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Group Defamation in France

Jean Peytel*

IT CANNOT BE SAID that there is any French legislation which specifically protects citizens of any particular ethnic origin or creed. For instance, there is no law that shelters members of a particular religious faith from group defamation.

The absence of legislative texts in this connection is explicable by the tradition rooted in the French psyche, born out of the French Revolution, that frowns upon racial discrimination and religious intolerance. Shortly after the publication of the Declaration of Rights by the young American Republic, the Constituent Assembly, on 26th August 1789, proclaimed its famous "Declaration of the Rights of Man and the Citizen" which for the first time in France established the principles of the equality of all citizens before the law, and equality of taxation, restored to the Protestants the rights and obligations of citizenship, and conferred these rights and obligations on the Jews. The Declaration states that men are born and remain free and equal in their rights, that social distinctions can only be founded on the common good and that no man be called to account for his opinions, religious or otherwise.

Since the rights of citizens belonging to ethnic or religious minorities were the same as those of other citizens, by virtue of principles thus laid down, no special protection was called for. Such protection would in any case have run counter to the principle of equality as well as to another republican and liberal tradition which also derived from the Revolution of 1789, i.e., freedom of thought and expression, to state opinions orally or in writing, and to publish such opinions on any problem, even of a religious or racial character.

Furthermore, until very recently no special protection was required in a nation where popular feeling was resolutely hostile to any sort of discrimination, at least in theory. Anti-semitic manifestations undoubtedly did occur sporadically in particular cases as at the time of the trial of Captain Dreyfus, an event that divided France between 1894 and 1906. But it is a fact that anti-semitism did not represent a specific threat or characteristic disadvantage to the ethnic or religious group at which it was

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aimed. Even though decried in certain quarters, this group enjoyed all the rights of liberties of other French citizens, and these rights and liberties were never jeopardized. Anti-semitism in France towards the end of the 19th century and the beginning of the 20th century was an intellectual or fashionable attitude, a kind of snobbery, and it was only when the dark realities of the Third Reich emerged upon the Western European scene that the mask of anti-semitism assumed its tragic aspect.

German military power was menacingly looming on the horizon, war was already casting its shadow, and Nazi propaganda, skillful as it was in dividing peoples whom it sought to weaken, swiftly took note of the disorders it could initiate in France by causing the seed of anti-semitism to be sown in the newspapers of that country. The authorities soon became aware of the dangers of such a campaign, but lacked the means of acting effectively to suppress these onslaughts. The courts, more often than not, when required to consider the application of the Law of 29th July 1881 on freedom of the Press, ruled that "general attacks directed against indeterminate collectivities did not amount to defamation or public insult (*injures publiques*) and could not therefore justify prosecutions by persons belonging to these collectivities." To suppose a cause of action on grounds of defamation or public insult, it was necessary that the defamatory or insulting imputations complained of should consist in a precise and specific fact and should be directed against persons so identified that each of the members of the plaintiff community should consider himself to have been personally wronged; on the other hand, defamatory or insulting attacks amounting even to violent criticism of a class of citizens or a profession did not constitute a cause of action.

It was from the standpoint of national defense that, in the face of the Nazi danger, the Government, availing itself of the special powers voted for this purpose by Parliament, modified certain articles of the Press law of 29th July 1881 by a decree passed on 21st April 1939. Although general in scope, it was the first—and only—text which could be regarded as protection against group defamation. The report of the Prime Minister (President du Conseil as he was then) read as follows:

All that excites hatred, all that brings Frenchmen into conflict with other Frenchmen, can no longer be considered

as anything else than treason . . . Articles 32 and 33 of the law of 29th July 1881 repress defamation and public insult against individuals. There is no doubt that groups possessing legal personality and competent to take legal steps through their qualified representatives may become plaintiffs claiming damages in a criminal case in order to obtain redress on the grounds of insult or defamation against them. The question has arisen whether the same applies to a group which is not a moral person not possessing a legal existence enabling it to bring an action. The question is controversial according to jurisprudence. In the present state of jurisprudence it is therefore permissible to assert that public statements tending to divide citizens or defamation directed to that end against a group of persons cannot easily be the subject of proceedings. In order to breach this gap, sufficiently brought to light by a whole series of recent facts, we propose that articles 32 and 33 (2) of the law of 29th July 1881 be supplemented by adding thereto provisions repressing defamation and insult committed against a group of persons who, by reason of their origin, belong to a particular race or creed, when the aim of such defamation is to stimulate hatred between citizens and inhabitants. It should be observed that the addition thus made to the law of 29th July 1881 is not in any way of such a nature as to alter the concept of freedom which is its fundamental basis. There is no other aim than to coordinate this concept with those that are inseparable from the Republican motto itself (Liberty—Equality—Fraternity). In this context, no reason drawn from race or religion can disrupt the equality of citizens; no reservation born out of circumstances of heredity can, in respect of one of them, infringe the feeling of brotherhood which unites all the members of the French family. But it is not, really speaking, their interests which are at stake in this connection, but rather that of the national collectivity.

The texts amended by the Decree of 21st April 1939 are the following:

Art. 32 of the Law of 29th July 1881 (2nd paragraph)

Defamation committed by the same means¹ against a group of persons not designated by article 31 of the present law, but who, by their origin, belong to a particular race or religion, shall be punished by imprisonment, varying between one month and one year and a fine between 500 to 10,000 francs,² when its purpose is to incite citizens or inhabitants to hatred of one another.

¹ The means referred to in the new articles 32 and 33 of the law of 29th July 1881, are "speeches, shouts or threats proffered in public places or at

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Art. 33 of the same law (2nd paragraph)

Insults committed in like manner (see n. 1, above) against individuals, when it shall not have been preceded by provocation, shall be punished by imprisonment varying between five days and two months and a fine varying between 16 or 300 francs, or either of these penalties alone. The maximum term of imprisonment shall be of six months and the maximum amount of the fine shall be 500 francs³ if the insult was proffered against a group of persons who, on account of their origin, belong to a particular race or creed, for the purpose of inciting the citizens or inhabitants to hatred of one another.

These texts, promulgated on the eve of World War II in order to avoid divisions in the French nation, were not applied frequently before the invasion of France in May and June 1940. It goes without saying that during the period of German occupation (1940-1944) they were not applied to protect members of the Jewish faith, abominably persecuted by the occupying forces, against whom the so-called Vichy Government had promulgated exceptional legislation which was annulled by the ordinance of 9th August 1944 which restored republican legality. It is therefore only after the liberation of France by the allied armies that significant applications of these texts by the courts are to be found. If the truth be told, judges have shown the greatest caution, even a certain shyness, in applying the repressive texts of 1939, perhaps because they considered that the reasons relating to the national interest which had given rise to these amendments to articles 32 and 33 of the Law of 1881 no longer obtained.

The fact remains that certain decisions required the existence of incitement to violence in order to punish defamation against an ethnic or religious entity. The Court of Cassation felt it necessary to recall on several occasions, by quashing the judgments of the Court of Appeal, that such defamation is punishable when, without a call to violence, its aim is to stimulate hatred

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public meetings, written or printed, sold, distributed, offered for sale or exhibited in public places or at public meetings, posters or hoardings, exposed to the public eye, as well as sketches, illustrations, paintings or emblems exposed to the public eye, offered for sale, peddled or distributed."

² The 1939 text refers to old francs. The current rate of the fine is between 300 and 300,000 new francs, i.e., in round figures between \$60 and \$60,000.

³ The 1939 text refers to old francs. The current rate of the fine is between 150 and 150,000 new francs, i.e., in round figures between \$30 and \$3,000.

between citizens or inhabitants (Cf. Cassation Criminelle 26th June 1952, Dalloz 1952—page 641—and 26th June 1954, Dalloz 1954—page 646). For instance, a ruling rendered in 1952 by the Supreme Court quashed a decision of the Court of Appeal of Paris, which had held that defamatory imputations against Jewish doctors inserted in a newspaper did not fall within the provisions of article 32 of the law of 29th July 1881, on the mistaken ground that, in order that such imputations should be punished, the article required an intention on the part of the author of the libelous statements to incite citizens and inhabitants to social disorders and disturbances and, in consequence, to violence.

Case law on this score nevertheless remains generally very restrictive and is expressed, *inter alia*, in a decision of the Court of Appeal of Paris of 26th March 1952 (Dalloz 1953, page 342). It held that although insults and libelous statements against a group of persons who belonged to the Jewish religion were contained in an article advising "healthy suspicion" of Jews, regarded them as foreigners, and advocated a "balanced and reasonable anti-semitism" with "just and necessary laws," it was not however established that it was the intention of the author of the article concerned to conjure up feelings of passion, such as hatred, since he called for the exercise of reason, and not passion, and furthermore stated that his ideas were opposed to what he himself described as "ignoble German and racist persecution."

Jurisprudence is now clearly marked out, and the scope of the protection afforded by the criminal law is therefore restricted to instances where the purpose of speeches, writings, pictures is to incite hatred, not only as between citizens, but also as between the inhabitants of France.

Side by side with the criminal law, which sanctions the offences of insults and defamation against ethnic and religious groups, and enables the victims to intervene as plaintiffs claiming damages in a criminal case independently of the fine exacted by the State, the possibility of seeking a remedy in the courts of civil jurisdiction is to be found in the fundamental principles of law and the Civil Code; compensation may be sought from those who, by their tortious acts, cause prejudice to persons belonging to any particular ethnic or religious group. A case in point is refusal to grant employment, or maneuvers tending to the wrongful dismissal of an employee of a particular faith. The texts which may be relied

upon are very general in character: Articles 1382 and 1383 of the Civil Code.⁴ In order that damages should be awarded against the defendant under these articles, French jurisprudence requires three elements to be present: a tort, damage, and a causal link between the tort and the damage suffered. Although it is relatively easy to show damage and its imputability to the facts alleged by the plaintiff, the tortious act is generally more difficult to establish. There cannot be any question of a tort as a moral concept. But relative to a tort considered as a breach of the legal order, certain writers have defined this as the breach of a pre-existing obligation. The result is that each particular case sets a very delicate problem of appreciation to the courts. However, proceedings have been instituted on the basis laid down by the French Constitution, and this indirectly takes us back to the Declaration of the Rights of Man and the Citizen.

On 4th October 1958, the French People adopted a new Constitution, with a preamble which reads as follows:

The French People solemnly proclaims its attachment to the Rights of Man and to the principles of national sovereignty such as they have been defined by the Declaration of 1789, as confirmed and completed by the preamble to the Constitution of 1946.

The preamble of the 1946 Constitution to which reference is made, is worded as follows:

On the morrow of the victory won by the free peoples over regimes which have attempted to enslave and to degrade the human person, the French People once again proclaim that every human being, without any distinction of race, religion or creed, possesses inalienable and sacred rights. It solemnly re-affirms the rights of Man and of the Citizen enshrined in the Declaration of Rights of 1789 and the fundamental principles recognized by the laws of the Republic.

Finally, Article 2 of the Constitution of 1958 proclaims that France "ensures the equality before the law of all citizens, without any distinction of origin, race or religion."

However general in character these texts may be, it nonetheless results that any act whose effect is to disrupt the equality

⁴ Art. 1382—Any act whatsoever by any person which causes damage to another obliges the person by whose fault the damage has occurred to make good such damage. Civ. 1348-1°.

Art. 1383—Every person is responsible for the damage occasioned by him, not only by his act, but through his negligence or his imprudence. Civ. 1382; Pén. 319 s; R. 26; R. 30; R. 34; R. 38; R. 40.

of citizens before the law is a breach of a pre-existing obligation and, consequently, is a tort giving rise to an action for damages. Any racial or religious discrimination may therefore be held to be tortious in the absolute discretion of the Courts.

It should nevertheless be pointed out that no constant jurisprudence has yet been established on the basis of these texts, and that certain associations as well as members of Parliament have submitted draft legislation with regard to the recruitment in industrial or commercial undertakings of employees not belonging to what is termed in the United States the "Caucasian race."

The legislative provisions must also be mentioned which enable the consequences of group defamation to be indirectly countered:

(1) *Change of Name*. Article 1 of the revolutionary law of the 6th Fructidor, Year II (25th August 1794)—which is still in force—prohibits the assumption of a name other than that to which an individual is entitled by virtue of his birth certificate or, more precisely, his ascendance; but this rule as to the immutability of patronymic appellation is not entirely absolute: a change of name may, *inter alia*, be granted by way of governmental authorization. The law of 11th Germinal, Year XI (1st April 1803), supplemented by subsequent texts, established a change of name procedure by decree (a governmental act) passed on the advice of the Council of State (Conseil d'Etat), this institution being the supreme administrative tribunal in France.

In order to obtain an authorization of change of name, an interest must be justified, whose nature it is for the government to appreciate, following upon an inquiry made by the Council of State and the delivery of favorable opinion by that body. In former times administrative practice was fairly strict; in regard to foreign sounding names, the principle of the gallicizing of the name was not admitted, but certain names could be altered, by reason of difficulties of pronunciation. With regard to names usually borne by Jews, practice prior to 1940 was not in favor of authorizing changes which might have appeared as running counter to egalitarian notions. During the period of German occupation, under the Vichy government, the law of 10 February 1942 prohibited Jews from changing their names. This law, which formed part of the exceptional measures taken against Jews, was of course repealed in 1944.

But since the liberation of France, the events of 1940-1944 and the odious persecution to which French Jews, as all other European Jews, were subjected, have led the Council of State to agree far more readily to the changing of names habitually borne by Jews, whether owners were of Israelite origin or not. At its General Assembly of 6th March 1947, the Council of State, taking into account the racial persecution of the occupation period, did in fact express the opinion that persons with patronyms reputedly Jewish could for that reason alone be authorized to change these patronyms.

(2) *Changes of First Names.* With the same object of fusion or assimilation in mind, the post-war legislators introduced an innovation by abolishing a principle of French law which was still in force, *viz.*, the immutability of an individual's first name or names, which, even more than the patronymic name, was regarded as immutable by French legislation. No legal provision existed enabling a first name to be changed, whereas, as has been seen above, it was possible to change a patronym by decree. However, on the one hand, ridiculous or undesirable first names are bestowed on many children, and on the other hand, it was considered pointless to authorize Jews to change their names, in order to integrate them in the national community, if they were forced to retain first names of Hebrew origin which stressed their origin. On this score, article 57 of the Civil Code has been supplemented by the following provisions of the law of 12th October 1955:

The first names of a child as shown on his birth certificate may, if a legitimate interest is established, be altered by judgment of the civil courts delivered at the request of the child, or, during his minority, at the request of his legal representative. The judgment shall be rendered and published in the conditions provided for in articles 99 and 101 of the present Code. The addition of other first names may in like manner be decided upon.

The intention of the legislation has been to institute a simpler, easier and swifter method to effect a change of first names than the cumbersome administrative procedure applicable to changes of name. The aim has only partly been fulfilled, because the application of the law of 1955 has had to face the resistance of the courts, which still clung to the classical rule of the immutability of first names. Most of the courts called upon to give a ruling

on applications submitted by Jews wishing to change their names have interpreted the words "legitimate reasons" in the law in question as meaning a major and exceptional interest, and have held that such an interest could not be evidenced, or at least that it had no current existence as "racial prejudices did not flourish on French soil." A certain number of appeals have been lodged with the Court of Cassation, and rulings have not yet been given, but it is most likely that these will favor a very liberal interpretation of the law of 1955. A curious historical detail is noteworthy: An imperial decree made by Napoleon the 1st prohibits Jews from selecting first names of biblical origin for their children. This decree is obsolete and has never been applied, but yet it has never been repealed. It did not spring from anti-semitic views; on the contrary, the Emperor did in fact wish to promote the complete integration of French Jews who, until the Revolution, had lived a marginal existence in France. The imperial decree mentioned has been invoked on several occasions to support changes of first names.

Conclusion

By way of conclusion to the present study, it must be noted that French legislation against group defamation is very restricted and that, on the whole, the body of case law does not favor its very intensive or liberal application. This trend, however, is merely a manifestation of adherence to general principles, according to which there does not exist any racial or religious discrimination in France, and the conviction that any law which purports to protect any particular category of French citizens is as dangerous, both for the nation and for the groups concerned themselves, as a discriminatory law.