

Freedom of expression and respect for beliefs in France

by John Warwick Montgomery

An important colloquy took place on February 17, 2015 at the headquarters and under the sponsorship of the Paris bar in the wake of the Charlie Hebdo murders by Islamic terrorists a month before. Titled, “Liberté d’expression et respect des croyances,” the conference featured two major speakers, Michel de Salvia, speaking on the case law of the European Court of Human Rights, and Jean-Yves Dupeux, discussing relevant French case law. The issue was the tension between freedom of speech and the protection of religious belief in a democratic society.

Although that tension is certainly present in all western societies, it is particularly acute in France, where the Revolution against the Old Regime eliminated blasphemy law but where, in 1905, the separation of church and state was achieved – not, as in the United States, to protect religions from government interference, but to reduce as much as possible the influence of the church in French public life.

Indeed, the history of the tension between free speech and religious belief in France has created a checkered legal scene, making one think of the radical extremes of French politics in general across the centuries: from the autocracy of the Ancien Régime to the radicalism of the Revolution (in which the second-generation revolutionaries guillotined the first generation revolutionaries) to the autocracy of Napoleon; from the chaos of the Days of May, 1968, to the return of Charles de Gaulle to even greater central power thereafter. All of which confirms the aphorism of the sixteenth-century Protestant Reformer Martin Luther that the history of a fallen face is “the history of a drunk, reeling from one wall to the other.”

The immediate aftermath of the Charlie Hebdo atrocities on 7 January was a universal outcry against the terrorists who had killed the editors and cartoonists of the satirical journal for their depictions of Muhammad and swipes at Islam. I was myself in Paris at the time and could hardly make my train connections because of the massive street demonstrations. Virtually everyone identified with the magazine; the cry “Je suis Charlie” was (and is) present almost everywhere in the country.

There were, of course, dissenters—some claiming that the satires in *Charlie Hebdo* had gone beyond the limits of

good taste (which, as a matter of fact, they had—but that was consistent with a long tradition of nasty French satire in print and in film). Those dissenters found themselves in deep trouble, not a few of them receiving stiff fines and even prison sentences for “inciting to terrorism.” Thus, a black comedian, Dieudonné, who has long been a thorn-in-the-flesh to the politically-correct establishment, and has been regarded as an anti-Semite, was indicted for putting on his Facebook page “Je me sens Charlie Coulibaly” (Coulibaly being one of the terrorists); for this “apology for terrorism” he was given a two-month suspended sentence, and could have received a sentence of seven years imprisonment and a fine of €100,000. (Cf Alexander Stille, “Why French Law Treats Dieudonné and Charlie Hebdo Differently,” *New Yorker*, January 15, 2015.)

One thinks of other, parallel instances of criminal and civil actions in France against those critiquing religious positions. Most striking is the legal history of former femme fatale Brigitte Bardot’s verbal attacks on Islam for its ritual slaughters of sheep. She has been fined five times, the latest conviction requiring her to pay €15,000, for inciting racial hatred against Muslims. In 2005, Jean-Marie Le Pen, former head of the conservative Front National political party, having made strongly negative statements about the consequences of Muslim immigration in comments to the national newspaper *Le Monde*, was convicted of inciting racial hatred.

What is the legal basis of such convictions? Press freedoms are guaranteed by the 29 July 1881 Press Law; section 14 of this comprehensive act, however, condemns hate speech – incitement to racial discrimination, hatred, or violence on the basis of one’s origin or membership (or non-membership) in an ethnic, national, racial, or religious group. The Code Pénal, 625-7, R.624-3 and R.624-4, also makes it an offence to engage in such defamatory or injurious conduct via private communication.

In November, 2014, a French counterterrorism law was passed by Parlement. Its effect is to move “incitement” and “defence of terrorism” from the Press Law to the Criminal Code. Penalties are a five-year maximum prison sentence (seven years if posting online is involved) and €45,000 (€100,000 if there is online posting).

Significantly, in an unsuccessful attempt in France to ban the Martin Scorsese film, “The Last Temptation of Christ” (1988), the French court nonetheless declared that “respect for beliefs” was legally on the very same level as “freedom of expression.”

The difficulty, as M Dupeux rightly pointed out, is that there is no proper definition of such terms as “provocation” or “defamation” or “injury” in these areas, so the result is that the French judge is left to decisions based on little more than naked subjectivity.

The European Court of Human Rights has, in general, been pro-government in its handling of freedom of expression cases that involve a religious dimension. The court has stated on several occasions, even when it has sided with the applicant, that it cannot rely upon a single, common European moral or religious position, owing to the pluralism and the variation of belief amongst the European States-Parties to the Convention (see, for example, *Otto-Preminger-Institut v Austria I* [application 13470/87; judgment 20 September 1994], para 50). The Strasbourg court therefore generally relies on an individual nation’s “margin of appreciation” to determine what in fact constitutes incitement to religious hatred, apology for terrorism, etc. What would constitute a genuine offence in one European country would not necessarily be so categorised in another.

The case of *Leroy v France* (application no 36109/03; judgment of October 2, 2008) is illustrative of the manner in which the ECHR generally exempts from the protection of freedom of expression law those prosecuted for hate speech. In that case, the court considered that the cartoonist who published a drawing showing the attacks on the Twin Towers on September 11, 2001, with the caption, “We all dreamt about it ... Hamas did it,” was rightly condemned for complicity in defence of terrorism. The court stated: “In conclusion, the domestic court could reasonably consider that the interference with the applicant’s exercise of his right to freedom of expression was necessary in a democratic society within the meaning of Article 10 of the Convention. There was therefore no violation of this provision.”

The contrast with the Anglo-American common-law tradition could hardly be greater. The US Supreme Court has

repeatedly refused to condemn hate speech as such. It has even allowed provocative action in situations where great offence was given to a given religious group—the classic example being the pro-Nazi march in Skokie, Illinois—a predominately Jewish community in the Chicago area (see *National Socialist Party of America v Village of Skokie* [432 U.S. 43 (1977)]). Only if the hate speech or action is on the level of “crying ‘fire’ in a crowded theatre”—productive of riot or affray—will freedom of speech or action be prohibited. American law has regarded First Amendment freedoms as too important to be curtailed in a democratic society unless (and it is very rarely the case) that the provable consequences are so severe as to outweigh the exercise of those freedoms.

To be sure, America, unlike Europe, has never suffered the horrors of bombings, the Nazi regime or the death camps, but the central jurisprudential question remains: How important is freedom of expression in general and freedom to assert and to critique religious positions in particular? The American view is that such freedoms are of paramount significance and that any compromise of those freedoms can only reduce genuine democracy and lead to an abridgment of human rights. Freedom of expression is a tender plant: it must be protected against every effort to limit it, whatever the best intentions of those desiring to do so.

A mature society must tolerate dissenting opinions—even those of an obnoxious character. If one’s cherished beliefs are attacked and ridiculed, in an open society one has the facilities to respond. The American society is often regarded by Europeans as childish and immature. But in regard to “hate speech,” it is Europe (and the French) who display gross immaturity by their efforts to protect their citizenry—regarded as children—from insult and corresponding emotional distress. It was Voltaire (surely French) who declared: “I do not agree with what you say, but I shall defend to the death your right to say it.” Would that contemporary French law paid closer attention to that *bon mot*.

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