MONIKA DUPPELFELD

HOLOCAUST DENIAL LAWS VERSUS HATE SPEECH LAWS IN GENERAL: HOW FAR CAN WE STRETCH FREEDOM OF EXPRESSION?

LLM RESEARCH PAPER
CENSORSHIP AND FREEDOM OF EXPRESSION - LAWS 520

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

2009

ABSTRACT

This paper considers the German specific Holocaust denial law and the New Zealand general hate speech law and their interferences with the fundamental right to freedom of expression. The main argument is that the current legislation – regarding both countries – contains insufficiencies. While the prohibition of the "simple" Auschwitz Deception in section 130 (3) of the German Criminal Code in cases of judgmental statements leads to an infringement of the underlying dogmatics and justifications of the German Basic Law, the New Zealand approach leads to an insufficient scope of protection regarding Holocaust denying statements under section 131 of the Human Rights Act. As recent incidents of Holocaust denial– in Europe and in New Zealand – show, fighting against Holocaust denial via legislation gains high importance. Thus, it is concluded that the German jurisdiction should adjust the scope of protection of freedom of expression by excluding not only wrong facts, but also judgmental statements which are based on wrong facts from the scope of protection. In contrast, it is suggested that the New Zealand legislature should narrow the thresholds required under section 131 to enable the punishment of Holocaust denying statements.

Word Length:

The text of this research paper (excluding abstract, table of contents, footnotes, bibliography, and appendices) comprises approximately 16,500 words.

Holocaust denial – freedom of expression – hate speech

TABLE OF CONTENTS

I INTRODUCTION

> I am not happy when censorship wins, and I don't believe in winning battles via censorship…The way of fighting Holocaust deniers is with history and with truth.[1]

These words by Deborah Lipstadt, historian and author of the book "Denying the Holocaust", after Holocaust denier David Irving was found guilty in Austria[2], constitute a clear statement pro freedom of expression. Despite her bitter history and debate with Irving, Lipstadt stands up for the right "as being of central importance in a democratic state".[3] Freedom of expression is a value which is quintessential to a liberal democratic society.[4] This applies to speech which finds a broad consent in society as well as to opinions of minorities. However, one has to ask whether the protection should be admitted for hate speech, or the expression of Holocaust denying statements, too.

Having a look at the daily press of the last months, one has to ascertain that Holocaust denial and thus, the question of its interference with freedom of expression is becoming increasingly pervasive. This especially, as the increase of the Internet enables a fast and far reaching dissemination of Holocaust denying statements. Recent cases like the conviction of European Holocaust deniers, the German lawyer Sylvia Stolz on 8th of May 2009[5] and the Austrian Gerd Honsik in April 2009[6] and the Holocaust denying statements by the British bishop Richard Williamson yet again show the vitality of the issue. However, despite the continuous growth of neo-Nazi political movements targeting their hostility towards Jews in Europe and Germany[7], the problem of Holocaust Denial or racist speech with special regard to Jews is not solely a European or German one.

---

[1] "Holocaust Denier Irving is jailed" (20 February 2006) *BBC News* http://news.bbc.co.uk (accessed 6 November 2009).

[2] Irving was sentenced to three years in prison because of denying the Holocaust of European Jewry. Irving had claimed in 1998 that Lipstadt had libelled him in her book "Denying the Holocaust". The judge ruled in favour of Lipstadt, for further information see: *Irving v Penguin Books Ltd, Deborah Lipstadt* (2000) WLR 362478 (HC QBD).

[3] Grant Huscroft and Paul Rishworth (ed) *Rights and Freedoms New Zealand Bill of Rights Act 1990 Human Rights Act 1993* (Brookers, Wellington, 1995) 173 for New Zealand with reference to the White Paper which proposed the Bill of Rights Act.

[4] See Steven J Heyman *Free Speech and Human Dignity* (Yale University Press, New Haven and London, 2008) 1; Winfried Brugger "Verbot oder Schutz von Hassrede? Rechtsvergleichende Beobachtungen zum deutschen und amerikanischen Recht" (2003) 128 AoeR 372; Alexander Tsesis "Dignity and Speech: The regulation of hate speech in a democracy" (2009) 44 Wake Forest LR 497.

[5] See Julia Jüttner "Fräulein Stolz und der Hitlergruß" (9 May 2009) www.spiegel.de (accessed 6 November 2009).

[6] See Manfred Seeh "Wiederbetätigung: Fünf Jahre Haft für Gerd Honsik" (28 April 2009) http://diepresse.com (accessed 6 November 2009).

[7] See Geoffrey Bindman "Outlawing Holocaust denial" (1997) 147 NLR 466.

During the research for this paper, a number of students from Lincoln University in Canterbury (near Christchurch) dressed as Nazis and concentration camp inmates for an Oktoberfest Party organised by one of their university's halls of residence.[8] Besides the clothes showing Nazi slogans like "Sieg Heil!" and "Hitler's my boi", the students "were heiling to Hitler and making tasteless jokes about one of the darkest periods of human history."[9] Press releases out of the same week report on Iran's president Mahmoud Admadinejad, speaking before a crowd of supporters at Teheran University. During that speech Admadinejad "questioned whether the Holocaust was a 'real event' and called it a pretext for the creation of Israel. He said the Jewish state was founded on 'a lie and a mythical claim'."[10]

While the latter statement can constitute a criminal offence under the German Criminal Code, as this provides under certain circumstances for a conviction in case of the denial of the Holocaust as an event of historical fact, the same statement may not lead to any legal consequences in other countries, such as New Zealand. This is caused by the fact that only a few countries have enacted special laws to criminalise the sole expression of Holocaust denial, whilst most of the countries have made hate speech or the incitement to racial hatred in general a punishable offence.[11] Such legislation seeks to uphold the rights of racial minorities to equality and dignity and to live free from discrimination and persecution.[12] This is justified by the argument, that a legal system, pursuing to establish peace and order, does not have to protect hate or hate speech as this may lead to violence. However, hate speech may have its own nuances which make it more difficult to draw clear boundaries between the protection of speech and the prohibition of hate speech. Moreover, one has to take into consideration that restrictions to freedom of expression have to be within the limits prescribed by the particular law. This problem gets virulent regarding provisions explicitly prohibiting Holocaust denial.

Hence, keeping Deborah Lipstadt's words in mind, this paper examines the important issue of which kind of "censorship" is an appropriate approach to fight Holocaust deniers and

---

[8] See "University apologises for students in Nazi garb" (21 September 2009) www.stuff.co.nz (accessed 26 September 2009).

[9] Ibid.

[10] The New Zealand Herald "Iranian opposition supporters crash state rallies" (19 September 2009) http://www.nzherald.co.nz (accessed 26 September 2009); "Ahmadinedschad nennt Holocaust ein 'Märchen'" (18 September 2009) http://www.spiegel.de (accessed 23 September 2009); M Amedeo Tumolillo "Ahmadinedjad Goes on 'Larry King Life'" (26 September 2009) The Lede The New York Times News Blog http://thelede.blogs.nytimes.com (accessed 23 October 2009).

[11] Such as in New Zealand, see V.

[12] Juliet Moses "Hate Speech: Competing Rights to Freedom of Expression" (1996-1999) 8 Auck U LR 185.

how far we can stretch the fundamental right of freedom of expression. By comparing the current and specific German Holocaust denial law to the more general New Zealand hate speech law, this paper analyses the advantages and disadvantages of the two approaches and their interferences with freedom of expression. The paper argues that the German approach is broader in its scope than the New Zealand one as it covers all kinds of Holocaust denying statements. Thus, regarding the protection of the legally protected good the broad scope means an advantage. Moreover, the paper argues that same advantage can mean a disadvantage as Holocaust deniers have more opportunities to appear in court rooms and to disseminate their manipulative thoughts. In addition, the paper finds that the New Zealand approach is more consistent with the right to freedom of expression than the German one and that it limits this fundamental right in a less restrictive way. This paper shows that the current section 130 (3) German Criminal Code (GCC) leads to insufficiencies regarding the justification of a limitation of article 5 of the Basic Law, the freedom of expression. It argues that Holocaust denying statements – and thus wrong facts – in a judgmental context are capable of falling under the scope of freedom of expression, but that section 130 (3) does not qualify as a justified limitation to the right of freedom of expression. In contrast, section 131 of the Human Rights Act (HRA) is a justified limitation to section 14 of the Bill of Rights Act (BORA). This paper suggests that the German legislature should adjust the legal insufficiencies by excluding not only wrong facts, but also judgmental statements which are based on wrong facts from the scope of protection under article 5 of the Basic Law. Moreover, the paper proposes that New Zealand should maintain its general hate speech approach to fight against Holocaust deniers. However, this paper argues that section 131 HRA should be amended regarding its high thresholds and strict criteria as reality has shown and shows that recent incidents do not fulfil the criteria of the provision.

The first part of this paper defines Holocaust denial and gives a brief overview of the institutions and main figures who promote Holocaust denial – or as they call it – revisionism[13] in the public.

The second part of this paper addresses Holocaust denial in the broader context of hate speech and freedom of expression by working out the nature of the existing laws against Holocaust denial. It scrutinises the rationale underlying hate speech and tries to adapt this harm rationale to the denying of the historical fact of the Holocaust. Moreover, this part will

[13] See Robert A Kahn *Holocaust Denial and the Law (a comparative study)* (Palgrave Macmillan, New York, 2004) 2.

analyse the rationales underlying freedom of expression and find arguments for and against a legislative intervention regarding hate speech.

Part three of this paper analyses whether section 130 (3) GCC, which prohibits the denying of Auschwitz (specific Holocaust denial law), is a justified restriction to the freedom of expression, guaranteed under article 5 of the German Basic Law. First, it will describe the development of section 130 (3) and its underlying jurisdiction. However, it will focus on the relationship between the Holocaust denial law and freedom of expression and provide solutions to solve the existing legal problems and inaccuracies.

Part four of this paper constitutes the equivalent of part three, outlining the New Zealand response to Holocaust denial. As the New Zealand legislation does not contain a specific Holocaust denial law this paper analyses its coverage under the hate speech provision of section 131 HRA and scrutinises its interference with freedom of expression.

The last part of this paper compares the two different approaches by showing advantages and disadvantages of the regulations and provides some arguments for which approach should be taken.

II HOLOCAUST DENIERS – WHO THEY ARE AND WHAT THEY BELIEVE

A Holocaust Denial – a Definition

"I shall call 'revisionism' the doctrine according to which the genocide practiced by Nazi Germany against Jews and Gypsies did not exist but is to be regarded as a myth, a fable, or a hoax."[14]

Holocaust deniers or as they call themselves revisionists, assert that the Nazi Holocaust of the Jews never happened.[15] Among other reasons, such as anti-Semitism the denial and downgrading of the Holocaust pursues the purpose of rehabilitating the ideas of National Socialism as a form of society by serving as neo-Nazi propaganda.

---

[14] Pierre Vidal-Naquet *Assassins of Memory Essays on the Denial of the Holocaust* (Columbia University Press, New York, 1987) 79.

[15] Robert A Kahn, above n 13, 2; The Danish Center for Holocaust Denial and Genocide Studies www.holocaust-education.dk (accessed 10 November 2009).

B Personalities and Institutions

Nowadays[16] Holocaust denial is not only a problem which occurs in Germany or continental Europe where it mainly has its roots. It is a vital phenomenon in many parts of the world that threatens governments and those who are targeted by it. Although there exists an alarming racist and anti-Zionist propagandistic movement within Arabian countries, this examination will just point out one institution and one personality denying the Holocaust out of the western world.

1 The Institute for Historical Review

The Institute for Historical Review was founded in 1978 by the American Willis Carto who is also the publisher of several ultra-conservative and mildly anti-Jewish magazines.[17] What led to the founding of the Institute was the preceding publication of various Holocaust-denial literatures, which had reached its peak in the 1960s. The first publication during that time was *The Drama of the European Jews*[18] by the French "historian" Paul Rassinier, who had been imprisoned in the concentration camp Buchenwald for his socialist beliefs during World War II. Although relying on unsupported assertions and highly questionable evidence[19], Rassinier's publication provided a basis and inspiration for a second generation of Holocaust deniers, which found coverage under the IHR.[20]

Today the IHR is led by Mark Weber and has its headquarters in California. While historians and critics describe the IHR as a pseudo-scientific think tank, the founders and members of the institute understand the organisation as an "educational, public interest research and publishing center [that strives] to bring history into accord with the facts."[21]

---

[16] For the origins of Holocaust denial see Ben S Austin "A Brief History of Holocaust Denial" http://frank.mtsu.edu/~baustin/denhist.htm (accessed 27 September 2009); see Peter R Teachout "Making 'Holocaust Denial' a crime: reflections on European anti-negationist laws from the perspective of US constitutional experience" (2006) 30 VtLR 655, 661.

[17] See Kenneth Lasson "Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society" (1997-1998) 6 Geo Mas L Rev 35, 41.

[18] Paul Rassinier *Le Drame des juifs européens* (Le Sept Couleurs, Paris, 1962/64) translated by Harry Elmer Barnes *The Drama of the European Jews* (Steppingstones Publications, Silver Spring MD, 1975, foreword by Michael Hardesty).

[19] See Peter R Teachout, see above n 16, 661; Richard J Evans *Lying about Hitler: History, Holocaust and the David Irving Trial* (Basic Books, New York, 2001).

[20] See ibid, 662. Further publications were for example Arthur Butz *The Hoax of the Twentieth Century: The Case Against the Presumed Exterminations of European Jewry* (Theses & Dissertations Press, Chicago, 1976) David Irving *Hitler's War* (Hodder & Stoughton, London, The Viking Press, New York, 1977). For further publications during that time and their publication under the IHR see founder of the IHR William Carto "A Brief History of Holocaust Revisionism" in Germar Rudolf (nom de plume) (ed) *Dissecting the Holocaust The Growing Critique of Truth and Memory* (2 ed, Theses & Dissertations Press, 2003) 579-581.

[21] The Institute for Historical Review www.ihr.org/main/about (accessed 11 November 2009).

However, commentators have rightly criticised this understanding of the Institute being misleading. Paul Rauber, for example, comments that[22]

> The question [of whether the IHR denies the Holocaust] appears to turn on IHR's Humpty-Dumpty word game with the word Holocaust. According to Mark Weber, associate editor of the IHR's Journal of Historical Review [now Director of the IHR], "If by the 'Holocaust' you mean the political persecution of Jews, some scattered killings, if you mean a cruel thing that happened, no one denies that. But if one says that the 'Holocaust' means the systematic extermination of six to eight million Jews in concentration camps, that's what we think there's not evidence for." That is, IHR doesn't deny that the Holocaust happened; they just deny that the word 'Holocaust' means what people customarily use it for.

Besides conferences which were held by the IHR throughout the last years, the institute uses its Journal of Historical Review as a voice for their movement, populated by a handful of highly motivated individuals, including Mark Weber, David Irving, Robert Faurisson and Ernst Zündel.[23]

2 David Irving

One of the individuals in the Holocaust denial movement is David Irving. He is a British writer who disseminates his views denying the Holocaust in public and thus, has brought the Holocaust on trial heaps of times. The publication of "Denying Holocaust" by Deborah Lipstadt in 1993 in which she describes Irving as someone "who ha[s] frequently proposed extremely controversial theories about the Holocaust, including the claim that Hitler had no knowledge of it, has become a Holocaust denier"[24] led to Irving's first appearance in a courtroom, bringing an unsuccessful libel case against Lipstadt. Instead, the trial revealed him as a "right-wing pro-Nazi polemicist".[25] Moreover, Irving was convicted of glorifying and identifying with the German Nazi-Party in Austria and served a prison sentence.

One of his last appearances in public was in relation to the protest and turmoil around bishop Richard Williamson who had denied the Holocaust in February 2009 and who had

---

[22] See Paul Rauber (17 January 1992) *East Bay Express* San Francisco 4 see http://www.nizkor.org/ftp.cgi/documents (accessed 27 September 2009). The author of this paper wants to repudiate from Weber's statement.

[23] Michael Shermer and Alex Grobman *Denying History Who says the Holocaust never happened and why do they say it?* (University of California Press, Berkeley, 2000) 42.

[24] Deborah Lipstadt *Denying the Holocaust* (The Free Press, New York, 1993) 111.

[25] Richard J Evans, above n 19, 228 quoting the judge of the trial, Mr. Justice Gray.

asked Irving how to present his views without causing an angry backlash.[26] Hereupon, Irving was quoted "He is not a Holocaust denier. Like me, he does not buy the whole package."[27] This quotation is stressed by the fact that Irving officially disclaims to affiliate with the IHR and that he aspires to the respect of the scholarly historical community for the work he has done with Nazi documents which were found to be extremely valuable in understanding German and Nazi historiography.[28] However, Irving often speaks at IHR conventions and lectures to denier groups around the world - activity at least suggesting that he is an apologist for the Holocaust deniers, if not for Hitler and the Nazis.[29]

C What they deny

Most modern definitions of Holocaust denial focus on the dismissal of three main points which are contained in many Holocaust definitions.[30]

The first assertion concerns the fact that an estimated six million Jews were killed during World War II. The suggestion of this number of Jewish victims is judged by deniers to be too high. "Anywhere from 300,000 to one or two million Jews died or were killed in ghettos and camps."[31] The second historical fact they deny, is the existence of the poison gas chambers in Auschwitz and other concentration camps with the intention to use them as an extermination program. "Scientific experiments show that gas was not used to kill people, but only for disinfections."[32] Furthermore, Holocaust deniers assert that there was no intention to commit genocide of Jews based on racial ideology. The Nazi policy was just in pursuit of deporting Jews, but not of killing them. These three main claims are sometimes specified or subdivided into statements, such as that the gas chambers had holes in their roofs or that the gas chamber in Auschwitz is a fake for tourists.[33]

---

[26] See "Holocaust row bishop Richard Williamson contacts David Irving" (26 February 2009) www.telegraph.co.uk (accessed 30 September 2009).

[27] Ibid.

[28] See Peter R Teachout, see above n 16, 666. Michael Shermer and Alex Grobman, above n 23, 48 give an example for this double-sided nature of Holocaust-denial historiography quoting German historian Hans Mommsen, who had endorsed Irving for his work in 1978. However, as Irving proudly displayed this statement on his website, Mommsen requested its removal due to Irving's judgments on the Holocaust.

[29] Michael Shermer and Alex Grobman, above n 23, 49.

[30] See ibid, 100; The Danish Center for Holocaust Denial and Genocide Studies, see above n 15; Holocaust Denial on Trial www.hdot.org/en/denial (accessed 11 November 2009) for further explanation.

[31] See Michael Shermer and Alex Grobman, above n 23, 100 quoting from Bradley Smith's advertisement in college newspapers.

[32] The Danish Center for Holocaust Denial and Genocide Studies, above n 15.

[33] See Holocaust Denial on Trial, above n 30.

D Why they are wrong

Although these assertions are known historical facts and historians agree that the Holocaust happened[34], there has always been a debate concerning single issues. Therefore, this section aims to give some of the most important evidence for these historical facts, whilst showing at the same time, how Holocaust deniers – or as they call themselves historical revisionists – "massage and mangle the evidence to suit their ideological agenda".[35]

Regarding the assertion that gas chambers and crematoria were not used for genocide, but only for delousing clothing[36], Holocaust deniers misuse quotations by divorcing them from their context. As an example, one can refer to historian Arno Mayer who concluded in his book *Why Did the Heavens Not Darken* that "Sources for the study of the gas chambers are at once rare and unreliable."[37] However, Mayer did neither suggest by saying so that gas chambers were not used for genocide nor that they did not exist. This becomes clear by the context of the quotation which refers to the fact that there are just rare studies concerning this fact as the SS destroyed most camp records as well as it razed the crematoria.[38] However, there are different kinds of evidence, such as eye-witness accounts, photographs and Zyklon-B gas traces on the walls of the gas chambers to prove that gas chambers were used for genocide.[39] Just recently, Israeli Prime Minister Benjamin Netanyahu held aloft two documents - a copy of the minutes of the Wannsee Conference, in which Nazi officials planned the Final Solution that led to the killing of six million Jews and the original blueprints of the Auschwitz-Birkenau death camps at the UN, rebutting Ahmadinedjad's Holocaust denying statements.[40] "They contain a signature by Heinrich Himmler, Hitler's deputy himself. Are these plans of the Auschwitz-Birkenau concentration camp where one million Jews were murdered ... a lie, too?"

---

[34] So does the author of this text.

[35] Peter R Teachout, see above n 16, 664.

[36] See Fred Leuchter *The Leuchter Report-The End of a Myth* www.revisionists.com (accessed 10 November 2009).

[37] A J Mayer *Why Did the Heavens Not Darken* (Pantheon, New York, 1990) 362.

[38] Ibid. "Sources for the study of the gas chambers are at once rare and unreliable. Even though Hitler and the Nazis made no secret of their war on the Jews, the SS operatives dutifully eliminated all traces of their murderous activities and instrument. No written orders for gassing have turned up thus far. The SS not only destroyed most camp records, which were in any case incomplete, but also razed nearly all killing and cremating installations well before the arrival of Soviet troops. Likewise, care was taken to dispose of the bones and ashes of the victims."

[39] See Michael Shermer and Alex Grobman, see above n 23, 127; Holocaust Denial on Trial "Myth/Fact Sheets", see above n 30.

[40] See The New York Times "Netanyahu Attacks Ahmadinedjad's Holocaust Denial" (24 September 2009) www.nytimes.com (accessed 10 November 2009).

Regarding the scope and scale of the Holocaust, deniers put an equation mark between different historical interpretations of numbers of victims. The figure of six million is an estimate deriving from demographic research, based on the registered numbers of Jews before and after the war, emigrated Jews living in other countries, number of deported Jews and so on. As historians have diverging "calculation methods" the exact numbers of estimated Jewish losses vary mainly within the range of 4,600,000 to over 6,000,000 million.[41] Holocaust deniers use these diverging numbers to state that the whole Holocaust is a false construction. However, just by coming to different results, one cannot deny the fact of Holocaust denial. With regard to other groups killed by the Nazis, such as gypsies, Poles, Serbs, mentally or physically handicapped people or political opponents the total number is even higher.[42]

> The fact that they [the numbers] do not come out the same but are within a reasonable range of error variance gives us assurance that somewhere between the earlier estimates of five million and more recent estimates of six million Jews died in the Holocaust.

The above described Holocaust denier David Irving is one of the main advocates that Hitler did not know about the Holocaust or that he did not have the intention for genocide, referring to quotes from Hitler.[43] After the publication of his book *Hitler's war* he offered 1000 to anyone who could produce a written order as documentary proof that Hitler ordered the Holocaust.[44] However, there exist documents such as a letter signed by Hitler, authorising the killing of the handicapped.[45] This is a piece of evidence stressing the fact that "if the Nazis were willing to kill their own people, it is reasonable then to assume they could kill people whom they considered alien and whom they viewed as a cancer on society – the Jews."[46] Moreover, the Wannsee conference documents reflect Hitler's real intent; Part I of the protocol is a listing of who took part in the conference on the Final Solution (Endlösung) of the Jewish question. Reading the document in the context of Hitler's politics and the theories published in is book *Mein Kampf* his real intent, to kill the Jews, becomes obvious.[47]

---

[41] See Appendix 1: Historian's Estimates of Jewish Losses in Each Country.
[42] Michael Shermer and Alex Grobman, see above n 23, 174.
[43] David Irving, see above n 20, 427.
[44] See Andrew Walker "Profile: David Irving" (20 February 2006) *BBC News* http://news.bbc.co.uk (accessed 30 September 2009).
[45] See Michael Shermer and Alex Grobman, above n 23, 204.
[46] Ibid, 101.
[47] The Wannsee Protocol includes paragraphs, such as "The remnan that eventually remains will require suitable treatment; because it will without doubt represent the most resistand part, it consits of a natrual selection that could, on ist release, become the germ-cell of a new Jewish revival."

These examples show how institutions and individuals misuse evidence and historical facts for their own purposes to deny the Holocaust. Therefore, they try to undermine and functionalise their statements as racist or propagandistic.

III HOLOCAUST DENIAL IN THE CONTEXT OF HATE SPEECH AND FREEDOM OF EXPRESSION

Thus, to have a full understanding of the problems that arise while answering the research question with special regard to the German and New Zealand jurisdiction one has to examine Holocaust denial in the broader context of hate speech and freedom of expression. Therefore, this section aims to discuss the various reasons for and against regulating hate speech in general, its interference with the fundamental right to freedom of expression and its application to particular Holocaust denial laws.

A The Nature of the Laws against Holocaust Denial

To scrutinise the nature of the laws against Holocaust denial, one has to distinguish between different kinds of laws. A number of European countries have laws on their books making Holocaust denial explicitly or implicitly a crime, such as Austria, Belgium, the Czech Republic, France, Germany, Israel, Lichtenstein, Lithuania, Luxembourg, Poland, Portugal, Romania, Spain and Switzerland.[48] However, the laws of these countries differ from each other regarding the elements of the offence, the sentencing and have different nuances. While some countries criminalise both, Holocaust denial and the promotion of Nazi ideology through speech, symbols or public association, others concentrate on one aspect. Moreover, it is worth to mention that countries like Romania and Lithuania, despite having explicit denial laws on the books, enforce them sporadically.[49]

During its EU Presidency Germany tried to put the fight against racism throughout Europe back on the political agenda, focussing on the enactment of a specific Holocaust denial law binding the whole Union.[50] This proposal took place in the context of the

---

[48] Compare Dominic McGoldrick and Thérèse O'Donnell "Hate-speech laws: consistency with national and international human rights law" (1998) 18 Legal Studies 453, 456; Michael J Bazyler "Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism" (2006) www1.yadvashem.org (accessed 30 September 2009).

[49] See Michael J Bazyler, see above n 48.

[50] See Committee on Civil Liberties, Justice and Home Affairs "Fighting racism in Europe: should Holocaust denial be a criminal offence?" (19 March 2007) Press Release www.europaparl.europa.com (accessed 30 September 2009); BBC News "Push for EU Holocaust denial ban" (15 January 2007) BBC News

discussion regarding the Council Framework Decision on Combating Racism and Xenophobia. The initiation of such framework by the Commission in 2001 was based on a series of racist and xenophobic motivated events all over Europe.[51] However, the framework had been frozen since 2005[52] and was discussed again in 2006 and 2007. It came to the result of criminalising the intentional conduct referring to crimes against humanity in general, but not only to holocaust denial. The current framework met the minimal consensus of the EU Ministers stating that[53]

> Publicly condoning, denying or grossly trivializing
>
> Crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court (Articles 6,7, and 8) 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, and
>
> Crimes defined by the Tribunal of Nuremberg (Article 6 of the Charter of the International Military Tribunal, London Agreement of 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

will be punishable in all EU member states. However, it is worth to emphasise that the Framework Decision does not cover crimes committed on other grounds, for example by totalitarian regimes.[54] Thus, the result of this framework is that it does not criminalise Holocaust denial outright, but an imprisonment up to three years is optionally available for "denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes."

---

http://news.bbc.co.uk (accessed 30 September 2009). See further Sebastian Weber "Strafbarkeit der Holocaustleugnung in der Europäischen Union" (2008) 1 ZRP 22.

[51] The European Commission includes one national of each member state and is the executive body of the European Union. It is responsible for proposing legislation, implementing decisions and upholding the Union's treatises see Treaty Establishing the European Community, 10 November 1997, Official Journal C 340 (consolidated version Official Journal C 321 E of 29 December 2006), articles 211 et seq. Article 213 states that it is independent in the performance of their duties. For the proposal of the Commission see Commission Proposal for a Council Framework Decision on Combating Racism and Xenophobia COM (2001) 664 final Official Journal C 75 E http://eur-lex.europa.eu (accessed 30 September 2009).

[52] See "Racism and holocaust denial debated at EU Parliamentary hearing" (20 June 2006) www.eu-un.europa.eu (accessed 30 September 2009).

[53] Council of the European Union "Framework Decision on Racism and Xenophobia" (19 April 2007) Press Release 8665/07 http://register.consilium.europa.eu/ (accessed 30 September 2009). The approach was first pending on the lifting of Parliamentary reservations, but the reservations were lifted in 2008, see Permanent Representatives Committee "A item note" (26 November 2008) http://register.consilium.europa.eu/ (accessed 30 September 2009) and Council of the European Union "2908th meeting of the Council" (27 and 28 November 2008) Press Release 16325/1/08 REV 1 http://register.consilium.europa.eu/ (accessed 30 September 2009).

[54] See "Racism and holocaust denial debated at EU Parliamentary hearing", see above n 52.

This approach, as it is not that specific as for example, the German or Austrian Holocaust denial law and as it provides for punishment of publicly inciting to violence or hatred in general as well[55] leads to the approach of broader laws covering the prohibition of hate speech and racial incitement. Regarding this more general approach, there exist a number of international and national legal instruments referring to "incitement to violence" alongside racial vilification.[56] Countries providing such a law therefore, do not specifically criminalise Holocaust denial, but prosecute individuals that promote hate speech.

To assess whether this kind of law can be applied in case of Holocaust denying statements and whether Holocaust denying laws are a form of hate speech laws, one has to scrutinise the harm rationale and the injury it might cause to the public good.

B Hate Speech: The Harm Rationale

As emphasised above, freedom of expression is a fundamental right in liberal democracies[57] and thus, gains a high protection. However, one has to ask whether the same can be applied to hate speech as it raises fundamental issues from legal and philosophical standpoints.[58] There exist different facets of hate speech. It may find its expression in the form of epithets such as "Nigger", public campaigns against ethnic groups or religions or swastikas spray painted on a gay man's car. The list of examples seems to be endless. Although quite different in their circumstances and appearance, they all have something in common: the effect to cause harm.

Hate speech is intended to injure, degrade, denigrate or ridicule people and by those means, to cause psychological and physical harm and discrimination.[59] Before having a closer look at the specific effect of harm and its manifestation, it is necessary to point out the targets as the concrete effect of harm may depend on the target it affects. One can draw a distinction,

---

[55] See paragraph 1 of the Framework Decision. Compare Council of the European Union "Framework Decision on Racism and Xenophobia" (19 April 2007) Press Release 8665/07 http://register.consilium.europa.eu/ (accessed 30 September 2009).

[56] See for example Wojciech Sadurski *Freedom of Speech and Its Limits* (Kluwer Academic Publishers, Dordrecht, Boston, London, 1999) 192. Moreover, see multilateral agreements, such as the International Convention on the Elimination of All Forms of Racial Discrimination 1966 and International Convenant on Civil and Political Rights 1966.

[57] See III D.

[58] See Jean-François Gaudreault-Des Biens "From Sisyphus's Dilemma to Sisyphus's Duty? A Mediation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide" (2001) 46 McGill LJ 1117, 1118.

[59] See ibid; Human Rights Commission "Submission to the Government Administration Committee into the Inquiry into Hate Speech" (5 May 2005).

categorising two groups: first, hate speech that is directed toward particular individuals or the targeted group and secondly, the harm which is communicated to society and the public as a whole.

The harm hate speech causes on the individual person or the target group advances feelings of prejudice and inferiority of the targeted group.[60] The professors Lee Epstein and Thomas Walker define hate speech in their highly respected study *Constitutional Law for a Changing America* as[61]

> Expression based on hatred [that] goes well beyond the standards of appropriateness or good taste. It arises from hostile, discriminatory, and prejudicial attitudes toward another person's innate characteristics: sex, race, ethnicity, religion, or sexual orientation. When directed at a member of a targeted group, such expression is demeaning and hurtful. Hate speech tends to be devoid of traditional commentary on political issues or on the need for changes in public policy. Instead, its central theme is hostility toward individuals belonging to the target group.

Therefore, people targeted by hate propaganda and hateful messages respond to it feeling humiliated and being fearful[62] because physical violence may follow. The stigmatisation can lead to a loss of self-abasement and self-worth, psychological injury, such as emotional distress[63], intimidation and isolation and as a consequence, to the quitting of a job or the leaving of a home. Thus, it is an indirect cause of the hate speech that targets underperform in academic circumstances. The harm of hate speech toward particular individuals can therefore be summarised as the violation of their rights of personal security, personality, dignity and equality.

Moreover, with regard to the second category of a potential target of hate speech, the harm caused to particular individuals or a group may be reflected to the public and thus, society might suffer as well. By telling the audience what links the "target" as a group, isolating the opponent and destroying the validity of its characteristics, the audience will want to distance itself from what it finds abhorrent and that can create a negative impact on the

---

[60] See Kent Greenawalt *Fighting Words* (Princeton University Press, New Jersey, 1995) 59.

[61] Lee Epstein and Thomas Walker *Constitutional Law for a Changing America: Rights, Liberties and Justice* (4 ed, CQ Press, Washington D.C., 2001) 271.

[62] See Kathleen Mahoney "Hate Speech: Affirmation or Contradiction of Freedom of Expression" (1996) U ILL LR 789, 792.

[63] Steven J Heyman *Free Speech and Human Dignity*, see above n 4, 165; see further Richard Delgado "Words that Wound: A tort action for racial insults, epithets, and name calling" (1982) 17 Harv CR-CL LR 133, 138.

target.[64] Thus, hate speech undermines fundamental democratic values, such as the societal order and the responsibility not to use your freedom to infringe another's. However, the right to be recognised as a person is the most fundamental right that an individual has. It is a right that lies at the basis of all their other rights and that constitutes a functioning society and political community.[65]

Moreover, hate speech can lead to an atmosphere of discrimination and potential violence and increases the risk of hate crimes, xenophobia and genocide.[66] The latter effect is likely to result from violence committed by other persons incited by "vilifiers" to assault the victims of racial vilification. The former aspect, the potential violence, might not only result from "vilifiers" or incited people, but also from the reaction by the victims of group vilification. This aspect with its different forms of violence degrades the standards of everyday life and civility. It undermines social peace and harmony, and thus, the entire society as a result.[67]

Another aspect one has to consider is the risk of tensions between speakers and a third group of people. As set out under the harm of increasing violence, initially non-involved persons might be incited and continue with hate propaganda or react with violence. Thus, hate speech may affect not just those whom are targeted. The same applies to people who disagree with the speaker and align themselves with the target. Moreover, individuals or a whole group may be the subject of an attack not because they are for example homosexual and therefore, target to an attack against homosexuals, but merely because they are thought to be.[68] Thus, hate speech can affect anyone.

As could be shown, hate speech might cause harm. Every instance of genocide came on the heels of a wave of hate speech, depicting the victims in belittling terms.[69] Therefore,

---

[64] Office of Film and Literature Classification "Submission Inquiry into Hate Speech" (29 October 2004) 6 www.censorship.govt.nz (accessed 30 September 2009).
[65] See Steven J Heyman, see above n 4, 171.
[66] Juliet Moses, see above n 12, 195; Jean-François Gaudreault-DesBiens, see above n 58, 1119. See Michael Rosenfeld "Hate Speech in Constitutional Jurisprudence: A comparative Analysis" (2003) 24 Cardozo LR 1523, 1525 who distinguishes between general hate speech laws that are concerned with hatred or vilification towards certain groups and speech that incites violence.
[67] See Wojciech Sadurski, see above n 56, 195.
[68] See Human Rights Commission, above n 59, 5.
[69] Richard Delgado and Jean Stefancic "Four Observations about Hate Speech" (2009) 44 Wake Forest Law Review 353, 363.

speech has to be taken seriously; it forms the social world that makes harm possible. As Matsuda points out[70]

> There is no genocide without supporting propaganda. There is no rape without misogyny; there is no gay bashing without homophobia. There is no lynching without the 'N' word. This is not a poem. I mean it as a statement of fact. Without the language that says "this is not a person", it is typically not possible for human beings to harm other human beings.

C Holocaust Denial as Hate Speech: Does it cause similar Harm?

To assess whether Holocaust denial is a form of hate speech one has to analyse how the harm rationale is reflected in Holocaust denying statements in relation to its categories of targets. There are some arguments supporting the theory that explicit Holocaust denial is a form of hate speech affecting an individual target or a group.

At first, by denying that the Holocaust has happened, institutions like the IHR or persons like Irving deny survivors their history. However, "to deny a people their history is to deny them the most essential element of their group existence. It is always a precursor to the subordination, diminishment, and ultimately the destruction of a people."[71] One might not even surmise the harm and hurtfulness of someone who suffered and survived the Holocaust listening to statements that "it never happened". Moreover, Holocaust denying statements do not only cause harm regarding the survivors, but carry the indictment of denigrating the memory of those who suffered incarceration in the Nazi concentration camps, thus constituting for those affected and their families a kind of desecration as well.[72]

This harm is reflected in a the German case *Beleidigungsfähigkeit eines erst nach 1945 geborenen Juden* the court stated that[73]

> The very historical fact that humans were segregated according to their origin under the so-called Nuremberg laws, and were robbed of their individuality with a view to their extermination, gives

---

[70] Mari J Matsuda "Hate Speech: What Price Tolerance" (13 March 2003) Panel Discussion Arlin M Adams Center for Law and Society at Susquehanna University www.susqu.edu/documents/hate.pdf (accessed 1 October 2009).

[71] Arthur Berney in Boston College Law School "Debate: Freedom of Speech and Holocaust Denial" (1987) 8 Cardozo LR 559, 572.

[72] See Peter R Teachout, above n 16, 670.

[73] *Beleidigungsfähigkeit eines erst nach 1945 geborenen Juden* [1979] 75 BGHZ 160 (DE) (FCJ), translated by Eric Stein "History against free speech: The German law against the 'Auschwitz'- and other 'lies'" (1986) 85 Michigan Law Review, 277, 303.

> the Jews living in the Federal Republic a special personal relationship with their fellow citizens; in this relationship the past is present even today. They are entitled, as a component of their personal self-image, to be viewed as a part of a group, singled out by fate, to which all others owe a particular moral responsibility, and that is an aspect of their honor. The respect of this self-image constitutes for every one of them one of the guarantees against a repetition of discrimination and a basis for their life in the Federal Republic.

Moreover, this leads to the thereto linked harm of fear and intimidation of Jewish people as Holocaust denial is a current form of the classis anti-Semitism doctrine of the evil, manipulative and threatening world Jewish conspiracy.[74] What is on the surface a denial of the reality of genocide is, at its core, an appeal to genocidal hatred.[75] Therefore, it has an impact upon the feelings of the Jews and can cause anger and intimidation. Holocaust deniers, such as David Irving, are for example often connected with right-wing groups in Europe, giving speeches in front of them.[76] Although neo-Nazism has its own nuances, its supporters may also espouse the denial of the Holocaust. Moreover, it is Holocaust deniers and neo-Nazis common goal to revive or resurge Nazism or Nazi ideological principles.[77] Thus, Holocaust deniers use neo-Nazis as a mass-audience to plant seeds of questioning and doubt about the Holocaust and to make the world safe for anti-Semitism again.[78] It is without any question, that marches, speeches and any kind of neo-Nazim or anti-Semitism in the form of Holocaust denial causes fear and intimidation to the targeted group.

The aspect of anti-Semitism is reflected in the second target, the entire society suffering from hate speech, as well. Holocaust denying statements – as seen above in relation to the connection between neo-Nazis and Holocaust deniers – engender anti-Semitism in others. This leads to discrimination and the destruction of the order in which Jewish people have the same right of recognition. Thus, the public good and peace, reflected in a functioning societal order of a democracy is harmed. In the case against Holocaust denier Zündel *(R v Zündel)* the Appeal Court found that "[t]his appeal concerns the wilful publication of deliberate, injurious lies and the legislation which seeks to combat the serious harm to society as a whole

---

[74] See Anti-Defamation League "Introduction: Denial as Anti-Semitism" www.adl.org/Holocaust/theory (accessed 1 October 2009).
[75] Ibid.
[76] The Nizkor Project "David Irving, Holocaust denial, and his connections to right-wing extremists and Neo-National Socialism (neo-Nazism) in Germany www.nizkor.org (accessed 3 October 2009).
[77] See Oxford English Dictionary "neo-Nazism" http://dictionary.oed.com.helicon.vuw.ac.nz (accessed 3 October 2009); Holocaust Denial on Trial, see above n 30.
[78] See Anti-Defamation League, above n 74.

caused by these calculated and deceitful falsehoods."[79] Moreover, the judgment refers to another decision of the Supreme Court of Canada, *R v Keegstra*[80], in which a school teacher had taught his pupils that Jews have various evil qualities and thus he made frequent anti-Semitic statements. Although this case was not directly concerned with a Holocaust denying statement, it becomes applicable for this analysis by being quoted in the decision against the Holocaust denier Zündel. In *Keegstra* the court clearly recognised[81]

> the invidious and severely harmful effects of hate propaganda upon target group members and upon society as a whole. It was found that members of such groups, not unexpectedly, respond to the humiliation and degradation of such "expression" by being fearful and withdrawing from full participation in society. Society as a whole suffers because such "expression" has the effect of undermining the core values of freedom and democracy...[thus] Holocaust denial has pernicious effects upon Canadians who suffered, fought and died as a result of the Nazi's campaign of racial bigotry and upon Canadian society as a whole.

This shows that Holocaust denying statements can target the same victims, an individual person or a targeted group as well as the whole society of a nation than hate speech. Problems that arise with regard to hate speech can have to be considered under the more specific Holocaust denial statement, too. Thus, one can argue, that Holocaust denial is a special form of hate speech. However, this does not mean, that Holocaust denial may be punishable in every country which has hate speech laws on their books. It might be the case that the actual case might not meet the requirements of the specific criteria of a hate speech law. A Holocaust denying statement may have its own nuances, too – whether it is "just" denying or used in a judgmental context and thus, lead to different legal consequences.

Moreover, one can raise the issue – like Teachout – that there is a distinction whether to say a state may legitimately censor hate speech because of the hate element or to censor same speech because the views expressed fail to conform to some state-established, orthodox version of history.[82] This is a good point and part of the research question. However, the statement is not linked to the fact whether a Holocaust denying statement can be regarded as a form of hate speech or not.[83] One can argue against the classification of a Holocaust denial statement as a form of hate speech, that the law sometimes provides different provisions,

---

[79] *R v Zundel* [1992] 2 SCR 731 (SCC).
[80] *R v Keegstra* [1990] 3 SCR 697 (SCC).
[81] Quoted in *R v Zundel*, above n 79.
[82] Peter R Teachout, see above n 16.
[83] See Christopher Bishop "Denying the undeniable: Holocaust denial, the criminal law, and free speech" (LLB (Hons) Research paper, Victoria University of Wellington, 2007) 24 – 25.

covering both aspects and therefore, draws a distinction. An example could be the above mentioned European Framework which consists of sub-paragraphs, pointing out hate speech in general in the first one and focussing of the denial of genocide in a second one.[84] Another example is the German Criminal Code which contains hate speech laws as well as prohibiting Holocaust denial specifically.[85] However, the coexistence of hate speech and Holocaust denial law in specific does not lead to the conclusion that both forms have to be distinguished. As could be shown Holocaust denial statements contain the same harm rationale than "general" hate speech does. Therefore, it qualifies as hate speech. Another perspective is that the coexistence of laws wants to avoid loopholes in relation to the single criteria of hate speech law. Thus, one has to assess whether hate speech laws – being more general or specific in form of a Holocaust denial law – is a justified restriction of freedom of expression.

D The Importance of Freedom of Expression

Speech is the vehicle by which humans express and exchange their thoughts, beliefs, and opinions. Every thought, belief, opinion and statement and word contains power and thus, in turn causes a certain effect on its recipient. "Written constitutions and Bill of Rights invariably protect freedom of speech as one of the fundamental liberties guaranteed against state suppression or regulation."[86] Even in countries in which freedom of expression does not gain constitutional status, it is protected by common law, culturally and politically. Especially European countries, however, protect other important values, such as human dignity and personal honour as well, and hence, have to balance freedom of expression against these other highly valued rights. On the contrary, the American form of freedom of expression, guaranteed by the First Amendment, is absolute and trumps all other values. Despite this difference, however, freedom of expression is a basic value in all western countries. Thus, one has to ask why we should protect free speech. What are its underlying rationales?

E The Rationales behind Freedom of Expression

There are three main rationales mentioned in scholarship and cases justifying freedom of expression. These are briefly outlined below.

---

[84] Framework Decision, above n 53.
[85] German Criminal Code, s 130 with all its subparagraphs.
[86] Eric Barendt *Freedom of Speech* (2 ed, Oxford University Press, Oxford, 2005) 1.

1 The "marketplace of ideas"

Freedom of expression is connected to the development of democracies, starting in ancient Greece. "The agora and later in Rome the forum romanum were the original and literal 'marketplace of ideas'."[87] This premise was developed through the years and subsequently transformed into the American First Amendment, where it finds its strongest form. In the Anglo-American environment John Milton and John Stuart Mill are well-respected for their arguments and theories they pushed forward pro freedom of expression, the importance of an open debate to discover the truth. Milton declared[88]

> Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties…Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter.

Mill argues even stronger for the publishing not just of truth, but to allow false statements as well.[89]

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race…those who dissent from the opinion, still more than those who hold It. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose the clear perception and livelier impression of truth, produced by the collision with error.

Later on, Justice Holmes put these ideas into the often-cited words: "The best test of truth is the power of though to get itself accepted in the competition of the market."[90] In other words, the scholars and practitioners argue for freedom of expression without censorship as free speech will eliminate weak and wrong opinions. Thus, free speech is postulated for the marketplace to operate and to find truth.

2 Freedom of expression as promoter for self-development and –fulfilment

Another main rationale underlying freedom of expression is its necessity for personal self-fulfilment and –development. It is the natural right's premise that mental self-fulfilment

---

[87] Stephen J Roth "The Laws of Six Countries: An Analytical Comparison" in Louis Greenspan and Cyril Levitt (eds) *Under the Shadows of Weimar – Democracy, Law, and Racial Incitement in Six Countries* (Praeger, Westport, Conneticut, London, 1993) 180.

[88] John Milton "Aeropagitica: A Speech fort he Liberty of Unlicensed Printing" to the Parliament of England in 1644 in John Milton *Prose Writings* (Everyman's Library, JM Dent & Sons Ltd, London, 1958) 145.

[89] John Stuart Mill "On Liberty" in *Three Essays* (OUP, first published as a World's Classics paperback, 1991) 14, 21.

[90] *Abrams v United States* (1919) 250 US 616, 630, Holmes J dissenting.

is a primary good.[91] By having free expressions one can create a critical reasoning. "Restrictions on what we are allowed to say and write...to hear and read, inhibit our personality and its growth."[92] Quoting Sartre "self-expression is an expression of choosing ourselves"[93], a human voicing of our distinctive identity.[94] Speech distinguishes human beings from animals. Thus, to be free in the form and content of speech is a manifestation of autonomy. Speech – whether written or spoken – is a direct way of communication. By using speech, an individual expresses its autonomy, showing his thoughts and beliefs to others. Speech does, moreover, include a feedback of those who are confronted with one's thoughts and opinions. Hence, freedom of speech might create a self-regulation and therefore, benefit society.

3 Participation in a democracy

Moreover, it is essential to have free speech in order to debate, contribute to and to participate in the democratic process. This political argument is often urged in connection with the theory of Alexander Meiklejohn and his followers. In Meiklejohn's view it is the primary purpose of free speech to protect the right of all citizens to understand and discuss political issues in order to participate effectively in the working of democracy.[95] Freedom of expression may affect the citizens' choices regarding their decision making and voting. It was held in *R v Kopyto* that "[a] democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions."[96] Some commentators stress the fact that the argument only works if the democratic ideal of equal participation in the process of government stands above majority rule.

This rationale can be linked to a "negative" theory of free speech protection, stating that there are strong arguments to be suspicious of governments and their fallibility. Referring to governments and their decisions, it has a political impact and thus, can influence the participation of citizens in the democratic process. However, it is more an argument pointing out the negative aspects of regulation, rather than highlighting the good of free speech.

---

[91] See T Scanlon "Freedom of Expression and Categories of Expression" (1979) 40 U Pittsburg LR 519.
[92] Eric Barendt, above n 86, 13.
[93] J Sartre *Being and Nothingless* (Philosophical Library, New York, 1956) 598.
[94] See Stefan Braun *Democracy of Balance Freedom of Expression and Hate Propaganda Law in Canada* (University of Toronto Press, Toronto, 2004) 36.
[95] See Eric Barendt, above n 86, 18 referring to Alexander Meiklejohn *Free Speech and ist Relation to Self-Government* (Harper, New York, 1948) and ibid "The First Amendment is an Absolute" [1961] Supreme Court Review 245.
[96] *R v Kopyto* (1987) 47 DLR 213, 226 (CoA), Cory J.

Frederick Schauer mainly emphasises the importance of this argument as a justification for the protection of freedom of expression.[97]

> Freedom of speech is based on large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of government power in a more general sense.

This idea pushes forward the idea of freedom of expression of a control mechanism and as a medium to balance decisions made by governments.

F A Critique of the Rationales behind Freedom of Expression

However, the above mentioned rationales behind freedom of expression have been criticised by many commentators and scholars.

The rationale of discovering truth assumes that the expression of a true statement is the highest premise for a society. This perception treats truth as being absolute and objective and thus, is one-dimensional. The view presupposes that one can prove and verify the facts underlying speech with regard to self-evident truths.[98] However, there is the sort of opinion that is hardly amenable to the truth analysis, in particular those statements which come close to the "pure opinion".[99] In such cases, it might be difficult to assess the truthfulness and to justify truth. Moreover, societies might have different understandings of what is true or not. This stresses the fact that truth is not absolute, but relative.

The argument is linked with a criticism to Mill's argument that the utility of an opinion cannot be separated from its truth as one can argue that a public and free debate of a restriction of a certain kind of speech does not damage society. This emphasises that the establishment of truth is not necessary impossible when banning a publication or a certain kind of speech. To argue against this by saying that it is overall misguided to restrict and suppress a certain kind of speech because this drives unpleasant ideas underground and that

---

[97] Frederick Schauer *Free Speech: A Philosophical Enquiry* (Cambridge University Press, Cambridge, 1982) 86.
[98] See Sionaidh Douglas-Scott "The Hatefulness of Protected Speech: A Comparison of the American and European Approaches" (1999) 7 William & Mary Bill of Rights Journal 305, 335.
[99] See Wojciech Sadurski, above n 56, 10.

they may surface later in a more dangerous form, departs from the argument of truth.[100] It might be an argument against the restriction of speech in general, but does not relate to the interests of truth.

Moreover, the attempt to find truth by a free marketplace of ideas does not consider the differences and variety of education and knowledge among the citizens who participate in the process. The idea of a free market for speech assumes that all individuals have the same qualifications, options and access to the market. However, some voices, those with greater access to the media to disseminate their opinion, might "dominate, shout down, or silence weaker but possibly truer voices."[101] It is highly questionable whether such inequality in positions to find truth is an appropriate way to discover truth. Mill's theory however, is based on equality and the fact that "middle class, educated audience whose members would be able to make up their own minds"[102], but this theoretical construct does not reflect reality. This leads to argument that a free marketplace of ideas does not necessarily lead to the reception of truth, but to undesirable results. "Indeed, some historical experience suggests the contrary; the Nazis came to power in Germany in 1933, although there had been (relatively) free political discourse under the Weimar Republic during the 1920s."[103]

A further concern relating to the theory of discover truth, is the question whether the model of a free marketplace of ideas relates to opinion as well as to wrong facts. Arguments that "truth and falsehood may grapple" are more relating to an opinion than to a false fact. One can argue that false statements do not contribute to the process of discovering the truth and thus, they can be excluded from the freedom of expression. However, one can argue that falsity is necessary for the confirmation of the truth.[104] This view does not consider the appeal of false statements. False statements may have sufficient amplifying volume, in propaganda and mass media, they can often win the battle[105] or in the words of the Williams Committee report[106]

---

[100] See Eric Barendt, above n 86, 9.
[101] See Sionaidh Douglass-Scott, see above n 98, 336.
[102] Quoted in Sionaidh Douglass-Scott, above n 98, 336. Alan Regel "Hate Propaganda: A Reason to Limit Freedom of Expression" (1984) 49 Sask Law Rev 303, 307 moreover, points out that Mill assumes the audience will recognize the truth when confronted with it, whereas in fact humans are prone to persuasion by arguments that are not sound.
[103] See Eric Barendt, above n 86, 9.
[104] See Karl Popper *The Open Society and its Enemies* (Routledge and Kegan Paul, London, 1962) 123-124.
[105] See Wojciech Sadurski, above n 56, 12.
[106] Committee on Obscenity and Film Censorship "Report of the Committee on Obscenity and Film Censorship" (1979) 55. The marketplace of ideas rationale is essentially an adaptation of Adam Smith's economic philosophy to law, in that faith is placed in the market to reach the correct conclusion provided that the

> Against the principle that truth is strong and (given the chance) will prevail, must be set Gresham's Law, that bad money drives out good, which has some application in matters of culture and which predicts that it will not necessarily be the most interesting ideas or the most valuable works of art that survive in competition.

This does not mean that a state has to restrict freedom of expression and has to suppress all wrong facts, which has to be discussed in the individual case. However, the issues show the lack of the principle of the marketplace of ideas to discover the truth. Drawing a comparison to economic marketplaces, one can however doubt, that a free and unrestricted market leads to the best results and truth, as reality shows that democracies need regulations and restriction of a their marketplace to eliminate an unwanted balance of power.

In relation to the rational of self-fulfilment and -development it is without any doubt that freedom of expression is important for a person's self-fulfilment. However, one has to see that freedom of expression is not the only freedom and right that promotes the development of a personality. As seen above, it can be argued that the exercise of freedom of speech infringes human dignity or the rights of another person affected by the speech to be treated with equal respect and concern.[107] This argument is linked to the fact that individuals are part of a community and thus, can just exercise their freedoms within the boundaries of a community. "Such criticism proceeds from the Aristotelian thesis that humans are incomplete as individuals because they can develop and exercise distinctively human capacities only through participation in group life."[108]

Besides the rationale of self-fulfilment the theory of freedom of expression as an engine-room for democracy shows its lacks as well. It has been questioned as a justification for free speech in cases of non-political speech as its proponents argue for it in relation for a working democracy. However, this leads to the difficult questions of what can be considered as political speech and whether it is always possible to identify what is political. The fact that for example Meiklejohn has admitted that political issues can derive from philosophy,

---

market is allowed to function uninhibited by external restrictions, see Petra Butler and Andrew Butler *The New Zealand Bill of Rights Act: a commentary* (LexisNexis, Wellington, 2005) 307.

[107] Compare Eric Barendt, above n 86, 15.

[108] Sionaidh Douglas-Scott, see above n 98, 338.

literature and art[109], makes it even more difficult to draw clear boundaries of political speech. As Sadurski puts it that[110]

> it seems that there is some incongruency between the rationale and the scope of the protection: ... The first horn of the dilemma captures the sense of unease that many of us have about elevating politics to the apex of human activity; such an elevation is aid to smack of elitism, and of neglect for other realms of human endeavour...The second horn of the dilemma ... can only be remedied by watering down the sense of "the political" to a point at which virtually any worthy activity ... will in turn find its remote articulation in the voting decision.

G *Arguments for and against Legislative Intervention regarding Hate Speech and Holocaust Denial*

Having analysed the rationales of harm, freedom of expression and the criticism which can be pushed forward in relation to the rationales of freedom of expression, one has to apply the arguments to the restriction of hate speech, in particular to Holocaust denying statements.

As history and present have shown, and, shows, the theory of a free marketplace of ideas to discover the truth, seems to fail to a certain degree regarding hate speech and especially, in its form of Holocaust denial. As the introductory statement by Lipstadt shows, deniers should be fought with truth. By doing so Lipstadt refers to the truth-rationale underlying freedom of expression. It is without any doubt, that education about the past and truth gain high importance and that is the right way to fight Holocaust deniers by convicting them with words. However, the mentioned convictions in the past months and the increased neo-Nazism movements show the failure of "discovering the truth". Recently, Irving has started a "speech – tour" within the United States[111], disseminating his denying statements. Actions like that show that societies are not able to flatten this kind of thinking. Thus, it seems that the law is tasked to keep the truth, to regulate the free marketplace of ideas, as testimonies of World War II are dying, but the problem of Holocaust denial remains a hot issue. As pointed out in the Cohen-Report "given the right circumstances, human beings can be persuaded to believe almost anything. Some individuals, of course, are more susceptible than others."[112] This statement can be stressed by the fact that Holocaust deniers – or

---

[109] See "The First Amendment Is an Absolute", above n 95, 256.
[110] Wojciech Sadurski, above n 56, 22.
[111] See http://www.focal.org/speaks/index.html (accessed 10 November 2009).
[112] Special Committee on Hate Propaganda in Canada "Report of the Special Committee on Hate Propaganda in Canada" (Queen's Printer, Ottawa, 1966) 6.

revisionists – use manipulative language as pointed out above. Reading their publications with respect to the research of the paper, has revealed that one has to read critically to judge the true content of these documents. Thus Teachout referring to Brickel questions rightly[113]

> Does constitutional commitment of freedom of expression mean, as Holmes argues, that we have to sit idly by while the marketplace of ideas determines which ideas prevail and which do not, and accept whatever ideas in the long run come to be accepted by a dominant majority, no matter how brutal and savage and destructive those ideas may be?

Supporters of an unrestricted freedom of expression, argue that a law restricting speech might even alert the targeted group. This might be true to a certain degree. However, one has to assess the outcome of a law restricting speech not just in consideration to the targeted group, but to the whole society which might suffer from it. Moreover, a legislative intervention – although alerting the problem of Holocaust denial – might protect and value the human dignity and rights of victims of hate speech and in particular, Jews. This argument considers the harm caused by hate speech; the discrimination, hate and intolerance. The right to freedom of expression cannot be seen to trump all other values and rights, such as recognition and human dignity.[114] This is at least true for the German Basic Law and the New Zealand Bill of Rights which both consider a limitation of freedom of expression due to certain criteria and values. It is more than questionable why a democracy should allow hate speech in form of Holocaust denial as it is its supporters' goal to destroy democratic rationales and to revive National-Socialism thought and structures. This would disavow the rationales of a democratic state and thus, the rationale of freedom of expression entirely.

These arguments are often confronted with statements that the restriction of speech leads to a chilling effect and a "slippery slope" towards censorship. However, this view misses the point that there might arise another "slippery slope" that leads into a marketplace of ideas where bad ideas prosper and good ideas vanish."[115] Moreover, to allow limitations to the freedom of expression does not make a point regarding the extent of restriction and whether it is more useful to restrict the scope of protection than to create exceptions to a broad protection.[116] As Bickel concluded "Where nothing is unspeakable, nothing is undoable."[117]

---

[113] Peter R Teachout, above n 16, 670.
[114] See Steven J Heyman, above n 4, 170.
[115] Irwin Cotler "Holocaust Denial, Equality and Harm: Boundaries of Liberty and Tolerance in a Liberal Democracy" in Raphael Cohen-Almagor (ed) *Liberal Democracy and the Limits of Tolerance: Essays in Honor and Memory of Yitzhak Rabin* (Michigan University Press, Ann Arbor, 2000) 151, 169.
[116] See for example under IV C 3 c).

Words may be as hurtful as a punch. One carefully has to assess to which degree speech and the denying of the Holocaust should be prohibited and thus, which of the following presented legal responses is preferable. However, one can conclude in general that freedom of expression is not an absolute principle.

IV THE GERMAN RESPONSE TO HOLOCAUST DENIAL

A Laws against Holocaust Denial – an overview

The German Criminal Code provides far-reaching provisions regarding the incitement of people, as well as Holocaust denial. While hate speech in form of Holocaust denial may be punishable under certain circumstances as insult (section 185 GCC), section 130 GCC and its several sub-paragraphs contain the punishment of hate speech, and different kinds of the Auschwitz Deception, the most explicit form of Holocaust denial. This paper focuses on the analysis of problems concerning the "simple Auschwitz Deception" provided under section 130 (3) GCC.[118]

B The "simple" Auschwitz Deception

The "simple" Auschwitz Deception is a special form of Holocaust denial. It is understood as the denial of the National Socialist genocide of the Jews out of hand, but covers the dismissal of one or more of the Holocaust – essentials[119] as well.[120]

1 Reasons for the implementation of the "simple" Auschwitz Deception

The "simple" Auschwitz Deception is covered by section 130 (3) of the German Criminal Code since 1994, when the Criminal Fighting Law (Verbrechens-bekämpfungsgesetz) amended the Criminal Code. Although the "simple" Auschwitz Deception had already been indictable as an insult under section 185 GCC there existed several reasons to amend the law.

---

[117] Alexander M Bickel "Domesticated Civil Disobedience: The First Amendment, from Sullivan to the Pentagon Papers" in *The Morality of Consent* (Yale University Press, New Haven, 1975) 72-73.

[118] See Juliane Wetzel "The Judicial Treatment of Incitement against Ethnic Groups and of the Denial of National Socialist Mass Murder in the Federal Republic of Germany" in Louis Greenspan and Cyril Levitt (eds), see above n 87, 83-106.

[119] Such as the existence of a plan to kill the Jews; the existence of poison gas chambers etc.

[120] See Joachim Neander "Mit dem Strafrecht gegen die 'Auschwitz-Lüge': Ein halbes Jahrhundert § 130 Strafgesetzbuch 'Volksverhetzung'" (2006) see http://aps.sulb.uni-saarland.de/theologie.geschichte (accessed 10 November 2009).

On the one hand, German legislature wanted to create a higher range of sentences than provided under the former law of section 185 GCC. Beyond that reason, the applicability of section 185 was bound by a complaint which required a personal concernment. Therefore, it has been discussed controversially by the literature and courts[121] whether the denial of the Holocaust in the form of the Auschwitz Deception was covered by section 185 GCC. The Federal Constitutional Court explicitly left this question unanswered as well.[122] Consensus just existed concerning the classification of the "aggravated" Auschwitz Deception under sections 185, 194 GCC as a collective insult.[123] First amendments to this fragmentary legislation led to the omission of the complaint-requirement for the persecutees of the National Socialist regime.

However, the determining cause for the implementation of the "simple" Auschwitz Deception by section 130 (3) GCC was the *Deckert*- judgment by the Federal Court of Justice.[124] The District Court in Mannheim had convicted Deckert, the former local chairman of the right-wing National Democratic Party of Germany under the former section 130 and under section 185 GCC, but the Federal Court of Justice invalidated the judgment and remanded the case to the District Court.[125] The Federal Court found that Deckert's speech, in which he talked about the "gas chamber lie" did not fulfil the requirements of the above mentioned sections as both of the provisions just covered the "aggravated" Auschwitz Deception at that time. The judgment caused a storm of protest and led to the introduction of an appropriate amendment bill to the German Parliament one month after the *Deckert*-judgment, which was implemented into the current law in October 1994.

---

[121] *Strafbarkeit der Leugnung des Massenmordes an Juden (Holocaust)* [1994] 40 BGHSt 97, 105 (DE) (FCJ); Günter Bertram "Entrüstungsstürme im Medienzeitalter – der BGH und die 'Auschwitzlüge'" (1994) 31 NJW 2002.

[122] *Strafrechtliche Bewertung der Leugnung der Judenvernichtung* [1994] 90 BVerfGE 241, 252 (DE) (FCC).

[123] Theodor Lenckner in Adolf Schönke and Horst Schröder (eds) *Strafgesetzbuch Kommentar* (27 ed, C H Beck, Munich, 2006) section 185 para 5 Criminal Code see http://beck-online.beck.de/ (accessed 10 November 2009).

[124] Andreas Stegbauer "Der Straftatbestand gegen die Auschwitzleugnung – eine Zwischenbilanz" (2000) 6 NStZ 282; Friedrich Kübler "Rassenhetze und Meinungsfreiheit Grenzüberschreitende Aspekte eines Grundrechtskonfliktes" (2000) 125 AoeR 109, 114; Klaus Miebach and Jürgen Schäfer in Wolfgang Joecks and Klaus Miebach *Münchener Kommentar zum Strafgesetzbuch Band 2/2* (C H Beck, Munich, 2005) section 130 para 12 Criminal Code see http://beck-online.beck.de/ (accessed 10 November 2009).

[125] *Strafbarkeit der Auschwitzlüge* [1993] 31 BGHSt 226 (DE) (FCJ); *Strafbarkeit der Leugnung des Massenmordes an Juden (Holocaust)*,above n 121.

2 *Section 130 (3) of the German Criminal Code*

Before scrutinising the conflict between section 130 (3) GCC and freedom of expression one has to analyse the requirements of the penal law provision.

(a) Legally protected good

There is still controversy about the legally protected good under section 130 (3) GCC. With relation to the German Federal Ministry of Justice the legally protected good ought to be the general and public interest, "not to poison the political climate"[126]. A minority opinion understands the post-mortem right to respect the killed Jews as victims of misconduct to their human dignity as the legally protected good under section 130 (3).[127] However, the majority disagrees with this opinion emphasizing the distinction between "approval, denial and downplaying" in section 130 (3) as the denial and downplaying do not mean an assault of the human dignity. Therefore, they consider the public peace as the good legally protected by section 130 (3) GCC.[128]

(b) Statement of facts

At first, section 130 (3) requires the approval, denial or downplaying of an act committed under the rule of National Socialism of the kind indicated in section 6 (1) of the Code of International Criminal Law (Völkerstrafgesetzbuch). The Auschwitz Deception is covered by the alternative "denial", which is the contestation or negation of the historical facts which are covered by section 6 (1) of the Code of International Criminal Law.[129] The denial does not have to be made expressively; it might arise from the context as well, such as the term "myth of Auschwitz".[130] Moreover, the denial has to be made publicly or in a meeting, in a manner capable of disturbing the public peace. This means that the denial has to be made e.g. in a congress and not in a house, where it is "just" heard by three or four individuals. Furthermore, a statement, such as the Auschwitz Deception is covered by the provision when

---

[126] Sabine Leutheusser-Schnarrenberger in Stenographische Berichte BT-12 (1994), 19671; similar *Volksverhetzung durch Verteidigerhandeln I* [2000] 46 BGHSt 36, 40 (DE) (FCJ); Tatjana Hörnle "Verbreitung der Auschwitzlüge im Internet" (2001) 6 NStZ 309, 310.

[127] See Andreas Stegbauer, above n 124, 283.

[128] Herbert Tröndle and Thomas Fischer *Strafgesetzbuch* (51 ed, C H Beck, Munich, 2003) section 130 para 23 Criminal Code; Theodor Lenckner and Detlev Sternberg-Lieben in Adolf Schönke and Horst Schröder (eds), above n 125, section 130 para 2 Criminal Code.

[129] Winfried Brugger, above n 4, 396; Peter Rackow in Bernd von Heintschel-Heinegg (ed) *Beck'scher Online Kommentar Strafrecht* (9 ed, C H Beck, Munich, 2009) section 130 para 1 Criminal Code see http://beck-online.beck.de/ (accessed 10 November 2009).

[130] See Andreas Stegbauer, above n 124, 283.

it is made in a public assembly.[131] The Federal Justice Court has found that these statements, made publicly or in a meeting usually disturb the public peace. Therefore, the last fact does not require a high verification.

C The Prohibition of the Auschwitz Deception and Freedom of Expression

As section 130 (3) GCC prohibits the denial of the Holocaust, one can argue that this means it is a limitation of the freedom of expression which is guaranteed in article 5 (1) of the German Basic Law. Therefore, one has to ask whether the legal prohibition is within the scope of the valid limitations provided under article 5 (2).

1 The Scope of Protection of Freedom of Expression

Article 5 of the German Basic Law guarantees freedom of expression. It states, that "every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources". Although the law uses the term "opinion" one has to ask what is understood by the term. Over the years the Federal Constitutional Court of Justice has defined the scope of protection of article 5.

First of all, it protects every kind of opinion, which is characterised by the element of statement, comment and evaluation.[132] The underlying understanding which was given to the term "opinion" by the Federal Constitutional Court means "that every opinion is characterised by the subjective relationship of an individual person to the substance of his or her statement"[133] This subjective relationship makes it impossible to decide whether the statement is true or not. It does not matter whether the statement is justified or gratuitous, whether it is rational, emotional, valuable or not, dangerous or harmless. The expression of an opinion does not lose its protection by its severe or injuring tone.[134]

---

[131] Peter Rackow in Bernd von Heintschel-Heinegg (ed), above n 129, section 130 para 1 Criminal Code; *Volksverhetzung - Leugnen des Holocaust durch Verteidigerhandeln* (2002) 47 BGHSt 278 (DE) (FCJ).

[132] See *Wahlkampf* [1982] 61 BVerfGE 1, 8 (DE) (FCC). See Thomas Wandres *Die Strafbarkeit des Auschwitz-Leugnens* (Duncker & Humblot, Berlin, 2000) 277 – 285.

[133] *Brokdorf* [1985] 69 BVerfGE 315, 344 (DE) (FCC).

[134] *Strafrechtliche Bewertung der Leugnung der Judenvernichtung,* above n 122, 247; Winfried Brugger, above n 4, 376; Franz Schemmer in Volker Epping and Christian Hillgruber *Beck'scher Online Kommentar Grundgesetz* (3 ed, C H Beck, Munich, 2009) article 5 para 4 Basic Law see http://beck-online.beck.de/ (accessed 10 November 2009).

However, the Federal Constitutional Court has found that the protection of article 5 goes beyond its wording and covers the assertion of facts under certain circumstances as well. This is justified by the Court, as facts can contribute to the forming of an opinion. Nevertheless, there is an exception to this broad understanding of the scope of protection of article 5 of the Basic Law. As wrong assertions of facts cannot contribute to the process of the forming of an opinion, the protection of the fundamental right of freedom of expression is not guaranteed for these cases. The protection of wrong facts would jeopardize the process of communication which is the heart of freedom of expression.[135] This exception applies to pure and isolated assertions of facts, but not the mixture of assertions of facts and opinions as the Federal Constitutional Court of Justice has found that statements, which link a subjective comment with a fact are protected under article 5. This is justified by an effective protection of the fundamental right of freedom of expression.[136] However, the courts have to prove at first whether one can separate the wrong fact from the judgmental statement to reach a differentiated result. Just in cases where a distinction is not possible one has to treat the whole statement as a unit which is protected under article 5 of the German Basic Law.[137]

2 How to apply the Jurisdiction to Holocaust denying statements

Having analysed the scope of protection one has to apply the jurisdiction to Holocaust denying statements, in particular to the "simple" Auschwitz Deception. With regard to the above mentioned, one can pinpoint that the pure and isolated statement, that Auschwitz or the Holocaust has never happened is not protected by the freedom of expression under article 5 of the German Basic Law.[138] This classification is confirmed by the Federal Constitutional Court which stated that the Auschwitz Deception is a proved wrong assertion of facts.[139] This would apply to statements such as "Scientific experiments show that gas was never used to kill people, but just for disinfections." or "Just 1 million Jews died during World War II." However, one has to consider that these statements may not be reducible to the single and isolated assertion of a wrong fact. They are often made in a context, which describes the whole historical process and are mixed up with judgmental comments. This is the case in

---

[135] *Böll* [1980] 54 BVerfGE 208, 219 (DE) (FCC); Stefan Huster "Das Verbot der 'Auschwitzlüge', die Meinungsfreiheit und das Bundesverfassungsgericht" (1996) 8 NJW 487.

[136] Hans Jarass in Hans Jarass and Bodo Pieroth *Grundgesetz für die Bundesrepublik Deutschland Kommentar* (7 ed, C H Beck, Munich, 2004) article 5 para 5 German Basic Law.

[137] *Strafrechtliche Bewertung der Leugnung der Judenvernichtung*, above n 122 , 250.

[138] The alternatives of approval and downplaying require judgmental elements even by its wording. However, the "simple" Auschwitz Deception is covered by the denial and therefore, medium of the analysis.

[139] *Strafrechtliche Bewertung der Leugnung der Judenvernichtung*, above n 122, 249.

statements like "The Genocide practised by Nazi Germany against Jews and Gypsies did not exist, but is to be regarded as a myth, a fable, or a hoax." or "The exaggerated proclaimed number of 6 million dead Jews is not attributable to the use of gas chambers but to the fact that they could not stand the workload." Therefore, this kind of statement would fall within the scope of article 5 of the German Basic Law as it would be covered by the third category, acknowledged by the Federal Constitutional Court.

3 Limits to the Right of Freedom of Expression

When implementing section 130 (3) GCC, legislature failed to see that the Auschwitz Deception often contains judgmental elements so that article 5, as well as its permissible restrictions, may be applicable. Courts confirmed this understanding by foregrounding the distinction between judgmental statements and wrong facts. However, one has to take in mind the above mentioned scenario, the "simple" Auschwitz Deception mixed up with a judgmental statement. The addition of judgmental elements does not change the "simple" Auschwitz Deception to an "aggravated" one[140], as the latter one requires additional elements such as "the assault of the human dignity"[141]. Whenever a separation of opinion and wrong fact would distort the statement as a whole, one has to see it as a unit which falls within the scope of article 5.[142] Therefore, one has to scrutinise whether section 130 (3) GCC in the form of the "simple" Auschwitz Deception is a permissible restriction to the freedom of expression.

(a) Overview

Article 5 (2) of the German Basic Law states that "these rights shall find their limits in the provisions of general laws, in the provisions for the protection of young persons and in the right to personal honour". First of all, one could think of a right to personal honour to justify section 130 (3) GCC as a limitation to freedom of expression. However, one has to take into consideration the genesis of the law and its legally protected good. As the provision of the "simple" Auschwitz Deception purposes to protect the public peace, and not the human dignity or the honour of the people, who suffered from the National Socialist regime[143], "the

[140] But see Winfried Brugger, above n 4, 396,
[141] German Criminal Code, s 130 (1) no 2.
[142] However, the courts refuse from doing so as they do not want to make the partial unconstitutionality a subject of discussion.
[143] Stefan Huster, above n 133, 488 with further comments regarding the habits of the courts, which nonetheless argue with human dignity to justify section 130 (3) of the Criminal Code.

right of personal honour" cannot be the relevant justification. However, one can think of a justified limitation under the "provisions of general laws".

(b) Analysis of the term "general law"

"The concept of 'general laws' was controversial from the very beginning."[144] The Federal Constitutional Court has developed several theories which ought to simplify the interpretation of the term, such as the special right theory (Sonderrechtslehre) and the theory to balance the legally protected interests (Abwägungslehre), which are combined in the German jurisdiction. The special right theory requires that the freedom of expression limiting provisions must not prohibit an opinion or the expression of an opinion as such.[145] Although it is discussed controversially what is meant by special right[146], there exists consensus that a provision, which goes against a particular opinion, is a special right. All other implementations and nuances of the special right theory require even stricter criteria, so that the consensus is the minimal content of the theory.

Applying this abstract interpretation to the provision of the prohibition of the "simple" Auschwitz Deception at hand, it is arguable that section 130 (3) is a model case for the interpretation of the term "special right" as it prohibits a particular opinion, the denial of the Holocaust. This means, that the provision may be unconstitutional in the case of the "simple" Auschwitz Deception in a judgmental context.

(c) How to solve the problem

The inaccuracy of the law is more of a theoretical problem, which is slightly dogmatic, than a problem of reality as the courts refuse to make a big issue out of section 130 (3) and its unconstitutionality in certain cases. However, this dogmatic inaccuracy needs to be solved.

(i) Abandoning of the special right theory

One solution could be to refrain from the special right theory. Instead, the courts could only focus on the question whether the freedom of expression limiting provision, such as

---

[144] Donald P Kommers *The Constitutional Jurisprudence of the Republic of Germany* (Duke University Press, Durham and London, 1989) 372.
[145] Stefan Huster, above n 133, 489.
[146] Walter Schmitt Glaeser "Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts" (1972) 97 AoeR 276, 281; Donald P Kommers, above n 144 , 376.

section 130 (3) GCC serves the purpose to protect a legally protected good, which is of such a high value, that it justifies trumping the freedom of expression.[147] With regard to the German history and the legally protected good under section 130 (3), the conservation of the public peace, one could endorse a balancing in favour of section 130 (3) in case of the "simple" Auschwitz Deception in a judgmental context.

However, this does not seem to be a preferable solution. The Federal Constitutional Court has developed the special right theory over decades with important motives, trying to obtain the dogmatic underlying article 5 of the German Basic Law. Article 5 is one of the most important and most fundamental rights which is provided under the German law. It aims to ensure the democratic process which derives from free speech without censorship. Therefore, it is elementary, that provisions do not prohibit a certain and particular opinion, but are neutral to be within the scope of protection. This becomes even more important in the case of political speech as a foundation of democracy. Just to concentrate on the theory of balancing the legally protected interests does not seem to lead to the same result, the non-alignment of opinion in a democratic state. Thus, one has to hold onto the special right theory.

(ii) Limitations deriving from the Constitution

Moreover, one could try to justify section 130 (3) GCC as a limitation to the freedom of expression using conflicting constitutional law instead of using the limitation of the "general laws".[148] Such a solution, however, is not feasible. The German Basic Law contains a particular regulation and pattern regarding the limitation of the individual fundamental rights. While some fundamental rights mention other fundamental rights, liberties or constitutional principles[149] to justify a limitation, others require a "simple" or an "aggravated" limitation[150]. Moreover, there are some fundamental rights, which do not mention the possibility of a justified limitation at all. However, it is acknowledged that these rights may be restricted by the conflicting constitutional law, which means the law of a constitutional value. Applying this rule to article 5 of the Basic Law requires that the provision itself does not

[147] Stefan Huster, above n 133, 489; Bodo Pieroth and Bernhard Schlink *Grundrechte Staatsrecht 2* (24 ed, C F Müller, Heidelberg, 2008), 646.
[148] Ibid, 341; Stefan Huster, above n 133, 489.
[149] Donald P Kommers, above n 144, 366.
[150] As an example: article 9 (2) of the Basic Law contains an explicit limitation in the rights of the constitutional order, a "simple" limitation means through or on the basis of a statute as e.g. article 2 (1). Aggravated limitations require statutes which fulfil certain circumstances, such as article 5 (2), 10 (2). Other articles do not mention a limitation at all, 5 (3).

mention the possibility of a limitation at all, but article 5 (2) does. It mentions the provisions of general laws, which describes an "aggravated" limitation. Therefore, one can argue that a use of clashing constitutional law would breach the imperious pattern of the German Constitution. This would create a precedent. Moreover, the "breach" could be misused in other circumstances, to justify limitations to fundamental rights, which were not intended by the Constitution. Thus, governmental influence could extend to the disadvantage of the fundamental rights and therefore, democracy.

(iii) Revision of jurisdiction

The solutions of abandoning the special right theory or to use other limitations are based on the level of limitation of the freedom of expression. However, they cannot solve the inaccuracy, which derives from the facts, that the "simple" Auschwitz Deception in a judgmental context falls under the scope of article 5 and that section 130 (3) does not constitute a permissible limitation to the freedom of expression. They are even creating greater dogmatic problems. Therefore, a revision describing the scope of protection seems to be more appropriate.

As seen above, the Federal Constitutional Court has developed a highly complicated jurisdiction regarding opinions, facts and a mixture of both to prevent a reduction of the protection under article 5.[151] This leads to the normative undesirable result that the assertion of facts in a judgmental context, which can implicate a more negative effect, is privileged towards the factual assertion of fact. Therefore, the Federal Constitutional Court should clarify in its jurisdiction that courts should really try to separate the judgmental and factual elements of a statement to guarantee the most extensive protection under article 5. Moreover, the Constitutional Court should emphasise that statements, whose judgmental element is based on a false fact, do not fall under the scope of protection regarding article 5, where a distinction of the different elements is impossible. This is especially important, as reality shows that courts try to classify a judgmental Auschwitz Deception as a false fact anyway, to deny the protection under article 5 (1) of the Basic Law.

---

[151] *Wahlkampf/CSU: NPD Europas* (1982) 60 BVerfGE 1, 8 (DE) (FCC); Hans Jarass in Hans Jarass and Bodo Pieroth *Grundgesetz für die Bundesrepublik Deutschland Kommentar*, above n 136 , article 5 para 3 German Basic Law.

It is obvious, that the classification of a Holocaust denial statement, whether it is just factual or judgmental, as a false fact, means a restriction to the scope of protection which is guaranteed under article 5. However, the judgmental element in these circumstances is based on a false fact and one has to ask, whether a different solution to solve the inaccuracy would not lead to more drastic restrictions to the right of freedom of expression. The prohibition of the Holocaust denying law, stated under section 130 (3) GCC certainly is an exceptional case, which has to be as unique and exceptional as the acts committed under the National Socialist regime, whose denial is prohibited by the law. A revision or clarification of the jurisdiction however, seems to be the less radical restriction for the fundamental right of freedom of expression.

D Conclusion

The German statutory law prohibits the so called "simple" Auschwitz Deception under section 130 (3) GCC. The implementation of this section was followed by a political controversy, but did not create a legal debate as the German Federal Constitutional Court found that false facts, such as the denial of the Holocaust do not fall within the scope of the freedom of expression. However, in theory the "simple" Auschwitz Deception can contain judgmental elements which leads to the consequence that such statements are protected under the freedom of expression. As section 130 (3) GCC cannot be classified as a general law required under article 5 (2) of the Basic Law to justify a limitation to the freedom of expression, the Federal Constitutional Court should revise its jurisdiction.

V THE NEW ZEALAND RESPONSE TO HOLOCAUST DENIAL

With reference to a phone call with Mr Paul Warhurst, Information Adviser of the New Zealand Human Rights Commission, New Zealand has a low score on the problem of Holocaust denial. Mr Warhurst mentioned, that just one complaint regarding "Holocaust" had been reported to the Race Relations Office in 2006. However, this statistical number does not protect New Zealand from the problem of neo-Nazi political movements and the occurrence of Holocaust deniers in the future as can be seen from latest happenings in Canterbury. Therefore, this paragraph will scrutinise whether Holocaust denial is prohibited under the current New Zealand legislation and its impacts of freedom of expression.

A The Absence of an explicit Law against Holocaust Denial

Like other common law countries the New Zealand legislation does not offer a Holocaust denial law that explicitly makes it a criminal offence to deny certain facts about the Holocaust like Germany. However, the legal framework provides several hate-speech laws, under the Human Rights Act 1993, which might cover Holocaust denial as well.[152]

B Covering of Holocaust Denial by New Zealand's Hate Speech Laws

1 Section 131 of the Human Rights Act

The following, it is analyses whether the denial of the Holocaust is capable of falling under the criminal hate speech provision, provided under section 131 HRA. It prohibits the incitement of racial disharmony.[153]

(a) Genesis of the law

New Zealand has legally faced the problem of the incitement of racial disharmony since the enactment of the Race Relations Act in 1971, in particular by enacting section 25. Prior to this, various legal means, such as the offence of sedition and a criminal libel offence under the Crimes Act 1961, were used to prevent acts which might promote racial disharmony.[154] One of the main reasons for the implementation of a special law to "uphold the rights of racial minorities to equality and dignity and to live free from discrimination"[155] was in order to satisfy article 4 (a) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. Section 131 of the Human Rights Act 1993 continues the criminal offence first established by the Race Relations Act 1971.

(b) Legally protected good

Section 131 covers not only words considered likely to excite hostility or bring groups into contempt (as in section 61), but also words considered likely to excite ill-will or bring groups into ridicule.[156] One of the reasons for this law is the avoidance of harm. The provision

---

[152] This paper focuses on the criminal matter of the Human Rights Act, section 131.
[153] For the wording of section 131 see Appendix 3, 1.
[154] Juliet Moses, above n 12, 186; Grant Huscroft and Paul Rishworth, above n 3, 194.
[155] Juliet Moses, above n 12, 185.
[156] Grant Huscroft and Paul Rishworth, above n 3, 209; Human Rights Commission, above n 59, 11.

permits punishment of a person for statements they have made because of what other people might be led, as a result, to think about still another group of people, or racial or ethnic group.[157] Considering section 131 from the harm perspective, it aims to protect the targeted groups, those groups as a collective and, by extension, society as a whole.[158] Evidence for society as a protected good can also be found in the documents relating to the predecessor of section 131 HRA, the Race Relation Act, as[159]

> Speech should be free unless some specific harm, such as public disorder results or is reasonably anticipated ... the public order element is seen as important not only because it limits the restraint on speech but also because it introduces a comparatively certain objective element in an area of subjectivity.

Thus the provision takes up the two targets being hit by harm, the individual target as well as the whole society in the form of public peace and order.

(c) Statement of facts

However, section 131 and its predecessor have rarely been used,[160] which might be reasoned by the specific requirements of the provision.

As provided under section 131, a person must not publish, distribute or broadcast spoken or written matter which is threatening, abusive or insulting with the intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.[161] First of all, similarly to the German law, speech is not capable to be prohibited under section 131, if it was only spoken at home. The section requires a publication or distribution to the public at large or to members of the public. Secondly, the grounds of racial disharmony are interpreted broadly.[162]

---

[157] Human Rights Commission "The Right of Freedom of Opinion and Freedom of Expression" www.hrc.co.nz/report (accessed 10 November 2009).
[158] See ibid.
[159] Robert Hallowell "Racial Disharmony: A General Explanation" (13.03.2006) Commentary sent by Paul Warhurst, Information Adviser of the New Zealand Human Rights Commission, via email.
[160] The only decision under section 25 of the Race Relations Act was in *King-Ansell v Police* [1979] 2 NZLR 531, however, just concentrating on the question whether the phrase "ethnic origin" could apply to Jews.
[161] Human Rights Act 1993, s 131.
[162] See Grant Huscroft and Paul Rishworth, see above n 3, 199.

The first question that arises is what one has to understand by "threatening, abusive or insulting". To assess whether the words are threatening, abusive or insulting, one can adopt the test of the reasonable person in the position of the person or group alleged to be discriminated against. This test was first used by the Tribunal in *Proceedings Commissioner v Pryor*[163] in relation to section 61, the civil arm of the Human Rights Act. As 131 HRA is broader than section 61, but contains the same words and as there is no jurisdiction solely relating to section 131, one can apply the definitions underlying section 61. Moreover, although the words seem to suggest a requirement of intention, it is clear that words may be considered, for example, insulting regardless of the intention with which they were spoken.[164]

In addition, the speech has to be "likely to excite hostility or illwill against, or bring into contempt or ridicule". This criterion requires a high threshold to prevent unwarranted incursion into the right to freedom of expression[165]; it reflects the real danger of hate speech. To assess whether speech is likely to influence the audience and to increase the risk of manifestation of hostility or contemptuous behaviour depends on the extent to which others are racist, or are considered capable or being influenced by racist expression.[166] Huscroft criticises that the decision whether racist expression was persuasive, is made by a human rights body and thus, might depend on the enthusiasm of those charged with the responsibility for enforcing it.[167] However, the Tribunal has worked out some criteria in former decisions[168] taking into account the sensitivity of New Zealanders, humour and stereotyping.[169] Moreover, with regard to the fact that section 131 has never been used, one can confute that the provision might catch less extreme propaganda. To require actual proof - such as postulated by Dickson CJ in the Canadian Supreme Court[170]- would not fully remove politisation, but increase speculation subjectivity since it would be necessary to assess the recipients prior feelings towards the target group and any changes following the comments.[171] This subjective factor could create a loophole as for example more rational recipients might be less influenced.

---

[163] *Proceedings Commissioner v Pryor* [1993] 1 ERNZ 358.
[164] See Grant Huscroft and Paul Rishworth, see above n 3, 204.
[165] Robert Hallowell, see above n 159, 21.
[166] Grant Huscroft and Paul Rishworth, see above n 3, 205.
[167] Ibid.
[168] See *Proceedings Commissioner v Archer* [1996] 3 HRNZ 123, 129; *Neal v Sunday News Auckland Newsaper Publications* (1985) EOC 76299.
[169] These aspects can also be found in Human Right Commission "Exciting Racial Disharmony Discussion Paper on section 9A of the Race Relations Act 1971 which makes it unlawful to excite racial disharmony" (1984) 6-8.
[170] *R v Keegstra*, see above n 80.
[171] See Juliet Moses, above n 12, 189.

"The criminal arm of the HRA is unambiguous in its requirement of intent"[172] following from the fact that section 131 creates an offence and criminalisation and thus, as leading to far-reaching consequences, needs special justifications and is a high threshold of *mens rea*. The criterion of intent might lead to different difficulties. While on the one hand it might be hard to have evidence for a speaker's intent, on the other hand, it might protect those who are misled by others. Thus, although section 131 is potentially broader than section 61, it seems that section 131 contains insufficiencies, which might led to a restrictive application of the criminal provision. This is stressed by the fact that a prosecution under section 131 requires the consent of the Attorney-General.

2 *Holocaust Denial under section 131 of the Human Rights Act*

As there has been no case of denying the Holocaust, it is hard to say whether this might be covered by section 131 HRA. However, this paper examines this question considering the examples set out under the German response to Holocaust denial.

As "threatening, abusive and insulting" does not require a subjective element but is proved on the standard of reasonable person, there is little doubt that a sentence like "Scientific experiments show that gas was never used to kill people, but just for disinfections." or "Just 1 million Jews died during World War II." will not fulfil the criterion. Holocaust denying statements in a judgmental context[173] might be able to fulfil the criteria as they contain a plus. They do not "only" deny the Holocaust, but might contain opinions, which would insult a reasonable person. Considering the "pure" Holocaust denial statement, this first criterion might even be hard to overcome, as Holocaust denying literature usually avoids insult and threat. It deliberately seeks credibility by using mild, pseudo-scientific language.[174]

However, it is harder to assess whether Holocaust denial is capable of being "likely to excite hostility or illwill against, or bring into contempt or ridicule any group of persons". One can argue that we expect people or at least well-educated people, not being influenced by these statements, as them being part of history, not only Germany's, but the world's history.

---

[172] Tessa May Bromwich "Balancing freedoms: A critique of New Zealand's hate speech legislation in light of the New South Wales and Victorian Experience (LLB (Hons) Research Paper, Victoria University of Wellington, 2005) 13.
[173] See IV B 1.
[174] Geoffrey Bindman, above n 7, 467.

However, the recent incident in Canterbury – without assessing that the students intended to excite hostility or illwill or being influenced by Holocaust denying statements – shows, that at least "ignorance" as Lincoln Vice-Chancellor Roger Field put it, is the reason for such a behaviour. Having this in mind, it is not unlikely that a Holocaust denying statement could fulfil the criterion under section 131.

As stated above, the intention of a speaker is likely to be difficult to prove. Referring again to the Canterbury incident, it was mentioned that the students were not driven by "malicious intent"[175] However, it is not entirely impossible to prove such intention in cases where the statement contains explicit hatred against Jews. Moreover, the Court of Appeal found in *King-Ansell v Police*[176] that Jewish people in New Zealand, most likely the target of Holocaust denial, form a group with common ethnic origins and thus, fall under the protection of section 131.

The analysis has shown that Holocaust denying statements in a judgmental context – considering all the thresholds and obstacles, such as the consent of the Attorney General – at least to a certain degree – are capable of falling under section 131. However, it seems to be very unlikely, that statements, such as the "simple Auschwitz Deception" would fall under the scope of the provision as it is up to the human rights body's discretion whether a reasonable person is threatened or insulted by these words. Considering the manipulative language of Holocaust deniers it seems that this objective test might fail.

C New Zealand's Hate Speech Laws and Freedom of Expression

As section 131 HRA regulates hate speech and possibly Holocaust denying statements in a judgmental context, one can argue that this means it is a limitation of the freedom of expression which is guaranteed in section 14 of the New Zealand Bill of Rights Act 1990 (BORA). Therefore, one has to ask whether the legal prohibition is within the scope of the valid limitations provided under section 14 BORA. Analysing this question one has to have in mind that the BORA is not supreme law, but that Parliament may enact provisions that cannot be struck down just because of its inconsistency with the BORA.[177]

---

[175] See "University apologises for students in Nazi garb", above n 8.
[176] *King-Ansell v Police*, above n 160.
[177] Bill of Rights Act 1990, s 4. The New Zealand Bill of Rights Act 1990 evolved out of a White Paper proposal to establish a supreme law constitutional bill of rights. However, in the end it turned out a ordinary legislation, see Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press,

1 Hate speech under the scope of protection of section 14 BORA?

Section 14 of the New Zealand BORA guarantees freedom of expression. It states, that "everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form." Similarl to the German regulation, although mentioning "opinion" specifically, the fundamental right guarantees freedom of expression in a broader context. "The right appears sufficiently broad to include anything that may be written or said, without regard to the nature of a particular communication or the context in which it occurs."[178] Moreover, the first judgments after the enactment of the BORA, concerned with freedom of expression, state its broad understanding as well. In *Duff v Communicado Ltd* Lord Blanchard stated that "expression should be defined widely, and that questions of limits on the right should generally be determined pursuant to section 5."[179] In *Solicitor-General v Radio NZ LTD* "What is guaranteed [by s 14] is the right to everyone to express their thoughts, opinions and beliefs however unpopular, distasteful or contrary to the general opinion or to the particular opinion of others in the community."[180] This statement is also published in the handbook on the New Zealand Bill of Rights Act 1990 by the Ministry of Justice, whose guidelines help ensure that policies, practices and legislation are developed consistently with the BORA.[181] Hence, the large and liberal interpretation given to freedom of expression suggests that the optimal approach is to balance the contextual values and factors in section 5 of the Bill of Rights Act.[182]

The last statement supports the issue that limits on rights should involve "ad hoc balancing". Under the ad hoc balancing methodology all expressive activity except acts of violence would fall within the meaning of "free expression" and the Court would then proceed to assess the reasonableness of particular limits on those forms of expression imposed by the law in issue.[183] However, the New Zealand law is not clear on whether to take this approach or not. One can also argue in favour of a definitional balancing[184], requiring Courts to produce a definition that would read in inherent limitations so as to exclude protection for obscenity, child pornography and may be hate speech in the form of wrong facts, such as

---

Melbourne, 2003) 168.

[178] Paul Rishworth and others, above n 177, 311.

[179] *Duff v Communicado Ltd* [1996] 2 NZLR 89, 99.

[180] *Solicitor -General v Radio NZ Ltd* [1994] 1 NZLR 48, 55.

[181] See Ministry of Justice *The Handbook of the New Zealand Bill of Rights Act 1990: An Introduction to the Rights and Freedoms in the Bill of Rights Act for the Public Sector* (Wellington, 2004) 54.

[182] Ibid, 20.

[183] See Petra Butler and Andrew Butler, above n 106, 120.

[184] Ibid.

Holocaust denial. Such an approach was found in other judgments as well.[185] However, considering the location of section 5, it suggests that issues of limiting rights should be considered separately from the question of the scope of freedom of expression.

As courts have not found so far, whether wrong facts, such as the denial of the Holocaust fall in the scope of section 14, one can only assume its practical outcome. As assessed above, purely Holocaust denying statements might not even fall under section 131 of the HRA and thus, one might not even come to the question whether section 131 of the HRA as a hate speech law interferes with the freedom of expression. From this perspective, one can argue, that at least those statements, including a judgment or opinion, such as "The exaggerated proclaimed number of 6 million dead Jews is not attributable to the use of gas chambers but to the fact that they could not stand the workload." may fall under the scope of section 14 of the BORA. Excluding certain areas of speech and expression would render section 5 redundant.[186] The same is valid, considering the Canadian Charter of Rights and Freedoms on which the New Zealand courts have drawn heavily on the case law.[187] In *R v Zundel* the offence was an unjustified restriction on freedom of expression as the restriction as the doctrine of content-neutrality protects falsehoods as well as truths, particularly since the question of whether a statement is true or false can be determined only by reference to its content.[188] Thus, one might divine that New Zealand courts would even decide that the purely denying of the Holocaust or the simple Auschwitz deception would fall in the scope of section 14 of the BORA.

2 Hate speech as a justified limitation to freedom of expression

Assuming that Holocaust denying statements – at least those made in a judgmental context – would fall under section 131 of the HRA, but under the protection of section 14 of the BORA as well, one has to examine whether the New Zealand hate speech law in its form of section 131 of the HRA is a justified limitation to the freedom of expression. Section 5 of the BORA provides that[189]

---

[185] *Solicitor-General v Radio NZ Ltd*, see above n 180, 59-60.
[186] See Petra Butler and Andrew Butler, above n 106, 122.
[187] Richard Clayton and Hugh Tomlinson *The Law of Human Rights* (2 ed, Oxford University Press, Oxford, New York, 2009) 1518.
[188] *R v Zundel*, see above n 187, 731; Richard Clayton and Hugh Tomlinson, above n 1518, 1514.
[189] Bill of Rights Act 1990, s 5.

> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

(a) General overview of section 5 of the BORA

Section 5 of the BORA has to be seen within the context of sections 4 and 6. As mentioned above, courts cannot strike down laws being inconsistent with the BORA. Section 4 requires the enactment despite their inconsistency. However, this comes only into play if the legislation cannot be given a meaning that is consistent with the BORA by virtue of section 6 of the BORA and if any limitation on the right cannot be demonstrably justified in terms of section 5.[190]

Determining whether a limitation is justified, the Court of Appeal has developed a test in *Moonen v Film and Literature Board of Review*[191] which was confirmed by the New Zealand Supreme Court in *R v Hansen*[192]. The test has its origin in the Canadian case law, at first set out in *R v Oakes*.[193] The test requires several steps, described by Richardson J as follows:[194]

> [A)n abridging inquiry under section 5 will properly involve consideration of all economic, administrative and social implications. In the end it is a matter of weighing:
> (1) the significance in the particular case of the values underlying the Bill of Rights Act;
> (2) the importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act;
> (3) the limits sought to be placed on the application of the Act provision in the particular case; and
> (4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits.

Tipping J summarised these points in *R v Hansen*[195] that a limitation is justified when the "limiting measure serve[s] a purpose sufficiently important to justify curtailment of the right or freedom", when "the limiting measure [is] rationally connected with its purpose"; when the

---

[190] *Moonen v Film & Literature Review Board* [2000] 2 NZLR 9.
[191] Ibid.
[192] *R v Hansen* [2007] NZSC 7.
[193] *R v Oakes* [1986] 1 SCR 103 (CSC).
[194] Richardson J refers to *Reference Re Public Service Employee Relations Act (Alta)* [1987] 1 SCR 313 rather than *Oakes,* but the test quoted from that case by Dickson CJC ist he *Oakes* test.
[195] *R v Hansen*, see above n 192, at para 104, Tipping J.

"limiting measure impair[s] the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose and when "the limit [is] in due proportion to the importance of the objective".

(b) Application of the test regarding hate speech

Regarding the first criterion one has to assess whether the objective underlying hate speech gains sufficient importance. The above analysis of the harm rationale has shown that hate speech laws aim to protect the society and the target groups from the dissemination of hate speech. In particular the denying of the Holocaust in a judgmental context can cause a denigration of those who suffered incarceration in the Nazi concentration camps. Moreover, these statements are able to insult the memory of relatives and the whole society, depriving part of the society their history. This poses the danger of leading to further discrimination and hostility. Thus, hate speech is of great social concern and of sufficient importance.

Section 131 of the HRA, punishing racial disharmony aims to protect the entire society as well as the targeted group from harm.[196] Thus, the "limiting measure is rationally connected with its purpose". This applies to hate speech in general, as well as to Holocaust denying statements in a judgmental context. Moreover, the test requires that the interference with the right of freedom of expression is as little as possible. As seen above, section 131 of the HRA contains some obstacles and high threshold which have to be overcome. The requirement of intent, for example, ensures, that in the particular case, only those people will be prosecuted, who deny the Holocaust intentionally. If, for example, in the Lincoln University case – presuming that all other criteria are fulfilled – a court or tribunal was not able to prove that the students acted intentionally to create illwill[197], this would not result in a prosecution. Considering the thresholds of the provision, the interference with the fundamental right of freedom of expression is as little as possible. This can be stressed by the fact, that there has only been one prosecution under the predecessor of section 131 of the HRA.

As a last requirement under the test, the limitation has to be in reasonable proportion to the importance of the objective. As outlined above hate speech and its particular form of Holocaust denial is capable of having a destabilising and divisive effect on society. It is an

[196] See above V B 1 b).
[197] "University apologises for students in Nazi garb", above n 8.

affront to the target's group dignity which causes it to suffer detrimental effects.[198] Revisiting the initially mentioned approach of Holocaust deniers and anti-Semites, to establish the political ideas of the Nazi times, it seems more than proportional to limit freedom of expression to this extent, as it is the goal of Holocaust deniers to undermine these fundamental freedoms entirely. Thus it is adequate and proportional to protect the society and the democratic order by limiting freedom of expression.

Thus, the limitation on freedom of expression imposed by section 131 of the HURA appears to be justified in light of section 5 of the BORA. However, a contrary finding would still require courts to apply the provision.

D Conclusion

As analysed so far, the New Zealand law does not provide a specific law prohibiting the denial of the Holocaust. However, it is possible, that Holocaust denying statements made in a judgmental context are capable of falling under section 131 of the HRA and thus, lead to a criminal offence. The examination has shown that other statements, such as the simple Auschwitz deception are unlikely to be covered by section 131, as the provision requires insult or threat. Holocaust deniers however, use manipulative language and may avoid this criterion. Although there has not been a case under the New Zealand law relating to Holocaust denial and section 131, it appears further, that these statements would fall under the scope of section 14 of the BORA, but would be reasonably justified with regard to section 5 of the BORA. This result seems to be consistent with the New Zealand law and its understanding of freedom of expression.

To exclude Holocaust denying statements or in general false facts from the scope of protection under section 14 would ignore the two-stage process suggested by the BORA, the proper delineation of the broad scope and the reasonableness of any limits.[199] This ensures a more transparent analysis and enables an individual assessment. Moreover, the comparative constitutional experience also favours this methodology. As the White Paper of the BORA was "based closely on s 1 of the Canadian Charter"[200] which manifests the two-stage process, it is consistent to take it as a basis for the understanding of the BORA.

---

[198] See Juliet Moses, above n 12, 195.
[199] See Petra Butler and Andrew Butler, above n 106, 121.
[200] White Paper, para 10.26 p 71.

VI GERMANY VERSUS NEW ZEALAND, HOLOCAUST DENIAL LAW VERSUS HATE SPEECH LAW – WHICH APPROACH TO PREFER?

Having analysed the different responses to Holocaust denial, it is necessary to draw a comparison, pointing out the common characteristics, differences as well as advantages and disadvantages of the approaches.

As examined, the German law does not only provide provisions regarding racial incitement, but also an explicit Holocaust denial law under section 130 (3) of the GCC, which makes the simple Auschwitz deception a criminal offence. In contrast, the New Zealand legal framework contains a general criminal hate speech law under section 131 of the HRA, which requires high thresholds regarding its criteria as well as the consent of the Attorney General. Thus, one can say that the German legal framework states a better protection against Holocaust deniers. Phrases like "Six million did never die" and "There have been no gas chambers in Auschwitz" or "Auschwitz and its concentration camps is a lie" are capable of falling under section 130 (3) of the GCC, whereas it is doubtful that a reasonable person in New Zealand would find the statements threatening, abusive or insulting. This might be indicated by the fact that for example the "Holocaust" incidents resulting in a complaint reported to the Human Rights Commission, are rare. It is more likely that Holocaust denying statements mixed with opinion and judgment are degrading and thus, insult a targeted group or the entire society. Hence, the New Zealand law contains loopholes. Holocaust deniers might have greater freedom to disseminate their ideas and revisionist statements, while the German law provides far-reaching provisions gaining to encompass all kinds of Holocaust denying statements.

However, from the perspective of Deborah Lipstadt, the New Zealand response to Holocaust denying literature and statements is preferable[201]

> Rather than law, there is another "weapon" in our arsenal. That is the quick and forceful condemnation by scholars, political and religious leaders, and the people of stature of denial and deniers.

One can argue that by providing different provisions, the German law gives Holocaust deniers a greater likelihood to appear in court rooms, to attract attention and to use courts as a stage

[201] Interview with Deborah Lipstadt "Defending History: Deborah E Lipstadt and Holocaust Denial" (Three Monkeys Online, November 2006) www.threemonkeysonline.com (accessed 8 October 2009).

for their false and denying statements. As these cases enjoy great popularity with special regard to the media, Holocaust deniers might even increase the number of their audience by being on everyone's lips.

Moreover, the analysis has shown that the New Zealand framework contains another advantage as it seems to be more consistent with the New Zealand Bill of Rights Act, especially freedom of expression, than section 130 (3) of the GCC in relation to article 5 of the German Basic Law. This is likely to be caused by the different developments and state of the fundamental rights catalogue. While Germany protects freedom of expression under its Constitution and thus, it is subject to the very complicated regulations of limitations and dogmatics, the New Zealand BORA protects freedom of expression with the state of an ordinary law, being able to be restricted by the general restriction of section 5. As a consequence, the current German legislation contains insufficiencies regarding Holocaust denying statements made in a judgmental context as these are not capable to constitute a justified limitation of article 5 of the Basic Law. As section 130 (3) prohibits a particular opinion or statement, the denying of the Holocaust, it creates a special law, which does not qualify as a justified limitation. Considering the law from a theoretical point of view it is not precise. In accordance with the dogmatics underlying the German constitution, its freedoms and scope of protection, it is recommended to qualify Holocaust denying statements in a judgmental context as a wrong fact and thus, to deny them the scope of protection under article 5.

In contrast, is remains questionable whether a similar provision (such as section 130 (3) of the GCC) would be a justified limitation under section 5 of the New Zealand BORA. The section is not interpreted to that effect that a restriction must not prohibit a certain kind of opinion. However, applying the above mentioned test[202] it is unlikely that such provision would fulfil the requirements such as the proportionality to the importance of the objection. Moreover, it is unlikely that New Zealand courts – following the Canadian jurisdiction – would exclude wrong facts, such as Holocaust denying statements, from the scope of protection regarding freedom of expression. Thus – although inconsistency would not lead to the striking down of a provision – the current New Zealand approach is more consistent and complying within the construct of freedom of expression than the German one.

---

[202] See V B 2 b).

However, it remains questionable which response is favourable. Although the Holocaust caused outrageous harm and victims, the recent incidents – whether in Germany, New Zealand or at an international level – show that people forget this part of history or at least do not care and display ignorance. The harm caused by this behaviour is even increased by the fact, that well-educated and academic individuals, such as Irving and Williamson disseminate their thoughts and statements with persuasiveness and straightforwardness, being capable of establishing their ideas in countries, other than the origin of the Holocaust. The recent incident at Lincoln University shows that New Zealand – although geographically thousands of miles apart from the origin of Holocaust – is not immune from the appearance Holocaust denying ideas or the ridiculing of these times. It is unacceptable that such behaviour is being apologised with regard to the fact, that New Zealanders are not conscious about the Holocaust and its context.

Because of the different "Holocaust denial" - approaches and as the Holocaust is Germany's direct history, it seems inappropriate to provide the same solution for both countries. The German law should stick to its provisions, especially section 130 (3) as abolition would have a great political impact. As being the country which is responsible for the happenings during World War II and because of the intensified and pervasive incidents of Holocaust denial, anti-Semitism and neo-Nazism within Germany, section 130 (3) provides a legitimate and adequate response to the phenomenon of Holocaust denial. However, courts should clarify the scope of protection regarding freedom of expression and emphasise that Holocaust denying statements, whose judgmental element is based on a false fact, do not fall under the scope of protection regarding article 5.

This paper proposes that the New Zealand legislation should not introduce a specific Holocaust denial law, but stick to its general hate speech law provided under section 131 of the HRA. However, the legislator should narrow the thresholds of the criteria under section 131 of the HRA and simplify the proceeding under that section to ensure that it does not run idle but states a functioning and balancing protection against the harm caused by Holocaust denying statements. One could think of deleting the requirement of the consent of the Attorney General as well as simplifying the proof intent. With regard to the importance of the objective, such amendment would still be likely to meet the requirements set out in the tests under section 5.

Deborah Lipstadt is right: truth, history and education gain high importance to fight against Holocaust deniers. However, freedom of expression is not an absolute right. Allowing hate speech such as Holocaust denying statement can subvert the marketplace of ideas.

VII CONCLUSION

This paper began by pointing out the rationales underlying hate speech and freedom of expression and its application to Holocaust denying statements. Throughout the paper, it has been shown that the German law provides far-reaching provisions criminalising Holocaust denying statements, in particular the "simple Auschwitz Deception" under section 130 (3) GCC. However, it was highlighted that the current section 130 (3) interferes with the fundamental right of freedom of expression, as wrong facts in a judgmental context fall within the scope of protection of the fundamental right, but section 130 (3) does not qualify as a general law and thus, is not a justified limitation to the freedom of expression. Hence, to solve the appearing insufficiencies, the Constitutional Court should emphasise that statements, whose judgmental element is based on a false fact, do not fall under the scope of protection regarding article 5 of the Basic Law.

In contrast, it has been shown that the New Zealand law criminalises hate speech in general. It was highlighted that Holocaust denying statements are mostly not capable of falling under the scope of section 131 HRA as the provision requires the fulfilment of high thresholds and strict criteria. Thus, the New Zealand legislation should narrow the requirements of the provision to fight against Holocaust deniers. Thus, with regard to the differences between the countries, their history and legal approaches to fight against Holocaust denial, one can say, that a limitation of freedom of expression regarding Holocaust denial is justified within the boundaries of the two systems.

VIII APPENDICES

A Appendix 1: Historians' Estimates of Jewish Losses in Each Country

HISTORIANS' ESTIMATES
OF JEWISH LOSSES IN EACH COUNTRY

Country	Reitlinger	Hilberg	Gutman and Rozett	Benz
Poland	2,350,000–2,600,000	3,000,000	2,900,000–3,000,000	2,700,000
Soviet Union	700,000–750,000	900,000	1,211,000–1,316,500	2,100,000
Hungary	180,000–200,000	<180,000	550,000–569,000	550,000
Romania	200,000–220,000	270,000	271,000–287,000	211,214
German Reich	160,000–180,000	<120,000	134,500–141,000	160,000
Czechoslovakia	233,000–243,000	260,000	146,150–149,150	143,000
Netherlands	104,000	<100,000	100,000	102,000
France	60,000–65,000	75,000	77,320	76,134
Austria	60,000	<50,000	50,000	65,459
Yugoslavia	58,000	60,000	56,200–63,300	60,000–65,000
Greece	57,200	60,000	60,000–67,000	59,185
Belgium	25,000–28,000	24,000	28,900	28,518
Italy	8,500–9,500	1,000	7,680	6,513
Luxembourg	3,000	>1,000	1,950	1,200
Norway	>1,000	762	762	758
Denmark	>100	60	60	116
Total	4,578,800	5,109,822	5,859,622	6,269,097

NOTE: Where ranges are given, the higher numbers are used in the totals. Most historians believe the most recent figures (from Gutman and Rozett and Benz) are the most accurate. Figures compiled from Gerald Reitlinger, *The Final Solution* (New York: Beechhurst Press, 1953 [1978]); Raul Hilberg, *The Destruction of the European Jews* (Chicago: Quadrangle Books, 1961); Yisrael Gutman and Robert Rozett, "Estimated Jewish Losses in the Holocaust," *Encyclopedia of the Holocaust*, vol. 4, edited by Yisrael Gutman (New York: Macmillan, 1990); Wolfgang Benz, *Dimension des Volkermords: Die Zahl der Judischen Opfer des Nationalsocialismus* (Munich: Deutscher Taschenbuch Verlag, 1991).

Source: Michael Shermer and Alex Grobman *Denying History Who says the Holocaust never happened and why do they say it?* (University of California Press, Berkeley, Los Angeles, London, 2000) 177.

B Appendix 2: German Legislation

1 Section 130 of the German Criminal Code

Incitement to hatred

(1) Whosoever, in a manner capable of disturbing the public peace

1. incites hatred against segments of the population or calls for violent or arbitrary measures against them; or
2. assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population,

shall be liable to imprisonment from three months to five years.

(2) Whosoever

1. with respect to written materials (section 11 (3)) which incite hatred against segments of the population or a national, racial or religious group, or one characterised by its ethnic customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group

(a) disseminates such written materials;
(b) publicly displays, posts, presents, or otherwise makes them accessible;
(c) offers, supplies or makes them accessible to a person under eighteen years; or
(d) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of Nos (a) to (c) or facilitate such use by another; or

2. disseminates a presentation of the content indicated in No 1 above by radio, media services, or telecommunication services

shall be liable to imprisonment of not more than three years or a fine.

(3) Whosoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated insection 6 (1) of the Code of International Criminal Law, in a manner capable of disturbing the public peace shall be liable to imprisonment of not more than five years or a fine.

(4) Whosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment of not more than three years or a fine.

(5) Subsection (2) above shall also apply to written materials (section 11 (3)) of a content such as is indicated in subsections (3) and (4) above.

(6) In cases under subsection (2) above, also in conjunction with subsection (5) above, and in cases of subsections (3) and (4) above, section 86 (3) shall apply mutatis mutandis.
table of contents

2 Article 5 Basic Law

Freedom of Expression
(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.
(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.

C *Appendix 3: New Zealand legislation*

1 Section 131 of the Human Rights Act 1993

Inciting racial disharmony

(1) Every person commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding $7,000 who, with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons,—

(a) Publishes or distributes written matter which is threatening, abusive, or insulting, or broadcasts by means of radio or television words which are threatening, abusive, or insulting; or

(b) Uses in any public place (as defined in section 2(1) of the Summary Offences Act 1981), or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting,—

being matter or words likely to excite hostility or ill-will against, or bring into contempt or ridicule, any such group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.

(2) For the purposes of this section, publishes or distributes and written matter have the meaning given to them in section 61 of this Act.

2 Section 14 of the Bill of Rights Act 1990

Freedom of Expression

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

Justified limitations

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

IX BIBLIOGRAPHY

A Legislation

Bill of Rights Act 1990 (NZ)

Human Rights Act 1993 (NZ)

Race Relations Act 1971 (NZ)

German Criminal Code 1871 (as amended in 2008)

Basic Law of the Federal Republic of Germany

Code of International Criminal Law (2002).

International Convention on the Elimination of All Forms of Racial Discrimination 1965

B Cases

1 United States Cases

Abrams v United States (1919) 250 US 616.

2 New Zealand Cases

King-Ansell v Police [1979] NZLR 531.

Neal v Sunday News Auckland Newspaper Publications (1985) EOC 76299.

R v Kopyto (1987) 47 DLR 213, 226 (CoA).

Proceedings Commissioner v Pryor [1993] 1 ERNZ 358.

Solicitor -General v Radio NZ Ltd [1994] 1 NZLR 48.

Proceedings Commissioner v Archer [1996] 3 HRNZ 123.

Duff v Communicado Ltd [1996] 2 NZLR 89.

Moonen v Film & Literature Review Board [2000] 2 NZLR 9.

R v Hansen [2007] NZSC 7.

3 German Cases

Beleidigungsfähigkeit eines erst nach 1945 geborenen Juden [1979] 75 BGHZ 160 (DE) (FCJ).

Böll [1980] 54 BVerfGE 208 (DE) (FCC).

Wahlkampf [1982] 61 BVerfGE 1 (DE) (FCC).

Wahlkampf/CSU: NPD Europas (1982) 60 BVerfGE 1 (DE) (FCC).

Brokdorf [1985] 69 BVerfGE 315 (DE) (FCC).

Strafbarkeit der Auschwitzlüge [1993] 31 BGHSt 226 (DE) (FCJ).

Strafrechtliche Bewertung der Leugnung der Judenvernichtung [1994] 90 BVerfGE 241 (DE) (FCC).

Strafbarkeit der Leugnung des Massenmordes an Juden (Holocaust) [1994] 40 BGHSt 97 (DE) (FCJ).

Volksverhetzung durch Verteidigerhandeln I [2000] 46 BGHSt 36 (DE) (FCJ).

Volksverhetzung - Leugnen des Holocaust durch Verteidigerhandeln (2002) 47 BGHSt 278 (DE) (FCJ).

4 Canadian Cases

R v Oakes [1986] 1 SCR 103 (SCC).

*Reference Re Public Service Employee Relations Act (Alt*a) [1987] 1 SCR 313.

R v Keegstra [1990] 3 SCR 697 (SCC).

R v Zundel [1992] 2 SCR 731 (SCC).

5 British Cases

Irving v Penguin Books Ltd, Deborah Lipstadt (2000) WLR 362478 (HC QBD).

C Texts

Barendt, Eric *Freedom of Speech* (2 ed, Oxford University Press, Oxford, 2005).

Bickel, Alexander M *The Morality of Consent* (Yale University Press, New Haven, 1975).

Braun, Stefan *Democracy of Balance Freedom of Expression and Hate Propaganda Law in Canada* (University of Toronto Press, Toronto, 2004).

Butler, Petra and Andrew Butler *The New Zealand Bill of Rights Act: a commentary* (LexisNexis, Wellington, 2005).

Butz, Arthur *The Hoax of the Twentieth Century: The Case Against the Presumed Exterminations of European Jewry* (Theses & Dissertations Press, Chicago, 1976).

Clayton, Richard and Hugh Tomlinson *The Law of Human Rights* (2 ed, Oxford University Press, Oxford, New York, 2009).

Cohen-Almagor, Raphael (ed) *Liberal Democracy and the Limits of Tolerance: Essays in Honor and Memory of Yitzhak Rabin* (Michigan University Press, Ann Arbor, 2000).
Epstein, Lee and Thomas Walker *Constitutional Law for a Changing America: Rights, Liberties and Justice* (4 ed, CQ Press, Washington D.C., 2001).

Evans, Richard *Lying about Hitler: History, Holocaust and the David Irving Trial* (Basic Books, New York, 2001).

Greenawalt, Kent *Fighting Words* (Princeton University Press, New Jersey, 1995).

Greenspan, Louis and Cyril Levitt (eds) *Under the Shadows of Weimar – Democracy, Law, and Racial Incitement in Six Countries* (Praeger, Westport, Conneticut, London, 1993).

Heyman, Steven J *Free Speech and Human Dignity* (Yale University Press, New Haven and London, 2008).

Huscroft, Grant and Paul Rishworth (ed) *Rights and Freedoms New Zealand Bill of Rights Act 1990 Human Rights Act 1993* (Brookers, Wellington 1995).

Irving, David *Hitler's War* (Hodder & Stoughton, London, The Viking Press, New York, 1977).

Jarass, Hans and Bodo Pieroth *Grundgesetz für die Bundesrepublik Deutschland Kommentar* (7 ed, C H Beck, Munich, 2004).

Joecks, Wolfgang and Klaus Miebach *Münchener Kommentar zum Strafgesetzbuch Band 2/2* (C H Beck, Munich, 2005) http://beck-online.beck.de/ (accessed 10 November 2009).

Kahn, Robert A *Holocaust Denial and the Law (a comparative study)* (Palgrave Macmillan, New York, 2004).

Kommers, Donald P *The Constitutional Jurisprudence of the Republic of Germany* (Duke University Press, Durham and London, 1989).

Lipstadt, Deborah *Denying the Holocaust* (The Free Press, New York, 1993).

Mayer, A J *Why Did the Heavens Not Darken* (Pantheon, New York, 1990).

Meiklejohn, Alexander *Free Speech and ist Relation to Self-Government* (Harper, New York, 1948).

Milton, John *Prose Writings* (Everyman's Library, JM Dent & Sons Ltd, London, 1958).

Mill, John Stuart *Three Essays* (OUP, first published as a World's Classics paperback, 1991).

Ministry of Justice *The Handbook of the New Zealand Bill of Rights Act 1990: An Introduction to the Rights and Freedoms in the Bill of Rights Act for the Public Sector* (Wellington, 2004).

Pieroth, Bodo and Bernhard Schlink *Grundrechte Staatsrecht 2* (24 ed, C F Müller, Heidelberg, 2008).

Popper, Karl *The Open Society and its Enemies* (Routledge and Kegan Paul, London, 1962).

Rassinier, Paul *Le Drame des juifs européens* (Le Sept Couleurs, Paris, 1962/64) translated by Harry Elmer Barnes *The Drama of the European Jews* (Steppingstones Publications, Silver Spring MD, 1975, foreword by Michael Hardesty).

Rishworth, Paul and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003).

Rudolf, Germar (nom de plume) (ed) *Dissecting the Holocaust The Growing Critique of Truth and Memory* (2 ed, Theses & Dissertations Press, 2003).

Sadurski, Wojciech *Freedom of Speech and Its Limits* (Kluwer Academic Publishers, Dordrecht, Boston, London, 1999).

Sartre, J *Being and Nothingless* (Philosophical Library, New York, 1956).

Schauer, Frederick *Free Speech: A Philosophical Enquiry* (Cambridge University Press, Cambridge, 1982).

Schönke, Adolf and Horst Schröder (eds) *Strafgesetzbuch Kommentar* (27 ed, C H Beck, Munich, 2006) http://beck-online.beck.de/ (accessed 10 November 2009).

Shermer, Michael and Alex Grobman *Denying History Who says the Holocaust never happened and why do they say it?* (University of California Press, Berkeley, 2000).

Tröndle, Herbert and Thomas Fischer *Strafgesetzbuch* (51 ed, C H Beck, Munich, 2003).

Vidal-Naquet, Pierre *Assassins of Memory Essays on the Denial of the Holocaust* (Columbia University Press, New York, 1987).

Wandres, Thomas *Die Strafbarkeit des Auschwitz-Leugnens* (Duncker & Humblot, Berlin, 2000).

D Journals

Bertram, Günter "Entrüstungsstürme im Medienzeitalter – der BGH und die 'Auschwitzlüge'" (1994) 31 NJW 2002.

Bindman, Geoffrey "Outlawing Holocaust denial" (1997) 147 NLR 466.

Brugger, Winfried "Verbot oder Schutz von Hassrede? Rechtsvergleichende Beobachtungen zum deutschen und amerikanischen Recht" (2003) 128 Archiv des oeffentlichen Rechts 372.

Delgado, Richard "Words that Wound: A tort action for racial insults, epithets, and name calling" (1982) 17 Harvard Civil Rights – Civil Liberties Law Review 133.

Delgado, Richard and Jean Stefancic "Four Observations about Hate Speech" (2009) 44 Wake Forest Law Review 353.

Douglas-Scott, Sionaidh "The Hatefulness of Protected Speech: A Comparison of the American and European Approaches" (1999) 7 William & Mary Bill of Rights Journal 305.

Fogo-Schensul, Credence "More than a river in Egypt: Holocaust Denial, the Internet and International Freedom of Expressions Norms" (1998) 33 Gonzaga Law Review 241.

Gaudreault-Des Biens, Jean-François "From Sisyphus's Dilemma to Sisyphus's Duty? A Mediation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide" (2001) 46 McGill Law Journal 1117.

Hörnle, Tatjana" Verbreitung der Auschwitzlüge im Internet" (2001) 6 NStZ 309.

Huster, Stefan "Das Verbot der 'Auschwitzlüge', die Meinungsfreiheit und das Bundesverfassungsgericht" (1996) 8 NJW 487.

Kübler, Friedrich "Rassenhetze und Meinungsfreiheit Grenzüberschreitende Aspekte eines Grundrechtskonfliktes" (2000) 125 Archiv des oeffentlichen Rechts 109.

Lasson, Kenneth "Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society" (1997-1998) 6 Geo Mas L Rev 35.

Mahoney, Kathleen "Hate Speech: Affirmation or Contradiction of Freedom of Expression" (1996) U ILL LR 789.

McGoldrick, Dominic and Thérèse O'Donnell "Hate-speech laws: consistency with national and international human rights law" (1998) 18 Legal Studies 453.

Meiklejohn, Alexander "The First Amendment is an Absolute" [1961] Supreme Court Review 245.

Moses, Juliet "Hate Speech: Competing Rights to Freedom of Expression" (1996-1999) 8 Auck U LR 185.

Regel, Alan "Hate Propaganda: A Reason to Limit Freedom of Expression" (1984) 49 Sask Law Rev 303.

Rosenfeld, Michael "Hate Speech in Constitutional Jurisprudence: A comparative Analysis" (2003) 24 Cardozo LR 1523.

Scanlon, T "Freedom of Expression and Categories of Expression" (1979) 40 U Pittsburg LR 519.

Schmitt Glaeser, Walter "Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts" (1972) 97 Archiv des oeffentlichen Rechts 276.

Stegbauer, Andreas "Der Straftatbestand gegen die Auschwitzleugnung – eine Zwischenbilanz" (2000) 6 NStZ 282.

Stein, Eric "History against free speech: The German law against the 'Auschwitz'- and other 'lies'"" (1986) 85 Michigan Law Review, 277.

Teachout, Peter R "Making 'Holocaust Denial' a crime: reflections on European anti-negationist laws from the perspective of US constitutional experience" (2006) 30 VtLR 655.

Tsesis, Alexander "Dignity and Speech: The regulation of hate speech in a democracy" (2009) 44 Wake Forest LR 497.

Varat, Jonathan D "Deception and the first Amendment: a central, compley, and somewhat curious relationship" (2006) 53 University of California Law Review 1107.

Weber, Sebastian "Strafbarkeit der Holocaustleugnung in der Europäischen Union" (2008) 1 Zeitschrift für Rechtspolitik 22.

E Other

Anti-Defamation League "Introduction: Denial as Anti-Semitism" www.adl.org/Holocaust/theory (accessed 1 October 2009).

Austin, Ben S "A Brief History of Holocaust Denial" http://frank.mtsu.edu/~baustin/denhist.htm (accessed 27 September 2009).

Bazyler, Michael J "Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism" (2006) www1.yadvashem.org (accessed 30 September 2009).

BBC News "Holocaust Denier Irving is jailed" (20 February 2006) http://news.bbc.co.uk (accessed 6 November 2009).

BBC News "Push for EU Holocaust denial ban" (15 January 2007) http://news.bbc.co.uk (accessed 30 September 2009).

Bishop, Christopher "Denying the undeniable: Holocaust denial, the criminal law, and free speech" (LLB (Hons) Research paper, Victoria University of Wellington, 2007) 24 – 25.

Boston College Law School "Debate: Freedom of Speech and Holocaust Denial" (1987) 8 Cardozo Law Review 559. [Transcript of the proceedings derived from The Holocaust and Human Rights: The First International Conference, held by Boston College Law School Holocaust/Human Rights Research Project and the Anti-Defamation League of B'nai Brith.

Bromwich, Tessa May "Balancing freedoms: A critique of New Zealand's hate speech legislation in light of the New South Wales and Victorian Experience (LLB (Hons) Research Paper, Victoria University of Wellington, 2005).

Committee on Civil Liberties, Justice and Home Affairs "Fighting racism in Europe: should Holocaust denial be a criminal offence?" (19 March 2007) Press Release www.europaparl.europa.com (accessed 30 September 2009).

Committee on Obscenity and Film Censorship "Report of the Committee on Obscenity and Film Censorship" (1979) 55.

Council of the European Union "Framework Decision on Racism and Xenophobia" (19 April 2007) Press Release 8665/07 http://register.consilium.europa.eu/ (accessed 30 September 2009).

Council of the European Union "2908th meeting of the Council" (27 and 28 November 2008) Press Release 16325/1/08 REV 1 http://register.consilium.europa.eu/ (accessed 30 September 2009).

Epping, Volker and Christian Hillgruber *Beck'scher Online Kommentar Grundgesetz* (3 ed, C H Beck, Munich, 2009) http://beck-online.beck.de/ (accessed 10 November 2009).

Hallowell, Robert "Racial Disharmony: A General Explanation" (13.03.2006) Commentary sent by Paul Warhurst, Information Adviser of the New Zealand Human Rights Commission, via email.

Heintschel-Heinegg, Bernd von (ed) *Beck'scher Online Kommentar Strafrecht* (9 ed, C H Beck, Munich, 2009) http://beck-online.beck.de/ (accessed 27 July 2009).

Holocaust Denial on Trial www.hdot.org/en/denial (accessed 11 November 2009).

Human Rights Commission "The Right of Freedom of Opinion and Freedom of Expression" www.hrc.co.nz/report.

Human Rights Commission "Exciting Racial Disharmony Discussion Paper on section 9A of the Race Relations Act 1971 which makes it unlawful to excite racial disharmony" (1984) 6-8.

Human Rights Commission "Submission to the Government Administration Committee into the Inquiry into Hate Speech" (5 May 2005).

Jüttner, Julia "Fräulein Stolz und der Hitlergruß" (9 May 2009) www.spiegel.de (accessed 6 November 2009).

Leuchter, Fred *The Leuchter Report-The End of a Myth* www.revisionists.com (accessed 10 November 2009).

Leutheusser-Schnarrenberger, Sabine in Stenographische Berichte BT-12 (1994), 19671.

Matsuda, Mari J "Hate Speech: What Price Tolerance" (13 March 2003) Panel Discussion Arlin M Adams Center for Law and Society at Susquehanna University www.susqu.edu/documents/hate.pdf (accessed 1 October 2009).

Neander, Joachim "Mit dem Strafrecht gegen die 'Auschwitz-Lüge': Ein halbes Jahrhundert § 130 Strafgesetzbuch 'Volksverhetzung'" (2006) http://aps.sulb.unisaarland.de/theologie.geschichte (accessed 10 November 2009).

Office of Film and Literature Classification "Submission Inquiry into Hate Speech" (29 October 2004) 6 www.censorship.govt.nz (accessed 30 September 2009).

Oxford English Dictionary "neo-Nazism" http://dictionary.oed.com.helicon.vuw.ac.nz (accessed 3 October 2009).

Permanent Representatives Committee "A item note" (26 November 2008) http://register.consilium.europa.eu/ (accessed 30 September 2009).

Rauber, Paul (17 January 1992) *East Bay Express* San Francisco 4 see http://www.nizkor.org/ftp.cgi/documents (accessed 27 September 2009).

Seeh, Manfred "Wiederbetätigung: Fünf Jahre Haft für Gerd Honsik" (28 April 2009) http://diepresse.com (accessed 6 November 2009).

Special Committee on Hate Propaganda in Canada "Report of the Special Committee on Hate Propaganda in Canada" (Queen's Printer, Ottawa, 1966).

The Danish Center for Holocaust Denial and Genocide Studies www.holocaust-education.dk (accessed 10 November 2009).

The Institute for Historical Review www.ihr.org/main/about (accessed 11 November 2009).

The New York Times "Netanyahu Attacks Ahmadinedjad's Holocaust Denial" (24 September 2009) www.nytimes.com (accessed 10 November 2009).

The New Zealand Herald "Iranian opposition supporters crash state rallies" (19 September 2009) http://www.nzherald.co.nz (accessed 26 September 2009).

The Nizkor Project "David Irving, Holocaust denial, and his connections to right-wing extremists and Neo-National Socialism (neo-Nazism) in Germany www.nizkor.org (accessed 3 October 2009).

Tumolillo, M Amedeo "Ahmadinedjad Goes on 'Larry King Life'" (26 September 2009) The Lede The New York Times News Blog http://thelede.blogs.nytimes.com (accessed 10 October 2009).

Walker, Andrew "Profile: David Irving" (20 February 2006) *BBC News* http://news.bbc.co.uk (accessed 30 September 2009).

"Ahmadinedschad nennt Holocaust ein 'Märchen'" (18 September 2009) http://www.spiegel.de (accessed 23 September 2009).

"Holocaust row bishop Richard Williamson contacts David Irving" (26 February 2009) www.telegraph.co.uk (accessed 30 September 2009).

"Racism and holocaust denial debated at EU Parliamentary hearing" (20 June 2006) www.eu-un.europa.eu (accessed 30 September 2009).

"University apologises for students in Nazi garb" (21 September 2009) www.stuff.co.nz (accessed 26 September 2009).

http://www.focal.org/speaks/index.html (accessed 10 November 2009).

Interview with Deborah Lipstadt "Defending History: Deborah E Lipstadt and Holocaust Denial" (Three Monkeys Online, November 2006) www.threemonkeysonline.com (accessed 8 October 2009).