
THE DIEUDONNE CASE – AN EXAMINATION ON THE LIMITS OF SATIRE AND SPEECH UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS

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The fine line between what's acceptable and what is not under the remit of 'Free Speech' is a continuous social, political, and legal battle on both the national and European scale, such as it should be in any democratic and educated society. Such an issue has generated controversy before, but during this past decade attacks have escalated into violent, as in the Danish Cartoons controversy,¹ or even fatal, the Charlie Hebdo incidence,² attacks, and with this in mind, it's a good time as any to re-examine the legal *locus standi* on this matter.

The apparent conflict is apparent most prominently in the European Convention of Human Rights (the Convention),³ more evidently in the interplay between the freedom as established under article 10(1),⁴ and the restrictions of said freedom as established under articles 10(2)⁵ and 17.⁶ While previous cases in the European Court of

¹ ML Sjølie, 'The Danish cartoonist who survived an axe attack' (The Guardian, 4 January) <<https://www.theguardian.com/world/2010/jan/04/danish-cartoonist-axe-attack>> accessed 18 October 2016.

² Phipps C, Topping A, McCarthy T, 'Charlie Hebdo magazine attack: vigils held as French hunt suspects – as it happened' (The Guardian, Updated 11 August). <<https://www.theguardian.com/world/live/2015/jan/07/shooting-paris-satirical-magazine-charlie-hebdo>> accessed 18 October 2016.

³ European Convention of Human Rights 1950.

⁴ European Convention of Human Rights, Article 10(1), 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.'

⁵ Ibid Article 10(2) 'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

Human Rights (the European Court) have examined and re-examined the remits of article 10, e.g. the **Mondragon**,⁷ **Vajnai**,⁸ and **Stoll**⁹ cases, the **Dieudonné**¹⁰ case seems to be the most prominent in examining the direct inter-play between articles 10(1), 10(2), and 17, with both the particularities of the case, the background of the plaintiff and the court's concluding arguments deserving special recognition.

The subject of this case, Dieudonné M'Bala M'Bala, is a comedian who has repeatedly been accused and condemned of hate-speech remarks in France,^{11,12} as well as going so far as participating in politics with both the EuroPalestine Party in 2004, and the Anti-Zionist Party in 2009, as well as having close ties with former far-right politician Jean-Marie Le Pen.¹³ He also came to international prominence after having invented the Quenelle¹⁴ salute, a gesture which became closely associated with anti-Semitism in France and soon made headlines elsewhere. During one of his shows, on 26 December 2008, he invited on stage academic Robert Faurisson, a noted Revisionist¹⁵ who had been previously accused and convicted of denying the existence and use of gas chambers during the Nazi Holocaust. M'Bala M'Bala presented Daurisson with a 'prize of intolerance and insolence',¹⁶ while his assistant, wearing a striped pygama with a yellow Star of David attached, gave him the 'prize' which consisted of a chandelier with three apples.

After a video recording of the event was made public, Dieudonné was arraigned by the 'Tribunal de Grand Instance (TGI)', where he was charged with 'the public injury with regards to a person or a group of person on the basis of their origin, or their

⁶ 'Nothing in this 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.'

⁷ *Otegi Mondragon vs Spain* App no 2034/07 (ECtHR, 15 March 2011).

⁸ *Vajnai vs Hungary* App no 33629/06 (ECtHR, 8 October 2010).

⁹ *Stoll vs Switzerland* App no 69698/01 (ECtHR, 10 December 2007).

¹⁰ *M'Bala M'Bala vs France* App no 25239/13 (ECtHR, 20 October 2015).

¹¹ Unknown, 'Dieudonné fait appel de sa condamnation en Belgique pour antisémitisme' (Le Figarotv, 26 November) <<http://video.lefigaro.fr/figaro/video/Dieudonné-fait-appel-de-sa-condamnation-en-belgique-pour-antisemitisme/4632804704001/>> accessed 18 October 2016.

¹² Lee, d, 'Hong Kong's French and Israeli consulates condemn race-hate comic's visit' (South China Morning Post, Updated 19 January 2016) <<http://www.scmp.com/news/hong-kong/politics/article/1901879/hong-kongs-french-and-israeli-consulates-condemn-race-hate>> accessed 18 October 2016.

¹³ AWL, 'Dieudonné: symptom of a wider problem' (Workers' Liberty, 13th January) <<http://www.workersliberty.org/story/2014/01/13/dieudonn%C3%A9-symptom-wider-problem>> accessed 18 October 2016.

¹⁴ J Lichfield, 'What is the 'quenelle'? Nicolas Anelka banned for five-matches for' (The Independent, 27 February 2014) <<http://www.independent.co.uk/sport/football/news-and-comment/what-is-the-quenelle-nicolas-anelka-banned-for-five-matches-for-performing-gesture-in-premier-league-9158322.html>> accessed 18 October 2016.

¹⁵ Françaisrt.com, 'Robert Faurisson condamné A quatre mois de prison pour des propos révisionnistes' (RT en Français, 27 September 2016) <<https://francais.rt.com/france/26922-robert-faurisson-condamne-quatre-mois>> accessed 18 October 2016.

¹⁶ 'prix de l'infréquentabilité et de l'insolence'

ancestry or the ethnicity, nation, race or the faith of a person', on the basis of articles 23 and 24 of the French Press Code, which said:

*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.*¹⁷

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Dieudonné argued that before the event in question, he knew about the 'poisonous reputation'¹⁹ of Faurisson but was not knowledgeable of his previous history with anti-Semitism. Rather he had invited him on stage as he was one of the academics protesting the slave house in Goree, Senegal. The defendant also argued that the choice of costume was worn by a previous comedian in his play and was 'the most efficient in provoking the audience', while the audience was told that he used to costume so he wouldn't need to find another. Meanwhile the chandelier was simply 'found in a lodge.'²⁰

¹⁷ Translation: The penalties provided for in the sixth paragraph of Article 24 will be used against anyone who disputes, by one of the means set forth in article 23, the existence of one or more crimes against humanity as defined by Article 6 of the Charter of the International Military Tribunal, annexed to the London Agreement of 8 August 1945 and have been committed either by members of an organization declared Criminal under Article 9 of the Statute, or by a person convicted of such crimes by a French or international court.

¹⁸ Translation: Punishments shall be laid out to those deemed as accomplices to an act which is classified as a felony or misdemeanor who, whether through speeches, shouting or threats uttered in public places or meetings, or by written or printed matter, drawings, engravings, paintings, emblems, images or other medium of writing, speech or sold or distributed, offered for sale or displayed in public places or meetings, or by posters or placards exposed to public view, or by any means of communication the public electronically, directly incite the perpetrator or perpetrators to commit such action, if the provocation was followed by effect.

¹⁹ 'reputation sulféreuse'.

²⁰ 'été trouve dans une loge.'

However, the French Court of First Instance, the TGI, dismissed M'Bala M'Bala's defense. It pointed to his admission to the audience during the event that he was not only reacting to a French journalist's assertion about the nature of his shows as being 'the largest anti-Semite meeting since the Last World War', but he wanted to 'do one better this time around.'²¹ He introduced Faurisson as a person who most of France 'wanted nothing to do with' and 'the victim of the Israeli Occupation and Zionist militias'.²² He also made undisputed reference to his notorious publications when commenting that Faurisson '*a été tabasse par les milices sionistes qui sont tres actives*'. The defendant in this case had also put up a mis-en-scène including a person wearing striped pajamas (the same uniform used in Nazi concentration camps during the Holocaust), a yellow star of David with the French term for 'Jew', written on them, and presented a chandelier with three apples stuck on it. Such deliberate usage of symbols closely associated with the suffering of millions of Jews, from the pajamas to the religious connotations behind the chandelier, left the audience without any doubt that such a mis-en-scène was an expression of anti-Semitism. Lastly, the Court argued that even comedy has its limits, and that such a deliberate act exceeds said limits.

In the subsequent appeal adjudicated by the Parisian Court of Appeal,²³ it noted that such a deliberate offence of the memory of the ethnicity by the use of such obvious propos constituted an outrageous act intending solely on injuring or mocking a certain group of people. The Court also argued that:

If Dieudonné M'Bala claims his right to freedom of expression and, somehow, immunity should enjoy artistic creation humorous vocation, it must be remembered that these rights are essential in a democratic society, are not without limits, especially in cases concerning the respect for the dignity of the human person, which is the case here, and when the scene of acts give way to an event which no longer has the character of a show.²⁴

The French Court De Cassation also rejected M'Bala M'Bala's subsequent re-appeal on the same grounds.

In his appeal to the European Court of Human Rights, M'Bala M'Bala as plaintiff argued that he only presented a mis-en-scène, and that neither him nor the other person attempted to directly hurt or injure anyone. He also criticized the French courts for allegedly misinterpreting article 23 of the French Code, as for the first time they considered that the injurious act did not result from the usage of offensive language or any types of words, but rather from the background context and the mis-en-scène in

²¹ '*faire mieux cette faix-ci*'.

²² '*milice d'occupation israelienne*' and '*milices sionistes*'.

²³ Decided on 17 March 2001.

²⁴ '*si Dieudonné M'Bala revendique son droit à la liberté d'expression et, en quelque sorte, l'immunité dont devrait bénéficier la création artistique à vocation humoristique, il doit être rappelé que ces droits, essentiels dans une société démocratique, ne sont pas sans limites, tout spécialement lorsqu'est en cause le respect de la dignité de la personne humaine, ce qui est le cas en l'espèce, et lorsque les actes de scène cèdent la place à une manifestation qui ne présente plus le caractère d'un spectacle*'.

question. Such a restriction on his freedom of speech ‘was neither foreseeable nor necessary’. On the other hand, the French Government argued that such a claim should be dismissed on the basis of article 17, and that the effect of the props and actions of the plaintiff were clearly identified as having a ‘racist objective’, ‘*objective raciste consistant*’, recalling the Court of Appeal’s comment that Dieudonné had intended ‘to deliberately cause offense to the memory of the Jewish people’. They also argued that the plaintiff’s abuse of article 10 was contrary to the fundamental values of the Convention, which were defined as ‘justice and peace’, ‘*que sont la justice et la paix*’. They also countered the plaintiff’s assertions by stating an older case, **Cour De Cassation (Crim, 23/11/1907)**, where it was argued that it is important for the tribunal to regard the context of each situation – even when the words used may not the harmful character in question, the character and background in their nature can reveal to the public their true self. The Government also reminded the Court about the plaintiff’s admission to the audience, just before the act stated, that the sketch was ‘*la plus grosse connerie*’ that he had ever attempted.

In its judgement the European Court argued that it cannot discuss or examine the merits of what constitutes the public injury of a person or a group of persons, as this is only the remit of the national courts, ‘*notamment aux tribunaux, d’interpréter et d’appliquer le droit national*’. Rather, the Court can only verify its position based on article 10, relying on the national authorities to establish the acceptable limits of the appertaining facts. Meanwhile, the Court commented that the protection offered by article 10 of the Convention applies equally when it comes to satire ‘which is a form of artistic expression and social commentary that, using the art of exaggeration and deforming the reality which they are referring to, is naturally intended on provoking and agitating’.²⁵ The Court also mentioned that as in **Lawless vs Ireland**, the establishment of article 17 was to ‘ensure the impossibility of deriving from the Convention a right allowing the activity [...] which sees the destruction of the rights and liberties which are recognized by this same Convention’,²⁶ and that ‘no single person is allowed to abuse from the provisions of the Convention to allow the destruction of anyone’s fundamental freedoms and liberties’. The Court also argued that the contestation of the crimes committed by the Nazis against the Jewish population, as in the **Garaudy** case, is an incompatible *rationae materiae* with the Convention’s articles and the freedoms established by article 10. Having a ‘revisionist character’ goes against the fundamental values of the Convention, which are justice and peace.

The Court noted, as put forward by the French Government, the public honoring of a notorious revisionist historian, together with the plaintiff’s express intention of one-upping, or as he put it, ‘to do better than the previous spectacle’²⁷, which was defined as

²⁵ ‘*qui est une forme d’expression artistique et de commentaire social qui, de par l’exageration et la deformation de la realite qui la caracterisent, vise naturellement a provoquer et a agiter*’.

²⁶ ‘*mettre dans l’impossibilite de tirer de la Convention un droit qui leur permette de se livrer a un activite... visant a la destruction des droits et libertes reconnus dans la Convention*’.

²⁷ ‘*faire mieux d’un precedent spectacle*’.

‘the largest meeting of anti-Semites since the last great World War’.²⁸The Court also flatly rejected the argument put forward by the plaintiff that there was no revisionist props in the scene, saying that when Faurisson accused all those that disagreed with him as being ‘*affirmationnistes*’ this represented an attempt to put his anti-Semitic arguments on equal level with ‘clearly established history facts’, and is prohibited by French Law, which in turn is subtracted from article 17 as a protection against article 10.

The Court also examined the controversial props used in light of the circumstances of the play in question, thus rejecting the plaintiff’s argument that the internal courts interpreted the sketch only *prima facie*, without regarding the external elements which were suggesting a different interpretation than the one they perceived. Dieudonné was regarded by the Court as a ‘comedian with a history of strong political engagement, making himself a candidate in multiple elections’, noting as well his previous history of being condemned for racial hatred. Rather, with this background in mind, the Court argued that the plaintiff ‘did not use his satirical prowess to denigrate the thesis of his invitee or of denouncing antisemitism, but rather, to enhance it, as observed by the public’s reaction to the play, notably the phrase “Faurisson a raison” being clearly heard.’

Dieudonné’s lack of explanations about his intentions, but rather the announcement in the preamble of the scene in question that he wanted to surpass the previous spectacle as being ‘the largest anti-Semitic meeting since the last World War’ was an indication that could have oriented the perception for the public about the intention of the next act, together with the plaintiff’s expression ‘*de faire mieux en matiere d’antisemitisme*’. In the national courts, the plaintiff was happy to argue that the preamble was simply ‘*l’excuse de provocation*’ to justify the injurious act:

In the present case, by announcing his wish to push anti-Semitic provocation to its paroxysm and by publicly paying tribute, to that end, to an individual known for his negationist ideas, calling him on stage to be awarded, by an actor representing a caricature of a Jewish deportee, an object ridiculing a symbol of Judaism, the defendant excessively overstepped the permissible limits of the right to humour.

The Court also described the costume as being ‘*outrageusement grotesque*’, arguing that such an act was ‘*une demonstration de haine et d’antisemitisme, ainsi que la remnise en cause de l’holocauste*’. Such ideologies and manifest expressions of said ideology cannot be accepted as it goes against the fundamental values of the Convention, and thus does not deserve the protection under article 10. Therefore, the plaintiff’s plea was dismissed.

The Court’s decision was notable for a number of reasons: Primarily, it emphasized the French Court’s 1907 decision that when it comes to the incitement of racial hatred, a face-value inspection of the words, actions and images used is not

²⁸ ‘*le plus grand meetig anti-Semite depuis la dernier guerre mondiale*’.

enough, but rather, they must be used in context together with the background of the event. The imagery, the audience, the previous history of the comic, and the significance of each prop or costume used must all be examined closely. The Maltese Courts took a similar approach in the **Arthur Galea Salamone** case: the fact that even though a number of people of colour were close to the protest, no acts of violence or obscenities were made public, was evidence enough to acquit the plaintiff and not be condemned as inciting racial hatred.

Secondly, the European Court argued that the freedoms as listed under article 10 were not unlimited and without reproach. The inciting of racial hatred, coupled with the deliberate offence of the suffering of an ethnic group goes against the basic fundamental values of the Convention, as no article should allow the successful subversion of any person's rights under a different article of the same Convention. While satire should be allowed and promoted in any democratic society, and while the French Court of First Instance admitted the use of satire as being '*une forme d'expression artistique et de commentaire social qui, de par l'exageration et la deformation de la realite qui la caracterisent, vise naturellement a provoquer et a agiter*', there must be a comedic intention behind such a provocative act, or at least an intention to aware the rest of the population about certain truths. In this case, the mis-en-scene used the cloak of satire as a way to promote its anti-Semitic and its negationist message: The very reaction by the audience, which wasn't one of warm laughter but rather of incitement and anger, was enough to dilute any comedic mirage behind the act, but it further exemplified the true intention behind said choices.