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FREEDOM OF EXPRESSION: AT GUNPOINT?

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Dear Editor,

‘Freedom of expression (...) is the matrix, the indispensable condition, of nearly every other form of freedom.’¹ Given the media’s instrumental role in freedom of expression, namely acting as ‘the eyes and the ears of the public’,² the notion of freedom of the press has naturally become associated with the idea of freedom of expression.

Questions abound in France of late about the scope of freedom of expression and the press. On the same day the French satirical weekly, *Charlie Hebdo*, famous for its insolent, garish and incendiary caricatures, sold out an initial run of five million copies of its latest ‘survival’ issue – featuring a cover that boldly lampooned the prophet Muhammad – the notorious French comedian Dieudonné was arrested and charged with incitement of terrorism by suggesting on Facebook that he sympathised with one of the gunmen involved in the brutal terrorist attacks in Paris.

Firstly, this letter will briefly sketch a picture of current law pertaining to freedom of expression and the press in France. In turn, it will consider whether the different treatment accorded to *Charlie Hebdo* and Dieudonné can be considered sound and well founded or simply reveals the existence of insidious hypocrisy and double standards at the heart of the Fifth Republic.

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¹ *Palko v Connecticut*, 302 US 319 [1937].

² *Irish Times Ltd, v Ireland* [1998] 1 IR 359 at 409 per Keane J.

Freedom of expression was fervently affirmed in France as an inalienable right by the Declaration of the Rights of Man and of the Citizen 1789, which in the wake of the Ancient Regime, describes the right as ‘one of the most precious rights of man.’³ Taking its inspiration from Article 11, one of the foundational legal statements on freedom of the press and freedom of expression in France, is the Law on the Freedom of the Press of 29 July 1881, which liberalised publishing and defined the freedoms and responsibilities imposed on the media in France.⁴ Article 1 asserts, ‘Printing and publication are free.’⁵ The Press Law of 1881 is however strongly curbed by a myriad of exceptions including: the Pleven Act of 1972, which prohibits incitement to hatred, discrimination, slander and racial insults; the controversial Gayssot Act of 1990 prohibits any racist, anti-Semitic, or xenophobic discourse or activities, including Holocaust denial; and the Law of 30th December 2004,⁶ which prohibits the use of freedom of expression to incite hatred against people because of their gender, sexual orientation, or disability. Yet, one must equally bear in mind, that one of the founding principles of the Republic is secularism; France abrogated its laws criminalising blasphemy shortly after the French Revolution in 1791.⁷ Thus, these laws work to allow for religions and their creeds to be ridiculed but condemn incitement to hatred towards a follower of a religion.

In its abstract form, France has eagerly claimed to venerate the principle of freedom of expression and the press. It is only when such freedoms come into conflict with other fundamental or constitutionally guaranteed rights or interests that these rights and this

³ Article 11 of the Declaration of the Rights of Man and the Citizen 1789.

⁴ The Law on the Freedom of the Press of 29 July 1881 (Press Law of 1881).

⁵ *ibid.*

⁶ Loi n°2004-1486 du 30 décembre 2004 portant création de la haute autorité de lutte contre les discriminations et pour l'égalité (1).

⁷ (n 4).

aforementioned enthusiasm to vindicate them, appears to dwindle.⁸ As EM Forster neatly put it: '[W]e are willing enough to praise freedom when she is safely tucked away in the past and cannot be a nuisance. In the present, amidst dangers whose outcome we cannot foresee, we get nervous about her, and admit censorship.'⁹ Indeed, France's laws curtailing hate speech are considered to be some of the toughest in the EU.¹⁰ The numbers of legal actions for hate speech have multiplied following these aforementioned amendments to the Press Law of 1881.¹¹ It is advanced here that despite its landmark sanctification of the right in the wake of the French Revolution, in modern times, the ambits of freedom of expression in practice are, in fact, notably circumscribed.

This restrictive approach to freedom of expression is well illustrated by the decision of the *Conseil d'Etat* in January 2014 to uphold the cancellation of the controversial comedian Dieudonné's stand-up performance, because of the show's potential to infringe upon human dignity through his notoriously anti-Semitic jokes and gestures.¹² Freedom of expression ostensibly operates under a repressive regime in France. In other words, while discourse that breaches of the law can be sanctioned; discourse itself cannot be prohibited before it has even taken place. It is worth noting that Dieudonné's shows do not advertise themselves as anti-Semitic, and as such, banning them before they even take place exemplifies the strikingly restrictive position taken on freedom of expression in France.

⁸ Tom Daly, 'Strengthening Irish Democracy: A Proposal to Restore Free Speech to Article 40.6.1° of the Constitution' [2009] DULJ 228.

⁹ EM Forster, 'Two Cheers for Democracy,' (Harcourt Brace, 1951).

¹⁰ France: Strict defamation and privacy laws limit free expression (Index on Censorship, 19 August 2013) <www.indexoncensorship.org/2013/08/france-faces-restrictions-on-free-expression/> accessed 16 March 2015.

¹¹ *ibid.*

¹² Ordonnance n 374508 du 9 janvier 2014 du Conseil d'État en référé.

Naturally the glaring discrepancy between the treatment of *Charlie Hebdo* and Dieudonné, particularly against a backdrop of a French government and nation touting the Republic's valorisation of the right to freedom of expression, further calls into question the complex relationship between the hallowed right of freedom of expression and humour in France. Interestingly, French jurisprudence does seem to recognise that the notion of freedom of expression includes a right to excessiveness, outrageousness and parody when it has a humorous purpose.¹³ In 1992, the Grand Instance Court of Paris affirmed this, stating that freedom of expression does allow us to alter and exaggerate the traits and personality of the person we are depicting;¹⁴ freedom of expression encompasses a right to be disrespectful and insolent.¹⁵ Further illustrating the existence of such a right is the 'casse-toi, pov' con scandal.¹⁶ Here, the former President Sarkozy, was re-greeted with the words of his infamous foul-mouthed outburst on a placard displayed at an anti-Sarkozy demonstration, which resulted in the protestor's arrest for causing offence to the presidential function and of the Republic. However, in 2013, France was criticised by the European Court of Human Rights who considered that the sanction imposed on the protestor was disproportionate and detrimental to freedom of expression, advancing such a sanction has a dissuasive effect on satire, which can contribute to the discussion on questions of public interest.¹⁷ In 2007, *Charlie Hebdo*, whose cartoons belong to a particular genre of humour known as '*la gouaille parisienne*' that is deliberately galling and irreverent, defended itself and won its court case for its republication of caricatures ridiculing the prophet Muhammad, as he laments fundamentalist violence (these cartoons were also purportedly a trigger for the shootings at the satirical magazine's offices on 7th January 2015).¹⁸ Here, the Grand Instance Court of Paris reasoned that despite the shocking,

¹³ *ibid.*

¹⁴ Conseil d'État decision (n 12).

¹⁵ Conseil d'État (n 12).

¹⁶ "'Casse-toi pov' con" la Cour européenne épingle la France' *Le Parisien* (14 March 2013).

¹⁷ *ibid.*

¹⁸ Tribunal de Grande Instance de Paris, 17^{ème} chambre, 22 March 2007.

even offensive character of the caricatures, unlike a publication on public billboard that is almost unavoidable, no one is obliged to buy or even read the weekly satirical magazine. It held that limits on freedom of expression had not been surpassed because it aimed its ridicule at Islam in general, without deliberate intention to directly and gratuitously offend the Islamic community.¹⁹

The immediate response in France to the recent massacre has been a crackdown on hate speech and anti-Semitism, with mounting arrests for comments both spoken and written on social media that appear to glorify terrorism. Among those detained was the highly contentious comedian, Dieudonné, who will shortly be tried under anti-terrorism laws, originally found in the Press Law 1881 and moved into the criminal code in November 2014, for his alleged sympathising with terrorism on social media. These laws allow for harsher, fast-track punishments including a €100,000 fine and 7 years imprisonment when the incitement to terrorism takes place on the internet.²⁰ Despite the comedian's claims that he was merely trying to make people laugh, his Facebook comment at issue, described by French Interior Minister Bernard Cazneuve as both lacking respect and desiring to stir up hatred, potentially goes far beyond the aforementioned right to excessiveness for the purposes of humour and may well result in a conviction under these notably stringent laws.²¹

However, this knee-jerk response resulting in a string of arrests in France on the 'vague' charge of condoning terrorism, continues to spark a furore with certain human rights NGOs, including Amnesty International. Dalhuisen advanced that the French authorities must be careful not to

¹⁹ *ibid.*

²⁰ Loi n° 2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme.

²¹ Colette Davidson, 'France's post-Hebdo crackdown on 'incitement': Hypocritical?' *The Christian Science Monitor* (20 January 2015) <www.csmonitor.com/World/Europe/2015/0120/France-s-post-Hebdo-crackdown-on-incitement-Hypocritical-video> accessed 16 March 2015.

infringe upon the right of freedom of expression themselves.²² It is argued that ambiguous and loosely defined offences such as ‘defence of terrorism’ overly circumscribe expression by potentially criminalising discourse, which, while offensive to some, lacks intention to incite violence or discrimination.²³

In conclusion, the different treatment of the incendiary caricatures of *Charlie Hebdo* and Dieudonné’s terrorism condoning remarks might well be explicable by reference: socially, to the tangible fear among the French citizenry in the aftermath of three days of terror in the French capital; and legally, to the complex collection of laws regulating freedom of expression in France, which clearly recognise the particular place for its centuries’ old Gallic tradition of satire but strictly censure speech which could be perceived as defending terrorism. Nevertheless, it is submitted here that, such laws marred by arguably ‘selective restrictions and ambiguities’²⁴, including an ominously low threshold of expression that may incur liability even in the absence of intention, ought to be lambasted, or at the very least challenged for potentially over-circumscribing expression and for what, by some, might brand political favouritism. The way in which French authorities act in the turbulent aftermath of the horrific killings will be the litmus test for its actual commitment to vindicating the supposedly sanctified right to freedom of expression, as they engage in the perennial balancing act of competing human rights.²⁵ ‘Freedom of expression does not have favourites’²⁶ and measured response to curtailing speech is indispensable to the preservation of the venerated right of freedom of expression, the ‘lifeblood’ of democracy.²⁷

²² ‘France faces “litmus test” for freedom of expression as dozens arrested in wake of attacks’ (Amnesty International, 16 January 2015) <www.amnesty.org/en/news/france-faces-litmus-test-freedom-expression-dozens-arrested-wake-attacks-2015-01-16> accessed 16 March 2015.

²³ *ibid.*

²⁴ Alexander Stille, ‘Why French Law Treats Dieudonné and Charlie Hebdo Differently,’ *The New Yorker* (15 January 2015).

²⁵ (n 22).

²⁶ *ibid.*

²⁷ *R v Secretary of State for the Home Department ex parte Simms* (2000) 2 AC 115 per Lord Steyn.

Is mise le meas,

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