

**A CRITIQUE OF HOLOCAUST DENIAL  
AND HATE SPEECH LAWS IN EUROPE**



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# 1 Chapter 1: Introduction and methodology

## 1.1 Scope and objective of thesis

The topic of this thesis is European legislation regarding “hate speech”, with specific emphasis on Holocaust denial. It contends that Europe is not justified in imposing limitations on freedom of speech in this respect, because such laws are not necessary or effective in achieving their primary objectives while imposing limitations on individual and group rights. On both a legal and philosophical level, individual rights should be preserved and protected when there is no objective reason for their limitation.

Justifications for limiting freedom of expression in Democracies must be within boundaries that support and respect individual and group rights to self-determination. Democracies are based upon the principle that the people are the ultimate source of power and that the government exists to promote their wellbeing. In order to make social and political decisions, the people must have access to information. The more fettered this access is, the less people are able to make choices and draw conclusions about how they want to be governed.

Limitations on individual freedoms in Democracies must be justified. This is especially true of freedom of expression since it is so central to the functioning of democracy; limitations on freedom of expression are limitations on democracy itself. Therefore, the state has the burden of proof to show that any limitations that it seeks to impose are necessary and that the same objective could not be achieved by less invasive means, since it is seeking to abridge the individual’s right to express an opinion.

This paper contends that states and international institutions have not met that burden of showing that limitations on freedom of expression are justified in the area of Holocaust denial and hate speech legislation, and that they have not gone far enough to protect freedom of expression. By basing these limitations on socially accepted norms, both states and international institutions fail to protect legitimate speech that falls outside of generally accepted ideas.<sup>1</sup>

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<sup>1</sup> The ICCPR has never found in favor of someone seeking protection for right wing ideas. The ECHR has stated in the *Lehideux and Isorni v. France* case, ECHR 1998, that Art.17 of the ECHR could be so broadly applied that most controversial political ideas would be outside the scope of protections of the ECHR. This case will be discussed in detail later on.

This is an important area for research not only because people in Europe are imprisoned for expressing opinions which in other Democracies<sup>2</sup> would be seen as either protected speech, or a crime not warranting imprisonment. It is also important, because such limitations are a limitation upon participatory democracy. If one is not able to express one's own opinions and try to convince others of their validity, a democracy cannot exist. Therefore, it is important to understand that a limitation on freedom of expression is also a limitation on democracy itself.<sup>3</sup>

## 1.2 Methodology

My thesis will be based on an interdisciplinary approach of using both legal and philosophical material to evaluate the necessity and appropriateness of Holocaust denial and hate speech legislation. First I will examine national legislation and international treaties and court cases pertaining to limitations on freedom of speech. I will analyze both those cases which have found such limitations to be justified and those cases which have found such restrictions to be unconstitutional.<sup>4</sup> Cases will be selected to provide a thorough understanding of the right of freedom of expression under the international instruments, as well as cases from national courts. These cases will also be compared with provisions from national constitutions within Europe as well as rights guaranteed through the European Convention on Human Rights. This examination will supply the legal fundamentals of the problem. Second, in addition to analyzing the pertinent cases, this paper will discuss the philosophical justifications and political considerations which are used to support the existence of such laws and the limitations of freedom of which they entail. The national laws and international instruments and the court decisions applying them will then be examined in the light of legal and philosophical arguments from varying national and international judicial systems to determine if the state has legitimate cause to limit freedom of speech in such a manner.

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<sup>2</sup>The US, Canada, and Australia would not imprison people for this type of speech.

<sup>3</sup>Certain general restrictions on speech are common to all Democracies. These include laws against libel of individuals and direct incitement of violence. These types of limitations, which are narrowly aimed at preventing injury to individual or group rights, not the prohibition of the expression of opinion about historical or political subjects, are beyond the scope of this paper.

<sup>4</sup>Contrast *Garudy v. France*, ECHR 2003, with Spanish Constitutional Court Judgment No. 235/2007, of November 7.

### 1.3 Justification

Limitations on freedom of expression are one of the most important issues within any democracy. The right to freedom of expression is so important that the United States puts that right in the First Amendment in its Bill of Rights.<sup>5</sup> With democracy and freedom of expression being so inter-related<sup>6</sup>, it is difficult to limit any aspects of freedom of expression, without in turn limiting, to some degree, democracy and the ability of people to share and examine the ideas of others. “Extreme speech” or in the case of this thesis, Holocaust denial and hate speech, is that which tests a society’s commitment to open debate and toleration of opposing views, even if those views be shocking, disturbing and/or erroneous. A democracy is based on the tenet that people should have free access to information without fear of harm or punishment so that they can evaluate competing arguments in determining how they should best be represented and governed.

Few can have sympathy for the ideas of Holocaust deniers and perhaps the preferred response to their ideas is disgust. However in imposing such limitations, one must thoroughly examine the need for them. This thesis will argue that the limitations placed on people through memory laws and hate speech laws breach of the rights of individuals groups to self-determination, and therefore constitute a violation of their basic human rights, since they are restrictions based purely on social values rather than real danger. Along with violating this fundamental right to self-determination, pragmatic and philosophical problems arise from the limitation of such speech in a democracy. It is an important question within our societies as to what we can tolerate and what we cannot. I assert that greater toleration will led to better outcomes for society and that society at large must not fear the expression of an argument, so devoid of fact and commonsense, that if it were not dealing with such a sensitive topic it would be laughable.

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<sup>5</sup> The First Amendment to the US Constitution states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

<sup>6</sup> As discussed below the Australian court held that the word “democracy” implied freedom of speech. *Australian Capital Television Pty. Ltd. v. Commonwealth*, (1992) 177 CLR 106.

#### 1.4 Definition and scope of Holocaust denial

Holocaust denial essentially consists of denying that crimes against humanity were committed by the Nazis. Generally one of the following claims is made in denial literature:

- That the Nazis did not use gas chambers to murder millions of Jews.
- That most of those who died at concentration camps such as Auschwitz succumbed to diseases such as typhus rather than being executed
- That although crimes may have been committed against the Jews, the Nazi leadership was unaware of the nature and extent of those crimes.
- That it is a gross exaggeration to say six million Jews were killed.
- That trumped-up claims of atrocities against the Jews were used cynically to generate political support for the expropriation of Palestinian land to create a Jewish homeland.
- That the number of Jews killed in the so-called Holocaust pales in comparison to the number of dissidents and Christians killed in Soviet gulags.
- That academics are afraid to speak the truth about these matters for fear of being charged with anti-Semitism.<sup>7</sup>

Holocaust denial and hate speech are intertwined concepts; often Holocaust denial is prosecuted under hate speech laws where there is no direct legislation outlawing it.<sup>8</sup>

Holocaust denial, which is often called “negationist literature”, is a subset of hate speech and general memory laws. Holocaust denial is somewhat different from general hate speech in that it focuses on the denial of a specific historical fact. The Holocaust is also unique in that specific legislation often accords it the status of unquestionable historic fact, by prohibiting its denial.

In order to avoid prosecution under the Holocaust denial laws, the proponents of Holocaust denial, have attempted to present their arguments in the guise of “pseudo-science.” In this form, Holocaust denial does not always make blatant claims about ethnic groups. But, even when it does not make explicit claims against ethnic groups, it often implies negative claims against such groups. In this form, it is much more difficult to distinguish Holocaust denial from academic inquiry.

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<sup>7</sup>Points quoted from: Teachout, Peter R. “Making “Holocaust Denial” a Crime: Reflections on European Anti-Negationist Laws from the Perspective of U.S. Constitutional Experience” Vermont Law Review Volume 30 Number 3, Spring 2006, accessed last May 6, 2010 at <http://lawreview.vermontlaw.edu/articles/v30/3/teachout.pdf>

<sup>8</sup> See: Section 4.1 of this paper on National Legislation.



## 2 Chapter 2: Freedom of speech is essential for the existence of democracy

Democracy and freedom of expression are inseparable ideas. In order for one to influence the government, one must have the ability to exchange ideas. This connection is so strong that Australian courts have found a protected right to freedom of expression merely in the word “democracy”.

Australia, in turn, deliberately refused to adopt a bill of rights. But when the Australian Parliament passed a law prohibiting televised political advertising and instead allotted free time to parties and candidates, the Australian High Court measured this law against a constitutional right to free speech although no such right was to be found in the text of the constitution.

The High Court reasoned that the constitution declares Australia to be a democracy, and that there is no way to be a democracy without recognition of freedom of speech. The right was therefore in the Court’s view implied in the notion of democracy, at least is so far as political speech is concerned.<sup>9</sup>

The preceding quote demonstrates both the interconnectedness of the concepts of democracy and freedom of expression and, also, the dilemma faced by Democracies.

While freedom of speech is necessary for Democracies to exist, some argue that not all speech need be protected. There is a paradoxical tension between limitations on freedom of expression and democracy. Since, one must be able to freely express one’s views in order to influence democracy, limitations on this right are limitations on democracy itself. If a government is to be considered a democratic society, such limitations must be used only when absolutely necessary.

However, democracy does not require a completely libertarian view of freedom of speech and certain limitations are required for a democratic society to work. For example, the instigation of violence against others would create an environment where people were unable to exercise their rights under a democracy. All Democracies limit speech in cases such as libel, blackmail and incitement to violence.<sup>10</sup> Such limitations are different in kind from laws prohibiting Holocaust denial and hate speech laws in

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<sup>9</sup> Grimm, Dieter; “Freedom of Speech in a Globalized World” found in *Extreme Speech and Democracy* (2009), p.11, commenting on the holding in *Australian Capital Television Pty. Ltd. V. Commonwealth*, (1992) 177 CLR 106.

<sup>10</sup> Though the extent of these limitations varies amongst countries as well.

that they apply narrowly to protect individual rights rather than broadly to prohibit the expression general opinions conducive to a free exchange of ideas. Holocaust and hate speech prohibitions are more easily extended to apply to legitimate expression critical of the way their government is run and how their officials act. Restrictions on these ideas are particularly troubling to democratic ideals.

C. Edwin Baker in his article “Autonomy and Hate Speech” makes a twofold argument.

(i) that the legitimacy of the state depends on its respect for people’s equality and autonomy and (ii) that as a purely formal matter, the state only respects people’s autonomy if it allows people in their speech to express their own values---no matter what these values are and irrespective of how this expressive content harms other people or makes government processes or achieving governmental aims difficult. Achievement of more substantive aims, such as helping people experience fulfillment and dignity, must occur with a legal structure that as a formal matter respects people’s equality and autonomy.

\* \* \*

Democratic legitimacy, I believe, and certainly the civil libertarian commitment, requires that, in advancing people’s substantive autonomy as well as in advancing substantive egalitarian aims and other proper policy goals, the legal order neither have the purpose to nor use general means that disrespect people’s formal autonomy (or their formal equality). On this view, respect for free speech is a proper constraint on the choice of collective or legal means to advance legitimate policy goals. Typically racist hate speech embodies the speaker’s at least momentary view of the world and, to that extent, expresses her values. Of course, her speech does not respect others’ equality or dignity. It is not, however, her but the state’s legitimacy that is at stake in evaluating the content of the legal order. Law’s purposeful restrictions on her racist or hate speech violate her formal autonomy, while her hate speech does not interfere with or contradict anyone else’s formal autonomy even if her speech does cause injuries that sometimes include undermining others’ substantive autonomy. For this reason, prohibitions on racist or hate speech should generally be impermissible—even if arguably permissible in special, usually institutionally bound, limited contexts where the speaker has no claimed right to act autonomously—such as when, as an employee, she has given up her autonomy in order to meet role demands that are inconsistent with expressions of racism.<sup>11</sup>

Freedom of opinion is an absolute right.<sup>12</sup> It is a fundamental contradiction to say that one has the right to his opinion, but that he is prohibited from expressing it.<sup>13</sup> It is necessary element for a democracy to function that people have the right to express

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<sup>11</sup> *ibid.* p. 143

<sup>12</sup> See: Article 18 of the ICCPR, International Covenant on Civil and Political Rights, (Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966), and Article 9 of ECHR, Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 1950.

<sup>13</sup> Though this is in many countries considered “*forum internum*” verses “*forum externum*” or simply inward belief and outward manifestation, limitations are permitted of the latter.

their opinions, even if that right is used in an offensive, shocking or insulting way. Under these circumstances, every restriction upon the free exercise of speech must be judged by whether it is absolutely necessary to protect some legitimate interest of the state or its people, whether it is drafted as narrowly as possible to accomplish its goals, and whether the same goals could be not attained by other less restrictive means.

It is the contention of this paper that Holocaust denial and hate speech laws are not required to protect any legitimate interests in present day Europe. More than sixty years have passed since the defeat of National Socialism and there has been no serious attempt to revive it. While such laws may have been justified in the period just after World War II when European institutions and economy had been destroyed and were in a weakened condition, there is no proof that they are needed today. No one has made any serious attempt to make a rational argument for the necessity for these laws today. They are remnants of the past and are justified on emotional, not rational grounds.

For Germany, there is great political pressure to admit the atrocities committed by National Socialism. Holocaust denial laws are a way for Germany to say that it will never allow this to happen again. Though such laws may be politically expedient, that alone does not justify the limitation of individual rights of free expression. Everyone condemns the atrocities which were committed by the Nazis, but that does not justify the necessity for these laws today. It is time for Europe to subject these laws to serious scrutiny to see if they are needed.

In order to justify such prohibitions, one must show that there is some causal connection between the prohibited speech and conduct which threatens legitimate interests of the state or its people. Then, one must show that the laws are effective in attaining their purpose with the least possible limitations on individual freedoms. It is the contention of this paper that Holocaust denial and hate laws fail on both counts. It has not been demonstrated that they are either necessary or effective.

America allows greater freedom of speech in these areas than Europe and still maintains its democratic institutions. There is no empirical evidence that such prohibitions are more effective in dealing with hatred as a belief than simply letting it be freely expressed and judged in the market place of ideas. Europe is moving away from

blasphemy laws, which like Holocaust denial and hate speech laws, prohibit offensive expression. It is time that it also moved past Holocaust denial and hate speech laws.

### 3 Chapter 3: Development of Holocaust denial and hate speech legislation in Europe

The first trial dealing with propaganda related to the Holocaust was at the Nuremberg trials, although it did not concern Holocaust denial explicitly. At Nuremberg, Julius Streicher was convicted of war crimes and executed, though he had nothing to do with the actual perpetration of those war crimes. He was a Nazi propagandist, and as such was held responsible for creating an atmosphere in which the crimes of the Holocaust could be committed. The Nuremberg Court held that:

Striecher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes, as defined by the Charter, and constitutes a crime against humanity.<sup>14</sup>

Holocaust denial has been seen as an attempt to rehabilitate the Nazi ideology by distorting the understanding of history to make it more palatable, thereby creating the threat of its possible return. It is in an attempt to prevent the spread of such ideologies like National Socialism, that States have adopted legislation such as making Holocaust denial illegal. Holocaust denial has been prosecuted under hate speech clauses in national legislation, as well as direct legislation prohibiting Holocaust denial. Because of its proximity to the devastation caused by National Socialism, the nations within Europe are far more wary of extreme speech than other democracies such as those in North America and Australia that were not affected so directly.<sup>15</sup> After the Nuremberg trials, Democracies throughout Europe adopted anti-hate speech legislation, and legislation aimed at prohibiting Holocaust denial.

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<sup>14</sup> See The Avalon Project at Yale Law School, Judgement: Streicher, available at <<http://avalon.law.yale.edu/imt/judstrei.asp>> (last accessed 13 April 2010).

<sup>15</sup> However, there have been criminal prosecutions in both Canada (*R. v. Zundel*, [1992] 2 S.C.R. 731: The Supreme Court of Canada reversed the defendant's conviction after holding that the law under which he was prosecuted was unconstitutional) and Australia (*Jones v. Toben*, [2002] FA 1150: The defendant was ordered to stop publishing his material and when he did not do so, he was sentenced to jail for contempt of court). Unlike the many European cases, neither of these defendants were sentenced to prison as a result of their speech; the defendant in the Australian case was jailed for contempt of court after he refused to stop publishing.

### 3.1 National legislation prohibiting holocaust denial and hate speech

Fourteen separate European States now criminalize Holocaust denial.<sup>16</sup> "The European states that now criminalize Holocaust denial posit that such denial constitutes an attempt to justify crime, incites hate crime, or seeks to undermine the findings of the International Military Tribunal of August 1945 (the Nuremberg Tribunal)."<sup>17</sup> National legislation dealing with Holocaust denial is important both in itself and because of the deference paid to it by both the ECHR and the UN Human Rights Council. Europe is the only region in the world that has strict legislation dealing directly with Holocaust denial, but it is not alone in having expansive legislation creating a category of hate speech. European countries have used various laws to combat Holocaust denial. Austria has direct legislation on the matter of Holocaust denial. Article 3h of the Prohibition Act (Verbotgesetz)<sup>18</sup> makes it a crime to deny the National Socialist genocide, or other National Socialist crime against humanity, or to seek to minimize or justify them. The law provides for imprisonment for one to ten years, or for up to twenty years, if the offender or his activities are particularly dangerous.

Other countries that have similar legislation prohibiting Holocaust denial are:

Belgium<sup>19</sup>, the Czech Republic<sup>20</sup>, France<sup>21</sup>, Germany<sup>22</sup>, Liechtenstein<sup>23</sup>, Lithuania and Luxembourg<sup>24</sup>.

Though all of these countries have similar legislation, the penalties vary in severity, with Austria having the harshest penalty. Austria's law predates most other such legislation, having been enacted in 1947, and was originally aimed at banning any revival of Nazism through banning the political party. In 1992 the law was amended to make Holocaust denial illegal. The Austrian law against Holocaust denial permits the incarceration of people for up to 20 years if they are deemed particularly dangerous, though the standard sentence is 1 to 10 years. In contrast, German legislation, which

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<sup>16</sup> See: Whine, Michael; "Expanding Holocaust Denial and Legislation Against It", found in *Extreme Speech and Democracy* (2009) P. 543

<sup>17</sup> *ibid.*

<sup>18</sup> Österreich, StGBI 13/1945, amended version BGBl 148/1992, cited in *ibid.*, p. 544

<sup>19</sup> Article 1 of the law of 23 March 1995, Belgium

<sup>20</sup> Article 261a of the amended constitution of 16 December 1992, Czech Republic

<sup>21</sup> Article 24 *bis* of the amended Press Act of 29 July 1881, France

<sup>22</sup> Article 130 of the amended Penal Code of the Federal Republic of Germany

<sup>23</sup> Article 283 of the Penal Code of Liechtenstein

<sup>24</sup> Article 457-3 of the revised Criminal Code, Luxembourg

was enacted in 1994, has a maximum sentence of 5 years. France has also adopted tough anti-denial legislation; it amended its Press Act of 29 July 1881, under the Gaysot Act of 1990. France had previously punished Holocaust denial in Civil Court, but did not have legislation making denial a criminal offense.

Other countries have prosecuted Holocaust denial under hate speech laws. These laws have the limitation of only applying to Holocaust denial when it can be considered spreading hatred. While both national and international courts have taken broad views of what constitutes spreading hatred, there still a question whether merely denying the existence of the Holocaust without making other anti-Semitic claims is spreading hatred.

The most notable example of this use of hate speech legislation is the United Kingdom, which has prosecuted Holocaust denial under legislation used to combat hate speech. Holocaust denial was legal in the UK prior to the enactment of the Criminal Justice and Public Order Act (1994) and the Crime and Disorder Act (1998), but afterwards the UK has successfully prosecuted cases of Holocaust denial under these laws where hatred was also incited.<sup>25</sup> This has led to a decrease in the amount of publications of Holocaust denial in the UK, whereas before, Britain was the European center of Holocaust denial. The Netherlands has also used hate speech legislation to prosecute Holocaust denial.<sup>26, 27</sup>

Switzerland has enacted legislation prohibiting the denial of any genocide.<sup>28</sup> This type of legislation has problems of its own.<sup>29</sup> But it has at least provided consistency in prosecuting denial of any genocide, rather than just singling out the Holocaust.

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<sup>25</sup> "Lady Jane Birdwood was convicted in April, 1994 for possessing and distributing threatening, abusive, and insulting literature that contained Holocaust-denial statements; Charlie Sargent, Will Browning, and Martin Cross were convicted for stirring up racial hatred in 1994 for publishing *Combat*<sup>18</sup>, a magazine that denied the Holocaust; Nick Griffin and Paul Ballard were convicted in April, 1998 for publishing *The Rune* magazine, which contained denial material; Simon Sheppard was convicted in June 2000 for publishing leaflets that contained statements ridiculing the Holocaust." Whine, op. cit. P. 539 Note: 5

<sup>26</sup> Siegfried Verbeke and Ivo Janssen were both convicted under Article 137 of the Netherland's Criminal Code which makes it illegal to defame, or incite religious or racial hatred.

<sup>27</sup> Notably Spain also had legislation making it illegal to deny the Holocaust, until such law was ruled unconstitutional by the high court in 2007. The specifics of that case will be discussed further on.

<sup>28</sup> Whine, op. cit. p. 546

Europe, under the presidency of Germany in 2007, has further tried to move forward and make Holocaust denial legislation more uniform throughout the region. They did this with the Framework Decision on racism and xenophobia, which called upon all member states to enact legislation criminalizing, among other things, intentional conduct publicly (1) inciting to violence or hatred against groups or persons defined by reference to race, colour, religion, descent or national or ethnic origin or (2) condoning, denying or grossly trivializing crimes of genocide, crimes against humanity or war crimes when the conduct is carried out in a manner likely to incite to violence or hatred.<sup>30</sup>

The original language met opposition from countries, including the UK, Ireland, Italy and some of the Scandinavian States, which were concerned about freedom of expression issues. In order to obtain passage, language had to be added to sections 1(c) and 1(d) to make it clear that Holocaust denial and other hate speech was illegal only when it was used in such a way as to incite violence or hatred against such persons. Provisions were also added to sections 2 to 4 to limit the requirements to enact such legislation.

While some European nations have concerns over freedom of expression regarding Holocaust denial legislation, not all of them share this and prosecutions continue. Recently many high profile people have been convicted of Holocaust denial<sup>31</sup> and fined or incarcerated for periods of up to five years and less famous cases have been numerous.

The momentum to institute criminal proceedings, however, has not diminished in recent years, and some states continue to demonstrate their commitment to persecute offenders. According to the Austrian authorities, for example, more than two hundred criminal convictions were secured under their prohibition statute from 1999 to 2006.<sup>32</sup>

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<sup>29</sup> The concept of genocide is a modern concept and it is difficult to apply to those events in the past before the concept existed, such as the killing of the Native Americans, or the deaths of millions of Indians under the British Raj. It is difficult to see people being prosecuted for denying these events.

<sup>30</sup> Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008F0913:EN:HTML>> (accessed on April 13, 2010)

<sup>31</sup> David Irving in Austria, Germar Rudolf in Germany, Ernst Zündel in Germany, Sylvia Stolz in Germany.

<sup>32</sup> Whine, *op. cit.* p. 549



Despite the UK's objections to limitations under this Act, it has prosecuted people for Holocaust denial under new laws that came into effect in the 1990's, but only where it was clear that racial hatred and bigotry were present.<sup>33</sup>

### 3.2 Holocaust denial and hate speech provisions in international instruments

Generally, protection of freedom of expression is weaker under regional and international treaties than under many national laws, and the deference paid by the international bodies to national laws has further weakened the protections, because many cases are found to be outside the scope of the treaties.

Both the ICCPR (International Covenant on Civil and Political Rights) and ICERD (International Convention on the Elimination of All Forms of Racial Discrimination) have limited the protection of freedom of speech. The UN Human Rights Committee stated in the case of *Faurisson v. France*<sup>34</sup>, that the ICCPR does not protect Holocaust denial and ICERD calls directly for bans on speech disseminating ideas of racial or ethnic superiority. While neither deals directly with Holocaust denial in its text, prohibitions against hate speech have been found to be applicable to Holocaust denial.

#### 3.2.1 ICCPR

The UN Human Rights Committee has ruled consistently that hate speech is not protected under ICCPR. The articles that protect speech under the Covenant are Articles 19 and 20. Article 19 is concerned with protections of speech and Article 20 deals with necessary restrictions to freedom of speech.

##### **Article 19**

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;

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<sup>33</sup> See footnote 25

<sup>34</sup> *Robert Faurisson v. France*, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993(1996)

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

**Article 20**

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.<sup>35</sup>

Article 20 calls on States to enact legislation providing that “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”<sup>36</sup>. This positive obligation on states to limit freedom of speech has met resistance from the US and the US has made a reservation against it.<sup>37</sup>

### 3.2.2 ICERD

Article 4 of The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>38</sup>, states as follows:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;<sup>39</sup>

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<sup>35</sup> ICCPR, International Covenant on Civil and Political Rights, (Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966)

<sup>36</sup> ICCPR, International Covenant on Civil and Political Rights, (Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966) Art. 20 Para. 2

<sup>37</sup> See US reservation at: See:

[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec)

<sup>38</sup> While ICERD has not been used directly to prosecute Holocaust denial, its text clearly disallows it and states that have not made reservation to ICERD would be required to legislate against Holocaust denial where it incited racial hatred.

<sup>39</sup> CERD, International Convention on the Elimination of All Forms of Racial Discrimination (Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965)

A substantial number of countries, most notably the UK and the US, have taken issue with this Article and have placed reservations on it so that it would not impair the freedom of speech rights of their people. In its First General Comment, the UN Committee on the Elimination of Racial Discrimination which monitors ICERD has chastised members who failed to implement legislation banning speech that would fall under article 4.

International Convention on the Elimination of All Forms of Racial Discrimination, the Committee found that the legislation of a number of States parties did not include the provisions envisaged in article 4 (a) and (b) of the Convention, the implementation of which (with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention) is obligatory under the Convention for all States parties.

The Committee accordingly recommends that the States parties whose legislation was deficient in this respect should consider, in accordance with their national legislative procedures, the question of supplementing their legislation with provisions conforming to the requirements of article 4 (a) and (b) of the Convention.<sup>40</sup>

The reservation entered by the United States states that the prohibitions mandated by Articles 4 and 7 of the ICERD are not reconcilable with the US constitution:

That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.<sup>41</sup>

CERD had this to say about the US reservation:

[T]he prohibition of dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression, given that a citizen's exercise of this right carries special duties and responsibilities, among which is the obligation not to disseminate racist ideas.<sup>42</sup> The Committee recommends that the State party review its legislation in view of the new requirements of preventing and combating racial discrimination, and adopt regulations extending the protection against acts of racial discrimination, in accordance with article 4 of the convention.<sup>43</sup>

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<sup>40</sup> General Recommendation No. 01: States parties' obligations (Art. 4): 25/02/72. Gen/Rec/No.01

<sup>41</sup> Declarations and Reservations US to CERD accessed on May 6, 2010, at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec)

<sup>42</sup> The Committee uses circular reasoning here to justify this prohibition, i.e. one can prohibit racist speech because it is prohibited.

<sup>43</sup> UN Committee on the Elimination of Racial Discrimination, 'Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America' 14/08/2001. A/56/18, para. 391

### 3.3 Trend in international law to limit hate speech to protect minority rights

Since the adoption of the ICCPR and ICERD there has been a continued trend to limit racist speech within international agreements and to create greater regard for minority groups and peoples that might face prejudice.

A... distinct development, has been the growth of anti-discrimination norms at international and regional (and, of course, nation) levels over the twentieth century. It is striking that among the limited number of specific UN-sponsored Conventions and Declaration following the ICCPR are examples relating to race discrimination (CERD), the suppression of apartheid (International Convention on the Suppression and Punishment of the Crime of Apartheid (1973)), gender discrimination (Convention on the Elimination of All Forms of Discrimination Against Women (1979) (CEDAW), and discrimination on the grounds of religion or belief (Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)). These documents tend to associate the suppression of speech which advocates discrimination with the realization of the goal of equality[...]

For all of these reasons, extreme speech (which so often emerges from those on the political far right) has been seen as alien, and to some extent antithetical, to the concerns of the international human rights movement. In light of this, it is perhaps unsurprising that in no case concerning restrictions imposed on speech has the HRC (Human Rights Committee in charge of overseeing the application of the ICCPR) found in favour of a speaker associated with the extreme right.<sup>44</sup>

The trend in the international community to limit extreme speech is so strong that some argue that it could be considered that such limitations are a part of customary international law.

On the basis of these and other developments, (referring to international agreements) it is now strongly arguable that the protection against (at least) racial discrimination is an obligation *erga omnes*, that is binding on all states and having the status of a peremptory norm. The ECHR has held that discrimination on the grounds of race may constitute a breach of the prohibition on inhuman or degrading treatment (Cyprus v. Turkey (2002) 35 EHRR 731).<sup>45</sup>

The international community has adopted a view that freedom of expression also carries with it positive duties on people<sup>46</sup>. These duties include not perpetuating racist or other bigoted ideas. While this has not met with stiff opposition from most of the world, there are however some states that find such a positive obligation on individual speech to be detrimental to legitimate freedom of speech. With a number of notable states still

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<sup>44</sup> Hare, Ivan, "Extreme Speech Under International and Regional Human Rights Standards" found in, *Extreme Speech and Democracy* (2009) p.76

<sup>45</sup> *ibid.*, p.76 and footnote 67

<sup>46</sup> See above quote from UN Committee on the Elimination of Racial Discrimination, 'Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America' 14/08/2001. A/56/18, para. 391

making reservations with respect to such limitations on speech, an argument can be made that prohibition of hate speech has not risen to the level of *erga omnes*. The point, however, that needs to be taken from this is that the international agreements either support or obligate member states to adopt legislation making extreme speech illegal.

### 3.4 Holocaust denial and hate speech provisions in the ECHR

The European Court of Human Rights, while not directly outlawing Holocaust denial, has ruled on several occasions that, hate speech and Holocaust denial do not fall under its protection. Rights to freedom of speech are granted under article 10 of the ECHR which states:

#### Article 10 – Freedom of expression

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.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>47</sup>

The ECHR has gone on to further define the protections of article 10.

The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.<sup>48</sup>

The ECHR however has granted a great amount of leeway to states to determine the appropriate limitations on freedom of speech:

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<sup>47</sup> ECHR, Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 1950

<sup>48</sup> *Case of Handyside v. The United Kingdom* (Application no. 5493/72), ECHR Strasbourg, 7 December 1976. Para. 49

The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights[...] The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines.

These observations apply, notably, to Article 10 para. 2 (art. 10-2). In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.

Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force...<sup>49</sup>

This deference to the states greatly limits the protection for speech under the ECHR, since it gives a great deal of control to the states that are signatories. The ECHR has further weakened these rights of freedom of speech contained in the ECHR by incorporating the provisions of Article 17 when dealing with freedom of expression. Article 17 states:

Article 17 - abuse of rights  
Article 17 provides that no one may use the rights guaranteed by the Convention to seek the abolition or limitation of rights guaranteed in the Convention. This addresses instances where states seek to restrict a human right in the name of another human right, or where individuals rely on a human right to undermine other human rights (for example where an individual issues a death threat).<sup>50</sup>

This has removed certain classes of speech from any protection under the ECHR.

### 3.5 Holocaust denial and hate speech provisions of the Council of Europe Convention on Cybercrime

The internet has caused changes in the area in Holocaust denial and hate speech laws, since it has made it easier for people to disseminate information, as well as allowing people access to material, denying the Holocaust in countries where such material is prohibited. The Council of Europe Convention on Cybercrime has tried to deal with this new medium by requiring states to adopt legislation outlawing the use of the

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<sup>49</sup> *ibid.* para. 48

<sup>50</sup> ECHR Art. 17

internet to propagate Holocaust denial. This was done in the Additional Protocol to the Convention, which created a uniform prohibition throughout Europe and sought to block dissemination of material denying the Holocaust on the internet, at least within Europe.<sup>51</sup> This optional protocol to the Convention has been signed and ratified by 6 states inside the Council of Europe.<sup>52</sup>

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<sup>51</sup> Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, Council of Europe, Strasbourg, 28 January 2003, available at <<http://conventions.coe.int/Treaty/EN/Treaties/html/189.htm>> (accessed on April 13, 2010).

<sup>52</sup> *ibid.*

<<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=189&CM=8&DF=17/02/2006&CL=EN>> (accessed on April 13, 2010).

## 4 Chapter 4: Court decisions regarding Holocaust denial and hate speech

This chapter discusses the decisions by various national courts and international bodies relating to Holocaust denial and hate speech.

### 4.1 Holocaust denial and hate speech decisions under the ICCPR

The UN Human Rights Committee which monitors the ICCPR has been unsympathetic to protecting speech regarding Holocaust denial. While the ICCPR affords different protections to people than does the ECHR, both have limited protection of speech. In the case of *Faurisson v. France*<sup>53</sup>, the Court demonstrates the parameters of Article 19 and its relation to Holocaust denial:

The restriction on the author's freedom of expression was indeed provided by law i.e. the Act of 13 July 1990. It is the constant jurisprudence of the Committee that the restrictive law itself must be in compliance with the provisions of the Covenant. In this regard the Committee concludes, on the basis of the reading of the judgment of the 17th Chambre correctionnelle du Tribunal de grande instance de Paris that the finding of the author's guilt was based on his following two statements: "... I have excellent reasons not to believe in the policy of extermination of Jews or in the magic gas chambers ... I wish to see that 100 per cent of the French citizens realize that the myth of the gas chambers is a dishonest fabrication". His conviction therefore did not encroach upon his right to hold and express an opinion in general, rather the court convicted Mr. Faurisson for having violated the rights and reputation of others. For these reasons the Committee is satisfied that the Gayssot Act, as read, interpreted and applied to the author's case by the French courts, is in compliance with the provisions of the Covenant.

To assess whether the restrictions placed on the author's freedom of expression by his criminal conviction were applied for the purposes provided for by the Covenant, the Committee begins by noting, as it did in its General Comment 10 that the rights for the protection of which restrictions on the freedom of expression are permitted by article 19, paragraph 3, may relate to the interests of other persons or to those of the community as a whole. Since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism. The Committee therefore concludes that the restriction of the author's freedom of expression was permissible under article 19, paragraph 3 (a), of the Covenant.

Lastly the Committee needs to consider whether the restriction of the author's freedom of expression was necessary. The Committee noted the State party's argument contending that the introduction of the Gayssot Act was intended to serve the struggle against racism and anti-semitism. It also noted the statement of a member of the French Government, the then Minister of Justice, which characterized the denial of the existence of the Holocaust as the principal vehicle for anti-semitism. In the absence in the material before it of any argument undermining the validity of the State party's position as to the necessity of the restriction, the Committee is satisfied that the

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<sup>53</sup> *Robert Faurisson v. France*, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993(1996)



restriction of Mr. Faurisson's freedom of expression was necessary within the meaning of article 19, paragraph 3, of the Covenant.<sup>54</sup>

As mentioned above, the HRC has never sided with a defendant who advocated right wing ideas. This has essentially created no international system of protection for people advocating views that fall outside standard political views, at least on the right.

#### 4.2 Holocaust denial and hate speech decisions under the ECHR

Freedom of expression is protected under Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. This Article, which includes exceptions relating to licensing of broadcasting, epitomizes the European conception of freedom of expression. Article 10(2) provides that the exercise of these freedoms may be subject to conditions and restrictions that are necessary in a democratic society. The interaction of these two articles has been previously discussed. Article 10 has been said to apply “not only to ‘information’ or ‘ideas’ that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.”<sup>55</sup> However, the protection for views that shock or disturb, which is really the essence of freedom of speech, is particularly weak under the Convention because of the “margin of appreciation” granted to member nations to decide, in the first instance, what best suits their societies.

The margin of appreciation... has attracted a great deal of justified criticism for its lack of precision as a legal concept. These criticisms apply equally to free speech doctrine, but the application of the doctrine in Article 10 cases has been particularly generous where states are seeking to suppress extreme speech. The flexibility of the concept of the ‘rights of others’ in Article 10(2) and the refusal of the ECtHR to exclude, for example, offence which may be caused to others permit the Court to limit speech in cases where the Court is unsympathetic to the motives of the speaker.<sup>56</sup>

The already weak level of protection provided by Article 10 as applied with deference to national interests, has further been undermined by the Court’s use of Article 17 to carve out large exceptions to the application of Article 10. The case of *Norwood v. United Kingdom*,<sup>57</sup> is illustrative of the ECHR’s use of Article 17.

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<sup>54</sup> *ibid.*

<sup>55</sup> *Oberschlick v. Austria*, 11662/85 (1991) ECHR

<sup>56</sup> Ivan, *op. cit.* p. 78

<sup>57</sup> *Norwood v. the United Kingdom* no. 23131/03, 16 November 2004

Norwood was tried and convicted under the British law making it illegal to intentionally display any sign that is threatening, abusive or insulting within the sight of a person likely to be caused distress, if he intends, or is aware that it may be threatening, abusive or insulting.<sup>58</sup> He appealed to the ECHR, which rejected his appeal on the ground that it fell within Article 17.

The ECtHR declared Mr. Norwood's application under Article 10 to be inadmissible on the basis that the images he had displayed were a public attack on all Muslims in the United Kingdom and fell within Article 17:

Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.

The use made of Article 17 also demonstrates how little scope there is for reliance on Convention arguments when dealing with extreme speech. Several regrettable results flow from this. First, the ECtHR's reliance on Article 17 is incompatible with the Court's oft-repeated statements that Article 10 applies not only to speech which is favourably received, but also to that which offends, shocks, or disturbs the state or any sector of the population. Secondly, the broad interpretation of Article 17 has the effect of excluding the speech in question from the protection of Article 10 altogether. This is particularly dangerous since it removes the need for the state to justify the interference with Convention rights and drastically reduces the Court's role in ensuring that any limitations are narrowly construed and convincingly established. Thirdly, the decision is contrary to earlier statements from the European Commission on Human Rights to the effect that Article 17 is strictly confined to those situations which threaten the democratic system of the state itself and even then is limited to the extent that the restriction is proportionate to the seriousness and duration of the threat.<sup>59</sup>

In the case of *Lehideux and Isorni v. France*<sup>60</sup>, the ECHR stated that Article 17 has placed Holocaust denial outside the protection of Article 10;

[T]here are limits to freedom of expression: the justification of a pro-Nazi policy cannot enjoy the protection of Article 10 and the denial of clearly established historical facts—such as the Holocaust—are removed by Article 17 from the protection of Article 10. As regards the applicant's convictions for denying crimes against humanity, the Court refers to Article 17: in his book the applicant calls in question the reality, degree and gravity of historical facts relating to the Second World War which are clearly established, such as the persecution of Jews by the Nazi regime, the Holocaust and the Nuremberg trials. Denying crimes against humanity is one of the most acute forms of racial defamation towards the Jews and of incitement to hatred of them.<sup>61</sup>

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<sup>58</sup> *Norwood v. DPP*, [2003] EHC 1564 (Admin.)

<sup>59</sup> Ivan; op. cit. p. 78

<sup>60</sup> *Lehideux and Isorni v. France* (case no. 55/1997/839/1045, application no. 24662/94) ECHR

<sup>61</sup> Information Note No. 54 on the Case law of the Court, European Court of Human Rights, Strasbourg, June 2003

The broad interpretation of Article 17 has so limited the protections provided by Article 10 that one must wonder if the Convention still protects any statements that “offend, shock or disturb.”<sup>62</sup> Certainly no such speech that falls into the following categories is protected:

In order that Article 17 may be applied, the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation’s democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others.<sup>63</sup>

The *Lehideux* case, rather than narrowing the provisions of Article 17, interprets it as exempting almost any possible kind of offensive political speech from the protections of Article 10(1). It shows that the application of Article 17 is so broad that it almost entirely abrogates the protections in Article 10.

It is hard to think of any controversial political speech which cannot be said to fall within one of the categories exempted from protection by Article 17. For example, it could be argued that speech advocating the Platonic system of government would not be protected by Article 10, since it falls within Article 17’s proscription of speech concerning “undemocratic methods.” While it is unlikely that one would be prosecuted for advocating such a position, as it is not as controversial as the expression of racist or far right political views, it merely shows the Court’s ability to dismiss any arguments that it finds unsympathetic on the technical ground that Article 17 removes them from the protection of Article 10.

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<sup>62</sup> The argument for using Article 17 to exempt speech or conduct from the protections of Article 10 is also inherently contradictory. One cannot take away the rights of others, in response to them threatening to take away the rights of others without being guilty of the same infraction that they are guilty of. It is the dilemma of tolerance: one must be tolerant of all views even those views that are not tolerant of the views of others. If not, they face inherent self-contradiction.

<sup>63</sup> *Lehideux and Isorni v. France* (case no. 55/1997/839/1045, application no. 24662/94) ECHR

## 5 Chapter 5: Critique of European Holocaust denial and hate speech laws

This Chapter will critique the deficiencies of European Holocaust denial and hate speech laws in the light of jurisprudence from other Western democracies and from a philosophical viewpoint.

### 5.1 No protection is given to false statements

Some European nations<sup>64</sup> and North American nations have come to different conclusions on the issue of protecting false statements of fact. Though there is little legal opinion that staunchly supports the protection of false statements, many countries do protect them to provide ‘breathing space’ for arguments to be made. Protection of false statements is central to the argument in support of allowing Holocaust denial as a form of freedom of expression, as all statements denying the Holocaust, either in scope or methods are patently false.

Countries which have memory laws do not protect the right of people to make false statements. As stated above, Currently fourteen European nations have such memory laws in place to criminalize denial of the Holocaust. The German court ruled directly in the case of BGHZ (Entscheidungen des Bundesgerichtshofes in Zivilsachen)<sup>65</sup> that false statements were not protected under the German constitution.

First of all it is clear that on one can depend on the protection of freedom of expression for statements which deny the historical fact of the Jewish murders in the “Third Reich.” Even in the confrontation over a question that essentially disquiets the public, as is the case here, no one has a protected interest in spreading untrue statements.<sup>66</sup>

This has been a harder line than other countries have been willing to take. Canada, for example, has dealt directly with the issue. In the case *R. v Zundel*, [1992] 2 S.C.R. 731, the defendant was convicted in the trial court of the crime of “spreading false news” under section 181 of the Canadian Criminal Code for distributing a booklet that “suggested, inter alia, that it had not been established that six million Jews were killed before and during world War II and that the Holocaust was a myth perpetrated by a

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<sup>64</sup> Spain's Constitutional Court has recently ruled that false statements of fact are protected.

<sup>65</sup> BGHZ (Entscheidungen des Bundesgerichtshofes in Zivilsachen) 75 (1979)

<sup>66</sup> Kahn, Robert; “Holocaust Denial and the Law: A Comparative Study”, Palgrave MacMullan (2004) P. 18

worldwide Jewish conspiracy.”<sup>67</sup> On appeal, the Canadian Supreme Court reversed the conviction on the ground that this prohibition of spreading false news was incompatible with the protections for freedom of speech contained in section 2(b) of the Canadian Charter of Rights and Freedoms:

Section 181 of the Code infringes the guarantee of freedom of expression. Section 2(b) of the Charter protects the right of a minority to express its view, however unpopular it may be. All communications which convey or attempt to convey meaning are protected by s. 2(b), unless the physical form by which the communication is made (for example, a violent act) excludes protection. The content of the communication is irrelevant. The purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and selffulfillment. That purpose extends to the protection of minority beliefs which the majority regards as wrong or false. Section 181, which may subject a person to criminal conviction and potential imprisonment because of words he published, has undeniably the effect of restricting freedom of expression and, therefore, imposes a limit on s. 2(b). Given the broad, purposive interpretation of the freedom of expression guaranteed by s. 2(b), those who deliberately publish falsehoods are not, for that reason alone, precluded from claiming the benefit of the constitutional guarantees of free speech. Before a person is denied the protection of s. 2(b), it must be certain that there can be no justification for offering protection. The criterion of falsity falls short of this certainty, given that false statements can sometimes have value and given the difficulty of conclusively determining total falsity.<sup>68</sup>

The US Supreme Court stated the US position on the dissemination of both false ideas and false opinions in the public arena in *Gertz v. Welch*, 418 US 323 (1974).<sup>69</sup> The Court stated:

We begin with the common ground. Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust and wide-open" debate on public issues. *New York Times Co. v. Sullivan*, 376 U.S. at 270. They belong to that category of utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. As James Madison pointed out in the Report on the Virginia Resolutions of 1798: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 J. Elliot, *Debates on the Federal Constitution of 1787*, p. 571 (1876). And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual

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<sup>67</sup> *R. v. Zundel*, [1992] 2 S.C.R. 731 August 27, 1992

<sup>68</sup> *ibid.*

<sup>69</sup> The quoted statement pertains to speech in the public arena which is made without intentional malice. False statements made about private individuals who are not public officials or public figures may subject the speaker to civil liability for damages.

assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. As the Court stated in *New York Times Co. v. Sullivan*, supra, at 279: Allowance of the defense of truth, [p341] with the burden of proving it on the defendant, does not mean that only false speech will be deterred. The First Amendment requires that we protect some falsehood in order to protect speech that matters.<sup>70</sup>

In its earlier decision in *New York Times v. Sullivan*, 376 US 254 (1964), the US Supreme Court had found that false statements themselves can be thought to be protected and valuable in at least some circumstances:

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions--and to do so on pain of libel judgments virtually unlimited in amount--leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. [note 19] Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. [...] Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." *Speiser v. Randall*, supra, 357 U.S. at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.<sup>71</sup>

This case has been interpreted by James Weinstein to give greater protection of freedom of speech with regards to untrue statements.

The Supreme Court has sent mixed signals about whether false statements of fact in public discourse are inherently valuable or are protected only for pragmatic reasons such as creating 'breathing space' for true factual statements. But whatever the reason, modern First Amendment doctrine has extended considerable protection to the false factual statements in public discourse. Thus for a mixture of theoretical and practical reasons, the Court would probably find that the most salient harm caused by Holocaust denial that government can legitimately address—the infliction of psychic injury on Holocaust survivors and their families—is not weighty enough to justify the suppression of even false statements within public discourse.<sup>72</sup> (Extreme speech P. 90)

In *New York Times v. Sullivan*, supra, the US Supreme Court used a statement by John Stuart Mill to justify these protections: "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about "the clearer perception and livelier impression of truth, produced by its collision with error"<sup>73</sup>.

This line of reasoning was followed by the Spanish Constitutional Court in their recent decision to overturn a law outlawing Holocaust denial as being unconstitutional.

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<sup>70</sup> *Gertz v. Welch*, 418 US 323,339-341 (1974)

<sup>71</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)

<sup>72</sup> Weinstein, James, "An Overview of the American Free Speech Doctrine and its Application to Extreme Speech" found in *Extreme Speech and Democracy* (2009) p. 90

<sup>73</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 fn 19 (1964)

It is appropriate to point out that the mere dissemination of conclusions in respect of the existence or non existence of specific facts, without issuing value judgments on these or their unlawful nature, affects the scope of scientific freedom acknowledged in section b) of art. 20.1 CE. As we declared in JCC 43/2004, of 23 March, our Constitution confers greater protection to scientific freedom than to freedom of expression and information, the ultimate purpose being based on the fact that "only in this way is historical research possible, which is always, by definition, controversial and debatable, as it arises on the basis of statements and value judgments the objective truth of which it is impossible to claim with absolute certainty, with this uncertainty consubstantial to the historical debate representing what is its most valuable asset, to be respected and meriting protection due to the essential role it plays in forming an historical awareness adapted to the dignity of citizens of a free and democratic society".<sup>74</sup>

So courts throughout the North America and in Spain have interpreted freedom of expression to protect factually untrue statements in some circumstances.

As pointed out by various courts there is a great deal of jurisprudence documenting the potential benefits of even factually false statements. The Canadian court in its reasoning in *Zundel, supra*, dealt with whether deliberate lies could be valuable to society.

The first difficulty results from the premise that deliberate lies can never have value. Exaggeration -- even clear falsification -- may arguably serve useful social purposes linked to the values underlying freedom of expression. A person fighting cruelty against animals may knowingly cite false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g., 'cruelty to animals is increasing and must be stopped'. A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate the number or geographical location of persons potentially infected with the virus. An artist, for artistic purposes, may make a statement that a particular society considers both an assertion of fact and a manifestly deliberate lie; consider the case of Salman Rushdie's *Satanic Verses*, viewed by many Muslim societies as perpetrating deliberate lies against the Prophet. All of this expression arguably has intrinsic value in fostering political participation and individual self-fulfillment. To accept the proposition that deliberate lies can never fall under s. 2(b) would be to exclude statements such as the examples above from the possibility of constitutional protection. I cannot accept that such was the intention of the framers of the Constitution.<sup>75 76</sup>

The scenarios described in the above quotation are clearly more palatable than denying the Holocaust,<sup>77</sup> but equal application of the law would have to mean that if freedom of expression were not extended to false statements, these statements would as well be

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<sup>74</sup> Spanish Constitutional Court Judgment No. 235/2007, of November 7

<sup>75</sup> *R. v. Zundel*, [1992] 2 S.C.R. 731 August 27, 1992

<sup>76</sup> Even though Zundel was acquitted in Canada, he was later deported back to his home country of Germany on the grounds that he was a national security threat. In Germany he was convicted of 14 counts of incitement of racial hatred and he has recently served a prison sentence of five years. See CBC story "Zundel released from German prison", accessed at <http://www.cbc.ca/world/story/2010/03/01/zundel-release.html> on May 3rd.

<sup>77</sup> At least to secular individuals, as Salman Rushdie's works created a great deal of outrage amongst religious groups.

deemed unprotected speech, and people who found harm from such statements<sup>78</sup> could seek redress from the courts. Not giving ‘breathing space’ to individuals, and even putting them in peril of criminal prosecution does seem to be greatly restrictive on individuals since people making statements they believed to be true could rightly fear prosecution.

The argument for not protecting false statements of facts is also undermined by the fact that false statements of fact are inherently less dangerous than statements of opinion. This is because, a false statement of fact that is so blatantly false that the courts are willing to adopt the contrary fact as being the indisputable truth, means that any false statement reaching that level of disbelief is easily disproved. Unlike statements of opinion, which have some room for argument, blatantly false statements that are readily disprovable should offer very little opposition to the correct belief. In fact, the most basic precepts of democracy rely on individuals at the most minimal level to be able to follow logical arguments and make appropriate decisions. Legislating against the expression of false facts seems to be overkill, since it has the danger of freezing out legitimate speech in order to prevent something that poses less of a threat than the expression of radical opinion, because false facts have the inherent weakness of being untrue.

## 5.2 American market place of ideas v. European balancing approach

Europe and America have come to represent the two sides of this argument. America tends to emphasize the rights of individuals to express their opinions, even though they may be considered to be shocking or repulsive by the community, and to believe that the government has little right to interfere with or judge those opinions. On the other hand, Europe tends to believe that the rights of individual speakers must be balanced against equal or sometimes greater respect for the rights of communities and other individuals. While this may only be a matter of the different weight given to individual versus community rights, the result may be substantially different.

American jurisprudence has generally taken the position that the government should not interfere with the dissemination of ideas whether true or false or make a judgment as to

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<sup>78</sup> I.e. companies engaged in animal testing, or religious groups, to fit with the above example.



their validity or utility. In the specific case of Holocaust denial, America does not have the same proximity to the atrocities committed during World War II as Europe and, particularly those countries in which they were committed. However, America as a country does have its own checkered past. America has chosen to deal with that past, and groups that might wish to reinvent the past, differently than Europe. Slavery, segregation and blatant racism have long played a troubling role in America. Despite this, America has not limited speech regarding racism, or groups, such as the Ku Klux Klan, that espouse racist views:

As is well-known, American First Amendment doctrine protects incitement to racial hatred, Holocaust denial, and other forms of hate speech widely criminalised in the rest of the world, and explicitly excluded from free expression principles in numerous human rights documents.<sup>79</sup>

The US Supreme Court has considered the permissible limits on hate speech in two cases involving cross burnings. Cross burning has a very sorted place in America's segregationist past since it was used by the Klu Klux Klan to intimidate blacks. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), held that the city ordinance was unconstitutionally overbroad because it reached protected as well as unprotected speech. *R.A.V.* stands for the proposition that even unprotected speech cannot be discriminated against.

Professor Weinstein states:

*R.A.V.* teaches two lessons. The first is that the prohibition against viewpoint discrimination is so central to the framework of American free speech doctrine that it applies not just to public discourse and other forms of protected speech, but also to speech beyond the scope of First Amendment protection. The second lesson—and the one particularly relevant to the question of the constitutionality of hate speech laws—is that the basic First Amendment precept that '[t]here is an "equality of status in the field of ideas"' extends to the expression of racist ideas, including 'virulent notions of racial supremacy'. Thus under the First Amendment, The most offensive expression of racist ideology is on an equal footing with arguments for or against higher taxes, the legality of abortion, or the legitimacy of the war in Iraq.<sup>80</sup>

In *Virginia v. Black*, 538 US 343 (2003), found that a Virginia statute against cross burning was unconstitutional, but that cross burning done with an attempt to intimidate can be limited because such expression has a long and pernicious history as a signal of

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<sup>79</sup> Schauer, Federick; "Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture" (February 2005). KSG Working Paper No. RWP05-019

<sup>80</sup> Weinstein, op. cit.. 86

impending violence. In reconciling the holding of the two cases, Justice O'Connor stated:

A ban on cross burning carried out with the intent to intimidate is fully consistent with this Court's holding in *R. A. V.* Contrary to the Virginia Supreme Court's ruling, *R. A. V.* did not hold that the First Amendment prohibits all forms of content-based discrimination within a proscribable area of speech. Rather, the Court specifically stated that a particular type of content discrimination does not violate the First Amendment when the basis for it consists entirely of the very reason its entire class of speech is proscribable. 505 U. S., at 388. For example, it is permissible to prohibit only that obscenity that is most patently offensive in its prurience--i.e., that which involves the most lascivious displays of sexual activity. *Ibid.* Similarly, Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R. A. V.*, the Virginia statute does not single out for opprobrium only that speech directed toward "one of the specified disfavored topics." *Id.*, at 391. It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political affiliation, union membership, or homosexuality." *Ibid.* Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. Pp. 14-17.<sup>81</sup>

The US Supreme Court's limitations on cross burning are narrow and are not meant to limit speech not aimed directly at intimidation. As the Court stated, in holding that Virginia's statute was overbroad:

It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings. As Gerald Gunther has stated, "The lesson I have drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot's hateful ideas with all my power, yet at the same time challenging any community's attempt to suppress hateful ideas by force of law." Casper, Gerry, 55 *Stan. L. Rev.* 647, 649 (2002) (internal quotation marks omitted). The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.<sup>82</sup>

By contrast Europe has taken a more restrictive view of permissible speech. A case in England demonstrates the difference in outlook. England, though a common law country, generally has lesser protections of speech than the US, though it goes farther to protect speech in some areas than much of continental Europe. The case of *Hammond*

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<sup>81</sup> *Virginia v. Black et al.*, 538 U.S. 343 366-367 (2003)

<sup>82</sup> *ibid.*

v. *DPP*, [2004] EWHC 69 (Admin), illustrates how the state does not mind taking sides. In this case Hammond a preacher was protesting against homosexuality.

The justices ruled that that the statements on his sign, were ‘insulting’ and ‘caused distress to persons who were present’. In their view ‘there was a pressing social need’ for the restriction on Hammond’s expression because Hammond’s message implied that the gay and lesbian communities were immoral and because ‘there is a need to show tolerance towards all sections of society’.<sup>83</sup>

The balancing between rights in Europe can further be seen in the judgment of the Spanish Constitutional court.

[N]either ideological freedom (art. 16 SC) nor freedom of expression (art.20.1 SC) includes the right to makes statements, expressions or campaigns of a racist or xenophobic nature, since as art. 20.4 states, there are no unlimited rights and this is contrary, not only to the right to honour of the person or persons directly affected, but to other constitutional rights, such as that of human dignity (art. 10 SC), which both public authorities and citizens themselves are required to respect in accordance with the terms of arts. 9 and 10 of the Constitution. Dignity as a rank of category of the person as such from which the right to honour derives and is promulgated (art. 18.1 SC.), does not admit any discrimination on grounds of birth, race or sex, opinions or beliefs. Hatred and disrespect of a whole people or ethnic group (of any people or any ethnic group) are incompatible with respect for human dignity, which can only be fulfilled it is attributed equally to all mankind, to all ethnic groups and people. Therefore, the right to honour of members of a people or ethnic group in so far as it protects and expresses the feeling of dignity itself, is unquestionably infringed when a whole people or race are generically offended and derided, irrespective of who they are. Thus the expressions and claims made by the respondent also ignore the effective validity of the higher values of the system, specifically that of the value of equality contained in art.1.1 de la Constitution, in relation to art. 14 of the same, and so they cannot be considered to be constitutionally legitimate. In this respect, and even when, as has been reiterated, the constitutional requirement of objective veracity does not operate as a restriction to the scope of ideological freedoms and freedom of expression, such rights do not in any case, guarantee the right to express and disseminate a specific comprehension of history or perception of the world with the deliberate intention, in doing so of despising and discriminating persons or groups of people on the basis of any personal, ethnic or social condition or circumstance, as this would be tantamount to admitting that due to the mere fact of making an argument in a more or less historical discourse, the Constitution permits the violation of one of the higher values of the legal system, namely equality (art. 1.1 S.C.) and one of the foundations of the political order and of social peace, that is, the dignity of persons (art. 10.1 SC.)<sup>84</sup>

This reasoning clearly shows a different view from the American First Amendment protections.

Interestingly, in this case, the Spanish Constitutional Court held while a law making it illegal to deny the Holocaust was unconstitutional, it could be illegal for a person to justify the Holocaust, showing that the court extended greater protection to false

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<sup>83</sup> Weinstein, James; “Extreme Speech, Public Order, and Democracy: Lessons from the Masses” found in *Extreme Speech and Democracy* (2009) p. 31

<sup>84</sup> Spanish Constitutional Court Judgment No. 214/1991, of November 11

statements (denial of the Holocaust) than it did to opinions (that justified the Holocaust):

[I]t is constitutionally legitimate to punish as crimes conduct which, even when it is not clearly seen to be directly inciting the perpetration of crimes against the rights of peoples, such as genocide, it does presuppose an indirect incitement to do so, or provokes in some way discrimination, hatred or violence, which is precisely what in constitutional terms is permitted by the establishing the category of public justification of genocide (art. 607.2 PC). This comprehension of public justification of genocide, always with the customary caution for respect regarding the content of ideological freedom, in that includes the proclamation of personal ideas or political stance, or adherence to those of others, permits the proportional penal intervention of the State as the ultimate solution for defending protected public fundamental rights and freedoms, whose direct affectation excludes conduct justifying genocide from the scope of protection of the fundamental right to freedom of expression (art. 20.1SC) so that, interpreted in this sense, the punitive regulation does, on this point, conform to the Constitution.<sup>85</sup>

It is arguable that opinions expressing extreme views represent a greater danger for societies than false statements, since there is no way to absolutely disprove the validity of an opinion. Facts can be disproven, though there is often enough looseness of play in facts as well to create at least some question of truth, but opinions can often be purely subjective. This means that a state in regulating speech needs to make subjective claims on truth. This of course is extremely problematic for people who constitute the minority in a society. Since the majority can dictate the norms accepted within a society, those ideas that fall outside of those norms can be subjected to prosecution based on ideas that might be legitimate.

The aforementioned English case of *Hammond v. DPP, supra*, shows the dangers of such subjective regulation of ideas. Not only does this case demonstrate the limitations and the deference that will be paid to the larger community when weighing the worth of speech, it also illustrates some of the evils that not protecting speakers' rights can have. While Hammond merely expressed his views on a socially relevant issue, he was assaulted by the crowd, arrested, tried and convicted.

His core speech right was first violated by the failure of the police to protect him from physical assault, then compounded by his arrest, trial and conviction for doing no more than expressing, in fairly innocuous terms, a dissenting view about the 'organization and culture of society'. There can be no denying Hammond's speech was on a matter of public concern. The morality of homosexual activity is a topic that has obvious relevance to current social policy matters... Nor can there be any doubt that Hammond was expressing his views in a setting dedicated to public discourse—the pedestrian area of a town square where speakers evidently are free to express their views on issues of

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<sup>85</sup> *ibid.*

the day. It would appear, then, that Hammond's speech lies at the heart of the expression that must be allowed in any free and democratic society.<sup>86</sup>

This case<sup>87</sup> shows that opinion that is merely unpopular can be silenced.

Allowing a state to place a monopoly on truth creates problems with people whose views do not fall within that bracket. Clearly like in the *Hammond* case, many people might believe homosexuality to be wrong, as it is often a tenet of many religions. While racism and bigotry are almost universally thought of as false, the state still cannot claim to have absolute certainty about this issue.

US Supreme Court Justice Sandra Day O'Connor wrote about the issues involved in the government regulating opinion and defending the rigidity of First Amendment protections, as follows:

But though our rule has flaws, it has substantial merit as well. It is a rule, in an area where fairly precise rules are better than more discretionary and more subjective balancing tests. On a theoretical level, it reflects important insights into the meaning of the free speech principle—for instance, that content-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate[...]. On a practical level, it has in application generally led to seemingly sensible results. And, perhaps most importantly, no better alternative has yet come to light<sup>88</sup>

The idea of balancing an individual's right to speak versus the needs of the community always has the profound flaw of subjectivity. It is almost impossible to create a clear and uniform standard between permitted speech and prohibited speech. This ambiguity hurts all members of democracies in that it will cause even permitted speech to be silenced because of fear of prosecution. One of the fundamental requirements of legislation is that it clearly state what is permitted and what is proscribed, so that one may adjust his conduct accordingly. Legislation prohibiting certain types of speech often are defective in this regard.

### 5.3 Memory laws constitute legislated orthodoxy

Holocaust denial and hate speech laws constitute legislated orthodoxy: they state that one view is permitted and the other is not allowed. Such legislation forces an individual

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<sup>86</sup> Weinstein, op. cit. p. 32

<sup>87</sup> Which was upheld by the ECHR as being within the discretion of the state.

<sup>88</sup> *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994).

to accept the orthodox position decreed by the state and prohibits him from expressing his own contrary opinion. Such a position is anathema to a democracy.

The US Supreme Court took up the issue of legislated orthodoxy in the cases of *West Virginia State Board of Education by Barnette*, 319 U.S. 624 (1943) and *Wooley v. Maynard*, 430 U.S. 705 (1977). Both cases involved Jehovah's Witnesses, but were decided on the basis of freedom of speech, not freedom of religion. *Barnette* held that a state statute that required children in public school to participate in saying the Pledge of Allegiance to the flag of the United States or face the threat of expulsion from school was unconstitutional. In *Wooley*, the Supreme Court reversed the misdemeanor conviction of a man for covering up the state slogan "Live free or die" on his automobile license plate. In both cases, the Supreme Court ruled that states cannot "coerce uniformity of sentiment" and went on to state in *Wooley*:

Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life - indeed constantly while his automobile is in public view - to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."<sup>89</sup>

Memory laws that criminalize the expression of dissenting views raise many serious questions, both legal and ethical about the role of society, which make their application difficult.

[T]he criminal offense of negationism raises the question of the relationship between ethical-social and legal-criminal norms and the need to distinguish the border between ethics and law. This risk appears to take place precisely in those situation where, among the ensemble of infinite interpretations of historical facts (and of historical schools), the state elevates one interpretation to the level of criminal protection, and consequently promotes it as the one official, unique interpretation. Therefore, the assessment of the trial judge rests not so much on the reconstruction of the facts but rather on the interpretation of those facts. What is judged, in other words, is the denial, minimization, or justification of those events. Even when an interpretation is generally accepted, the criminal law should not protect that interpretation, nor should it punish assertions that question it. In such a situation, the law essentially protects an ideology.<sup>90</sup>

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<sup>89</sup> *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)

<sup>90</sup> Fronza, Emanuela; "The Punishment of Negationsim: The Difficult Dialogue Between Law and Memory" *Vermont Law Review* Volume 30 Number 3, Spring 2006, accessed last May 6, 2010 at <http://lawreview.vermontlaw.edu/articles/v30/3/fronza.pdf>

Subjugating individual beliefs to the beliefs of the community to this extent runs the danger of creating an oppressive society as bad as that which it attempts to guard against. Ian Cram in his book “Contested Words”, quotes Burt Neuborne, to the effect that coerced communities

... use force to impose a false façade of unity, a process that has very often resulted in procrustean abuse and tyranny, without materially advancing the values of caring and humanity that make true community worth striving for.<sup>91</sup>

One need not look far for this in history. Contemporaneously, France is engaged in a debate over the use of religious dress and is contemplating a complete ban of the niqab<sup>92</sup>, which has clear implications for the rights of individuals versus the rights of the community.

Censorship based upon the claim of the good of the community often leads to abuses of its own in denying legitimate individual rights. It is improper to merely look at the atrocities committed by the Nazis and ignore the atrocities which have been committed by other groups by the imposition of communitarian beliefs upon individuals (e.g., the Inquisition and forced assimilation of minority groups). Any coerced imposition of a society’s ideas, whether it be Holocaust denial or restrictions on ethnic or religious groups sets a dangerous precedent that may lead to further limitations that threaten democracy itself. History has shown that trust in the good intentions of the leaders of government is often misplaced.

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<sup>91</sup> Cram, Ian; “Contested Words” Ashgate Publishing 2006 p.137

<sup>92</sup> See: “France Moves Ahead With Islamic-Veil Ban” in the Wall Street Journal accessed on May 8, 2010 at <http://online.wsj.com/article/SB10001424052748704133804575197670616862724.html>

## 6 Chapter 6: Problems in applying the balancing approach

The application of the balancing approach has many problems that are not present in the American rigid, bright line approach of protecting individual expression of opinion.

### 6.1 Inconsistent court decisions

The balancing approach adopted generally in Europe has a fundamental weakness, compared with the market place of ideas that the United States uses, in that it is almost impossible to have consistent court rulings when it comes to such a nuanced approach. This balancing approach is especially difficult to apply in changing times, and is especially ill-suited for Europe, which is dealing with the problem of assimilating new and heterogeneous minority groups at this time. This is evident when one contrasts the treatment of the Danish cartoons (though the cartoons were reprinted in so many different countries that it became a pan European problem) with the treatment of films which offended Christian sensibilities.

The ECHR upheld two cases of blasphemy in the 1990s, both of which involved banning films that could be considered offensive to Christians, *Otto Preminger Institut v. Austria*<sup>93</sup> and *Wingrove v. UK*<sup>94</sup>. While these blasphemy laws were used to protect Christian sensibilities, they were not applied to protect Muslims offended by the Danish cartoons. When these cartoons were republished in France, Muslim organizations called without success for them to be banned.

The court (French Court) concluded that:

Although the character of the caricature may be shocking, even insulting, to Muslim sensitivities, the context and the circumstances of its population in the paper Charlie Hebdo arose independently of any deliberate intention to directly

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<sup>93</sup> *Otto Preminger Institut v. Austria*, Application # 13470/87 (1994)

<sup>94</sup> *Wingrove v. The United Kingdom* (19/1995/525/611) (1996)



and gratuitously offend people of the Muslim faith; that the acceptable limits of freedom of expression have not, therefore, been exceeded.<sup>95</sup>

After the Danish cartoon scandal, there has been a general move to end blasphemy laws. While some European states have liberalized laws against blasphemy, they have not liberalized laws dealing with hatred. The blasphemy cases and the Danish cartoon case illustrate some of the problems inherent in applying laws restricting free speech.

There is the danger that the courts will make arbitrary distinctions in applying the laws to protect some favored groups while subjecting other groups to abuse. There is only an arbitrary distinction between hatred and blasphemy; in fact the lines can be so blurred that there can be little distinction between the two. Now, with the changing demographics of Europe as a result of the inflow of immigrants, religion has gone beyond merely characterizing belief systems and started to define peoples.

While it can reasonably be argued that allowing Holocaust denial as speech does not serve any public good other than bringing issues to the forefront, the same can be said in the Danish cartoon case. The Danish cartoons depicted, among other things, Mohammad with a turban on his head resembling a bomb. This was not only offensive to Muslims because of the association of Mohammad with violence, but the very act of drawing Mohammad was offensive. It cannot be argued that this was a nuanced criticism of Islam, with the legitimate purpose of fostering genuine debate. Even though these images were clearly offensive to Muslims, the response to them was not at all like the response to Holocaust denial. While the images were universally renounced, the concept of freedom of expression was lauded and their publication was argued to be a necessary part of a free press.

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<sup>95</sup> Mbongo, Pascal; "Hate Speech, Extreme Speech, and Collective Defamation in French Law" found in *Extreme Speech and Democracy* (2009) p. 231, and p. 232.

The Muslim community attempted, without success to have blasphemy laws used against the people involved. One Muslim group pointed to an obvious double standard: if they had chosen to depict Judaism and Jews in a derogatory light that would be illegal activity in certain countries, while these cartoons, which held Islam and its adherents up to scorn and ridicule were not illegal. Denmark which has no law against Holocaust denial refused to print cartoons denying the Holocaust, while a smaller paper in Denmark did, but only depicting less offensive images submitted. This double standard violates one of the basic tenets of equality before the law. Given the fact that judges are usually members of the dominant groups in society, it is difficult for courts to apply the law in an even-handed manner.

## 6.2 Lack of clear and objective standards

The balancing approach has the inherent problem of subjectivity. Any time a court is required to balance competing interests, it must assign weights to various factors and the weights assigned are almost always based upon subjective criteria. The problem with not establishing clear and objective standards for people to follow is illustrated by the following quote:

As an example from recent years dealing with religious abuse and defamation, we may cite the criminal proceedings taken against the writer Michel Houellebecq for the following remarks taken from an interview granted by the latter to a literary magazine: '[A]fter all, the stupidest religion is Islam. When you read the Koran you're appalled (...) appalled'. The writer was nevertheless acquitted. The Giniewski case is no less remarkable in terms of the difficulty of the task faced by the judiciary. This case concerned an article published in a journal in 1994 that was very critical towards Pope John-Paul II's encyclical *The Splendour of the Truth* (*Veritatis Splendor*, 1993). The author of the article, Paul Giniewski, a writer, historian, and theologian, was prosecuted for religious defamation damaging to Catholics because of certain passages in his, article, and in particular, the following:

The Catholic Church institutes itself as the sole guardian of divine truth... It loudly proclaims the fulfilment of the Old Covenant in the New, the superiority of the latter... Many Christians have recognized that scriptural anti-Judaism and the doctrine of "fulfilment" of the Old Covenant in the New led to anti-Semitism and prepared the ground in which the idea of implementation of Auschwitz took seed.

Giniewski was initially convicted for the article. His conviction was later annulled before a court of appeal, the ruling of which then annulled by the Court of Cassation. A new court of appeal was charged with judging the case and

convicted the author for religious defamation. The case was brought before the ECtHR, who concluded that France's conviction of Giniewski constituted a violation of freedom of expression.<sup>96</sup>

While the ECtHR overturned his conviction, the evidence of religious sympathies can clearly be seen, as Giniewski was convicted by national courts for using fairly benign language.

French law continues to demonstrate one of the weaknesses in the balancing approach, because the great judicial discretion involved leads to unequal outcomes.

French criminal law theoretically accords all religions with the same protection against abuse or defamation. This equality is not, however, confirmed in reality, in that the majority of trials (and therefore the majority of convictions) concern speech directed towards Christianity (and almost exclusively towards Catholicism) and Islam. Many explanations exist for this situation:... the fact that judges apprehend speech directed towards Jews under the category of racial, rather than religious, abuse and defamation (denigrating public speeches directed towards Judaism as a doctrinal corpus are virtually non-existent in France)<sup>97</sup>

This characterization has led to its own problems:

The Dieudonné case also deserves mention as an illustration of the random nature of trials for racial abuse defamation. 'Black' (or rather mixed-race) professional comedian and political activist Dieudonné M'Bala had given an interview with a Lyons newspaper during the 2002 presidential elections in which he wished to be a candidate. To the question '[W]hat do you think of the rising anti-Semitism amongst young 'beurs' (North-Africans born in France)?' he replied:

Racism was invented by Abraham. 'The Chosen People', that's the beginning of racism. Muslims today are retaliating tit for tat. For me, Jews and Muslims, it doesn't exist. So anti-Semitism doesn't exist, because Jews don't exist. These two notions are just as stupid as each other. No one is Jewish or else everyone is. I don't understand any of it. In my opinion, Jewish, it's a sect, a scam. It's one of the most serious ones because it was the first. Some Muslims take the same route by reviving concepts like 'the Holy War'...

The court of appeal acquitted Dieudonné by stating that 'returned to their original context, the terms "Jewish, it's a sect, a scam" is rooted in a theoretical debate on the influence of religions and does not constitute an attack on the Jewish community as human community'. For its part, the Court of Cassation (bearing in mind that it does not cite the activist in the same way) argued that 'the affirmation "Jewish, it's a sect, a scam" It's one of the most serious ones because it was the first.' Is not grounded in the free criticism of a religious fact contributing to a debate of general interest, but constitutes abuse that targets a group of people on the grounds of its origin. The suppression of this abuse is

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<sup>96</sup> *ibid* p. 231

<sup>97</sup> *ibid* p. 233

therefore a necessary abridgement of freedom of expression in a democratic society'.<sup>98</sup>

### 6.3 Difficulty in determining who is guilty

The case of *Jersild v. Denmark*<sup>99</sup>, shows another problem of applying the Holocaust laws: how do you decide which participants in the dissemination of prohibited views are criminally liable? Jersild was a journalist who conducted a television interview with members of a Neo-Nazi organization, who made derogatory statements about immigrants and ethnic groups during the interview. The interview was edited and shown on television. The members of the group making the statements were convicted of disseminating racial remarks and the reporter was convicted of aiding and abetting the dissemination of such ideas by the national court. The ECHR cleared the reporter of disseminating racist views, based on the finding that the report was intended for an educated audience and not meant to champion them. "Thus although the journalist was protected in *Jersild*, the ECtHR was clear that the individual members of the extremist group interviewed by him were properly convicted of the dissemination of racist insults".<sup>100</sup>

Similarly, Catholic Archbishop Williamson was recently convicted in Germany of making remarks denying the Holocaust in a television interview with Swedish Television.<sup>101</sup> During the interview, Williamson stated that "he did not believe than any Jews were killed in gas chambers during World War" and that "he did not believe the consensus among historians that six million Jews were killed by the Nazis."<sup>102</sup> The interview took place in Germany, but the Archbishop was assured that the interview would be broadcast only in Sweden, where such views were legal. The television

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<sup>98</sup> *ibid* p. 234

<sup>99</sup> *Jersild v. Denmark* (Application no. 15890/89) (1994) ECHR

<sup>100</sup> Hare, Ivan, "Extreme Speech Under International and Regional Human Rights Standards" found in *Extreme Speech and Democracy* (2009) P. 73

<sup>101</sup> See: Christian Law Journal. "Catholic Bishop Convicted of Holocaust Denial", [www.christianlawjournal.com/featured-articles/catholic-bishop-convicted-of-holocaust-denial/](http://www.christianlawjournal.com/featured-articles/catholic-bishop-convicted-of-holocaust-denial/) Lasted accessed on May 3, 2010.

<sup>102</sup> Citations from interview in *ibid*.

interview was not broadcast in Germany; however, it was available on the internet in Germany. The person making the statements was fined, but the interviewer who conducted the interview was not charged with any crime.

#### 6.4 Difficulty in determining what is prohibited Holocaust denial or hate speech

The changing nature of Holocaust denial has also presented a challenge to the courts. In recent years, Holocaust denial has started to take on the guise of scientific debate. With the changing of Holocaust denial, and its pretense to become more “pseudo-scientific” it has dropped much of the blatant anti-Semitism and on the face of it does not seek to interfere with the rights of anyone. Attempts to disguise Holocaust denial as legitimate historical debate has hampered attempts to prevent it:

[M]ore subtle and legally aware Holocaust deniers do not generally even identify the targets of their ideological politics in a direct fashion. Instead, they cloak themselves in the garb of academic inquiry and the search for historical accuracy and truth. Their underlying, but central, anti-Semitism is generally articulated in vague, coded terms understandable and understood by their closed circle of adherents. Traditional criminal law categories, like incitement of conspiracy, are difficult if not impossible to apply in such cases. A legally knowledgeable Holocaust denier has little difficulty in writing of ‘Zionists’ and ‘Marxists,’ or of ‘survivors’ in scare quotes or in asserting that ‘our traditional enemies’ are behind the claims that the Holocaust occurred. While direct semiotic attacks on ‘Jews’ for example will easily and uncontroversially fall afoul of most non-American legal regimes aimed at prohibiting racial, religious, and ethnic hate speech, more subtle encodings may prove more difficult to regulate.<sup>103</sup>

The problem that this gives rise to is demonstrated in the “Auschwitz myth” case<sup>104</sup> where two defendants published a paper called the “Auschwitz-myth”. In the “Auschwitz myth” case (*NJW* (1995): 1038), German Judge Kob found the defendants not guilty for the following reasons:

Goertz and Siefert accepted the Holocaust as a historical fact and by the term “Auschwitz-myth” had not intended to deny the Holocaust. Kob conceded that some in right-wing circles used the phrase to escape punishment for Holocaust denial, but this usage did not inhere in the term itself. The German word *Mythos* (“myth”) was “ambiguous.” *Der Spiegel* Had used the term “Auschwitz-myth” without raising suspicions. Given this, Kob was compelled by the principle in *dubio pro reo* (“in doubt for the defense”) to acquit the two defendants.

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<sup>103</sup> Fraser, David; “On the Internet, Nobody Knows You’re a Nazi’: Some Comparative Legal Aspects of Holocaust Denial on the WWW” found in *Extreme Speech and Democracy* p. 518)

<sup>104</sup> *NJW* (1995): 1038 (Administrative Court (*Amtsgericht*) Hamburg, February 3, 1995

The public debate turned on the plausibility of Kob's interpretation of "Mythos." The *Süddeutsche Zeitung* noted that the Duden foreign-word dictionary listed three definitions of the term: "an epic, poem or story handed down from the prehistory of a people," "a glorified person, thing or event, which has a legendary character," or "a fairytale." Critics expressed disbelief at Kob's interpretation of Mythos. Ignatz Bubis put it bluntly: "They wanted with the word 'myth' to express clearly the comparable word 'lie,'" Michael Friedman saw another example of the "inability" of German law "to understand the violence which hides just in words."<sup>105</sup>

The changing of Holocaust denial to fit within permitted bounds in the legal framework of countries that regulate such speech, undermines the basic argument for outlawing it in the first place. Often the court can be placed in the awkward position of being unable to adequately judge whether the speech is prohibited or not. While the mere difficulty of prosecution is not a philosophical reason for allowing such speech, it does go to the practical nature of enforcing such laws. In fact defendants in trials like this can face a win, win situation: if they lose they can easily be seen as martyrs for their causes and if they are acquitted, they can claim the State tacitly approves their speech. The cause of people being prosecuted often receives more publicity, especially if the people being prosecuted claim that they are the victim of a conspiracy, than if they were simply ignored.

It also begs the question that if people are not advocating hurting others or advocating the taking of others rights,<sup>106</sup> people have the right to collective identity and the right to self-determination which their speech would be necessary for them to realize these rights.

## 6.5 Questionable effectiveness of Holocaust denial and hate speech laws

For all the arguments for and against Holocaust denial and hate speech, and whether it should be protected or prohibited, there are practical aspects to the debate that are often overlooked. First, are bans on hate speech effective in limiting the spread of racism, xenophobia and anti-Semitism? And, even beyond the problem of whether such laws are effective, there are the practical problems of enforcing such bans.

There is no empirical proof that bans on hate speech are effective in preventing racism, xenophobia or anti-Semitism. While philosophical talk of whether hate speech has any value is an interesting debate, the moral justification for the imposition of often lengthy

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<sup>105</sup> Kahn, Robert; "Holocaust Denial and the Law: A Comparative Study", Palgrave MacMullan 2004 p. 79

<sup>106</sup> This is true at least in law since motives cannot be inferred without evidence upon which to base the inferences.

prison sentences should rest on more than fear of a possible social changes; proof should be required of actual tangible affects. This of course is a difficult concept to quantify, and it would be impossible on the micro level: how could one measure how offended someone was? But on a macro level, there should be some evidence of a danger posed to the state which will be prevented by the law. The difficult problem of providing empirical evidence is stated below:

Germany's experience with Nazism is often noted in explaining their current prohibitions on hate speech but it is less clear that this history shows that these prohibitions are *now* needed. Historical accounts might find that racist hate speech prominent in periods leading up to the genocide. But that finding would clearly not be enough. It would not show whether this speech was causal or merely symptomatic, maybe even usefully symptomatic (in exposing a problem that needed to be dealt with), of deeper underlying forces. And it would not show whether, even if causal in that historical context, it would be so under different historical conditions—for example, the conditions that exist in modern democracies. Moreover, even if historically causal and potentially causal again, racist speech takes many forms and occurs in many contexts. Thus, the account would need to show, in addition, that the specific hate speech that proposed legal regulations would effectively prevent was at least a contributing cause of virulent racist or genocidal practices.<sup>107</sup>

One argument that has been made is that hate speech deters participation of people in the political sphere.

By regulating such speech [hate speech], the state sends a message to blacks or gays that their participation is welcome.

There are certainly some practical problems with that view. It makes a causal assumption that hate speech deters participation in public discourse, yet its proponents have never undertaken or cited serious empirical research to show that, in longstanding, stable, and prosperous democracies any such causal relationship exists (as opposed to societies such as Rwanda or the former Yugoslavia, where undeveloped public discourse could indeed lead to mass atrocities), no more than it has been shown that violence in the media breeds systemic social violence. And it is questionable whether speech should be penalized on grounds of a wholly speculative causal link. In other words, there is no evidence that these aims of social inclusion are in fact promoted through hate speech bans.<sup>108</sup>

Absent a clear causal link between hate speech and undesirable affects on society, there seems to be little justification for bans on hate speech other than communitarian or judicial dislike of such comments.

[H]ate speech regulation is distinctive in that it seeks to repress speech merely because it has 'the tendency' to produce violence or disorder. Law that seeks to suppress speech

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<sup>107</sup> Baker, Edwin; "Autonomy and Hate Speech" found in *Extreme Speech and Democracy* (2009), p. 146 and 147

<sup>108</sup> Heinze, Eric; "Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech" found in *Extreme Speech and Democracy* (2009) p. 197

with this 'tendency' is in reality law that seeks to suppress violations of essential social norms.

If we were truly serious about prohibiting speech that might cause actual racial or ethnic or national violence, we would proscribe much more than what is currently classified as hate speech. We would proscribe all manner of cinema, novels, and popular entertainment. That hate speech regulation does not reach anywhere near so far suggests that sociologically speaking, hate speech regulation is most essentially about suppressing speech that violates civility norms. We may tell a story about the connection between hate speech and violence, but the actual shape of the law suggests that we are instead using law to enforce norms of propriety in sensitive areas like race, nationality, and ethnicity. Even the branch of hate speech regulation that purports to turn on objective and empirical facts, like the causation of discrimination or violence, turns out on closer inspection to participate in the venerable tradition of using law to enforce essential community norms.<sup>109</sup>

Even if one accepted that there was a clear causal link between hate speech and violence or fostering an environment that was conducive to a situation where genocide or crimes against humanity could be committed, one would still have to prove that hate speech regulation was effective in preventing such a situation. Though, as the above quote points out, if that link were clear, violence in movies, TV shows, books and magazines would, and should be greatly curtailed because it would be causing a great number of social ills.<sup>110</sup> While it is a sign of societal health that racist views are not accepted, the lack of evidence to suggest that merely hearing those views creates racism belies the argument for such legislation.

Since there is no clear empirical evidence showing a link between extreme speech and these social ills, the question becomes: Is hate speech legislation legitimate and what is its effect? Some commentators say that it only makes the problem worse by publicizing their views.

Michael Whine's chapter in this volume [Extreme Speech and Democracy], and Fraser's as well, show that bans on Holocaust denial have by no means proved either effective or desirable as means of combating Holocaust denial. Prosecutions for

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<sup>109</sup> Post, Robert; "Hate Speech" found in Extreme Speech and Democracy (2009) p. 136

<sup>110</sup> Kathleen Mahoney (as cited by Kahn, Robert Holocaust Denial and the Law: A Comparative Study Palgrave MacMullan 2004 on p. 136) argues that proving the media's effect on women was:

[...] like trying to prove that alcohol causes traffic deaths[...] The links are suggestive but none of them are dispositive. The liberal requirement to prove 'clear and present danger' ignores these realities and analytically predetermines the issue...

There are only subjective differences between the promotion of violence on television or in music and hate speech. The effect of both are hard to prove, but there is no justification in treating them differently. If speech demeaning other people is harmful, then all of it should be outlawed.



Holocaust denial are precisely what nourish it: high profile trials engender sensational media attention, lending quasi-credibility to Holocaust deniers, which, in turn, contrary to the aims of the bans, actively encourages ongoing doubts about the existence or gravity of the Nazi extermination programmes. No American Holocaust deniers have attained anything like the stature of Robert Faurisson in France, or indeed David Irving throughout much of Europe. To the contrary, the absence of bans and the consequent absence of prosecutions in the US leave such figures consigned to the obscurity they deserve.<sup>111</sup>

In the absence of evidence that Holocaust denial produces a negative effect and absent the clear determination that Holocaust denial legislation is an effective means of combating such negative effects, the only legitimate reason justifying Holocaust denial laws would be the psychological damage it does to people that hear it. Generally, this is not enough to justify such criminal limitations. Furthermore, the group that would be most traumatized by such speech is declining:

Jews did suffer as the principal victims of Nazi ideology and practice. The trauma which does surround denial for many members of various Jewish communities must not be dismissed or diminished. But soon the biological reality of historical experience will take its final toll. There will be no more survivors[...] In the near future, these systems will be forced to recognize a kind of communitarian, idealized second, and third generation traumatization in order to justify further legal interventions. That too must suffer serious, if not fatal, epistemological (not to mention slippery slope) difficulties.<sup>112</sup>

With all these reasons dismissed, hate speech regulation of Holocaust denial seems to fail most obviously on pragmatic grounds.

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<sup>111</sup> Heinze op. cit. p. 199

<sup>112</sup> Fraser, David; "On the Internet, Nobody Knows You're a Nazi": Some Comparative Legal Aspects of Holocaust Denial on the WWW" found in *Extreme Speech and Democracy* p. 537

## 7 Chapter 7: Reasons for protecting extreme and unpopular speech

There are several reasons why extreme and unpopular speech should be protected in order to further other interests of society.

### 7.1 Freedom of speech is a component of the right to self-determination

Article 1 of the ICCPR establishes the right to self-determination as a pre-eminent group right. However, Article 1 needs to be interpreted within Article 5 of the Covenant, which is similar to Article 17 in the ECHR. Article 5 states that none of the rights given can be used to undermine the rights of others. These articles are seemingly contradictory and when read together seem to prohibit the very political speech which is clearly a necessary element of the right to self-determination.

The view of Dr. Robert Post, Dean of Yale Law School and a prominent writer and lecturer on Constitutional law and freedom of speech,<sup>113</sup> that racist speech should be immune from regulation within the public arena, is criticized by Professor Steven Heyman of Chicago-Kent School of Law as follows:

Post contends that 'racist speech is and ought to be immune from regulation within public discourse'. '[T]he value of self-determination,' he writes, 'requires that public discourse be open to the opinions of all.' 'If the state were to forbid the expression of a particular idea, heteronomous nondemocratic.' This would violate the fundamental principle that (in the words of John Rawls) citizens should be treated "'in ways consistent with their being viewed as free and equal persons.'" [...]

The problem with Post's argument is that it fails to come to terms with the distinctive nature of hate speech. Because hate speech denies recognition to other citizens, it is plainly incompatible with Piaget's description of democracy as founded on 'the mutual respect of autonomous wills,' as well as with Post's 'image of independent citizens deliberating together to form public opinion'. Hate speech disrespects the autonomy of others and refuses to deliberate with them. In these ways, it tends to undermine rather than promote the formation of a genuinely common will.<sup>114</sup>

While the argument against Post's claim is true with respect to speech intended to intimidate or incite violence, it does not seem valid with regard to the expression of such views in the context of normal political discourse. Such a rule would seem to prevent one segment of society from advocating the advancement of their political rights in any way which diminished the rights of others, even through legally permissible means. If one has the right to self-determination, it then follows that one

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<sup>113</sup> See: <http://www.law.yale.edu/faculty/RPost.htm>

<sup>114</sup> Heyman, Steven; "Hate Speech, Public Discourse, and the First Amendment" found in *Extreme Speech and Democracy* p. 171 and 172

must be allowed to advocate greater representation or other forms of government. A strict interpretation of such a rule would mean that the status quo could never be changed, even through legal means, since inevitably the rights of others would be affected.

## 7.2 Permitting extreme and unpopular speech may produce a stronger society

The argument in favor of laws prohibiting Holocaust denial and other hate speech is that they protect society from the expression of extreme right wing views which are associated with the rise of National Socialism and the atrocities committed by the Nazis before and during World War II. It is thought that there is little social value in letting people express such abhorrent views.<sup>115</sup> Why would one tolerate such speech when Germany and Europe have fears of the re-emergence of extreme ideologies such as fascism and the dangers it might represent to the whole of Europe?

These restrictions on speech are seen to be beneficial to society by limiting the influence of potentially dangerous ideologies, but the opposite might just as well be true. One argument for allowing such speech which was advanced on a philosophical level by John Stuart Mills in his treatise "On Liberty" is that laws regulating speech can leave the population defenseless against these pernicious ideas since they have never really had to confront them in a way that made them defend their ideas. Mills stated:

[E]ven if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but, fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience.<sup>116</sup>

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<sup>115</sup> The argument has been advanced that racist ideologies have been so thoroughly discredited that governments can legislate against them as they have already been rejected as valid or useful ideologies. (See: Linda Smiddy's article "An Essay on Professor Fronza's Paper: Should Holocaust Denial Be Criminalized?") The same lessons from history can also be drawn from censorship, and the imposition state sponsored orthodoxies. If one is to use history as a guide the principles of the enlightenment have served societies well. While racist ideologies have been the scourge of many societies, it is equally true to say that government imposed beliefs have been the same. One cannot use history to prove one consideration, and then ignore it when it disproves the proposed solution.

<sup>116</sup> Mill, John Stuart "On Liberty" (1869) Chapter II para. 43 accessed on May 06, 2010 at <http://www.bartleby.com/130/2.html>

Some democracies justify the protection of extreme speech in that exposure to vigorous debate of even the most obnoxious views results in a stronger society that is more resistant to such extreme views and, therefore, more able to rationally determine their own form of society and government. Suppression of such ideologies merely drives them underground where they can fester, undetected for years before emerging in new and more virulent forms.<sup>117</sup> People who experienced the Holocaust know National Socialism for what it is, but that generation is dying off. A new generation that has not been exposed to such extreme ideologies and has not been subject to the necessity to discuss and debate them, may not be as well prepared to deal with the re-emergence of such ideologies. Simply accepting that National Socialism is bad, because you have been told that it is, produces a weaker belief than if you have examined the subject yourself and come to your own conclusions. It is as if, when you are inoculated with the virus of extreme thought, you form an immunity to it<sup>118</sup>. When people are confronted with disagreeable ideas, they can educate themselves and be better informed than if they had never come in contact with them. Many people believe that many that by allowing full and free discussion of the most heinous beliefs, the people of a society become better equipped to make good decisions about how their society and government should be organized.

Furthermore, open discussion permits the pressure of such movements to be vented over time under favorable conditions when society is strong enough to deal with them, rather than erupting violently at time when the society has been weakened by other political or

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<sup>117</sup> See *Jersild* case above and the case of Archbishop Williamson. It is not because these views are illegal that people no longer believe them. It is because they are patently false. Prohibition merely makes it impossible to debate them in an open way. It does nothing to refute them or to persuade believers that they are false. At best, prohibition keeps the ideas from reaching a larger audience, but even this may be unlikely given the publicity given to most Holocaust denial trials.

<sup>118</sup> This is similar to the "vaccination theory" of free speech where extreme speech provokes a counter response. See "Making Holocaust Denial a Crime" by Peter Teachout, Examples are counter protests to Klu Klux Klan rallies which are often far larger than the rallies themselves. It also should be noted that when confronted with ideas, people can educate themselves and become better informed than if they had never come in contact with contradictory ideas.

economic events. If Germany had had a history of free and open political discussion, instead of just having emerged from a monarchy under the Kaiser which restricted political debate and democratic institutions, the German people might have been better prepared to withstand the false appeal of National Socialism. The economic collapse of the German economy following World War I also weakened ability of the German people to properly assess the issues, since a desperate society is more likely to turn to extreme means to alleviate its situation and even given such extreme circumstances, there is no evidence of speech being the cause, rather than merely a symptom.

## 8 Chapter 8: Conclusion

Holocaust denial is clearly repugnant speech and something which society would surely benefit from being free from, at least in its most virulent form, but there is a great price which society must pay in order to be free from such speech. Freedom of speech is an essential part of democracy and requires people to be tolerant of the opinions of others even if those people whose opinions are not tolerant of others.

Noam Chomsky, a prominent liberal writer and scholar, wrote in a letter defending Robert Faurisson, a notorious Holocaust denier. In his letter, Chomsky wrote “it is a truism, hardly deserving discussion, that the defense of the right of free expression is not restricted to ideas one approves of, and that it is precisely in the case of ideas found most offensive that these rights must be most vigorously defended. Advocacy of the right to express ideas that are generally approved is, quite obviously, a matter of no significance.”<sup>119</sup>

Much time has passed since the commission of the atrocities associated with the Holocaust and there is little evidence of the ill effects of Holocaust denial. The fact that there have been no serious attempts to revive National Socialist ideology during this long period clearly undermines the argument that Holocaust denial legislation is necessary and legitimate in present day Europe. The courts have been uneven in their application of hate legislation. Courts tend to be conservative and, as guardians of the *status quo*, their role as protectors of the prevailing social norms constitutes a clear threat to the fundamental rights of new minority groups. The courts have few criteria upon which to justify excluding some speech from protection while protecting other speech, other than the fact that they find it offensive and unpalatable. By preventing speech that is not within acceptable social norms, the society is deprived of the vibrant interplay of ideas that are necessary for the functioning of a society.

Europe has instituted programs to educate people on the atrocities of the Holocaust. This is clearly appropriate since everyone with an interest in humanity should have a

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<sup>119</sup> Chomsky, Noam; “Some Elementary Comments on The Rights of Freedom of Expression” Appeared as a Preface to Robert Faurisson, *Mémoire en défense*, October 11, 1980 accessed on May 6, 2010, at <http://www.chomsky.info/articles/19801011.htm>

clear understanding of the atrocities which occurred. However, legislation which outlaws speech that denies even the occurrence of factual events has not been shown to equip a society to prevent the rise of hatred or bigotry. The social value of such works of revisionism should be determined through education by means of open discussion outside the courtroom, since judicial sanctions against publication of ideas would clearly have a tremendous “chilling effect” on scholarly work. Gordon A. Craig, a prominent scholar of German history and a professor of history at Princeton and Stanford Universities, wrote in the *New York Review of Books* that one of David Irving’s books was “the best study we have of the German side of the Second World War” and he contended that it was “indispensable” in studying that period.<sup>120</sup> David Irving is a notorious Holocaust denier.<sup>121</sup> The fact that at least some very reputable academics think that there might be merit in some of these works seems to indicate that the debate should take place among historians and not before judges.

The defendants in most landmark decisions upholding freedom of speech have been reprehensible people who have said extremely offensive things. That is the battleground on which freedom of speech is fought. People who express socially acceptable ideas that no one finds objectionable do not challenge the prevailing beliefs of a society. Those who express generally accepted ideas are not prosecuted. It is in the area of expression of extreme or unpopular ideas that the right of freedom of speech is defined. Protection of those who express unpopular ideas strengthens the protection for everyone. While speech that everyone agrees with does have some value in a democratic society in expressing the common values that hold a society together, it does not lead people to question their basic assumptions about the world. The value of dissenting ideas is that they enable people to think about and test the validity of the common assumptions upon which a society is based. This makes for a stronger and more vibrant society, since its beliefs have been tested in open debate against other alternatives.

While fear of a repeat of the Holocaust is clearly something that is legitimate, the lack of any clear link between Holocaust denial and a future repetition of such an event

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<sup>120</sup> D. D. Guttenplan, *Is a Holocaust Skeptic Fit to Be a Historian?*, N.Y. TIMES, June 26, 1999

<sup>121</sup> See the English High Court ruling in the David Irving libel suit, reported in *The Guardian* (April 11, 2000).

leaves grave questions as to whether such prohibitions can be justified. The fame and notoriety afforded to people who are tried on charges of Holocaust denial and hate speech can easily lead one to the conclusion that such laws actually promote, rather than prevent, the spread of extreme viewpoints. Also, blaming the propagation of hate speech as the sole or determinative cause of the atrocities committed during World War II, would be a flawed interpretation of history, since many causes contributed to the horrible extermination of a defenseless people.

The American system of dealing with speech seems to provide adequate protection to people and society without unnecessarily limiting the rights of individuals. It would seem that tolerance is the great lesson that should be learned from the atrocities of World War II, and that book burning itself may have as negative effect on respect for human rights as tolerating false and repugnant speech.



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