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The conflict between Holocaust denial and freedom of speech

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1 Introduction

1.1 Thesis scope and objective

The objective of this thesis will be an analysis of the conflict between Holocaust denial and freedom of speech, an conflict which occurs necessarily when one disseminates hate speech that violates the rights of others and threatens public order and claims that such expressions are protected by the right to freedom of speech. Freedom of speech is a fundamental human right but one of the most disputed concerns in liberal societies. Every society worldwide limits the exercise of the right to freedom of speech to a certain level. Therefore, it should be emphasized that freedom of speech can never be an absolute right as it always takes place in a context of competing values.¹ In this regard, international law declares that speech limitations have to be necessary, lawful and to follow a legitimate aim to protect the rights of others or the democratic order.²

However, as freedom of speech is one of the most fundamental human rights, the justification requirements on limitations are high and concern legal, moral and political issues. On these grounds, the research question that this thesis aims to decide is not as much whether freedom of speech should be limited than if free speech restrictions on account of Holocaust denial meet this high justification requirements as set by international human rights law as well as by domestic law of democratic states. Important to mention is that Holocaust denial legislation was since its emergence during the second part of the 20th century frequently object to changes and that early forms of such legislation differ from recent versions. For this reasons, within the scope of the thesis will be to determine whether Holocaust denial legislation in its earlier form met the justifications requirements in the area of international and domestic law, politics, and concerning philosophical questions, and if the same can be observed regarding recent developments of Holocaust denial legislation. To identify these justification requirements, international legal standards will be analyzed as well as essential political and philosophical arguments concerning the right to freedom of speech and its limitation. In addition, as the topic of the thesis concerns in specific Holocaust denial, the Holocaust and its denial will be part of a detailed analysis.

The importance of the research is given through the fact that the approach that societies establish to meet the challenge of Holocaust denial is fundamental for any democracy, as restrictions on freedom of speech always as well limit democracy itself. Regarding this in mind, the question is as well if the persecution of Holocaust deniers serves or harms the interests of democracy.

¹ See David van Mill, "Freedom of Speech", *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, <https://plato.stanford.edu/archives/win2017/entries/freedom-speech/> [last modified Winter 2017].

² See UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Article 19, <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 20 March 2018].

1.2 Methodology

The thesis will be based on an interdisciplinary approach that combines legal and philosophical analyses. On the one hand, the legal approach will analyze European and North American domestic law as well as international human rights law to determine the conflict between Holocaust denial legislation and the right to freedom of speech. Central research material will include court rulings, treaties, and legal journals. On the other hand, the philosophical approach analyzes the concept of freedom of speech, determines the justification requirements for speech limitations and critically examines the validity of arguments that aim to justify Holocaust denial legislation. Additionally, fundamental questions regarding antisemitism and hate speech will form part of the philosophical analysis. Research material will encompass philosophical texts, articles and the analysis of particular philosophical debates.

Furthermore, as the topic concerns Holocaust denial, historical and political background information will be analyzed to support the line of argumentation. In particular, this will include an analysis of historical factors concerning the Holocaust and political factors concerning the Holocaust denial movement. The research material concerning these components will include academic publications, newspaper articles, Internet sources, films and documentaries, as well as material provided by Holocaust museums and Holocaust research centers from Budapest, Jerusalem, Krakow, Riga, Berlin, Mexico City, Oslo, and from former concentration camps like Auschwitz, Mittelbau-Dora, and Buchenwald.

Moreover, as the Holocaust was committed by Nazi Germany in Europe, special attention to the past and present situation of Germany will be paid as well as to the situation of Holocaust denial in the European Union, which includes an analysis of historical and political factors, but also, in particular, of recent legal developments. Additionally, some results will be compared to the North American legal approach regarding Holocaust denial, mainly to the United States and Canada, as well as to the political situation in the Middle East concerning for example states like Israel and Iran, whenever such comparisons support the analysis of the thesis objective.

On a side note, it should be mentioned that some resources concerning Holocaust denial material were not directly accessed as such material is unlawful in Germany and not available through the Internet. Anyhow, a direct analysis of Holocaust denial material was not necessary due to the high amount of secondary literature by academic scholars that provided profound analyses of the nature and scope of this material.

1.3 Outline

The development of the line of argumentation starts with chapter 2 which provides important historical and political background information on the Holocaust, antisemitism and Holocaust

denial. Afterward, in chapter 3, the concept of freedom of speech will be philosophically analyzed, the justification requirements for its limitation discussed, and the validity of arguments that aim to justify Holocaust denial legislation critically examined. Chapter 4, 5 and 6 entail analyses of domestic law and court rulings to illustrate the existing Holocaust denial legislation. Chapter 7 references in particular to international human rights law, with a special focus on the European Court of Human Rights. Subsequently, chapter 8 critically analyzes very recent legal and political developments in the European Union that are connected to Holocaust denial and chapter 9 criticizes the general effectiveness of Holocaust denial legislation. Ultimately, chapter 10 establishes a final assessment of the political dimensions of recent developments concerning Holocaust denial.

1.4 Declaration of research ethics

To prevent misunderstandings, I would like to emphasize that at no point of this thesis the existence of the Holocaust as a historical fact will be an object of scrutiny. This ethical statement shall prevent possible abuse of the research for any form of denialism by third persons with extremist or antisemitic aims.³

³ See The National Committee for Research Ethics in the Social Sciences and the Humanities (NESH), “Guidelines for Research Ethics in the Social Sciences, Humanities, Law and Theology”, *Norwegian National Research Ethics Committees*, <https://www.etikkom.no/en/ethical-guidelines-for-research/guidelines-for-research-ethics-in-the-social-sciences--humanities-law-and-theology/> [last modified 28 June 2015].

2 Holocaust denial

This chapter will provide important background information concerning the Holocaust, antisemitism, and Holocaust denial in order to set the foundations for the development of the line of argumentation.

2.1 Historic overview: Holocaust

The term Holocaust refers to genocide through the killing of approximate 6 million European Jews between 1941 and 1945. In particular, the Holocaust is defined by the singular nature of the systematic, administrative mass murder committed by Nazi Germany and its collaborators to exterminate the European Jews and other groups, of which major parts of the German and European population were killed due to the intent to destroy these groups, such as political opponents, homosexuals, Jehovah's Witnesses, Poles, Romani, Soviet prisoners of war, and persons with mental or physical disabilities.

Furthermore, political theorist Hannah Arendt described the nature of the crimes that were executed during the Holocaust in her report of the 1961 Eichmann trials in Jerusalem as crimes which were targeting Jews, but which beyond that have to be determined as attacks on humanity itself.⁴ She argues that the Holocaust poses a threat to all humanity due to its singular nature as a crime against humanity and justifies this by stating that to plan to exterminate the European Jews means to aspire to eliminate a certain part of humanity, which damages the diversity of all humankind.⁵ This argument is strengthened by the fact that the first use of gas chambers in Nazi Germany were part of the Nazi *Aktion T4* plan which involved the mass murder of persons with mental or physical disabilities due to reasons of racial hygiene, a racist belief system that was part of the Nazi's totalitarian ideology which aimed to transform the human being by eliminating certain aspects of the humaneness.⁶ Later, the same gasification techniques were used to mass murder the European Jews.⁷ Therefore, the crimes of the Holocaust are not war crimes but crimes against humanity as defined by the International Military Tribunal at Nuremberg (IMT)⁸, not only as they lack any military necessity for the means of warfare and are targeting the civilian population, but as well as they constitute crimes which target the human status of the victims itself.⁹

⁴ See Hannah Arendt, *Eichmann in Jerusalem. Ein Bericht von der Banalität des Bösen* (München: Piper Verlag, 2007), 399-400.

⁵ See *ibid.*, 391.

⁶ See *ibid.*, 195-198.

⁷ See *ibid.*, 198.

⁸ See Yale Law School, *Charter of the International Military Tribunal*, 8 August 1945, Article 6, <http://avalon.law.yale.edu/imt/imtconst.asp> [accessed 20 March 2018].

⁹ See Arendt, *Eichmann in Jerusalem*, 391.

2.2 Historic overview: Antisemitism

Antisemitism is defined as the hostility or discrimination against Jews as religious or racial group.¹⁰ Furthermore, antisemitic hostility is often expressed through fundamental contempt and convictions such as that Jews should not be as they are, but ought to be different.¹¹ In this sense, antisemitism falls together with the rejection of Jews due to the belief that certain disregarded features form their Jewish identity. At the same time, this rejection is often accompanied by conceptions of how Jews ought to be in order to gain acceptance.¹²

Examples of correspondences from the Central Council of Jews in Germany (Zentralrat der Juden in Deutschland) will illustrate this point further. The *Zentralrat* annually receives many letters and e-mails from individuals that criticize the State of Israel's politics.¹³ Some of these authors refer to themselves as worried and well-intentioned citizens and formulate their objections in an objective manner which addresses the Israeli government or Israelis in general.¹⁴ However, certain forms of antisemitism are inherent to the disagreeing expressions of these citizens.¹⁵

“Dear ladies and gentlemen, as long as you not understand that your terror [...] cannot lead to any understanding or agreement, as long will you be deservedly despised by people with humanist ideals. [Translation from original quote: Guten Tag, solange Sie nicht begreifen, dass Ihr Terror [...] keine Verständigung herbeiführen kann, solange werden Sie zu Recht von humanistisch geprägten Menschen verachtet.]”¹⁶

“Is there really nobody within the community of Jews in Germany that is wise, self-critical, fair and demonstrates human compassion? [Translation from original quote: “Gibt es tatsächlich innerhalb der Gemeinschaft der Juden in Deutschland keine weisen, selbstkritischen und menschlich gerecht empfindenden Mitmenschen?”]¹⁷

The above-described definition for antisemitism can be applied on the expressions of the author: the expressions are hostile and discriminatory as they are formulated against Jews in

¹⁰ See Michael Berenbaum, “Anti-Semitism”, *Encyclopædia Britannica*, 26 April 2018, <https://www.britannica.com/topic/anti-Semitism> [accessed 9 May 2018].

¹¹ See Monika Schwarz-Friesel, „Dies ist kein Hassbrief – sondern meine eigene Meinung über Euch! – Zur kognitiven und emotionalen Basis der aktuellen antisemitischen Hassrede“, *Hassrede/Hate Speech. Interdisziplinäre Beiträge zu einer aktuellen Diskussion*, edited by Jörg Meibauer (Gießen: Gießener Elektronische Bibliothek, 2013): 161-162.

¹² See Evyatar Friesel, “Juden-Hass gestern und heute: Ein historischer Blick auf 130 Jahre judeophobische Feindseligkeit”, *Hassrede/Hate Speech. Interdisziplinäre Beiträge zu einer aktuellen Diskussion*, edited by Jörg Meibauer (Gießen: Gießener Elektronische Bibliothek, 2013): 25.

¹³ See Schwarz-Friesel, „Dies ist kein Hassbrief”, 150.

¹⁴ See *ibid.*, 154-155.

¹⁵ See *ibid.*, 155.

¹⁶ *Ibid.*, 156.

¹⁷ *Ibid.*, 155.

general, propagate hate and show contempt against Jews based on certain features which rejection is accompanied by conceptions of how Jews ought to be in order to gain acceptance.

All in all, the Holocaust originated from a centuries-old unbroken tradition of European antisemitism, which manifestation in Germany is determined by the emergence of the Nationalist Socialist German Workers' Party (NSDAP) and the establishment of a totalitarian, fascist regime which political agenda included the plan to exterminate the European Jews during the Second World War. Indeed, "The Final Solution to the Jewish Question", as the Nazi Party named the plan to mass murder the European Jews, was the most terrible disaster that Jews had to endure in modern history and constitutes a denial of their right to existence. Therefore, it shall be argued that Holocaust denial is inherently antisemitic because any denial or trivialization of the Holocaust is an attack on Jews, because the remembrance of the crimes of the Holocaust are of high individual, historical and political importance for Jews.¹⁸ This does not only concern Holocaust survivors who were directly affected by the Holocaust, but all Jews, as the Holocaust is the most terrible disaster of modern Jewish history and strongly determines collective but as well individual Jewish identity.¹⁹ Therefore, as antisemitism is inherent to Holocaust denial, every form of Holocaust denial, as well the pseudo-scientific camouflaged revisionism, is antisemitic hate speech. Furthermore, the same can be said concerning the effects of Holocaust denial on other affected groups.

2.3 Holocaust denial

The Holocaust was since it occurred exposed to denial. During the execution of the Holocaust, the Nazis referred to the Holocaust only by codewords within an ideological reference system. Furthermore, during the end of the Second World War, Nazi Germany attempted to eliminate the evidence of their crimes by destroying governmental documents and by demolishing the mass destruction facilities in the death camps (like gas chambers or crematories), before the Allies could gain control over them.²⁰

In the most general form, Holocaust denial means to deny that crimes against humanity were committed by Nazi Germany during the Holocaust. By far, Holocaust denial is a complex phenomenon and a variety of expressions can fall under Holocaust denial which do not necessarily deny only the mere existence of the Holocaust. Also, expressions that trivialize the Holocaust by reducing the extent of crimes that were executed or that compare the Holocaust to other crimes in order to relativize them or attempt to rehabilitate the responsible persons,

¹⁸ See Catriona McKinnon, "Should We Tolerate Holocaust Denial?", *Res Publica* 13 (2007): 18, doi: 10.1007/s11158-006-9013-8.

¹⁹ See *ibid.*, 18.

²⁰ See Andrew Altman, "Freedom of Expression and Human Rights Law: The Case of Holocaust Denial", *Speech and Harm: Controversies Over Free Speech*, edited by Ishani Maitra and Mary Kate McGowan (Oxford: Oxford University Press, 2012): 28, doi: 10.1093/acprof:oso/9780199236282.003.0002.

account as Holocaust denial.²¹ Following, I will define the mere denial of the Holocaust as simple Holocaust denial and separate it from more complex Holocaust denial expressions that contain additionally elements.²² These additional elements can be normative in form of judgments or descriptive in form of factual claims.

The following examples of common Holocaust denial expressions will illustrate the point further:

[1.] That the Nazis did not use gas chambers to murder millions of Jews.

[2.] That most of those who died at concentration camps such as Auschwitz succumbed to diseases such as typhus rather than execution.

[3.] That although crimes may have been committed against the Jews, the Nazi leadership was unaware of the nature and extent of those crimes.

[4.] That it is a gross exaggeration to say six million Jews were killed.

[5.] That trumped-up atrocities against the Jews were used cynically to generate political support for the expropriation of Palestinian land to create a Jewish homeland.

[6.] 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.

[7.] That academics are afraid to speak the truth about these matters for fear of being charged with anti-Semitism.”²³

Regarding the examples, expression [1.] in particular denies that the Nazis used gas chambers to mass murder Jews, whereas [2.] denies that most of those who died at concentration camps were murdered and claims that they died from diseases. Both examples can be interpreted as trivializing the Holocaust by reducing the extent of crimes and attempting as well to rehabilitate the responsible criminals (so as [3.] and [4.]). Expression [5.] is an attack on the State of Israel and [6.] relativizes the Holocaust by comparing it to other events. Example [7.], which claims the existence of a general environment of fear which impedes academics to speak the truth about the Holocaust due to possible sanctions, can be regarded as an example that illustrates a common conviction among Holocaust deniers.

²¹ See Martin Imbleau, "Denial of the Holocaust, Genocide, and Crimes Against Humanity: A Comparative Overview of Ad Hoc Statutes", *Genocide Denials and the Law*, edited by Ludovic Hennebel and Thomas Hochmann (Oxford: Oxford University Press, 2011): 237, doi: 10.1093/acprof:oso/9780199738922.003.0008.

²² See Robert A. Kahn, "Holocaust Denial and Hate Speech", *Genocide Denials and the Law*, edited by Ludovic Hennebel and Thomas Hochmann (Oxford: Oxford University Press, 2011): 78-79, doi: 10.1093/acprof:oso/9780199738922.003.0008.

²³ Peter R. Teachout, "Making Holocaust Denial a Crime: Reflections on European Anti-Negationist Laws from the Perspective of U.S. Constitutional Experience", *Vermont Law Review* 30 (2006): 663.

All of these expressions have a rather complex structure. An additional example of simple Holocaust denial would be: The Holocaust does not exist. Furthermore, often is Holocaust denial accompanied by normative judgments. An example would be: The Holocaust does not exist, it is a hoax, myth or swindle. Additionally, sometimes the antisemitism that motivates Holocaust denial become more obvious when normative judgments are assigned to Jews. For example: The Holocaust is a Jewish hoax to support Zionism. Such arguments are often considered as part of conspiracy theories that regard Jews as responsible for numerous events worldwide.²⁴

Still, Holocaust denial can reach more sophisticated forms and challenge for example the first official records of the crimes of the Holocaust which were established by bodies such as the IMT.²⁵ For example, one common claim is that the IMT could not establish historical truth as it was bound to the Allies interest in persecuting the crimes of the National Socialist Regime. However, supporters of this claim will face difficulties in proving that the Allies interest in the persecution of crimes would by any means diminish the credibility and authenticity of the empirical evidence that the IMT achieved to collect in order to lead the proceedings.

2.4 Holocaust deniers

Holocaust deniers reject the term denier and self-describe themselves as revisionists.²⁶ However, Holocaust deniers can clearly be differentiated from historical revisionists, as they are not motivated by the goal of historical inquiry rather than by antisemitism and racism, defined as hostility and discrimination that target the groups and persons that are affected by the Holocaust, and/ or by antidemocratic ambitions and political extremism through political ideologies such as Nazism and Fascism. Moreover, Holocaust deniers are not using established scientific methodologies, ignore evidence in form of remains from mass destruction facilities in the death camps, archival material in form of governmental documents and written orders by the Nazi regime that proves Nazi atrocities, detailed lists of victims and lists concerning the logistics of train deportations, films and technical documentations, and accounts of eyewitnesses of Holocaust survivors, Nazi perpetrators and third persons.²⁷ Furthermore, the main difference between historical revisionists and Holocaust deniers is that deniers challenge the central aspects of the Holocaust which are clearly established and proved through countless amounts of empirical evidence, whereas historical revisionists focus their research on areas where the evidence is incomplete or ambiguous such as for example Hitler's role in the Holocaust, Jewish responses to persecution, or reactions by third persons inside and outside of Nazi-occupied Europe.²⁸ All in all, Holocaust deniers commitment to

²⁴ See Altman, "Freedom of Expression", 29.

²⁵ See Imbleau, "Denial of the Holocaust", 238.

²⁶ See Kenneth Lasson, "Defending Truth: Legal and Psychological Aspects of Holocaust Denial", *Current Psychology* 26 (2007): 227.

²⁷ See *ibid.*, 227-223.

²⁸ See Teachout, "Making Holocaust Denial a Crime", 664.

certain ideologies leads them to disrespect empirical data and to shape their findings to support their claims, even by fabricating evidence.²⁹

The claim that certain ideologies shape the findings of Holocaust deniers is valid, but, in general, such objectives could be raised to a certain amount as well against academics.³⁰ Nevertheless, the crucial point is the particular nature of the ideology that motivates and is the aim of Holocaust deniers, not so much that they are determined by an ideology at all.³¹ This particular ideology varies from denier towards denier but there exist certain common elements. When one regards the limited scope of the denial (which never opposes that the Second World War or certain battles happened, but always the Holocaust and, in particular, denies facts concerning victims and perpetrators), it shall be argued that their ideology is antisemitic, driven by racial hatred and, at least in some cases, pursues as well antidemocratic and political extremist aims.³² Further details that regard political factors concerning the Holocaust denial movement will be discussed in chapter 9 and 10. Moreover, as deniers antisemitic and racist conclusions precede their research and analyses, it can be argued that their aim is not to gain scientific insights or to contribute towards the state of knowledge but to eradicate the awareness of the truth. One reason for this conduct is that the established truth prevents the resurgence of past criminal ideologies and that Holocaust deniers attempt to rehabilitate the regimes that were responsible in order to clear the way for political ideologies like Nazism or Fascism.³³ All in all, Holocaust denial, and any other form of denialism of large-scale and state-sponsored human rights violations is anti-democratic and has to be determined as an element of dangerous political extremism.³⁴

Furthermore, in particular the pseudo-scientific camouflage in which the most sophisticated forms of Holocaust denial appear, are the most dangerous to the general public as they could generate the conviction that the existence of the Holocaust is a matter of opinion rather than of fact and strengthen the willingness to antisemitism, racism, Nazism and Fascism of an unaware public. For example, the American Institute for Historical Review (IHR) publicizes Holocaust denial propaganda through its *Journal of Historical Review* (JHR) according to common conventions of academic style and claims to be a non-ideological, non-political and non-sectarian public interest research, educational and publishing center to promote greater public awareness about events of twentieth-century history that are still of social-political relevance today.³⁵ However, the IHR is not promoting greater public awareness about history but on the contrary aims to destroy knowledge by eliminating the awareness of the truth regarding historical facts like the Holocaust. Furthermore, the facts that IHR founder Willis

²⁹ See *ibid.*, 664.

³⁰ See *ibid.*, 665.

³¹ See *ibid.*, 665.

³² See Lasson, "Defending Truth", 243.

³³ See Imbleau, "Denial of the Holocaust", 238.

³⁴ See *ibid.*, 238.

³⁵ See McKinnon, "Tolerate Holocaust Denial?", 22.

Carto has been an activist for extreme-right politics, that the former director, David McCalden, was responsible for a racist breakaway of the United Kingdom far-right party National Front, and that the actual director, Mark Weber, is connected to neo-Nazi groups in the United States contradicts the self-assertion of the IHR as being a non-ideological, non-political and non-sectarian public interest research, educational and publishing center.³⁶

Moreover, the case of British Holocaust denier David Irving, who publicizes in the JHR, will help to illustrate the point further.³⁷ David Irving wrote so far more than 30 books on Nazi Germany, its central figures and German perspective on the Second World War.³⁸ Although he lacks a former education in history, his books were published in major and respected presses in the 1960s and 70s.³⁹ Furthermore, respected historians had expressed the view that the work Irving has done with Nazi documents is valuable to understand German experience of the Second World War.⁴⁰ Notwithstanding, the same historians disregarded his disguised admiration of Nazi leadership and sometimes crude antisemitism.⁴¹ Nevertheless, David Irving's 1996 libel suit in front of the United Kingdom High Court of Justice against the US historian Deborah Lipstadt and the publisher Penguin Books proved the double-site nature of his "historical research".⁴² Irving had sued for defamation of his reputation after Lipstadt had remarked in her book "Denying the Holocaust: The Growing Assault on Truth and Memory", which was published by Penguin Books, that Irving had deliberately twisted evidence to support his ideological views.⁴³ During the trial, evidence introduced by Lipstadt's experts indicated that Irving had knowingly referred to fabricated documents in order to make certain claims.⁴⁴ Finally, judge Charles Gray ruled in favor of Lipstadt finding that the assertions from Lipstadt's book were essentially true.⁴⁵ The final ruling declares:

"[...] my conclusion [is] that Irving displays all the characteristics of a Holocaust denier. He repeatedly makes assertions about the Holocaust which are offensive to Jews in their terms and unsupported by or contrary to the historical record [...] Irving has for his own ideological reasons persistently and deliberately misrepresented and manipulated historical evidence; that for the same reasons he has portrayed Hitler in an unwarrantedly favourable light, principally in relation to his attitude towards and responsibility for the treatment of the Jews; that he is an active Holocaust denier; that he is anti-Semitic and racist and that he associates with right wing extremists who promote neo-Nazism."⁴⁶

³⁶ See *ibid.*, 22.

³⁷ See *ibid.*, 23.

³⁸ See *ibid.*, 11.

³⁹ See *ibid.*, 11.

⁴⁰ See Teachout, "Making Holocaust Denial a Crime", 666.

⁴¹ See *ibid.*, 666.

⁴² See *ibid.*, 666.

⁴³ See *ibid.*, 666.

⁴⁴ See *ibid.*, 666.

⁴⁵ See *ibid.*, 666.

Subsequent, in 2006, David Irving was sentenced to three years in prison in Austria for Holocaust denial.⁴⁷ In reaction, Deborah Lipstadt declared that although she abhors Irving's message she opposes his imprisonment as it could make him, in some eyes, seem like a hero of free speech and martyr to fellow deniers.⁴⁸ Indeed, Irving's conviction permitted him to claim that his Holocaust denial constitutes a free speech issue and allowed him the self-staging as fighting against oppression and state despotism based on his political views.⁴⁹

⁴⁶ Irving v. Penguin Books Limited and Deborah E. Lipstadt, 11 April 2000, EWHC QB 115, Paragraph 13.161-13.167.

⁴⁷ See Michael J. Bazyler, "Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism", *Yad Vashem: The International Institute for Holocaust Research*, 7, http://www.sissco.it/download/dossiers/istitutointernazionale_olocausto_2006.pdf [accessed 20 March 2018].

⁴⁸ See Bazyler, "Holocaust Denial Laws", 14.

⁴⁹ See Lasson, "Defending Truth", 243.

3 Freedom of speech

This chapter will philosophically analyze the concept of freedom of speech, determine the justification requirements for speech limitations, and critically examines the validity of arguments that aim to justify Holocaust denial legislation.

Voltaire, a prominent figure of the French Enlightenment, is often quoted to have said:⁵⁰

“I might disapprove of what you say, but I will defend to the death your right to say it.”⁵¹

This liberal worldview found much support among free speech advocates, in particular as well among those who argue that Holocaust denial should not be criminalized as such legislation restricts the right to freedom of speech.⁵² In this sense, the absolute right to freedom of speech is considered a necessary condition for democracy and a prerequisite for other fundamental rights such as the right to self-determination. Regarding this point, the High Court of Australia has found the protection of the right to freedom of speech as implied in the notion of democracy itself, as it reasoned that there is no way to be a democracy without the recognition of freedom of speech.⁵³ Furthermore, arguments that support this liberal position often oppose government control and restriction of speech by referencing to the First Amendment to the United States Constitution, a fundamental safeguard of the right to freedom of speech on behalf of democracy.⁵⁴ This First Amendment states that:

“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.”⁵⁵

All in all, one important libertarian defender of freedom of speech is British philosopher John Stuart Mill. In his 1859 treatise “On Liberty”, Mill argues that:

⁵⁰ On a side note: Simon Lee argues in “The Cost of Free Speech” that Voltaire never expressed himself in such a way and that Evelyn Beatrice Hall invented the expression later to summarize Voltaire's attitude.

⁵¹ See Winfried Brugger, “The Treatment of Hate Speech in German Constitutional Law (Part I)”, *German Law Journal* 4, no. 1 (2003): 1.

⁵² For example, Alan Dershowitz, Professor of Law at Harvard University Law School, defended this position during the conference “The Holocaust and Human Rights: The First International Conference”, which was held at Boston College Law School on April 17, 1986.

⁵³ See Christopher A. Sutherland, “A Critique of Holocaust Denial and Hate Speech Laws in Europe” (Master thesis, University of Oslo, 2010), 6.

⁵⁴ See Lasson, “Defending Truth”, 243-244.

⁵⁵ Cornell University Law School, *First Amendment to the United States Constitution*, archived from the original on 4 May 2013, https://www.law.cornell.edu/constitution/first_amendment [accessed 20 March 2018].

“If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.”⁵⁶

Mill justifies this statement by arguing that to exclude certain opinions from the possibility to be expressed means to suppress by authority an opinion which at least in principle might be true.⁵⁷ At the same time, whosoever suppresses a certain opinion because the person is sure that the opinion is false, assumes its infallibility since the person claims that its own certainty is the same thing as an absolute certainty which allows to decide the question for all by means of authority.⁵⁸ Moreover, Mill argues that to allow those to speak their opinion even if they are not shared among the majority is one of the best possibilities to defeat wrong opinions.⁵⁹ He brings forward the argument that if the opinion is wrong, all those who defend the truth will be able to disprove the erroneous opinion, and, thus, gain a clearer perception and livelier impression of the truth by its collision with non-truth.⁶⁰ On the other side, those who suppress opinions exclude others from the means of judging for themselves on the particular opinion. Furthermore, speech limitations can harm democracy, as freedom of speech is an essential right and necessary condition for the function and the maintenance of the public order of democratic systems, free speech restrictions always constitute as well limitations on democracy itself.

For this reasons, to create a free marketplace of ideas which is not restricted by governments who suppress certain opinions ensures the best conditions for exchanging ideas and to seek for truth.⁶¹ However, the concept of a free marketplace of ideas is standing and falling on the assumption of equality which has to be established among speakers in order to enable the free exchange of opinion. Thus, this assumption of equality is in certain contexts unconvincing, especially when discriminatory opinions in form of hate speech are exchanged between speakers. It seems in accordance with common sense convictions to doubt that persons who are harmed by hate speech expressions, even if these persons hold in principle the same equal position to participate in an exchange of opinions, are always able to make use of the right to freedom of speech and argue against those who are propagating hate.⁶² Therefore, under the circumstances of a hostile environment, it is likely that the harassing effects of hate speech expressions generate inequality and can silence persons who are harmed by them, especially if they might fear violent consequences for speaking up.⁶³ Therefore, it is important to

⁵⁶ John Stuart Mill, *On Liberty* (Kitchener: Batoche Books, 2001), 18.

⁵⁷ See *ibid.*, 19.

⁵⁸ See *ibid.*, 19.

⁵⁹ See *ibid.*, 19.

⁶⁰ See *ibid.*, 19.

⁶¹ See Gerald Tishler, “Freedom of Speech and Holocaust Denial”, *Cardozo Law Review* 8 (1987): 569.

⁶² See Doris Unger, “Kriterien zur Einschränkung von hate speech: Inhalt, Kosten oder Wertigkeit von Äußerungen?”, *Hassrede/Hate Speech. Interdisziplinäre Beiträge zu einer aktuellen Diskussion*, edited by Jörg Meibauer (Gießen: Gießener Elektronische Bibliothek, 2013): 265

⁶³ See Unger, “Einschränkung von hate speech”, 265

emphasize that freedom of speech can never be an absolute right and that in a context of competing values free speech limitations based on certain justified reasons are a necessary condition to ensure that fundamental human rights are effectively available for all.

3.1 Limitations based on incitement to physical violence

Mill himself argues that there are certain conditions under which freedom of speech should be the target of legal restrictions.⁶⁴ He argues that whenever a certain expression might lead to the immediate danger of physical harm, one shall be rejected of the right to freedom of speech.⁶⁵ This argument, subsequently named the harm principle, establishes the base for many forms of legislation concerning the limitation of freedom of speech where restrictions of free speech are based on the incitement to violence or hatred such as in Article 20 of the ICCPR.⁶⁶ Furthermore, the harm principle forms the base for many arguments that concern justification requirement for limitations on the right to freedom of speech. Mill gives an example for a case that illustrates which criteria determine the harm principle:

“An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.”⁶⁷

All in all, limitations on the right to freedom of speech has to be justified based on the harm principle in order to meet the justification requirements of free speech restrictions. However, where Mill apparently only regarded the dangers of an incitement to physical violence as a motivation factor strong enough to restrict free speech, many scholars shifted their attention to the psychological harm and the environmental costs that hate speech can cause.⁶⁸

3.2 Limitations based on psychological harm

The political and legal philosopher Joel Feinberg argues that, in general, offensive speech such as hate speech can cause offense to a present audience. However, he continues in its argumentation by stressing that offense cannot account as a form of psychological harm which is strong enough to meet the justification requirements for limitations on freedom of speech. He argues that:

⁶⁴ See Erik Bleich, “The Rise of Hate Speech and Hate Crime Laws in Liberal Democracies”, *Journal of Ethnic and Migration Studies* 37, no. 6 (2011): 917-918.

⁶⁵ See Mill, *On Liberty*, 52.

⁶⁶ See UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Article 20, <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 20 March 2018].

⁶⁷ Mill, *On Liberty*, 52.

⁶⁸ See Unger, “Einschränkung von hate speech”, 264.

“Not everything that we dislike or resent, and wish to avoid, is harmful to us [...] These experiences can distress, offend, or irritate us, without harming any of our interests. They come to us, are suffered for a time, and then go, leaving us as whole and undamaged as we were before. The unhappy mental states they produce are motley and diverse. They include unpleasant sensations (evil smells, grating noises), transitory disappointments and disillusionments, wounded pride, hurt feelings, aroused anger, shocked sensibility, alarm, disgust, frustration, impatient restlessness, acute boredom, irritation, embarrassment, feelings of guilt and shame, physical pain (at a readily tolerable level), bodily discomfort, and many more.”⁶⁹

However, it can be argued that whenever offensive speech reaches a certain profoundness, which is characterized through the level of disturbance that is caused through factors like that the offended have no possibilities to avoid the confrontation, that the persons have to endure such offenses repetitively, and that the offense implies threats, such speech does cause perseverative disturbance that should account as psychological harmful offense.⁷⁰

Nevertheless, besides the determination of the profoundness of psychologically harmful offense through hate speech, the question which has to be decided is if psychological harm, in general, can meet the justifications requirements that freedom of speech limitations demand. In this regard, free speech advocates argue that democratic citizens might have to be asked to endure the harmful effects of offensive speech like hate speech even if it can cause psychological harm. The analysis of critique as a form of speech shall illustrate this argument further. Critique is generally accepted in many societies even if critical speech can cause offense and, under the above-discussed conditions for profound offense, as well psychological harm.⁷¹ However, it is implausible that the fact alone that critique can cause psychological harm can be seen as an argument strong enough to legitimize speech restrictions on critical speech. Furthermore, even if the harm critique causes would be determined as strong enough to meet the justification requirements for free speech restrictions, a legal approach that criminalizes critical speech would dramatically limit the right to freedom of speech, endanger the democratic order and pose a threat to human rights in general. Therefore, the support of hate speech restrictions that are based on a harm principle that operates on the psychological level, bears the risk to set the foundations for further speech restrictions and even freedom of speech violations, because by the same arguments it could be justified that possible free speech regulations should not only restrict hate speech but as well various other kinds of speech which can cause psychological harm.

⁶⁹ Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (New York: Oxford University Press, 1987): 45, doi: 10.1093/0195046641.001.0001.

⁷⁰ See Unger, “Einschränkung von hate speech”, 274.

⁷¹ See *ibid.*, 271.

3.3 Limitations based on environmental costs

Another argument concerning freedom of speech restrictions in cases of hate speech is that such speech causes environmental costs. To be more precise, the argument is that hate speech causes social harm in the sense of that it is harmful to the society as it creates a hostile environment which can have grave long-term and short-term effects on society at large as well as on individual members. In this regard, it should be of interest to discuss the case of Julius Streicher, a notorious antisemite, hate speech propagandist, and the publisher of “Der Stürmer” from 1923 to 1945, which was an antisemitic weekly newspaper and main distribution platform for hate speech propaganda against Jews in Germany during that time. He was convicted during the IMT of having committed crimes against peace and crimes against humanity as he was responsible for creating an environment of hate which supported the perpetration of crimes that were committed against Jews in Nazi Germany, but as well in all of Europe during the Holocaust.⁷² In this sense, the environmental cost argument is that antisemitic hate speech propaganda had strengthened the acceptance, support and even participation in crimes that were committed during the Holocaust among the members of society.

A further example to illustrate environmental costs arguments concerning free speech restrictions is the failure of democracy in Germany during the Weimar Republic between 1919 and 1933. During the time of the Weimar Republic, the Nazi Party under Adolf Hitler was democratically elected. In general, hate speech propaganda together with certain determinants are often interpreted as having strengthened the support for right-wing extremism and Nazism in the general public which facilitated the rise of the Nazi part. In particular, these social and political determinants were:

[1.] Fragile democratic institutions.⁷³

[2.] A weak civil society.⁷⁴

[3.] Major economic difficulties since the First World War.

Under these conditions, hate speech propaganda could create a hostile environment which supported the Nazi rise and ended in the commitment of the Holocaust. Therefore, the Weimar Republic is often identified as an example of the failure of a democracy, which collapse perhaps might have been prevented if hate speech propaganda would have been criminalized. However, scholars like Robert A. Kahn argue that to interpret the experience of the Weimar Republic as a libertarian problem, in the sense that an abuse of freedom of speech by the Nazi

⁷² See Yale Law School, *Judgement: Streicher*, <http://avalon.law.yale.edu/imt/judstrei.asp> [accessed 20 March 2018].

⁷³ See Eric Heinze, “Viewpoint Absolutism and Hate Speech”, *The Modern Law Review* 69, no. 4 (2006): 548-549.

⁷⁴ See David Fraser, “Law’s Holocaust Denial. State, Memory, Legality”, *Genocide Denials and the Law*, edited by Ludovic Hennebel and Thomas Hochmann (Oxford: Oxford University Press, 2011): 17-18, doi: 10.1093/acprof:oso/9780199738922.003.0008.

party led to the abolishment of democracy, is mistaken.⁷⁵ In general, the Weimar Republic had a wide range of laws to protect the state against extremist speech and activities.⁷⁶ Hitler himself was tried, convicted and sentenced for treason during the Munich Beer Hall Putsch of 1923.⁷⁷ Accordingly, the failure of democracy during the Weimar Republic was not institutional and did not lay in the lack of laws that could protect the democratic order, but in the failure of a political elite which refused to make use of these laws to concern right-wing extremism and prevent the dangers of the Nazis' party rise. This "blindness on the right eye"⁷⁸ was partly based on the widespread belief among the politicians of the Weimar Republic to regard Communism as a more serious threat towards democracy and that measures to prevent the rise of Communism hold a higher priority.⁷⁹

3.4 Limitations based on political agendas

States worldwide limit freedom of speech based on particular political agendas, which justify these free speech restrictions based on different argumentations. Therefore, the important question at this point is to determine the arguments that justify these limitations on freedom of speech. The example of the political agenda of Germany serves to illustrate such arguments concerning Holocaust denial legislation.

The Federal Republic of Germany, subsequent to the experiences of Nazi Germany, developed the political agenda of a militant democracy, the *Wehrhafte Demokratie*. The idea which precedes a *Wehrhafte Demokratie* is that freedom, as enshrined in certain fundamental rights, can be abused in order to destabilize the democratic order, in particular by abusing freedom of speech.⁸⁰ Therefore, the framers of the Basic Law of the Federal Republic of Germany decided to transfer the government certain rights to protect the democratic order whenever this order is in danger.⁸¹ On these grounds, freedom of speech can be limited whenever certain expressions are interpreted as posing a threat to democracy. In present Germany, Holocaust denial has been determined as posing a threat to public order strong enough to justify the criminalization of such speech. In this regard, to deny the Holocaust has been interpreted as an attack on the foundation of the Federal Republic of Germany, because the remembrance of the Holocaust is of high importance to safeguard the establishment of a national political order which formation process is strongly determined by the experience of the Holocaust as committed by Nazi Germany and encompasses a conviction towards "no more fascism and no more Nazi rule" in the field of domestic politics, but as well due to foreign affair interests in the sense of

⁷⁵ See Robert A. Kahn, "Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany", *University of Detroit Mercy Law Review* 83 (2006): 183.

⁷⁶ See *ibid*, 183.

⁷⁷ See *ibid*, 183.

⁷⁸ See Kahn, "Holocaust Denial", 84.

⁷⁹ See Kahn, "Hate Speech Law", 184.

⁸⁰ See Brugger, "German Constitutional Law (Part I)", 5-6.

⁸¹ See *ibid.*, 6.

securing cross-national political stability.⁸² However, free speech advocates criticize such justifications that are based on the guardianship idea of the *Wehrhafte Demokratie*, which aims to protect democracy, as paternalistic interventions which are built on the assumption that the state knows better than the individual what is in its best interest.⁸³

To conclude, arguments that are based on political agendas and aim to justify free speech restrictions based on particular context-based determinants cannot claim general validity and hold at best hold temporary, exceptional validity which cannot in principle meet the high justifications requirements that limitations on freedom of speech demand. Furthermore, to support such arguments bears the risk to produce a slippery slope effect which ends in the justification of state despotism that undermines democratic values and sets the foundation for further human rights violations.

All in all, the double-sided nature of Holocaust denial, on the one hand, as a form of antisemitic hate speech, and, on the other hand, as an element of political extremism that is based on antidemocratic ideologies which pose a threat to democracy, raised crucial questions among states worldwide on how to concern Holocaust denial. Politically speaking, democracy establishes the foundation for human rights and without the former, the later could not exist. Accordingly, states human rights obligations demand them to limit freedom of speech in order to protect the democratic order in cases in which such limitation is necessary and provided by law. Therefore, states that consider Holocaust denial as a threat to the democratic order have to decide whether and in which form such speech should be criminalized. Harm principle arguments which determine environmental costs or the incitement to violence or hatred have been identified as justifying Holocaust denial legislation.

⁸² See *ibid.*, 184.

⁸³ See David van Mill, "Freedom of Speech", *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, <https://plato.stanford.edu/archives/win2017/entries/freedom-speech/> [last modified Winter 2017].

4 Holocaust denial legislation

This chapter will analyze the legal structure of Holocaust denial legislation. Therefore, it starts with discussing the main point of legal reference for Holocaust denial legislation, the International Military Tribunal at Nuremberg (IMT), held between 1945 and 1946.

The IMT is internationally recognized for having achieved to deal with the most fundamental crimes that were committed by Nazi Germany during the Holocaust. In this sense, the empirical data that was accumulated during the trials and which is based on documents and testimonies of witnesses and confessions of perpetrators, led to convictions and is since then an important source that provides evidence to prove that Holocaust denial is a factual lie. Besides that, many freedom of speech restrictions concerning Holocaust denial are based on explicit references towards the IMT. This allows national courts to avoid the necessity of qualifying facts and conclusions concerning the crimes that were committed during the Holocaust and allows states the establishment of legislations that are supported by references to an internationally recognized body. Therefore, Holocaust denial is often defined as equivalent to the denial of crimes determined by the IMT. For example, concerning Holocaust denial, Article 1 (d) of the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law from the Council of the European Union criminalizes the following:

“Publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group”⁸⁴

Furthermore, Holocaust denial is criminalized in domestic law and international law based on various different legal statutes. In this regard, most legal statutes can be either identified as ad hoc statutes which extraordinary criminalize Holocaust denial or as hate speech statutes which criminalize Holocaust denial as a form of antisemitic hate speech. However, both types of legal statutes still have to be differentiated. Firstly, ad hoc statutes criminalize Holocaust denial by identifying the content of certain expressions as being antisemitic, and/or, by determining the danger that such expressions pose to society. Example of countries with such legislations are France or Germany. Secondly, hate speech statutes criminalize Holocaust denial as a form of antisemitic hate speech. However, some hate speech statutes do not criminalize Holocaust denial based on its antisemitic content, but solely by the danger that

⁸⁴ Council of the European Union, *Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law*, 28 November 2008, Official Journal of the European Union 51, L 328, Article 1(d), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0913&from=EN> [accessed 20 March 2018]

certain expressions pose to society. Examples for countries with such hate speech statutes which are of interest regarding Holocaust denial are Canada or the United States, although both countries lack explicit Holocaust denial legislation. However, antisemitic hate speech and Holocaust denial was under hate speech statutes the matter of legal proceedings in both countries and led to criminal convictions in Canada.

5 National Holocaust denial legislation

This chapter will analyze national Holocaust denial legislation and compare the results with one another. Particular attention will be paid to relevant court rulings.

5.1 Unites States

Starting with United States legislation might seem incomprehensible, regarding the fact that there are no laws that criminalize Holocaust denial in the United States. Anyhow, an analysis of the reasons for that fact allows to identify the scope of national Holocaust denial legislation of other states with more accuracy.

In general, the strong libertarian protection of the right to freedom of speech due to its enshrinement in the First Amendment to the United States Constitution might seem as the reason for the lack of Holocaust denial legislation in the United States. However, even in United States law, the right to freedom of speech not always trumps other legal concerns, especially when a conflict between freedom of speech and hate speech arises.⁸⁵ In this regard, the Supreme Court of the United States developed in the 1942 landmark decision of *Chaplinsky v. New Hampshire*⁸⁶ a fighting words doctrine which limits free speech whenever certain expressions are likely to generate a breach of peace.⁸⁷ This fighting words doctrine bears some similarities to other hate speech statutes in countries like Canada.⁸⁸ However, one fundamental difference is that hate speech restrictions based on content regulations are unconstitutional (as incompatible with the First Amendment) in United States law. Therefore, rather than to regulate freedom of speech by the content of certain expressions, regulations are based on the danger that certain expressions pose to society.⁸⁹

Furthermore, the 1977 *National Socialist Party of America v. Village of Skokie* was an important case in the United States that concerned antisemitic hate speech and its conflict with freedom of speech.⁹⁰ The case involved the advertised plan of the National Socialist Party of America (NSPA) to march through the village of Skokie, a predominantly Jewish community with a large number of Holocaust survivors.⁹¹ Moreover, the NSPA aimed to display the Nazi swastika during the march. In response, the villagers filed a lawsuit against the NSPA to prevent the march and the display of the Nazi swastika. However, the Supreme Court of the United States decided against the village of Skokie, reasoning that the Nazi swastika enjoys as a symbolic form of free speech the protection of the First Amendment. In

⁸⁵ See Kahn, "Hate Speech Law", 164.

⁸⁶ See *Chaplinsky v. New Hampshire*, 9 March 1942, 315 U.S. 568, No. 255.

⁸⁷ See Bleich "Hate Crime Laws", 922.

⁸⁸ See Kahn, "Holocaust Denial", 83-84.

⁸⁹ See Kahn, "Hate Speech Law", 168.

⁹⁰ See *National Socialist Party of America v. Village of Skokie*, 14 June 1977, 432 U.S. 43, No. 76-1786

⁹¹ See Kahn, "Holocaust Denial", 81.

other words, the court did not consider the threat that the displaying of the Nazi swastika posed as strong enough to exercise the fighting words doctrine.⁹² However, in the 2003 *Virginia v. Black*, the Supreme Court of the United States decided that the threat posed by cross burning was reason enough to execute the fighting words doctrine and criminalize such speech in Virginia.⁹³ Cross burning as a symbolic form of speech holds a very negative connotation in Southern States like Virginia and is interpreted as causing sedition and racial hatred because of the direct link to the racist ideology of the Ku Klux Klan.

In conclusion, the lack of Holocaust denial legislation in United States law cannot solely be explained by referring to the First Amendment. The determination of the danger level that certain expressions pose is essential for freedom of speech restrictions based on the fighting words doctrine. However, such danger seems to be determined by the historical and political context in which certain expressions occur. On the one hand, as issues concerning the Ku Klux Klan recall memories on segregation, slavery, and violence towards African-Americans, which determine the history of the United States, cross burning was identified as justifying the execution of the fighting words doctrine.⁹⁴ On the other hand, it is unlikely that the fighting words doctrine would be executed in cases of Holocaust denial because as the Holocaust did not take place in the United States, Holocaust denial is not regarded as posing a dangerous threat to society. Not surprisingly, European nations like Germany, Poland, or France, which were directly affected by the Holocaust, determine this question differently. All in all, the relationship between cross burning and problematic and terrible parts of the history of the United States can be identified as similar to the relationship that Holocaust denial and National Socialism have for European states and make it comprehensible, why courts rulings on hate speech statutes in cases of antisemitic hate speech and Holocaust denial differ in Europe and the United States.

5.2 Canada

Canada adopted in 1970 a specific hate speech statute, Criminal Code Article 319, that criminalizes racist acts (and so as well antisemitic acts).⁹⁵ To determine a racist act the Canadian courts ask whether an expression in question is “hateful”.⁹⁶ Therefore, the Canadian hate speech statute is explicit content-based, it debates the meaning of the words itself, rather than it determines the incitement potential by analyzing the words impact on an audience like in the United States.⁹⁷ In this regard, an example that concerns Holocaust denial is the case of *R v. Keegstra*⁹⁸, which involved a teacher who had taught its students that Jews were

⁹² See Kahn, “Hate Speech Law”, 169.

⁹³ See *Virginia v. Black*, 7 April 2003, 538 U.S. 343, No. 01-1107.

⁹⁴ See Kahn, “Hate Speech Law”, 176. ??? SURE?

⁹⁵ See Kahn, “Holocaust Denial”, 80.

⁹⁶ See *ibid.*, 83-84.

⁹⁷ See *ibid.*, 83-84.

⁹⁸ See *R v. Keegstra*, 13 December 1990, 3 S.C.R. 697.

treacherous killers and that the Holocaust was a myth.⁹⁹ The Supreme Court of Canada confirmed a former lower court ruling that had convicted Keegstra and ruled that the teacher had abused the right to freedom of speech for spreading hate speech propaganda that harmed the targeted persons and groups and, by engaging in acts of humiliation and degradation, harmed as well society as such.¹⁰⁰ Furthermore, the Supreme Court found that denial propaganda was only tenuously connected with the values underlying the right to freedom of speech and upheld that the hate speech statute is constitutional and in conformity with the right to freedom of speech as protected through Section 2(b) of the Canadian Charter of Rights and Freedoms.¹⁰¹

Still, the Zündel affair proved the difficulty to prosecute Holocaust denial in Canada, as the country lacks a specific ad hoc statute that extraordinary criminalizes such denial. Erich Zündel, who published the book “The Hitler We Love and Why” and distributed a tract named “Did Six Million Really Die?” claimed that the Holocaust was in fact a Zionist swindle.¹⁰² In 1985, Zündel was persecuted, convicted and sentenced to nine months in prison for having spread false statements likely to cause injury or mischief to a public interest.¹⁰³ However, in *R v. Zundel*¹⁰⁴ the Supreme Court of Canada found 1992 that the scope of Article 181 of the Canadian Criminal Code, which criminalizes the spreading of false news, was too broad to be applied under the circumstances of the case and that the execution of the provision had violated Zündel’s right to freedom of speech.¹⁰⁵ Following, Erich Zündel started to disseminate Holocaust denial material through the Internet which led to another prosecution under Canadian law.¹⁰⁶ This time, Canadian courts found Zündel guilty under the Canadian Human Rights Act for using telecommunication devices to distribute hateful messages against minorities.¹⁰⁷ In the aftermath, Zündel was deported to Germany in 2005 where he was convicted and sentenced to 5 years in prison for inciting hatred and denying the Holocaust.¹⁰⁸ German authorities had requested an extradition of Zündel (who was a German citizen) as his Zundelsite (the web page distribution platform for Holocaust denial material) was accessible in Germany, for what reason his acts were falling within the German jurisdiction.¹⁰⁹ On a side note, a similar situation had already occurred in a 1998 case concerning Frederick Töben, an Australian Holocaust denier who was charged with violating Germany’s Criminal Code

⁹⁹ See Imbleau, “Denial of the Holocaust”, 264-265.

¹⁰⁰ See *ibid.*, 265.

¹⁰¹ See *ibid.*, 264-265.

¹⁰² See Lasson, “Defending Truth”, 235-236.

¹⁰³ See *ibid.*, 236.

¹⁰⁴ See *R v. Zundel*, 27 August 1992, 2. S.C.R. 731.

¹⁰⁵ See Imbleau, “Denial of the Holocaust”, 264.

¹⁰⁶ See *ibid.*, 264.

¹⁰⁷ See *ibid.*, 264.

¹⁰⁸ See Lasson, “Defending Truth”, 236.

¹⁰⁹ See Imbleau, “Denial of the Holocaust”, 256.

Article 130 as he distributed through the Internet Holocaust denial material which was available in Germany.¹¹⁰

5.3 France

France adopted in 1972, subsequent to its ratification of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the first legislation that explicitly dealt with hate speech and outlawed all racist, antisemitic or xenophobic acts.¹¹¹ In the subsequent period, Holocaust denial could be subject to prosecutions, based on Holocaust deniers racist and anti-democratic aims.¹¹² However, the occurrence of antisemitic acts and the increasing popularity of parties of the far-right like the National Front persuaded the French government in 1990 to adopt an ad hoc statute which extraordinary criminalized Holocaust denial as such, not only in reference to antisemitic or racist ambitions.¹¹³ This ad hoc statute, called the Gayssot Law, outlaws Holocaust denial by referencing to the IMT.

In this connection, the example of notorious Holocaust denier Robert Faurisson, a former academic, illustrates how French courts deal with Holocaust denial. Faurisson was fined in 1983 by French courts for antisemitic expressions that were falling under the French hate speech statute after making remarks on a radio show that supported Holocaust denial.¹¹⁴ Subsequently, in 1990, after the adoption of the Gayssot Law, Faurisson was convicted again of Holocaust denial after he gave an interview to a far-right magazine where he described Nazi Germany death camp destruction facilities like gas chambers as a myth and was sentenced to a 250,000 franc fine of which 100,000 francs were suspended.¹¹⁵ Subsequently, Faurisson challenged the conviction in front of the United Nations Human Rights Committee where the complaint was dismissed (further details will be discussed in chapter 7.3). Nonetheless, Faurisson continued with his denial activities and was convicted again of Holocaust denial by a Paris court in October 2006, after he said on the Iranian Television that no gas chambers were used by Nazi Germany to murder Jews.¹¹⁶

Following, the French Parliament adopted in 2006 a proposal to outlaw additionally to Holocaust denial as well the denial of the Armenian genocide.¹¹⁷ The proposal was finally rejected by the French Senate.¹¹⁸ Among other things, the difference between the Gayssot Law

¹¹⁰ See *ibid.*, 256.

¹¹¹ See Laurent Pech, “The Law of Holocaust Denial in Europe. Toward a (qualified) EU-wide Criminal Prohibition”, *Genocide Denials and the Law*, edited by Ludovic Hennebel and Thomas Hochmann (Oxford: Oxford University Press, 2011): 198, doi: 10.1093/acprof:oso/9780199738922.003.0008.

¹¹² See *ibid.*, 198.

¹¹³ See *ibid.*, 199.

¹¹⁴ See Bazyler, “Holocaust Denial Laws”, 8.

¹¹⁵ See *ibid.*, 8.

¹¹⁶ See Lasson, “Defending Truth”, 227.

¹¹⁷ See Imbleau, “Denial of the Holocaust”, 244.

¹¹⁸ See *ibid.*, 244.

and the Armenian genocide proposal was that the later was linked to a 2001 law that recognized the Armenian genocide based on a declaration which stated that the French Republic publicly recognizes the Armenian genocide of 1915.¹¹⁹ However, whereas the Gayssot Law references to the IMT and avoids to qualify the facts and conclusions that were established by the IMT, the Armenian genocide proposal references to a declaration that was adopted by France itself.¹²⁰ For this reasons, the proposal provoked a great controversy in French society and caused strong opposition among historians and jurists against what would become known as memory laws, laws that promote state-sponsored historical interpretations of past events by criminalizing to challenge these interpretations in form of denial.¹²¹ Following, The controversial discussions reached the point at which some critics demanded the repeal of the Gayssot Law.¹²² Indeed, following the line of reasoning, the legal difference between the Armenian genocide proposal and the Gayssot Law does not rebut the fact that both favor a promotion of particular historical interpretations of past events and outlaw to challenge these interpretations in form of denial. More attention to this concerns regarding the danger of state despotism in form of memory laws will be paid when discussing recent developments in the European Union in chapter 8.

5.4 The Federal Republic of Germany

German law regarding Holocaust denial started to develop in the period after the Second World War. In the postwar period, the recognition of Germany's status as a peaceful nation depended on the absence of antisemitism and the reestablishment of a political order free off Nazism. Therefore, West German courts legally acknowledged Jews in 1949 the status of a group which could seek protection under Criminal Code Article 185, an article which protects persons or groups from verbal attacks in form of insults or defamation.¹²³ Originally, the group definition of Jews in German law was based on National Socialist laws (the so-called Nuremberg laws from 1935) to single out Jews and facilitate their prosecution.¹²⁴ To turn these laws upside-down in order to protect Jews was interpreted as reflecting the courts' efforts to come to terms with the Nazi past.¹²⁵

However, during the Nieland affair, first problems arose. In 1958, Friedrich Nieland mailed a pamphlet to 2,000 prominent West Germans, including the entire Federal Parliament, propagating that the gassing of six million Jews was a lie and that Hitler had been a Jewish

¹¹⁹ See *ibid.*, 244.

¹²⁰ See *ibid.*, 244.

¹²¹ See Pech, "Holocaust Denial in Europe", 205.

¹²² See *ibid.*, 205.

¹²³ See Winfried Brugger, "Ban on or Protection of Hate Speech - Some Observations Based on German and American Law", *Tulane European and Civil Law Forum* 17 (2002): 8.

¹²⁴ See Kahn, "Hate Speech Law", 184-185.

¹²⁵ See *ibid.*, 185.

agent.¹²⁶ Nieland was charged for insulting Jews and endangering the state by calling for antisemitic restrictions, which was interpreted as equal for calling for a return of National Socialism.¹²⁷ Anyhow, the presiding judge, Nicholas Budde, discharged Nieland on both accounts as he argued that his pamphlet was not directed against all Jews but merely “International Jewry”, which does not fall within the group definition of Jews of the renewed laws from 1949.¹²⁸ Soon after the acquittal, a scandal emerged as it was revealed that Nicholas Budde, the very same judge that had discharged Nieland, had written a law journal article about “Jewish power” during the times of National Socialism.¹²⁹ In view of these circumstances, a debate about the role of ex-Nazis in the German judiciary followed.¹³⁰ In connection to this debate, the Federal Parliament adopted in 1960 a hate speech statute by replacing one section of Criminal Code Article 130 that was originally used to outlaw class hatred with racial hatred in order to criminalize antisemitism.¹³¹ However, it remained still difficult for courts to prove that simple Holocaust denial (without further normative judgments such as calling the Holocaust a swindle or myth) was a matter of racial incitement.¹³² These difficulties were partly based on the wording of Criminal Code Article 130 which concerns racial hatred.¹³³ Furthermore, problems remained as the common practice to prosecute Holocaust denial under the insult laws of Criminal Code Article 185 created the undesired impression that such crimes were rather a private matter than of high public concern, which contradicted the Federal Republic of Germany’s official political position to regard Holocaust denial as one of the most serious threats to the democratic order.¹³⁴

Moreover, as long as the criminalization of Holocaust denial was bound on Jewish group membership, the law faced limitations that became obvious in the *Zionist Swindle case* of 1978.¹³⁵ The complainant, who pressed insult charges against another person accused of Holocaust denial, was not Jewish but had Jewish grandparents.¹³⁶ Hence, the court asserted that due to the law’s group based scope, the non-Jewish complainant was not entitled to press charges under Criminal Code Article 185.¹³⁷ However, the court declared that the group harmed under this circumstances consists of the countless number of people who accept the Holocaust as a historical fact, which did not lead to a conviction of the defendant but initiated a debate about extending the standing requirements under the insult laws in cases of

¹²⁶ See *ibid.*, 185.

¹²⁷ See *ibid.*, 185.

¹²⁸ See *ibid.*, 186.

¹²⁹ See *ibid.*, 186.

¹³⁰ See *ibid.*, 186.

¹³¹ See *ibid.*, 186.

¹³² See *ibid.*, 189.

¹³³ See *ibid.*, 189.

¹³⁴ See *ibid.*, 188.

¹³⁵ See Kahn, “Holocaust Denial”, 87.

¹³⁶ See *ibid.*, 87.

¹³⁷ See Kahn, “Hate Speech Law”, 187.

Holocaust denial.¹³⁸ Following, the Federal Parliament passed in 1985 an amendment to Criminal Code Article 194 that allowed the government to press charges against Holocaust denial under the insult laws without the need of an official complainant.¹³⁹

Nonetheless, further legal difficulties remained and were causing another controversy during the Deckert affair. In 1992, Günter Deckert, who was the head of the right-wing National Democratic Party of Germany at that time, translated a speech of US Holocaust denier Fred Leuchter that offered pseudo-scientific explanations of why there could have been no gas chambers in Auschwitz.¹⁴⁰ Subsequently, a 1991 court ruling convicted Deckert of racial incitement under Criminal Code Article 130.¹⁴¹ However, the ruling was annulled by a 1994 decision of the German Federal Court of Justice which stated that bare denial of the gas chambers without further expressions of degrading statements (such as calling Jews liars) could not account to meet the test of an injury to the human worth of the victims, which to prove was a requirement to make use of Article 130.¹⁴²

For this reasons, the Federal Republic adopted in 1994 an ad hoc statute that concerned simple Holocaust denial by adding a particular subsection to Criminal Code Article 130 that criminalizes incitement to hatred by referring explicitly to expressions of simple Holocaust denial regardless of further normative judgments.¹⁴³ Shortly afterward, in the 1994 *Irving case*¹⁴⁴, the German Federal Constitutional Court defended the new ad hoc statute as being in accordance with the right to freedom of speech as protected by Article 5 of the Basic Law.¹⁴⁵ The case concerned a state administrative ruling that prohibited the British Holocaust denier David Irving to hold a speech in Munich.¹⁴⁶ The Federal Constitutional Court reasoned its decision by declaring that Article 5 of the Basic Law does not protect the dissemination of incorrect or untruthful factual statements.¹⁴⁷ In this regard, the court's main argument was that expressions of such nature do not contribute anything to the formation of public opinion.¹⁴⁸

¹³⁸ See *ibid.*, 187-188.

¹³⁹ See *ibid.*, 188.

¹⁴⁰ See *ibid.*, 190.

¹⁴¹ See *ibid.*, 190.

¹⁴² See *ibid.*, 190.

¹⁴³ See Joachim Neander, "Mit dem Strafrecht gegen die Auschwitz-Lüge: Ein halbes Jahrhundert § 130 Strafgesetzbuch Volksverhetzung", *theologie.geschichte* 1 (2006): 296.

¹⁴⁴ See Bundesverfassungsgericht, 13. April 1994, 1 BvR 23/94 - Rn. (1-52).

¹⁴⁵ See Kahn, "Hate Speech Law", 193.

¹⁴⁶ See *ibid.*, 192.

¹⁴⁷ See Pech, "Holocaust Denial in Europe", 195.

¹⁴⁸ See *ibid.*, 195.

6 Examples of Constitutional Court's rationale concerning Holocaust denial legislation

This chapter analyzes the German Federal Constitutional Court's reasoning regarding Holocaust denial legislation, followed by a comparison to a judgment by the Spanish Constitutional Court, which declared Holocaust denial legislation in form of ad hoc statutes as being unconstitutional. This analysis shall contribute towards an understanding of the nature of the legal conflict that Holocaust denial legislation poses to the right to freedom of speech.

6.1 German Federal Constitutional Court

The German Federal Constitutional Court declared that untruthful factual statements do not fall under expressions that are protected by the right to freedom of speech as enshrined in Article 5 of the Basic Law. Such a decision is epistemologically and legally problematic. Three arguments will follow that criticize the reasoning of the German Federal Constitutional Court.

Firstly, the court draws a subjective distinction between the expression of opinions on historical facts and pure factual statements on historical facts.¹⁴⁹ Such a distinction opposes any more generous interpretations of the concept of opinion that would regard simple Holocaust denial, which does not include normative judgments or calls for action, as opinion.¹⁵⁰ Furthermore, by contrasting opinion and untruthful factual statements, the Federal Constitutional Court enters the antique philosophical debate about the difference between *doxa* (Ancient Greek for opinion) and *episteme* (Ancient Greek for knowledge).¹⁵¹ This debate concerns not only the conceptual understanding of both terms but also the methods for ascertaining the truth in both cases.¹⁵² In this sense, the difference between the method for ascertaining the truth in case of knowledge and in case of opinion is defined by the criteria of truth that are demanded.¹⁵³ Whereas opinions demand rather subjective criteria of truth, the higher burden of proof that characterizes knowledge, demands objective criteria of truth.¹⁵⁴ The problem that now arises regards the Holocaust as a historical fact. On the one hand, to prove the trueness of a historical fact, one has to interpret certain empirical evidence and to reason one's interpretation of these facts based on arguments. On the other hand, the interpretation in question has to meet the objective criteria of truth that are demanded of knowledge by proving that the method for ascertaining the truth is a method that allows

¹⁴⁹ See *ibid.*, 196.

¹⁵⁰ See *ibid.*, 196.

¹⁵¹ See Simone Dietz, "Die Lüge von der Auschwitzlüge - Wie weit reicht das Recht auf freie Meinungsäußerung?", *Kritische Justiz* 28, no. 2 (1995): 213.

¹⁵² See *ibid.*, 217.

¹⁵³ See *ibid.*, 215-218.

¹⁵⁴ See *ibid.*, 213.

scientific truth-seeking.¹⁵⁵ The German Federal Constitutional Court relies on this philosophical basis when drawing an epistemologically not very sound distinction between opinion on historical facts and untruthful factual statements on historical facts. In the latter case, an evidently established historical truth is denied by an untruthful factual statement. For this reasons, the court's decision that the right to freedom of speech does not protect any dissemination of untruthful factual statements, indicates that Holocaust denial can neither account as *episteme* nor as a form of *doxa* that could seek protection. However, where the court is right concerning *episteme*, the criteria of truth that *doxa* demands are rather subjective, do not have to meet high standard of objectivity or to follow certain methods for ascertaining the truth that have to meet scientific standards. Therefore, when the court argues that Holocaust denial cannot account as an opinion on historical facts but only as an untruthful factual statement on historical facts, the court takes criteria of truth that are commonly demanded from *episteme*, not from *doxa*, but transfers them on *doxa*. To demand such high truth standards from *doxa* in order to constitute an opinion that can seek protection under the right to freedom of speech, could have a chilling effect on the formulation and expression of opinions in general.

Secondly, states that enforce particular interpretations of historical facts by law, endanger the autonomy of science.¹⁵⁶ In this sense, the German Federal Constitutional Court undermines scientific methods to establish the truth, because it intervenes in the scientific standards for open and autonomous debates concerning the interpretation of facts based on arguments in order to prove them true. Therefore, libertarian defenders of freedom of speech argue that it is a matter of public interest not to limit freedom of speech in order to secure the best conditions for truth-seeking.¹⁵⁷

Thirdly, the German Federal Constitutional Court relies in its reasoning on the following previous judgment of the German Federal Court of Justice:¹⁵⁸

“The historical fact itself, that human beings were singled out according to the criteria of the so-called "Nuremberg Laws" and robbed of their individuality for the purpose of extermination, puts Jews living in the Federal Republic in a special, personal relationship vis-A-vis their fellow citizens; what happened [then] is also present in this relationship today. It is part of their personal self-perception to be understood as part of a group of people who stand out by virtue of their fate and in relation to whom there is a special moral responsibility on the part of all others and that this is part of their dignity. Respect for this self-perception, for each individual, is one of the guarantees against repetition of this kind of discrimination and forms a basic condition of their lives in the Federal Republic. Whoever seeks to deny these events denies vis-A-vis each individual the personal worth of Jewish persons. For the person

¹⁵⁵ See *ibid.*, 216.

¹⁵⁶ See *ibid.*, 218.

¹⁵⁷ See Mill, *On Liberty*, 19.

¹⁵⁸ See Pech, “Holocaust Denial in Europe”, 198.

concerned, this is continuing discrimination against the group to which he belongs and, as part of the group, against him.”¹⁵⁹

This judgment states that the German nation has a special moral responsibility towards the collective self-perception, dignity, and security of Jews living in contemporary Germany.¹⁶⁰ However, the German Federal Constitutional Court transforms this special moral responsibility into a positive legal obligation in form of an *ultima ratio* to acknowledge the Holocaust through the use of criminal law.¹⁶¹ Nevertheless, as limitations of the right to freedom of speech demand high justification requirements, such a conduct has to be justified by additional arguments in order to reason the necessity of the means. The reasons that the German Federal Constitutional Court provides are political and based on Germany’s political agenda as a state that came to terms with its Nazi past. However, as already discussed in chapter 3.4, justifications to limit fundamental rights, such as the right to freedom of speech, that are based on particular context-based determinants cannot claim general validity. Furthermore, the reliance on such arguments bears at least in principle the risk to end in the justification of state despotism, which undermines democratic values and sets the foundation for further human rights violations.

Additionally, one final question that has to be decided is whether German courts establish historical truth in form of memory laws through the imposed ad hoc statute regarding Holocaust denial. Indeed, the German Criminal Code Article 130 enforces by law certain historical interpretations. However, one has to take into account that these historical interpretations are already established by third parties and that the law only references to these establishments (for example by a reference to the findings of the IMT). However, organs of the judiciary that enforces interpretations of historical facts by law, even when only referencing to already “established historical facts”, limit freedom of speech. In the above-described case, this conduct is legitimized based on a political agenda that neither philosophically nor legally can meet the high justification requirements that are demanded to limit freedom of speech.

6.2 Spanish Constitutional Court

Following, a comparison to the rationale of the Spanish Constitutional Court will further strengthen the critique on the German Federal Constitutional Court. The Spanish Constitutional Court declared in 2007 that ad hoc statutes that criminalize Holocaust denial are unconstitutional under certain circumstances.

¹⁵⁹ See Teachout, “Making Holocaust Denial a Crime”, 672.

¹⁶⁰ See Pech, “Holocaust Denial in Europe”, 198.

¹⁶¹ See Winfried Brugger, “The Treatment of Hate Speech in German Constitutional Law (Part II)”, *German Law Journal* 4, no. 1 (2003): 36.

The Spanish Constitutional Court convicted Léon Degrelle in 1991, a Belgian Ex-Nazi and Holocaust denier.¹⁶² Beforehand, a lower court still had discharged Degrelle, who was sued by a Holocaust survivor of having expressed doubts about the existence of crematories and his desire for the rise of another Führer. The court had argued that such expressions are protected by the right to freedom of speech.¹⁶³ However, the Constitutional Court found that the second part of Degrelle's expressions were racist declarations which insulted Jews and were contrary to the right to honor and other fundamental principles such as the protection of human dignity.¹⁶⁴ Regarding the circumstances of the case, the court reasoned that one's right to dignity should have predominance over another person's right to freedom of speech.¹⁶⁵ To summarize, the court exercised a balancing test between the right to dignity and the right to freedom of speech based on the determination of antisemitic and racist connotations of certain expressions of Holocaust denial, regardless of whether the Holocaust actually constitutes a historical fact.¹⁶⁶ Therefore, the Spanish Constitutional Court avoided causing a controversy about the role of courts that enforce by law state-sponsored interpretations of historical facts, as occurred in France and Germany. Following the case, the Spanish Criminal Code was modified to introduce provision 607 (2), which had a broad application and criminalized the denial of the existence of genocides in general, not only of the Holocaust.¹⁶⁷ However, in 2007, the Spanish Constitutional Court found that the provision was unconstitutional as it criminalized simple genocide denial, which determination as a racist declaration was difficult when any further normative judgment was missing.¹⁶⁸ Nonetheless, the court reconfirmed that the justification of genocides or any attempt to rehabilitate regimes responsible for these crimes still constitutes a criminal act under provision 607 (2).¹⁶⁹

In conclusion, the Spanish Constitutional Court found ad hoc statutes criminalizing simple genocide denial (which includes simple Holocaust denial) without involving any normative judgment as unconstitutional.¹⁷⁰ This comparison supports the view that the German Federal Constitution Court has reassured the establishment of a legislation which to justify legally proves to be difficult, once political justifications supporting the decision are disregarded.

¹⁶² See Imbleau, "Denial of the Holocaust", 262.

¹⁶³ See *ibid.*, 262.

¹⁶⁴ See *ibid.*, 262.

¹⁶⁵ See *ibid.*, 262.

¹⁶⁶ See *ibid.*, 262.

¹⁶⁷ See *ibid.*, 261.

¹⁶⁸ See *ibid.*, 262.

¹⁶⁹ See *ibid.*, 262.

¹⁷⁰ See Pleno del Tribunal Constitucional, *Cuestión de inconstitucionalidad 5152-2000*, 7 November 2007, Sentencia 235/2007.

7 International human rights law

This chapter analyzes the conflict that Holocaust denial poses to human rights and discusses the solutions that were established under international human rights law. This part will include an analysis of important human rights treaties from the United Nations and of the European Convention on Human Rights.

The Second World War (and in particular as well the Holocaust) determined the formation of the United Nations and the establishment of the International Declaration on Human Rights. In this sense, Holocaust denial can account as an attack on the origins of international human rights law and threatens the foundations of human rights. Therefore, Holocaust denial legislation could be interpreted as serving to protect human rights establishments. However, the dilemma that occurs is that Holocaust denial legislation itself contradicts human rights because such legislation restricts one of the most fundamental human rights, the right to freedom of speech. For all these reasons, international human rights law found itself in the need to develop a solution to the dilemma that Holocaust denial legislation poses to human rights. One common solution is the duty approach, which is characterized by the view that the exercise of certain human rights carries with itself also positive duties.¹⁷¹ In this sense, international human rights law demands that no given rights should be used to undermine the rights of others or to threaten public order and that, in such cases, certain rights might be subject to legal restrictions if it serves a legitimate aim, is necessary and provided by law.¹⁷² Such restrictions shall support the establishment of human rights in a context of conflicting values and rights. Concerning Holocaust denial, the duty approach means to execute a balancing test between the right to freedom of speech of the Holocaust denier and the interests and rights of the harmed persons. Depending on the circumstances, such rights and interests could concern other fundamental human rights such as the right to dignity or equality or the protection of the general public order in a democracy.

7.1 United Nations

The United Nations did not adopt any provision to criminalize Holocaust denial. However, two important treaties, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR), have limited the right to freedom of speech based on hate speech provisions. Moreover, the United Nations Human Rights Committee (HRC) found that hate speech provisions are applicable to Holocaust denial.¹⁷³ Further details regarding this application will be analyzed when discussing *Faurisson v. France*.¹⁷⁴

¹⁷¹ See Altman, “Freedom of Expression”, 30-31.

¹⁷² See *ibid.*, 30-31.

¹⁷³ See *ibid.*, 14.

¹⁷⁴ See *Robert Faurisson v. France*, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (1996).

7.1.1 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

The ICERD criminalized hate speech in Article 4, where is stated that:

“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;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”¹⁷⁵

7.1.2 International Covenant on Civil and Political Rights (ICCPR)

Article 19 of the ICCPR concerns the right to freedom of speech:

“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;

¹⁷⁵ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, Article 4, <http://www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf> [accessed 20 March 2018].

(b) For the protection of national security or of public order (ordre public), or of public health or morals.”¹⁷⁶

Section 1 and 2 of Article 19 declare the right to freedom of speech, whereas section 3 explicitly limits its scope based on the already discussed view that the exercise of human rights carries with itself positive duties.

However, it is Article 20 of the ICCPR that explicitly prohibits hate speech:

“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.”¹⁷⁷

7.1.3 United Nations Human Rights Committee (HRC)

The United Nations Human Rights Committee, which monitors the ICCPR, received in 1993 a complaint by Robert Faurisson who challenged his Holocaust denial conviction under the French Gayssot Law.¹⁷⁸ The HRC rejected his complaint, reasoning that:

“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 restriction of Mr. Faurisson's freedom of expression was necessary within the meaning of article 19, paragraph 3, of the Covenant.”¹⁷⁹

This judgment demonstrates that the HRC holds the view that Holocaust denial is not protected by the right to freedom of speech and that the balancing test between the right to freedom of speech of Robert Faurisson and the national security interests of a protection of the public order of France was decided in favor of the French Republic. An argument which justifies this decision is that the HRC regards the Gayssot Law as serving to combat antisemitism (which promotes Article 4 of the ICERD).

¹⁷⁶ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Article 19, <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 20 March 2018].

¹⁷⁷ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Article 20, <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 20 March 2018].

¹⁷⁸ See Imbleau, “Denial of the Holocaust”, 253.

¹⁷⁹ Robert Faurisson v. France, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (1996), Paragraph 9.7.

“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.”¹⁸⁰

7.2 European Convention on Human Rights

The right to freedom of speech is enshrined in Article 10 of the European Convention on Human Rights (ECHR):

“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.”¹⁸¹

Furthermore, regarding freedom of speech, the European Court of Human Rights (ECtHR) established in the key case of *Handyside v. The United Kingdom* a characteristic view which can be interpreted as favoring the principle of viewpoint neutrality regarding content regulations in cases of hate speech.¹⁸²

“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",

¹⁸⁰ Ibid., Paragraph 9.6.

¹⁸¹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, Article 10, https://www.echr.coe.int/Documents/Convention_ENG.pdf [accessed 20 March 2018].

¹⁸² See Altman, “Freedom of Expression”, 30.

"restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued."¹⁸³

However, following this declaration, the ECtHR went on in its argumentation and stressed its recognition of the competence of European states for implementing Article 10.2 of the ECHR based on each state's particular historical past.¹⁸⁴ This so-called margin of appreciation doctrine permits European states a wide authority to decide on questions of necessity in cases of speech restrictions.¹⁸⁵

"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."¹⁸⁶

Moreover, Article 17 of the ECHR possibly limits the right to freedom of speech further, based on an abuse clause:

"Article 17 - Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."¹⁸⁷

All in all, several Holocaust deniers that were convicted under the domestic law of European nations have applied in front of the ECtHR and claimed that Holocaust denial prosecution had violated their right to freedom of speech. The ECtHR rejected so far all complaints of freedom of speech violations from Holocaust deniers due to different reasons. Some key cases shall be discussed now.

¹⁸³ Handyside v. the United Kingdom, Application No. 5493/72, 7 December 1976, Paragraph 49.

¹⁸⁴ See Artūrs Kučs, "Denial of Genocide and Crimes against Humanity in the Jurisprudence of Human Rights Monitoring Bodies" *Journal of Ethnic and Migration Studies* 40, no. 2 (2014): 310.

¹⁸⁵ See Kučs, "Denial of Genocide", 310.

¹⁸⁶ Handyside v. the United Kingdom, Application No. 5493/72, 7 December 1976, Paragraph 48.

¹⁸⁷ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, Article 17, https://www.echr.coe.int/Documents/Convention_ENG.pdf [accessed 20 March 2018].

7.3 European Court of Human Rights

Regarding Holocaust denial, the ECtHR has adopted two different approaches to decide on the legitimacy of freedom of speech restrictions. The first approach is based on the court's assessment of the legitimacy of the interference considering the requirements established in the second part of Article 10 of the ECHR.¹⁸⁸ In other words, the court observes if the speech restrictions were provided by law, served a legitimate aim and were necessary in a democratic society.¹⁸⁹ For example, in the case of *X v. Federal Republic of Germany*¹⁹⁰, a complainant had disseminated a pamphlet which denied the Holocaust. After he had lost a civil suit against a plaintiff who was the grandson of a Holocaust survivor, he challenged his conviction as a violation of his right to freedom of speech. The ECtHR decided that the infringement of the right to freedom of speech of the complainant was justifiable as the pamphlet had constituted a defamatory attack against every member of the Jewish community and Jews in general.¹⁹¹ Furthermore, in the case of *H., W., P. and K. v. Austria*¹⁹², the court adopted the view that Holocaust denial legislation contributes towards the maintenance of public order and serves national security interests and crime prevention.¹⁹³ The case concerned the criminal conviction of the complainants based on their promotion of pamphlets that claimed that the killing of six million Jews by Nazis was a lie.¹⁹⁴ The court holds the same position in the case of the *Nationaldemokratische Partei Deutschlands v. Germany*¹⁹⁵ where a city ordained an obligation on the complainant's party to ensure that Holocaust denial was not expressed during their conferences.¹⁹⁶

However, the ECtHR recently changed its original approach of assessing case-by-case the legitimacy of interferences with Article 10 in cases of Holocaust denial and adopted an approach that excludes Holocaust denial from the protection of Article 10 at all.¹⁹⁷ In this regard, the court makes use of Article 17 and declares that Holocaust denial is opposed to the underlying values of the ECHR and has to be regarded as an abuse of the rights that were established by the convention.¹⁹⁸ This shift in the court's rationale was, even if still not applied, already announced in the ruling of *Lehideux and Isorni v. France*.¹⁹⁹ The case of

¹⁸⁸ See Kučs, "Denial of Genocide", 308.

¹⁸⁹ See *ibid.*, 308.

¹⁹⁰ See *X. v. Federal Republic of Germany*, Application No. 9235/81, 16 July 1982.

¹⁹¹ See Altman, "Freedom of Expression", 32.

¹⁹² See *H., W., P. and K. v. Austria*, Decision as to the admissibility of 12 October 1989.

¹⁹³ See Kučs, "Denial of Genocide", 309.

¹⁹⁴ See *ibid.*, 309.

¹⁹⁵ See *Nationaldemokratische Partei Deutschlands v. Germany*, Application No. 25992/94, 29 November 1989.

¹⁹⁶ See Kučs, "Denial of Genocide", 309.

¹⁹⁷ See *ibid.*, 308.

¹⁹⁸ See *ibid.*, 308.

¹⁹⁹ See Paolo Lobba, "Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime", *The European Journal of International Law* 26, no. 1 (2015): 242.

*Lehideux and Isorni v. France*²⁰⁰ concerned the conviction of two complainants who publicly defended the crime of collaboration with the enemy of Marshal Pétain, the head of the Nazi-controlled government of Vichy France.²⁰¹ The French government defended the conviction by stating that the complainants had lent credence to theories that were refuted by historians in order to rehabilitate the image of Marshal Pétain.²⁰² The ECtHR finally held that the conviction had violated the right to freedom of speech of the complainants. Moreover, of particular interest for the topic of Holocaust denial is the reasoning of the court regarding the non-application of Article 17. The ECtHR declared that Article 17 could not be executed as the case concerned an ongoing debate among historians, not clearly established facts (following, the court determines the Holocaust as such a fact to give an example that differentiates from the issues regarding Marshal Pétain).

“The Court considers that it is not its task to settle this point, which is part of an ongoing debate among historians about the events in question and their interpretation. As such, it does not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17.”²⁰³

Soon afterward, in *Garaudy v. France*²⁰⁴, the ECtHR regarded the complaint of a French author who had been convicted under the Gayssot Law for Holocaust denial as inadmissible and reasoned its decision by reference to Article 17:²⁰⁵

“There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust [...] undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.”²⁰⁶

Since then, the ECtHR came to similar conclusions in a number of cases concerning Holocaust denial, such as *Remer v. Germany*²⁰⁷, *Nachtmann v. Austria*²⁰⁸, *Honsik v. Austria*²⁰⁹,

²⁰⁰ See *Lehideux and Isorni v. France*, Application No. 24662/94, 23 September 1998.

²⁰¹ See Lobba “Exceptional Regime”, 242.

²⁰² See *ibid.*, 242.

²⁰³ *Lehideux and Isorni v. France*, Application No. 24662/94, 23 September 1998, Paragraph 47.

²⁰⁴ See *Garaudy v. France*, Application No. 65831/01, 24 June 2003.

²⁰⁵ See Altman, “Freedom of Expression”, 32.

²⁰⁶ *Garaudy v. France*, Application No. 65831/01, 24 June 2003, Paragraph 1(i), English translation of the decision’s extracts, <http://www.proyectos.cchs.csic.es/transitionaljustice/sites/default/files/maps/info/case-law/GARAUDY%20v.%20FRANCE.pdf> [accessed 20 March 2018].

²⁰⁷ See *Remer v. Germany*, Application No. 25096/94, 6 December 1995.

²⁰⁸ See *Nachtmann v. Austria*, Application No. 36773/97, 9 September 1998.

²⁰⁹ See *Honsik v. Austria*, Application No. 25062/94, 18 October 1995.

or *Witzsch v. Germany*²¹⁰, always by reference to Article 17 of the ECHR. The principal difference since the ECtHR came to apply Article 17 is that the court's level of scrutiny decreased, in particular concerning the court's assessment of the legitimacy, necessity, and lawfulness in terms of the proportionality of speech restrictions in cases of Holocaust denial.²¹¹

²¹⁰ See *Witzsch v. Germany*, Application No. 41448/98, 20 April 1999.

²¹¹ See Kučs, "Denial of Genocide", 312.

8 Critique on recent legal and political developments

This chapter criticizes the recent legal and political developments concerning Holocaust denial in the European Union and in regards to the ECtHR.

8.1 European Court of Human Rights

The task of the ECtHR is to be the human rights guardian of freedom and peace in Europe. The following three arguments shall demonstrate that the recent legal developments concerning the approach of the ECtHR towards Holocaust denial endanger this guardian function. Afterward, one political argument in favor of the ECtHR shall be made.

Firstly, the ECtHR's application of the abuse clause of Article 17 could be considered as a minor issue if this exceptional regime would be limited to Holocaust denial.²¹² Nevertheless, the court's reference to the Holocaust as a "clearly established historical fact" which denial constitutes an abuse of rights, could provoke a slippery slope which effects that other notions of denialism (like the denial of other genocides) also have to be considered as an abuse of rights once the events in question are considered "established historical facts".²¹³ In this regard, one should consider the case of *Perinçek v. Switzerland*²¹⁴, which concerned the denial of the Armenian genocide and was decided in favor of the complainant who objected his prosecution by Swiss authorities based on denialism as a violation of the right to freedom of speech. However, in *Perinçek v. Switzerland*, the ECtHR did not make use of Article 17 of the ECHR and reasoned this decision by highlighting that restrictive measures against denialism cannot automatically attract the abuse clause, which is limited to expressions that incite violence or hatred.²¹⁵ In this sense, the ruling of the ECtHR concerning *Perinçek v. Switzerland* implies that the application of Article 17, even if not exercised in the case, would be valid once an expression of denialism is determined to hold a certain level of incitement to violence or hatred.²¹⁶

Secondly, the application of Article 17 could have a guillotine effect and strongly decrease the amount of speech that is protected by the right to freedom of speech of Article 10.²¹⁷ In this sense, the ECtHR's former case-by-case assessment of facts and circumstances would shift into a general and superficial rejection of all denialism speech once its incitement potential is determined, because the exclusion of denialism would not be based as before on the criteria of the second section of Article 10 (as being provided by law, following a legitimate aim, and

²¹² See Lobba "Exceptional Regime", 248.

²¹³ See *ibid.*, 248-249.

²¹⁴ See *Perinçek v. Switzerland*, Application no. 27510/08, 15 October 2015.

²¹⁵ See Lobba "Exceptional Regime", 250.

²¹⁶ See *ibid.*, 250.

²¹⁷ See *ibid.*, 250.

necessary to protect public order or the rights of others), but on an exceptional regime that outlaws denialism with incitement potential as an abuse of rights.

Thirdly, the recent shift in the rationale of the ECtHR and application of Article 17 in cases of Holocaust denial can be interpreted as favoring ad hoc statutes regarding freedom of speech in cases of Holocaust denial. However, if the ECtHR takes decisions that are supporting the legal approaches towards Holocaust denial of particular European states, such as France or Germany, the court could come into discredit for one-sided favoring. In this regard, in terms of promoting the equality among European states, the court needs to provide convincing reasons why the denial of other crimes against humanity by, for example, the European Communist regimes, should not be considered as justifying the attraction of Article 17.²¹⁸ Concerning this point, in Ukraine exist a debate whether to identify the artificial famine Holodomor between 1923 and 1933 as a genocide perpetrated by the Soviet regime.²¹⁹ Similar propositions exist, for example, in Latvia and concern the deportations to gulags in Siberia after the occupation of the country by the Soviets.²²⁰ According to the court, the denial of such events would provoke the application of Article 17 once the link between such conduct and an incitement to violence or hatred is proved. However, the determination of this incitement potential is often linked to the political and historical context of states and their determination of the danger that certain speech pose to the public order. Furthermore, the ECtHR has to respect these particular determinants based on its margin of appreciation doctrine in equal terms among all European countries. If Ukraine claims that the denial of the Holodomor is a threat to the public order, how could the ECtHR reject this claim but support Germany's determination of Holocaust denial as threatening the public order?

All in all, I would like to emphasize that the opposing of the ECtHR concerning Holocaust denial can be interpreted as supporting the formation of a shared European identity and as a symbol for a united Europe against political extremism and threats to human rights. Such conduct seems valuable in the context of increasing heterogeneity in Europe, events like Brexit, and the problems of European migration politics. In this sense, the approach of the ECtHR could be interpreted as promoting this guardian function for freedom and peace in Europe and as supporting the establishment of solidarity and stability in the European Union.²²¹ Nevertheless, since the ECtHR abandons its original approach to apply Article 10.2 (which by far provides already enough grounds to challenge Holocaust denial) and makes use of the abuse clause of Article 17 to oppose Holocaust denial, the conduct of the court eventually creates a chilling effect on freedom of speech.²²² Furthermore, the ECtHR might encourage with its approach European states to adopt legislation that criminalizes the denial

²¹⁸ See Kučs, "Denial of Genocide", 313.

²¹⁹ See Paolo Lobba, "Punishing Denialism beyond Holocaust Denial: EU Framework Decision 2008/913/JHA and Other Expansive Trends", *New Journal of European Criminal Law* 5, no. 1 (2014): 71

²²⁰ See Kučs, "Denial of Genocide", 302.

²²¹ See Lobba "Exceptional Regime", 250.

²²² See Kučs, "Denial of Genocide", 315.

of state-sponsored interpretations of historical events in general. Very recently, such developments could be observed in Poland, where the Polish state adopted the Lex Gross law that punishes to criticize certain aspects of Poland's conduct during the Second World War, especially in terms of its collaboration with Nazi Germany regarding the Holocaust.²²³

8.2 Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law by the Council of the European Union

In 2008, the Council of the European Union adopted the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law²²⁴ in order to harmonize the European law concerning hate speech.²²⁵ The Framework Decision includes an ad hoc statute that criminalizes Holocaust denial.²²⁶ Following, several European states, mostly from Central and East Europe, expressed their criticism regarding the fact that the Framework Decision does not encompass any prohibition against the denial of crimes against humanity that were committed by the Soviet regime.²²⁷ Responding to these critiques, the Council agreed to annex a declaration that additionally criminalizes the denial of crimes against humanity that were committed by all totalitarian regimes, not only by Nazi Germany.²²⁸ However, this one-size-fits-all solution turned the Framework Decision into a legal declaration that supports the development of criminalizing denialism of all forms. Such a development could further promote that European states start to adopt memory laws that serve the interest of protecting certain interpretations of historical facts.²²⁹

Moreover, the question that remains to be decided is how effective harmonized European law can be in terms of combating racism and xenophobia, which originates and is determined by the particularities of the contexts of European states. In this sense, it shall be argued that laws that take this historical and political differences into account are more effective in addressing racist and xenophobe acts in the context where they occur, as general, superordinated laws that attempt to cover all different forms of racism and xenophobia in all regions at once.²³⁰

²²³ See Shimon Stein and Moshe Zimmermann, "Holocaust-Gesetz. Mehr Politik als Wahrheit." Zeit Online, 22 February 2018, <http://www.zeit.de/gesellschaft/zeitgeschehen/2018-02/holocaust-gesetz-polen-justizreform-israel> [accessed 20 March 2018].

²²⁴ Council of the European Union, *Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law*, 28 November 2008, Official Journal of the European Union, L 328/55, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0913&from=EN> [accessed 20 March 2018]

²²⁵ See Kučs, "Denial of Genocide", 302.

²²⁶ See *ibid.*, 302.

²²⁷ See *ibid.*, 302.

²²⁸ See *ibid.*, 302.

²²⁹ See *ibid.*, 302.

²³⁰ See Sebastian Weber, "Strafbarkeit der Holocaustleugnung in der Europäischen Union", *Zeitschrift für Rechtspolitik* 21 (2008): 23-24.

Moreover, the Framework Decision established a legal approach which is determined by the political concept of the *Wehrhafte Demokratie*.²³¹ In this regard, the Council of the European Union endangers to turn all Europe into a *Wehrhafte Demokratie*.²³² However, as not all European states are based on the particular laws and political concepts that constitute a *Wehrhafte Demokratie*, this development is problematic due to two reasons: Firstly, this development does not regard the historical and also legal differences between European states, and, secondly, to turn Europe into a *Wehrhafte Demokratie* means to transfer a political concept that might be valid regarding the domestic affairs of Germany, under which the *Wehrhafte Demokratie* emerged and since then constitutes an important part the political agenda, but not necessarily outside this field. Such generalizations, especially when they concern legal approaches towards the punishment of crimes, bear the risk of producing unpredictable consequences for the domestic affairs of European states on behalf of transnational European politics.

8.3 Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems by the Council of the European Union

The Internet emerged to be one of the most important distribution platforms for Holocaust denial propaganda.²³³ Therefore, the Council of the European Union adopted in 2003 an Additional Protocol to its Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems that criminalizes Holocaust denial material and establishes European wide censorship regulations.²³⁴ Internet censorship affects the freedom of speech not only of those who deny the Holocaust but of all citizens and limits their right to seek and receive information. As the right to receive information in order to form opinions is a necessary prerequisite and integral part of the right to freedom of speech, such Internet censorship limits the right to freedom of speech of a much wider group than the rather small group of Holocaust deniers, which is an essential problem and further reason to criticize Holocaust denial legislation.

Moreover, that such censorship can have non-deliberate and grave effects on the formation of public opinion shall illustrate the following example. An Internet research of the words “Jew + Soap + Holocaust + Nazi” by Google.de on the 12 of July 2006 in Germany (which censors the Internet based on domestic laws once Holocaust denial is concerned and is as well a member of the Additional Protocol of the Council of the European Union) listed among the

²³¹ See Lobba “Exceptional Regime”, 253.

²³² See *ibid.*, 253.

²³³ See Lasson, “Defending Truth, 233.

²³⁴ See Council of the European Union, *Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems*, 28 January 2003, Council of Europe, Treaty no. 189, <http://conventions.coe.int/Treaty/EN/Treaties/html/189.htm> [accessed 20 March 2018].

first 170 hits around 70 websites that supported the claim that the Nazis had turned their victims into soup, 33 websites objected this claim, and other 70 did not mention anything concerning the topic.²³⁵ The claim that Nazis had turned their victims into soup is disproved by historians.²³⁶ However, out of the 33 websites that objected the claim, 31 were blocked due to Internet censorship regulations concerning Holocaust denial material.²³⁷ Of the remaining 2 websites, only one was freely accessible, the other was a fee-based website.²³⁸ Therefore, the example illustrates that Internet censorship can produce contradictory outcomes to the original purposes that underly the censorship, especially in times where the Internet had developed to be one of the main information sources for many issues.²³⁹

²³⁵ See Neander, “Auschwitz-Lüge”, 299.

²³⁶ See *ibid.*, 299.

²³⁷ See *ibid.*, 299-300.

²³⁸ See *ibid.*, 299.

²³⁹ See *ibid.*, 300.

9 Critique on the effectiveness of Holocaust denial legislation

This chapter will analyze the effectiveness of Holocaust denial legislation in terms of the maintenance of public order and to combat antisemitism.

9.1 Critique on the effectiveness of Holocaust denial legislation concerning the maintenance of public order

Following, the question will be determined whether the criminalization of Holocaust denial is effective in terms of the maintenance of public order. Recent criminal justice statistics led to the conclusion that antisemitism is on the rise in Europe. In 2006, Germany recorded in total 1,809 antisemitic incidents. This high number never went below the 1,000 mark since 2013.²⁴⁰ Moreover, increasing antisemitic convictions in relation to past years could also be observed in France.²⁴¹ However, one principal question that arises is whether criminalization of Holocaust denial and antisemitic hate speech is the best solution to maintain the public order or if equal or even more attention should be regarded to other fields, like social and educative community programs. In this sense, it should be highlighted that the majority of persons convicted for antisemitic acts and neo-Nazi crimes in former East German Socialist states are under the age of twenty-one.²⁴² In this regard, it shall be argued that criminalization might not support crime prevention, but further increase the attractiveness of committing antisemitic acts among endangered individuals. Therefore, the state would develop a more effective approach to protect the public order if it analyzes the reasons for the emergence of antisemitism and neo-Nazism among endangered individuals under the age of twenty-one and prevents them from slipping into extremism through supportive social and educative community programs. Moreover, some scholars argue that the criminalization of Holocaust denial and antisemitic hate speech drives extremist groups underground, which creates catalyzers for even more radical forms of antisemitism.²⁴³ Furthermore, extremist groups that operate underground, are more difficult to control, which complicates the working conditions of state security services and makes it more difficult to protect the public order.

In addition, it shall be argued that national politicians can support the maintenance of the public order if they analyze the reasons that motivate the general public to support extremist parties that promote antisemitism and engage in Holocaust denial, and develop adequate strategies to concern this problems. So far, the democratic parties of Germany or France opposed antisemitism through uniform resistance against antisemitic acts and Holocaust denial of individuals of extremist parties that raised public attention. In this regard, in France,

²⁴⁰ See Bayzler, "Holocaust Denial", 199.

²⁴¹ See *ibid.*, 199.

²⁴² See Michael Bazyler, *Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World* (New York: Oxford University Press, 2017): 200.

²⁴³ See Heinze, "Viewpoint Absolutism", 578.

the party advisor Kenneth Lasso of the far-right National Front (FN) had encountered strong political and also legal opposition after he had denied the Holocaust and the formal leader of the FN, Jean-Marie Le Pen, was criticized for antisemitism.²⁴⁴ The same could be observed when Björn Höcke, member of the far-right and potentially anti-democratic party Alternative for Germany (AFD), hold an antisemitic speech in Dresden, Germany, in January 2017. Nevertheless, even though the democratic parties oppose political extremism, the question remains what strategies the governments of such states develop to regard the problematic situations that motivate a not to be underestimated part of the general public to support or at least accept the extremist ambitions of members of far-right parties. These parties are on the rise and both above-mentioned parties, the FN and the AFD, achieved high election results during governmental and regional elections (the AFD very recently 12,6 percentage at the federal elections for the *Bundestag* in September 2017), the democratic parties is in the need to provide convincing solutions.²⁴⁵ All in all, it shall be argued that states should develop effective approaches for the maintenance of public that takes political factors into account and develop non-legal solutions that, apart from the criminalization of Holocaust denial, concern the problems of antisemitism and extremism among endangered individuals and the general public.

9.2 Critique on the effectiveness of Holocaust denial legislation concerning the combat of antisemitism

Following, the question will be determined whether the criminalization of Holocaust denial is effective in terms of combating antisemitism. Holocaust denial legislation developed from laws that are based on the protection of victims of Holocaust denial such as Jews or Holocaust survivors from defamatory attacks towards laws that protect the public order from anti-democratic and political extremist threats. Nowadays, in larger cities in Germany, many Synagogues, Jewish Community Center, Jewish schools or kindergartens receive continuous police protection. However, Jewish publicist Peter Sichrovsky criticized Germany's ad hoc statute regarding Holocaust denial which emerged from the turned upside-down former Nazi Nuremberg laws with the words that the state interferes a second time on the same issue, first to commit Auschwitz than to punish those, who claim it never happened.²⁴⁶ In this sense, the permanent police protection and the positive discrimination based on exceptional legal statutes might not support the creation of an environment free of fear of persecution as it

²⁴⁴ See Lasso, "Defending Truth", 227.

²⁴⁵ See Bundeswahlleiter, *Bundestagswahlen 2017: Endgültiges Ergebnis*, 12 October 2017, Büro des Bundeswahlleiters, Pressemitteilung No. 34/17, https://www.bundeswahlleiter.de/info/presse/mitteilungen/bundestagswahl-2017/34_17_endgueltiges_ergebnis.html [accessed 20 March 2018].

²⁴⁶ See Sebastian Cobler, "Das Gesetz gegen die Auschwitz-Lüge. Anmerkungen zu einem rechtspolitischen Ablaßhandel", *Kritische Justiz* 18, no. 2 (1985): 160-161.

continuously reminds Jews of the existing dangers of antisemitism which could threaten and intimidate them.²⁴⁷

Besides that, Jewish Professor of Law Alan Dershowitz expressed the view that we as a society fail and even support the strength of the Holocaust denial movement if we imprison Holocaust deniers instead of challenging them in public debates and defeat them.²⁴⁸ One argument that supports this claim further is the danger to form a public conviction which entails the belief that Holocaust denial legislation will “solve” the problem of antisemitism and, hence, the society as such is released. On the contrary, antisemitism is a problem of all who live in societies in which such forms of racial hatred exist. Special ad hoc statutes criminalizing Holocaust denial do not free society in its need to reflect about Holocaust denial and to take antisemitism seriously, not only by means of law. Therefore, Holocaust denial legislation bears the risk to freeze the necessary political debates about the Holocaust, especially in countries where the Holocaust determines questions concerning national identity and responsibility.²⁴⁹ All in all, to engage with Holocaust deniers in an open debate could further strengthen society as it permits its members to deal with the problems of antisemitism where they occur, rather than to criminalize them and push them to the margins of society.

²⁴⁷ See *ibid.*, 160-161

²⁴⁸ See Tishler, “Holocaust Denial”, 569.

²⁴⁹ See Dietz, “Auschwitzlüge”, 222.

10 Concluding remarks

This chapter will determine whether Holocaust denial legislation serves the interest of democracy in the sense of strengthening the democracy in states which Holocaust denial legislation.

The historical and legal reconditioning of the Holocaust could achieve to deal with most crimes against humanity that were committed by Nazi Germany. However, all these efforts could not end antisemitism. Antisemitic hate still manifests in form of different beliefs, expressions or acts worldwide, even in countries which are commonly recognized for their commemorative culture, such as Germany. Moreover, there can be little doubt that the perishing of the last Holocaust survivors who can witness about the crimes that were committed by Nazi Germany will strengthen the Holocaust denial movement and facilitate Holocaust deniers to find gullible and vulnerable converts among people with little knowledge of history.²⁵⁰ Therefore, it is important to support the remembrance of the Holocaust and to acknowledge the moral imperatives that follow for a world that generated such crimes against humanity: to contribute towards a society and a political order that prevents a possible repetition of the Holocaust.²⁵¹

However, it has been argued that especially the recent legal developments concerning Holocaust denial legislation are problematic. One final remark should relate to the issue of the politicization of Holocaust denial which could weaken democracy in such states. Whenever states such as Germany regard it based on a particular political agenda as their state duty and moral responsibility to adopt Holocaust denial legislation, the question that has to be determined is to whether such state conduct actually serves the respectful remembrance of the Holocaust. The early Holocaust denial laws still hold as main objective to protect Jews and Holocaust survivors from antisemitic insults and defamation. Nevertheless, in recent times, Holocaust denial legislation developed and turned into laws that support the maintenance of public order and combat forms of antisemitic hate speech in general. However, as the state-sponsored combat of antisemitism and remembrance of the Holocaust is always linked to certain political agendas, the Holocaust could be used as a pawn for politics that serve other purposes than the above described. This becomes striking when one regards the situation of Holocaust denial in the Middle East or as well in some European states. For example, Poland was internationally criticized for the adoption of Holocaust denial legislation (the Lex GROSS laws, mentioned in Chapter 8.1) which are more in line with recent political developments and the countries aim for the establishment of state-sponsored interpretation of historical facts rather than the promotion of a respectful remembrance of the Holocaust.²⁵² Another example

²⁵⁰ See Lasson, "Defending Truth", 256.

²⁵¹ See Bayzler, "Holocaust Denial", 200.

²⁵² See Shimon Stein and Moshe Zimmermann, "Mehr Politik als Wahrheit." *Zeit Online*, 22 February 2018, <http://www.zeit.de/gesellschaft/zeitgeschehen/2018-02/holocaust-gesetz-polen-justizreform-israel> [accessed 20 March 2018].

regards the political situation in Iran. In 2005, the former Iranian President Mahmoud Ahmadinejad held a speech during which he was calling the Holocaust a myth.²⁵³ In 2006, during another speech, the former President stated the following:

“They have fabricated a legend under the name Massacre of the Jews, and they hold it higher than God himself, religion itself and the prophets themselves. [...] If somebody in their country questions God, nobody says anything, but if somebody denies the myth of the massacre of Jews, the Zionist loudspeakers and the governments in the pay of Zionism will start to scream.”²⁵⁴

The speech of Mahmoud Ahmadinejad was followed by the international conference “Review of the Holocaust: Global Vision” in Tehran in 2006, which was initiated by the Iranian Foreign Ministry.²⁵⁵ The conference was regarded with condemnation by many states worldwide such as the United Kingdom or Germany and was described as an unacceptable affront to victims of the Holocaust.²⁵⁶ Furthermore, an additional reason for the discrediting of the conference was the fact that many infamous Holocaust deniers, such as Robert Faurisson, Georges Thiel, and Frederick Toben, along with persons like the former Ku Klux Klan leader David Duke, attended it.²⁵⁷

All in all, the politicization of Holocaust denial bears the risk to support the instrumentalization of the Holocaust to do politics that do not hold as a priority the establishment of a respectful remembrance of the events in question but rather using it for other purposes. An example and last remark on how the political dimension of the Holocaust can influence state politics in a rather different way is the following. 36 Holocaust survivors recently demanded the president of the State of Israel, Benjamin Netanjahu, to change the government’s controversial migration politics, in particular concerning the deportation of around 36,000 refugees from Eritrea and Sudan.²⁵⁸ The Holocaust survivors stated that they could best understand what it means to be a refugee and, hence, not support the government’s conduct.²⁵⁹

²⁵³ See Bazzyler, “Holocaust Denial Laws”, 12.

²⁵⁴ Al Jazeera, “Ahmadinejad: Holocaust a myth”, 16 March 2006, <https://www.aljazeera.com/archive/2005/12/200849154418141136.html> [accessed 20 March 2018].

²⁵⁵ See Lasson, “Defending Truth”, 224.

²⁵⁶ See Bazzyler, “Holocaust Denial Laws”, 12-13.

²⁵⁷ See Lasson, “Defending Truth”, 229-230.

²⁵⁸ See Lissy Kaufmann, “Gefangen in der Unsicherheit” *Zeit Online*, 20 February 2018, <http://www.zeit.de/politik/ausland/2018-02/israel-fluechtlinge-abschiebung-afrikanische-drittlaender-asylopolitik> [accessed 20 March 2018].

²⁵⁹ See *ibid.*

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