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French Law and Racist Speech

By Magali Bessone

French law is not always very clear when it comes to punishing racist speech. Judges, aware that this prohibition is crucial in a democracy, are forced to interpret the law with the utmost rigour.

Reviewed : Gwénaële Calvès, *Envoyer les racistes en prison ? Le procès des insulteurs de Christiane Taubira* (Paris: LGDJ, 2015), 106 p. and Ulysse Korolitski, *Punir le racisme ? Liberté d'expression, démocratie et discours racistes* (Paris: CNRS Editions, 2015), 452 p.

How and why should racist speech be punishable by law in France? Isn't France a democracy where freedom of speech is a key value, something often reasserted in the case of pornographic speech or blasphemy? Is this crackdown on racist speech[1] – described by some as a 'judicial Reign of Terror' (Le Pourhier, 2015, p. 33, quoted in Calvès, p. 14) – legitimate, given that the people who use or support it frame it as an example of 'political incorrectness,' fighting back against 'self-righteousness', or simply as tactlessness or stupidity, neither of which carry any legal sanction? Why is the criminal justice system so uncompromising when it comes to racist speech, something often presented as a French specificity?[2]

[1] Racist speech is understood in a broad sense, in keeping with the provisions of article 23 of the 1881 law, which lists: 'written or printed text, drawing, engraving, painting, emblem, image, or any other written, spoken or pictorial item sold or distributed, offered for sale or exhibited in a public place or assembly, or by means of a placard or notice exhibited in a place where it can be seen by the public, or by any other electronic means of communication to the public.'

[2] For a nuanced reflection about the 'divide' between 'permissive and prohibitionist stances' towards hate speech (and particularly racial hate speech) and insisting on the importance of comparative study of different legal systems according to their legal traditions and the socio-historical contexts in which they were devised and are

Two recent books provide essential keys for understanding the justifications and workings of French law against racist speech, the first by law professor Gwénaële Calvès, the second by philosopher and political scientist Ulysse Korolitski. Both agree that while the law is partly inconsistent regarding the criminalisation of racist speech, it is crucial that the public expression of racist speech be prohibited in order to defend our democracy's inherent values, which fundamentally include freedom of speech. Prohibiting racist speech is far from an unacceptable limitation on free speech; on the contrary, when racist speech calls on the notion of freedom of expression, this is an internal contradiction: by its very principle, racist speech undermines the conditions of public debate by positing the exclusion of certain individuals from the public space as a sphere for the exchange of reasons. The law prohibiting racist speech is at the heart of an essential apparatus for affirming and defending democratic debate.

However, according to both authors, the modes on which criminal law is expressed are ambiguous: criminal law is the 'locus for the *symbolic* affirmation of a society's key values' (Calvès, p. 88, my emphasis) and its practice itself is 'a mode of expressing values' framed as 'a silent normative discourse' (Korolitski, p. 416). And because its discourse is 'symbolic', perhaps even 'silent', anti-racist criminal law must go hand-in-hand with explicit public discourse making a clear commitment to the choice of these values and the weight they should be given in legal decisions. If the law prohibiting racist speech is not sustained, both ethically and politically, by public expression of our society's democratic values, it will continue to appear incoherent and arbitrary, which are the two main arguments levied by critics of its legitimacy. These two books therefore invite us to reflect more broadly on the respective roles of the legal and the political in the expression of democratic values.

Judges' interpretive work

On a legal level, the role of judges in assessing the charges brought before them is both fundamental and extremely delicate because the law's intention is ambiguous and its definitions not very precise. G. Calvès' book uses the recent verdicts reached in court proceedings against people who insulted Christiane Taubira to analyse how judges proceed in determining crimes of racist speech. Her argument is a powerful one: the jurisprudence in these cases reveals a remarkable level of coherency in the judges' principles and methods of interpretation, given the 'intrinsically case-by-case nature of the law regulating freedom of expression' (Calvès, p. 48). In Weberian terms, the problem with anti-racist law is that it does not correspond to the ideal-type of formal rationality: the rule of law cannot be applied in a purely procedural and mechanical way by the judge and, therefore, the legal consequences of people's actions seem unpredictable and arbitrary to them. This, in turn, fuels suspicion about the 'real' ideological motivations behind these decisions. On 30th October 2014, the 17th chamber (the so-called

applied, see Charles Girard 'Le droit et la haine. Liberté d'expression et 'discours de haine' en démocratie', *Raison Publique*, http://www.raison-publique.fr/article694.html

'press chamber') of the Paris district court found the weekly newspaper *Minute* guilty over its front cover showing a photograph of Christiane Taubira, altered to make her mouth open and empty, alongside the caption: '*Maligne comme un singe, Taubira retrouve la banane*' ('Crafty as a monkey, Taubira has got her banana back' – a combination of two French expressions 'to be crafty as a monkey' and 'to have the banana', meaning 'to be happy'). Why was this sentence handed down when the same chamber acquitted *Charlie Hebdo* on 22nd March 2007 for its front cover, a drawing by Cabu showing a bearded man with his head in his hands saying '*C'est dur d'être aimé par des cons*' ('it's hard being loved by jerks')?

As G. Calvès shows, the judges' decisions, far from being doomed to subjectivity and personal ideological conviction, were based on a solid, shared hermeneutical technique that combined formal rationality and material rationality –a 'semiology of racist speech' (Calvès, p. 41) – and that allowed them to identify, case-by-case, the meaning and scope of the racist speech in question. The book's incisive argument first charts the interpretive method used by judges in these recent cases in order to then show that accusations of biased verdicts are based on a misunderstanding of the nature and scope of this method.

In the first section of the book, G. Calvès begins by reminding readers of the different legal definitions judges have at their disposal to define the speech they have to judge. In particular, they have to determine whether the offending speech constitutes a *public insult of a racist nature*. These are distinguished from *non-public* insults of a racist nature – a common law offence outlined in the French Penal Code and punishable by a simply fine – and from public insults *with no racist dimension*. For the latter, the distinction is not based on the insulter's motives or intention, on whether they are 'racist' or not. The law prohibiting racist speech is a communication law that is not concerned with determining whether insulters are racist "in their heart": as G. Calvès reminds us (p. 33), 'there is no crime of opinion in France' and 'the law does not probe hearts and minds'. The criterion used is the *attack on the honour* of the person insulted resulting from *assigning them to a determined and essentialised group* in the context of the publicly expressed insulting speech. There is a subtle difference between '*enculé de ta race*' (literally, 'motherfucker of your race'), which does not claim to target a determined group and is not a racist insult, and '*sale race maudite*' (literally, 'damned dirty race') addressed to a Jew, in which, in the speaker's mind, the race in question is determined and deliberately targeted, and which therefore constitutes a racist insult (Calvès, p. 22).

Public insults of a racist nature are determined on a case-by-case basis, depending on the *enunciative* situation of the speech and the relevant context of its *reception*. According to G. Calvès' forceful argument, the theory used by judges in interpreting offences of racist speech is necessarily contextual. She shows that their practices consist in working on the basis of three hermeneutical circles: the broadest is based on 'the standard of a normal speaker in a given situation', which calls on the notion of connivance and shared discursive usage in the public space. Then judges take into consideration the standard of the '"normal" audience, reader, or listener in the given context' – the 'normal' reader of *Minute* or *Charlie Hebdo* is an 'informed' reader able to understand the implicit meaning and scope of given remarks. Finally, there is the

third, smallest circle 'of the text into which the [litigious speech] fits' (Calvès, p. 37-38) – the clues provided by the front cover, the volume as a whole, the blog article, etc. that surround the speech in question. Determining the nature of the insult requires 'adjusting focus' to determine the relevant discursive context and reconstructing standards of normality based on which the meaning and scope of the offending speech can be judged.

Reference to the common criteria of a society's public culture is the decisive factor here. The accusation of 'double standards' (Calvès, p. 50) often levied against measures prohibiting racist speech testifies above all to the incomprehension surrounding the role of this reference in judges' hermeneutic practice.

Interpreting common criteria – a source of misunderstanding

Accusations of partiality regarding the prohibition of racist speech are based on two arguments. First, that judges only apply the full force of the law against certain caricaturists or humourists who go against the politically correct, whereas the same offences are not sanctioned (or not as heavily) when committed by people who 'curry favour with the "self-righteous left wing"' (Calvès, p. 52). Second, that the law protects certain groups better than others, 'according to the changing demand for "respect" and "recognition" that seems to be deeply affecting French society' (p. 69). In the second half of her book, G. Calvès shows with remarkable clarity that these criticisms are based on misunderstandings of the hermeneutic method at the heart of anti-racist law. However, she underlines that these misunderstandings also derive from the judges' own hesitations, as their task is made particularly difficult by two recent developments: first, the evolution of means of communication, and second, the increasing tendency to confuse antiracist law and antidiscrimination law.

On the one hand, it is harder and harder to determine the standards of normal interpretation because of the increase in isolated parts of drawings or words being shared on social networks, meaning they are de facto systematically decontextualised. It is therefore difficult to assume that the meaning of speech will be provided by an explanatory paratext (the newspaper's front page, the rest of the content of the article, etc.) or even that it will correspond to the meaning an 'informed' reader would ascribe to it. In order to determine the nature of the speech in question, judges can only base their decision on interpretive elements drawn from a 'global hermeneutic consensus (p. 49). Therefore, the author regrets, in order to reach a *consensus* about what meaning a *normal* reader placed in *normal* circumstances (on Facebook or Twitter, for example) would give to the offending speech, 'a literal reading necessarily is a legitimate reading mode' (p. 68). Any 'apparently' racist speech, even when ironic or antiphrastic, is therefore often qualified as racist.

On the other hand, the legislation prohibiting racist speech, which was – as U. Korolitski's overview of the history reminds us – put in place *to fight against racism* (with all the

inherent ambiguity of this ill-defined aim), soon became a key instrument in antidiscrimination law. As such, because it is forbidden to discriminate 'by reason of' sex, sexual orientation, or 'membership or non-membership, actual or supposed, of a […] race',[3] sexist or homophobic speech, for example, seem to also benefit from the same legislation – and the law allowed for hope in this regard. However, there is a fundamental difference between racist speech and the other cases: in the case of racism, the argument of the freedom to express opinions or 'debate ideas' is inadmissible. Conversely, the 'bedrock' of discursive consensus about what constitutes an insult in speech relating to gender, sexual orientation, handicap, or religious membership is currently 'less solid' in our society (p. 80). And because the nature of the speech is above all determined by this assumed 'global hermeneutic consensus', judges will tend to consider that 'such speech relates to the expression of an opinion that must be protected in the name of freedom of thought, criticism, and debate' (ibid.)

The seemingly partial resulting verdicts therefore reinforce the idea that certain populations are protected while others are left aside in Republican law. In point of fact, this difference just translates the fact that criminal justice only *reflects* our collective conscience and in no way *cures* 'the deep pathologies undermining democracy' (Christiane Taubira, quoted in Calvès, p. 88). Judges do not claim to change the French collective conscience and, indeed, they do not have the means to do so. First, because their hermeneutic practice is *based* on the 'accepted criteria of the community', which they must therefore assume to be coherent and stable (p. 49, 86). Second, because in France, unlike in the United States, for example, citizens do not have access to the verdicts handed down: judges do not explain their arguments, definitions, or verdicts in public and therefore cannot provide any public education regarding values. G. Calvès deplores this 'lack of publicity' (p. 86) and calls for a form of public speech that reminds us both loudly and clearly of the fundamental values – including freedom of speech – underpinning legal decisions. One can only join the author in this call and perhaps even take it further: rather than accepting a division of public speech in which only lawmakers are responsible for committing publicly to our key values, it is high time courts fully embraced their role as sounding boards for, and spaces for the creation of, our democratic norms and values. The law against racist speech is a case-by-case law, par excellence. It is therefore crucial that courts publicly espouse the ethical positions and social justice objectives that underpin, albeit too implicitly, their legal decisions, thereby opening up a common and informed conversation on these issues.

[3] Article 225-1 of the Penal Code lists the prohibited discrimination charges: 'Discrimination comprises any distinction applied between natural persons by reason of their origin, sex, family situation, pregnancy, physical appearance or patronymic, place of residence, state of health, handicap, genetic characteristics, morals, sexual orientation or identity, age, political opinions, union activities, or their membership or non-membership, actual or supposed, of a given ethnic group, nation, race or religion.'

The inconsistency of Parliamentary justifications for the legislation against racist speech

Ulysse Korolitski presents and analyses the parliamentary justifications provided when French legislation prohibiting racist speech[4] was put in place and reveals the theoretical weaknesses of the reasoning that went hand-in-hand with the creation of this legislation. He shows the extent to which the arguments used by members of Parliament to justify it prove confused and inconsistent and identifies three main theoretical problems:

- 'using causality' – in other words, the implicitly assumed but never clearly analysed conviction that racist speech must be prohibited because it is the direct or probable cause of racist acts;

- 'invoking truth' – in other words, the conviction that racist discourse must be punished because the racial theory underpinning it is false, even though it is not up to the law to establish truth;

- finally, 'identifying the specifically discursive harmfulness of speech' – in other words, the conviction that racist speech must be punished because, in itself, as a speech act, it infringes on the fundamental values of the Republic, as if, in turn, not prohibiting racist speech meant accepting the violation of antiracist values (Korolitski, p. 233).

U. Korolitski's meticulous theoretical elucidation based on the arguments used by members of Parliament is crucial: identifying the inconsistencies, shortcomings, and contradictions of the law affords us a better understanding of the reasons why, in courts and in the public space alike, legislation prohibiting racist speech is challenged. This is also a necessary prerequisite for understanding the stakes and scope – legal in G. Calvès' case and philosophic in U. Korolitski's – of the two books discussed here: the vagueness of the rule of law has to be noted and admitted. In itself, this is no reason to discredit antiracist legislation, but it does identify the issues which the theory and practice of law prohibiting racist speech must address.

The theoretical justifications of antiracist legislation

As U. Korolitski reminds us, just because the members of Parliament's justifications were incomplete or even contradictory, this does not automatically mean that the legislation

[4] This legislation is essentially based on four main laws. The Law of 29th July 1881 known as the 'Law on the Freedom of the Press', the Marchandeau Decree of 1939 against defamation in the press (repealed the 16th August 1940), the Law of the 1st July 1972 relating to the fight against racism, known as the 'Pleven Law', and finally the very controversial Law of the 13th July 1990, prohibiting any racist, anti-Semitic or xenophobic act, the so-called 'Gaysott Law'.

prohibiting racist speech cannot be justified. The philosophical discussion in the second section of his book offers three theoretical avenues that could offer a robust justification of the legislation, while also outlining its limitations.

The weakness of the first type of argument used by the members of Parliament was presupposing a direct or probable causal relationship between racist speech and racist feelings or acts, without proving it. The presupposition of direct causality is 'qualitative': any racist speech must be prohibited because it is, in and of itself, an incitement that leads to racist acts. However, in the absence of any solid, converging studies testifying to the fact that racist speech represents what the American Supreme Court calls a 'clear and present danger', in other words, that it is possible to systematically and clearly identify a direct influence of speech on action, then this conception of a causal link does not provide any solid arguments in favour of prohibiting racist speech. A second 'quantitative' conception of causality can also be used. According to this conception, the danger derives from the fact that public racist discourse has a wide impact. Thus, while it may be diffuse, the incitement has all probability of indirectly reaching at least one person within this large audience likely to act in a racist manner: 'it is the publicity of the incitement that leads to law enforcement' (Sophie Martin-Valente, quoted in Korolitski, p. 248).

U. Korolitski underlines the questionable nature of this reasoning when it claims to be purely quantitative or probabilistic: what counts when it comes to the offending speech is the *nature* of the effects we have decided to either prevent or encourage, even – above all – when the move from word to deed is uncertain. The author therefore suggests using a theory of *presumption of causality,* which offers a more rigorous justification for producing and applying antiracist law. The relevance of presumption is evaluated not only on a quantitative basis – the number of people in a position to hear or see the speech – but also on the *values* we choose to encourage. In other words, because judges inevitably find themselves facing uncertainty when it comes to the causal link between speech and action, because there will necessarily be errors of interpretation – regarding the link between speech and inciting hatred, regarding the attack on honour or on public order likely to result from the speech in question – then they must first and foremost publicly endorse the normative choice presiding over the decision to prohibit racist speech. If 'one type of error is judged preferable to another' (Edna Ullmann-Margalit, quoted in Korolitski, p. 266), it is in the name of publicly displayed adhesion to a moral value or a political aim.

Moving into the area of normativity also resolves the second problem identified in the members of Parliament's arguments: the relationship between law and truth. According to U. Korolitski, the law has to recognise that, to a certain extent, it is indifferent to science and truth. The latter informs descriptive discourse, rather than normative discourse, about reality: truth cannot determine the law any more than law can determine the truth. This is why the public expression of racist or revisionist views is not prohibited because the theories in question are wrong, but rather because the public expression of racist or revisionist speech is considered dangerous for the democratic values we have chosen to defend. It is important to join the author

in insisting that 'denouncing the fact revisionism has been made into an offence because this imposes an official truth does not hold; the creation of this offence does not claim to state the truth but rather to prohibit a speech act, the nature and harmfulness of which are assessed in relation to an objective situation' (p. 341).

Finally, the solution to the third problem requires understanding the extent to which racist speech, as a speech act, represents a verbal contestation of democratic values, independently of any assumption of causality between that speech and racist acts. If racist speech is prohibited because, in and of itself, it represents a public attack on our society's values, does it therefore follow that any criticism of, or challenge to, these values is forbidden on principle? The author's reply, based on a theory of the value of democratic debate, is a resounding 'no'. Racist speech, as a speech act, makes discussion impossible on principle: it presupposes an *asymmetrical* relationship between interlocutors and 'infringes on the equality of voices in the discussion' (p. 398), it tends towards closing off and *crystallising* debate in the name of a claim to truth that 'hinders discussion' (p. 396), and it defines the sphere of public debate by *exclusion*. The law prohibiting racist speech is justified because, by its very discursive nature, such speech attacks the central value of our democracy according to U. Korolitski, i.e. the freedom of expression and discussion for everyone. Being able to criticise values is crucial and based on this same freedom. This is why prohibition must go hand-in-hand with the public expression of its normative justification: it calls for a shared debate (which remains to be conducted) about the values we want to protect.

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