FRANCE'S ENTANGLEMENT IN THE ARMENIAN GENOCIDE ISSUE

(FRANSA'NIN "ERMENİ SOYKIRIMI" TARTIŞMASINDA KAYBOLUŞU)

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Abstract: *The subject of this article is a law passed in the French Parliament. The draft law was passed in the French Parliament by proposition of Mrs. Valerie Boyer, a member of the ruling party in France, and which is entitled "The Law to punish the Denial of the Existence of Genocides Recognized as such by the Law." The article will try to present the processes behind the proposal and passing of the law, as well as the political intentions behind it. Article will also analyze on what grounds Constitutional Council overruled the law.*

Keywords: *France, Boyer Law, Genocide Convention, EU Framework Decision, Constitution of France, Constitutional Council of France, European Court of Human Rights*

Öz: *Bu makalenin konusu Fransız Parlamentosu'nda geçen bir kanundur. Kanun taslağı Fransız Parlamentosu'ndan Fransa'daki iktidar partisi milletvekillerinden Bayan Valeri Boyer'in önerisi ile geçmiştir ve başlığı "Kanun ile Tanınmış Soykırımların Varlığının İnkarının Cezalandırılması Kanunu". Makale söz konusu kanunun önerilmesi ve geçmesi süreçlerini ve arkasındaki siyasi niyetleri inceleyecektir. Ayrıca makalede Anayasa Konseyi'nin kanunu hangi gerekçeler ile iptal ettiği de değerlendirilecektir.*

Anahtar Kelimeler: *Fransa, Boyer Yasası, Soykırım Sözleşmesi, AB Çerçeve Sözleşmesi, Fransa Anayasası, Fransa Anayasa Konseyi, Avrupa İnsan Hakları Mahkemesi*

Introduction

The subject of this Article is a law passed in the French Parliament. The draft law was proposed by Mrs Valerie Boyer, a member of the ruling party in France, Union for a Popular Movement (Union pour un

Mouvement Populaire), representing Marseilles. The official title of the law is *"The Law to punish the Denial of the Existence of Genocides Recognized as such by the Law* (Loi visant à réprimer la contestation de l'existence des génocides reconnus par la loi)". Despite the efforts by the President Sarkozy and Mrs Boyer to the effect that it does not target at Turkey, the press and media insistently referred to the law as *The Law Punishing the Denial of the Armenian Genocide* (Loi pénalisant la contestation du génocide arménien). This was also confirmed by the government spokesman when he was addressing the parliament during the debates on this law. It is further confirmed in the written observations submitted by the government to the Constitutional Council to defend the law. The text of these observations could be found in the Part V of this article. The law will be referred to as the Boyer Law in this article.

The Boyer Law was adopted on 7 December the lower house of the parliament (Assemblée Nationale) in a session attended by 56 members of parliament (MPs) and 45 of them voted in favour of the adoption of the law, that is to say by 7.7 % of the MPs in a parliament with 770 seats. 12 amendments were proposed in the lower house, some of them were withdrawn before the session while some were withdrawn during the session. One of the amendments (amendment 4) was proposing the inclusion of the Chaldean and Assyrian genocides (?) of the draft as well (implying that they took place in the Ottoman Turkey). This proposal was withdrawn before the session. Another amendment was submitted by Mr. Jacques Remiller, MP for Isère, (amendment 12) proposing that the massacres inflicted by the Republicans on the Royalists in the Vendée province of France in 1793-94 be also recognised as genocide. Mr. Remiller points out, in the justification of the proposed amendment, that the Royalists that were killed by the Republicans were skinned and tanneries were established in the town of Ponts-de-Cé at the outskirts of Vendée in order to manufacture leather jackets for the Republican army officers with these human skins. This proposal was also withdrawn before the session.

The Boyer Draft Law, after being adopted in the lower house, was submitted to the Senate that constitutes the upper house in the French parliament. The Committee of Laws (Commission des Lois) of the Senate debated the draft law and was led to the conclusion that it was in contradiction with the constitutional principle of the freedom of expression. It drafted its report reflecting this conclusion and submitted it to the plenary session of the Senate. However the plenary of the Senate did not agree with the opinion of the Committee of Laws and adopted the Boyer Law on 23 January 2012 with 127 votes in favour and 86 votes against.

Senator Jacques Mézard of the electoral district of Cantal (Auvergne) and MP Michel Diefenbacher of Lot-et-Garonne took an initiative to carry the law to the Constitutional Council to find out whether the law is in line with the constitutional principles. 65 MPs and 77 Senators signed the petition that required a minimum of 60 signatures from both chambers and the petition was submitted to the Constitutional Council on 31 January 2012.

The Constitutional Council, which is the competent authority to verify the constitutionality of the laws, declared on 28 February 2012 that it was led to the conclusion that the Boyer Law is in contradiction with the French Constitution.

The French President, most probably with a view to circumventing the objections raised by the Constitutional Council to justify its decision and to avoiding a new cancellation, instructed the government no later than the Constitutional Council's decision was made public to examine the decision and to draft another law for the same purpose.

The Constitutional Council, which is the competent authority to verify the constitutionality of the laws, declared on 28 February 2012 that it was led to the conclusion that the Boyer Law is in contradiction with the French Constitution.

I will examine in this article 1) the Boyer Law; 2) the contradictions that it contains; 3) the submission of the French MPs to the Constitutional Council; 4) the submission of the Senators; 5) the observations of the government on the arguments raised by the MPs and Senators; 6) the counter-observations of the MPs; 7) the verdict of the Constitutional Council; and 8) the conclusion that could be drawn from the entire exercise.

I. THE BOYER LAW

The Boyer Law reads as follows:

Article 1

The first paragraph of the Article 24 (bis) of the Law of 29 July 1881 on the Freedom of Press is replaced by the five paragraphs drafted as follows:

Those who condone, deny or grossly trivialize publicly the crimes of genocide, the crimes against humanity and the war crimes as defined in a non exclusive manner:

1) by the Articles 6, 7, and 8 of the Charter of the International Criminal Court established in Rome on 17 July 1998;

2) by the Articles 211-1 and 212-1 of the Penal Code;

3) by the Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945;

and that are recognized as such by law, an international convention signed and ratified or adhered to by France, by a decision adopted by a European Community or international institution, or qualified as such by a French jurisdiction made executable in France

shall be punished as provided for in the sixth paragraph of the Article 24.

Article 2

Article 48-2 of the Law of 29 July 1881 on the Press Freedom is amended as follows:

1) Insert the words: "or any other victim of the crime of genocide, war crimes, crimes against humanity or crimes or offences of cooperation with the enemy" *after the word "*deported*".*

2) Insert the words : "of genocides" *after the word* : "condoning"

1. The Article 1 of the Boyer Law

The text of the law amended by the Boyer Law is shown below together with the shape that it took after the amendment (The previous form of the Article 24 (bis) of the Law of 1881 on the Press Freedom is crossed while the text that substituted it is printed in bold letters)

Article 24 (bis)

~~*Those who deny, through the means indicated in the Article 23, the existence of one or several crimes against humanity as defined by the Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 and that are committed either by the members of an organization declared criminal according to the Article 9 of the said Charter or by a person found guilty of such crimes by a French or international court, shall be punished according to the provisions of the paragraph 6 of the Article 24.*~~

Those who condone, deny or grossly trivialize publicly the crimes of genocide, the crimes against humanity and the war crimes as defined in a non exclusive manner:

4) by the Articles 6, 7, and 8 of the Charter of the International Criminal Court established in Rome on 17 July 1998;

5) by the Articles 211-1 and 212-1 of the Penal Code;

6) by the Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945;

and that are recognized as such by law, an international convention signed and ratified or adhered to by France, by a decision adopted by a European Community or international institution, or qualified as such by a French jurisdiction made executable in France

shall be punished as provided for in the sixth paragraph of the Article 24.

a) What did Article 24 punish before it was amended?

One can see that the amendment made on Article 24 (bis) of the Law of 1881 on Press Freedom introduces a fundamental change in the Article and almost re-writes the Article. The crossed text above indicates that the Article 24 (bis) was punishing, before the amendment, the crimes defined by the Article 6 of the Charter of the International Military Tribunal (Nürnberg Court) appended to the London Agreement of 8 April 1945. The crimes defined in the Article 6 of the Charter are the following:

Article 6 (of the Charter of the Nürnberg Tribunal)

(a) Crimes against peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;*

(b) War crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;*

> ***(c) Crimes against humanity****: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.*
>
> *Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.*

For a French court to criminalize a person according to the Article 24 (bis) before the amendment, the act committed by that person had to be characterized as a crime by an international court.

Those who committed the crimes contained in the Article 6 above of the Charter of the Nürnberg Court were punished according to the Article 24 (bis) that was in force before the adoption of the Boyer Law, in case they were found guilty by the French courts.

In order to better understand the change introduced by the Boyer Law it may be appropriate to examine separately a) the crime that is being punished; and b) who is going to be punished when he commits that crime?

b) What is the crime that is being punished

The crime that is being punished is the denial of any crime that the Nürnberg Court has characterized as genocide. For a French court to criminalize a person according to the Article 24 (bis) before the amendment, the act committed by that person had to be characterized as a crime by an international court (Nürnberg Court according to this Article). This detail is important for Turkey because it indicates that the verdict of an international court (Nürnberg Court) was required in order to criminalize a person for the denial of a crime. Mr. Jean-Jacques Hyest, Chairman of the Senate Committee of Laws, pointed out that the scope of the law did not go beyond this. In fact when a law of similar content was being debated on 4 May the Committee of Laws of the Senate, the Committee opposed by unanimous vote the incorporation of the debate of that law in the agenda of the Senate, because it was led to the conclusion that the law was in contradiction with the constitutional principle of the freedom of expression. Mr Hyest, the Chairman of the Committee, when he was submitting the Committee's

report to the plenary of the Senate, pointed out that: "*as I underlined in my report, criminal action can be taken, according to the Article 24 (bis), only in case of a denial of the holocaust".*

Therefore the denial of an act that is not established as genocide by an international court was not punished in France before the Boyer Law.

c) Who is going to be punished when he commits that crime?

For a French court to punish a person for having denied genocide, in addition to the precondition that it has to be a crime covered by the Charter of the Nürnberg Court, it has to be committed, according to the Article 24 (bis):

a) either by a member of a group characterized as a criminal organization according to the Article 9 of the above-mentioned Charter;

b) or by persons found guilty by the French or international courts.

d) What is new in the Article 1 of the Boyer Law?

After having explained what the present situation on this particular subject in France is, we may now examine what is the new element introduced by the Boyer Law. Before the amendment, the Article 24 (bis) used to punish only those who denied the holocaust. The Boyer Law added to the scope of the previous legislation the punishment of the denial of the genocide characterized as such by the international Criminal Courts of Rwanda and Yugoslavia. This is not specified as clearly as that in the text, but the Article 1 a) of the Boyer Law provides that the crimes of genocide as defined by the Article 6 of the Charter of the International Criminal Court of Rome will also be covered. Since there are verdicts of international criminal courts that characterize the Rwanda and Srebrenica massacres as genocide, there is nothing wrong in punishing those who deny these two genocides (in addition to holocaust).

But the Boyer Law did not stop there. After incorporating the Rwanda and Srebrenica cases into the scope of the punishment, it went one step further and provided for the punishment of the denial of another event, namely the events that took place in the Ottoman Turkey, despite the fact that there is no decision by any competent international court that characterizes these events as genocide.

From another perspective, the Boyer Law brings about an ironical situation: It has been established that the crime of genocide was committed in Rwanda. There are strong evidences, on the other hand, that the French soldiers were implicated in this genocide. Now, if a French soldier admits that he was involved in the Rwandan operation, he will have to be punished for having committed genocide, because an international court decided that genocide was committed in Rwanda; if, on the other hand, he denies the Rwandan genocide, then, he will have to be punished for the denial of genocide under the Boyer Law.

e) Which means shall be used to commit the offence of denial?

Another detail worth mentioning in the Boyer Law is the means that will be used to commit the offence of denial. The first paragraph of the Article 24 (bis), which is now repelled, provided that *"those who deny, through the means indicated in the Article 23, the existence of one or several crimes against humanity"* shall be punished. The said Article 23 read as follows:

Article 23 (of the Law of 1881 on the Freedom of Press)

Shall be punished as accomplices of an act characterized as crime or offense those who,

- *either by lectures, shouting or threats hurled in the public places or meetings, or by writings, printed materials, drawings, paintings, emblems, pictures or all other support of written material, speech or picture sold or distributed, marketed or displayed in the public places and meetings;*

- *or advertisements or posters displayed to the large public;*

- *or by any means of communication to the public through the electronic means, provoke the perpetrator or perpetrators to commit the said act, in case the provocation bears effects.*

  This provision shall also be applicable even if the provocation is followed only by an attempt to crime provided for in the Article 2 of the Penal Code.

There is no reference to this Article the Boyer Law. Therefore, the reference to the means mentioned in this Article falls down as well. However similar provisions with slightly different scope exist also in the EU Framework Decision. Article 1 (1) (b) of the said Decision reads as follows:

Article 1 (1) (b) (of the EU Framework Decision)

1. *Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:*

   (b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;

The EU Framework Decision does not draw up an inventory of the means as detailed as in the Article 23, however it introduces a detailed practice in this field. It may be appropriate to take a closer look at this practice as it may interest Turkey in the future. Article 5 of the Framework Decision provides for the liability of the legal persons that become instrumental in the commission of the offense of the denial of genocide.

Article 5 (of the EU Framework Decision)

Liability of legal persons

1. *Each Member State shall take the necessary measures to ensure that a legal person can be held liable for the conduct referred to in Articles 1 and 2, committed for its benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:*

   (a) a power of representation of the legal person;

   (b) an authority to take decisions on behalf of the legal person;

   or

   (c) an authority to exercise control within the legal person.

2. *Apart from the cases provided for in paragraph 1 of this Article, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 of this Article has made possible the commission of the conduct referred to in Articles 1 and 2 for the benefit of that legal person by a person under its authority.*

3. *Liability of a legal person under paragraphs 1 and 2 of this Article shall not exclude criminal proceedings against natural persons who are perpetrators or accessories in the conduct referred to in Articles 1 and 2.*

4. 'Legal person' means any entity having such status under the applicable national law, with the exception of States or other public bodies in the exercise of State authority and public international organisations.

2. Article 2 of the Boyer Law

Article 2 of the Boyer Law amends the Article 48-2 of the Law of 1881 on the Press Freedom. This Article was added to the Law in 1990, that is to say 110 years after it was first adopted. The purpose of the addition was to allow the associations established by the victims of the deportation to the concentration camps and the participants in the Resistance against occupying German forces during the Second World War, to become civil party in the court proceedings initiated in order *"to protect the moral interest and the honour of these victims and heroes"*. The consolidated text of the Article 48-2 after the incorporation of the amendments brought by the Boyer Law is as follows (Additions are printed in bold letter and underlined)

Article 48-2 (of the Law of 1881 on the Press Freedom)

Every association duly registered since at least 5 years at the time when the act was committed whose charter allows to defend the moral interests of those who took part in the Resistance and those of the deportees to the concentration camps ***or any other victim of the crime of genocide, war crimes, crimes against the humanity or the crimes of cooperation with enemy*** *may exercise the rights to be enjoyed by the civil party regarding the condoning* ***of genocides****, of the war crimes, crimes against the humanity or crimes or offences of cooperation with the enemy and in connection with the violation provided for in the Article 24 (bis).*[1]

a) Paragraph 1 of the Article 2 of the Boyer Law

Article 48-2 of the Law of 1881 is composed of one sentence with two parts. The First part of the sentence determines whose moral interests and honour is going to be protected. They are, as mentioned above, those who took part

1 Toute association régulièrement déclarée depuis au moins cinq ans à la date des faits, qui se propose, par ses statuts, de défendre les intérêts moraux et l'honneur de ou des déportés **ou de toute autre victime de crimes de génocide, crimes de guerre, crimes contre l'humanité ou des crimes ou délits de collaboration avec l'ennemi** peut exercer les droits reconnus à la partie civile en ce qui concerne l'apologie **des génocides,** des crimes de guerre, des crimes contre l'humanité ou des crimes ou délits de collaboration avec l'ennemi et en ce qui concerne l'infraction prévue par l'Article 24 bis.

in the Resistance and those who were deported to the concentration camps during the Second World War. The paragraph 1 of the Article 2 of the Boyer Law adds to them "the **victims of the crime of genocide, war crimes, crimes against the humanity".** A law that was passed in order to settle an internal account in France has thus become a law that encompasses the victims of all types of genocide. The terminology used in the law is "*the victims of all types of genocide";* however it is obvious that the targeted "*victims"* are the Armenians, because the victims of the Nazi practices have already been covered by the Article 48-2 before it was amended. As to the Rwandan genocide, the French soldiers in Rwanda were not the victims but a part of those who perpetrated genocide. Therefore it is not likely that the French Parliament adopted a law to punish its own soldiers. As to the Srebrenica victims, there were no French citizens killed there. Therefore nobody apart from the Armenians could be targeted by this Article.

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b) Paragraph 2 of the Article 2 of the Boyer Law

The Paragraph 2 of the Article 2 of the Boyer Law amends the second part of the single sentence that constitutes the Article 48-2 of the Law of 1881 on Press Freedom. This part of the sentence was identifying the persons that would be punished for having condoned a crime. They were those who would condone *"war crimes, crimes against the humanity and cooperation with the enemy".* The second part of the single sentence, which constituted the Article 48-2 of the Law of 1881, used to read as follows:

> *.....may exercise the rights to be enjoyed by the civil party regarding the condoning of the war crimes, crimes against the humanity or crimes or offences of cooperation with the enemy and in connection with the violation provided for in the Article 24 (bis).*

The Boyer Law adds to them now the offence of *"denying the crime of genocide"* and it will read as follows after the amendment:

> *.....may exercise the rights to be enjoyed by the civil party regarding the condoning* ***of genocides****, of the war crimes, crimes against the humanity or crimes or offences of cooperation with the enemy and in connection with the violation provided for in the Article 24 (bis).*

The aim of this addition can hardly be dissimulated. It aims at providing to the Armenian associations operating in France an opportunity to become a party in the legal proceedings initiated against those who deny the Armenian genocide.

There is no contradiction to any constitutional principle in taking such an initiative. However the initiative looks very much like grafting a tomato plant on a fig tree.

II. THE CONTRADICTIONS OF THE BOYER LAW

After having summarized what the Boyer Law brings as a new element, I now turn to the examination of the Law in light of the French legislation and the international law. It is not easy to determine where to start to discuss the logic of this law. The authors of this law should perhaps be congratulated for having managed to put so many contradictions in such a short text. Let us have a look at these contradictions:

1. The EU Framework Decision on which the Boyer Law is based contradicts the international conventions.

Before discussing whether the Boyer Law contradicts the French legislation or international law, it may be appropriate to examine the EU Framework Decision that constitutes the basis of this Law. When Mrs Boyer was presenting the draft law to the plenary of the French National Assembly in her capacity as the Rapporteur of the Committee of Laws, she pointed out that, by passing this law, France was fulfilling its commitment to the European Union that was stemming from an EU Framework Decision. In other words the EU Framework Decision constitutes the basis of the Boyer Law. But this Framework Decision is in contradiction with the provisions of an international convention, which is the main text in this field, namely the **United Nations Convention of 1948 on Prevention and Punishment of the Crime of Genocide** (hereafter 'Genocide Convention').

This Convention is binding for all EU Member States as all of them are party to it. The Genocide Convention enumerates clearly the authorities that will be entitled to determine whether an act of genocide is in fact committed. The Articles 6 and 9 of the Convention, which pertain to this subject, read as follows:

Article 6 (of the Genocide Convention)

Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article 9

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

According to these Articles the following 3 types of tribunals are authorised to determine whether an act of genocide has been committed:

a) Authorised tribunals of the country where genocide is claimed to have taken place.

b) An international tribunal that is set up specifically for the purpose of looking into such claims

c) International Court of Justice of The Hague in case one of the parties to the dispute files a claim.

In fact the past practice in this field has been very much in line with these provisions: German Nazis who committed the crime of genocide were tried in a tribunal set up in the German city of Nürnberg in line with the criteria of the paragraph (a) above. Belgian Nazis were tried in a tribunal set up in the Belgian city of Mechelen (Malines). The perpetrators of the Rwandan genocide were tried in a tribunal set up according the criteria of the paragraph (b) above and that worked sometimes in Rwanda sometimes in The Hague. Similarly the perpetrators of the Srebrenica genocide were tried in an international tribunal set up for the Yugoslav war criminals.

While these provisions of the UN Genocide Convention were binding for the Member States of the European Union, they violated this commitment and introduced a new rule with the Article 1 (4) of the Framework Decision, which reads as follows:

Article 1 (4) of the EU Framework Decision

> *Any Member State may, at the time of the adoption of this Framework Decision by the Council, make a statement that it will make punishable denying or grossly trivializing the crimes referred to in paragraph 1 (c) and/ or (d), only if the crimes referred to in these paragraphs have been established by a final decision of a national court of this Member State and /or an international court or by a final decision of an international court only.*

According to the underlined part of these provisions, any EU Member State is authorised to punish the denial of a crime even if the denied act was established as genocide, not by an authorised international court but by its own national tribunals. The EU Member States have thus deviated from the commitment that they have undertaken according to the provisions of the Genocide Convention and added a new institution to the list of authorised tribunals that were enumerated in the Convention.

The EU Member States have thus deviated from the commitment that they have undertaken according to the provisions of the Genocide Convention and added a new institution to the list of authorised tribunals that were enumerated in the Convention.

This is nothing less than a clear-cut violation of the commitment undertaken by the EU Member Countries by becoming party to the Genocide Convention. A group of countries, such as EU Member States, cannot put aside their obligations stemming from an international convention and agree on different criteria that contradict their earlier commitment. This is a violation of international law. If they will be allowed to ignore their commitment there is no logic in signing such international agreements.

Therefore the EU Framework Decision on which the Boyer Law is based contradicts the Genocide Convention that is binding for the EU Member States[2].

2. The Boyer Law contradicts the Provisions of the EU Framework Decision

Let us leave aside, for a moment, the fact that the EU Framework Decision contradicts the international obligations of the EU Member States. There

2 For more detailed information: Yaşar Yakış, *A European Union Framework Decision on the Offence of Denying a Crime*, Review of Armenian Studies, no.23, July 2011, pp, 63-92

are several other contradictions in the Boyer Law. One of them is the contradiction between the provisions of the Boyer Law and the provisions of the Framework Decision. Furthermore there is a double violation here. Here is the reason why:

Article 1 of the Boyer Law provides that *"those who…deny…the crime of genocide...that are recognized as such by (the French) law"* shall be punished. There is a law in France that recognizes the 1915 incidents as genocide. It is a law passed on 29 January 2001 and composed of one sentence that reads as follows:

"France recognizes the Armenian genocide of 1915"

This text does not fit any format in the modern law making and does not contain any sanction. It simply makes a political statement. In the social sciences such a text is considered more as a "*Declaration"* rather than a "*Law"*. The Boyer Law considers this law of 2001 as a court decision in the sense of the Genocide Convention, supposes that the 1915 incidents have thus been established as genocide and as a consequence of this provides for the punishment of the denial of these incidents.

While the right to establish a fact as genocide was entrusted by the Article 1 (4) of the Framework Decision to one of the three judicial authorities, the Boyer Law takes this right away from the judicial authorities and entrusts it to the members of parliament. The Boyer Law thus contradicts both the provisions of the EU Framework Decision and the principle of the separation of powers, which is one of the basic principles of the rule of law. This is the reason why I qualified it as a double violation.

Mr. Badinter, the former Chairman of the French Constitutional Council, believes that the law of 2001 is also in contradiction with the constitutional principle of separation of powers. He says that if that law was submitted to the Constitutional Council, it would have been declared unconstitutional. He underlines that in the past the governments avoided on purpose the submission of such laws to the examination of the Constitutional Council. However, after 2008, individuals who are party to a judicial proceeding are also entitled to carry their file to the Constitutional Council; and that, in case a person is brought to justice for having denied the crime of genocide, he will be entitled to carry the proceeding to the Constitutional Council and claim the unconstitutionality of the law because of its contradiction to the constitutional right of expression. Badinter points out on the other hand that, according to a new practice that has evolved in the Constitutional

Council, if a law punishes a person according to a previous law that was not submitted on time to the scrutiny of the Constitutional Council, the parties may ask the cancellation of this previous law. Badinter believes therefore that if a person is punished under the Boyer Law, the Constitutional Court may start by cancelling the 2001 law[3].

Badinter voiced his concern that a law that is initiated by Mrs Boyer for the sake of supporting the Armenian cause may end up by causing a serious damage to that cause. The distorted logic of the Boyer Law hit ultimately the wall of judiciary.

3. The Boyer Law contradicts the obligations of France towards the EU

Mrs Boyer was pointing out that this law was being passed in order to abide by the obligations of France towards the EU, but this law is doing exactly the opposite by stepping back from a commitment undertaken by France towards the EU. The obligation mentioned by Mrs Boyer stems from the Article 1 (4) of the Framework Decision. This Article offers the EU Member States the possibility of choosing one of the following two alternatives:

- The Member State may either punish the denier of genocide in case the denied event is established as genocide by its national tribunals;

- or, the Member State may punish such denier only when the event is established as genocide by an authorised international court.

France opted for the second alternative and informed the EU authorities in due form that it will seek the verdict of an authorized international court before punishing a denier.

France was the first country to make such a choice. For this reason Turkey was encouraging the other EU Member States to be inspired from this logical decision of France, because this decision was in conformity with the obligations of the EU Member States stemming from the Genocide Convention. It appears now that France is stepping back from this commitment, because France will not seek any longer the verdict of an authorized international court and will find it sufficient if the French laws (not even French courts) consider an act as genocide.

There is a double violation here again: If France was to require the verdict

3 Badinter, *Le Parlement n'est pas un tribunal*, Le Monde, 15.1.2012

of its national court instead of the verdict of an international court, this would mean that France still remains within the limit authorized by the Framework Decision, but it would step back from its earlier commitment of seeking the verdict of an international court. However the Boyer Law did not stop there. It both stepped back from its commitment and included in the scope of the punishment the denial of facts that are not established as genocide not even by a French court. It is a pity that such a big discrepancy escaped the attention of the French law makers.

4. The Boyer Law Contradicts the Constitutional Principles of France

The Boyer Law violates the constitutional principle of the freedom of expression. A draft law of similar content was submitted to the French parliament. After it was adopted by the National Assembly it was passed to the Senate. The Committee of Laws of the Senate opposed the adoption of that law and conveyed its position to the plenary in a report adopted by unanimity. The plenary adopted the report and as a consequence of this, it refused to incorporate that draft law in its agenda.

The question of the contradiction of the Boyer Law to the constitutional principle of the freedom of expression is voiced extensively by the French Senators and MPs in their submission to the Constitutional Council.

Among the reasons mentioned in the report for the opposition to the draft law, the most important one was the contradiction of the draft law to the constitutional principle of the freedom of expression. In the plenary 196 Senators voted in favour of the Committee report and 74 Senators voted against it. The contradiction between the freedom of expression and a draft law of similar content was therefore reconfirmed as recently as 4 May 2011. This zigzag in the attitude of the French Senate requires a reasonable explanation.

The question of the contradiction of the Boyer Law to the constitutional principle of the freedom of expression is voiced extensively by the French Senators and MPs in their submission to the Constitutional Council which is examined below under chapters III, IV and VI of this article.

5. The Boyer Law contradicts a Report drafted by the Speaker of the French National Assembly

Mr. Bernard Accoyer, the Speaker of the French National Assembly, drafted in 2008 a comprehensive report on a subject called in France *"Lois*

mémorielles (Laws about memory or history)". It is a voluminous report of 480 pages. Almost all stakeholders were consulted during the debates that led to the drafting of the report.[4] One of the important observations is contained in the page 181 of the report, which reads as follows: *"....(The mission) considers that the role of the parliament is not to adopt laws that qualify or assess the historical facts, a fortiori when such laws contain penal sanctions".*[5] The Boyer Law did exactly the opposite of what is said in this report of the Speaker Accoyer. Because of this background, Mr. Accoyer was among the high profile French politicians who voiced loudly his opposition to the Boyer Law.

6. The Boyer Law contradicts the Article 10 of the European Convention of Human Rights

France is a party to the European Convention on Human Rights. Therefore the provisions of this Convention are binding for France. Article 10 (1) of the Convention that pertains to the freedom of expression reads as follows:

Article 10 (1) of the ECHR

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.*

If anyone is punished in France for having denied an act that is not established as genocide by an authorized international court, the case will most probably be taken by the defendant to the European Court of Human Rights after having exhausted national legal recourses. We will see, in view of these clear provisions, how France will defend herself in that Court.

The Background of the work pertaining to the punishment of the denial of genocide within the EU

There are revealing details in the background of the preparatory works of the EU Framework Decision that may shed further light on this debate.

4 Rapport d'Information, en application de l'Article 145 du Reglèment, au nom de d'Information sur les questions mémorielles, par M. Bernard Accoyer, Président de l'Assemblée Nationale.

5 (La Mission) Considère que le rôle du Parlement n'est pas d'adopter des lois qualifiant ou portant une appréciation sur des faits historiques, *a fortiori* lorsque celles-ci s'accompagnent de sanctions pénales

When the preparations started within the European Union to draft a Framework Decision on this subject the word *"genocide"* was not mentioned in the texts. According to the information that reached the Turkish authorities, the word *"genocide"* was incorporated in the text upon the initiative of France in early 2000s. This attitude of France is an indication that she was preparing the ground for such a law already in early 2000s. Therefore a closer look at this process may be appropriate.

The initiation of the work on this subject in the European Union goes back to mid-1990s when xenophobia started to rise in the EU countries. In a document of 1996, titled *Council Joint Action*, the need was emphasized for the Member States to act jointly and to approximate their legislation in order to combat racism and xenophobia. The word *"genocide"* had not yet appeared the texts. The condoning of the crimes against the humanity was punished and this included in an indirect way the condoning of genocide, because genocide is considered among the crimes against the humanity. However neither the word "*genocide"* nor "*denial"* was mentioned as such in the texts. The offence that the Member States were planning to punish at that stage was the condoning of the crimes against the humanity. In fact, this idea was reflected in the Title I of a *Council Joint Action* document of 1996 that reads as follows:

Title I (of the EU Council Joint Action)

A. In the interest of combating racism and xenophobia, each Member State shall undertake…to ensure effective judicial cooperation in respect of offences based on the following types of behaviour:

*(b) public condoning, **for a racist or xenophobic purpose**, of crimes against humanity and human rights violations;*

This text tells us that condoning of the crimes against the humanity is not punished as such. It is punished only when it is committed "**for a racist or xenophobic purpose".**

The subsequent stage of the developments on this subject is the EU Commission stage. The Council instructed the Commission to prepare a Draft Framework Decision on this subject. The Commission prepared the Draft and submitted it to the Council in addition to the crimes against humanity, the word *"genocide"* is also added to the text of Article 4 (c) of the Draft. In other words, an implicit reference to genocide within the context of the crimes against humanity was not found sufficient. It was felt necessary to mention it specifically. However what is punished here is still

not the condoning of crimes against the humanity, but committing this offence "**for a racist or xenophobic purpose".**

While Mrs. Boyer was pointing out that the purpose of the Law that she was proposing was to carry this concept to the French legislation, the Boyer Law goes definitely beyond the scope of the Framework Decision, because it punishes the denier whether or not this denial was made "**for a racist or xenophobic purpose"**. In other words the Boyer Law carries this concept to the French legislation by making the punishment much harder.

An initiative that was started in mid 1990s for the sake of combating racism and xenophobia has thus become a law that incites racism and xenophobia instead of combating it.

Why the Boyer Law was pushed forward at this particular juncture

Many comments appeared both in the Turkish and French press to the effect that President Sarkozy pushed this question forward at this particular juncture for the sake of gaining the support of Armenian community in France for his candidacy to the presidential elections. This may, in fact, be one of the reasons. However a closer look may be appropriate in order to find out to what extent the support of Armenian votes could tilt the balance in favour of Sarkozy:

The estimates regarding the size of the Armenian community in France varies between 300 000 and 400 000 depending upon how you identify an Armenian. Taking the maximum figure, one may say that this corresponds to roughly around 250 000 voters, The average turnout in the French general elections is around 60 %, which means that around 150 000 Armenians may go to the ballot boxes, but these voters are spread over the entire spectrum of political parties. Since the support of the UMP is not likely to go higher than 30-40 %, the number of Armenians who are likely to vote in favour of Sarkozy will remain around 60 000. This corresponds to 0.1 % of the total voters. Sarkozy can hardly attract voters from the electorate of the Socialist Party, because the Socialist leader François Hollande supports the Armenian cause as strongly as Sarkozy does. For this reason we may assume that the effect of the Armenian vote will be negligible.

Therefore there may be other reasons. One such reason may be Sarkozy's desire to attract votes from the electorate of right extremist Le Pen's party. Anti-Turkish propaganda is one of the cheapest materials that are used in many European countries for electioneering purposes. The second reason

may therefore be that Sarkozy might have wished to join those who do so.

The third reason may be independent from the electoral purposes and be connected to deep rooted anti-Turkish feelings that Sarkozy is known to nourish. Sarkozy is a leader who blocked Turkey's accession process to the EU for reasons difficult to explain. A leader who acts under the guidance of such emotional motives will also harm the national interests of his own country, but we have to admit that even the Heads of States may become hostage of their emotions rather than giving prominence to the national interests of the country that they govern.

The forth reason may be the new outreaches of Turkey's foreign policy and the more active role that Turkey tries to assume in its immediate neighbourhood. Some of these neighbourhoods overlap with regions that France was considering historically as its own zone of influence such as the Middle-East. Sarkozy demonstrated on more than one occasion that he felt disturbed by the outreaches of Turkey's foreign policy. Therefore this may be another reason behind this initiative.

Mr. Alain Juppé, the Minister of Foreign Affairs under Sarkozy and former Prime Minister, dissociated himself from this initiative and is on the record to state that "this was an untimely initiative".

III. THE SUBMISSION OF THE FRENCH PARLIAMENTARIANS TO THE CONSTITUTIONAL COUNCIL

A Group o French Senators and Members of Parliament submitted the law to the scrutiny of the French Constitutional Council. They did so despite the strong opposition of the President of the Republic. It needs a lot of courage to oppose the leader of a political party even in a country like France that is considered as one of the cradles of the freedom of thought. Therefore they deserve genuine congratulations for this initiative.

Mr. Alain Juppé, the Minister of Foreign Affairs under Sarkozy and former Prime Minister, dissociated himself from this initiative and is on the record to state that "*this was an untimely initiative"*. This attitude of the Minister of Foreign Affairs is all the more meaningful in a country where, constitutionally, the foreign affairs come under the purview of the President of the Republic.

Many of the points that I underlined above are also underlined by the French parliamentarians in their submission. However the submissions drafted both by the Senators and Members of Parliament (MPs) contain

additional elements demonstrating the inconsistency of the Boyer Law. These submissions, the observations made by the government on the points raised in the submissions and the counter-observations of the MPs provide important clues on the reasoning of each party. The entire exercise is full of lessons that indicate to what extent the Boyer Law was an ill-advised initiative.

I will summarize these texts with a view to contributing to the better understanding of the entire subject.

There are overlapping arguments used by the Senators and the MPs in their submission to the Constitutional Council. However many of them are different.

There are also frequent references to the ***Declaration of Human Rights and Rights of the Citizens*** that was issued in 1789 after the French Revolution (henceforth '*Declaration of*). These principles are underlined on several occasions both in the submissions of the parliamentarians and in the verdict of the Constitutional Council.

The Submission drafted by a group of MPs has a short cover letter signed by two MPs namely Jacques Myard, MP for Yvelines and Michel Diefenbacher, MP for Lot-et-Garonne and Chairman of the Turkish Caucus in the French National Assembly, in which they summarize in the subsequent paragraphs the Memorandum attached to it.

Here is the cover letter of the Submission of the MPs:

> *We (the MPs) have the honour to submit to your scrutiny, in line with the second paragraph of the article 61 of the Constitution, the draft law to punish the denial of the existence of genocides recognized as such by the law.*
>
> *This law seems to us to be two times unconstitutional.*
>
> *On the one hand, it does not come within the purview of the legislative field. The Constitution does not authorize the legislator to equip himself with the right to formulate a historical truth and to sanction its denial by a prison sentence and a fine.*
>
> *What is more, our Parliament cannot disregard its responsibility towards the European Council that aims, in its Framework Decision of 2008, only at penalizing the crimes of our times and not those of the past.*

> *On the other hand, this law constitutes an open violation of the freedom of opinion and expression since there is no invitation or incitement to the racial hatred. The law introduces a new offence of* "minimizing*" of every crime that is characterized as genocide by our parliament.*
>
> *The mission of information conducted by the then Speaker of the National Assembly Mr. Bernard Accoyer had actually denounced by unanimity those* "Memory Laws" *(Lois mémorielles) where the legislator assumes the role of historian and bans the critics of history from doing their job.*
>
> *Please find attached herewith the signatures of 66 MPs who submit this law to the scrutiny of the Constitutional Council.*
>
> *Please accept, Mr. Chairman and distinguished members of the Council the expression of my very high consideration.*

After this cover letter comes a memorandum of 9 pages that details the arguments of the MPs. I will pick up only the salient features of their arguments.

The MPs asked the Constitutional Council to declare unconstitutional only the article 1 of the law and the last paragraph of the article 2 that is inseparable from it (but the Council decided to cancel not only the article 1 and the last paragraph of the article 2, but also all remaining paragraphs of the article 2 as well).

The detailed argumentation of the MPs continues as follows:

> *The petitioners have the honour to submit to your scrutiny the Article 1 of the Boyer Law as well as the last paragraph of the Article 2 which is inseparable from it.*
>
> *They would like to underline at the outset that the submission does not at all support or tolerate any denial: All genocides are to be blamed absolutely, irremediably and unquestionably at the individual as well as at the collective level. This is not what is at stake.*
>
> *What is at stake is the will of the legislator to exempt such facts from the collective reflection and from the public debate by using penal means. In fact it is worth underlining that the referred text introduces in our legislation, in an unprecedented manner, an offence linked to a legal recognition. Unlike the law no. 90-615 of 13 July 1990, this*

law does not aim at a precise past event that is recognized by the international law, neither does it aim at punishing racist and xenophobic acts, but it invents an offence that will be applicable as a result of a totally unclear legislative recognition.

In fact the history is not a judiciary matter; therefore it cannot be a legislative matter.

One does not need to read (George) Orwell to learn that the totalitarian States may act as a "police" of history, regulate how to use it and ban any debate on it. ...The referred case does not pertain to making punishable genocide that already exists in the French and international law. It pertains to the denial of certain genocides: those that are already recognized as such by the French legislation and those that will be recognized in the future.

One wonders how genocide could be established on the legislative grounds alone: not to judge it but to create an obstacle to the freedom of expression. Will the Armenian genocide, which is already recognized by the law no. 2001-70 of 29 January 2001, be more questionable or less questionable in view of the provisions of the referred law, than what has been committed in Cambodia, in ex-Yugoslavia or in Rwanda? Would the events such as religious wars in France and the "Vendée genocide" *in the past or more recent events that have taken place in the Ivory Coast and Libya come within the purview of the offence that is being created? If yes, when and according which criteria?*

The competence of sanctioning a crime against humanity is a task that belongs to a judge who will apply national and international criteria. This task cannot stem from a legislative recognition. If the criterion of this recognition is historical, the legislator has no right to penalize the denial of genocide at a given moment of history. Why this genocide is more scandalous today than it was yesterday? If it takes into consideration the concerted action, in the sense of the article 211-1 of the (French) Penal Code, to what extent the implication of a population is required? If on the other hand the criteria are based on the number of the victims, is there any degree in the horror?

This submission will make questionable the Memory Laws that it refers to. It attempts to make a legislative judgment of the historical facts and their denial will have to become punishable.

The law that is submitted to the Council and that is constructed particularly in a wrong manner from the legal standpoint is an expression of this will to penalize the denial of a historical fact. The law should not make the history; neither should it try to protect it. By giving itself such a target, the legislator aims at a "mission impossible*", namely to affirm the untouchable, unquestionable, undisputable character of the past events. But doing so, it is not the events that will be penalised but a debate on such events.*

The legislator cannot do everything. ....By penalizing certain genocides the legislator aims at an end that the law cannot attain, namely the end of sanctifying certain historical facts considered as unquestionable. By becoming attached to the history of peoples, no matter how tragic they may be, the legislator comes close to the irrational, to the national sentiments, to the collective belonging and to the analysis of the facts…By touching the subjective assessment, the legislator goes beyond the constitutional domain.

The signatories of this submission do not question the existence of genocides; neither do they question the possibility of incriminating their perpetrators or inciters. They simply question the possibility of creating a new offence subordinate to the legislative body and vague recognition of the historical facts. In legal terms, the right to render a judgment belongs to the judges and not to the legislators. The judgment, in its heuristic sense, can only belong to the public debate of history and the referred law attempts exactly to prevent it. The judgment, in its ethical sense, could only belong to the individual or collective human conscience. By creating an offence of denying a historical fact with an uncertain content, because it is determined by a law, the referred law mixes up these different categories. Despite the fact that the referred law becomes part of the law of 29 July 1881 on the press freedom, it contains a repressive provision: it aims at punishing the denial of the existence of a crime of genocide with one year jail sentence and a fine of 45 000 Euros.

It may not be the task of the Constitutional Council to scrutinize the law from this standpoint, but it may be appropriate to underline that the legislative recognition may be in contradiction with the provisions of the Charter of the International Penal Court because this may impede the statement of the witness and the freedom of expression of the defendants in the Court.

The law contradicts the Constitution in several points:

1. *The legislator has overestimated its competence*

The law refers to two cumulative criteria to implement a sanction: definition of the crime of genocide according to the article 211-1 of the Penal Code and recognition as such by the French law.

The law cannot "recognize" genocide because this provision is devoid of all operative forces. The law does not "recognize", *it prepares the ground, it instructs, it bans, determines and should have an imperative value. This is what comes out clearly of the decision no. 2005-512 DC of 21 April 5005:*

> "…. the principle of the clarity and the objective of the constitutional value of intelligibility impose on the legislator the obligation of adopting sufficiently clear and non equivocal formulas with a view to equipping the subjects of law against an interpretation that is against the Constitution or against the risk of arbitrary acts. The task of working out the rules that the Constitution accorded only to the laws should not be referred to the administrative authorities."

Imperative requirement of the law is all the more clear since the Article 34-1 of the Constitution offers a more adequate framework for "recognitions" *after the revision of 23 July 2008.*

The Council had already a chance to give a verdict on the "recognition*" of the historical facts by the law. The following sentence that was incorporated in the school curriculum was submitted to the scrutiny of the Constitutional Council:* "The school curriculum appreciates the particularly positive role of the French presence overseas, especially in the North Africa, and accords to the history and to the sacrifices of the combatants of the French army who came from these territories the eminent place that they deserve". *The Constitutional Council pointed out in its decision no. 2006- of 31 January 2006 that the subject that is covered by this sentence was not an area that comes within the purview of the law.*

The situation is further aggravated here since the legislative recognition, which is inoperative by itself, will entail penal prosecutions.

Therefore, it is not possible to depend, for the implementation of the

law, on a distinct legislative condition that is not subjected to any criteria: One genocide will come within the purview of application of article 24 (ter) of the law of 29 July 1881 if the legislator decides so, while another genocide will not because there will not be a specific recognition by the law. In addition to the violation of the principle of equality, this law is vague because of this "recognition" *that does not fit any framework.*

If a law that recognizes genocide gains a definitive value, the legislator will most probably not use its power to abrogate such a law or change its field of application. In case such a law does not gain definitive value, the field of application of the Article 1 of the Boyer Law will change when there is a declassification or abrogation. This will make the application of an offence particularly unclear since it will depend in the first case (that is to say the declassification) on the regulatory power, in the second case on a simple abrogation. One can hardly figure out that the legal "recognition" *of a historical fact with ensured penal consequences could escape the check of Constitutionality. It does not meet the constitutional criteria of clarity, generality and imperative character of the law. It does not fit any of the categories of the Article 34 of the Constitution. How is it possible to incriminate a person on such an unconstitutional legal basis? An inoperative law by itself cannot serve a basis for the determination of an offence.*

Therefore, the principle of the imperative character, clarity and intelligibility of law are disregarded. The Boyer Law determines an offence by the legislative recognition of a particular fact and it does so by reference to another law, which has no field of application.

Therefore, the principle of the imperative character, clarity and intelligibility of law are disregarded.

The Boyer Law determines an offence by the legislative recognition of a particular fact and it does so by reference to another law, which has no field of application. It aims at one single target and restricts the field of application of the law only to that case. Such a law is definitely in contradiction with the Constitution.

2. *Article 2 of the Declaration of human rights has been disregarded.*

The article 1 of the law disregards the rule of the separation of

powers by basing the implementation of the same offence not only on the decision of a penal judge but also on the recognition by the legislator of a particular genocide. The legislator cannot establish concrete cases of application of the penal law. It can only draw a general framework where it will apply.

3. *The clarity and the intelligibility of the penal law have been disregarded.*

   The constitutional case law forbids legislative imprecision especially in criminal matters. In a decision adopted on 16 September 2011, the word "family" *was found unclear by the Constitutional Council, not to punish but only to characterize an act as incest. The decision reads as follows:* "The legislator should not abstain from designating precisely the persons who should be regarded, in this particular case, as members of a family; otherwise the principle of the legality of offences and punishments will be disregarded."

   The notion of "grossly trivializing" *the existence of a fact* "recognized" *as genocide does not meet the criteria of precision required in the criminal law. The scientific debate of a fact has to find its place in the history and it may trivialize one fact or the other. The place where the incident took place, duration, number of victims, the methods of massive extermination etc. should be specified. What is the* "grossly trivialization"*? It may only lead to a purely subjective assessment. Does the word* "grossly" *refer to the questioning the number of the victims, to the denial of the duration of the crime against humanity, to the debate of the venue or to the real perpetrator of an act? Or does it refer to the handling of the resistance in the group of criminals?*

   Such a phrase is in contradiction with the Article VIII of the Declaration of 1789 because of its lack of clarity.

   This phrase cannot pass the test of constitutionality.

4. *Article VIII of the Declaration of Human Rights and Rights of Citizens has been disregarded*

   There is absolutely no need to prohibit the denial of genocide. A very high number of authors, which are not of lesser importance, believe on the contrary that it is indispensable to hold a debate on historical facts. If it is banned, this will lead to a legal historical truth,

protected by the State because it is officially recognized, it cannot be publicly questioned and therefore the public will be suspicious about it. The signatories believe that since there is a historical fact, there cannot be a legal historical truth.

You don't fight a statement, no matter how false it may be, by banning its expression. On the contrary you fight it by demonstrating publicly that it is erroneous. Neither the prohibition nor the punishment that is attached to it is necessary for the fight against genocide.

5. *The law is in contradiction with the freedom of communication that is guaranteed by the article XI of the Declaration of 1789.*

   The first article of the Boyer Law violates the freedom of communication by providing for a real censorship.

   The petitioners are of course aware that the Court of Cassation refused, by its decision no. 12008 of 7 May 2010, to see a "serious" *question of constitutionality in the so-called* "Gayssot Law" *no. 90-615. The Court did so basing its reasoning on the fact that* "the incrimination was referring to the texts incorporated in due form in the domestic law". *If there is a reference to all present and future laws that recognize the genocides, this does not make constitutional all laws that are referred to. Furthermore such laws cannot be regarded as having been introduced in due form in the domestic legislation because of such a simple reference. Such reasoning looks also tautological: The question of constitutionality does not become less serious in case the legislator has defined incrimination. In fact the Court of Cassation has confused its role as a filtering authority and a judge of tribunal and deprived the Constitutional Court of the competence that is accorded to it by the Article 61-1 of the Constitution. The constitutionality question raised by the Memory Laws is very serious in the sense of the law 2009-1523 of 10 December 2009. Could the punishment of an infringement of the past be regarded as in conformity with the freedom of communication?*

   The jurisprudence of the European Convention for the Protection of the Human Rights, in the case Marais vs. France*, no. 31159/96 of 24 June 1996, admits that the freedom of expression, as it is conceived by the Convention, is not disregarded in that particular case. The verdict reads as follows:*

   "The commission believes that the writings of the defendant are in

> contradiction with the fundamental values of the Convention, as it is explained in its preamble, namely the justice and peace. It considers that the defendant attempts to divert the Article 10 from its main goal by using his right to the freedom of speech in a manner contrary to the text and the spirit of the Convention. If his claims were to be admitted this would contribute to the loss of the rights and freedoms guaranteed by the Convention"

Even if one may be surprised that in other cases the human dignity was not appreciated by the case law of the Court (C.E.D.H. K.A vs. Belgium, 17 February 2005), one can understand that the finality of the Convention is put forward in order to justify that the protection of the free communication should not be used for the sake of the Convention itself. This decision points out that the verdict of the Nurnberg Court could be opposed to the defendant. It also gives a ruling on a provision that aims at giving effect to an international convention, namely the Statute establishing the Nurnberg Court. Therefore it is not transposable to a text that infringes any freedom of communication in view of the national criteria alone. In all circumstances, the incrimination under discussion should not be assessed in light of its conformity with the Convention, but according to its conformity with the Constitution. Yet the jurisprudence of the Constitutional Court is clear on this subject. It would not admit an impossibility of expression that would be sanctioned by penal law. The decision no. 2009-580 of 8 June 2008 points out in the clearest words the following: "the freedom of expression and communication is so precious that its exercise is a pre-condition for democracy and one of the guarantees of the respect for other rights and freedoms. The infringements of the exercise of this right should be based on a necessity, adapted and proportioned with the objective to be attained". *Even if we admit that the objective to be attained were the recognition of genocide only, the prohibition of challenging it is not definitely proportioned with this objective.*

Since all means of public expressions contained in the Article 23 of the law of 29 July 1881, namely speeches, printed material, pictures, lectures, posters, electronic communications etc., the offence under consideration deprives not only the historians and the citizens, but also those who are accused for having committed genocide from defending themselves with whatever means they deem appropriate.

Therefore the article X of the Declaration of 1789 has been disregarded.

6. *Freedom of Research has been disregarded*

   Freedom of research is clearly confirmed in the decision 83-165 adopted by the Constitutional Council on 20 January 1984. The decision reads as follows: "Because of their nature, the tasks of teaching and carrying out researches not only allow but also demand that, for the sake of the service itself, the free expression and independence of the personnel should be guaranteed by the provisions that are applicable to their case". *By banning the denial of a historical fact, the law violates the freedom of research and the independence of the researchers.*

   More precisely the decision no. 2010-20 QPC reaffirms that "the guarantee of the independence of teachers-researchers results from a fundamental principle recognized by the laws of the Republic".

   By obstructing the negation of a historical fact, the Boyer Law undermines the constitutionally guaranteed freedom of research and the independence of teachers-researchers that it entails.

7. *The law makes a distinction between the genocides* "recognized by the French law" *and all the other crimes against humanity and disregards the principle of equality without an appropriate justification.*

   The Boyer Law creates an offence of denial of genocide that is recognized by the French law only, according to the exclusively national criteria.

   Therefore a genocide characterized as such by an international criminal court (this point will be further developed below) or by the French criminal judge –or by both- may still be denied domestically while another genocide defined in the Article 211-1 of the Penal Code and recognized by the French law could not be denied any longer.

   By making a distinction between genocides based only on the notional legislative criteria, Article 1 of the Boyer Law brings in a difference in treatment that is not justified in light of the objectives of combating the denial.

   A similar inequality stems from the fact that the Boyer Law aims only at the genocide and omits the other crimes against humanity contained in the Article 212-1 of the Penal Code or in the Article 7 of the Statue of the Nurnberg Court. If the Constitutional Council admits the difference between the war crimes and the crimes against

humanity, the crimes against humanity are all punished by the Penal Code by the same penalties. Is denying genocide more dangerous for the democracy and human dignity than denying the deportation or the practice of systematic torture?

By limiting the field of application of incrimination to genocide only, the legislator creates an inequality in view of other crimes against humanity. Therefore, the principle of equality will be violated without any justification in case the Council admits that clear infringements caused by the Boyer Law to the principles of the penal law, to the freedom of communication and to the freedom of research were justified in light of the pursued objective.

8. *The activities of the political parties have been limited without proper justification*

The only limitation imposed on the political parties by the Constitution is in the field of the respect for the principle of national sovereignty, of democracy, respect for the principle of legality in their functioning or in their financial rules. The political debates cannot be limited for reasons other than the ones in the article political party may deem appropriate to start a debate on the impact of the past genocides on the present international relations. The activities of such political parties will be limited by the provisions of this law. For instance the question of Turkey's accession to the European Union is linked at this point to the recognition of the Armenian genocide. Therefore any debate may turn into incrimination since the assessment of the facts has consequences on today's events. Yet the political parties will not be able any longer to deny or even debate this subject. Therefore the law is in contradiction with the Article 4 of the Constitution.

These are the justifications for which the petitioners request the Constitutional Council to declare that the Article 1 of the Boyer Law and the third paragraph of the Article 2 that is inseparable from it are in contradiction with the Constitution.

IV. THE SUBMISSION OF THE SENATORS

Unlike the MPs, the Senators made an effort not to antagonize the Armenian voters in France and started to draft their submission by pointing out, *"with a view to avoiding any ambiguity"*, that their initiative was motivated solely

by the considerations of principle and by their attachment to the constitutional strictness while, like the majority of their parliamentarian colleagues, they believed that it was shameful to question the reality of the facts, that it was painful for the descendants of the victims to forget the past and that they remained in solidarity with them.

In other words opposing this law does not mean to protect the denial; it only reminds the respect for the French Constitution. They believe that the constitutional principles are disregarded to a great extent especially in the field of freedom of communication and expression on the one hand and in the field of legality of offences and punishments on the other.

Here is an abridged version of the Senators' arguments:

The Submission of the Senators

A. On the freedoms of communication and expression

1. *They (the Senators) emphasise that the free communication of thought and opinions is, as contained in the article 11 of the Declaration of 1789, one of the most precious rights of the human beings. To speak, write and print in full freedom are essential rights that could be limited only when they are used in an abused manner. As the Constitutional Council pointed out in various decisions, using this right is one of the essential guarantees of the respect for other rights and freedoms and more precisely a prerequisite for democracy.*

2. *This freedom makes sense only when it protects the expressions that shock, that hurt and that disturb because the other expressions do not need to be protected. As a consequence of this, even if a statement is hard or unbearable for some of those who hear it, rather than regarding it as a reason for banning, it should be considered as a way of using this fundamental right. In other words, the freedom should be the main rule with all what it may imply and the limitations should be an exception. As the Constitutional Council pointed out, the exceptions to this freedom should be necessary, adapted to the conditions and proportioned to the aims that are targeted.*

3. *The immediate question that arises is that of the criteria of this necessity. The Constitutional Council gave an early answer to this question in 1982 when it pointed out that the freedom should be*

reconciled "with the objectives of the constitutional values that are the protection of the public order, the respect for the freedoms of others and the preservation of the pluralistic character of the socio-cultural trends of expression that may be infringed by these modes of communication". *This means that it is not up to the legislator to impose limitations to the exercise of this right according to what it feels desirable or opportune; it has to fulfil one of the objectives of the constitutional value that is the only justification to legitimize a restriction on the freedom.*

In fact it goes without saying that the freedom will not exist anymore if the infra-constitutional motivations were to suffice to challenge it.

4. *It is in light of these cursory reminders that the Boyer Law has to be scrutinized. Firstly the freedom of communication and expression will be disregarded in case the law is not overruled; secondly they are neither necessary, nor adapted to the conditions nor proportioned.*

5. *Denying a genocide may be in certain cases absurd or horrible or both. However it is after all a thought or an opinion that may be properly supported by facts, sometimes by more or less scientific evidences.*

   Yet the author of such a thought will now be penalized even heavily by this law. An infringement of the freedom is not of course measured according to whether you like the expressed opinion. There should not be any doubt in the infringement of freedom.

6. *Actually the law penalizes those who deny or trivialize* "the existence of one or several crimes of genocide defined in the article 211-1 of the Penal Code and recognized as such by the French law". *However it aims only at the Armenian genocide of 1915. Two observations may be relevant to this fact:*

   - *This historical tragedy is recognized neither by an international convention nor by a court decision.*

   - *If this law is not overruled, the Parliament will acquire a new competence that is mentioned neither in the article 34 nor elsewhere in the Constitution.*

7. *In fact the parliament may seize in the future the right of determining some sort of official truth through the law and expand the field of*

limitations provided in this law. On the one side a battle of memories may start and the winners of this battle will be those who gain a legislative recognition. On the other side, political circumstances may lead the parliament to characterize a tragedy as genocide. In such a case not only the historians but also the journalists will not be able to accomplish their task properly without risking to be penalized.

8. *Therefore the Boyer Law is two times in contradiction with the freedom of communication and expression. First, because of the Armenian genocide; second because of the other events that that the parliament may establish as genocide in the future. The Constitutional Council will not be able to stop this trend in case it allows this law to be passed.*

The Boyer Law is two times in contradiction with the freedom of communication and expression. First, because of the Armenian genocide; second because of the other events that that the parliament may establish as genocide in the future.

9. *In addition to this violation of the freedom of expression and violation of the article 34 of the Constitution, there is a new element that arises: If the law recognised a fact as genocide, no other label could be given to it without risking penal sanctions while the Constitutional Council, commenting on the article 11 of the Declaration of 1789, pointed out that* "this freedom implies the right for everyone to chose any terminology that he wishes to '*express*' his opinion".

10. *Then comes the freedom of teachers and researchers. The Constitutional Council did in fact remind that* "because of their nature, the job of the teachers and researchers require, for the interest of the service, that their freedom should be guaranteed".

    There is no need to insist upon this, but it had to be reminded all the more so because this question does not interest the historians alone, but also the journalists, and beyond these professionals, it also interests the citizens in general.

11. *After having established these infringements of the constitutional principles, we may now turn to the question of whether they are "necessary, adapted to the conditions and proportioned". Are there sufficiently strong reasons to justify the violation of the freedom of communication, freedom of expression, freedom of expressing one's*

thoughts with the words that one chooses, and the freedom of teachers and researchers? In light of earlier decisions of the Constitutional Council there are no sufficiently strong reasons to justify such a restriction.

12. *Talking about the public order, this is what was aimed at by the* "EU Framework Decision of 28 November . *The Boyer Law was proposed in order to abide by the requirements of this Framework Decision. The article 1 (c) of the Framework Decision provides that an intentional conduct should be made punishable in case it is* "directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group". *This element is not valid for France since there is not such an intentional conduct to incite hatred regarding the only genocide that is recognized today by the French law and everybody should be proud of it. Our citizens of the Armenian origin are not the target of any incitement to hatred or violence. On the contrary they enjoy the solidarity in compassion and there is no meaningful or large number of people to deny or even trivialize the genocide that their ancestors were victim of.*

    In these conditions the objective of the protection of the public order is simply absent.

    To those who may be offended because of this observation, we may tell that this is exactly the price of the freedom. The freedom cannot be limited for the sake of facing the dangers that are only virtual.

13. *What about, is in this case, the other objective that used to justify a ban, namely the respect for the freedom of the others? It is equally absent in the present case.*

    In fact if you protect everyone for ever from being shocked or hurt, sometimes even in a painful manner, you cannot call this a freedom. The freedom of others that we are trying to protect is an objective freedom, a freedom for all. This freedom may be infringed for instance by the racist and xenophobic conducts and the victims of it will not be only those who are directly targeted. Those who cannot stand racism and xenophobia may also be the victim.

    On the contrary, the freedom of others that we are trying to protect

cannot become a subjective freedom that depends on the personal or family history and sensitivity of everyone. If this freedom is to be limited by such constraints there will not be any limit to the infringements to the freedom of expression. Even bad taste, mistakes, stupidity or aberration cannot be subjected to bans.

Consequently, we should ask ourselves the following question: Which freedom of the others will be threatened under the legislation in force and could not be protected if the Boyer Law did not exist?

14. *The Constitutional Council has rightly declared that the infringements of the freedom are necessary only for the objectives of the constitutional value. Keeping this in mind, such an objective does not exist in the present case. Therefore, what remains is the infringement of the freedom.*

We may even add that the measures that the Boyer Law wants to introduce are not adapted to the case and are not proportionate.

To be convinced that it is so, it will be enough to remind that the Constitutional Council gave a verdict on a disproportionate ban that resembles very much the present case.

It was again about the law of 29 July 1881. The contention was about a ban directed to persons prosecuted for the offence of defamation. They were asked to bring evidences to prove that the defamatory facts were true since these facts had taken place more than 10 years ago. The Constitutional Council admitted the idea that some restrictions may be justified for the sake of the public order and decided as follows: "Since they refer to the facts that had taken place more than 10 years ago, this ban aims at all speeches or writings stemming from historical or scientific works. ….Because of its general and absolute character, this ban constitutes an infringement of the freedom of expression that is not proportionate with the pursued objective. Therefore it disregards the Article 11 of the Declaration of 1789."

Certainly it was about a right to forget while, in the present case, we are talking of something that is exactly the opposite of it, namely of the duty to remember. However, legally, there is no reason why the Constitutional Council should show less vigilance in this case than in the other case.

15. *Five conclusions could be drawn from the foregoing: 1) the law violates seriously the freedoms of communication and expression; 2) this violation is made all the more grave by not allowing a person to express his opinion with the words that he chooses; 3) the violation becomes more grave by preventing the teachers and researchers from enjoying their constitutional rights; 4) these grave violations are not justified by any legitimate necessity: 5) the measures are disproportionate. With all of these violations, the parliament attributes to itself a new competence that ignores the provisions of the article 34 of the Constitution.*

A. On the legality of the offences and crimes

16. *It is not conceivable to presume that the parliament has the right to envisage new violations by determining the penalties that are applicable to such violations. The parliament has no right to ignore the requirements of the articles 8 and 9 of the Declaration of 1789. The Boyer Law contradicts these essential principles both in the framework and in the content.*

17. *Regarding the framework, it pertains to the* "existence of one or several crimes of genocides defined in the article 211-1 of the French Penal Code and recognized as such by the French law". *Even if it is recognized by the French law, it is not formally recognized by any international convention or by a national or international court decision in the presence of two parties and is not sealed with a verdict. Therefore this is a first difficulty since the constitutive elements of genocide were not precisely identified and certified. Furthermore there is another essential question: Is the French law necessarily a law whose purpose is the recognition of genocide in the sense of the new article 24 (bis) that will be introduced in the law of 29 July 1881 or is this a law that produced the effect of recognizing genocide? In the first hypothesis only the Armenian genocide will be covered by the Boyer Law. This was what the authors of the text pointed out during the preparatory works of the Law while the text of the new article 24(bis) does not say that it is limited to the Armenian genocide.*

18. *In the French legislation we have cases where we had to recognize genocide despite the fact that the main purpose of the law was different, such as the laws passed to adapt the French legislation to the UN Security Council resolution for the establishment of the*

international tribunal to judge the perpetrators of war crimes in ex-Yugoslavia and in Rwanda.

19. *What should be the attitude of the French judge in these two cases if he was asked to give a verdict? However we may assume that such a case will not arise because there are not over-zealous associations that will go to the court to complain about a denial of genocide for the cases of Rwanda and ex-Yugoslavia. Did the French law recognize, implicitly or explicitly, the existence of genocide in ex-Yugoslavia and in Rwanda? The genocides will be regarded as recognized only if court decisions are made on the basis of these laws. In this case, will the application of the article 24 (bis) depend on the court decisions possibly to be made by the courts of foreign countries for offences committed in France?*

    We know that the intention of the authors of the Boyer Law was to cover only the Armenian genocide. It was considered regrettable in the Committee of Laws of the National Assembly that the Rwandan genocide was not recognized, but a promise was made to fill this gap soon.

    The parliamentarians looked as if they were not aware of the existence of the laws on the ex-Yugoslavia and Rwandan genocides but the judges are aware of their existence. They will have serious doubt on whether to stick to the text of the Boyer Law or to the biased intention of its authors. It is only natural that one judge may decide one way while another judge in the opposite way. As a consequence of this, the citizens will be treated differently in view of the penal law until the Court of Cassation eliminates the divergence. But it is exactly this doubt that was prohibited by the article 8 of the Declaration of 1789, by the article 34 of the Constitution and by the Constitutional Court in its interpretation of these two articles.

20. *Regarding the content, the denial or trivialization will be penalized only if it is about the existence of the crimes of genocide. Intriguingly, this precision leads to a freedom of imputing a crime to a person. It may not be possible to deny the facts, but the responsibility for it could be attributed to any person without a juridical risk. This may not be unconstitutional but it is strange. It goes the same way for the concept of* "grossly trivializing". *There is equivalent concept in the penal law in which field precision is a constitutional precondition. Where does the trivialization begin and where does it end? At which point it becomes "*grossly trivializing"?

The judges will be faced with such new questions and the answers to it will unavoidably vary from one court to the other and also from one moment to the other.

21. *Easily understandable terminology in the daily life may not fit exactly the same way in the field of Penal Code where strictness is necessary. The vague notion of* "grossly trivializing" *will leave to the judges a considerable margin for assessment.*

22. *The Boyer Law includes very important uncertainties both in the framework and in its content that are difficult to accommodate in the penal law. Before they confuse the judges, these uncertainties will confuse whoever would like to express his opinion on a complicated subject.*

23. *The denial or grossly trivialization will discriminate those groups that could not catch the attention of the parliaments despite the fact that their suffering was more than the one covered by the Boyer Law.*

24. *Each of the point that is made in this submission is sufficient for the cancellation.*

This concludes the views of the MPs and Senators regarding the incongruity of the Boyer Law.

VI. OBSERVATIONS BY THE GOVERNMENT

The government provided its own views as an answer to the arguments voiced by the Senators and MPs.

Here is an abridged version of the government's response:

Observations by the Government

I. On the disregard of the legislator of its own competence and infringement of the separation of powers

A. *According to the petitioners the legislator could penalize the denial or grossly trivialization of the existence of the crimes of genocide* "recognized as such by the French laws" *without disregarding its competence, because according to them, a law such as the law no. 2001-70 dated 29 January 2001 on the recognition of the Armenian*

genocide of 1915, is devoid of imperative character and does not stem from the legislative competences enumerated in the Article 34 of the Constitution.

They claim on the other hand that, by linking the offence of the denial of a crime to its recognition by the legislator, it encroaches upon the field of competence of the judiciary, thus disregards the separation of powers.

A. These grievances of the parliamentarians rely on an inexact assessment of the scope of the contested provisions and are not justified.

1. As the petitioners point out, the Article 1 of the Boyer Law is a provision with penal character that aims at punishing by a prison sentence of one year and a fine of 45 000 Euros the denial of the existence of certain crimes of genocide or grossly trivialization of such crimes that is to say what we call "denial*" in the current language.*

The crimes in question are those that correspond to the definition of genocide contained in the Article 211-1 of the Penal Code and that were recognized as such by the French legislation. In view of the specificity of each crime of genocide the legislator wanted to punish the conduct of the denier only after making sure, on a case by case basis, that such a punishment was necessary. From the legalistic standpoint, only the Armenian genocide of 1915 is recognized by the above-mentioned law of 29 January 2001.

This law and the future laws with similar content contribute to limiting the field of application of the contested legislation. Therefore, independently from their political and symbolic scope, these laws cannot be regarded as laws devoid of normative character.

On the contrary they constitute the exercise of the competence of determining the crimes and the offences as well as the punishments that are applicable to them. This competence belongs exclusively to the legislator according to the provisions of the Article 34 of the Constitution.

2. The legislator should not be blamed of having ratified an encroachment on the field of judiciary by ignoring the separation of powers.

In fact on the one hand by recognizing the existence of genocide the legislator does not compete with the judiciary that is competent to judge the perpetrators of the crime of genocide. This is evident in the case of the Armenian genocide of 1915 whose perpetrators passed away and cannot be prosecuted for this reason. However the crime has in fact been committed. Some of the perpetrators have been punished in 1919 according to the Ottoman laws by the Military Court of Istanbul. It is not clear why the legislator should abstain from drawing conclusions from this reality.

On the other hand, as several parliamentarians pointed out during the debates, the reference to the genocides referred to in the Article 1 of the Boyer Law cannot be interpreted as limiting the competence of the members of the judiciary that will be called to look into the matter.

In fact it follows from the text of the same article that these members of the judiciary have to make sure that these facts correspond to the definition of the crime of genocide contained in the Article 211-1 of the Penal Code. Recognizing that these facts are parts of genocide is a pre-condition for their incrimination and it does not release the judge from the obligation to qualify the facts according to the provisions of the Article 211-1.

For all these reasons, it goes without saying that the judges will not ignore that the facts had to be recognized by the legislator in view of the scientific consensus that has to prevail in the recognition. It has to be mentioned in this regard that the Swiss courts have admitted "the existence of a large consensus stemming from the political statements that rely in their turn on a large scientific consensus on qualifying the facts of 1915 as genocide" *(Tribunal fédéral, 12 December, 6B_3982007, point 4.2).*

Article 1 of the Boyer Law that does not encroach on the field of judiciary does not undermine its independence.

Therefore it is not at all in contradiction with the principle of the separation of powers.

II. On the violation of the Principle of Legality of Offences

A. The petitioners criticize the Article 1 of the Boyer Law for having disregarded the principle of the legality of offences that stems from

the Article 8 of the Declaration of 1789, as it punishes the denial and the grossly trivialization of the Armenian genocide of 1915 while the constitutive elements of this genocide were not precisely identified in an international convention or in a court verdict.

They believe, at the same time, that it is not clear in the Boyer Law whether the laws mentioned in it are the ones that pertain to the recognition of genocide (of 1915) only or do they also include the laws that pertain to Yugoslav and Rwandan genocides.

Finally they claim that the notion of grossly trivialization mentioned in the Article 1of the Boyer Law is not clear enough to meet the requirement of the principle of the legality of offences.

B. *The government does not share this view.*

1. *Firstly, as it was mentioned above, the Article 1 of the Boyer Law determines the facts whose denial or grossly trivialization could be punished according to the definition contained in the Article 211-1 of the Penal Code. Therefore it cannot be claimed that it does not meet the requirement of the principle of the legality of crimes and offences as contained in the Article 8 of the Declaration of 1789.*

   Regarding the facts qualified as genocide, the intervention of a law that recognizes them as constitutive elements of a crime of genocide, reinforces the predictability of the provisions of the Article 1 of the Boyer Law rather than ignoring these requirements. By doing so, nobody will be able to ignore which incidents these provisions will be applied to. Therefore the petitioners cannot draw the conclusion that the principle of legality of crimes is disregarded, since such a recognition does not aim at substituting the punishment of the perpetrators of the crime or imposing the judge an "official truth".

2. *It results from the parliamentary debates that when the legislator was referring to the genocides* "recognized as such by the French law" *it had in mind only the laws that pertained to such recognition. In other words, it did not have in mind the laws that may have such an effect. Therefore, the provisions of the Article 1 of the Boyer Law will be applicable only to the Armenian genocide of 1915.*

   In fact, even if it was not mentioned during the preparatory works, the principle of a strict interpretation of the penal law would require a careful reading of the contested provisions.

3. *Finally, by punishing not only the act of denial of the existence of the crime of genocide but also the grossly trivialization of it, the Article 1 of the Boyer Law does not disregard the principle of the legality of offences.*

   This precision, which aims at out-manoeuvring the strategies of denial, is in fact directly borrowed from the case laws pertaining to the application of the Article 24 (bis) of the law of 29 July 1881 on the freedom of press, the so-called "Gaysot Law".

   The notion of grossly trivialization referred to in the Article 1 of the Boyer Law has to be understood as trivializing in the proportions that exceed the needs of the public debate or the scientific discussion.

III. On the violation of the freedom of expression and communication, freedom of research, free exercise of political activities and of the principle of the necessity of punishments

A. *The petitioners claim that the Article 1 of the Boyer Law undermines disproportionately the freedom of expression and communication that is guaranteed by the Article 11 of the Declaration of 1789 as well as the freedom of research and the free exercise of political activities.*

   They also claim that the contested provisions disregard as well the principle of necessity of punishments in the absence of serious reasons of public order.

B. *These grievances should not be taken into consideration by the Constitutional Council.*

1. *As the petitioners remind that the Constitutional Council has established a constant jurisprudence which says that the freedom of expression and communication guaranteed by the Article 11 of the Declaration of 1789 is so precious that its exercise is a precondition for democracy and one of the guarantees of the respect for other rights and liberties.*

   However it does not mean that all types of infringement of this freedom should be banned. It has to be reconciled with other requirements of constitutional value as long as this infringement is necessary, adapted and proportionate to the pursued goal.

   In the present case the punishment of the denial of certain genocides is justified by such goals and does not exceed what is necessary to reach them.

*On the one hand the crime of genocide, as defined in the Article 211-1 of the Penal Code, is a unique case as far as the seriousness of the acts in question. These acts have to be committed "*as the implementation of a concerted plan aiming at the total or partial destruction of a national, ethnic, racial or religious group or of a given group determined by any other arbitrary criteria". *Denying genocide when its existence is an established fact would mean that those who claim it are the authors of a collective lie.*

The denial is, in general, in the form of an incitement to discrimination that should not be tolerated more than an open provocation to such behaviour that is punished by the paragraph 8 of the Article 24 of the law of 29 July 1881 (on the freedom of press).

The European Court of Human Rights, in its decision on the admissibility of the Garaudy vs France *case, pointed out that* "the denial of the crime against humanity is one of the most acute forms of racial defamation and incitement against the Jews. The denial or revision of such historical facts will call into question the values that constitute the foundations of combating racism and anti-Semitism and are likely to disturb the public order".

On the other hand the denial is, like the abuse or defamation, a disregard of the memory and dignity of the descendents of the victims and should be punished in certain circumstances for the sake of the preservation of the public order especially for the preservation of the human dignity against all types of slavery and degradation, which is a constitutional value.

The government believes that a consensus exists already at the European Union level as could be noticed in the adoption of the Framework Decision of 28 November 2008 on Combating Certain Forms of and Expressions of Racism and Xenophobia by Means of Criminal Law. The Article 1 of the said Framework Decision makes it compulsory for the Member States to punish, under certain reservations and conditions, the apology, denial and public trivialization of the crimes of genocide.

Of course, the Article 1 of the Boyer Law does not specify like the Framework Decision that the denial of the crime of genocide is punishable only when "the conduct is carried out in a manner likely to incite violence or hatred against such a group or a member of such a group". *The reason for it is that a clearer formulation of a*

reservation in this sense was not necessary because, for reasons explained above, such a risk may be regarded as part and parcel of the crime of genocide.

In these circumstances, the Article 1 of the Boyer Law cannot be regarded as an excessive infringement of the freedom of expression and communication of individuals and political parties for whom the Constitution does not provide any special treatment. For the same reasons this article does not disregard the principle of the necessity of punishments contained in the Article 8 of the Declaration of 1789.

2. *The Article 1 of the Boyer Law does not limit in an arbitrary manner the freedom of expression of teachers and researchers more than it is required by the Constitution and in general terms does not disregard the freedom of historical research.*

On the one hand, like the conduct punished by the Article 24 bis of the law of 28 July 1881, the denial or grossly trivialization of the crime of genocide will be subjected to sanctions provided by the Article 1 of the Boyer Law only in case this conduct is carried out in bad faith. The author of a work carried out according to the requirements of objectivity and seriousness of the historical research will not be prosecuted under these provisions no matter how iconoclastic could be its conclusions.

Therefore the Boyer Law cannot be regarded as impeding the development of the historical research on the crimes that come within the purview of its field of application.

IV. On the disregard of the principle of equality

A. *The petitioners claim that the Article 1 of the Boyer treats the individuals differently on two occasions: on the one hand, regarding the crime of genocide and the crimes against humanity and on the other hand, between the genocides recognized by the French laws and those that are not recognized so by them while they may have been recognized by court decisions.*

They draw the conclusion that the contested provisions are in contradiction with the principle of the constitutional equality.

B. *This grievance is not more justified than the previous ones.*

On the one hand, the crime of genocide has in fact, as it has been explained previously, a special place among the crimes against

humanity because of a specific intentional element and this gives a particular scope to the denial of such a crime. In view of this different situation, the Article 1 of the Boyer Law was able, without disregarding the principle of equality, to cover only the crimes of genocide thus excluding the other crimes against humanity and war crimes.

On the other hand regarding the crimes of genocide and independently from those whose denial has already been punished by the Article 24 (bis) of the law of 29 July 1881, the legislator was able to figure out that it was particularly necessary to punish the denial of the Armenian genocide of view of the size of the phenomenon. A big number of the descendents of the victims of this crime live on the French soil and in view of the place that this genocide occupies in the collective republican mind as it is demonstrated by the consensus that prevailed before the adoption of the law of 29 January 2001.

Therefore, the Article 1 of the Boyer Law is not at all in contradiction with the constitutional principle of equality.

For these reasons the government believes that the grievance contained in the petition does not call for the cancellation of the Boyer Law.

Therefore it believes that the request of the petitioners should be rejected.

Despite these counter-arguments by the French government, the Constitutional Council overruled the law on 31 January 2012.

VI. COUNTER-OBSERVATIONS OF THE MPs

In line with the French practice the MPs were allowed to submit to the Constitutional Council the "*counter-observations*" that reflect the comments of the parliamentarians on the subjects where the government expressed its views.

Here is an abridged version of the counter-observations of the MPs:

Counter-observations of the MPs

The observations of the Government, dated 15 February 2012, call for the following responses:

The Boyer Law is neither aimed at the prosecution of the perpetrators of genocide nor at the necessary fight against their apology; is it simply aimed at the impossibility of calling publicly into question genocide when it is or will be recognized by a distinct penal law. According to the observations made by the government, contrary to what its name suggests, the Boyer Law aims only at the Armenian genocide. The objectives mentioned to justify this absolute prohibition are the "protection of the public order and the rights of the others" *and the respect owed to the memory of the victims and to the dignity of their descendants.*

The petitioners who submitted the law to the scrutiny of the Constitutional Council believe that such arguments cannot avoid several grievances of unconstitutionality that the text contains and refer to the contradiction of its Article 1 to the Article VI of the Declaration of 1789.

1. On the competence of the legislator on the penal matters

Article 1 of the Boyer Law provides that in order to impose a sanction it will be required not only the recognition of genocide by a judge but also the recognition of the same genocide by a law. The petitioners maintain that the applicability of the penal law cannot be based on a past or future legislative recognition. If the law of 29 January of 2001 was abrogated or amended, the denial would become possible again. However no objective criterion is attached to this recognition since the facts enter the field of application of the article 211-1 of the Penal Code (see observation 7 hereinafter).

In fact the observations have to recognize that "this law (*the law that recognizes the genocide*) contributes to limit the field of application of the contested law*". A penal incrimination defined by law cannot depend on adopting a distinct law without ignoring the provisions of the Article VII of the Declaration of 1789 and those of the Article 34 of the Constitution that the law uses to determine the offence. This determination cannot be made conditional on an express legislative recognition. This recognition will establish a unique concrete case for the application of the penal law.*

Therefore the Boyer Law does not determine at all an offence and its sanction, but makes subordinate the existence of this same offence that it created to a special legislative recognition.

2. On the legislative competence to recognize genocide

A law cannot "recognize" *a historical fact: Such a law disregards by definition the provisions of the Article 34 of the Constitution and the requirement of prescriptive rules, strongly emphasized by the decision of the Constitutional Council. Such recognition does not come within the purview of the law. It may rather be the subject of a resolution. Here again, the government would like to point out that in addition to their symbolic* "effect", *which is in contradiction with the Article 34, these laws cannot be considered as being devoid of normative feature. In other words what will give the law its normative feature will be the incrimination. To adopt such reasoning means that an unconstitutional law would lose its unconstitutionality as soon as it triggers a sanction.*

A law cannot "recognize" a historical fact: Such a law disregards by definition the provisions of the Article 34 of the Constitution and the requirement of prescriptive rules, strongly emphasized by the decision of the Constitutional Council.

It is a law which is not operative by itself but which will trigger a sanction. It is exactly this type of reasoning that the (Constitutional) Council avoided by emphasizing that a simple definition of the word "incest" *could not refer to a definition as vague as* "family". *The mechanism is therefore against the intelligibility and clarity of the penal law and to the requirement of predictability that it entails.*

3. On the Separation of Powers

It has never been suggested in the submission, as the government's observations imply, that the legislator will be competing with "those who are entitled to judge the perpetrators of the crime of genocide". *Confusion is created here between two different subjects: one of them is judging the crime of genocide. It comes within the purview of the competent judge according to the Article 211-1 of the penal law or to international treaties and this competence is not challenged in the Boyer Law. The second is judging the denial of genocide and the prosecution is tied here to a specific recognition which will stem from a source other than the judge.*

4. The notion of the "grossly trivialization" *cannot be taken as a definition for a legal incrimination*

The notion of the "grossly trivialization" *is clear enough to be de-*

linked from the generality of the penal law. It has become clear enough but not because the Court of Cassation used this notion to qualify the facts and made a distinction between the bad faith and good faith of the incriminated person. In fact, by trying to specify the "proportions that clearly exceed the need of the public debate or scientific discussion", *the government demonstrates that this is not one of the criteria. Could we debate the number of victims? To what extent? Could we challenge the dates when a concentration camp was functioning? Until which moment? When a* "latent form of apology" *is referred to, this demonstrates only totally imprecise and unpredictable character of the communications that could be sanctioned.*

5. *The question on the necessity of penal law is not answered. It may be convenient to underline once more that what is at stake here is not the prosecution of the perpetrators of genocide, but the freedom of expression and research. The prohibition of the denial of a historical fact is not necessary for the manifestation of the truth.*

6. On the freedom of communication

Once more it will be convenient to make a distinction between the necessary incrimination of the perpetrators or apologists of genocide that is covered by the Penal Code and the necessary freedom of debate that cannot substitute it.

The government wrongly refers to the decision no. 2011-131 QPC of 20 March 2011, because this decision establishes the unconstitutionality of the lapse of time for the cases of defamation that go back to more than 10 years since it aims without distinction at "all speeches and written texts that are the result of historical or scientific works as well as the imputations referring to the events whose mention or comment are part of a public debate of general interest". *Once more, one has to admit that according to this decision the legislator cannot govern the history in a democratic society, all the more so in the case of a legislator in penal matters.*

The legislator should prosecute the perpetrators of crimes or those who praise them. The European Court of Human Rights reminds it: "The freedom of expression is valid not only for the information or compiled ideas that are considered as inoffensive or indifferent but also for those that hit, shock and disturb. This is what the pluralism, tolerance, open mindedness require. Without them it is not democracy" *(23 September 1998,* Lehideux and Isorni vs France, *no.*

55/1997/839/1045, point 55). The distinction is therefore established by the Court between the moral punishment for concealing the crime against humanity and freedom of expression (point 54). The jurisprudence of the European Court of Justice is therefore quoted in a wrong manner: "The Court believes that it does not need to express an opinion on the constitutive elements of the offence of the denial of the crimes against humanity" *(Garaudy, 24 June 2003). As it is exposed in our petition, it is within the framework of the promotion of the rights and liberties guaranteed by the Article 17 of the European Convention of Human Rights that the Court thought the freedom of expression should not be turned to the advantage of the deniers which may lead to the rehabilitation of the Nazi regime (In addition to the decisions quoted above, see Jersild CI Danemark, 23 September 1994). Furthermore it is pointed out that such a demonstration may be based on the Nurnberg trials and that the conventionality of the Article 24 of the law of 29 July 1881 is not as important as the constitutionality of the Boyer Law.*

Putting forward the protection of the public order is not appropriate. There cannot be a historical "public order". *Supposing even that the recognition of genocide through law was aimed at social appeasement, one may say that on the contrary it may incite the group in question as the perpetrator of the crime and its descendents may be incited to a violent denial. Furthermore, since the law aims only at certain genocides, for the moment it is only one, one cannot understand what the difference between the Armenian genocide and the other genocides that are not covered by the Boyer Law is.*

7. On the freedom of historical research

The observations of the government maintain that the Boyer Law will follow the "consensus of historians" *even if they attribute this role to the judiciary by omitting the legislative recognition provided for by the Article 1 of the Boyer Law. But we are talking here about a postulate of principle: Even if genocide has already been recognized previously by the scientific community, it is not guaranteed that it will also be recognized by the French law or French or international judiciary court. It is not guaranteed either that the legislator* "will force" *the consensus by preventing exactly the launching of a challenge when the consensus does not exist.*

8. Even if we were to admit that the public order could justify an absolute restriction of the right of expression on genocide recognized today by

law, one has to admit then that nothing justifies, in light of these elements, that the legislator could make a distinction between one genocide and the other. On which ground the Cambodian, Chechen of 1944, Shoa –which is not covered by the Boyer Law- will be considered less worthy of attention than the Armenian genocide. On which ground such tragedies, such crimes will be less worthy of attention for the memories of the victims or for the human dignity than the Armenian genocide. Is there any hierarchy in the horror? Which criteria, objective and rational, authorize the legislator to make a distinction between the genocides that cannot be denied and those that could be denied? Actually there is no such a criteria.

In light of the arguments contained in the petition, the Boyer Law contains a flagrant absence of equality between genocides.

9. By stating in the paragraph IV-B that the genocide has a special place among the crimes against humanity, the government observations disregard the provisions of the Article 212-1 of the Penal Code that are also aimed at the "implementation of a concerted plan against a group" *by such acts as the deportation or enslaving. The criteria mentioned here cannot be taken into consideration neither could be taken into consideration the size of the phenomena of denial. Certainly it is not the size of the phenomena that could explain why the freedom of expression is prohibited. The denial will thus be accepted for certain genocides and not for the others without an appropriate justification.*

To try to make a historical truth a sacred matter exceeds the competence of a legislator. He cannot dictate or officialise the history.

In a particularly well-sustained book under the title of "Auschwitz: Investigations on a Nazi plot" *Mr. Florent Brayard points out the following: "*The historical practice consists at the same time of issuing decrees and of proceeding to arbitrations. One has to be arrogant or ingenious to claim that these choices and arbitrations are operated in a sterile universe where objectivity should be the master. But when a historian is in the mood of writing history, he is surrounded much more by the present day environment than what his impersonal style may imply. When he decides, he has his reasons and some of these reasons have to do more with himself, his beliefs and his preconceived ideas than with the raw facts. The history is an earthly practice. As such it ignores perfection. To keep this in mind is the best that we could do. Obviously it is not what '*happens'* to the legislator who is worried to officialise the historical truth".

For these reasons, several grievances of unconstitutionality of the Article 1 of the Boyer Law should be taken as a justification to overrule the law.

This concludes the counter-observations of the MPs drafted as an answer to the observations made by the government on their arguments.

VII. THE VERDICT OF THE CONSTITUTIONAL COUNCIL

After having studied the arguments and the counter-arguments the Constitutional Council decided to declare that the Boyer Law was in contradiction with the Constitution. However the frequent references to the Declaration of 1789 indicate that, for the Constitutional Council, the contradiction of the Boyer Law with the Declaration was as important as its contradiction with the Constitution, if not more.

Here is the text of the verdict of the Constitutional Council:

The Constitutional Council,

Having listened to the Rapporteur,

1. *Considering that the MPs and the Senators submitted to the Constitutional Council the* ***Law to Punish the Denial of the Existence of Genocides recognized as such by the Law (the Boyer Law);***

2. *Considering that Article 1 of this law, inserts in the law of 29 July 1881 on the press freedom a new Article 24 (ter); that this article punishes by a sentence of one year of prison and 45 000 Euros those who deny or grossly trivialize the existence of one or several crimes of genocides defined in the Article 211-1 of the Penal Code and recognized as such by the French law; that Article 2 of the law amends the Article 48-2 of the same law of 29 July 1881; that the French legislation recognizes the right of certain associations to become party to the court cases in order to draw consequences from the creation of this new incrimination;*

3. *Considering that, according to the petitioners, the Boyer Law disregards the freedom of expression and communication contained in the Article 11 of the Declaration of 1789 and the principle of legality contained in the Article 8 of the same Declaration; that the Boyer Law will disregard the principle of equality by punishing only*

the denial of the genocides recognized by the French law and by excluding the other crimes against humanity; that the petitioners believe that the legislator has disregarded its own competence and the principle of the separation of powers contained in the Article 16 of the Declaration of 1789; that the principle of the necessity of punishment contained in the Article 8 of the Declaration of 1789 and the freedom of research as well as the freedom of the activities of the political parties that stems from the Article 4 of the Constitution;

4. *Considering that, according to the Article 6 of the Declaration of 1789,* "the law is the expression of the common will"; *that, as a result of this, the law should aim at introducing rules and giving them a normative impact;*

5. *Considering that according to the Article 11 of the Declaration of 1789* "the free communication of thought and opinions is one of the most precious rights of human beings: therefore every citizen should be able to speak, write, and print freely except in cases of abuse of this freedom"; *that the Article 34 of the Constitution provides that* "The law determines the rules regarding…the civic rights and the fundamental guarantees granted to the citizens for the exercise of the public freedoms"*; that, on this basis, the legislator has the right to introduce the rules concerning the exercise of free communication and the freedom of speech, writing and printing; that it may pass laws punishing the misuse of these freedoms in a manner to disturb the public order and infringing the rights of the other; that, however, the freedom of expression and communication is so valuable that its existence is a precondition for democracy and one of the guarantees of the respect of the other rights and freedoms; that disregard of this freedom should be necessary, adapted to the conditions and proportionate to the pursued objectives;*

6. *Considering that a legislative provision aiming at the* "recognition" *of a crime of genocide should not be given a normative impact attached to a law; that, however, Article 1 of the Boyer Law punishes the denial and trivialization of the existence of one or several genocides* "recognized as such by the French law"; *that the legislator disregarded in an unconstitutional manner, the exercise of the freedom of expression and communication by punishing the denial of the existence and the juridical qualification of the crimes that it recognized and characterized as such; that, as a result of this and without needing to examine the other grievances, it should be declared that the Article 1 of the Boyer Law and the Article 2, which is not separable from it, is in contradiction with the Constitution.*

DECIDED:

Article 1. The ***Law to Punish the Denial of the Existence of Genocides recognized as such by the Law*** *is in contradiction with the Constitution.*

Article 2. The present decision will be published in the Official Gazette of the Republic of France".

VIII. CONCLUSION

The verdict of the Constitutional Court stopped the Turkish-French relations from falling down the precipice, however they are still on the brink and the risks of falling are not avoided entirely.

The Constitutional Council overruled the law. Therefore the law will not enter into force. However no sooner had the Constitutional Council issued its verdict than Mr. Sarkozy, the then President of the Republic, was quoted in the media as having instructed his advisors that by the month of June new draft law should be submitted to the parliament to circumvent the reasons that led the Constitutional Council to overrule the Boyer Law. We will see whether Mr. Sarkozy's political party UMP will carry out this instruction now that he is not any longer the President of the Republic.

Mr. Badinter, the former Chairman of the Constitutional Council, had pointed out that the Constitutional Council may also declare unconstitutional the law of 29 January 2001 that recognizes as genocide the 1915 incidents in the Ottoman Turkey. It did not do so. This may be due to the fact that the parliamentarians did not refer to this question in their submission and the Constitutional Court did not look into a subject that was not brought to its attention by the parliamentarians. This may also be a *"quid pro quo"* extended to the Armenian community in France in exchange for the damage caused to the Armenian cause by this clumsy initiative.

The analyses made in the present article and the points made by the French parliamentarians in their submission to the Constitutional Council as well as the verdict of the Constitutional Council contain sufficient elements to persuade the potential initiators of similar laws in the future that such initiatives lead nowhere. The future will tell us whether proper lessons are drawn from this initiative and whether the sagacity will prevail over the short-sighted electioneering motivations.

The verdict of the Constitutional Court stopped the Turkish-French relations from falling down the precipice, however they are still on the brink and the risks of falling are not avoided entirely. Turkey and France have huge potentials for cooperation to be mobilized if this unpleasant problem put on the shoulder of France by a community that constitutes less than 1 % of its population were not to overshadow them.

When Galileo Galilei said in 1633 that the sun was not revolving round the planet earth, he was taken to the Inquisition and punished by it, because Galileo was denying a dogma that was accepted by the church. The Boyer Law wanted to punish the denial of a fact that a group of French Parliamentarians assumed as genocide. A reasonable person in France will have to explain now to the world public opinion the difference between the Boyer Law and the verdict of the Inquisition that punished Galileo.

BIBLIOGRAPHY

Yaşar Yakış, "A European Union Framework Decision on the Offence of Denying a Crime", *Review of Armenian Studies*, no.23, July 2011, pp, 63-92

Badinter, Robert "Le Parlement n'est pas un tribunal" *Le Monde*, 15.1.2012

Rapport d'Information, en application de l'Article 145 du Reglèment, au nom de la Mission d'Information sur les questions mémorielles, par M. Bernard Accoyer, Président de l'Assemblée Nationale.