



## **Limits to expression on religion in France**

by Esther Janssen

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### **Description**

The article examines the limits to expression on religion in France. It places the relevant provisions in French law and national case law concerning expression on religion within the context of the strict separation of the state and the church in France, known as *la laïcité*. Subsequently, it analyzes whether French case law complies with the relevant case law of the European Court of Human Rights.

### **Abstract**

During the last decade conflicts about expression on religion have increased globally. Generally, these conflicts are regarded as a conflict between freedom of speech and freedom of thought, conscience and religion. In France there are many active religious interest groups that aim to protect a certain religion in society. They often initiate judicial proceedings seeking to prohibit certain kinds of speech on their religion. This practice has resulted in a rich case law on the limits of expression on religion in films, film posters, advertising, satirical cartoons and literature.

In France special emphasis is placed on the neutrality of the state and the public sphere. The strict separation of the state and the church, *la laïcité*, originates in *La loi de 1905*. Accordingly, in cases concerning expression on religion the French judge clearly distinguishes different degrees of the public nature of speech.

However, even for French judges it is difficult to remain neutral. In past case law, the judiciary seems to have attempted a reintroduction of the offence of blasphemy and to have taken into account the point of view of the Catholic Church for the assessment of the insulting character of speech. What is more, in the famous *Ginienski* case the French judge protected catholic citizens that felt offended by

certain speech, but the European Court of Human Rights corrected France and gave priority to a free historical debate.

In its recent case law the European Court of Human Rights increasingly discerns unprotected attacks on a religion from protected critique on religious dogmas and institutions. Recent French case law, including the national affair of the Danish cartoons '*Charlie Hebdo*', in which the judge allowed critical speech on religion as part of political and public debate, is in line with this European development.

# Limits to expression on religion in France

by Esther Janssen<sup>1</sup>

*During the last decade conflicts about expression on religion have increased globally. Generally, these conflicts are regarded as a conflict between freedom of speech and freedom of thought, conscience and religion. In France active religious interest groups like AGRIF often initiate proceedings against speech on religion and thereby contribute to the proliferation of a rich case law concerning the limits to expression on religion in films, film posters, advertising, satirical cartoons and literature. The French Republic is characterized by a strict separation between the state and the church, known as laïcité. However, French case law demonstrates that it is hard even for French judges to stay neutral in cases concerning religion. The limits to expression on religion in France are in accordance with the case law of the European Court of Human Rights.*

## 1. Distinction between types of speech

Of all the, by now famous, twelve Danish cartoons, the image of the prophet Mohammed carrying a bomb in his turban has caused the greatest outrage on international level. While certain people considered the image to be blasphemous, others regarded it as insulting to or stirring up hatred against Muslims. It is important to distinguish clearly between different types of expression on religion.

Strictly speaking, blasphemy means the insult or the defamation of the person or honour of God. In a broader sense, the term refers to the defamation or insult of a religion.<sup>2</sup> One should distinguish blasphemy from the verbal abuse of *individuals* on the ground of their religion. One can speak of discrimination when speech declares people to be inferior to others and denies the equality of a person or a group of persons. Discrimination based on religion should be distinguished from discrimination based on race. When a person or a group of persons belong to a certain religious

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<sup>2</sup> B.A.M van Stokkum, H.J.B. Sackers, J.-P. Wils, *Godslastering, discriminerende uitingen wegens godsdienst en haatuitingen*, The Hague, The Netherlands: Ministry of Justice/WODC, Boom Juridische Uitgevers 2007, p. 96.

group as well as to a certain ethnic group, confusion can arise about the ground on which the discrimination is based. Are the religious convictions and practices used to attack the ‘race’ or ‘ethnic background’ or the ‘religion’ of the person or group of persons in question? When speech primarily expresses hate towards a certain group or religion or incites towards such hatred one can speak of *hate speech*. As *hate speech* has not been properly defined in either national or international laws, the notion is somewhat problematic.<sup>3</sup> In its *Manual on hate speech* the Council of Europe derives criteria for *hate speech* from international treaties and conventions and the case law of the European Court of Human rights.<sup>4</sup>

There are several legal grounds for the prohibition of speech on religion: protection of God or religion, religious feelings, public order or religious freedom. Freedom of speech can be limited on moral grounds and so as to prevent offence or damages.<sup>5</sup>

Which types of speech and acts are prohibited in which countries is determined by the strongly national development of the relation between religious affairs and criminal law, as well as the changing insight to the right that is to be protected and the possible penalization of the behaviour.<sup>6</sup>

To examine the limits to expression on religion in France, this article places the French law and the national case law concerning expression on religion in the context of the strict separation of the state and the church that characterizes the French Republic and is known as *la laïcité*. Subsequently, the article analyzes whether the French case law complies with the case law of the European Court of Human Rights.

## **2. *La laïcité*, separation of the church and the state in France**

The French version of the separation of the church and the state is known as *la laïcité*. This notion is said to be untranslatable in any other language. Of all Western countries only the French constitution

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<sup>3</sup> T.E. McGonagle, *Minority rights and freedom of expression: a dynamic interface*, PhD Dissertation, Amsterdam: University of Amsterdam 2008. Publication forthcoming.

<sup>4</sup> M.D. Evans, A. Weber, *Manual sur le discours de haine*, in: M.D. Evans, A. Weber, *Human rights in Culturally Divers Societies*, part II, Council of Europe Manuals, Leiden, The Netherlands: Martinus Nijhoff Publishers 2008.

<sup>5</sup> A.J. Nieuwenhuis, *Over de grens van de uitingsvrijheid*, Nijmegen, The Netherlands: Ars Aequi Libri 1997, chapter 3.

<sup>6</sup> Van Stokkum 2006, p.13.

refers to the notion. For these reasons *la laïcité* is also called ‘*une exception française*’. However this idea is controversial.<sup>7</sup>

The Catholic faith functioned as the official religion of France for a long time, until the Revolution of 1789 caused a schism. During the Revolution the freedom of religion was laid down in *La Déclaration des droits de l'homme et du citoyen*.<sup>8</sup> Although *le 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 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*’.<sup>9</sup>

These developments resulted in *La loi de 1905*, an act that is still central to the relation between the church and the state. *La loi de 1905* forms the key to *la laïcité*<sup>10</sup>, although it does not define the notion – nor does any other regulation. Article 1 regulates the freedom of religion and runs as follows: ‘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 runs as follows: ‘La République ne reconnaît, ne salarie ni ne subventionne aucun culte.’ The term *la laïcité* appeared for the first time in the Constitution of 1946 and figures in the current article 1 of the Constitution of 1958 that runs as follows:

*‘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.’*

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<sup>7</sup> Rapport public du Conseil d'État, 2004, Considérations générales: *Un siècle de laïcité*, Paris, France: La Documentation Française, 2004, p.7, p.121.

<sup>8</sup> A.J. Nieuwenhuis, ‘Tussen laïcité en AWGB’, *NJB*, issue 18, 30 April 2004, p. 938.

<sup>9</sup> Rapport public du Conseil d'État, 2004, Considérations générales: *Un siècle de laïcité*, Paris, France: La Documentation Française, 2004, p.16.

<sup>10</sup> *Idem*, p.20.

The neutrality of the state 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 authorities.<sup>11</sup> *La laïcité* can be considered as the underlying principle to all laws that regulate the position of religion in the French public sphere. Like in Turkey, the public sphere and education are neutral towards religion. Civil servants, teachers and students in public schools are not allowed to wear religious symbols, such as a headscarf.<sup>12</sup>

*La laïcité* is not a fixed concept and has been the subject of further interpretation since 1905. For several years the French president Sarkozy has been advocating a more 'positive conception of *la laïcité*'. His suggestion that religious feelings should have a more prominent place in French society renewed the public debate on the interpretation of *la laïcité* several years ago.<sup>13</sup>

### 3. French law

In France, freedom of speech is protected through article 11 of *La Déclaration des droits de l'homme et du citoyen* of 1789 that has constitutional value.<sup>14</sup> Article 1 of *La loi du 29 juillet 1881* lays down the freedom of the press, *la liberté de la presse*, with the phrase 'L'imprimerie et la librairie sont libres.'<sup>15</sup> With this act, the French legislator has introduced a special code for public speech offences. Chapter four contains the public speech offences that can be considered as criminal restrictions to the principle of the freedom of the press.

In France, the offence of blasphemy was abolished in 1791 and has not been reintroduced ever since. The absence of the offence of blasphemy is not a feature exclusive to the French *laïque* concept of

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<sup>11</sup> Nieuwenhuis 2004, p. 938.

<sup>12</sup> The law that prohibits students in public schools to wear religious symbols was drafted on the advice of *La commission de réflexion sur l'application du principe de laïcité dans la république*, 'la Commission Stasi', commissioned by president Chirac to examine the subject in 2003. The report of 11 December 2003 is available at: <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf>.

<sup>13</sup> N. Sarkozy, *La République, les Religions, l'Espérance*, Paris, France: Les Éditions du Cerf 2004; R. Moerland, 'Sarkozy: er is geen staat zonder religieuze wortels', in: NRC Handelsblad, 18 January 2008; S. Hoogmoed, 'Frankrijk: scheiding van moskee en staat', available at: [www.dehelling.net/artikel/216](http://www.dehelling.net/artikel/216).

<sup>14</sup> Article 11 runs as follows: '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.' The article has constitutional value because the preambul of the Constitution of 1958 refers to the preambul of the Constitution of 1946 that for her part refers to the declaration.

<sup>15</sup> Article 5 further specifies: 'Tout journal ou écrit périodique peut être publié, sans autorisation préalable et sans dépôt de cautionnement, après la déclaration prescrite par l'article 7.'

the state. However, one could say that the penalization of blasphemy would not fit into the principle of *laïcité* of *La loi de 1905*. When assessing expression on religion, French judges often start by considering that France is an *État laïque* and an offence of blasphemy does not exist. In the Alsace and Moselle region, a particular legislation exists that does penalize ‘le blasphème public contre Dieu’. The legislation has survived from the German period of 1871 to 1918, is based on the German criminal code of 1871 and has been validated by *La loi du 17 Octobre 1919* and *le Décret du 25 Novembre 1919* (article 166). As not a single conviction on the ground of this provision can be found in the national judicial database, the provision can be considered as a local relic from the past without practical effect.<sup>16</sup>

In response to the affair of the Danish cartoons, the French MP Eric Raoult proposed a bill in 2006 seeking to penalize ‘la banalisation du blasphème religieux par voie de caricature’. The proposal remained without effect.<sup>17</sup>

*La loi du 29 juillet 1881* does penalize insult, defamation and incitement to discrimination, hate or violence against *individuals*. Special ‘religious’ speech offences do not exist. *La loi du 29 juillet 1881* cites general offences that can be aggravated by particular grounds, when so stipulated in the subparagraphs of the relevant article. Apart from religion, aggravating grounds are ethnicity, nation, race, sex, sexual orientation and handicap.

Article 33-3 sanctions the insult of an individual or a group of persons on the ground of their religion with a fine of up to € 22.500,- or imprisonment up to 6 months.<sup>18</sup> Article 32-2 sanctions the defamation of an individual or a group of persons on the ground of their religion with a fine of up to € 45.000,- or imprisonment up to one year.<sup>19</sup> Article 24-8 establishes the same punishment for the

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<sup>16</sup> Annex II, CDL(2008)090add2, p. 37-38 to: European Commission for Democracy through Law, *Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to hatred*, study no.406 / 2006, CDL-AD(2008)026, Strasbourg: Council of Europe 23/10/2008, available at: [http://www.venice.coe.int/docs/2008/CDL-AD\(2008\)026-f.asp](http://www.venice.coe.int/docs/2008/CDL-AD(2008)026-f.asp).

<sup>17</sup> The proposal is available at <http://www.assemblee-nationale.fr/12/propositions/pion2993.asp>.

<sup>18</sup> Paragraph 3 of article 33 runs as follows: ‘Sera punie de six mois d'emprisonnement et de 22500 euros d'amende l'injure commise, dans les conditions prévues à l'alinéa précédent, 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.’

<sup>19</sup> Paragraph 2 of article 32 runs as follows: ‘La diffamation commise par les mêmes moyens 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 sera punie d'un an d'emprisonnement et de 45000 euros d'amende ou de l'une de ces deux peines seulement.’

incitement to discrimination, hate or violence against an individual or a group of persons on the ground of their religion.<sup>20</sup> Article 23 describes the ways in which these offences can be committed.<sup>21</sup> The dominant doctrine notes that first the general offence must be committed, while the identification of the particular aggravating circumstance comes second.<sup>22</sup> Before one can be found guilty of one of the offences, the intent of the author has to be established. As a general rule, intent is often assumed from the circumstances of the case. The mere finding of the elements of the offences renders them punishable, without the need to establish any specific resulting damage.<sup>23</sup> Although freedom is the core principle and prohibitions to public speech are mere exceptions to this principle, the offences do not include specific free speech clauses. A preliminary article in *Le Code Procédural Penal* (CPP), introduced by *La loi du 15 juin 2000*, recalls the priority of the principles granted by the European Convention of Human Right.<sup>24</sup> In *La loi du 29 juillet 1881*, free speech is explicitly protected through the very strict procedural rules that the act establishes especially for press law cases.<sup>25</sup> Pursuant to article 65 formal charges against an offender of the provisions of *La loi du 29 juillet 1881* have to be pursued within 3 months (as opposed to 3 years for ordinary crimes). In France, this term has always been considered as one of the essential elements of the regulation of freedom of speech.

Article 40-1 CPP establishes ‘le principe de l’opportunité’.<sup>26</sup> This means that the public prosecutor has a certain discretionary power whether to prosecute crimes or not. This general principle also applies to public speech offences and their prosecution therefore does not depend on the question

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<sup>20</sup> Paragraph 8 of article 24 runs as follows: ‘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 de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée, seront punis d’un an d’emprisonnement et de 45000 euros d’amende ou de l’une de ces deux peines seulement.’

<sup>21</sup> Article 23 runs as follows: ‘Seront punis comme complices d’une action qualifiée crime ou délit ceux qui, soit par 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, auront directement provoqué l’auteur ou les auteurs à commettre ladite action, si la provocation a été suivie d’effet.

Cette disposition sera également applicable lorsque la provocation n’aura été suivie que d’une tentative de crime prévue par l’article 2 du code pénal.’

<sup>22</sup> cf JCP 1998 volume 70 ; cf JCP 2005 volume 110 ; cf Eerera Gazette du palais 1995 N° 697 ; cf Lesclous and Marsal droit pénal 1998 chronicals 21 and 23.

<sup>23</sup> Annex II, CDL(2008)090add2, p. 42.

<sup>24</sup> Annex II, CDL(2008)090add2, p. 39.

<sup>25</sup> Article 50, 53, 55, 56 and 59 of *La loi du 29 juillet 1881* form good examples. The act is available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722&dateTexte=20090102> .

<sup>26</sup> Article 40-1 CPP is available at: [http://www.legifrance.gouv.fr/affichCode.do;jsessionid=83BF83458B31A20EDCA59649B4F3F62D.tpdjo12v\\_1?idSect ionTA=LEGISCTA000006167418&cidTexte=LEGITEXT000006071154&dateTexte=20090103](http://www.legifrance.gouv.fr/affichCode.do;jsessionid=83BF83458B31A20EDCA59649B4F3F62D.tpdjo12v_1?idSect ionTA=LEGISCTA000006167418&cidTexte=LEGITEXT000006071154&dateTexte=20090103) .

whether or not the victim of an offence has filed a complaint against the offender. While article 48-6 of *La loi du 29 juillet 1881* states, to the contrary, that general insults and defamations of a private person are only prosecuted in case of complaint by the victim, it also stipulates that the public prosecutor can initiate proceedings on his own initiative against insults and defamations of people on the ground of their ethnic background, nation, race or religion.

The victim has the right to question the decision of the public prosecutor not to prosecute before his superior, the procurer general, who can instruct the prosecutor to proceed with the prosecution (art.40-3 CPP). The victim himself can also initiate proceedings, by either bringing a case before the examining magistrate or naming the offender directly before the tribunal (art.1-2, 85 and 392 CPP). Civil proceedings are also based on the criminal provisions of *La loi du 29 juillet 1881*. Therefore, the strict procedural rules of *La loi du 29 juillet 1881* also apply in civil cases. Civil damages and criminal fines are unified.<sup>27</sup> Thanks to a reorganization of the tribunals in Paris, where 9 out of 10 press law cases are being held, the same judges rule in criminal and civil press law cases. Civil and criminal press law is unified to a high extent.

A civil claim can be filed by anyone who has personally suffered damages caused directly by the offence (art.2 CPP). Article 48-1 of *La loi du 29 juillet 1881* grants interest groups the same rights as private persons, on the basis of the provisions penalizing insult, defamation and incitement to discrimination, hate or violence against individuals on the ground of their ethnic background, nation, race or religion. Therefore, religious interest groups can also claim damages in civil cases concerning expression on religion.

*Le principe de l'opportunité* often leads the prosecutor to the decision to leave the initiative to start proceedings against general insults and defamations to private parties. On the contrary, prosecutors are inclined to prosecute insults and defamations on discriminatory grounds on their own initiative. This policy is in line with the general guidelines for criminal policy as issued by the Ministry of Justice. These guidelines are a response to the increasing amount of discriminatory speech and aim to intensify public action against racism, xenophobia and anti-Semitism and make such action more coherent. The cases concerning discriminatory speech form but a minority of the entire amount of the cases brought before the criminal courts. In comparison with the total number of charges, only a small percentage of charges concerning discriminatory speech are dropped, while a large percentage

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<sup>27</sup> C. Bigot, *Connaître la loi sur la presse*, Paris, France: Victoires-Éditions 2004, p.100.

of the accused are discharged due to the strict procedural rules applying to press law cases. It should be noted that, as no specific religious, racial or ethnic speech offences exist, the statistics that report the amount of complaints and convictions on the basis of these criminal provisions do not make distinctions on the basis of the discriminatory grounds.<sup>28</sup>

#### 4. French case law

In France there are many active religious interest groups that aim to protect a certain religion in society. They often initiate judicial proceedings seeking to prohibit certain speech about their religion. This practice has resulted in a rich case law on the limits to expression on religion in films, film posters, advertising, satirical cartoons and literature. Well-known organizations are *L'Association Générale contre le Rascisme et pour le respect de l'Identité Française et chrétienne* (AGRIF), *l'Association Croyances et Libertés*, *le Mouvement contre le rascisme et pour l'amitié entre peuple* (MRAP), *la Ligue des droits de l'homme* (LDH) and *la Ligue internationale contre le rascisme et l'antisémitisme* (Licra). The interest groups have a large influence. They play a big part in cases concerning free speech. Feld speaks of '*la privatization de la censure littéraire*'.<sup>29</sup> The case law discussed below confirms this image. *Ave Maria*, *Je vous salue Marie*, *La dernière tentation du Christ*, *Larry Flint*, *Amen* and *Girbaud* were all civil proceedings initiated by interest groups. *Charlie Hebdo*, *Sainte Capote en Christ en gloire* were criminal cases.

Roy points out that in France, next to the Jewish population, the Islamic population in particular forms a target for continuous negative speech – nowadays mainly on the Internet. At the same time, it is the Islamic population that lacks the political and social organization that could enable it to express dissatisfaction and act in the interests of the Muslims they represent.<sup>30</sup> Not surprisingly only one of the cases discussed below concerned speech on Islam. In the national affair of the Danish cartoons '*Charlie Hebdo*', several Muslim organizations jointly initiated summary proceedings seeking to prohibit a magazine depicting the prophet Mohammed. The request was annulled because it did not meet the strict requirements of *La loi du 29 juillet 1881*. These procedural rules form an obstacle for anyone who takes a matter to court: in 2002 MRAP, LDH and Licra started civil and criminal proceedings against *La Rage et l'Orgueil*, the book written by the Italian journalist Oriana Fallacci and

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<sup>28</sup> Annex II, CDL(2008)090add2, p. 44-45.

<sup>29</sup> E. Feld, *La privatization de la censure littéraire*, Mémoire de DEA de Sociologie Juridique sous la direction de Monsieur le Professeur Jean-Philippe Heurtin, Université Panthéon – Assas Paris III 2002/2003.

<sup>30</sup> O. Roy, *La laïcité face à l'islam*, Paris, France: Editions Stock 2005.

published by Éditions Plon. The organizations argued that the book contained negative speech on Arabs, Muslims and Islam and incited to discrimination, hatred and violence on religious and racial grounds. Both proceedings were brought to a quick end on formal grounds.

In the French case law concerning expression on religion, objects of controversy have taken the form of images that diverged from the traditional Christian iconography, such as the depiction of the Holy Cross, the crucifixion of Christ and the Last Supper. In particular the combination of religious topics and sex has created much ado.

#### ***4.1 Distinction between the speech offences***

The distinction between the different speech offences and the different aggravating grounds permits the judge to better demarcate different situations, apply the law to individual cases and motivate his decisions. It also permits the public to better understand the rights that the offences protect and the legitimate restrictions to free speech.<sup>31</sup> The cases of *Houellebecq* and *Dieudonné* form good illustrations.

In 2002, *le Tribunal de Grande Instance (TGI) de Paris* considered the remark ‘*La religion la plus con, c’est quand même l’islam. Quand on lit le Coran, on est effondré.*’, made by the French author Michel Houellebecq in an interview about his new novel *Plateforme* published in the French magazine *Lire*, to be acceptable. According to *le TGI de Paris* the remark could neither be considered as a racial insult to Muslims, nor as an incitement to religious or racial hatred against Muslims.<sup>32</sup>

On the contrary, in 2007, *la cour de cassation* considered the remark ‘*Les juifs, c’est une secte, une escroquerie. C’est une des plus graves parce que c’est la première.*’, made by the French comedian Dieudonné in an interview published in the French journal *Lyon Capitale*, to be unacceptable. According to *la cour de cassation*, the remark could not be considered as critique on a religion that is allowed as part of public debate, but constituted an insult against a group of people on the ground of their origin. Its repression was a necessary restriction to free speech in a democratic society.<sup>33</sup>

Below, we examine other case law concerning expression on religion.

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<sup>31</sup> Annex II, CDL(2008)090add2, p. 41.

<sup>32</sup> Chambre correctionnelle du TGI de Paris, 22 oktober 2002, unpublished. See: *Le Monde* Thursday 24 October 2002, p.12.

<sup>33</sup> Cour de cassation, Assemblée plénière, 16 February 2007, N° 06-81785. Available at: <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000017634942&fastReqId=831873254&fastPos=1>.

## 4.2 An obvious abuse of the traditional iconography

In France, so as to be able to insult a religious group in its convictions, an expression has to constitute an obvious abuse of the traditional iconography. The cases of *Larry Flint* and *Amen* form good illustrations.

The poster of the film *The people vs Larry Flint* by Milos Forman depicted Woody Harrelson, the actor who played the role of porn tycoon Larry Flint, in the position of the crucified Christ and merely covered by a loincloth of the American flag against the background of the lap of a woman in bikini shorts. In 1997, people from all over the world cried shame over it and the American film company decided to replace the poster with a less offensive version.

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 court. In first instance and again in appeal, the judge decided that considering the current status of social development the poster did not constitute an obvious insult of 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 didn't 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.

The judge attached much importance to the fact that the church hierarchy had not considered it necessary to take the matter to court.<sup>34</sup> Leclerc notes that the judge thus used the opinion of the church hierarchy as the starting point of his decision, although, the French Republic does not acknowledge the hierarchy of any service.<sup>35</sup>

In 2002, AGRIF brought an action against the poster of the film *Amen* by Costa-Gavras. The poster depicts the Christian cross and the swastika, a catholic clergyman and a Nazi officer. AGRIF regarded the poster as defamatory of the catholic population, because it would wrongly suggest that Catholics had approved of Nazism. According to the defense, the poster concerned a debate on a

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<sup>34</sup> TGI de Paris, 20 February 1997, *AGRIF t. Columbia Tristar Films*, *Légipresse* April 1997, p.49, annotation *Liberté d'expression et respect des croyances*.

<sup>35</sup> Annotation H. Leclerc, *Vinci et le code*, Cour d'appel de Paris, 8 April 2005, *Légipresse* n°223 July/August, p.145.

genocide that had taken place in the ignorance and even with the approval of those represented by AGRIF today.

The French judge considered that the poster did not represent the Catholic cross extended by the swastika. According to the judge, the mix by no means was 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 the 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 fermée*'. 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. The poster was held to be permissible.

Tricoire calls the motivation of the judge too far-reaching and dangerous. A judge should restrain from giving a value judgment, as well as from founding his decision in 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.<sup>36</sup>

The judge attached much importance to the fact that *l'Église 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'Église de France* had failed in her mission to educate consciences.<sup>37</sup> Leclerc notes that, again, the judge relied in his decision on a position taken by the Church.<sup>38</sup>

#### **4.3 *Gratuitously offensive: the commercial character and the forced cognizance of the expression***

An expression may not be gratuitously offensive. According to French case law, 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. The cases *Ave Maria*, *Je vous salue Marie* and *La Dernière Tentation du Christ* form good illustrations.

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<sup>36</sup> Annotation A. Tricoire, *Interprétation du sens de l'affiche d'un film par le juge*, TGI de Paris, 21 February 2002, *Légipresse* n°192 June 2002, p.108.

<sup>37</sup> TGI de Paris, 21 February 2002, *Légipresse* n°192 June 2002, p.105-106, annotation A. Tricoire, *Interprétation du sens de l'affiche d'un film par le juge*.

<sup>38</sup> Annotation H. Leclerc, *Vinci et le code*, Cour d'appel de Paris, 8 April 2005, *Légipresse* n°223 July/August, p.146.

In 1984, the prohibition of the big billboards of the film *Ave Maria* by Jacques Richard was requested in summary proceedings. The poster in question showed a young woman, only covered by a blouse around the hips, with her arms and feet tied to a cross. The judge considered that the representation of the cross in a provocative advertising 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 necessarily are unwillingly confronted with disputable, misleading and commercial advertising.<sup>39</sup> The poster was prohibited.

A year later, in 1985, the film *Je vous salue Marie* by Jean-Luc Godard was the subject of a legal dispute. 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.

*Le TGI de Paris* rejected the request to prohibit the film submitted by three organizations. The organizations argued that the film infringed the right to respect for the religious feelings of the faithful they represented, but *le TGI* ruled: ‘one can not blame the director, the producer or the distributor of the film – as long as no screaming, tempting and deceiving advertising is engaged in it – for having submitted a work to the critique and judgment of the individual spectator who, by buying an entrance ticket, has taken the initiative to enter into a unique relationship with the work. This applies particularly to the case of spectators who are familiar with the author’s work and in advance have taken the risk of accepting the provocative or shocking character of the work. This behavior on the part of the spectator is part of the fundamental freedom of men to come and go and have access to ‘*les oeuvres de l’esprit*’ and this freedom should not be obstructed.’<sup>40</sup>

According to *la cour d’appel de Paris*, the film did infringe religious convictions, but, in compliance with *le TGI*, it specified that ‘the effect of the film is attenuated and can be avoided when the work is

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<sup>39</sup> TGI de Paris, 23 October 1984, *Gazette du Palais (GP)* 1984, p.722; D., 1985, p.31, annotation R. Lindon.

<sup>40</sup> TGI de Paris, 28 January 1985, *Dalloz* 1985, p.129, annotation R. Lindon.

merely distributed in cinemas. The infringement made by the offensive aspects of the work is limited to those spectators that have taken the initiative to go to the cinema.<sup>41</sup> In 1990, the appeal before *la cour de cassation* was rejected. Eventually, the film was not prohibited.<sup>42</sup>

For similar reasons the film *La Dernière Tentation du Christ* (*The Last Temptation of the Christ*) by Martin Scorsese, the subject of a judicial case in 1988, was not prohibited. 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 in cinemas. Many Christians had difficulties with the tone of the film: the face of Christ was too human and Christ was too much in doubt as to whether to choose between his earthly life and his divine vocation.

Several French organizations were of the opinion that the film infringed the sensitivity of Christians and that it presented a misconceived image of their religion. They started summary proceedings. The judge did not prohibit the film, but demanded that the defense circulate a *communiqué* that informed the spectator about the objections of the organizations. In appeal, *la cour de Paris* confirmed the measure taken by the summary trial judge, so as to prevent anyone from being offended in his deepest convictions when unexpectedly confronted with certain scenes, due to insufficient information as to the content of the film. The judge demanded the insertion at the beginning of the film and on the film poster of a warning clarifying that the film was not an adaptation of the gospel.<sup>43</sup>

The case law shows that unexpected confrontation in a public space should be distinguished from the conscious choice for a closed medium. While intrusive billboards in public passages 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. In 1989, *le tribunal de Paris* put the party that requested the prohibition of *The satanic verses*, the famous controversial novel by Salman Rushdie, in the wrong, ruling that '*personne ne se trouve contraint de lire un livre*'.<sup>44</sup>

#### **4.4 Not gratuitously offensive: the link with a political or public debate**

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<sup>41</sup> Cour d'appel de Paris, *GP* 1985, p.344.

<sup>42</sup> TGI de Paris, 20 February 1997, *AGRIF t. Colombia Tristar Films, Légipresse* April 1997, p.50, annotation M-N. Louvet, *Liberté d'expression et respect des croyances*.

<sup>43</sup> TGI de Paris, 20 February 1997, *AGRIF t. Colombia Tristar Films, Légipresse* April 1997, p.50-51, annotation M-N. Louvet, *Liberté d'expression et respect des croyances*.

<sup>44</sup> E. Pierrat, *Le droit du livre*, Paris, France: Éditions du cercle de la librairie 2005, p.138.

An expression is not gratuitously offensive when it concerns critique expressed in the context of a political or public debate. What frequently causes a case to fail is the lack of two necessary constitutive elements of the offences: 1) the author did not intend to insult, defame or stir up hatred and 2) the expression is not a personal and direct attack on *the whole* of a religious group. The cases of *Charlie Hebdo*, *Sainte Capote* and *Christ en gloire* form good illustrations.

In September 2005, the Danish newspaper *Jyllands-Posten* published twelve satirical cartoons about Islam.<sup>45</sup> 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.

That also goes for France: the managing director of *France soir* had published the cartoons in his newspaper, a choice which cost him his job. The French satirical weekly *Charlie Hebdo* released a special issue, in which, apart from the Danish cartoons many French cartoons about Islam were also published.<sup>46</sup> *La Mosquée de Paris*, in the capacity of the French Muslim organization *La société des babous et des lieux saints de l’Islam*, initiated criminal proceedings against Philippe Val, chief-editor of *Charlie Hebdo*, for insulting a group of people on the ground of their religion. Other Muslim organizations, such as *L’Union des organisations islamiques de France*, joined the mosque. The organizations restricted their complaint to the two Danish satirical cartoons mentioned above and the cartoon published on the front cover of the magazine with the heading ‘*Mohammed débordé par les intégristes*’ and a picture of the prophet Mohammed covering his eyes with his hands and roaring ‘*C’est dur d’être aimé par les cons*’. In March 2007, *le tribunal de Paris* acquitted the chief-editor.<sup>47</sup>

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<sup>45</sup> The Danish cartoons are available at: <http://img220.imageshack.us/img220/3415/52na.jpg> .

<sup>46</sup> The cartoons in *Charlie Hebdo* are available at: [www.parijsblog.nl](http://www.parijsblog.nl) .

<sup>47</sup> TGI de Paris, 22 March 2007, *Légipresse* n° 242 - June 2007, p. 123 and further, annotation H. Leclerc, *Caricatures, blasphème et défi*.

The judge considered the image of Mohammed on a cloud and of Mohammed on the front cover to not be insulting to Muslims, because it was fundamentalists, and not Islam, that were ridiculed. The cartoons therefore did not constitute a personal and direct attack on Muslims as a whole. Contrarily, if one would examine the cartoon showing Mohammed with a bomb in his turban in isolation that would insinuate that terrorist violence is inherent to the Muslim community. According to the judge however, the Danish cartoons had evoked a political and public debate and *Charlie Hebdo* had published the cartoon in a critical manner. This context took away *Charlie Hebdo's* intent to insult.<sup>48</sup> *La cour d'appel* confirmed the judgment of *le tribunal*, but took a different approach. *La cour d'appel* was of the opinion that even the cartoon showing Mohammed with a bomb in his turban referred to a fraction of all Muslims, the fundamentalists, and not to the whole Muslim community. According to *la cour d'appel*, there could be no confusion 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.<sup>49</sup>

The organization *Aides Haute-Garonne* had organized *La nuit de la Sainte-Capote* (the night of the Holy Condom), an informative evening about the prevention of HIV. To announce the event the organization handed out a prospectus. 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 is accompanied by the following text: '*Sainte Capote protège-nous*'. AGRIF considered the picture to be insulting to the Catholic population and started a lawsuit.

Both *le tribunal* and *la cour de Toulouse* agreed with AGRIF and twice the organization was convicted for the insult of a group of people on the ground of their religion. But in February 2006, *la cour de cassation* annulled the decision of *la cour d'appel* by holding that the image was possibly provocative, surely a sign of bad taste and probably offensive to the Catholic community, but did not overstep the limits to freedom of speech. *La cour de cassation* considered that 'the hypersensitivity of a fraction of the faithful cannot make the public space unavailable for the representation of a religious woman in the context of the fight against HIV using the slogan '*Sainte Capote protège-nous*'. This consideration clearly displays the French concept of a neutral public space, where the sensitivity of a fraction of the

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<sup>48</sup> TGI de Paris, 22 March 2007, *Légipresse* n° 242 - June 2007, p. 125, annotation H. Leclerc, *Caricatures, blasphème et défi*.

<sup>49</sup> Cour d'appel de Paris 12 March 2008, *Légipresse* n° 252 - June 2008, p. 107-110, annotation H. Leclerc, *Les caricatures de Mahomet, suite*.

faithful should not manifest itself. According to *la cour de cassation*, 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.<sup>50</sup>

Another cartoon that combines religion, HIV and the use of condoms can be found in the issue of April 25, 2005 of the daily newspaper *Libération*. The cartoonist Willem had drawn a picture of a naked Christ wearing a condom. A group of bishops observes him. A white bishop says to a black bishop: '*Lui-même aurait sans doute utilisé un préservatif?*' AGRIF considered the cartoon insulting to the Catholic population and filed a complaint.

In all three instances AGRIF draw a blank. In November 2005 *le tribunal*, in May 2006 *le cour d'appel* and in May 2007 *la cour de cassation* ruled that the cartoon did not overstep the limits of the freedom of speech. According to *la cour de cassation*, *la cour d'appel* 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 of the protection against HIV and aimed at calling the attention of the reader to the HIV plague in Africa.<sup>51</sup>

#### **4.5 The Girbaud case: a reintroduction of the offence of blasphemy to French law?**

In 2005, the *Girbaud* case attracted a lot of media attention in France. The subject of argument was a billboard of Marithé François Girbaud, a brand of women's clothing. The billboard - 40 metres long by 11 metres wide - was placed on a building on the Avenue Charles-de-Gaulle in Neuilly-sur-Seine in March 2005. The poster depicted a parody on the Last Supper by Leonardo da Vinci and was a wink to the novel *The Da Vinci Code* by Dan Brown. 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. *The Da Vinci Code* expounds the theory that on the painting Mary Magdalene is placed in this position. A hand holding a dove, the traditional symbols of the Father and the Holy Ghost, figured between the women's legs.

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<sup>50</sup> Cour de cassation ch. crim. 14 February 2006, *Légipresse* n°232 - June 2006, p.116, annotation A. Tricoire, *Unjure envers la communauté catholique: contrôle de la cour de cassation*.

<sup>51</sup> Cour de cassation, ch. crim., 2 May 2007, *Légipresse* n°244 - September 2007, p.122.

*L'Association Croyances et Libertés* requested the prohibition of the poster in summary proceedings. The judge's reasoning is almost identical to the reasoning in the *Ave Maria* case. The poster constituted an insult to Catholics that was disproportional 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 prohibited the placement of the poster in all public spaces.<sup>52</sup>

The decision was upheld in appeal in April 2005. The judge considered that the separation of the church and the state did not obstruct the application of the law when a religion is insulted, because *La loi de 1881* penalizes the insult of a group of people on the ground of their religion. Again, the commercial nature and the forced cognizance of the expression formed important criteria. In addition, the choice to publish the poster just a week before Easter increased the insulting character.<sup>53</sup>

Discussion arose as to the question of whether the French judge in the *Girbaud* case had reintroduced the offence of blasphemy. Indeed, in appeal the judge seemed to make no distinction between the insult of a religion and the insult of individuals. According to Pierrat, blasphemy was reintroduced as a criminal offence after *Girbaud* and, therefore, even publishers of literary books should be on alert.<sup>54</sup> Contrarily, Rolland is of the opinion that blasphemy would have only 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.<sup>55</sup> Leclerc notes that article 1 of the French constitution does not contain a *right* to respect, but a *characteristic* of *l'État laïc* that concerns both the freedom to believe and the freedom not to believe. He reproaches the judge for a lack of tolerance.<sup>56</sup> 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. On this

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<sup>52</sup> TGI de Paris (ord.réf.) 10 March 2005, *Recueil Dalloz* n°20 2005, p.1326-1327, annotation P. Rolland.

<sup>53</sup> Cour d'appel de Paris 8 April 2005, *Recueil Dalloz* n° 20 2005, p.1327-1328, annotation P. Rolland.

<sup>54</sup> E. Pierrat 2005, p.138.

<sup>55</sup> Annotation P. Rolland, *La critique, l'outrage et le blasphème*, TGI de Paris (ord.réf.) 10 March 2005 and Cour d'appel de Paris (14<sup>e</sup> ch. B) 8 April 2005, *Recueil Dalloz* n° 20 2005, p.1328-1331.

<sup>56</sup> Annotation H. Leclerc, *Vinci et le code*, Cour d'appel de Paris 8 April 2005, *Légipresse* n°223 July/August, p.149.

subject it is not easy to preserve the serene neutrality that the judiciary of the Republic is required to exhibit.<sup>57</sup>

In November 2006, *la cour de cassation* has annulled the decision of *la cour d'appel*. *La cour de cassation* considered that 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 grounds of their religion.<sup>58</sup> A reintroduction of the offence of blasphemy was thus out of the question.

## 5. The European framework

### 5.1 *European and international standards*

Expression on religion has increasingly become an international concern. Accordingly, it has become the subject of regulation by different institutions on different European and international levels. This Europeanization of law and multilevel governance influences the scope of the margin of appreciation for national states on the subject.

Many international provisions prohibit racism, discrimination, xenophobia and hate speech on all kind of grounds, including religion. Examples are to be found in the provisions in the Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (art.3-6), The United Nations International Covenant on Civil and Political Rights (art.20), the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (art.4), Recommendation R(97)20 on Hate Speech of the Committee of Ministers of the Council of Europe (principles 2-7) and the General Policy recommendation n°7 on national legislation to combat racism and racial discrimination of the Council of Europe's European Commission against Racism and Intolerance (ECRI).

Next to these general provisions, standards dealing specifically with religion have come into being. One can observe a general trend towards the opinion that defamation or insult of a religion should

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<sup>57</sup> Idem, p.147.

<sup>58</sup> Cour de cassation, 14 November 2006, *Légipresse* n°238 January/February 2007, p.11.

not be prohibited and the offence of blasphemy should be abolished and that the insult of people on the ground of their religion can be prohibited, but that it is undesirable to create an offence that penalizes the insult of religious feelings. Criminal sanctions are seen as appropriate in relation to incitement to (religious) hatred, but class/collective action is often seen as the primary way to mobilize *civil society* and to protect victims of hate speech and other types of speech. The possibility for non-governmental organizations to claim damages in civil proceedings is often recalled. Examples can be found in Recommendation 1805 of June 29<sup>th</sup>, 2007 ‘*Blasphemy, religious insults and hate speech against persons on grounds of their religion*’ of the Council of Europe<sup>59</sup> and *The Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to hatred* of October 23<sup>rd</sup>, 2008 of the European Commission for Democracy through Law, the commission of the Council of Europe that advises Member States on constitutional matters.<sup>60</sup>

The subject of religion also turns up in EU regulations. Examples can be found in the Audiovisual Media Service Directive of the European Parliament and of the Council. Member states have to ensure that audiovisual media services don’t contain any content that incites to hatred on religious grounds (art.3b) and that audiovisual commercial communications do not include or promote any discrimination based on religion (art.3c (1/c/ii)).<sup>61</sup>

## **5.2 The case law of the European Court of Human Rights**

Article 10 and 9 of the European Convention of Human Rights (ECHR) protect, respectively, freedom of speech and freedom of religion on the European level. The European Court of Human Rights (ECtHR) rules in cases concerning these rights in highest and last instance.

The Court traditionally grants states a large margin of appreciation in cases concerning religion, because, contrary to ‘topics of political and public debate’, a ‘European common ground’ doesn’t

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<sup>59</sup> Recommendation 29 June 2007, 1805 (2007), ‘Blasphemy, religious insults and hate speech against persons on grounds of their religion’, Parliamentary Assembly of the Council of Europe, available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm> .

<sup>60</sup> European Commission for Democracy through Law, *Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to hatred*, study no.406 / 2006, CDL-AD(2008)026, Strasbourg: Council of Europe 23/10/2008.

<sup>61</sup> Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, published on: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007L0065:EN:NOT> .

exist for ‘morals’<sup>62</sup>. This reserved position in the cases *Otto Preminger* and *Wingrove* in 1994 and 1996 has caused the Court a lot of criticism. The Court allowed Austria to prohibit the Otto Preminger Institute to run the film *Das Liebeskonzil* in its cinema. In the film, the devil, on God’s request, spreads syphilis amongst the people to punish them for their sins. The Court allowed England to refuse a classification certificate for the video *Visions of ecstasy* and, thereby, obstruct the distribution of the video. In the video, the visions of Saint Theresa of Avila, a nun in the sixteenth century, are imagined as erotic ecstasies for which she gets the assistance of Christ and a woman symbolizing her spirit. The reason for censorship in both cases was ‘to protect the right of citizens not to be insulted in their religious feelings by public expression of views of other persons’.<sup>63</sup> By using a broad definition of ‘rights of others’ and combining it with religious freedom, the Court seemed to create the possibility for states to grant the faithful the unconditional right not to be offended in their religious feelings.<sup>64</sup> Critics held that article 9 does not contain such a right.<sup>65</sup>

In the case law of the Court there is a tight connexion between the size of the insult and the ‘holy’ character of religious questions or symbols. According to the Court, respect for the religious feelings of the faithful can already be violated ‘by provocative portrayals of objects of religious veneration... such portrayals can be regarded as malicious violation of the spirit of tolerance, which must be a feature of democratic society.’<sup>66</sup> States are allowed to take measures ‘..to provide protection against seriously offensive attacks on matters regarded as sacred by Christians.’<sup>67</sup> In 2005, the Court allowed Turkey to impose a fine on the publisher of *Prohibited phrases*, a novel containing critique on religion, for insulting ‘God, Religion, the Prophet and the Holy Book’ ‘..to provide protection against offensive attacks on matters regarded as sacred by Muslims.’<sup>68</sup>

The Court states that:

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<sup>62</sup> *Gay News Ltd and Another*, nr. 8710/79, 5 ECHR 123; *Choudhury*, ECHR 5 March 1991, nr. 17439/90; *Murphy*, ECtHR 9 July 2002, nr. 44179/98; *Leyla Şahin*, ECtHR 10 November 2005, nr. 44774/98.

<sup>63</sup> See §47 of *Wingrove*, ECtHR 25 November 1996, NJ 1998, 359 and §48 of *Otto Preminger*, ECtHR 20 September 1994, NJ 1995, 366, annotation E.J. Dommering.

<sup>64</sup> See §47 of *Wingrove*, ECtHR 25 November 1996, NJ 1998, 359 and §48 of *Otto Preminger*, ECtHR 20 September 1994, NJ 1995, 366, annotation E.J. Dommering.

<sup>65</sup> See the dissenting and concurring opinions of *Wingrove*, ECtHR 25 November 1996, NJ 1998, 359 and *Otto Preminger*, ECtHR 20 September 1994, NJ 1995, 366; See the annotation of R. De Winter for *Otto Preminger*, ECtHR 20 September 1994, NJCM-Bulletin 1995, 20-2, p.191, and D. Voorhoof for *Otto Preminger*, ECtHR 20 September 1994, ICM jaarboek, Antwerp: Maklu 1994, p.224 and of E.J. Dommering for *Otto Preminger*, ECtHR 20 September 1994, NJ 1995, 366; See annotation D. Voorhoof for *Wingrove*, ECtHR 25 November 1996, Auteurs & Media, 1997-2, p. 193.

<sup>66</sup> See §47 of *Otto Preminger*, ECtHR 20 September 1994, NJ 1995, 366, annotation E.J. Dommering.

<sup>67</sup> See §57 of *Wingrove*, ECtHR 25 November 1996, NJ 1998, 359.

<sup>68</sup> See §30 of *L.A.*, ECtHR 13 September 2005, nr. 42571/98, available at: [www.echr.coe.int](http://www.echr.coe.int) (HUDOC).

*'Amongst the responsibilities of the member states - in the context of religious opinions and beliefs - may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs...'*<sup>69</sup>

The Court makes a distinction between *'intimate personal convictions'*, for which the Court grants special protection – although the commercial nature can take away the intimate character - and questions of *'of indisputable public interest in a democratic society'*, that the Court considers to be permissible subjects for critical public debate.

If we look at the French case law in the light of the European framework, we can conclude that the decisions of the French judge fall within the margin of appreciation given to him by the European judge. However, the Court always sets a minimum norm. States still have the choice as to the extent they want to restrict expression on religion within their margin of appreciation. The French judge does not use the entire scope that the Court leaves to states for restrictions to expression on religion. Like the French judge, the Court discerns different levels of publicity of speech and takes into account the kind of medium and the scope of the public: mass media like radio, television and newspapers versus books, galleries and cinemas. But where the French judge permitted the film in the *Je vous salue Marie* case, the Court let Austria prohibit the film in the *Otto Preminger* case, because, via advertising, the content of the film had been made 'public'. The French case law clearly takes a more liberal view. The margin of appreciation used by the Court leads to the use of different criteria for the assessment of the public nature of speech, which is why national case law from different European states can be in conflict with each other.

Amongst the judges of the Court there are mixed opinions about religious topics. Within the Court, the proportion of votes was in *Otto Preminger* 6:3, in *Wingrove* 7:2 and in *I.A.* 4:3. In the *Giniewski* case the Court unanimously concluded that there had been a breach of article 10 ECHR. What was it that made France monumentally slip up?

### **5.3 The ECtHR blows the whistle on France: the Giniewski case**

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<sup>69</sup> See §49 of *Otto Preminger*, ECtHR 20 September 1994, NJ 1995, 366, annotation E.J. Dommering.

In 1994, the newspaper *Le quotidien de Paris* published the article ‘*L’obscurité de l’erreur*’ by journalist, sociologist and historian Paul Giniewski. The article is a reaction to the publication of the papal encyclical ‘*Veritatis Splendor*’. Giniewski criticizes the position of the Pope and states that the catholic doctrine made way for the conception and the realization of Auschwitz.<sup>70</sup> AGRIF considered the article defamatory for Catholics and initiated criminal proceedings. *Le tribunal* agreed with AGRIF, but in appeal Giniewski was discharged. AGRIF started a civil action. *Le tribunal* decided that the article constituted a defamation of Catholics, because Giniewski held the Catholic Church or even Catholics themselves responsible for the atrocities by the Nazis. However, according to *la cour d’appel*, the article aimed to contribute to the ongoing public debate on the possible causes of the Holocaust. *La cour de cassation* for its part annulled the decision of *la cour d’appel*, because the article was evidently defamatory. After referral, *la cour d’appel* adopted the opinion of *la cour de cassation* and stated that Giniewski had held Christians responsible for the mass killings committed by the Nazis. A new appeal with *la cour de cassation* was rejected, because *la cour d’appel* had rightly not accepted Giniewski’s plea of good faith.

The European Court was of another opinion. The Court stated that:

*‘By considering the detrimental effects of a particular doctrine, the article in question contributed to discussion of the various possible reasons behind the extermination of the Jews in Europe, a question of indisputable public interest in a democratic society. In such matters, restrictions on freedom of expression were to be strictly construed. Although the issue raised in the present case concerns a doctrine upheld by the Catholic Church, and hence a religious matter, an analysis of the article in question shows that it does not contain attacks on religious beliefs as such, but a view which the applicant wishes to express as a journalist and historian. In that connection, the Court considers it 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... Furthermore, it has already had occasion to note that “it is an integral part of freedom of expression to seek historical truth”, and that “it is not its role to arbitrate” the underlying historical issues.’<sup>71</sup>*

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<sup>70</sup> The judgment cites the following passage in the article: “*The Catholic Church sets itself up as the sole keeper of divine truth... It proclaims clearly the fulfilment 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 “fulfilment”.. 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*”.

<sup>71</sup> See §51 *Giniewski*, ECtHR 31 January 2006, nr. 64016/00, NJ April 2007-17, annotation E.J. Dommering.

The Court repeated the important principle in its settled case law that expressions have to be able to ‘*shock, offend and disturb*.’<sup>72</sup> The article was not gratuitously offensive: it did not overstep a limit, because it was not intentionally insulting or defamatory nor did it incite to hatred or disrespect. Giniewski had been convicted to pay the symbolic amount of damages of one franc and the costs for the publication of the verdict in a newspaper. The Court considered this last measure to be disproportional, because the publication referred to the article as defamatory, which had a chilling effect.<sup>73</sup>

Lawyers agree that the *Giniewski* case is the starting point of a turn in the doctrine of the Court concerning expression on religion in favor of freedom of speech.<sup>74</sup> Indeed, in several cases concerning expression on religion following the *Giniewski* case the Court came to the conclusion that there had been a breach of article 10 ECHR. In the *Albert-Engelmann* case in January 2006, the Court allowed critique on a movement within the Catholic Church and on a vicar-general of archbishopric.<sup>75</sup> In the *Tatlav* case in May 2006, the Court considered critique on Islam and Mohammed to be acceptable.<sup>76</sup> Again in the *Klein* case in October 2006, the Court considered that the criticism of an archbishop who advocated the prohibition of the film poster for *The people vs Larry Flint* did not constitute an infringement of the rights of others to express and profess their religion and could not be considered as a degrading remark on the content of a religion. The fact that the archbishop was insulted did not imply that the members of the church were insulted.<sup>77</sup>

The interpretation by the Court of ‘the right of others’, in combination with freedom of religion, is less broad than critics had feared after the *Otto Preminger* case. An unconditional right not to be offended in one’s religious feelings does not exist. The French *Giniewski* case is the starting point for an increasingly clear distinction made by the Court between unprotected attacks on religion and protected critique on religious dogmas and institutions.

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<sup>72</sup> See §43 *Giniewski*, ECtHR 31 January 2006, nr. 64016/00, NJ April 2007-17, annotation E.J. Dommering.

<sup>73</sup> *Giniewski*, ECtRM 31 January 2006, nr.64016/00, NJB 21 April 2006-16, p.899.

<sup>74</sup> Annotation E.J. Dommering, *Alinak*, ECtHR 29 March 2005, nr. 40287/98, I.A., ECtRM 13 September 2005, nr. 42571/98, *Giniewski*, ECtHR 31 January 2006, nr.64016/00, NJ April 2007-17, p.2001; Annotation P. van Sassen van Ysselt, *Kritiek op aartsbisschop die aantijging doet van blasfemie niet aangemerkt als kwetsing van groep gelovigen*, *Klein*, ECtRM 31 October 2006, no. 72208/01, NJCM-Bulletin volume 32 nr. 5 2007, p. 693.

<sup>75</sup> *Albert-Engelmann Gesellschaft MBH*, ECtHR 19 January 2006, no. 46389/99, available at: [www.echr.coe.int](http://www.echr.coe.int) (HUDOC).

<sup>76</sup> *Tatlav*, ECtHR 2 May 2006, no. 50692/99, available at: [www.echr.coe.int](http://www.echr.coe.int) (HUDOC).

<sup>77</sup> *Klein*, ECtHR 31 October 2006, no. 72208/01, NJCM-Bulletin volume 32 nr. 5 2007, annotation P. van Sassen van Ysselt, *Kritiek op aartsbisschop die aantijging doet van blasfemie niet aangemerkt als kwetsing van groep gelovigen*.

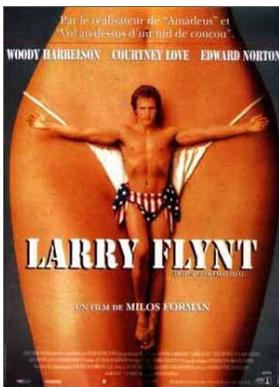
## 6. Conclusion

In France, special emphasis is placed on the neutrality of the state and the public sphere. *La laïcité* originates in *La loi de 1905*. The cases *Ave Maria, Je vous salue Marie* and *La dernière tentation du Christ* illustrate that the French judge clearly distinguishes different degrees of the public nature of speech. However, even for French judges it is difficult to remain neutral. In the *Girbaud* cases, the judge seems to have attempted a reintroduction of the offence of blasphemy. In the cases of *Larry Flint* and *Amen*, the judge seems to have taken into account the point of view of the Catholic Church for the assessment of the insulting character of speech. In the famous *Ginienski* case, the French judges were divided. *La cour de cassation* protected catholic citizens that felt offended by certain speech, but the European Court of Human Rights corrected France and gave priority to a free historical debate. In its recent case law, the European Court of Human Rights increasingly discerns unprotected attacks on a religion from protected critique on religious dogmas and institutions. The recent French cases of *Charlie Hebdo*, *Sainte Capote* and *Christ en gloire* are in line with this European development.

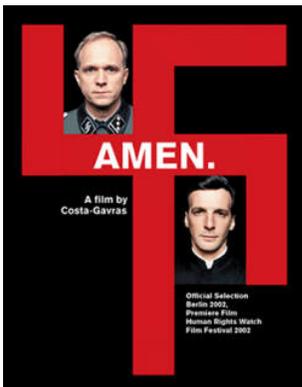
The film poster in the *Ave Maria* case



The film poster in the *Larry Flint* case



The film poster in the *Amen* case



The bill board in the *Girbaud* case



The prospectus in the *Sainte Capote* case



The satirical cartoon in the *Christ en gloire* case



The cartoon on the cover in the *Charlie Hebdo* case

