



## **Genocide-denial laws: A misguided attempt to criminalize history**

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## I – A Case-Study: The French Armenian Genocide Bill

**1. A new content-based prohibition** – Anyone who denies or rather “disputes”, in France, that the mass-murder of Armenians committed in Turkey between 1915 and 1917 constitutes less than a genocide, could be at risk of facing a prison sentence of up to one year and/or a fine of up to €45,000 if the so-called Armenian genocide bill ever becomes law.<sup>2</sup>

**2. Legislative history** – Put forward by France’s opposition Socialist Party, the bill, which was passed on October 12, 2006, is unlikely however to ever become the law of the land. Not only was it passed by a mere majority of 106 deputies out of 129 present on the day of the vote – in a lower house of Parliament which is composed of 577 deputies – but the French government has since exercised some informal pressure on the French Senate to let the bill slowly and discretely die.

**3.** Ironically, were the French bill to become law, anyone debating the same historical event may face prosecution in both France and Turkey but on conflicting grounds since Turkish authorities are not reluctant to pursue those who use the term “genocide” when evoking the massacres of Armenians in 1915-17.

**4. Definition of genocide** – In any case, it is important to note that “genocide” is legally defined in the French Penal Code as “the enforcement of a concerted plan aimed at the

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<sup>2</sup> See Adopted Parliamentary Bill no. 610 (*Proposition de loi « tendant à réprimer la contestation de l'existence du génocide arménien »*), October 12, 2006, available at: <http://www.assemblee-nationale.fr/12/ta/ta0610.asp>. The bill proposes to amend Act no. 2001-70 of January 29, 2001 (*Official Journal*, January 30, 2001, p. 8175) which already formally acknowledges the existence of the Armenian genocide of 1915, by adding a provision to the 1881 freedom of the press Act and according to which “Shall be punished by the penalties defined in section 24 *bis* of the Act of 29 July 1881 on freedom of the press those who, by one of the means set out in section 23 of the same Act, dispute the existence of the Armenian genocide of 1915.”

partial or total destruction of a national, ethnic, racial or religious group”.<sup>3</sup> In other words, for the French National Assembly, there is overwhelming historical evidence that the massacres committed in 1915-17 were the result of a deliberate and predetermined plan of the Turkish authorities to exterminate Armenians. This could become the official truth in France but it has to be said that not all historians agree with this interpretation.

**5. Personal thesis** – But it is obviously not my intention today to act as an historian and to determine whether the term “genocide” could genuinely describe what happened even though I would be inclined to agree to such interpretation.<sup>4</sup> As a lawyer, I would rather argue today, first of all, that it is not for any legislature to interpret and legally categorize past historical events, especially when those events took place in another country, and secondly, that no law should punish alternative – however inaccurate or indefensible – historical viewpoints.

## II – The Context: The Increasing Proclamation of Official Historical Truths

**6.** This is not the first time that the French legislature has allowed itself to promote a particular view of some historical events while criminalizing the expression of alternative viewpoints by amending the Penal Code or the 1881 Freedom of the Press Act.

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<sup>3</sup> Article 211-1 of the Penal Code reads as follow: “Genocide occurs where, in the enforcement of a concerted plan aimed at the partial or total destruction of a national, ethnic, racial or religious group, or of a group determined by any other arbitrary criterion, one of the following actions are committed or caused to be committed against members of that group:

- wilful attack on life;
- serious attack on psychological or physical integrity;
- subjection to living conditions likely to entail the partial or total destruction of that group;
- measures aimed at preventing births;
- enforced child transfers.

Genocide is punished by criminal imprisonment for life.”

<sup>4</sup> See e.g. T. Akçam, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility* (Metropolitan Books, 2006); R. Kévorkian, *Le Génocide des Arméniens* (Odile Jacob, 2006).

**7. The 1990 Holocaust-denial Act** – Following hysterical media coverage of a profanation of a Jewish cemetery committed by five brainless individuals with neo-nazis beliefs, in the southern city of Carpentras near Avignon, the French Parliament passed a law in 1990 which punishes the denial of the Holocaust.<sup>5</sup> Although the extreme-right has increasingly gained more influence in France since the end of the eighties, it is important to stress that neo-nazis did not and still do not represent any genuine threat to the French constitutional order. Furthermore, the actions of those five neo-nazis were severely punished under pre-existing provisions of the Penal Code. Regardless of the moral case in favour of the 1990 law, it is our view that from that day, the “camel’s nose is in the tent”.<sup>6</sup>

**8. Prohibition of sexist or homophobic remarks** – Indeed, the 1990 precedent has been constantly referred to by an increasing number of “communities” and other lobbies to further restrict the exercise of free speech. For instance, a 2004 law has extended the scope of a section of the 1881 Act on the freedom of the press – which previously “only” punished incitement to racial hatred or racial defamation – in order to also proscribe homophobic or sexist remarks.<sup>7</sup>

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<sup>5</sup> See Act no. 90-615 of July 13, 1990 (*Official Journal*, July 14, 1990, p. 8333). Law no. 90-615 of 13 July 1990 (“the *loi Gayssot*”) added to the Freedom of the Press Act a section 24 *bis* making liable to one year’s imprisonment and a fine of 300,000 French francs (now €45,000), or one of those penalties only, those who “deny the existence of one or more crimes against humanity as defined in Article 6 of the Statute of the International Military Tribunal annexed to the London agreement of 8 August 1945 which have been committed either by the members of an organisation declared criminal pursuant to Article 9 of the Statute or by a person found guilty of such crimes by a French or international court”.

<sup>6</sup> Justice Stewart, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 US 376 (1973), at 402.

<sup>7</sup> See Act no. 2004-1486 of December 30, 2004 (*Official Journal*, December 31, 2004, p. 22567).

**9. The “lois mémorielles** – But to focus only on those laws which dictate how to interpret historical events – the so-called “*lois mémorielles*”<sup>8</sup> – in addition to the 2001 law which acknowledged for the first time the existence of the Armenian genocide,<sup>9</sup> one may note another law passed in 2001 and which now obliges to describe the slave trade as “a crime against humanity”.<sup>10</sup> Last but not least, a provision of a 2005 law (later repealed) also required school history teachers to stress the “positive aspects” of French colonialism<sup>11</sup> and further criminalizes insults or defamatory statements aimed at “*harkis*”<sup>12</sup> as well as acts of apology of war crimes committed against this latter group.<sup>13</sup>

**10. Overreaching** – To use another daring metaphor, this was the last straw that broke the camel’s back. The Parliament clearly overreached. From that day, an increasing number of historians have found the courage to demand the repeal of these “*lois mémorielles*” and in particular, the last attempt (unsuccessful as yet) to dictate how Turkish history should be taught and discussed.<sup>14</sup>

**11. Political Context** – I should personally regret that in the past decade French MPs have always succumbed to the temptation to sacrifice freedom of expression for short-

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<sup>8</sup> For two recent and insightful studies, see M. Frangi, “Les lois mémorielles : de l’expression de la volonté générale au législateur historien” (2005) *Revue de droit public* 241 ; P. Fraisseix, “Le Droit mémorielle” (2006) 67 *Revue française de droit constitutionnel* 483.

<sup>9</sup> See Act no. 2001-70 of January 29, 2001 (*Official Journal*, January 30, 2001, p. 8175).

<sup>10</sup> See Act no. 2001-434 of May 21, 2001 (*Official Journal*, May 23, 2001, p. 8175).

<sup>11</sup> See Act no. 2005-158 of February 23, 2005 (*Official Journal*, February 24, 2005, p. 3128). Its Article 4 paragraph 2 reads: “School courses should recognise in particular the positive role of the French presence overseas, notably in North Africa.” A vast controversy ensued. Thanks to the (questionable) decision issued by the Constitutional Council (decision no. 2006-203 L), this paragraph was later repealed by mere administrative decree: see Décret n° 2006-160 of February 15, 2006 (*Official Journal*, February 16, 2006, p. 2369).

<sup>12</sup> Algerians who fought alongside the French army in 1954-1962, most of whom were later cowardly abandoned by the French government only to be mass-murdered by the forces of the newly independent state of Algeria.

<sup>13</sup> See Article 5 of Act no. 2005-158 of February 23, 2005.

<sup>14</sup> See e.g. P. Roger, “Des historiens ont jugé “affligeant” la proposition de loi socialiste”, *Le Monde*, October 12, 2006. See earlier the petition entitled “liberté pour l’histoire” which was published in *Libération*, December 13, 2005.

term political gains. This is once again clearly the major rationale behind the Armenian genocide bill.<sup>15</sup> It has also proven to be too tempting for some MPs to gain a sense of self-satisfaction from rewriting history rather than actually face more pressing tasks such as controlling the actions of the executive power or reforming the public finances of a nation in decline.

### **III – A Pragmatic Case against the French Armenian Genocide Bill**

**12. Historical Imperialism** – But I would never have thought possible that our failed class of French MPs would be as careless as to legislate on the past of another country. The scope of this latest bill is indeed quite extraordinary, since French law could eventually criminalize the denial of an historical event which took place outside of France and which did not involve, directly or indirectly, French authorities and/or French nationals. This is a quite unique example, if I dare say, of “historical imperialism” by a nation which, quite ironically, is always prone to denounce the US for passing, every once in a while, extra-territorial laws. And by comparison with the 1990 Act which outlaws denial of the Holocaust, even if one could reasonably disagree with the restrictions it imposed on free speech, this law is at least related to the wrongs committed by the French State.

**13. Hypocrisy** – It is also hypocritical for the French Republic, who has persistently refused until July 1995 – thanks to Jacques Chirac – to recognise the responsibility of the French State for the actions of the French police under the Vichy regime (1940-44), in

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<sup>15</sup> Legislative elections are due to be held next June. Up to half a million of French citizens are thought to be of Armenian descent.

particular its responsibility in the deportations of French Jews to Nazi Germany, to demand other nations to take action when it has failed, in the dramatic case of the Holocaust, to do so for decades. It should also be remembered that the atrocities committed against the Armenians in Turkey took place before Ataturk proclaimed the Turkish Republic. If the French Republic could distance itself from the actions of the Vichy regime, the Turkish Republic should also be entitled to distance itself from the actions of the so-called Committee of Union and Progress at the time of the Ottoman Empire.

**14. Pandora's Box** – The Armenian genocide bill could actually set a sad precedent which is likely to poison international relations. Clearly, some French MPs are not familiar with the “law of unintended consequences”. If France can grant itself the authority to legislate on other nations’ history, it is then fair game for some Turkish politicians to suggest retaliation in the form of a bill aimed at punishing anyone denying that the killings of Algerians under French colonial rule constituted a genocide.<sup>16</sup>

**15. Austrian Precedent** – Furthermore, since the Austrian precedent of 2000, i.e. EU Member States decided to diplomatically isolate Austria when the extreme right joined a coalition government, it is well established that it is counterproductive to tell other nations how to vote. It is unlikely to be more productive to instruct certain nations how to interpret their own history. A cynical individual may however see in the French bill a Machiavellian attempt to strengthen anti-liberal forces in Turkey, with the intention of

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<sup>16</sup> On some unsavoury episodes of French colonialism, see M. Ferro, *Le livre noir du colonialisme* (Hachette, 2004).

sabotaging Turkish's membership application to the EU.<sup>17</sup> It also particularly ironic that France appears willing to accept new restrictions on the right to free speech while combating Turkey's EU membership on the ground that Turkey does not do enough to promote free speech and human rights in general.

**16. Immature Attitude Towards History** – At the end of the day, the action of those 106 ignorant deputies appears to prove that France and Turkey actually have more in common than initially thought: Both countries share the same immature attitude towards history. Suppressing historical debate is thought to be a wiser option than promoting a debate on each country's misdeeds. Our personal view is that the French bill as well as Article 301 of the Turkish Penal Code, as a matter of principle, have no place in a modern, free and open democratic society.

#### **IV – A Normative Case Against Genocide-Denial Laws**

**17.** The time allocated precludes a full exposition of the normative case against the so-called “*lois mémorielles*” but let me stress that the reality and the horrors of the Holocaust, of slave trade or of the massacres committed against the Armenians do not justify the use of criminal law. To paraphrase Article 10 of the ECHR, I would argue that genocide-denial laws are not “necessary in a democratic society.”

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<sup>17</sup> Interestingly, some French citizens have unsuccessfully sought to involve the Community Courts in the controversy over the Armenian genocide. See CFI, Case T-346/03, *Krikorian* [2003]; ECJ, Case C-18/04 P, *Krikorian* [2004].

18. I do certainly know that this is not the current position of the ECtHR at least in relation to Holocaust-denial laws.<sup>18</sup> In a few words, the ECtHR considers that the Holocaust belongs to a special category of clearly established historical facts whose negation or revision would be removed from the protection of Article 10 by Article 17.<sup>19</sup> This reasoning is neither convincing nor acceptable.<sup>20</sup> First of all, it is not for a court of law to decide that punish alternative interpretations of particular historical even in the case where particular facts appear to be clearly established. Secondly, this reasoning can hardly be reconciled with the logic espoused by the Court in relation to all other historical events and according to which it is not the task of the Court to settle historical debates. The Court went actually as far as to state, in a case where the French applicants were prosecuted for questioning who was responsible for the policy of collaboration with Nazi Germany, that

“Even though remarks like those the applicants made are always likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously. That forms

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<sup>18</sup> See e.g. *Garaudy v France*, dec. no. 65831/01 (2003). This inadmissibility decision is available only in French.

<sup>19</sup> See *Lehideux and Isorni v France* (2000) 30 EHRR 665, para. 47. Article 17 of the ECHR provides that “Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

<sup>20</sup> The German leading case on Holocaust denial law is certainly not more compelling. See BVerfGE 90, 241. To justify the criminalization of the so-called “Auschwitz lie”, the German Constitutional Court has offered a Byzantine reasoning distinguishing between fully protected opinions and factual assertions which are not entitled to constitutional protection when they do not contribute to the formation of public opinion. And this is supposedly the case when a factual assertion is made by a speaker who knows it to be untrue. As a factual assertion that has been proven untrue, those denying the Holocaust cannot therefore claim any violation of their right to free speech. One may however ask whether we can trust public authorities to decide which historical interpretation has been proven untrue and whether courts have the ability to distinguish between pure value judgments, opinions based on truthful facts and deliberate assertion of untruthful facts. For a clear introduction to German hate speech law, see W. Brugger, “The Treatment of Hate Speech in German Constitutional Law” (Part I) (2002) 3 *German Law Journal* 12; (Part II) (2003) 4 *German Law Journal* 1. The journal is available online: [www.germanlawjournal.com](http://www.germanlawjournal.com).

part of the efforts that every country must make to debate its own history openly and dispassionately.”<sup>21</sup>

Yet, one may say there is no more debate among historians about the Holocaust and its meaning. But again, how could a court of law assess whether or an historical debate is still ongoing? I would argue that the only genuine argument is that those denying or minimising the actions of the Nazis are almost always animated by anti-Semitic intent. Therefore, what the law should require is the demonstration of racist intent rather than relying on an unwise category of indisputable historical events.

**19.** This does not mean, however, that Holocaust-denial laws are necessary in a democratic society since they impose official truths. Criminal provisions punishing incitement to racial hatred should constitute sufficient tools to deal with anti-Semitic utterances. And I should note, in passing, that unlike what some leading French intellectuals or newspapers have argued,<sup>22</sup> I do not believe that one can logically justify the criminalization of Holocaust denial while arguing that such a criminalization is not warranted in the case of the Armenian genocide on the ground that the latter is of “another nature”, i.e. those denying the Armenian genocide are thought not to be animated by a racist intent. And were this logic to be accepted, it would mean that Article 17 of the ECHR cannot be applied to those denying the Armenian genocide. Accordingly, the French bill would have to be assessed in light of Article 10 and would certainly fail the proportionality test.

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<sup>21</sup> *Ibid.*, para. 55.

<sup>22</sup> See e.g. “L’Arménie en otage”, *Le Monde*, Editorial, October 11, 2006.

**20.** In both cases, I think we should be wary about the *slippery slope effect* of genocide-denial laws and be clearly aware of the *line-drawing problems* raised by this type of law.

**21.** Let me mention, for instance, a well-known and pathetic example of the censorship effect of French law. In 1994 Bernard Lewis, a distinguished American academic and a specialist of the history of the Middle East, was prosecuted for remarks he made in an interview to the newspaper *Le Monde* and in which he expressed doubts as to whether the term “genocide” could correctly described what happened in 1915-17. The criminal action was dismissed but simply on the ground that the relevant provision of the 1881 Act on the freedom of the press only incriminated then, the denial of the Holocaust and no other genocide.<sup>23</sup> And I should add that the eminent Professor was nonetheless held liable for damages (for a symbolic amount) by a civil court in 1995 on the ground that he failed to express his views with “objectivity and prudence” as elements counter to his thesis were not alluded to.<sup>24</sup> This is simply an absurd judgment. At the very least, one cannot be expected to express oneself with “objectivity and prudence” in the context of a journalistic interview.

**22. US Case Law** – We, citizens of democratic states, should be entitled, as a matter of right, to question whether a “genocide” – within the meaning of international law<sup>25</sup> – occurred without fearing prosecution, to criticize past or present state actions without being accused of defaming or insulting one’s own country. This is why I would rather

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<sup>23</sup> Tribunal correctionnel de Paris, October 14, 1994 (unreported).

<sup>24</sup> Tribunal de grande instance de Paris, June 21, 1995: *Juris-Data* n° 1995-044058 ; *Légipresse* 1995, n° 125, I, p. 83.

<sup>25</sup> See W. Schabas, *Genocide in International law* (Cambridge University Press, 2000).

side with American courts on this issue.<sup>26</sup> As stated by an American Federal Court of Appeal in case involving a “Holocaust-denier”, no one should dispute his

“right to say his piece, repugnant though his message be. The federal courts have a long and proud tradition of protecting the right of individuals with unpopular points of view to express themselves publicly even where this subjects onlookers to intense discomfort, even anger.”<sup>27</sup>

**23.** The force of the law should not be used to enforce historical truths. Rather than criminalizing speech, we would be well-advised to follow the steps of US Justice Brandeis and argue that “the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom ».<sup>28</sup>

## V - CONCLUSION

**24.** I have long warned anti-racists groups in France about the slippery slope effect of legislation such as the 1990 Act on the denial of the Holocaust. Once you accept that the state has a right to legislate historical truth, i.e. to ban alternative interpretations of particular historical events, it is unsurprising that certain groups attempt to use the force of the law to protect their own historical narratives from challenges. Already, religious groups are attempting to deny any criticism of their religious beliefs. This should be resisted at all cost unless we are ready to forget that freedom of expression “constitutes

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<sup>26</sup> For an American perspective on Europe’s speech laws, see the sharp and instructive article by G. Alexander, “Illiberal Europe. The long and growing list of things you can’t legally say”, *Weekly Standard*, Vol. 11, Issue 28, October 4, 2006.

<sup>27</sup> *McCalden v. California Library Ass’n*, 955 F.2d 1214 (9<sup>th</sup> Cir. 1990).

<sup>28</sup> *Whitney v. California*, 274 US 357 (1927), at 376-377.

one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual's self-fulfilment".<sup>29</sup>

**25.** In the case of the Armenian genocide bill, the vicious effect of this dramatic restriction on freedom of expression is made even worse as a country grants itself the authority to legislate on the historical misdeeds of another nation. If a recent book on the Rwandan genocide is to be believed, French authorities bear a direct responsibility in this monstrous event.<sup>30</sup> Should this entitle any country to punish anyone denying the allegedly decisive role played by France in the Rwanda genocide?

**26.** History should be left to historians. Hate-speech laws already offer extensive – and at times disproportionate – protection to religious, ethnic and other minorities. There is no overriding public interest which could justify genocide-denial laws in modern and peaceful democratic societies. President Chirac finally realised in 2005 that it is not for the law to (re-)write history. One may hope that for once, he will follow up on his words and repeal the set of historical laws which have set such bad precedents.

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<sup>29</sup> *Handyside v UK* (1976) 1 EHRR 737, para. 49.

<sup>30</sup> A. Wallis, *Silent Accomplice: The Untold Story of France's Role in the Rwandan Genocide* (I.B. Tauris, 2006).