression concerns one person individually, the complaint of an association is only admissible if it has obtained the victim’s consent thereto. However, the Act did not amend Article 65-3, which provides for a prescriptive period of one year with regard to the press offences with a racial character. Consequently, press offences with a sexist or homophobic character are subject to a prescriptive period of three months. However, since 2011, a legislative proposal is being prepared in order to align the prescriptive period with that of the press offences with a racial character (para. 1.3.1 supra).\textsuperscript{1260}

The initial proposal of law reform provoked a lively debate between its advocates and opponents in the public opinion.\textsuperscript{1261} The criticism concerned both the opportunity of the legislation and its conformity with the French Constitution and the ECHR, more generally its compatibility with the right to freedom of expression. On 18 November 2004, the CNCDH adopted the advice


\textsuperscript{1260} Proposition de loi n°3794, relative à la suppression de la discrimination dans les délais de prescription prévus par la loi sur la liberté de la presse du 29 juillet 1881, déposé le 5 Décembre 2011. For the status of the legislative procedure see: http://www.senat.fr/dossier-legislatif/ppl11-122.html\#block-timeline . See also Proposition de loi n° 265, visant à porter de trois mois à un an le délai de prescription des propos injurieux ou diffamatoires à caractère homophobe, transphobe, sexiste ou à raison du handicap, déposé le 16 Janvier 2013 au Sénat.

to withdraw the proposal. The CNCDH strongly rejected this multiplication of categories of persons in need of a specific protection, because it constituted a segmentation of human rights that violated their universality and indivisibility; such Communitarianism was contrary to the French traditions and legal principles, notably the right to freedom of expression. The CNCDH considered: ‘Parce que c’est l’être humain en tant que tel, et non en raison de certains traits de sa personne, qui doit être respecté et protégé, la CNCDH émet des réserves sur la multiplication des catégories de personnes nécessitant une protection spécifique. Cette segmentation de la protection des droits de l’homme remet en cause leur universalité et leur indivisibilité. Légitimer afin de protéger une catégorie de personnes risque de se faire au détriment des autres, et, à terme, de porter atteinte à l’égalité des droits (...) qu’il n’était pas démontré que l’orientation sexuelle d’une personne ou d’un groupe de personnes génère une vulnérabilité nécessitant une protection spécifique de l’État. (...) C’est par la libre communication des pensées et des opinions (...) et non par la répression que la société française a progressé et continuera à progresser vers l’acceptation des différences et le respect de la dignité de chaque être humain.’

Subsequently, the Government abandoned its initial project for several months and amended its provisions into less controversial provisions. The initial proposal envisioned the creation of the offences of defamation and insult merely of a homophobic character and not also on the ground of sex. The Government has endorsed the criticism made by the associations defending the rights of women that the fact that the law would consider defamation or insult of women less reprehensible than defamation or insult of homosexuals. Associations defending the rights of homosexuals, for their part, criticized the imprecision of the discriminatory ground ‘orientation sexuelle’ that merely signifies a person’s sexual preference; transsexuals could therefore fall outside its scope. Padova argues that the same should apply to pedophiles, because legal sexual practices deserve protection. The scope of the discriminatory ground is to be determined in case law.

The initial proposal furthermore envisioned the creation of the offence of provocation to discrimination without further specifying the notion of discrimination. As the definition of discrimination in Article 225-1 concerned every distinction between persons on the ground of – amongst others – their

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1264 Monfort 2005, p.2 et seq.
1265 Padova 2005, p.2 et seq.
1266 Padova 2005, p.2 et seq.
sexual orientation, the effect of a broad interpretation of the notion could be that the offence would comprise of the provocation to legal discriminations.  

An example of a legal form of discrimination on the ground of sexual orientation under French law is the former impossibility of same sex marriage. Based on this reasoning, certain representatives of the monotheistic religions especially from the Catholic Church, such as Cardinal Lustiger, raised their concern – as part of the advice of the CNCDH – that the effect of the act was to prohibit religious texts that strongly condemn homosexuality, the possibility for religious adherents to publicly proclame personal religious convictions based on such texts or to oppose on the ground of their religious convictions proposals of law reform that seek, for example, the legalization of gay marriage. Under the initial proposal such latter expression would constitute provocation to discrimination against homosexuals, merely because it pleads in favour of the preservation of the legal regime that was existent at the time, which differed on the ground of a person’s sexual orientation.  

Bigot reduces this discussion to the core principles of the French traditional conception of freedom of opinion and stipulates that ‘la répression de l’action ne doit pas être confondue avec la répression de l’opinion, surtout lorsqu’il s’agit de s’appuyer sur des critères communautaristes. Nemélangéons pas les actes et les propos.’ While in French law certain sexist and homophobic acts are repressed in several offences where the sexual orientation of the victim forms an aggravating circumstance, such as Article 221-4 sub-paragraph 7 of the French penal Code penalizing ‘le meurtre à raison de l’orientation sexuelle de la victime’, contrarily, French law should not criminalize opinions that might hurt certain feelings.  

The Government has endorsed the criticism made by the CNCDH and religious representatives by specifying that in order for expression to be punishable on the ground of Article 24-9, it must provoke discrimination ‘prévues par les articles 225-2 et 432-7 du Code pénal’. The French legislator has thus signified that the offence of provocation to discrimination on the ground of sex, sexual orientation or handicap is not constituted, if expression provokes discrimination that is not criminalized under French law. Padova argues that the French legislator had better chosen to repress ‘les provocations aux discriminations “illegales”’. The criminalization of provocation to illegal discrimination would assure that a debate concerning legal discriminations on the ground of sexual orientation, such as the impossibility of gay marriage – at that time –, would remain possible and has the advantage that it does not have to enumerate all illegal acts of discrimination on the ground of sex, orientation

1267 Padova 2005, p.2 et seq.  
and handicap. From this strand of thought, Veron criticizes the decision made by the French legislator for creating new problems; homosexuals are not merely the victim of provocation to acts of discrimination enumerated in Articles 225-2 et 432-7 of the French Criminal Code.

It is stipulated that in 2012, leading up to the approval by the French National Assembly of a bill to allow same sex marriage and adoption, large protests against the bill were held by notably religious, conservative groupings and a significant increase of acts of violence and hate speech, particularly on the Internet, against homosexuals was recorded. The ‘marriage for all’ law was finally passed on 17 May 2013 after the Constitutional Council declared it compatible with the French Constitution. Before, the speech offences of a sexist and homophobic character have, however, generally not frequently been applied. The French Supreme Court has had the opportunity to set out the criteria of the offence of insult on the ground of sexual orientation in its decision of 12 November 2008. The Court annulled the condemnation of the Douai Court of Appeal with regard to the statement made by a representative in an interview in the magazine ‘La Voix du Nord’ that homosexuality was morally inferior to heterosexuality and constituted certain behavior performed by individuals, but not a characteristic of the identity of a group or a community comparable to race or ethnic background. The Court of Appeal had considered that people’s sexual orientation does not merely refer to their behaviour, but also defines their identity and homophobic insults, therefore, violate their human dignity. According to the Court the statements were ‘offensants et contraires à la dignité des personnes visées en ce qu’ils tendaient à souligner l’infériorité morale de l’homosexualité alors que les fondements philosophiques de ce jugement de valeur ne s’inscrivaient pas dans un débat de pensée’. Contrarily, the Supreme Court found that ‘les propos litigieux, qui avaient été tenus dans la suite des débats et du vote de la loi du 30 décembre 2004, ont pu heurter la sensibilité de certaines personnes homosexuelles, leur contenu ne dépasse pas les limites de la liberté d’expression.’ The mere moral rejection of homosexual behavior or practices that might hurt the feelings of homosexuals does not thus fall under the scope of the offence.

1270 Padova 2005, p.2 et seq.
1271 Veron, M., La lutte contre le sexisme et l’homophobie, Dr. pén. n°12, December 2004, p.3.
1274 Cons. Con. 17 May 2013, n°2013-669 DC.
7.3 Conclusion

The French legislator has envisioned several modifications of the 1972 Pleven Act that all saw at the enlargement of its scope in order to – more effectively – fight against racism and discrimination. The proposals that sought the criminalization of racist propaganda or the diffusion of racist and xenophobic ideas as such that do not exhibit any link to an act of racial discrimination against a specific designated group have been abandoned and since these texts, no further legislative action has been taken. The proposals seem to be at odds with the traditional requirements that the press offences must criminalize, in strictly circumscribed terms, the abuses of freedom of expression of opinion, which have a clear link with a reprehensible act so as not to constitute délits d’opinion. According to their wording, the proposals were rather aimed at the protection of people against opinions that violate their human dignity.

The Act of 30 December 2004 that extended the scope of the offences of racial defamation, insult and provocation to the discriminatory grounds of sex, sexual orientation or handicap seems to comply with the traditional requirements. The Government has even specified that in order for expression to be punishable on the ground of Article 24-9, it must provoke to discriminations ‘prévues par les articles 225-2 et 432-7 du Code pénal’, thus punishable forms of discrimination. It thereby seems to have endorsed the criticism that the Act would criminalize mere opinions on homosexual behavior or practices that might hurt the feelings of homosexuals and would therefore introduce délits d’opinion. This is prevented by a strict interpretation of the offences in case law.

8. The Gayssot Act of 13 July 1990

With the adoption of the Gayssot Act of 13 July 1990 the French legislator aimed to create an adequate legal response to the increase of negationistic discourse and anti-Semitic acts in the eighties and nineties of the former century that appeared difficult to qualify under the existing hate speech bans (8.1). The Gayssot Act notably introduced the offence of Holocaust denial into French law, but also brought a number of changes with regard to the existing hate speech bans (8.2). The analysis results in a general conclusion about the background and purport of the Gayssot Act (8.3).

8.1 The situation prior to the adoption of the Gayssot Act of 13 July 1990

Before the creation of the Gayssot Act of 13 July 1990, revisionist expression, consisting of expression that puts up for discussion the history of the Second World War and tends to deny or minimize the genocide of the Jews by the
Nazis, could only be prosecuted on the ground of the French hate speech bans of racial defamation, racial insult, racial provocation or offences of apology, such as the apology of crimes against humanity in Article 24-3 of the Press Act. The absence of a specific offence penalizing revisionist or negationist discourse, however, entailed several problems related to the qualification of the facts.

In 1954, the French Supreme Court confirmed a condemnation of the author Maurice Bardèche with regard to his book Nuremberg ou la terre promise on the ground of article 24-1 penalizing the apology of the crime of murder. The decision was motivated rather by the fact that Bardèche had manifested his anti-Semitism and Nazi sympathies than by the fact that he had actually made an apology of a crime of murder. In that same year, the French Supreme Court declared an association inadmissible in its prosecution of the author Paul Rassinier on the ground of the offences of insult and defamation with regard to his book Le mensonge d’Ulysse, a study on the living conditions in concentration camps based on his own experiences, in which he contested the existence of gas chambers in Buchenwald, and acquitted the author.

According to Droin, negationist discourse was most often successfully repressed on the ground of the offence of racial defamation. The difficulty of retaining the offence of racial provocation lay in the requirement to prove the intention of the author to provoke, because the expression was often presented as a pseudo-historical or scientific work. For example, in 1983, the French Supreme Court endorsed the condemnation by the Court of Appeal of Robert Faurisson on the ground of racial defamation, but also endorsed its acquittal on the ground of provocation to racial hatred with regard to his expressions ‘Le prétexte génocide des juifs’; ‘mensonge historique’; ‘la gigantesque escroquerie politico-financière dont bénéficièrent et l’état d’Israël et le sionisme international et les juifs de la diaspora’.

Because of the difficulties victims of negationist expression met when trying to obtain a condemnation on the ground of the press offences, they increasingly turned to the civil judge seeking a condemnation on the ground of Article 1382 of the Civil Code. The civil judges who lacked the guidance of precise statutory elements of the press offences were thus confronted with the task of giving judgments in historical questions. Droin analyses how the civil judges, in order to avoid having to judge historical truths, focussed on the

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1280 Droin 2009, p.216.
1282 Droin 2009, p.216 et seq.
scientific method that the authors of negationist expression used, but by doing so could not escape from mixing in the free practice of historical research.\textsuperscript{1283}

One famous case based on the ground of Article 1382 CC is the affair of ‘le point de détail’. In May 1990, Le Pen was condemned on the ground of 1382 CC for having stated in a radio interview that the use of gas chambers in order to exterminate the Jews was a ‘point de détail’ in the history of the Second World War. This decision was confirmed in appeal. In 1995, the French Supreme Court rejected an appeal. The Court considered that the victims could act on the ground of 1382 CC, because the expression did not constitute any of the press offences of the Act of 1 July 1972. The Court endorsed the consideration of the Court of Appeal that the expression did not constitute the offence of racial provocation, but was nevertheless shocking and intolerable and ‘rendait moins spécifiquement dramatiques les persécutions et les souffrances infligées’. For this reason the expression constituted a wrongful act in accordance with 1382 CC.\textsuperscript{1284}

It was the particular difficulties in qualifying negationist expression as one of the French hate speech bans which, in the eighties and nineties of the twentieth century, prevented an adequate legal response to the increase of negationistic discourse and anti-Semitic acts. In May 1990 the profanation of over thirty Jewish graves in a cemetery in Carpentras shocked the country. In response, many manifestations against racism and anti-Semitism were organized.\textsuperscript{1285} In this political context, the French legislator decided that legislative reform was necessary.

8.2 The merit of the Gayssot Act

8.2.1 Rationale of the Gayssot Act of 13 July 1990

In 1990 Jean-Claude Gayssot, representative of the Communist group in the National Assembly deposed at the National Assembly a draft act seeking to reinforce the existing anti-racism and discrimination legislation created by the Pleven Act of 1 July 1972 in order to more effectively fight against racism. The proposal aimed at several modifications of the 1881 Press Act, but notably proposed the creation of the offence of denial of crimes against humanity committed by the Nazi regime in Article 9. During the parliamentary debates, the insufficiency of existent anti-racism and discrimination laws as a direct cause or rationale of the proposal was clearly articulated by Gayssot and Pierre Arpaillange, the Minister of Justice representing the Government that was in

\textsuperscript{1283}Droin 2009, p.217.


330
favour of the proposal. Gayssot considered: ‘la multiplication des crimes racistes montre jusqu’à quelle extrémité peut conduire le poison du racisme. Le Parlement français se doit de participer au combat avec la plus grande vigueur face à cette dérive dangereuse pour la démocratie et les droits de l’homme. Un sursaut est nécessaire.’\textsuperscript{1286} And ‘Malgré l’existence de la loi de 1972, les délits racistes restent trop souvent impunis ou insuffisamment réprimés, et des théories racistes, des incitations au crime tendent à être assimilées à des idées comme les autres, et leurs auteurs traités comme des interlocuteurs ordinaires, sinon privilégiés. Il est donc nécessaire de renforcer les moyens légaux et juridiques de lutte contre le racisme, qui compléteraient de manière significative les textes existants.’\textsuperscript{1287}

Arpaillange explained ‘Certes, les écrits qui contestent la réalité de l’holocauste contiennent en général, pour le soutien de leur argumentation, des allégations telles qu’elles caractérisent des infractions soit de diffamation raciale, soit de provocation à la haine, à la discrimination ou à la violence raciale. Et les auteurs sont à ce titre poursuivis. Mais j’ai constaté aussi que ces auteurs, qui, sans doute, ont fait l’apprentissage de la loi sur la presse, sont de plus en plus prudents et s’entendent parfaitement à donner à leur écrits une résonance raciste que les incriminations pénales existantes ne permettent pas d’appréhender totalement.’\textsuperscript{1288}

In the vision of its proponents, the aim of the Act was also to protect the French Republic itself, because the banalization of acts of racism not only violated humanity, but also the central characteristics or values of the French Republic. One representative considered ‘Qu’entendons-nous en face, sinon un discours idéologique qui tend à banaliser ce qui est une infraction majeure contre notre Constitution, contre les principes qui fondent notre démocratie et notre République? Oui, c’est en répondant par les lois de la République, c’est-à-dire l’égalité, la liberté, la fraternité, la laïcité, c’est en répondant sur le plan idéologique que nous combattrons le racisme et que nous éviterons la banalisation exécrable de ces crimes non pas seulement contre l’humanité mais aussi contre notre nation, contre notre patrie.’\textsuperscript{1289} Another representative exclaimed ‘c’est fondamentalement un texte de défense de la République.’\textsuperscript{1290}

Contrary to the Pleven Act of 1 July 1972 that had been adopted unanimously by the National Assembly and the Senate, the proposal met severe criticism during the drafting in both the National Assembly and the Senate. The criticism primarily concerned Article 9, because the offence of denial of crimes against humanity would be contrary to the right to freedom of expression of opinion

\textsuperscript{1286} Parliamentary debates, JO 2 May 1990, French national assembly, p.917.
\textsuperscript{1287} Parliamentary debates, JO 2 May 1990, French national assembly, p.919.
\textsuperscript{1288} Parliamentary debates, JO 2 May 1990, French national assembly, p.905.
\textsuperscript{1289} Parliamentary debates, JO 2 May 1990, French national assembly, p.912.
\textsuperscript{1290} Parliamentary debates, JO 2 May 1990, French national assembly, p.929.
and free historical research. The Act thus formed the object of a sharp-tongued debate between its proponents, who consisted of representatives of the socialist and communist groups, and its opponents, representatives of the conservative and right-winged parties Rassemblement pour la République (RPR), Union pour la démocratie française (UDF) and the Front National.

Opponents of the Act argued that the existent anti-racism and discrimination laws were sufficient in order to counter racist expression. Phillipe de Villiers, representative of UDF, stated ‘Ce texte cherche à accréditer l'idée que la France serait devenue un pays raciste! (..) la France est le pays au monde le moins raciste qui soit. Nous ne pouvons pas tolérer d’entendre dire que la France est un pays raciste.’1291 and thus seemed to deny the existence of acts of racism in France in order to honour the French democratic ideal that in France only equal citizens existed. One of the most ardent opponents of the Act was Marie-France Stirbois, the only representative of the Front National in Parliament. Stirbois expressed the fear that the ever expanding French anti-racism and discrimination laws rendered any criticism concerning immigration and foreigners impossible and cited famous Greek philosophers of democracy who refused to equate citizens and foreigners in order to protect a democratic society from foreign dangers.1292 This argument was, however, severely contradicted by the other representatives who argued amongst others ‘il y a bien longtemps que notre société est bâtie sur d’autres bases que celles des philosophes grecs, même si l’on peut avoir le plus grand respect pour Platon et ses disciples. La société divisée en classes ou en ordres, avec des esclaves ou des serfs, des guerriers, des maîtres ou des seigneurs, elle a disparu en 1789!’1293

The lively parliamentary debates caused the Minister of Justice to sigh: ‘J’aurais souhaité retrouver l’unanimité de 1972. A l’époque, le Parlement avait oublié ses querelles partisans pour s’engager de manière résolue dans la lutte contre le racisme.’1294 The National Assembly finally adopted the Act by a majority of 307 against 265 votes.1295 However, the Senate adopted a motion by a majority of 216 votes against 92 that signified the rejection of the proposal, primarily because it considered the offence of denial of crimes against humanity to constitute a ‘délit d’opinion’.1296 ‘The National Assembly disregarded the position of the Senate and nevertheless adopted the final text of the Act on 30 June 1990 on the request of the Government.’1297

1291 Parliamentary debates, JO 2 May 1990, French national assembly, p.907.
1292 Parliamentary debates, JO 2 May 1990, French national assembly, p.909.
1296 Parliamentary debates, JO 11 June 1990, French Senate, p.1464.
1297 Parliamentary debates, JO 28 June 1990, French national assembly, p. 3103 et seq.

332
8.2.2 The criminalization of revisionism

The Gayssot Act of 13 July 1990 primarily created in Article 9 of the Act the new offence of denial of crimes against humanities committed by the Nazi regime, also referred to as the offence of Holocaust denial. The main accusation of the opponents was that this offence formed a délit d’opinion. According to Stirbois, the offence of provocation to racial hatred and violence introduced by the French legislator in 1972 already constituted a délit d’opinion, because the terms hatred and violence did not constitute punishable acts but merely a sentiment, respectively an attitude and because it was not required that the provocation was direct. Likewise, Article 9 criminalized the expression of an opinion and not the support of a criminal act by repressing the denial of a history established by the Tribunal of Nuremberg. The Gayssot Act formed a memorial law; it signified the establishment of an official history, thus government declared truth, and altered judges into historians.\(^{1298}\) According to Stirbois, however, the criminalization of racism was to be strictly defined and the independence of the judges was to be assured.\(^{1299}\) Jacques Toubon, representative of RPR, equally argued that judges already found difficulties in the application of the Eleven Act of 1972 and often risked the violation of freedom of expression by sanctioning opinions and thus approaching the délit d’opinion. It was therefore better not to add a new offence that would cause even more delicate problems for judges and not to ‘laisse le soin aux juges de faire le boulot!’\(^{1300}\)

Furthermore, the opponents criticized the Communist origin of the proposal and stipulated the danger for the state to intervene in history by viciously recalling the massacre of over 2000 Polish people in Katyn in 1940. It had been the USSR – thus Communists themselves – that had tried to falsify history during the Nuremberg trials by imputing the Nazis of these crimes that had been actually committed by the Russian police on orders from Stalin, which the Communist group had refused to acknowledge for a long time.\(^{1301}\) The opponents opposed the introduction of a special protection of the Jewish community with regard to the Holocaust, where other communities and genocides lacked such protection; such a ‘loi d’exception’ was contrary to the spirit of the republican legislator who had the task of creating texts of a general application.\(^{1302}\) The opponents also contradicted the effectiveness of the law. The law would be counter-productive; the criminalization of the denial of crimes committed by the Nazis, more specifically of the Holocaust, signified the acknowledgement of the idea that one cannot doubt the reality of the Holocaust. Hence, the offence would turn negationists into martyrs and their prosecution

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\(^{1298}\) Parliamentary debates, JO 2 May 1990, French national assembly, p.933.

\(^{1299}\) Parliamentary debates, JO 2 May 1990, French national assembly, p.914.

\(^{1300}\) Parliamentary debates, JO 2 May 1990, French national assembly, p.956.

\(^{1301}\) Parliamentary debates, JO 2 May 1990, French national assembly, p.933.

\(^{1302}\) Parliamentary debates, JO 2 May 1990, French national assembly, p.934.
before a tribunal would offer them a stage to expound their racist propaganda. More generally, they regretted the repressive nature of the Act and advocated a more preventative approach through the continuous education of morality and tolerance.

The opponents found the Senate on their side that declared in its motion: ‘Considérant que la création d’un délit de contestation de l’existence des crimes contre l’humanité conduirait à instituer une vérité historique officielle et instaurerait ainsi un délit d’opinion, que la falsification historique opérée par les auteurs d’écrits révisionnistes doit être démontrée et non condamnée pénalement sauf, comme le permet le droit actuel, lorsqu’elle s’accompagne de provocation à la discrimination, à la haine ou à la violence raciale, ou de diffamation ou d’injure à caractère raciste, et qu’enfin il appartient aux autorités disciplinaires de prendre les mesures éventuellement nécessaires à l’encontre d’enseignants qui diffuseraient les thèses révisionnistes auprès de leurs élèves.’

During the parliamentary debates, the Minister for Justice argued that the opponents of the Act overlooked the core starting point that Holocaust denial formed an expression of racism and the principle vector of anti-Semitism: ‘la négation de l’holocauste n’est qu’une expression du racisme et le principal vecteur contemporain de l’antisémitisme. Avec ces pseudo-historiens, on revient un siècle en arrière, à Gobineau, à tous ces esprits égarés qui ont voulu donner une tournure scientifique à la peur, une justification à l’agression. C’est pourquoi, à mon sens, pour combattre ceux qui nient l’holocauste, il est vain de démontrer une fois encore la vérité de l’histoire. Ce n’est pas la question de la vérité qui est en jeu pour eux!’

The vision that racism did not constitute an opinion, but an offence, was expounded by most proponents of the Act: ‘Le racisme, ce n’est pas une opinion, c’est un délit.’ One representative replied to Stirbois ‘Madame, vous avez cité Platon et Aristote. Vous me permettrez de vous citer une réflexion de Jean Paul Sartre. (…) Jean Paul Sartre disait: ’Je me refuse à nommer opinion une doctrine qui vise expressément des personnes particulières et qui tend à supprimer leurs droits ou à les exterminer.’

The Minister for Justice even argued that racism constituted an aggression and for this reason wondered whether it would be better if the racist offences were inserted into the Penal Code: ‘Le racisme n’est pas une opinion,

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1304 Parliamentary debates, JO 2 May 1990, French national assembly, p.926.
1305 Parliamentary debates, JO 11 June 1990, French Senate, p.1461.
1306 Parliamentary debates, JO 2 May 1990, French national assembly, p.905.
1308 Parliamentary debates, JO 2 May 1990, French national assembly, p.916.
c'est une agression! Chaque fois que le racisme parvient à s'exprimer, l’ordre public est immédiatement et gravement compromis.'1309 'Dès lors, la question n’est pas celle de la liberté d’expression ou de la liberté de la presse. Il n’y a pas de liberté qui tienne si cette liberté vise à agresser. C’est pour cela que j’ai posé la question de savoir si les débats racistes ne devraient pas être “sortis” de la loi sur la presse pour être inscrits dans le code pénal,'1310 Toubon criticized the Minister of Justice’s inconsistency in distinguishing between an opinion and an agression: ‘Vous avez soutenu que le racisme n’était pas une opinion, mais une agression. Redoutable distinction! A partir de quand l’expression d’une idée cesse-t-elle d’être une opinion pour devenir une agression, pour qui, quand, comment, sur quel sujet? Distinction si redoutable que je vous invite à exclure d’urgence toutes ces infractions de la loi sur la presse. Sinon, sur ce terrain glissant, nous allons peu à peu embarquer la liberté d’expression et la liberté de la presse. Par conséquent, si vous voulez être cohérent avec vous-même, maintenez ces infractions et ces peines dans le code pénal mais sortez-les de la loi sur la presse! The French legislator did not follow this advice. However, in order to avoid the creation of a délit d’opinion, he has provided for a most precise circumscription of the statutory elements of the offence (para.9.1-9.3 infra).1312

8.2.3 An aggravation of the sanctions of the hate speech bans

The Gayssot Act of 13 July 1990 further aggravated the sanctions of the existing – and new – French hate speech bans by offering the judge the possibility to pronounce supplementary penalties, such as the display and publication of the decision and the deprivation of certain civil rights, such as the right of eligibility and access to public functions. It was for this reason that the opponents of the Act, primarily Stirbois, accused the Communist group of creating a law that was prompted by the circumstances and solely aimed at Le Pen and the Front National, thus constituting a law ad hominem. The reporter of the commission des lois, Francois Asensi, had, however, explicitly recognized this aim of the Act in his report by considering ‘Nous ne sommes plus en 1972 ou l’extrême-droite représentait au plus 2 p. 100 du corps électoral.'1313 With regard to Le Pen and the Front National one representative remarked: ‘dont nous ne partageons ni les valeurs ni le discours : mais nous ne vous permettrons pas aujourd’hui de faire une loi ad hominem!'1314 The opponents accused the Act of constituting a ‘loi

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1313 Parliamentary debates, JO 2 May 1990, French national assembly, p.909.
1314 Parliamentary debates, JO 2 May 1990, French national assembly, p.906.
scélératé’, thereby referring to a series of laws created during the Third Republic (1870-1940) that aimed to repress the anarchistic movement.\footnote{Parliamentary debates, 2 May 1990, French national assembly, p.907; p.922.}

The argument did not affect the Minister for Justice who replied ‘le chef du parti de Mme Stirbois se sent visé et c’est quand même un bien étrange discours que de dire en même temps : je ne suis pas raciste, mais si vous faites de l’expression raciste un délit, je serai condamné. A ce dilemme, je propose à Mme Stirbois une solution : changer totalement de discours.’\footnote{Parliamentary debates, 2 May 1990, French national assembly, p.931.}

8.2.4 A reinforcement of the rights of anti-racism associations

Finally, the Gayssot Act of 13 July 1990 reinforced the rights of anti-racism associations. Contrary to the Pleven Act of 1972, no associations were however involved at the drafting of the Gayssot Act. On the one hand, given the political climate, the government kept the associations away from the drafting debates under the pretext of urgency. On the other hand, the associations did not desire to participate in the drafting debates, rightly because they considered it to be a political manoeuvre. The LDH opposed the creation of the offence of denial of crimes against humanity, while MRAP merely opposed its motivation; censoring the Front National.\footnote{Secondi-Nix, M., \textit{Lutte contre le racisme et justice pénale. Rôle des associations}, CNRS, CESDIP, October 1996, pp.55-56.}

Nevertheless, the Gayssot Act inserted Article 48-2 into the Press Act, which affords associations that according to their statutes defend ‘les interest moraux et l’honneur de la Résistance ou des déportés’ the right to set in motion a public prosecution on the ground of the new offence of denial of crimes against humanity, but also on the ground of the offences of ‘apologie des crimes de guerre, des crimes contre l’humanité ou des crimes ou délits de collaboration avec l’ennemi’ in Article 24-3 and constitute as a civil party. The Act also inserted a new Article 13-1 into the Press Act that afforded anti-racism associations the right of reply in the written and audiovisual press ‘lors qu’une personne ou un groupe de personnes auront, dans un journal ou écrit périodique, fait l’objet d’imputations susceptibles de porter atteinte à leur honneur ou à leur réputation à raison de leur origine ou de leur appartenance ou de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée’. Article 13 already afforded such a right of reply to any person, comprising natural persons and corporate bodies, who has been personally affected. The extension was justified by the fact that victims of racial defamation are often not aware of their rights, do not dare to complain or demand that the media insert a response to the racist expression in question.\footnote{Véron, M., \textit{Le renforcement du dispositif répressif contre la discrimination et le racisme. Présentation des lois des 12 et 13 juillet 1990}, \textit{Dr. pén.} October 1990, p.3.}
During the parliamentary debates the proposal to afford associations a right of reply in the media was severely contested on the ground of being counterproductive; every time an anti-racism association would use its right of reply in order to counter racist expression in the media, it would raise a discussion concerning racism.\textsuperscript{1319} What is more, associations called into suspicion the – racist – nature of the media in question. The fact that during the drafting of the article no consultation with the professional media had taken place was therefore highly criticized.\textsuperscript{1320} In order to prevent any abuse of the right of reply by associations the Act brought two restrictions. Firstly, with regard to racist expression that targets an individual person, an association can only exercise the right of reply when it has obtained the consent of the victim thereto. Secondly, if one association has exercised its right of reply ‘aucune association ne pourra requérir l’insertion d’une réponse’.\textsuperscript{1321}

8.3 Conclusion

The French legislator adopted the Gayssot Act of 13 July 1990 in order to more effectively fight against racism and discrimination. Its aim was to provide for an adequate legal response to the increase of negationistic discourse, which often could not be qualified under the existing French hate speech bans created by the Pleven Act of 1972, of anti-Semitic acts and of the rise of the political influence of the extreme right in the eighties and nineties of the previous century. As such manifestations of racism violated the central characteristics and values of the French Republic, the Act was regarded as fundamentally defending the Republic. The merit of the Gayssot Act was threefold: the creation of the offence of denial of crimes against humanity; the aggravation of the sanctions of the French hate speech bans; and a reinforcement of the rights of anti-racism associations, consisting of the right to set in motion public prosecutions on the grounds of the offences of 24\textit{bis} and 24-3, constitute as a civil party and the right of reply in the media with regard to expression punishable on the ground of the French hate speech bans. Contrary to the Pleven Act of 1972 that had been adopted unanimously, the Gayssot Act met severe criticism during its drafting. The criticism primarily concerned the creation of the offence of denial of crimes against humanity; it would notably signify the establishment by the French legislator of an official history with regard to the Holocaust and thus constitute a ‘délit d’opinion’. Contrarily, in the vision of the French legislator, pseudo-scientific negationistic discourse formed an expression of racism and the principle contemporary vector of anti-Semitism. Racism did not constitute an

\textsuperscript{1319} Parliamentary debates, \textit{JO} 2 May 1990, French national assembly, p.927.
\textsuperscript{1320} Parliamentary debates, \textit{JO} 2 May 1990, French national assembly, p.949.
\textsuperscript{1321} Véron 1990, p.3.
opinion, but a punishable act, an aggression that seriously violated the public order.

9. Holocaust denial

The offence of Holocaust denial is characterized by a number of elements, being denial (9.1), intent (9.2) and crimes against humanity (9.3). The constitutionality of the offence is a subject of controversy in French legal doctrine and is either claimed by reference to the value of human dignity or disputed on the basis that it constitutes a ‘délit d’opinion’ (9.4). The compatibility of the offence with international law comes as a result of international case law (9.5), which inspires French legal doctrine to consider revisionism punishable as an abuse of rights (9.6). The offence of Holocaust denial can be distinguished from the development of several ‘memorial laws’ since 1990 (9.7). The analysis results in a general conclusion about the offence of Holocaust denial in French law (9.8).

9.1 Denial

The Gayssot Act of 13 July 1990 inserted Article 24bis into the 1881 Press Act that sanctions ‘ceux qui auront contesté, par un des moyens énoncés à l’article 23, l’existence d’un ou plusieurs crimes contre l’humanité tels qu’ils sont définis par l’article 6 du statut du Tribunal militaire international annexé à l’accord de Londres du 8 août 1945 et qui ont été commis soit par les membres d’une organisation criminelle en application de l’article 9 dudit statut, soit par une personne reconnue coupable de tels crimes par une juridiction française ou internationale’ with a fine of up to €45,000 and or imprisonment of up to one year.1322 Contrary to the non-public racial defamation and racial insult, the French legislator has not criminalized the non-public denial of crimes against humanity as a petty offence.

The French legislator has criminalized not only the ‘negation’, but the ‘contestation’, the denial of crimes against humanity. The term permits to bring under its scope not only the total negation of a crime against humanity, but also the partial, nuanced, conditional or interrogative denial of such a crime.1323 Although the question as to whether the term should be broadly or restrictively interpreted has divided legal scholars; the legislator seems to have brought under the scope of the offence all expression that puts up for discussion the

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1322 The tribunal can order the public display or dissemination of the decision taken in accordance with Article 131-35 of the French Penal Code and can deprive the offender of his right to be elected and his right to hold a judicial office, or to give an expert opinion before a court, or to represent or assist a party before a court of law for a maximum period of five years (Article 131-26 para. 2 and 3 French Penal Code).

exact reality of the crimes against humanity.\textsuperscript{1324} The French Supreme Court has confirmed this by specifying that the offence of Article 24bis is even constituted, if the denial is presented ‘sous une forme déguisée, dubitative ou par voie d’insinuation.’\textsuperscript{1325} Expressions such as ‘prétendu holocauste’ or ‘prétendues chambres à gaz’ are therefore punishable on the ground of Article 24bis.\textsuperscript{1326}

In principle, however, the minimization of the number of victims of the Holocaust as such does not fall under the scope of Article 24bis. This is only the case if the expression is excessive or exaggerated and has a clear revisionist intention and thus is clearly made in bad faith. In 1997, the French Supreme Court annulled an acquittal by the Court of Appeal with regard to the phrase ‘Auschwitz 125,000 morts!’ published in the November issue of the magazine Révision in 1992, considering: ‘si la contestation du nombre des victimes de la politique d’extermination dans un camp de concentration déterminé n’entre pas dans les prévisions de l’article 24bis de la loi du 29 juillet 1881, la minoration outrancière de ce nombre caractérise le délit de contestation de crimes contre l’humanité prévu et puni par ledit article, lorsqu’elle est faite de mauvaise foi.’\textsuperscript{1327} As a result of this decision, historical research of the number of victims of the Holocaust and the method of extermination of Jews as practised by the Nazis is permitted as long as such research does not trivialize their war crimes.

The evoking of controversies about the legitimacy of the grounds of the Gaysso Act is also not prohibited; contesting the law is not necessarily the same as contesting the existence of a crime against humanity. Furthermore, although the law permits the sanctioning of the ‘contestation through insinuation’, it does not allow the condemnation of expression solely because it is uttered by men, who are part of a particular political movement known for its acquaintance with revisionist theories.\textsuperscript{1328} In 2012, the French Supreme Court overruled and annulled – without referral – the conviction by the Court of Appeal of Bruno Gollnisch, a French academic and politician and member of the Front National (FN) and the European Parliament, with regard to his statements ‘l’existence des chambres à gaz, c’est aux historiens d’en discuter (...) je ne nie pas les chambres à gaz homicides, mais la discussion doit rester libre’ during a press conference held by the FN at the Lyon III University.\textsuperscript{1329}

\textsuperscript{1324} Veron 1990, p.1.
\textsuperscript{1326} Beignier, De Lamy, Dreyer 2009, p.531.
\textsuperscript{1328} Ader, B., L’état de la jurisprudence sur la notion de négation depuis la loi Gaysso, Légipresse n° 293, April 2012, p. 236.
\textsuperscript{1329} French Supreme Court, crim. Ch., 23 June 2009, Légipresse n° 269, February 2010, III 269-19, annotation E. Derieux.
The Court of Appeal had considered that this appeal for a debate between historians had the objective of doubting the reality of the massive use of gas chambers and even testified of a ‘parti pris personnel en donnant de ces historiens hétérodoxes ou négationnistes, une présentation complaisante’. Contrarily, the Supreme Court held that the statements ‘qui renferment des énonciations contradictoires, ne permettent pas de caractériser (..) le délit (..). The Court of Appeal had therefore misunderstood Article 24 bis. Derieux questions whether the Supreme Court refrained from referring the case for a new appreciation on the merits out of fear of an eventual condemnation by the ECtHR. However, in 2011, the ECtHR found the disciplinary measure imposed by the Lyon III University on Gollnisch with regard to his teaching position as a Professor at the University for the same expression acceptable due to its ambiguous nature and eventual contribution to revisionist theories and possible subsequent disorder (Chapter 3, para. 1.5 supra). The possibly large scope of the offence of ‘contestation’ of crimes against humanity brings up the question as to how Article 24bis relates to the other French hate speech bans that have formed a legal ground for the condemnation of a variety of anti-Semitic expression that could be understood to signify the denial, trivialization or apology for the crimes committed by the Nazi regime, notably the Holocaust, such as imputations against Jews to exploit the legends of the Holocaust, to lie about the existence of the gas chambers, to lobby for world domination or to compare practices of Israelis with practices of the Nazis (para. 4.5.2 and 6.2 supra). The French Supreme Court has ruled that the offence of revisionism and the offence of apology for crimes against humanity in Article 24-3 cannot be applied at the same time, because these offences protect the same values. Contrarily, the French Supreme Court has ruled that one fact can be prosecuted on the ground of Article 24bis and the offence of racial defamation, because they protect interests of a different nature and for this reason, ‘lorsqu’elles sont en concours ne sauraient constituer un cumul idéal d’infractions’.

9.2 Intent and the presumption of bad faith

Article 24bis supposes, like most press offences, the existence of a dol generalis. The prosecuting party does not explicitly have to prove the author’s intention; his intention is implied and is a result of the tenor of the expression and his bad

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1331 ECtHR 7 June 2011, no. 48135/08 (Gollnisch v. France).
faith is presumed. A suspect thus has the difficult task of proving his good faith. Article 24bis thus requires that the author consciously publicly contests the existence of crimes against humanity committed by the Nazi regime. This intention is twofold: the author must have the intention to contest and the intention to do so publicly.

In its decision of 17 June 1997, the French Supreme Court insisted on the requirement of the author’s bad faith (para.9.1 supra). On the one hand, the Court required that the expression constituted a ‘minoration outrancière’, which implies an author’s bad faith. On the other hand, the Court stipulated the requirement of the author’s bad faith. In its annotation, Feldman argues that the aim of the French Supreme Court has rightly been to prevent a too extensive interpretation of the offence that the term ‘contestation’ might entail. According to Feldman, however, the Court’s reference to the author’s bad faith is redundant, because it is difficult to imagine a ‘minoration outrancière’ made in good faith. Contrarily, De Lamy criticizes the emphasis on the author’s bad faith, because the terms of the expression itself must be sufficiently explicit in order to derive the intention of the author. More generally, revisionists should not have the possibility of proving their good faith.

With regard to the intention to publicly contest crimes against humanity, in 2002 the French Supreme Court endorsed the condemnation by the Court of Appeal of a person who had posted on a website, which had the objective of fighting against revisionism, a message in which he denied the existence of the gas chambers. The Court had rightly rejected the suspect’s defence of having supposed that the website concerned a – private – discussion forum, because the suspect could not ignore the fact that his messages would be publicly diffused.

9.3 Crimes against humanity

Article 24bis only criminalizes the denial of crimes against humanity committed during the Second World War. The text of the Article refers to ‘l’existence d’un ou plusieurs crimes contre l’humanité tels qu’ils sont définis par l’article 6 du statut du Tribunal militaire international annexé à l’accord de Londres du 8 août 1945’. Article 6 of the Statute of the tribunal of Nuremberg defines crimes against humanity as ‘murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or

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1335 Veron 1990, p.2.
during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not it is in violation of the domestic law of the country where the act is perpetrated.’ Article 6 further indicates that the Nuremberg tribunal is only competent to judge persons who have acted ‘in the interests of the European Axis countries’. Likewise, Article 24bis specifies that the crimes against humanity must have been committed ‘soit par les membres d’une organisation criminelle en application de l’article 9 dudit statut, soit par une personne reconnue coupable de tels crimes par une juridiction française ou internationale’. The Nuremberg tribunal has declared as criminal the chefs of the Nazi party, the SD the SS and the Gestapo.\textsuperscript{1339} Hence, Article 24bis criminalizes the denial of crimes against humanity for the purposes of Article 6 of the Statute of Nuremberg, committed by the members of such organizations or a person found guilty of such crimes by a French or international jurisdiction. In the latter case it is not a requirement that a person is a member of one of these organizations.

It was in order to avoid the creation of a délit d’opinion that the National Assembly adopted the proposal of the Government to provide for a most precise circumscription of the statutory elements of the offence by referring to Article 6 of the statute of the tribunal of Nuremberg.\textsuperscript{1340} By doing so, the French legislator thought not to itself declare or create an official history, but merely to assume, take as a starting point a historical reality as established by French and international jurisdictions, in other words the authority of legal judgments. From this perspective, the offence of denial of crimes against humanities did not constitute a memorial law in senso strictu.

In case law, the ‘Union des Tsiganes et voyageurs de France’ has been found admissible in its complaint and constitution as a civil party on the ground of 24bis with regard to expression concerning all groups of people being the victim of the concentration camps.\textsuperscript{1341} Case law has thus acknowledged the criticism that the offence of denial of crimes against humanity would merely protect the Jewish community from offence.

French case law has always refused to apply the offence of the denial of crimes against humanity committed in other periods. For example in 1994, the Tribunal Correctionnel of Paris acquitted Bernard Lewis, expressed the idea that the reality of the Armenian genocide only existed in the imagination of the Armenian population on the ground of 24bis. The Court considered that the double reference in Article 24bis to Articles 6 and 9 of the Statute of the International Military Tribunal ‘a pour effet d’exclure de la protection contre la

\textsuperscript{1339} Beignier, De Lamy & Dreyer 2009, p.533.
\textsuperscript{1340} Parliamentary debates, JO 2 May 1990, French national assembly, pp.956-957.
contestation, instituée par la loi, tous les autres crimes contre l’humanité, comme, en l’espèce, ceux dont a été victime le peuple arménien en 1915.\footnote{1342}

In 1994, the French Supreme Court rejected two arguments often used by suspects of the offence of denial of crimes against humanity in their defence.\footnote{1343} Firstly, suspects argue that they are not familiar with judgments – condemnations on the ground of crimes against humanity – by the Nuremberg tribunal, because they have not been published in the French law gazette (Journal Officiel). For this reason, the judgments cannot be used against them. In casu, the Court rejected the argument considering that, on the one hand the authority of legal decisions are a result of their pronouncement and definitive character, independently from their publication, and on the other hand the judgment of the Nuremberg tribunal had been officially translated into French.\footnote{1344}

Secondly, suspects argue that Article 24\textit{bis} violates their presumption of innocence as protected in Article 6 ECHR, because Article 24\textit{bis} imposes judgments – condemnation on the ground of crimes against humanity – by the Nuremberg tribunal on the French judge, which is why the suspects cannot prove the truth of their statements and the French judge is not impartial. The Court rejected the argument, because the suspect is not prosecuted on the ground of the offence of crimes against humanity itself, but on the ground of the offence of denial of crimes against humanity. The suspect’s presumption of innocence thus concerns his expression, his denial, and not the act, i.e. the war crime itself. The French judge thus decides as to whether expression can be qualified under the legal definition of the offence of denial of crimes against humanity, not whether the act can be qualified as a crime against humanity. However, it is precisely because of its reference to the Statute of the Nuremberg tribunal that the offence of denial of crimes against humanity is highly controversial in French legal doctrine.

9.4 Constitutionality and the value of human dignity

Despite its difficult drafting history, the Gayssot Act was not submitted to the Constitutional Council – it is said for political reasons. The question arises as to whether the Constitutional Council, when confronted with such a question, would consider the offence of denial of crimes against humanity to be in conformity with the French Constitution or, on the contrary, incompatible with the freedom of communication of an opinion as protected in Articles 10 jo 11

\footnote{1342}{Cited in: CNCDH 1994, p.61.}
\footnote{1344}{In the same sense : French Supreme Court, crim.ch., 13 March 2001, n°00-85102, unpublished.}
DDHC. The question does not remain purely theoretical, but is of practical importance. Since the constitutional reform of 2008, which came into force on 1 March 2010, a citizen can dispute the constitutionality of a statutory provision during an on-going proceeding before a court. When it is argued that a certain statutory provision violates the rights and freedoms guaranteed by the Constitution, the Constitutional Council can be seized – on remand of the Council of State or the French Supreme Court – in order to ask a ‘Question Prioritaire de Constitutionnalité’ (QPC).1345 As a result of the case law of the Constitutional Council, freedom of expression must be conciliated with the protection of the public order, the rights of others and the respect for human dignity (para.1.1 supra). Does Article 24bis meet these objectives? According to Mbongo, if any provision in the 1881 Press Act is regarded as unconstitutional in French legal doctrine, it is the criminalization of revisionism in Article 24bis.1346 The question as to the constitutionality of the article keeps French legal scholars highly divided. Their pros and cons resemble those put to the fore during the parliamentary debates.

Rolland considers negationistic discourse as constituting opinions or value judgments on historic events. He recalls that opinions can only be criminalized, because of their link with a following reprehensible or punishable act. However, the precise problem with negationistic expression was the fact that it could not be condemned on the ground of racial provocation, because no manifest link existed between such expression and a reprehensible act. According to Rolland, the offence thus constitutes a délit d’opinion and for this reason must be abrogated.1347

Mathieu sums up as to why the Gayssot Act and memorial laws in general would be unconstitutional: they would constitute government declared truth and the State would install an official History; they would be contrary to the principle of equality, because they would protect the memory of one historic event and of one specific group – not other genocides of other groups – and would thus be inspired by Communautarism; they would lack the precision that the principle of legality of offences and sanctions and legal certainty requires;

1345 La loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la V° République inserted Article 61-1 into the French Constitution of 1958 that provides : Lorsque, à l’occasion d’une instance en cours devant une juridiction, il est soutenu qu’une disposition législative porte atteinte aux droits et libertés que la Constitution garantit, le Conseil constitutionnel peut être saisi de cette question sur renvoi du Conseil d’État ou de la Cour de cassation qui se prononce dans un délai déterminé.
1347 Rolland 1998, p.651 et seq.
and they would violate free historical research.\textsuperscript{1348} Mathieu therefore advocates the abrogation of Article 24\textit{bis} and with regard to revisionist expression to permit recourse only before the civil judge, on the ground of Article 1382 CC. According to Mathieu, Article 24\textit{bis} adds to the development of the multiplication of press offences and a regime of criminal responsibility disconnected from an author’s intention and the existence of actual prejudice. What is more, Article 24\textit{bis} would open up a Pandora’s box for the legislator to interfere with historical research. Contrarily, Article 1382 CC would permit the civil judge to apply the traditional rules of civil responsibility and to determine the actual abuse of the right of freedom of expression that harms the rights of others or the public order by focussing on the non-respect of scientific methods, which could indicate an author’s racist intention.\textsuperscript{1349} It is recalled that such recourse before the civil judge is impossible, since the French Supreme Court decided in 2000 that ‘les abus de la liberté d’expression prévus et réprimés par la loi du 29 juillet 1881 ne peuvent être réparés sur le fondement de l’article 1382’ (para.1.3.3 supra).\textsuperscript{1350}

These arguments do not convince the proponents of the offence. Beignier highly objects to the qualification of the offence as a délit d’opinion. He strictly discerns opinions or value judgments from facts: ‘c’est une opinion d’estimer que le roi Louis XVI était innocent et ne devait pas être condamné par la Convention, ou le contraire. Ce n’est pas une opinion que de constater qu’il fut décapité le 21 janvier 1793 et ce ne serait pas non plus une opinion que de prétendre qu’il ne le fut pas. Nul n’a à avoir de sentiment sur le constat d’un fait.’\textsuperscript{1351} Negationism does not form a vision on history or a thesis, but an affirmation concerning facts, a factual declaration that the Holocaust has not taken place or the gas chambers have not existed.\textsuperscript{1352} Although Beignier considers the criticism that the offence is too imprecise to be correct, it is partly countered by the fact that in case law, the offence is interpreted restrictively and the free serious historical research is preserved through the emphasis on an author’s bad faith. According to Beignier, the law on revisionism must, however, be revised in order to permit other


\textsuperscript{1349} Mathieu 2007-I, p.321 et seq.


\textsuperscript{1352} In the same sense : Droin 2009, p.282.
genocides, such as the Armenian genocide, to fall within its scope.\textsuperscript{1353} Likewise, Dreyer argues that all denial of the existence of crimes against humanity should be treated equally and therefore advocates an extension of the scope of Article 24\textit{bis} by creating one single offence penalizing the denial of the existence of crimes against humanity as they are recognized by law.\textsuperscript{1354}

The argument most used in favour of the offence is, however, the special nature of negationistic discourse; its anti-Semitic nature and its disguised political aim to rehabilitate National Socialism. Wachsmann explains that negationistic discourse consists of a factual allegation of which the false character and the intention to harm the victims of the facts in question is certain.\textsuperscript{1355} Troper argues, therefore, that negationistic discourse must be criminalized, because it constitutes a threat to the rights and liberties of others and an impairment of the democratic regime itself. The negation of the Armenian genocide is of a very different character.\textsuperscript{1356} Beignier equally considers that where the rationale of freedom of expression is to support democracy, negationism is grounded on an ideology contrary to democracy.\textsuperscript{1357}

De Lamy opines that if the offence would have been submitted to the Constitutional Council, it could have referred to the principle of human dignity as enshrined in the preamble of the Constitution of 1946.\textsuperscript{1358} In a famous decision in 1994 concerning the so-called ‘bioethics Act’, the Constitutional Council considered that it resulted from the preamble of the 1946 Constitution that the dignity of the human person against all forms of enslavement and degradation is a constitutional principle. Therefore, the freedoms guaranteed in Articles 1, 2 and 4 of the DDHC must be conciliated with the constitutional principle of human dignity.\textsuperscript{1359} In this context, human dignity is considered to be an integral part of the inalienable rights of personality.

According to Mathieu, the constitutional principle of human dignity can be regarded as expressing ‘la volonté républicaine d’intégration’: it assures the unity and indivisibility of the French Republic. Like the respect for all beliefs, the respect for human dignity is thus inscribed in the ‘pacte républican’. The dignity concerned here must, however, be considered as a value and not as a right: it signifies the interdiction to injure the human dignity of a person and is

\textsuperscript{1353} Beignier 1998, p.525 ; p.533.
\textsuperscript{1354} Dreyer 2003, p.25.
\textsuperscript{1356} Troper, M., Droit et négationnisme : la loi Gayssot et la Constitution, \textit{Annales Histoire Sciences Sociales} 1999, n°6, p.1239 et seq.
\textsuperscript{1357} Beignier 1998, p.497 et seq.
\textsuperscript{1358} De Lamy 2000, p.373.
\textsuperscript{1359} Cons. Con. 27 July 1994, n°94-343/344 DC. The Constitutional Council declared the Bioethics Act that regulates various issues related to ‘medically assisted reproduction’ such as embryo selection and paternity to be constitutional. (in full : Respect for Human Body Act and Donation and Use of Parts and Products of the Human Body, Medically Assisted Reproduction and Prenatal Diagnosis Act).
therefore an objective right rather than a subjective right. These values can be considered as essential values of the French Republic, i.e. the fundamental principles of the French legal order. They form limitations to freedom of expression that protect values rather than rights and have the aim of respecting fundamental principles rather than preventing disturbances.\textsuperscript{1360}

In a number of affairs, the Council of State has attached the protection of human dignity with the protection of public order. In one affair, the Council of State validated the decision of a mayor to interdict a public spectacle consisting of a competition in dwarf tossing ‘au nom du principe de dignité composante de l’ordre public’.\textsuperscript{1361} In a decision of 9 January 2014, the French Council of State agreed with the decision of the prefect of the Loire-Atlantique to prohibit the theatre show ‘Le Mur’ (The Wall) of humourist Dieudonné scheduled at Saint-Herblain, Nantes for being anti-Semitic.\textsuperscript{1362} The show had previously been held in the Théâtre de la Main d’Or in Paris. It included a sketch, in which the humorist mimed urinating against a wall. He then revealed that it was the Wailing Wall in Jerusalem. He also uttered salvos of abuse at prominent French Jewish performers, including radio presenter Patrick Cohen, concluding: ‘Gas chambers … a shame.’ The Administrative Court of Nantes, seized by the humorist’s lawyers in summary proceedings, had annulled the order of the prefect of the Loire-Atlantique prohibiting the show. According to the Administrative Court, a perceived risk to public order could not be used to justify as radical a measure as banning the show.

But the Council of State considered that ‘the reality and gravity of the risk of trouble to public order’ was ‘established’; ‘pour interdire la représentation à Saint-Herblain du spectacle « Le Mur », précédemment interprété au théâtre de la Main d’Or à Paris, le préfet de la Loire-Atlantique a relevé que ce spectacle, tel qu’il est conçu, contient des propos de caractère antisémite, qui incitent à la haine raciale, et font, en méconnaissance de la dignité de la personne humaine, l’apologie des discriminations, persécutions et exterminations perpétrées au cours de la Seconde Guerre mondiale ; que l’arrêté contesté du préfet rappelle que M. Dieudonné M’Bala M’Bala a fait l’objet de neuf condamnations pénales, dont sept sont définitives, pour des propos de même nature ; qu’il indique enfin que les réactions à la tenue du spectacle du 9 janvier font apparaître, dans un climat de vive tension, des risques sérieux de troubles à l’ordre public qu’il serait très difficile aux forces de police de maîtriser,’\textsuperscript{1363}

The Council of State, therefore, overturned the decision, finding ‘Les allégations selon lesquelles les propos pénallement répréhensibles et de nature à mettre en

\textsuperscript{1360} Mathieu 2007-I, pp.321 et seq.
\textsuperscript{1363} CE Ordonnance of 9 January 2014, n’374508, para.5.
cause la cohésion nationale relevés lors des séances du spectacle Le Mur tenues à Paris ne seraient pas repris à Nantes ne suffisaient pas pour écarter le risque sérieux que soient de nouveau portées de graves atteintes au respect des valeurs et principes, notamment de dignité de la personne humaine, consacrés par la Déclaration des droits de l’homme et du citoyen et par la tradition républicaine; qu’il appartient en outre à l’autorité administrative de prendre les mesures de nature à éviter que des infractions pénales soient commises;1364 In subsequent decisions, the Council of State has validated the decisions of the mayors of Tours and Orléans to prohibit the show in their cities.1365 Given the severity of the measure, it has been suggested that this ‘Jurisprudence Dieudonné’ could be brought before the ECtHR.1366 French jurisdictions have equally referred to the respect for human dignity in order to justify limitations to freedom of expression. For example, the Paris Court of Appeal has interdicted an advertising poster of the clothing trademark Benetton depicting a human buttock presented as a piece of meat on which the sign ‘HIV’ had been tattooed, because the poster used ‘une symbolique de stigmatisation dégradante pour la dignité des personnes atteintes de manière implacable en leur chair et en leur être de nature à provoquer à leur dètriment un phénomène de rejet ou de l’accentuer’.1367 According to Cammilleri-Subrenat, in this case, human dignity seemed to form ‘un rempart contre un libéralisme sauvage’.1368 She considers the principle of human dignity to be the best constitutional barrier against hate speech in general.1369 In a decision of 7 May 2010, the French Supreme Court refused to transmit a QPC concerning Article 24bis to the Constitutional Council filed by Le Pen and les Editions des Tuileries. They had been condemned on the basis of the article with regard to the publication of an interview in the extreme right winged, weekly Rivaol, in which Le Pen had stated that the German occupation of France ‘n’a pas été particulièrement inhumaine’. The French Supreme Court considered that the question posed lacked a serious character, because the article defined the offence of denial of crimes against humanity in a clear and precise manner and did not, therefore, violate the constitutional principles of freedom of expression and opinion.1370 The Court thus seemed to attach more importance to

1365 CE Ordonnance of 10 January 2014, n°374528; CE Ordonnance of 11 January 2014, n°374552.
1369 Cammilleri-Subrenat, A., L’incitation à la haine et la Constitution, Revue internationale de droit comparé, Vol.54 No 2, April-June 2002, p.541.
1370 French Supreme Court, crim.ch., 7 May 2010, n°09-80774, published.
the question of whether the offence is precisely qualified than to the question of whether the offence criminalizes an opinion that is closely connected to a subsequent action. According to De Montalivet, the solution of the Court is not self-evident. Given the lack of consensus in legal doctrine on the matter, the constitutionality of the article is not obvious. While the opinion of the Court seems to be that the article does not violate the principle of legality of criminal offences and sanctions, its motivation notably concerns the fact that the article does not violate the constitutional principle of freedom of expression and opinion. The Court thus gives a decision based on the merits of the case and its aim seems to be to smother any ‘contestation’ of the constitutionality of Article 24bis. By answering the QPC itself, the Court shows a certain resistance against the system of the QPC. According to De Montalivet, it can, however, be expected that the Constitutional Council would adopt the approach of the ECtHR.\textsuperscript{1371} Indeed, in the absence of a decision on the question as to the constitutionality of the offence of denial of crimes against humanity pursuant to Article 24bis by Constitutional Council, the question arises as to whether Article 24bis is in conformity with international provisions, notably Article 10 ECHR.

9.5 Compatibility with international law: the cases of Garaudy and Faurisson

The French Supreme Court has always considered the offence of denial of crimes against humanity in Article 24bis as being in conformity with Article 10 ECHR. In 1994, the Court considered that the second paragraph of Article 10 ECHR provides that the exercise of the right to freedom of expression carries duties and responsibilities and can be submitted to certain restrictions necessary in a democratic society, most notably for the protection of morals and the rights of others and ‘que tel est l’objet de l’article 24bis de la loi du 29 juillet 1881 modifiée par la loi du 13 juillet 1990.’\textsuperscript{1372} The ECtHR, for its part, also considers Article 24bis to form an interference with freedom of expression that is legitimate and necessary in a democratic society, due to the fact that it protects the rights of others and the public order and because revisionistic and negationist discourse run counter to the fundamental values of the Convention.\textsuperscript{1373} In the case Garaudy v. France, the


\textsuperscript{1373} See also: ECmHR 24 June 1996, n°31159/96, Marais/France. The ECmHR rejected a complaint against a condemnation of the ground of 24bis with regard to an article

349
ECtHR evoked Article 17 in order to deprive revisionist expression from the protection of Article 10. The case concerned the publication of the book Les mythes fondateurs de la politique israélienne by the author Garaudy, in which he denounces the pseudo-existence of the Holocaust and imputes the State of Israel and Jews in order to take financial advantage of this situation. The French Supreme Court had rejected an appeal against the condemnation of Garaudy on the grounds of denial of crimes against humanity, racial defamation and racial provocation. The ECtHR declared Garaudy’s complaint of violation of freedom of expression to be inadmissible considering: ‘There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.’

The HRC has ruled equally against revisionists, but takes a different approach than the ECtHR. In 1996, the HRC rejected a complaint by Faurisson who had been condemned in France on the ground of 24bis for having denied in an published in the magazine Revision that doubted ‘les prétendus gazages’ committed in the concentration camps of Struthof and more generally the use of the gas chambers in order to eliminate the Jewish community, because the expression run counter to the fundamental values of the Convention as expressed in its preamble, being justice and peace.

1374 French Supreme Court, crim.ch., 12 September 2000, n°98-88200; 98-88201; 98-88202; 98-88203; 98-88204, unpublished. The Court of Appeal had considered ‘derrière l’utilisation permanente du qualificatif “sioniste” c’est bien le lobby juif et les communautés juives dans leur ensemble que Roger Garaudy a cherché à mettre en cause .. En réalité, l’ouvrage de Monsieur Garaudy ne constitue pas un travail d’histoire mais de polémique qui visant l’ensemble de la communauté juive, en tant que coupable de cette gigantesque escroquerie, apparaît comme l’une des formes les plus fortes de la diffamation raciale et de la provocation à la haine raciale.’

1375 ECtHR 24 June 2003, n°65831/01, Garaudy/France.

interview in the magazine *Le choc du mois* the existence of the systematic extermination of the Jews by the Nazi regime and having stated, amongst others statements, that the myth of the gas chambers is ‘une gredinerie’ (dirty trick). The HRC did not, like the ECtHR, emphasize the negative effects that negationistic expression can have on social cohesion, peace, justice, pluralism and tolerance and did not declare the complaint inadmissible on the ground of Article 5 -1 ICCPR, which prohibits the abuse of rights.\textsuperscript{1377} The HRC emphasized the profoundly racist and anti-Semitic nature of Faurisson’s negationistic discourse that violated the rights of the Jewish community and considered that: ‘Since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-Semitic feelings, the restriction served the respect of the Jewish community to live free from an atmosphere of anti-Semitism. The Committee therefore concludes that the restriction of the author’s freedom of expression was permissible under article 19, paragraph 3 (a), of the Covenant.’\textsuperscript{1378} However, in the New General Comment no. 34 on Article 19 ICCPR (GC 34), adopted in 2011,\textsuperscript{1379} the HRC considers that ‘Laws that criminalize the expression of opinions about historical facts’ are deemed incompatible with the Covenant that ‘does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events’.\textsuperscript{1380} It remains to be seen how the HRC will interpret this consideration in subsequent case law (Chapter 3, para. 5.3 *supra*).

9.6 Revisionism as an abuse of right: ‘neutralization’ of the conflict

French legal doctrine generally holds that the solution of an abuse of right for the purposes of Article 17 ECHR is at the basis of the Gayssot Act of 13 July 1990 against revisionism and negationism that inserted Article 24bis into the 1881 Press Act. The denial of crimes against humanity committed by the Nazis during the Second World War falls outside the scope of the freedom to express an opinion and authors of such expression are simply deprived of this right and cannot invoke it in their defence.\textsuperscript{1381} The solution thus consists of what is called a

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‘neutralisation’ or denial of the conflict between freedom of expression and the fight against racism.\textsuperscript{1382} This approach is clearly reflected in the drafting history of the Act; during the parliamentary debates it was argued at several reprises that racism does not constitute an opinion but an offence and in support of this vision the formula of Sartre was cited according to which anti-Semitism does not form a category of expression protected by freedom of opinion (para.8.2.2 supra). This radical solution by the French legislator is said to be inspired by the case law of the ECtHR.\textsuperscript{1383} According to De Gouttes, the solution is implicitly consecrated in other international provisions, such as Article 20-2 ICCPR and Article 4 ICERD, according to which the diffusion of racist ideas is not a matter of opinion, but a punishable offence and the notion of an abuse of rights was equally at the core of the draft Act of Toubon in 1996 that sought the criminalization of the diffusion of racist and xenophobic messages (para.7.1 supra). According to De Gouttes, one must be prudent with the criminalization of such opinions, because France has interpreted Article 4-5 ICERD as meaning that States must refrain from adopting offences that are not in conformity with freedom of opinion.\textsuperscript{1384}

The solution thus diverges from the solution that according to French legal doctrine was at the basis of the Pleven Act of July 1972, i.e. the search for conciliation, the correct balance between two interests, freedom of expression and the fight against racism.\textsuperscript{1385} The French Supreme Court has adopted this solution by affirming on several occasions that Article 24-8; 32-2 and 33-3 are in conformity with Article 10-2 ECHR.\textsuperscript{1386} The French Supreme Court has, however, also considered that Article 24bis is in conformity with Article 10-2 ECHR.

Droin highly criticizes the view that the neutralization of the conflict is the basis of Article 24bis. The Article evokes the sentiment of creating a délit d’opinion by referring to the Statute of Nuremberg and taking as a starting point an official reality based on the judgments of the Nuremberg tribunal, installed by the victors of the Second World War. According to Droin, as Holocaust denial consists of – false – statements concerning facts and has an undisputable anti-Semitic nature and political aim, it violates the rights of others and the public order and is closely related to the offences of racial defamation and racial provocation; in order to clarify this the offence thus must be modified.\textsuperscript{1387}

9.7 Development of memorial laws since 1990 and proposals to modify Article 24bis

\begin{itemize}
\item \textsuperscript{1382} De Gouttes 2001, p.6 et seq.
\item \textsuperscript{1383} Droin 2009, p.215 et seq.
\item \textsuperscript{1384} De Gouttes 2001, p.6 et seq.
\item \textsuperscript{1385} Derieux 1992, p.81 et seq.; De Gouttes 2001, p.6 et seq.
\item \textsuperscript{1386} De Gouttes 2001, p.6 et seq.
\item \textsuperscript{1387} Droin 2009, pp.313-314.
\end{itemize}
Since the Gayssot Act of 13 July 1990, the French legislator has adopted several other texts recognizing the existence of historical events, notably the Act of 29 January 2001 ‘tendant à la reconnaissance du génocide arménien de 1915’,1388 the Act of 21 May 2001 ‘tendant à la reconnaissance de la traite et de l’esclavage en tant que crime contre l’humanité’1389 and the Act of 23 February 2005 ‘portant reconnaissance de la Nation et contribution nationale en faveur des Français rapatriés’.1390 On 18 October 2011, a draft act ‘portant transposition du droit communautaire sur la lutte contre le racisme et réprimant la contestation de l’existence du génocide arménien’ was deposited on the initiative of Valerie Boyer, representative of UMP in the National Assembly.1391 Article 1 of the Act sought – after an amendment1392 – the insertion of a new Article 24ter into the 1881 Press Act that provided ‘les peines prévues à l’article 24bis sont applicables à ceux qui ont contesté ou minimisé de façon outrancière, par un des moyens énoncés à l’article 23, l’existence d’un ou plusieurs crimes de génocide défini à l’article 211-1 du code pénal et reconnus comme tels par la loi française’.1393 The element ‘de façon outrancière’ was to ensure that scientific historical works would fall outside its scope.1394

After the text had been adopted by the National Assembly1395 and the Senate1396, the draft Act was submitted to the Constitutional Council. Contrarily,

1388 La loi n° 2001-70 du 29 janvier 2001 relative à la reconnaissance du génocide arménien de 1915.
1391 Proposition de loi n°3842 ‘portant transposition du droit communautaire sur la lutte contre le racisme et réprimant la contestation de l’existence du génocide arménien’, déposée le 18 octobre 2011.
1392 Proposition de loi n°4035 ‘visant à réprimer la contestation de l’existence des génocides reconnus par la loi’, déposée le 7 décembre 2011.
1393 Article 211-1 reads ‘Constitue un génocide le fait, en exécution d’un plan concerté tendant à la destruction totale ou partielle d’un groupe national, ethnique, racial ou religieux, ou d’un groupe déterminé à partir de tout autre critère arbitraire, de commettre ou de faire commettre, à l’encontre de membres de ce groupe, l’un des actes suivants : atteinte volontaire à la vie ; atteinte grave à l’intégrité physique ou psychique ; soumission à des conditions d’existence de nature à entraîner la destruction totale ou partielle du groupe ; mesures visant à entraver les naissances ; transfert forcé d’enfants.’
1394 Rapport n°4035 fait au nom de la commission des lois constitutionnelles sur la proposition de loi n°3842 ‘portant transposition du droit communautaire sur la lutte contre le racisme et réprimant la contestation de l’existence du génocide arménien’, Assemblée Nationale, 7 décembre 2011.
1395 Proposition de loi ‘visant à réprimer la contestation de l’existence des génocides reconnus par la loi’, texte adopté n°813, Assemblée Nationale, 22 décembre 2011.
1396 Proposition de loi ‘visant à réprimer la contestation de l’existence des génocides reconnus par la loi’, texte définitif n°52, Sénat, 23 janvier 2012 ; Rapport n°269 fait au nom
in its decision of 28 February 2012 the Council declared the Article to be unconstitutional, considering that ‘une disposition législative ayant pour objet de « reconnaître » un crime de génocide ne saurait, en elle-même, être revêtue de la portée normative qui s’attache à la loi ; que, toutefois, l’article 1er de la loi déléguée réprime la contestation ou la minimisation de l’existence d’un ou plusieurs crimes de génocide « reconnus comme tels par la loi française » ; qu’en réprimant ainsi la contestation de l’existence et de la qualification juridique de crimes qu’il aurait lui-même reconnus et qualifiés comme tels, le législateur a porté une atteinte inconstitutionnelle à l’exercice de la liberté d’expression et de communication ; que, dès lors, et sans qu’il soit besoin d’examiner les autres griefs, l’article 1er de la loi déléguée doit être déclaré contraire à la Constitution’, \(^{1397}\) The unconstitutionality of the proposed article was thus due to the requirement that the French legislator must have recognized in French law the existence of the genocide in order for its denial to be punishable. It is exactly this requirement, which discards the proposed article from Article 24bis that takes the authority – or reality – of the legal judgments by the Nuremberg tribunal as a starting point. The decision does is not surprising, when placed in the context of the intense debate caused by the development of laws qualifying historical events.\(^{1398}\)

It was the adoption of the Act of 23 February 2005, in which the French legislator declares in Article 4-2: ‘Les programmes scolaires reconnaissent en particulier le rôle positif de la présence française outre-mer, notamment en Afrique du Nord, et accordent à l’histoire et aux sacrifices des combattants de l’armée française issus de ces territoires la place éminente à laquelle ils ont droit.’, that evoked a national debate concerning the ensemble of laws, from then on designated as ‘lois mémorielles’. In 2006, Mathieu published a petition signed by sixty other legal scholars imputing memorial laws, comprising the Gaysssot Act, of being unconstitutional (para.9.4 supra).\(^{1399}\) In 2008, a parliamentary commission issued a report, in which it fundamentally reflected ‘sur les questions mémorielles’.\(^{1400}\)

The concern for reassurance and reconciliation of the French Republic with its past meant that the Commission did not to challenge the existing ‘memorial laws’, notably the aforementioned Acts of 13 July 1990; 29 January

\(^{1397}\) Cons. Con. 28 February 2012, n’2012-647 DC concerning ‘loi visant à réprimer la contestation de l’existence des génocides reconnus par la loi’, Sénat, 18 janvier 2012.

\(^{1398}\) For a clear synthesis of the debate on the criminalization of the denial of the existence of genocides see: Pénalisation de la négation des génocides: pour ou contre?, Actes de colloque, Légipresse n° 293 April 2012, p. 227-242.


2001; 21 May 2001; and 23 February 2005. However, according to the commission the National Assembly must renounce the creation of further laws that appreciate or qualify history. In the vision of the Commission, it is not within the competences of political majorities to give an appreciation of facts of the past. And the multiplication of laws that qualify history increases the risk of bringing into play the responsibility of historians and the creation of délits d’opinion. It considered ‘que le rôle du Parlement n’est pas d’adopter des lois qualifiant ou portant une appréciation sur des faits historiques, a fortiori lorsque celles-ci s’accompagnent de sanctions pénales. Mais le Parlement est dans son rôle quand il édicte des normes ou des limitations destinées à défendre des principes affirmés par le Préambule de la Constitution notamment pour lutter contre le racisme et la xénophobie.’

The Commission recalled, in defence of freedom of expression, that the 1881 Press Act already permits the sanctioning of expression that questions History for racist purposes on the ground of the offence of racial provocation pursuant to Article 24-8. The Commission thought the use of this offence preferable in order to sanction the most severe expression. It cited Mallet-Poujol, who advised ‘L’arsenal juridique existe, servons-nous en, quitte à le retravailler. Pour les propos les plus graves, utilisons l’arsenal pénal, les dispositions relatives à la provocation à la discrimination et à la haine raciale. Pour les propos les plus stupides, la bêtise relevant moins de la poursuite pénale que de la poursuite civile, utilisons l’arsenal civil sur le droit de la responsabilité, avec un débat intellectuel sur la fausseté des allégations.’

With regard to the Gaysot Act Mallet-Poujol declared: ‘A mon sens, la loi « Gaysot » de 1990, à laquelle j’adhère sentimentalement, procède d’un grand malentendu en raison de sa formulation et de son manque de lisibilité par rapport aux loigques d’incrimination du droit de la presse, notamment par rapport à l’incrimination de la provocation : les dispositions de l’article 24bis auraient pu figurer à l’article 24 sur les provocations et apologies de crime. (...) Le négationnisme est un déni, c’est donc une provocation ; cette assimilation est systématiquement faite par le juge, européen ou français, ainsi que par la doctrine. Mais le législateur, et c’est pourquoi je parais de malentendu, n’a pas clairement fait ce parallèle avec la provocation : la loi « Gaysot » a dépassé une sorte de ligne blanche, d’où le malaise des juristes et des historiens ; l’incrimination, peu lisible, ne met pas en valeur la faute et le préjudice, et donne l’impression de recréer un délité d’opinion.’

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1401 Rapport d’information n°1262, p.93 et seq.
1402 Rapport d’information n°1262, p.98.
1403 Rapport d’information n°1262, p.95.
1404 Rapport d’information n°1262, p.95 ; p.402.
1405 Rapport d’information n°1262, p.402. See also: Mallet-Poujol, N., La loi de pénalisation du négationnisme : la censure constitutionnelle ou le crépuscule des lois mémorielles, Légipresse n° 293 April 2012, p. 219-226.
The commission also recalled that the 1958 Constitution and the case law of the Constitutional Council requires that the National Assembly must respect the normative character of the law and implies that laws of a mere declarative nature are unconstitutional. According to the commission, the National Assembly, instead of creating new ‘memorial laws’, could take recourse to the new possibility created by the Constitutional reform of 2008 to vote resolutions on matters it regards to be important, such as historical events. It stated: ‘le vote des résolutions prévues par l’article 34-1 nouveau de la Constitution devrait donner au Parlement un meilleur outil d’expression sur l’histoire lorsqu’il souhaite reconnaître des événements significatifs pour l’affirmation des valeurs de la citoyenneté républicaine.’

9.8 Conclusion

In French legal doctrine, the criminalization of the denial of crimes against humanity in Article 24bis is highly controversial. It is notably due to the reference in the Article to the Statute of the Nuremberg tribunal and the focus on the authority of its legal judgments, or the reality of the Holocaust as established

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1406 It results from Article 34 of the 1958 Constitution, which determines the fields of competence of the National Assembly, that the Constitution does not permit the National Assembly to qualify historical facts. See: Rapport d’information n°1262, p.37. What is more, in a decision in 2004 (Cons. Con. 29 July 2004, n° 2004-500 DC), the Constitutional Council considered that it results from Article 6 of the 1789 Declaration, according to which ‘la loi est la volonté générale’, the law has the vocation to create rules and therefore must have a normative character. See: Rapport d’information n°1262, p.97. For these reasons, the so-called memorial laws can be regarded as unconstitutional.

1407 Before the constitutional reform of 2008, the vote of such resolutions was however not possible. The report regards the multiplication of memorial laws as a consequence of the limitations that the case law of the Constitutional Council has imposed on the power of the National Assembly. It results from two decisions of 1959 of the Constitutional Council (Cons. Con. 17 June 1959, n°59-2 DC and Cons. Con. 24 June 1959, n°59-3 DC) that the National Assembly is not allowed to adopt declarations in which it takes political stand on matters it regards to be important, such as historical events, by means of the vote of resolutions. In previous French Republics, the vote of resolutions that held the French Government responsible had been a common practice by parliamentarians, which contributed to the Republic’s political instability. Deprived of an important means of democratic expression on matters it thought to be of general interest, the National Assembly has compensated this restriction by the vote of laws that are rather of a symbolic than of a normative nature. See: Rapport d’information n°1262, p.23 et seq.

1408 Article 34-1 reads: ‘Les assemblées peuvent voter des résolutions dans les conditions fixées par la loi organique. Sont irrecevables et ne peuvent être inscrites à l’ordre du jour les propositions de résolution dont le Gouvernement estime que leur adoption ou leur rejet serait de nature à mettre en cause sa responsabilité ou qu’elles contiennent des injonctions à son égard.’

356
by its judges, that many legal scholars judge the offence as a délit d’opinion by appearances. However, the statutory elements of the offence can be said to be insufficient to do justice to the actual rationale and purport of the offence as it can be derived from its drafting history, the national and international case law and French legal literature; the denial of the Holocaust does not form an opinion, but the affirmation concerning facts of the history of the Second World War that have a profound racist, anti-Semitic and political aim and violate the rights of others and the public order and for this reason are dangerous for democracy and incompatible with the values of the French Republic, such as human dignity. Although the offence is generally understood in French legal doctrine to exclude a mere opinion from the scope of freedom of expression in accordance with Article 17 ECtHR and is on this account severely criticized, this thesis is contradicted by some legal scholars that understand the offence to be rather the outcome of a conciliation between freedom of expression and the rights of others and the public order. These legal scholars have suggested the modification of Article 24bis in order to better bring out its common characteristics with the offences of racial defamation and racial provocation.

From this perspective, the offence of denial of crimes against humanity must be distinguished from existing ‘memorial laws’ in senso strictu. Such memorial laws are unconstitutional, because they constitute declarations and appreciations concerning historical facts by the French legislator itself and lack a normative character. The criminalization of the denial of the existence of genocides as defined and qualified by French law is therefore also unconstitutional. Because of its specific nature, the question as to the unconstitutionality of the offence of denial of crimes against humanity in accordance with Article 24bis is not an open-and-shut case. One has to wait for the initiation of a test case in order to seize the Constitutional Council with a QPC on the matter.
III FRATERNITÉ: A SHARED ROLE OF THE STATE AND ASSOCIATIONS IN THE FIGHT AGAINST RACISM AND DISCRIMINATION

‘Il est important d’encourager toutes les associations qui tendent à resserrer les liens de fraternité entre les individus vivant dans une même société. (…) Oui, dans notre lutte antiraciste les associations sont nos alliés naturels.’

‘Cela [le droit d’action pour les associations antiracistes – EHI] permettra à des hommes, qui ne se rendent pas toujours exactement compte du sort qui leur est fait … d’être défendus, même lorsqu’ils ne connaissent pas l’étendue de leurs droits dans notre pays de liberté et d’égalité des citoyens par des associations qui, partageant ces responsabilités avec nous, avec le Gouvernement, avec le Parlement, sachant rendre leurs droits à chacun de ces hommes, nos égaux.’

French National Assembly, parliamentary debate of 7 June 1972 concerning the fight against racism

10. The engagement of public prosecutions

In France, the public prosecution of the hate speech bans can be set in motion by three different parties: the public prosecution (10.1); the affected party (10.2); and anti-racism associations – under certain conditions (10.3). The shared role of the State and associations in the prosecution of the hate speech bans contributes to their effective enforcement (10.4) and forms an integral part of the Government’s national policy on the fight against racism and discrimination (10.5). The analysis results in a general conclusion about the enforcement of the hate speech bans in France (10.6).

10.1 The public prosecutor

According to general French criminal procedure, the public prosecutor has certain discretionary power in determining whether or not to prosecute. ‘Le principe de l’opportunité’, established in Article 40-1 CPP, equally applies in French press law and is adopted in Article 47 of the 1881 Press Act, which provides that the prosecution of the press offences of the 1881 Press Act takes place ex officio and at the request of the public prosecutor. However, Article 48 of the 1881 Press Act immediately sets out the limitations to this principle. It provides for a limited number of press offences, comprising in Article 48-6 the offences of defamation and insult of individuals, that the public prosecution is dependent on a prior to a complaint by the victim. In this case, the competence of the public prosecutor to engage a public prosecution is subordinate to a request thereto by the person targeted by the expression. The 1881 Press Act thus confers an essential role on the victim in the engagement of public prosecutions of certain press offences. In fact, the French legislator has desired that the plaintiff remains ‘juge de opportunité du débat’, because of the impact that media trials can have and the echo they can give to the expression.1411 This does however not signify that the public prosecutor is obliged to give effect to the complaint; the public prosecutor preserves the opportunity to prosecute. The principle of opportunity often leads public prosecutors to remain inactive in the prosecution of insults and defamations against individuals and prefers to leave the initiative to the plaintiffs to engage a prosecution, if they consider the damages caused to be sufficiently grave (para.10.2-10.3 infra).1412 The victim of a violation of a press offence does, however, have the right to question the decision of the public prosecutor not to prosecute before his superior, the prosecutor-general, who can instruct the district prosecutor to proceed with the prosecution.1413

With regard to the French hate speech bans, a different regime applies. In this field the public order is concerned to such an extent that the engagement of the public prosecution on the initiative of the public prosecutor has been admitted since the 1939 Decree-law ‘Marchandieu’. Article 48-6 provides that the public prosecutor can engage the public prosecution in relation to the offences of defamation and insult against a group on the ground of their origin, ethnic background, nation, race or religion – and the offences of defamation and insult against a group on the ground of their sex or sexual orientation – ex officio, without the need for a prior complaint from the victim. This applies equally to racial defamation and insult committed against a person considered

1413 Article 40-3 CPP.
individually, if he or she has given his or her consent thereto. Public prosecutors are inclined to prosecute racial insult and defamation on their own initiative.\textsuperscript{1414} This policy is in line with the general guidelines for criminal policy, which aim at intensifying public action against racism and discrimination, issued by the Ministry for Justice (para.10.5 \textit{infra}). Likewise, as a result of the combination of articles 47 and 48 of the 1881 Press Act, the public prosecutor can freely engage public prosecutions of the press offences that are not mentioned in these articles, comprising the offence of denial of crimes against humanity and the offence of racial provocation.

10.2 The affected party

It results from general French criminal procedure that any person who has personally suffered damages directly caused by a violation of a felony or misdemeanour can take legal action for the reparation of damages before the criminal judge, which is also called an ‘action civile’ and for this purpose can set in motion a public prosecution.\textsuperscript{1415} This signifies that the affected party can initiate or ‘trigger’ the public prosecution by deposing a complaint and constitute as a civil party in order to provoke the designation of the investigating judge (‘juge d’instruction’)\textsuperscript{1416} or by directly summoning the offender of an offence before the criminal court (‘citation directe’).\textsuperscript{1417} The affected party can thus deprive the public prosecutor of any power of appreciation and can force the engagement of a public prosecution, even if the public prosecutor has decided not to prosecute. The victim is said to form a

\begin{footnotes}
\footnote{\textsuperscript{1415} Article 1 CCP provides ‘L’action publique pour l’application des peines est mise en mouvement et exercée par les magistrats ou par les fonctionnaires auxquels elle est confiée par la loi. Cette action peut aussi être mise en mouvement par la partie lésée, dans les conditions déterminées par le présent code.’ Article 2 CCP provides ‘L’action civile en réparation du dommage causé par un crime, un délit ou une contravention appartient à tous ceux qui ont personnellement souffert du dommage directement causé par l’infraction.’}
\footnote{\textsuperscript{1416} Articles 85 CCP et seq. Article 85 CCP provides ‘Toute personne qui se prétend lésée par un crime ou un délit peut en portant plainte se constituer partie civile devant le juge d’instruction compétent en application des dispositions des articles 52, 52-1 et 706-42.’}
\footnote{\textsuperscript{1417} Articles 550-566 CCP and 389-392-1 CCP. Article 551 provides ‘La citation est délivrée à la requête du ministère public, de la partie civile, et de toute administration qui y est légalement habilitée. L’huissier doit déférer sans délai à leur réquisition. La citation énonce le fait poursuivi et vise le texte de la loi qui le réprime.’ Article 550 provides ‘Les citations et significations, sauf disposition contraire des lois et règlements, sont faites par exploit d’huissier de justice.’}
\end{footnotes}
‘contre-pouvoir’ against a public prosecutor who remains inactive.\textsuperscript{1418} French legal doctrine underscores the dual nature of the civil action.\textsuperscript{1419} However, the victim remains a civil party to the public prosecution. Unnecessarily, it is stipulated that an affected party can bring a legal action for reparation of damages before the civil judge, separately from a public prosecution.\textsuperscript{1420} Hereunder, I will, however, focus on the civil action before the criminal court.

The 1881 Press Act likewise affords the affected party the possibility to set in motion a public prosecution, but only on the grounds of a limited number of press offences as enumerated in the last paragraph of Article 48, which comprise of the offences of defamation and insult of individuals. That same article 48 furthermore affords the affected party the possibility to set in motion the public prosecution in case of a refusal by a medium to insert a request of reply.\textsuperscript{1421} In these cases, by derogation of Article 47, the affected party can set in motion the public prosecution of a press offence and deprive the public prosecutor of any power of appreciation.\textsuperscript{1422} In other words, in these cases, the affected party can force the engagement of a public prosecution of a press offence, even if the public prosecutor has decided not to prosecute. Apart from the situations enumerated in Article 48, the affected party has no such right; public prosecutions of press offences are engaged \textit{ex officio} and are exclusively reserved for the initiative of the public prosecutor.

This, however, does not prevent the possibility for the affected party – in relation to all press offences – to constitute as a civil party by means of an intervention by joining his or her civil action to a public prosecution engaged by the public prosecution. The affected party can constitute as a civil party on any moment during the investigation and even during the court hearing.\textsuperscript{1423}

\textsuperscript{1419} Ibid.
\textsuperscript{1420} Article 4-2 CCP. With regard to the press offences, the victim has generally the choice to bring his civil action before the penal or civil judge, except for the situations provided for in Article 46 of the 1881 Press Act concerning certain determined persons protected in Articles 30 and 31 (ministers, representatives, public officials) who can bring defamation cases only before the penal judge.
\textsuperscript{1421} Article 13 of the 1881 Press Act.
\textsuperscript{1422} Beignier, De lamy & Dreyer 2009, p.590.
\textsuperscript{1423} Article 87, respectively 418 CCP.
10.3 Associations

10.3.1 Qualification: legal entitlement and an interest to act

Pursuant to articles 5 to 6 of the Act of 1 July 1901 ‘relative au contrat d’associations’, every association can act legitimately in court on the condition that they have been regularly declared.\textsuperscript{1424} The defence in court presupposes a qualification – that is a legal title – and an interest to act.\textsuperscript{1425} As, according to general French criminal procedure, any person who has personally suffered damages directly caused by a violation of a criminal offence can initiate an ‘action civile’ and for this purpose set in motion a public prosecution; this equally applies to groupings with legal personality. Hence, associations and other legal entities that are the victim of a racial defamation, insult or provocation can take legal action in order to request damages by invoking a direct and personal interest. An example of this can be found in a previously discussed case, in which the religious movement of the Jehovah witnesses could take legal action on the ground of the offence of religious defamation with regard to expression that equated the movement with an ‘association de malfaiteurs’ (para.4.3.2 \textit{supra}).\textsuperscript{1426} This reasoning was similarly applied in another case, which involved the imputation that the religious movement constituted ‘un mouvement totalitaire destructeur’.\textsuperscript{1427}

As a result of the general French law and established case law, associations cannot take legal action in defence of collective interests of which they have taken charge, if French law does not explicitly afford such a right. In 1954, the French Supreme Court ruled that ‘les associations ne tiennent d aucune loi le droit de poursuivre des diffamations ou des injures qui ne les atteignent pas personnellement et qui ne peuvent être poursuivies que sur la plainte de ceux qui en ont été directement victimes.’\textsuperscript{1428} Nevertheless, French law has increasingly afforded the right to associations to take legal action in order to

\textsuperscript{1424} Loi du 1 Juillet 1901 relative au contrat d’associations, JORF du 2 juillet 1901, p. 4025. Article 5 provides ‘Toute association qui voudra obtenir la capacité juridique prévue par l’article 6 devra être rendue publique par les soins de ses fondateurs. (…)’. Article 6 provides ‘Toute association régulièrement déclarée, sans aucune autorisation spéciale, ester en justice (…)’.

\textsuperscript{1425} Mallet-Poujol, N., L’action judiciaire des associations en droit des médias, Légipresse n°193, July/August 2002, p.95.


\textsuperscript{1427} French Supreme Court, civ.ch. II, 14 March 2002, n°99-19239, Bull. 2002 II, n°41, p.43.

defend collective interests in certain fields. This equally applies to the field of press law, which is seriously mobilized by associations that frequently take the initiative to start proceedings. For a large part, these legal actions concern images or messages that hurt certain convictions and religious or moral sensibilities.

The right of legal action for associations is highly criticized as part of French legal doctrine. Guinard denounces the ‘activisme moralisateur’ by associations, because ‘vouloir transformer en vérité officielle une morale qui n’est peut-être pas partagée par tout le monde, le risque est réel de faire de notre société une société soumise à certaines formes d’intégrisme, de nous conduire à un État ou les conduites individuelles ne seraient plus déterminées par des règles fixées par la représentation nationale, mais par des corps intermédiaires, aux intérêts certes louables, mais qui s’articulent mal avec la notion d’intérêt général’. What is more, the system of affording associations a qualification to act in court has been characterized as a ‘véritable démembrement de la notion d’intérêt général, sous couvert d’un intérêt collectif, transformant lesdites associations, ainsi habilitées, en véritables auxiliaires du Parquet, en sentinelles avancées de celui-ci’. According to Beignier, the civil actions of associations are not aimed at reparation of damages, instead their goal is merely to set in motion the public prosecution in order to get a criminal condemnation and civil reparation is reduced to a symbolic aspect. The civil action is not accessory to the public action, but an action that prepares the public action. In other words ‘l’action civile associative n’a pour finalité que de supprimer l’opportunité des poursuites du Ministère public dans un certain nombre de cas’. Furthermore, Beignier analyzes how the favor of the law towards the civil action of associations had soon been translated into ‘l’incrimination de délits envers des collectivités susceptible d’être blessées dans leur honneur’.

In order to prevent the existence of true censorship exercised by associations, the 1881 Press Act, however, limits the right of legal action for associations in several respects. The associations can only take legal action in the cases provided by the 1881 Press Act and their statutes; Articles 48-1 to 48-6 limitatively enumerate the associations that 1) according to their statutes defend a determined interest and 2) are regularly declared at least five years before the occurrence of the facts, that is the publication of the expression, that can take legal action on the ground of 3) determined press offences. For example, in 2011,

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1433 Beignier 1995, p.257.
1434 Beignier 1995, p.249.
the French Minister for Internal Affairs, Brice Hortefeux, remained unpunished in a case set in motion by an anti-racism association on the ground of racial insult with regard to his statement concerning Arabs ‘Quand il y en a un ça va. C’est quand il y a beaucoup qu’il y a des problèmes’. Although the event had secretly been filmed and placed on the Internet, it had taken place during an annual youth gathering of the political party UMP. Therefore, the facts had to be requalified as a non-public racial insult (Article 624-4 of the French Criminal Code), with regard to which, the association had no capacity to act.\textsuperscript{1435}

It was the Pleven Act of 1972 that inserted into Article 48-1 of the 1881 Press Act the right for associations, which according to their statutes fight against racism or assist victims of discrimination based on their origin, nation, ethnic background, race or religion to exercise the rights afforded to the civil affected party in case of a violation of the offences of racial defamation, insult and provocation (para.3.3.4 \textit{supra}). By derogation of Articles 47 and 48, these associations can, even though they cannot invoke any personal and direct damages, set in motion public prosecutions and constitute as a civil party. The statutory qualification to represent a collective interest exempts an association from the burden of proving the existence of direct damages, i.e. to have personally suffered from the facts. The courts have had some difficulty in admitting this competence. In a decision of 1 December 1981, the French Supreme Court had to recall ‘que les associations détiennent de par la loi le pouvoir d’exercer les droits reconnus à la partie civile pour mettre en movement l’action publique, sans autre condition.’\textsuperscript{1436} The Act of 30 December 2004 extended this right to the discriminatory grounds of sex, sexual orientation and handicap in Articles 48-4 until 48-6 in the 1881 Press Act (para.7.2 \textit{supra}). The Gayssot Act of 13 July 1990 inserted this right into Article 48-2 with regard to the offence of denial of crimes against humanity for associations, which according to their statutes defend the moral interests and honour of the Resistance and the deportees (para.8.2.4 \textit{supra}).

If racial defamations, insults and provocations target a group as a whole, the legal action of an association is admissible without prior consent. For example, the French Supreme Court has considered that the public prosecution on the ground of racial provocation ‘ne peut être mise en mouvement que par le ministère public, sans d’ailleurs qu’une plainte préalable soit nécessaire, ou par l’une des associations habilitées.’\textsuperscript{1437} If such expression targets an individual person, the association must obtain his or her prior consent in order for the

\begin{footnotesize}
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\item \textsuperscript{1435} Paris Court of Appeal 15 September 2011, \textit{Légipresse} n° 287 October 2011, 287-21, p. 531-532.
\item \textsuperscript{1436} French Supreme Court, crim.ch., 1 December 1981, n°80-92810, \textit{Bull. Crim.} 1981, n°317. NB. The case concerned a civil action of the association MRAP on the ground of Articles 187-1 and 416 CP.
\item \textsuperscript{1437} French Supreme Court, crim.ch., 3 March 1980, n°78-91949, \textit{Bull. Crim.} 1980, n°74.
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association to be admissible in its legal action. This requirement is strictly interpreted. An example can be seen in a previously discussed case, in which AGRIF could take legal action on the ground of the offence of religious defamation with regard to expression that associated the Carmel of Auschwitz with Nazi practices without the consent of the victim(s), because the expression targeted ‘non seulement la congrégation religieuse d’Auschwitz, à la supposer dotée de la personnalité morale, mais encore le groupe de personnes physiques membres de ladite congrégation [...] ainsi que l’ensemble des religieux susceptibles d’être associés à ce comportement.’ (para.4.3.2 supra)\footnote{French Supreme Court, crim.ch., 7 December 1993, n°90-87508, \textit{Bull. Crim.} 1993 n°373, p.472.}

Other than anti-racism associations, persons who are individually targeted by racial defamations, insults or provocations cannot set in motion public prosecutions, but can merely constitute as a civil party by means of an intervention.\footnote{Beignier, De Lamy, Dreyer 2009, p.593.} For example, the French Supreme Court considered that the annulment of a prosecution on the ground of racial provocation exercised based on the complaint of a victim did not violate article 6 ECHR and determined that the special rules of articles 47 and 48 do not deprive the affected party of intervening in the public prosecution engaged by the public prosecutor or engage a civil action separately from the public action.\footnote{French Supreme Court, crim.ch., 5 March 2002, n°01-83777, \textit{Bull. Crim.} 2002 n°55, p.166.}

Associations can only set in motion a public prosecution on the ground of the French hate speech bans, if they according to their statutes have the objective of fighting against racism and discrimination. Such an objective must be clearly expressed in the statutes of the association. Hence, in 2002, the French Supreme Court considered that an association that defends the rights of families could not take legal action on the ground of 24-8 with regard to expression alleged to provoke discrimination against families of foreign origin.\footnote{French Supreme Court, crim.ch., 17 December 2002, n°01-85650, \textit{Bull. Crim.} 2002 n°227, p.832.} Likewise, anti-racism associations can only constitute as a civil party in a proceeding concerning the offence of denial of crimes against humanity, if their statutes explicitly provide in the defence of moral interests or honour of the Resistance or the deportees. This is the case for the association LICRA,\footnote{French Supreme Court, crim.ch., 28 September 2004, n°04-80688, \textit{Bull. Crim.} 2004, n°223, p.796.} but not for the association SOS Racisme.\footnote{French Supreme Court, crim.ch., 28 November 2006, n°06-80340, \textit{Bull. Crim.} 2006, n°300, p.1080.}

The French Supreme Court has, however, given a broad interpretation to the notion of an anti-racism association. It was in 1993, in the previously

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\item \footnote{French Supreme Court, crim.ch., 7 December 1993, n°90-87508, \textit{Bull. Crim.} 1993 n°373, p.472.}
\item \footnote{Beignier, De Lamy, Dreyer 2009, p.593.}
\item \footnote{French Supreme Court, crim.ch., 5 March 2002, n°01-83777, \textit{Bull. Crim.} 2002 n°55, p.166.}
\item \footnote{French Supreme Court, crim.ch., 17 December 2002, n°01-85650, \textit{Bull. Crim.} 2002 n°227, p.832.}
\item \footnote{French Supreme Court, crim.ch., 28 September 2004, n°04-80688, \textit{Bull. Crim.} 2004, n°223, p.796.}
\item \footnote{French Supreme Court, crim.ch., 28 November 2006, n°06-80340, \textit{Bull. Crim.} 2006, n°300, p.1080.}
\end{itemize}
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discussed case concerning the caricature of a gonflated Christ in the journal *Fluide glacial* (para. 6.5.1 *supra*), that the French Supreme Court considered that AGRIF could have directly summoned the journal before the court on the ground of the offence of religious provocation, because according to its statutes the association had the intention to fight against racism, more specifically the defence of ‘des valeurs menacées de notre civilisation’ and against ‘le racisme antifrançais et antichrétien’, which constituted a punishable form of racism and because ‘le racisme (...) s’entend de toute discrimination fondée sur l’origine ou l’appartenance ou la non-appartenance soit à une race, soit à une ethnie, soit à une nation, soit à une religion, sans restriction ni exclusion [curs. EHJ].’ For the same reasons, in 1993 the French Supreme Court found the legal actions of AGRIF based on the offence of religious defamation admissible in the previously discussed cases concerning the Carmel of Auschwitz and ‘les églises catholiques de l’Est’ (para. 4.3.2 *supra*).

This case law of the French Supreme Court is criticized for extending the right of legal action of anti-racism associations that fight against racism and discrimination in general, to associations with the limited objective of fighting against racism and discrimination of certain groups. According to Korman, the French Supreme Court has justified an objective of an association that is in itself discriminatory of Frenchmen, as the aim of AGRIF is to protect ‘les Français Chrétiens’. Korman argues that although every particular group has the right to be protected as a group an association that *a priori* aims to fight racism cannot limit this objective to one single group.

AGRIF forms a group of persons that was constituted in 1974 under the name ‘Centre national de coordination des comités d’action politique et sociale’. Its original statutes did not originally comprise the fight against racism in its objectives. This objective was added in 1984 when it was transformed under its new name. For this reason, in 1986, the French Supreme Court confirmed the inadmissibility of AGRIF in its complaint grounded on the offence of racial provocation. According to the French Supreme Court, AGRIF was admissible in its fight against racism five years from the date on which the social objective defined by its statutes was modified, not from the moment it was declared; the objective to ‘défendre les valeurs menacées de notre civilisation, combattre les idées subversives et proposer des solutions de renouveau’ did not comply with the aim assigned to Article 48-1. In the *Fluide glacial* case in 1993, the French

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Supreme Court found AGRIF admissible, not only because the objective to fight against racism had been added to its statutes five years before the occurrence of the facts, but also because Article 48-1 does not require that an association has ‘l’unicité d’objet’, one single objective.\textsuperscript{1449}

Given the favor of the law towards the civil action of associations, the question arises as to whether the fear expressed by the legislator of 1972 has become a reality: have anti-racism associations become too powerful in initiating proceedings, because they, being specialized in their personal anti-racism campaigns, have lost sight of the general interest in the fight against racism? In the case of AGRIF, I would tend to answer this question in the affirmative. The association was, without exception, at the origin of all previously discussed cases concerning the ridiculing of the Catholic faith and at every turn its demands were denied (para.4.5.3 and 6.5.1 \textit{supra}). The interest of freedom of expression seems to call for a de-juridization in this field.

10.3.2 Les Français Chrétiens

There has been a multiplication in the eighties and nineties of actions before the civil judge grounded on 1382 CC or 809 CCP against images or messages that hurt certain convictions and religious or moral sensibilities instituted by associations that defend religious interests (para.5.4.1 \textit{supra}). The cases are not only criticized for introducing into French law a civil prohibition of blasphemy, but also for creating the right for religious associations to defend their religion and dogmas in court, while the French legislator has not explicitly afforded such legal entitlement.\textsuperscript{1450}

In the \textit{Ave Maria} case, the tribunal declared the association Saint Pie X admissible in its action, ‘dès lors qu’elle entendait défendre par ses statuts, les principes et dogmes constituant la religion et la morale catholique, et invoquer pour ce faire un intérêt moral tenu pour légitime par les règles de la vie sociale française’.\textsuperscript{1451} Such was confirmed in appeal.\textsuperscript{1452} In this case, the French civil judge did not only reintroduce a prohibition of blasphemy into French law, but also afforded associations that aim to protect religious principles and dogmas against criticism that might hurt religious feelings the right to act in the interests of religious adherents before the judge, while this is reserved for the exclusive competence of the French legislator, who has not created any provision affording such a specific legal capacity.\textsuperscript{1453}

\textsuperscript{1450} Droin 2009, pp.439-440.
\textsuperscript{1452} CA Paris, 26 October 1984, \textit{JCP} 1985 II 20452, annotation Th. Hassler.
\textsuperscript{1453} In the same sense: Droin 2009, p.439.

368
In the VSD case, the tribunal found a complaint made by AGRIF admissible because of ‘l’atteinte aux sentiments religieux que partagent ses membres et qu’elle s’est donnée pour objectif de protéger’. The Court of Appeal repeated the considerations from the Ave Maria case: ‘les associations sont recevables à agir dès lors que, par les statuts ou par leur titre personnel fondé sur une croyance individuelle propre, elles agissent pour défendre par les voies de droit les principes et dogmes de la religion et invoquent un intérêt moral légitime sans que pour autant les tribunaux aient à arbitrer entre les différentes conceptions que peuvent avoir les croyants quant aux exigences de leur foi’. \textsuperscript{1454}

The Court thus, however, admitted that the objective of AGRIF that pretends to defend all Catholics against the offence of their religion and dogmas is not that general and decided on the merits that the expression constituted an offence of the religious feelings of ‘certain Catholics’. \textsuperscript{1455}

In the je vous salue Marie case, the tribunal called the action of AGRIF ‘au nom d’un intérêt collectif très vivement contesté’. \textsuperscript{1456} In the case of La dernière tentation du Christ, the jurisdictions gave judgments without the question of admissibility even being raised. \textsuperscript{1457} In both cases, the demands of the associations were finally rejected on the merits of the case.

In 2000, the French Supreme Court annulled the decision of the Court of Appeal that had declared AGRIF inadmissible in its action, which aimed at the prohibition of the sale of the book entitled INRI depicting on its cover a crucified naked woman, because the expression did not violate any collective interest of the association. Contrarily, according to the Supreme Court, ‘il ressort des statuts de l’association que’elle avait un intérêt légitime à agir contre une publication qui, selon elle, porte atteinte aux sentiments religieux de ses membres, qu’elle s’est donné pour objet de protéger’. \textsuperscript{1458}

In all of these cases, the courts, with regard to the question of the admissibility of the religious associations, admitted certain actions grounded on the argument of their statutory objective and thus their speciality, but at the same time leaned on the idea of a violation of the interests of their members and thus of their representativeness and function of defence. According to Mallet-Poujol, the decisions are therefore torn between two ideas. However, the diffusion of ‘indecent’ images or messages will not shock ‘la Moralité’ with a big M, without shocking the spectators. In press law, the interest of individual

\textsuperscript{1455} Droin 2009, p.440.
members is therefore rarely indissociable from the collectif interest that can be regarded as the sum of the interests of individual members.

Beignier criticizes the actions of religious associations in order to protect their religion, dogmas and religious feelings: ‘toutes ces actions, qu’il s’agisse de préserver la foi chrétienne ou la foi islamique, ont été intentées par des personnes minoritaires dans leur confession, souvent animées de convictions intégristes’ en totale opposition avec les valeurs unanimement respectées en France. Cela est tout particulièrement vrai pour les catholiques, certains prêtres ayant été en justice étant à l’époque suspens a divinis, et depuis peut-être excommuniés. Likewise, Fourest and Venner analyze how the legal actions of associations of different kinds of religions have put ‘la laïcité à l’épreuve des intégrismes juif, chrétien et musulman’. Boulègue describes in detail how early cases were initiated by extreme right winged, conservative Catholic associations and supported by the Episcopat and how Islamic associations have followed their tracks of activism. What is more, the religious associations found the support of ‘islamo-gauchistes’; the actions are evident of a certain convergence and solidarity between religious conservatives.

10.4 Effective enforcement

By placing the action of anti-racism associations at the core of the mechanism that sets in motion the public prosecution, the French legislator has placed the associations on seemingly equal footing with the public prosecutor. An association that sets in motion a public prosecution by a complaint and constitution as a civil party in order to provoke the designation of the investigating judge or by directly summoning the offender of a press offence before the court produces the ‘initial act’ of the prosecution. Like the public prosecutor in his Introductory Submission or summons, it must therefore comply with the strict procedural rules of the 1881 Press Act and use the correct legal definition of the acts, i.e. the exact qualification of the criminal act and the applicable article, under penalty of nullity (para.1.3.1 supra). In the case of a complaint, after its consignation, the complaint of the association and the Introductory Submission of the public prosecutor form an indivisible whole; they can neutralize each others insufficiencies and irregularities and the appreciation of the validity of the prosecution is exercised in a global manner on the basis of these two acts. In case of a direct citation before the court, the

1463 Beignier, De Lamy & Dreyer 2009, p.603.
association must notify the public prosecutor of the prosecution, in order to associate him to the prosecution as a joined party.\textsuperscript{1464}

An association that sets in motion a public prosecution thus has a relatively strong position as a civil party to the public prosecution; it chooses and indicates which exact passages within a publication are prosecuted and the exact press offence as the legal basis. This implies that an association, in its civil action before the criminal court, may or even must give an appreciation as to the constitution of the press offence and thus the punishability of the expression; a qualification supposes an argumentation. Contrarily, as an association remains a civil party, it cannot give an opinion as to the imposition of a penalty, but can only request for damages. It equally results that an association can appeal the decision of the court to reject the requested damages up until the French Supreme Court.

On the basis of empirical research, Secondi-Nix describes how anti-racism associations, by initiating public prosecutions, have contributed to the evolution of case law.\textsuperscript{1465} According to Secondi-Nix, by their legal actions, the associations have played a determinant role in the evolution of the definition of the notion of a group. While in early decisions the courts used a quantitative criterion for the notion of a group, they have replaced this quantitative criterion by qualitative criteria, by accepting the arguments elaborated by the associations. In a decision of 3 December 1991, the French Supreme Court adopted the arguments by LICRA that the publication of an article entitled ‘Les Juifs qui en font trop’ in the extreme right magazine \textit{Le choc du mois} did not only intend to criticize certain Jews that exploit the Jewish martyrdom, but the Jewish community as a whole and considered ‘l’auteur étend à la collectivité juive dans son ensemble les griefs énoncés dans le texte, formulés auparavant à l’égard de certaines personnes prises individuellement.’\textsuperscript{1466} The Court therefore rejected an appeal against the condemnation on the ground of racial defamation.

In the previously discussed decision of 16 July 1992 (para.6.2 \textit{supra}), the French Supreme Court approved the argumentation of LICRA that, although an article reproducing two stickers with the text ‘Rapport Leuchter, fini les chambres à gaz?’ and ‘les coupeurs de verge à la grande vergue’ that imputed the Jewish community to lie about the existence of gas chambers did not explicitly designate the Jewish community, the author, who had found the text on the stickers not to be intolerable or scandalous, he had aimed at the Jewish

\textsuperscript{1466} French Supreme Court, crim.ch., 3 December 1991, n°90-83605, \textit{unpublished}.
community as the principle victim of the Nazi concentration camps. The Court therefore confirmed the condemnation on the ground racial provocation.\textsuperscript{1467}

In the previously discussed decision of 24 June 1997 (para.6.3 supra), the French Supreme Court adopted the arguments by LICRA, i.e. that an election pamphlet making a commitment to fight immigration fiercely, calling for the ‘envahisseurs’ to be driven out immediately and demanding the expulsion of ‘des étrangers irrespectueux et nuisibles’ formed a punishable racial provocation, because immigrants constitute a protected group. The Court, therefore, confirmed the condemnation and considered ‘Qu’en effet, les étrangers résidant en France, lorsqu’ils sont visés \textit{en raison de leur non-appartenance à la nation française}, forment un groupe de personnes au sens de l’article 24 alinéa 6 de la loi du 29 juillet 1881’.\textsuperscript{1468} [curs. EHJ]

The possibility for associations to set in motion a public prosecution enables associations to bring cases before the court concerning politically delicate subjects that the public prosecutor might be reluctant to prosecute exactly for this reason. In the case concerning the expression of politician Le Pen ‘d’autant que quand je dis qu’avec 25 millions de musulmans chez nous, les français raseront les murs, des gens dans la salle me disent non sans raison: ‘mais monsieur Le Pen, c’est déjà le cas maintenant’, it was the association LDH that had directly cited Le Pen before the correctional tribunal. The French Supreme Court finally rejected the appeal by Le Pen who argued that he denounced the danger of an augmentation of Muslim immigrants on the ground of their general dominant attitude, not on the ground of their religion and that Islam was not a religion, but a political, sociological or philosophical ideology.\textsuperscript{1469}

In the \textit{Mohammed cartoons} case, it was the association \textit{La société des habitants et des lieux saints de l’Islam} that had directly cited the chief-editor of \textit{Charlie Hebdo} before the court and was joined by several other Muslim associations.\textsuperscript{1470} Contrarily, the associations SOS Racisme and LDH had declared its support of the publication, although the lawyer of the LDH declared that the cartoon depicting Mohammed with a bomb in its turban constituted an insult of Muslims on the ground of their religion.\textsuperscript{1471} According to the public prosecutor, the cartoon merely denounced the use of violence by Islamic terrorists and therefore requested an acquittal.\textsuperscript{1472}

\textsuperscript{1470} Amongst others the associations \textit{L’Union des organisations islamiques de France} and \textit{la Ligue islamique mondiale}.
\textsuperscript{1471} Boulègue 2010, p.179.
\textsuperscript{1472} Boulègue 2010, p.186.
In fact, all previously discussed cases concerning criticism of Islam, islamization and Muslim-immigration on the ground of religious provocation have been, without exception, initiated by the associations (para.6.5.2 supra). While the French Supreme Court in some of these cases endorsed the vision of the associations that the expression aimed at Muslims as a group on the ground of their religion, in the other cases the French Supreme Court rejected this vision and found that the expression formed free criticism of a religion, its practices and immigration policy. By their legal actions, the associations have thus played a determinent role in the development of the line in case law that demarcates free criticism of a religion that might hurt religious feelings from the disqualification in harsh terms of a determined religious group.

10.5 Government policy

The hypothesis according to which anti-racism associations form a ‘contre-pouvoir’ against the public prosecutor who remains inactive can be attenued by an analysis of the criminal policy of the French Ministry for Justice that is aimed at an effective response to racism, anti-Semitism and discrimination. This policy is twofold. Firstly, it establishes highly specialized officials charged with the enforcement of anti-racism and anti-discrimination laws, which includes amongst others, the magistrates of the judiciary, of the Public Prosecution, and public servants such as police officers. The circular of 11 July 2007 created the ‘pôles antidiscriminations’ within every Tribunal de Grande Instance, which are directed by a referent magistrate of the Public Prosecution, who is charged with taking action in the field of racism and discrimination in close connection with several associations that dispose of relevant knowledge.

Secondly, the policy establishes dense relations between these officials and civil society, amongst others anti-racism and anti-discrimination associations and representatives of religious associations in order to cooperate and consult in the joint fight against racism and discrimination. Several circulars and specific framework conventions provide for such cooperation and

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1473 The associations LDH and MRAP deposed a complaint and constituted as a civil party with regard to the pamphlet ‘Stop l’immigration, la France pour les Français’; LICRA and MRAP deposed a complaint and constituted as a civil party with regard to the expression ‘des hordes musulmans inadmissibles’; MRAP directly cited the person responsible for the expression ‘commerçants extra-européens’ before the court; SOS Racisme initiated the case about the pamphlet concerning the city of Menton; l’Association de solidarité avec les travailleurs immigrés (ASTI) directly cited the person responsible for the tract ‘Non à l’islamisation de Sainte Lazard’ before the court; LICRA directly cited the person responsible for the pamphlet ‘Pas de cathédrale à la Mequée, pas de mosquée à Strasbourg’ before the court; the associations LICRA, SOS Racisme and MRAP all started multiple cases against the pamphlet ‘Non à l’islamisme’.

consultation.1475 On 14 December 2007 the Minister for Justice signed two framework conventions with the associations LICRA and SOS Racisme that were aimed at joint action in the fight against discrimination. According to the preamble of these conventions:

‘Le ministère de la justice, en s’appuyant d’une part sur une législation renforcée dans le domaine et d’autre part sur la mise en place de pôles anti-discriminations au sein des parquets sur l’ensemble du territoire national, comme prévu par la circulaire du 11 juillet 2007, démontre son engagement dans la lutte contre les discriminations et sa volonté d’encourager les victimes à saisir la justice.

La lutte contre les discriminations, pour être efficace, doit s’appuyer sur un partenariat réunissant tous les acteurs institutionnels et associatifs. Dans cette perspective le ministère de la justice et l’association LICRA, décident de conclure la présente convention afin de développer des réseaux, articulés avec les pôles anti-discriminations, chargés de la lutte contre les discriminations fondées sur l’origine, l’appartenance réelle ou supposée, à une ethnie, une nation, une race ou une religion.’1476

Article 1 stipulates the engagements of the associations to, on the one hand, develop an active partnership with the offices of the public prosecution of the Tribunaux de Grande Instance and more specifically with the pôles anti-discriminations by means of a close and regular relation with the referent magistrate charged with the direction of the pôle,1477 and to, on the other hand, educate the staff of the judiciary, judges and clerks, and other professionals susceptible of being in contact with victims of discrimination, such as police officers, in order to create awareness about discriminations.

The circular of 8 January 2009 recalled the necessity for the offices of the public prosecution to firmly respond to facts concerning Islamic or Jewish places of worship or persons on the ground of their religion or origin. In the circular of 5 March 2009, the Minister for Justice requested the Prosecutors-General to extend the competence to all acts committed on the ground of ethnic background, nation, race or religion or sexual orientation, in order to consign the treatment of the complete body of infractions of a racist or xenophobic character to a specialized magistrate – as the specific procedural rules for several infractions demand particular expertise – and to favor the exchanges between the offices of the public prosecution, the associations and the representatives of

1477 In particular, the associations engage amongst others to inform the judiciary about the difficulties victims of discrimination meet when filing complaint and solutions to favor the emergence of complaints by victims of discrimination; to accompany victims in their actions; to participate in the operation of testing; and to keep the offices of the public prosecution up to date about current events and case law in the field of discrimination.
religious communities, seen as essential for a pertinent response to acts of a racist or xenophobe character. The circular of 1 April 2009 recalls the possibility for the public prosecutors to request any association helping victims of discrimination or racism to intervene in order to support them at all stages of the procedure of complaint.

Pursuant to the policy of the Ministry of Justice, an informal collaboration between the Public Prosecutor and the associations has thus increasingly come into existence. Such collaboration dates back to 1989, when for the first time the idea was launched with the Public Prosecution to associate themselves with the actions taken by the associations by presenting them as ‘privileged interlocutors’. Starting from this date, the collective action taken by private groups was regarded as complementary to the actions by the Public Prosecution. Rather than a ‘contre-pouvoir’, the associations are even said to have become a ‘relais-citoyen’, civil assistant, of the Public Prosecution before the repressive jurisdictions.

In the Parisian district – where nine out of ten press cases take place given the high concentration of publishing companies – the office of the public prosecution organizes monthly consultations with anti-racism associations, where MRAP and LICRA are principally represented, in order to discuss the engagement of proceedings. The meetings facilitate the constitution as a civil party by associations in the public actions engaged by the public prosecution; a devious of roles that remains most common and preferred by the associations given the high procedural requirements for, and thus risk of invalidity of, the engagement of prosecutions. The annual reports concerning La lutte contre le racisme, l’antisémitisme et la xénophobie comprise the perspectives and evaluations of the activities of the anti-racism associations LDH, LICRA, MRAP and SOS Racisme. In the report on 2012, LICRA states to have been a civil party in 109 procedures throughout 2012, 61 percent of which concerned the hate speech bans.

The anti-racism associations thus play an important role in the fight against racism by the French government. Therefore, the legal services of the anti-racism associations LICRA, SOS Racisme, MRAP and LDH obtain financial support from the government in the context of the specific framework conventions. For example, on 1 December 2010, LICRA signed a convention with the Minister for Interior Affairs that aimed inter alia to exchange information on hate speech offences committed on the Internet. Since 2012, the partnerships of the French Government with the anti-racism and other civil

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1478 Secondi-Nix 1996, p.70.
1479 Secondi-Nix 1996, p.78.
1480 CNCDH report 2012, p. 394.

375
society associations now form part of the broader National Plan of Action against Racism and Anti-Semitism 2012-2014.\textsuperscript{1481}

10.6 Conclusion

Racism and discrimination affects the public order to such an extent that, pursuant to Articles 47 jo 48 of the 1881 Press Act, the engagement of the public prosecution of the French hate speech bans takes place \textit{ex officio}, i.e. on the initiative of the public prosecutor without the need for a prior complaint by the victim. In addition, Article 48-1 affords anti-racism associations the right to set in motion public prosecutions on the ground of the hate speech bans by deposing a complaint and by constituting as a civil party in order to provoke the designation of the investigating judge or by directly citing the offender of a hate speech ban before the criminal court. The anti-racism associations can thus deprive the public prosecutor of any power of appreciation and can force the engagement of a public prosecution. In addition to anti-racism associations, persons who are individually targeted by racial defamations, insults or provocations cannot set in motion public prosecutions, but can merely constitute as a civil party by means of an intervention.

The 1881 Press Act limits the possibility to take legal action on the ground of the hate speech bans to associations that according to their statutes have the objective of fighting against racism and are regularly declared at least five years before the publication of the expression. The French Supreme Court has, however, given a broad interpretation of the notion of an anti-racism association, comprising associations with the limited objective of fighting against racism and discrimination of certain groups. In the field of press law, associations are very active in the initiation of legal actions that for a large part concern images or messages that hurt certain convictions and religious or moral sensibilities. This moral activism is denounced for protecting collective interests, which is difficult to reconcile with the notion of – the fight against racism in – the general interest, and for being primarily aimed at obtaining criminal condemnations, not reparation of damages.

In the eighties and nineties, the civil judge afforded the right for religious associations to defend their religion and dogmas in court, on the ground of Articles 1382 CC or 809 CCP, while the French legislator has not explicitly afforded such legal entitlement, and has found religious associations admissible as much on the idea of a violation of the collective interests of their members as on their statutory objective. Given the overall favor of the law towards the legal actions of anti-racism associations, the fear of the legislator of

\textsuperscript{1481} Available at: \url{http://www.interieur.gouv.fr/Le-ministere/Organisation/Delegue-Interministeriel-a-la-Lutte-contre-le-Racisme-et-l-Antisemitisme/Plan-national-d-action-contre-le-racisme-et-l-antisemitisme-2012-2014}
1972 that anti-racism associations would become too powerful in initiating proceedings might be justified.

On the other hand, the possibility for associations to bring politically delicate subjects before the judge might be regarded as an advantage. As an association that sets in motion a public prosecution produces the ‘initial act’ in the prosecution, it has a relatively strong position as a civil party to the public prosecution. Subsequently, anti-racism associations, by initiating public prosecutions, have contributed to the evolution of case law concerning the notion of a group, more specifically to the development of the line in case law that demarcates free criticism of a religion that might hurt religious feelings from the disqualification in harsh terms of a determined religious group.

The thesis according to which anti-racism associations form a ‘contre-pouvoir’ against the public prosecutor who remains inactive can be attenued by an analysis of the criminal policy of the French Ministry for Justice aimed at an effective response to racism, anti-Semitism and discrimination. Several circulars and specific framework conventions provide for a dense cooperation and consultation between specialized officials and anti-racism associations and religious associations for a joint fight against racism and discrimination. The associations are regarded as ‘privileged interlocutors’, whose collective actions complement the actions by the Public Prosecution. This practice fits into the vision of the French legislator of 1972, according to which associations must reinforce the fraternity between citizens, form natural allies in the fight against racism and discrimination, and share responsibility with the Government to ensure the freedom and equality of all citizens.