Religious Freedom and Freedom of Expression in France

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Chapter 16

Religious Freedom and Freedom and Freedom of Expression in France.[1]

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There is no particular protection against a religious offence in France[2], even though respect for religious beliefs has its place in the French Constitution. The right to be respected for one's religious beliefs is indeed linked to the freedom of conscience, deriving directly from article 10 of the 1789 French *Declaration of Rights* (*Déclaration des Droits de l'Homme et du Citoyen)*, according to the French Constitutional Council.[3] Respect for religious beliefs is also linked to article 1 of the French Constitution, which defines the French Republic as secular (laïque) and requires that "all beliefs" be respected. Of course, this respect is well guaranteed for protecting freedom of faith in relation to individual and collective freedom of religious expression, but it becomes inexistent if we attempt to

[1] This presentation is the result of a collective national report on *Liberté d'expression et religion*, made for the *Annuaire International de Justice Constitutionelle*, 23 (2007), Paris, 2008, 207-249, written by B. CHELINI-PONT, E. TAWIL and M. PENA, President of the Paul Cézanne University of Aix-Marseilles, France.

[2] For an overview on the question, between 1980 and 2000, see B. BEIGNER, *L'Honneur et le Droit*, Paris, 1995, p. 330-337; E. DERIEUX, *Diffamations, injures et convictions en procès. Etat de la jurisprudence nationale*, *Annuaire Droit et religions* 1(2005), p. 105-126; P. MBONGO, *Le traitement juridictionnel des offenses aux convictions religieuses*, in *Mélanges en l'honneur de Jean-François Lachaume*, Paris, 2007, p. 691-708.

[3] Freedom of conscience derives from France's Declaration of Rights, article 10: "*No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law"*. In a first step, the Constitutional Council seemed to dissociate this freedom from this article, defining the first as a « fundamental principle recognized by the laws of the Republic » (Constitutional Council Decision n° 77-87, 23 November 1977, related to the freedom of teaching). The decisions of the Constitutional Council therefore quoted are directly available per year on the website: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/2009/decisions-par-date/2009/sommaire-2009.42028.html . But after the decision n° 2001-446, 27 June 2001, the Constitutional Council made sure it endorsed article 10 and also the 1946 Preamble, to again declare that freedom of conscience is a "fundamental principle recognized by the laws of the Republic".

include, as a logical ramification, the protection against a religious offence. There are two major reasons for this lack of protection:

The first is that religious beliefs are respected as one of the forms of French "freedom" of opinion. Yet, the French *Declaration of Rights* does not make a distinction between categories of opinion in its article 10, as the European Convention on Human Rights does, with its two separate articles, one on freedom of thought, conscience and religion (article 9) and the other on freedom of expression including "*the freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers*" (article 10).

The term "religion" is therefore seen by the French constitutional norm as an opinion. The word religion is expressed in the *Declaration of Rights*, article 10, as a "*religious opinion"* (or *religious view* depending on the English version). The word *religion* is also mentioned in the present Constitution,[4] article 1, as well as in the 1946 Preamble, paragraph 1, both of which forbid discrimination "by virtue of religion." But it is the term *"beliefs"* that is preferred in article 1 of the present Constitution, as well as in the 1946 Preamble, paragraph 5, stating that: "*no person may suffer prejudice in his work or employment by virtue of his origins, opinions or beliefs*". There is no law that provides a legal definition of religion, nor decision from the Constitutional Council, nor judgment from the Council of State (Highest Administrative Court).

It is therefore the freedom of opinion, "including religious views," that the French Declaration protects. Article 1 of the present Constitution (1958), on the "*respect of all beliefs,*" is an undetermined quantitative article in that it does not qualify the term "*belief."* There's a fundamental and voluntary lack of precision between the notions of opinion and belief, between the nature of opinion and belief and between faith and conscience. All in all, in the different texts on the protection of civil liberties, we find a general trilogy of "political, religious and trade union" opinions. But there is no distinction between religious beliefs and other beliefs. Freedom of opinion protects all beliefs and ordinary guarantees in general. It is not possible to find a hierarchy between an ordinary freedom of opinion and an "extraordinary" one, based on article 10 of the 1789 Declaration of Rights, even when combined with article 1 of the 1958 Constitution on the respect for all beliefs.

Consequently, no right for (legal) recourse against criticism of religions or intimate beliefs exists either, even when of the most "blasphemous" nature; freedom of opinion, renders all opinions, even anti-religious ones, perfectly free.

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[4] "*France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis*".

Intimate convictions are treated equally with any form of beliefs or opinions.

The second reason for the relative protection against religious offences is that freedom of expression is both extremely broad and secure under French law. It derives from article 11 of the French Declaration of Rights, which states: "*Free communication of thoughts and opinions is one of the most precious rights of man. Every citizen may therefore speak, write, and print freely, if he accepts his own responsibility for any abuse of this liberty in the cases set by the law"*. Freedom of the press [5] and audiovisual freedom [6] consequently have their place in the Constitution. In other respects, the French Constitutional Council has presented freedom of expression as being of particular importance: it is "*a fundamental freedom, especially since it exercises one of the essential guarantees for the respect of the rights and liberties of others*" [7]. Making one's own convictions public and carrying them onto the public scene necessarily exposes the believer to various but legitimate reactions in the framework of democratic pluralism. The believer or man of conviction cannot expect to be protected in his convictions. This sort of logic turns out to be close to the *Handyside* judgement, rendered by the European Court of Human Rights (ECHR): freedom of expression implies the risk that information or opinions can "*offend, shock or disturb the State or any sector of the population*" [8]. According to the ECHR, this freedom also constitutes one of the essential foundations of a democratic society. And, combined with the democratic principles of equality and pluralism, it does not tend to invoke, in order to protect the offended religious conviction, any opinion that would attack the aforesaid conviction. "We cannot imagine a case, where freedom of expression is at stake, which is not initiated by speeches judged shocking, afflictive, troubling or disturbing toward one or several individuals, or toward one or several public authorities. We cannot imagine the debate of ideas, including those about religion, without a confrontation between the protagonists who wish it." [9]

In the first section, we will see how constitutional indifference vis a vis "religion" has highly advantaged freedom of expression in France, when it "attacks" religion. In the second section we will present the limits that nevertheless

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[5] Constitutional Council Decision n° 84-181, DC, 10-11 October 1984, available on line.

[6] Constitutional Council Decision n° 82-141 DC, 27 July 1982, available on line.

[7] Constitutional Council Decision n° 84-181 DC, 10-11 October 1984, available on line.

[8] ECHR, 7 December 1976, *Handyside v. United Kingdom*, par. 49. The decision of the Court is directly available on the webpage: http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=29180649&skin=hudoc-fr&action=request

[9] P. MBONGO, *Le traitement juridictionnel des offences aux convictions religieuses*, in *Mélanges en l'honneur de Jean-François Lachaume*.

exist on freely expressing anti-religious views due to general legal constraints that weigh on freedom of expression.

1. Religion, a matter for which expression is free on principle

Because freedom of opinion and freedom of expression go hand in hand, religion is susceptible to being debated, commented, and criticized: it's a subject for which opinions and their expression are free, on principle. It is only by way of exception, when an infringement upon religious convictions legally constitutes an abuse of expression (verbal discrimination, insult or slander, provocation or incitement to racial violence or hatred), which intrudes on public order or upon other's freedom, that it will be possible to penalise a religious offence. It will not be the protection of religion itself that will justify the limit, but the necessity for public order and for protection of the rights of others.

One can freely express oneself on a religious matter. Specifically, religious criminal liability does not exist. French criminal law does not foresee and cannot foresee the criminal liability of blasphemy or attacks upon religious morals.[10] Freedom of expression entails the possibility of criticism or caricature of one or several religion(s).

a. *Absence of specific religious criminal liability, absence of blasphemy*

Because of the absence of a legal definition for religion, which is necessary to the principle of neutrality and freedom of conscience, a verbal, written or drawn religious offence is included in the general legal provisions for forbidden offences of this nature. It hasn't constituted a particular offence that would correspond to blasphemy in other countries, since the French Revolution. It was already the case long before the 1905 Law on the Separation of Church and State which put an end to the system of a State-recognized religion. In other respects, the French Constitutional Council Decision of the 19th of Novmeber 2004, concerning the previous constitutional European Union Treaty, considered that: " *Provisions in article 1 of the (French) Constitution, stating that France is a secular Republic, forbid anyone to take*

[10] Blasphemy was deleted from the text during the Revolution in 1791. It was re-established by the Law on Sacrilege in 1823, as a symbol of the royal absolutist temptation brought by Charles X, who also reestablished in the French constitutional Chart Catholicism as the State religion (par. 6). The Law on Sacrilege was never applied and was abolished in 1830 by the Monarchy of July. It called for forced labor and eventually capital punishment for religious acts of profanity.

advantage of their religious beliefs to emancipate themselves from shared rules governing relations between communities and individuals."[11] In this perspective, a specific criminal liability for a religious offence would undermine prohibitory rules laid down by the constitutional judge in the case of religious "communitarianism". Indeed, since 1999, a constitutional judge leans on article 1 of the 1958 Constitution to affirm that "these fundamental principles oppose the recognition of collective rights for any group defined by a community of origin, language or belief."[12] This ban, using the same terms, is reiterated in the Constitutional Council Decision of the 19th of November 2004.

Now we can understand why criminal liability for blasphemy is impossible in France and that none of the rules punishing an abuse of expression because of religious affiliation – especially those foreseen in the 29th of July 1881 law on the freedom of the press and in the criminal Code – comes close to making this possible, even if some meticulous minds could invoke as a counter example article 166 of the Alsacian criminal code,[13] maintained in a region that was reintegrated into France after World War I and where many laws inherited from the German Empire have been preserved.

b. *Absence of criminal liability for attacking public and religious morals*

The great ideological battles of French history ended up reducing "moral surveillance" of the population to constitutional safeguards on public order and the respect of the rights of others. A religious offence, in French law, cannot fall under the category of any "contempt of public or religious morality or public indecent act," because this offence simply does not exist in the French penal code. This type of criminal liability, established in the former penal code by the law of the 17th of May 1819 on Freedom of the Press, was abbreviated, then transferred to the 1881 Press law as "contempt of public mores," before becoming a penal code offence. The notion of contempt of public mores was withdrawn from the new 1994 penal code, in favor of a more concrete qualification of an incriminating event such as a sexual exhibition (article 222-

[11] Available on http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/ See also B. Chelini-Pont and E. Tawil, *Comment to Decision n°2004-505, on November 19, 2004, Annuaire Droit et Religion*, 1(2005), p. 473-475.

[12] Decision n° 99-412 on 15 June 1999, Charte Européenne des langues régionales ou minoritaires, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/

[13] Article 166: « *He who causes any scandal by blaspheming God in public, with insulting comments, or who has publicly shown contempt for any Christian faith, or any established religious community on Confederation territory, and any recognized corporation or institution of ceremonial worship, in a church or place of worship, has committed insulting or scandalous acts, will be sentenced to three or more years of prison* ».

32). The notion of morality as a component of public order became a direct and physical attack on human dignity.

Contempt of public and religious morals disappeared from the French context after having been an instrument of public politics for a long while. It corresponds to a long tradition of censorship and surveillance of behaviors and beliefs in a country where the Catholic religion was the State's religion until the end of the 18th century. Anti-Catholic criticism deriving from Protestantism or anti-religious criticism deriving from atheism and liberalism, displaying ones impiety or sexual immorality or asserting ones atheism, were inexorably hit with censorship and cruel condemnation ranging from being sent to the galleys, to exile, torture, mutilation and the death penalty. Capital punishment was provided for again (although not applied) by the April 1757 Declaration[14]. Numerous were the writings and declarations, from Molière's *Tartuffe* case, to the *Philosophical Dictionary*, followed by the forbidden publication of *Madame Bovary* and the famous case against Charles Baudelaire's *Fleurs du Mal* in 1857, that censorship in France forbade, for their irreligious content and/or their contempt for decent moral standards of behavior.

c. *The freedom to criticize and to caricature one or several religion(s)*

The memory of "moral order," as an impediment to freedom of expression, whether it be real or imaginary, is vivid enough in France to explain the textual silence on this offence. More so, anti-religious criticism, like the rejection of «moral order» backed by censorship, is one of the symbolic pillars of freedom of expression in France. It is consecrated by the use of satire.

The Houellebecq case illustrates this assertion. Despite acceptance that this famous writer had called Islam «the most idiotic religion in the world", and qualification of this as an "insult" based on article 33 of the 1881 Press Law was accepted, the balance of judgment leaned toward acquittal. The public ministry (leaving apart the defendant's good faith) put forth the view that "*magistrates were not there to lecture on morals, but to punish penal responsibility*." Houellebecq's statement does not constitute a "racial insult," and wasn't said to "provoke discrimination, hatred or racial violence." The decision conformed to the public prosecutor's request. In its considerations, the Court indicated that "*a spoken personal opinion relative to a religion, considered in its conceptual sense and which is not accompanied by an exhortation or call to share it, did not constitute an offence, even if it could shock*

[14] Addressed to booksellers and pedlars of writings who «*tend to defame religion, to stir emotions, to attack Royal authority and to disturb public order and tranquility in his State*s».

the people concerned to their attachment to their community or faith."[15]

Freedom to criticize

In another case, the *Giniewski* [16] one, in a judgment entered on the 8th of March 1995, the trial judge considered terms used against Catholics as slanderous, in an article published in the newspaper *Le Quotidien de Paris* by Paul Giniewski, a journalist, sociologist and historian, on the encyclic *Splendor of the Truth* published by pope John-Paul II. In this article, Giniewki wrote that the Catholic doctrine of the achievement of the old by the new Alliance had driven antisemitic ideals and formed the roots of the Nazi holocaust. But the Court of Appeal in Paris overturned the decision, on 9th of November 1995, considering that "*the thesis put forth was exclusively a matter of doctrinal debate (and) did not legally constitute a precise act susceptible of being characterized as slanderous*." This decision was accepted by the Court of Cassation, which rejected the appeal.

Condemned in another jurisdiction by the Court of Appeal of Orleans, in a joint civil action following the slander accusation, Paul Giniewski went to the European Court of Human Rights. This high court confirmed the analysis of the Paris Court of Appeal decision and invalidated the joint civil action suit[17]. According to the Court in Strasbourg, "*the applicant sought primarily to develop an argument about the scope of a specific doctrine and its possible links with the origins of the Holocaust. In so doing he had contributed, which by definition was open to discussion, to a wide-ranging and ongoing debate (...), without sparking off any controversy that was gratuitous or detached from the reality of contemporary thought."* [18]

Freedom to caricature

The history of the French mentality explains the fact that anti-religious satire is an extremely vivacious "tradition" that has resisted censorship from the Absolutist era (17-18th centuries) and the Concordat era (19th century) and even represents the flagship of freedom of satire which is the ultimate symbol of freedom of expression. Protection against anti-religious satirical tradition can be connected to constitutional principles of freedom of opinion and freedom of expression (articles 10

[15] The famous writer, pursued by several Muslim associations for «islamophobic purposes», wrote in the magazine *Lire* in September 2001 that «The most idiotic religion is indeed Islam. When one reads the Qu'ran, one is prostrate (...)». The Criminal Court of Paris pronounced its acquittal after a much-mediatised hearing on the 22nd of October 2002.

[16] TGI Paris, March 8, 1995, *AGRIF et ministère public v/ Tesson et la société le Quotidien de Paris.*

[17] ECHR, *Giniewski v. France*, January 31, 2006, available on the website of ECHR.

[18] Ibidem, par. 50.

and 11, Declaration of 1789), to freedom of the Press (Decision 84-181, DC on 10th and 11th of October 1984, *Entreprises de Presse*) and to the constitutional objective of pluralism (Decision 2000-433 on 24th of July 2000, relative to the Law on freedom of communication).

It is therefore extremely difficult, if not impossible, to obtain a suitable judgement against a religious offence when the aforesaid offence is committed by means of satire. No examples to the contrary exist to date. Therefore, the case of the Muhammad cartoons, published in 2005 in the Danish press and then at the beginning of 2006 in the satirical French newspaper *Charlie Hebdo,* as in several other foreign newspapers, does not escape tradition. The media, hard-hit by the Court's admission of the request to examine the charges of "public injuries towards a group of people because of their religion" (17th Chamber of Paris Criminal Court), quickly cried that this was a return to blasphemy offence. The *Charlie Hebdo* defence barely had to argue the admissibility of the case on the grounds that it endangered the principles of French laïcité. The Criminal Court judgement on 22nd of March 2007 does not even have to mention the defence of laïcité. Instead, it referred to freedom of expression as a fundamental constitutional value, which includes the right to circulate information and ideas, including those "*that offend shock or disturb*" (a direct allusion to the *Handyside* European case-law). The Court referred to the objective of pluralism as a constitutional value "*in an era characterized by the coexistence of numerous beliefs and confessions within one nation*." It recalled that in France's "*secular and pluralistic society, the respect of all beliefs goes together with the freedom to criticize religions, whatever they are, and with the freedom to represent subjects or objects of religious reverence; that blasphemy which offends the divinity is not punishable*." Finally, the Court decided that a public injury offence was not committed because on the first hand the caricatures weren't gratuitously offensive, and on the second, they took part in a real debate of ideas on the development of Islamist terrorism. To explain its decision the Court recalled that *Charlie Hebdo* was a satirical newspaper: "*Charlie Hebdo is a satirical newspaper containing numerous caricatures, that no one is obliged to buy or to read (...). The literary judgment of the caricature, although deliberately provocative, participates in this capacity to freedom of expression and communication of thoughts and opinions and (…) must consider this means of expression in order to analyze the sense and the reach of litigious cartoons.*" [19]

[19] TGI Paris, 17e ch., 22 March 2007, Sté des Habous et des lieux saints de l'Islam et autres c. Ph. Val, *JCP* G (Jurisclasseur Périodique Général de la Semaine Juridique) 2007, II, p. 10079, note E. DERIEUX ; *Legipresse*, juin 2007, n° 242, III, p. 123-128, note H. LECLERC ; *Comm. électr.*, mai 2007, pp. 46-50, note A. LEPAGE ; A. CAPITANI, A. and M. MORITZ, « Les caricatures de Mahomet face au juge correctionnel ou le délit d'injure entre le droit pénal et le droit européen », *RLDI*, juin 2007, n° 28, pp. 46-51. E.

d. ***Artistic and literary creation: freedom to use religious references***

Artistic and literary creation is an inseparable consequence of the freedom of expression. This is true, whatever the medium used and even if the creative outcome is used for advertising purposes. And yet, France does not have a specific constitutional provision for artistic and literary creation as is the case in other European countries, with terms like cultural freedom or freedom of creation, or in the case of article 28 of the Universal Declaration of Human Rights. Freedom of artistic and literary creation can be connected nevertheless to the 1789 French Declaration of Rights, article 10. It includes the right to use and to divert religious symbols for other means than religious. It is logical, according to the history of Western graphic arts and literature: what symbols are more frequently used than the religious ones, from Fra Angelico to Picasso, to magnify or to criticize religious figures?

Visual supports

Would the use of a visual medium in an open public place that imposes itself on the public, such as a television advertisement or poster, give additional credence to the factuality of a religious offence? This is a determining factor in assessing the recipient's lack of consent to a message being shown, according to the European jurisprudence and which we also see in Court ordinances on the criteria for assessing the seriousness of an offence based on obtrusive advertizing representations in public places where people are forced to pass by (see next section). Nevertheless, religious sensibilities are no less protected in creative works, except for general freedom of expression limitations and within the legal framework set by the intellectual property code.

A recent case illustrates this tradition of freedom in visual and literary creations that integrate the use of religious symbols. It was a case much covered in the media. A huge billboard for the fashion creative *Marithé and François Girbaud*, exhibited at Porte Maillot, Paris, was the cause for litigation led by the association *Croyances et Libertés* (Beliefs and Liberties), emanating from the French Episcopal Conference. The question it raised was to determine whether the poster insultingly parodied the Last Supper painted by Leonardo of Vinci - more so because of commercial motives - and seriously offended Catholics in their most sacred convictions, which would have constituted a "public insult because of belonging to a determined religion", or whether it was only the creation of an art photographer, otherwise very beautiful, inspired by a universally famous picture.

DERIEUX, L'affaire des caricatures de Mahomet : liberté de caricature et respect des croyances, *La Semaine juridique-Edition Générale*, 19-II (2007), p. 10078-10079 ; P. MBONGO, Les caricatures de Mahomet et la liberté d'expression, *Esprit*, 5(2007), n° 5, p. 145-150.

The President of the Paris District Court (Tribunal de Grande Instance), in the interim ordinance entered on the 10th of March 2005, recognized "*an act of aggressive and gratuitous intrusion into the intimacy of beliefs of those who, circulating freely on the public way and searching for no singular contact with a determined creation or spectacle, see themselves, unwillingly, necessarily and brutally confronted by an advertizing, commercial (defamatory) manifestation*." The judge characterised it as a defamatory act aimed at Catholics and ordered the withdrawal of the poster. On appeal, the Appellate Court of Paris, on the 8th of April 2005, confirmed the first interim ordinance in astonishing terms, considering the obligatory neutrality to which a French judge is held: "*The representation of a sacred event was a travesty, with the sole purpose of commercial advertisement (which can) insult convictions (...) founded on a two thousand year old narration and celebrated daily in the Eucharist (...). The sacrament of the Eucharist [is] a foundational event of Christianity, by which Christ, according to Catholic Church Catechism, consecrates bread and wine representing his body and his blood, in memory of the sacrifice of his own life, consented to by the Son of God, in reparation for our sins and for the world's salvation*." Welcomed, but not triumphantly, by the French episcopate, the 10th of March 2005 decision caused serious unease. In the absence of the bread, wine, and consecration gestures from the litigious poster, how could one consider it as an attack upon religious feelings, when nothing in the poster suggested it was a gratuitous and direct insult, or had a pornographic, erotic or grotesque nature to it? With regards to previous jurisprudence of the Higher Court (Court of Cassation), the first two decisions were hardly justifiable. In the end, it was no surprise that the Court of Cassation (first Civil Chamber) invalidated the judges' decisions, situating itself in line with its traditional jurisprudence which is reluctant to define the notion of "attack upon a religious feeling," without a real legal foundation, in order to avoid extending the law to protect not only the people but the religious content in general as well. The Court of Cassation decided on the 14th of November 2006 that "*the only formal parody in the painting of the Last Supper does not have as its objective the giving of offence to believers of the Catholic confession, nor to harming them because of their obedience and therefore does not constitute an insulting act, legally considered as a personal and direct attack against a group of people because of their religious affiliation*." [20]

The content of cinema

Speeches and pictures that offend religious convictions don't fall under the influence of the 'cinema police' either, according

[20] P. Malaurie, *Note sur Cass. civ. 1, 14 novembre 2006, Sté GIP v/ Association Croyances et Libertés et autres, JCP G*, (Jurisclasseur Périodique Général de la revue la Semaine juridique) March 14, (2007), 39.

to article 9 of the provisions in the "Film Industry Code", and to the 23rd of February 1990 Decree relative to the classification of cinematographic works. The Council of State, which exercises the control over delivering broadcasting licences, underlined that delivering a broadcasting licence had "*to reconcile general interests with the respect owed to public liberties and notably to freedom of expression*". This is the reason why, since the famous annulment of a ministerial refusal of a broadcasting licence from the Ministry of Information, for the 1975 movie *La Religieuse de Diderot*, no other case of ministerial censorship for religious outrage has been reported. And all attempts to forbid or censor a movie because of religious outrage remain ineffective,[21] whereas such are frequent in the case of ultra-violent or pornographic scenes. [22]

2. When attacks upon religious convictions are legislatively codified as attacks upon public order or upon the rights of others

After seeing this strong French framework, unable to conceive of any specific "religious offence" when critics aim at religious matters in general, we can counterbalance this impression by presenting the possibilities that nevertheless do exist in French law. There are general limits to the freedom of criticism, for example when criticism falls within the category of malevolent denigration. Certainly, limits on freedom of expression are restricted because of the constitutional value given to freedom of expression and communication. But important as the fundamental right to freedom of expression is, it is not without limits and should not be considered superior to other constitutionally guaranteed fundamental rights.

In accordance with general theory on fundamental rights, a measure of restriction on fundamental freedom must: 1) be founded on a legitimate motive (the general interest or respect of the rights of others), 2) not alter this fundamental right 3) find its foundation in a legislative text and 4) be in proportion to the grounds that justifies it. On these criteria, the judge can distinguish between tolerable anti-religious criticism and the rest, such as discrimination, provocation, incitement to hatred, slander or a reprehensible insult (all reasons quoted by the 29th of July 1881 law on the press, articles 28 to 33). The law will not lean on the content of the critique, but rather on the qualification given to it that transform it into malevolence. This consideration will focus on effectiveness of the criticism (precise and attributable facts), its "manner" (violence and

[21] The famous and controversial movie *Je vous salue Marie*, produced par Jean-Luc Godard, was considered as a creative work not offending towards Catholic faith (Court of Cassation, Civil Chamber 1, 21 July 1987, *AGRIF c. J.-L. Godard*).

[22] N. Guillet, *La police du cinéma: de la protection des mineurs au rejet de l'ordre moral, Revue de l'actualité juridique française*, 2003, see in http://www.rajf.org/spip.php?article1550

gratuitousness), and its motives (profit, hate or provocation against precise people or groups of people). In a way, malevolent intention permits a qualification as religious offence more than the content of the so-called offence.

a. ***The difficult legal grounds for charges against public order (illicit disturbance)***

Among the motives of general interest susceptible of justifying a restriction on freedom of expression, there are of course those of public order. Article 10 of the 1789 *Declaration of Rights* mentions only the term "law and order" as a ground for restriction: "*No one should be disquieted about expressing his opinions, even religious ones, provided that their manifestation does not disturb public order as established by law*". The French Constitutional Council's notion of public order, whose objectives are of constitutional value, is close to that of the Council of State, insofar as the Constitutional Council admits of some limitations on fundamental liberties when they are justified by the prevention of attempts against public order[23] and by safeguards for law and order.[24] On the other hand, the content of the different elements included in the notion is less clear. For the Council of State, the notion of public order covers three traditional elements: public security, public tranquility and public health. To this traditional trilogy, the Council of State recently added respect for human dignity.[25]

Within this framework, it remains difficult for the notion of disturbance of public order due to a religious offence to find its justification, whether it be under the authority of the administrative security police, or under judicial or penal procedures.

Censorship of films of a religiously offensive nature

We have already seen that since 1975 no ministerial censorship has forbidden a film because of its controversial religious content. In the same vein, it is difficult for administrative judges to accept that banning a movie because it offends 'local' religious convictions, is justified (although it would be possible according to a Council of State decision)[26].

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[23] Constitutional Council Decision, n°94-352, 18 January 1995, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/1995/les-decisions-de-1995.3905.html

[24] Constitutional Council Decision n° 82-141, 27 July 1982, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/1995/les-decisions-de-1995.3905.html

[25] Decision of the Council of State, 27 October 1995, *Commune de Morsang-sur-Orge, Recueil Lebon, (Recueil des décisions du Conseil d'Etat), 1995-2,* p. 372, conclu. FRYDMAN. *See also http://www.conseil-etat.fr/cde/fr/presentation-des-grands-arrets/*

[26] In the case *Société les Films Lutetia* the Council of State decided on the 18th of December 1959 that "a Mayor responsible for maintaining public order in his township, can forbid, on his or her territory, the viewing of a

In 1991, the Administrative Tribunal of Bordeaux cancelled the Major of Arcachon's (Bordeaux region) decision to forbid the movie *La dernière tentation du Christ*, in his territory.[27] Since then, films of offensive religious nature haven't been considered a matter of public disturbance, to the benefit of artistic and creative freedom.

Censorship of posters or writings for their religious offensive nature

In the same way, and logically, even in the cases where a judge has had to apply article 809 of the New Code of Civil Procedure, allowing him to warn of an imminent damage or to cease an "obviously illicit disturbance" created by an abuse of expression, there are few examples where disturbance of public order has been founded on manifest religious outrage. Based on article 809, the interim judge had the power to establish that an attack on religious sentiments had occurred and could order various measures such as seizing, forbidding, withdrawing or inserting a notice in the (offensive) communiqué specifying the condemnation. Since normally there is only one judicial control of a criminal nature for abuses of freedom of expression and communication by way of press or posters, the judge is extremely scrupulous when he has to establish that an outrage to religious feelings has occurred and has to determine its obvious illicit character. It is necessary that the outrage be "serious," that aggression against religious feelings be "*manifestly obtrusive, advertising and commercial, in public places of obliged passage, questionable and misleading, and in any case legislatively codified*". This definition was used in dealing with the poster of the movie *Ave Maria* in 1984. It represented a young woman tied to a Cross, feet and fists held by ropes, with shirt open, exposing her chest. The judge, at the request of an association to withdraw this poster from "all public places," ruled it "a particularly violent outrage to Catholics' essential realities and values," and ordered its withdrawal.[28] But this case remained an isolated one. In a recent litigation on the *Amen* movie poster, where Nazi and Christian Crosses were superimposed, the judge refused to consider this miscellany as an outrage.[29]

Finally, it suffices that a public place be voluntarily accessible for the possible disturbance to be deemed not take

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movie having been granted a ministerial broadcasting licence but whose projection would be susceptible to producing a serious disturbance or damage to public order, because of its immoral character and because of local circumstances".

See http://www.conseil-etat.fr/cde/node.php?pageid=162

[27] P. PACTEAU, *TA Bordeaux, 13 décembre 1990, United International Pictures, LPA*, December 11, (1991),

[28] TGI Paris, référé, 23 October 1984, *Association Saint Pie X c. Films Galaxie*. The Court of Appeal of Paris confirmed the ordinance (Paris, 1ere. Ch., sect. B., 26 October 1984, *Sté Greenwich Film et autres c. Société Saint Pie V*).

[29] TGI, référé, 21 février 2002, *AGRIF c. Sté Renn Production*.

place, as in cinemas or bookstores (refusal to forbid the cover of *The satanic Verses*, TGI Paris, 29 July 1989, refusal to forbid the cover of *I.N.R.I* showing a half-nude woman crucified [once more!], TGI Bordeaux, first chamber, sect. A.,16 November 1998, *Fnac v. Philippe Laguerie*). As in the *Marithé and François Girbaud* case previously cited, the judge at the Court of first instance had ruled that an illicit disturbance occurred, but as we saw, the Court of Cassation rejected this analysis.

b. ***Legal grounds that are more and more effective: respect for the rights of others***

Respect for others in freedom of expression is finally the strongest limit of constitutional origin vis-a-vis respect for religious convictions. According to article 4 of the 1789 French Declaration of Rights, in its most general sense: " *Liberty consists in the ability to do whatever does not harm another; hence the exercise of the natural rights of each man has no other limits than those which assure to other members of society the enjoyment of the same rights. These limits can only be determined by the law".* Which limits can be enforced then? Discrimination, provocation to hatred or violence, insult, slander, invasion of privacy (constitutionally protected, according to the Constitutional Council, by the article 2 of the Declaration of Rights, in its decision n° 99-416, 23d of July 1999), infringement of the right of personal portrayal and of human dignity. Human dignity is considered by the French Constitutional Council as a fundamental principle of constitutional value (Decision n° 94-343-344, 27th of July 1994).

In other respects, pluralism in French society and the necessity of reciprocal tolerance, recognized as constitutional objectives by the Constitutional Council (Decision n° 2000-433, 24 of July 2000, relative to the law on freedom of communication), have recently driven the legislature to add to these traditional criminal liabilities for the disrespect of others, a religious dimension that does not originally exist. This is why the new criminal Code, in its articles R. 624-3 and 624-4, represses private slander or insult when *"committed upon a person or a group of persons by virtue of their origin, their belonging or not belonging, real or supposed, to an ethnic group, a nation, a race or a determined religion*". Article 132-76 of the same Code also poses as an aggravating circumstance the commission of a criminal infraction because of religion. This aggravating circumstance is constituted "*when the crime is preceded, accompanied or followed by speeches, writings, pictures, objects or acts of any nature, attacking the honour or consideration of the victim or group of people to whom the victim belongs, by reason of their adherence or their non adherence, real or supposed, to an ethnic group, a nation, a race or a determined religion*".

Concerning controls in the audiovisual domain, recent laws have also enlarged the existing ambit of religious offences. The law of the 30th of September 1986 relative to freedom of communication has commissioned the *Conseil Supérieur de l'Audiovisuel* (CSA) to survey broadcast programs, to determine whether they contain, according to article 15, "*any incitement to hatred or to violence for reasons of race, sex, behaviors, religion or nationality*." This law prescribes in article 1 that: "." The CSA retains the power to sanction radio and television operators; its decisions are susceptible of recourse to the Council of State. The CSA has often taken this opportunity to forbid a broadcast in cases involving a religious offence, in the name of pluralism and tolerance. Recently, in 2005, the CSA issued a warning to the channel CANAL+ to conform to its legal and contractual obligations, after the broadcasting of its humoristic show, *Les Guignols de l'Info*, for a sequence treating the election of Pope Benedict XVI in a very seriously offensive manner. Wearing a headband with the words Adolf II, the puppet representing the pope said the blessing: "in the name of Father, the Son and the Third Reich...". In its communiqué on the 10th of May 2005, the CSA stated that CANAL+ did not respect its viewers' different religious sensibilities and encouraged discriminatory behavior because of religion or nationality. The puppet in question disappeared definitively from the show.

Similarly, the term "offence because of adherence to a determined religion" has been included in several articles under the 1881 law on the freedom of the press; in the law of the 1st of July 1972, completed by law number 90-615 of the 13th July 1990, carrying modification of articles 24, 33, 34 and 48 of the old law of the 29th of July 1881, for insult, slander, provocation and incitement to hatred. Individuals, or associations of individuals, especially those who fight against racism (article 48-1), as well as the public ministry by derogation, can engage actions or legal pursuits when a provocation to discrimination, hatred or violence, as well as slander or insult has been committed "towards a person or a group of persons for reason of their adherence or their non-adherence to a determined religion". These legal actions are possible without a prior complaint.

However, despite numerous litigations, it seems that penal qualifications prove still to be hardly adapted to infringements against religious convictions. Because of the particular procedure of the Law on Freedom of the Press, because of the often very general character of the offence, it remains difficult to define any offence which does not literally aim at a person or at a group, and which is not founded on sufficiently precise facts which could constitute official charges.