

IOANNA TOURKOCHORITI,
THE REVOLUTIONARY ROOTS OF AMERICAN
AND FRENCH LEGAL THOUGHT
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The book “Freedom of Expression: The Revolutionary Roots of American and French Legal Thought” (Cambridge University Press, 2022) discusses the difference in the protection of freedom of expression in France and the United States. In the US, the legal protection of freedom of expression trumps the protection of other values, like privacy or human dignity, a sign of American exceptionalism¹. Social restrictions coming from civil society, political correctness, limit expression. By contrast, in France limitations to freedom of expression are legitimate in order to protect other competing values. The role undertaken by civil society in the US is undertaken by the state in France. Civility norms are to be enforced by the state in France, whereas this is not the case in the US. Hate speech is not protected in France². In France, defamation based on a person’s “race” is punished more heavily than “ordinary” defamation and constitutes a “special crime”³. The divergence is also obvious in the area of self-expression. Wearing conspicuous religious symbols is forbidden since 2005 in “public schools and high schools” in France⁴. In 2010, the French Parliament banned the

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¹ Frederick Schauer, “The Exceptional First Amendment”, in Michael Ignatieff (ed.), *American Exceptionalism and Human Rights*, 2005, p. 29-56.

² See generally Ioanna Tourkochoriti, “Should Hate Speech be Protected: Group Defamation, Party Bans, Holocaust Denial and the Divide between Europe and the US”, *45 Columbia Human Rights Law Review*, 2014, p. 552-622.

³ Art. R 625-7 of the New Code Penal modifying articles 32, 33 of law of July 19th, 1881.

⁴ Law n° 2004-228, March 15th 2004, *J.O.R.F.* n°65 of March 17th 2004, p. 5190, “Encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics”. For a presentation see Jonathan Laurence, Justin

wearing of the burka⁵. Another difference relates to political campaign funding. The United States Supreme Court has invalidated federal legislation imposing limits on independent expenditures which usually come from corporations to support political campaigns as a violation of their speech rights⁶. France regulates strictly the funding of political campaigns and imposes upper ceilings to campaign expenditures⁷.

The book argues that these differences reflect a different understanding in the role of the government in the determination of the content and the limits of freedom of expression. This understanding of the role of the government was formed at the foundation of the two democracies in response to concrete political problems. Legislation limiting speech is frequently invalidated by the American Supreme Court. In France, similar legislation in many cases was not even referred to the *Conseil Constitutionnel* (under the previous system of deferral to the Council based on the initiative of members of the Parliament or the President of the Republic). But also most recently, since an appeals procedure was created to the CC, legislation limiting speech is rarely invalidated. This indicates that the difference relates to the interplay between law and liberty in the two legal systems. The debates around the French Revolution, the Declaration of Independence in the US, and the construction of the Federal Government there are instructive in relation to this interplay. These debates to a great extent formed the understanding on the proper relation between law and liberty.

If we approach the topic of freedom of expression from the perspective of comparative philosophy of history and legal philosophy, then it becomes obvious that three important concepts are at stake: The concept of government, the concept of republicanism and the concept of natural rights. What is at stake is a profound difference in the understanding of the role of the government, on the imaginary level. In the United States, it is rarely legitimate for the government to intervene as the regulator of interpersonal respect for harm caused by speech. The understanding of the role of the government in France is affected by the organic vision that the Middle Ages inherited from Aristotle⁸; Bodin's and Rousseau's vision. The construction and the organisation of the American states as well as of the Federal government is characterised by a series of "checks and balances" aiming to control, filter, and overall to moderate the power

Vaisse, *Integrating Islam, Political and Religious Challenges in Contemporary France*, 2006, John R. Bowen, *Why the French Don't Like Headscarves*, 2006.

⁵ Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public, *Journal Officiel de la République Française*, 2010, 18344.

⁶ *Citizens United v. FEC.*, 558 U.S. 310, 2010.

⁷ Loi 88-226 du 11 mars 1988 relative à la transparence financière de la vie politique [Law 88-226 of March 11, 1988, relating to the financial transparency in political life], *Journal Officiel [J.O.] Official Gazette of France*, Mar. 12, 1988, p. 3288; Loi 88-227 du 11 mars 1988 relative à la transparence financière de la vie politique [Law 88-227 of March 11, 1988, relating to financial transparency in political life], *J.O.*, Mar. 12, 1988, p. 3290; Loi 90-55 du 15 janvier 1990 relative à la limitation des dépenses électorales et à la clarification du financement des activités politiques [Law 90-55 of January 15, 1990, relating to limits on election expenditures and the reporting of political funding activities], *J.O.*, Jan. 16, 1990, p. 639; On the ceilings to campaign expenditures, see the decision of the National Commission on Campaign Accounts and Political Financing of November 26, 2007, regarding Nicolas Sarkozy, presidential candidate, *J.O.*, Jan. 10, 2008, p. 574. See the site maintained by the Library of Congress in the US, [link](#).

⁸ Bernard Guenée, *States and Rulers in Later Medieval Europe*, Fr. Transl. by Juliet Vale, 1985, p. 44.

of the government and its impact on individual liberty. If French constitutionalism is founded on a positive conception and a trust regarding the exercise of collective power, the inverse attitude prevails in the American context.

Second, adopting a comparative approach related to philosophy of history leads to examining the subtle nuances in the understanding of republicanism between the two systems. Both legal and political systems express republican ideals. In the US, the common good is defined as the need to protect negative liberties. The dominant conception is that the political sphere is instrumental to the private sphere. In France, negative liberties are protected only to the extent that they are compatible with the common good. The common good is something qualitatively different. The quality of being a citizen is primary. The Rights of Man make sense only as Rights of the Citizen.

Third, another important concept which is relevant to this discussion is the concept of natural rights. Natural rights discourse emerged in America shortly before the Declaration of Independence, in order to delegitimize attempts by the British Parliament to enact legislation limiting the negative liberties of the people in the colonies. In France, the debates among the participants in the National Assembly during the Revolution indicate that rights were seen as natural, because society is seen as natural also and as having the mission to help the citizens realise their rights.

The purpose of this analysis in comparative legal philosophy is to encourage reflection on the proper limits to freedom of expression. The US may be overprotecting freedom of speech in some respects and France may be under-protecting the same freedom. Understanding the ideologies behind the emergence of a legal regime protecting speech does not mean accepting historical determinism. It is possible to think critically about just criteria for limiting speech. Principles and rules elaborated in the past to meet concrete socio-political needs may not be relevant today to address contemporary concerns related to limiting rights. The book engages with major debates on issues related to free speech and proposes ways of thinking about balancing the relevant interests against other values. □