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**HOLOCAUST DENIAL: ONE'S FREE EXPRESSION  
OF THOUGHT OR JUST HATE SPEECH?**

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Holocaust denial: One's free expression of thought or just hate speech?

**Victoria**

UNIVERSITY OF WELLINGTON

*Te Whare Wānanga  
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This paper deals with the problems concerning Holocaust Denial as a special form of hate speech on the one side and freedom of expression on the other side. Firstly, it discusses Holocaust Denial in general to provide an overview why it is considered as hate speech. The author then discusses the procedural differences in various jurisdictions to examine the problems arising out of the prosecutions. Furthermore, the author gives an overview over the different legal frameworks and cases. Finally, the paper discusses freedom of expression in general, and free speech in combination with hate speech in particular. The paper concludes with an analysis whether New Zealand's hate speech provisions are sufficient to combat Holocaust Denial.

The text of this paper (excluding abstract, appendix, bibliography, content and footnotes) comprises of 15,168 words.

## I INTRODUCTION

During the course of writing her book *Denying the Holocaust: The Growing Assault on Truth and Memory*<sup>1</sup>, the author Deborah Lipstadt was invited to several television and radio shows to debate her book with Holocaust deniers. However, she refused to appear on these shows, stating that this would only lead to create "a debate that is no debate and an argument that is no argument"<sup>2</sup>. This illustrates one of the dilemmas of battling Holocaust deniers. Actual rebutting their assertions might give them a forum to repeat their claims, ignoring them leaves the assertions unanswered. At least for some people, factual engagement with Holocaust Denial is "an unpleasant necessity"<sup>3</sup>.

With the exponential growth of the Internet, Holocaust Denial is becoming increasingly pervasive<sup>4</sup>. Still, one might think that Holocaust Denial is not a real problem. But is that really the case?

### A The "Hayward-Controversy"

In May 2000, then little-known Massey University historian Joel Hayward suddenly became famous. He was the centre of a controversy regarding his master thesis written in 1993 at the University of Canterbury and graded with A+. In his research about revisionism Hayward came to the conclusion that there was no evidence that there was ever an official Nazi policy to exterminate Jews, that Nazi gas chambers may in fact have fallen into the category of "atrocious propaganda", and that far fewer than six million Jews died at the hands

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<sup>1</sup> Deborah Lipstadt, *Denying the Holocaust : The Growing Assault on Truth and Memory* (Penguin Books, London, 1994).

<sup>2</sup> Ibid, vii-viii.

<sup>3</sup> Robert Kahn *Holocaust Denial and the Law* (Palgrave MacMillan, New York, 2004) 12.

<sup>4</sup> Credence Fogo-Schensul "More Than a River in Egypt: Holocaust Denial, the Internet, and International Freedom of Expression Norms" (1997) 33 *Gonz L Rev* 241, 242.

of the Nazis<sup>5</sup>. Seven years later this thesis caused so much controversy that Hayward apologised for what he called a work “without sufficient knowledge and preparation”<sup>6</sup> and the University of Canterbury installed a working party to determine if Hayward should be stripped of his Master’s degree.

The working party however came to the conclusion that Hayward could not be stripped of his First-class honours degree although they described his work as “flawed” and “faulty”. The working party report<sup>7</sup> caused even more disturbance, raising such questions as scientific freedom and freedom of speech and ultimately even led to a petition to the University of Canterbury signed by numerous New Zealand lecturers<sup>8</sup>.

### ***B Problem Outline***

There can be no doubt that Hayward’s piece of work was infamous, that it was faulty and that it contained every single element of what is known as Holocaust Denial: A lie that is “not offensive solely to Jews and members of other groups that were victims of Nazi crimes. It is offensive to all who are informed about the facts of the Holocaust”<sup>9</sup>. However the question remains how such a piece of work and Holocaust Denial in general should be dealt with. Dealing with this matter has to take into account the importance of freedom of

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<sup>5</sup> Sean Scanlon “Making History” (20 May 2000) The Press, Christchurch (archived at <http://www.nizkor.org>); Rebecca Walsh “A+ equals anger for Jewish groups” (22 December 2000) available at <http://www.nzherald.co.nz/> (last accessed 28 September 2008).

<sup>6</sup> Rebecca Walsh “A+ equals anger for Jewish groups” (22 December 2000) New Zealand Herald.

<sup>7</sup> “Joel Hayward Working Party “Report to the Council of The University of Canterbury” (20 December 2000) available at <http://www.canterbury.ac.nz/hayward> (last accessed 28 September 2008).

<sup>8</sup> Martin Lally “Petition to the University of Canterbury” available at <http://www.joelhayward.com> (last accessed 28 September 2008).

<sup>9</sup> Anthony Julius “Combating Holocaust Denial through law in the United Kingdom” (2000) JPR 3 available at <http://www.jpr.org.uk/Reports/> (last accessed 28 September 2008).



expression, which is, as stated by the Federal Constitutional Court of Germany, a fundamental right<sup>10</sup>:

The fundamental right to free expression of opinion is, as the most direct expression of human personality in society, one of the foremost human rights of all... For a free democratic State system, it is nothing other than constitutive, for it is only through it that the constant intellectual debate, the clash of opinions, that is its vital element is made possible... It is in a certain sense the basis of every freedom whatsoever, "the matrix, the indispensable condition of nearly every other form of freedom".

This research paper aims to examine Holocaust Denial and the free speech issues it raises. It will give a broad overview on the way legislation and courts in the European Union (and Germany in particular), Canada and New Zealand deal - and are supposed to deal - with the problem. Finally, the paper will focus on the significant freedom of expression issues of regulating hate speech in general, and Holocaust Denial in particular.

## **II WHAT IS HOLOCAUST DENIAL?**

The history of the European anti-revisionist laws can be traced back to the time-period that immediately followed the Second World War. During that time period, the Axis Powers felt obligated to banish the propaganda and the displays of the Nazi regime<sup>11</sup>. Admittedly, there are several different forms of anti-revisionist laws, but most if not all of them have in common that they not only ban the outright denial of the Holocaust, but also the minimisation and justification of the Holocaust<sup>12</sup>. Therefore not only the denial that the Holocaust happened is threatened with criminal penalty, but also statements that try to

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<sup>10</sup> *Lueth v Harlan (Lueth-case)* (15 January 1958) BVerfGE 7, 198, 208.

<sup>11</sup> Edward N. Peterson *The American Occupation of Germany: Retreat to Victory* (Wayne State University Press, 1978) 138-66 (discussing how the United States used the process of denazification during occupation).

<sup>12</sup> Emanuela Fronza "The Punishment of Negationism: The Difficult Dialogue Between Law and Memory" (2001) 30 VTLR 609, 619.

minimise the nature and extent of the crimes by the Nazis or which try to justify those crimes towards Jews and other minorities, like Communists, homosexuals, mentally ill and prisoners of war, to just name a few<sup>13</sup>. To fully comprehend why all these forms of “denial” are included, it is crucial to understand the history, origins and nature of Holocaust-denial itself.

The first examples of denial took place immediately following the Second World War, when those allegedly responsible for the actions of the Nazi regime and its policies tried to defend and justify their contribution with statements claiming that atrocities had not been as bad as reported or that they had no responsibility for them<sup>14</sup>.

However, in the 1960s Holocaust Denial reached a new level with what is considered “modern Holocaust Denial literature” today<sup>15</sup>. The first publication was “*The Drama of the European Jews*”<sup>16</sup> by so-called French historian Paul Rassinier. Surprisingly, Rassinier was a well respected historian who himself was imprisoned in a concentration camp (Buchenwald) for being a socialist. He claimed that the idea that there had been a “Holocaust” had been invented by Zionists and the allied forces to validate their own policy<sup>17</sup>. However, Rassinier based his allegations primarily on unsupported assertions and on so-called evidence that was more than dubious<sup>18</sup>. Nevertheless, his ideas were largely the basis and inspiration for a second generation of deniers, with the most significant pieces of work being Arthur Butz’s *The Hoax of the Twentieth Century: The Case Against the Presumed Extermination of European Jewry*<sup>19</sup>

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<sup>13</sup> Ibid.

<sup>14</sup> Marvin Perry & Frederick Schweitzer, *Antisemitism: Myth and Hate from Antiquity to the Present* (Palgrave Macmillan, 2002) 177.

<sup>15</sup> Peter R. Teachout “Making Holocaust Denial a Crime: Reflections on European Antinegationist Laws from the Perspective of U.S. Constitutional Experience (2006) 30 VTLR 655, 661.

<sup>16</sup> Paul Rassinier “*The Drama of the European Jews*” (Michael Hardesty trans, 1975).

<sup>17</sup> Richard Evans “*Lying about Hitler: History, Holocaust and the David Irving Trial*” (Basic Book, 2002), 128, 135 (citing Rassinier).

<sup>18</sup> Ibid, 118.

<sup>19</sup> Arthur Butz *The Hoax of the Twentieth Century: The Case Against the Presumed Extermination of European Jewry* (Theses & Dissertations Press, 1976).

and David Irving's *Hitler's War*<sup>20</sup>. Those two books have set the stage for others, and have also introduced the major themes which characterize Holocaust Denial<sup>21</sup>.

Furthermore, the publishing of these books ultimately led to the founding of the Institute for Historical Review in 1979, which is dedicated to prove that the Holocaust is a "myth"<sup>22</sup>. Although the journals, books and articles published by the Institute cover a multitude of topics, it specialises in questioning the Holocaust<sup>23</sup>. Although the Institute's official policy is that it "does not deny the Holocaust", but would rather provide a forum to discuss legitimate "revisionist history", a quote from the Institute's journal states<sup>24</sup>:

There is no dispute over the fact that large numbers of Jews were deported to concentration camps and ghettos, or that many Jews died or were killed during World War II. Revisionist scholars have presented evidence ... showing that there was no German program to exterminate Europe's Jews, and that the estimate of six million Jewish wartime dead is an irresponsible exaggeration. The Holocaust -- the alleged extermination of some six million Jews (most of them by gassing) -- is a hoax and should be recognized as such by Christians and all informed, honest and truthful men everywhere.<sup>25</sup>

The director of the Institute is quoted with another expression of the Institute's perspective, stating that "[i]f by the 'Holocaust' you mean the

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<sup>20</sup> David Irving *Hitler's War* (World War II Books, 1977).

<sup>21</sup> Peter R. Teachout "Making Holocaust Denial a Crime: Reflections on European Antinegationist Laws from the Perspective of U.S. Constitutional Experience (2006) 30 VTLR 655, 662.

<sup>22</sup> Richard Evans "*Lying about Hitler: History, Holocaust and the David Irving Trial*" (Basic Book, 2002), 148.

<sup>23</sup> *Ibid*, 149.

<sup>24</sup> Herman Otten, Christian Responsibility to Truth, J HIST REV, Sept/Oct 1993, 32.

<sup>25</sup> The author feels the need to strongly repudiate that allegation.

political persecution of Jews, some scattered killings, if you mean a cruel thing that happened, no one denies that<sup>26</sup>.

Although there is some form of disagreement what exactly should be deemed as “revisionist” theses, those theses are generally spoken ones which claim one or more of the following:<sup>27</sup>

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

Nearly all of those assertions – with probably the exemption of the last – are contrary to known historical facts and are not accepted by respected historians. Additionally, it is widely appreciated that the claims lack credibility<sup>28</sup>.

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<sup>26</sup> Peter R. Teachout “Making Holocaust Denial a Crime: Reflections on European Antinegationist Laws from the Perspective of U.S. Constitutional Experience (2006) 30 VTLR 655, 663; (again, the author wished to repudiate).

<sup>27</sup> Michael Shermer & Alex Grobman *Denying History: Who Says the Holocaust Did Never Happen and Why Do They Say It* (University of California Press, Berkeley, 2002), 40, 100, 106.

<sup>28</sup> Peter R. Teachout “Making Holocaust Denial a Crime: Reflections on European Antinegationist Laws from the Perspective of U.S. Constitutional Experience (2006) 30 VTLR 655, 663.

There have been some efforts to differentiate between clear Holocaust Denial and legitimate historical revisionism<sup>29</sup>. The main difference between those two is that the latter try to focus on areas “for which the evidence is incomplete or ambiguous”, such as “Hitler's role in the event, Jewish responses to persecution, and reactions by onlookers both inside and outside Nazi-controlled Europe”<sup>30</sup>. The former group however focus their attention to facts that are clear and try to dispute the main features of the holocaust. According to one scholar: “Unlike true scholars [Holocaust deniers] have little if any respect for data or evidence. Their commitment is to an ideology and their 'findings' are shaped to support it”<sup>31</sup>.

The problem with Holocaust Denial is therefore not only that it is bad history, but that it is bad history that furthermore encourages and serves racist and Nazi propaganda. A close look at the ideology of Holocaust deniers will support this thesis.

It is widely agreed among scholars that denial is blatantly racist. The widespread view is that “those promoting Holocaust Denial are overwhelmingly anti-Semites and/or neo-Nazis”<sup>32</sup>. One example is known revisionist David Irving, who brought a libel suit against Deborah Lipstadt for her allegation that he had forged evidence to support his theses<sup>33</sup>. Although Irving's work has been described as being an important contribution to our understanding of the Third Reich and the Nazi regime – in fact, his research was praised as being “thorough and painstaking research into the archives”<sup>34</sup> – his work was also described by Charles Gray J as persistently and deliberately misinterpreting and manipulating historical evidence for his own ideological

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<sup>29</sup>Ibid, 664.

<sup>30</sup> Donald Niewyk (ed), *Introduction to The Holocaust: Problems and Perspectives of Interpretation* (2ed, Wadsworth Publishing, 1997) 1,7.

<sup>31</sup> Deborah Lipstadt “Deniers, Relativists and Pseudo-Scholarship”, [1991] 6 Dimensions 4.

<sup>32</sup> Tom W. Smith “The Polls--A Review: The Holocaust Denial Controversy”, [1995] 59 PUB O Q 269, 270.

<sup>33</sup> *Irving v. Penguin Books, Ltd.*, No. 1996-1-1113, [2000] EWCA QB 115

<sup>34</sup> Ibid, para 13.7.

sake. Additionally, he had portrayed Hitler in an unjustifiable positive light and would be an active Holocaust denier; that he furthermore was an active Anti-Semite and racist and bonded with extremists who promote neo-Nazism<sup>35</sup>. Irving's true nature is revealed by some of the comments he made during the course of the years<sup>36</sup>:

I don't see any reason to be tasteful about Auschwitz. It's baloney. It's a legend. Once we admit that it was a brutal slave camp and a large number of people died elsewhere in the war, why believe the rest of the baloney? I say, quite tastelessly in fact, that more women died on the back seat of Edward Kennedy's car at Chappaquiddick than ever died in a gas chamber in Auschwitz.

There are so many Auschwitz survivors going around, in fact the number increases as the years go past, which is biologically very odd to say the least. I'm going to form an Association of Auschwitz Survivors, Survivors of the Holocaust and other liars, or the ASSHOLS.

These comments are in my eyes so far out of line – in fact they can only be described as cruel and ugly and filled with pure hate – that they deserve no further comment and speak for themselves.

### ***III THE CHALLENGE OF BATTLING HOLOCAUST DENIAL IN COURT***

#### ***A The "Holocaust Denial Trial"***

Aforementioned Holocaust denier David Irving sued Deborah Lipstadt and her publisher, complaining that she had defamed him in her book *Denying*

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<sup>35</sup> Ibid, para 13.167.

<sup>36</sup> Gene Lichtenstein, Illusions at the L.A. Times, JEWISH J., Jan. 14, 2000, available at <http://digbig.com/4qnxc>; Ian Traynor et al., Three Years Is Not Enough Say Irving's Accusers, GUARDIAN (London), Feb. 22, 2006, at 4, available at <http://digbig.com/4rfyy> (last accessed 28 September 2008).

*the Holocaust-The Growing Assault on Truth and Memory*<sup>37</sup>. She had accused him of skewing data to reach unreliable conclusions. Therefore, she had to prove in court that the Holocaust happened to defeat him. She did so in a legal battle that lasted about 5 years, presenting numerous experts. In a very careful judgement that runs over 300 pages, Gray J rejects every single aspect of Mr Irving's case.

At first glance, it appears however shocking that the defendant actually had to prove in court, by testimony of numerous experts, that the Holocaust did happen. As there have been numerous finding of fact about the Holocaust and courts before that had to deal with the Holocaust<sup>38</sup>, there is a strong argument that the Holocaust is a historical fact and that the onus of proof should have been limited to the issue whether Irving skewed data.

### ***B The Systematic Distinction between Common Law and Civil Law Countries***

Common law countries like the United States, Canada, Great Britain and New Zealand on the one side and civil law countries like the European continental countries (eg Germany, France and Spain) and Latin American countries on the other side are not only – speaking in terms of legal systems - divided by the source of law. They are also divided by the norms of criminal procedure<sup>39</sup>. The first distinction means that in common law countries the law is created by the judges through precedent as opposed to civil law countries, where the law is created by the legislator, with the judge being reduced to a role

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<sup>37</sup> *Irving v. Penguin Books, Ltd.*, No. 1996-1-1113, [2000] EWCA QB 115.

<sup>38</sup> Gerald Tishler, Alan Dershowitz, Arthur Berney et al "Debate: Freedom of Speech and Holocaust Denial" (1987) 5 Card L R 559, 563.

<sup>39</sup> Robert Kahn *Holocaust Denial and the Law* (Palgrave MacMillan, New York, 2004) 13.

where he solely applies the existing law<sup>40</sup>. The second difference is however far more interesting for the purpose of this paper.

Common law countries have adversarial norms of criminal procedure. This means that evidence is presented by the parties of the trial – prosecution and defence – while the role of the judge is reduced to being a mere umpire<sup>41</sup>. The underlying ideal is that “law is a game”, and the courtroom is the scene for that game. The objective of the criminal procedure is to ensure that the result of the trial is fair, even if the truth is not completely uncovered by the prosecution. The supporters of this system rely on John Stuart Mill’s argument that the truth is most likely to come out by a clash of ideas which are presented by the prosecutor and the counsel of the defence<sup>42</sup>.

Civil law countries on the contrary have established an inquisitorial system. This means that evidence is gathered by the judge, who is the centre of this system, who presents the evidence and also questions the witnesses<sup>43</sup>. The objective of the law is the discovery of truth, and the criminal trial is a quest for the truth. As the word “inquisitorial” derives from the Latin word “quaestio”, which stands for “torture”, the extent to which the judge will go to explore the truth is indicated<sup>44</sup>. Furthermore, the underlying principle of the inquisitorial system is the supremacy of truth over fairness to the accused, which is however not to say that the system is unfair to the accused.

Critics of the adversarial system have indicated that it would advance lies and falsehood, and that trial by jury would contain of “khadi justice”<sup>45</sup>.

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<sup>40</sup> For an overview see: John Henry Merryman *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (2 ed, Stanford, Stanford University Press, 1985)

<sup>41</sup> Robert Kahn *Holocaust Denial and the Law* (Palgrave MacMillan, New York, 2004) 13.

<sup>42</sup> Stephan Landsmann *The Adversary System: A Description and Defense* (American Enterprise Institute, Washington DC, 1984).

<sup>43</sup> Mirijan Damaska *The Faces of Justice and State Authority: A Comparative Approach to the Legal System*, (Yale University Press, New Haven, 1986), 3-6.

<sup>44</sup> Robert Kahn *Holocaust Denial and the Law* (Palgrave MacMillan, New York, 2004) 13.

<sup>45</sup> Max Weber *Economy and Society*, vol 2 (Berkeley, University of California, 1978) 813.



Additionally, there is the argument that the adversarial system would lead to the coaching of witnesses as well as the debate of experts in courts, and that these problems were prevented in an inquisitorial system with a much more active judge<sup>46</sup>. A growing number of voices in the United States call for a reform of the current adversarial system<sup>47</sup>, and one commentator has stated (regarding the *Zundel* trial) that there was clearly “something wrong with viewing adversarial jurisprudence as an efficient tool for arriving at the truth”<sup>48</sup>.

The differences between the systems mirror the dilemma of proof, which is described as “the tension between the huge mass of facts documenting the Holocaust and a legal system that must give both sides a chance to tell their story”<sup>49</sup>. Given the huge difference between the systems, there should also be a difference in how courts have been willing to use the doctrine of judicial notice – which allows the court to recognize certain well-established facts as true – to the Holocaust. This part of the paper will therefore examine how and why courts in the different jurisdictions have been willing – or not willing – to apply this doctrine. It will also examine how courts solved the dilemma of requiring on the one hand prosecutors to prove the guilt of the accused and on the other hand preventing deniers from spreading their hate in a courtroom. This of course goes back to the problem outlined above: That a public debate with a denier might be more harmful than ignoring him<sup>50</sup>.

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<sup>46</sup> John Langbein “The German Advantage in Civil Procedure” (1986) 61 NWULR 823.

<sup>47</sup> Ellen Sward “Values, Ideology and the Evolution of the Adversary System” (1989) 64 INDLJ 301.

<sup>48</sup> Lawrence Douglas “Policing the Past: Holocaust Denial and the Law”, Robert Post (ed) *Censorship and Silencing: Practises of Cultural Recognition* (Getty Institute, Los Angeles, 1978), 78.

<sup>49</sup> Robert Kahn *Holocaust Denial and the Law* (Palgrave McMillan, New York, 2004) 14.

<sup>50</sup> *Ibid.*

### C *The Inquisitorial System in Germany and the Holocaust*

In Germany, Holocaust Denial prosecutions began as early as the mid of the 1970s, and were a mirror of how central and omnipresent the Holocaust and accounting for the past still were in German public life<sup>51</sup>. The rejection of the Nazi past and of Anti-Semitism was one of the founding principles of the Federal Republic of Germany, and was even more important regarding the fact that many former Nazis played important roles during the early years of the Republic. Germany felt an urgency to prove that it had truly changed, and the denial of holocaust threatened that image. Consequently, Holocaust Denial was and is regarded as a “breach of rules”<sup>52</sup>. For Germans, Holocaust Denial is not just an historical argument. It is not only a “clever” form of Anti-Semitism, but rather and much more dangerously an affirmation of the Nazi past and its ideology<sup>53</sup>.

In dealing with the Holocaust, two factors eased the aforementioned “dilemma of proof”. The first factor is that one of the underlying reasons for the prosecution of Holocaust Denial is not only the falsity of the statement, but also the danger that statement poses to society. Therefore, the judges could take judicial notice of the Holocaust without ultimately resolving the case. It allowed a debate about the dangerousness of Holocaust Denial without having to discuss the claims made by deniers<sup>54</sup>.

Secondly, and far more important is the inquisitorial nature of the German legal system. Under Section 244 of the German Criminal Procedure Code the judges is required to “explore ex officio all facts and evidentiary materials

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<sup>51</sup> Ibid.

<sup>52</sup> Rainier Erb “Public Responses to Antisemitism and Right-Wing Extremism” in Hermann Kurthen, Werner Bergmann and Rainie Erb (ed) *Antisemitism and Xenophobia in Germany after Unification* (Oxford University Press, Oxford, 1997) 218.

<sup>53</sup> Robert Kahn *Holocaust Denial and the Law* (Palgrave McMillan, New York, 2004), 15.

<sup>54</sup> Ibid, 16

which are of significance for the verdict”<sup>55</sup>. The roles of prosecution and defence counsel are however limited and the judge has the possibility to reject evidence on specified grounds like lack of relevance<sup>56</sup>. Additionally, and significant in the context of Holocaust Denial prosecution, the judge may reject evidence that is “superfluous on grounds of *Offenkundigkeit*”<sup>57</sup>. The doctrine of *Offenkundigkeit* applies to facts that are common knowledge, which means “facts of which rational people generally have knowledge or about which they can inform themselves easily from generally available sources without the requirement of specialist knowledge”<sup>58</sup>. The prerequisite of the knowledge being easily accessible is based on democratic theory. This means no less than that the accused who had facts against him established as *offenkundig* must have had a reasonable chance to become aware of those facts<sup>59</sup>.

Although the system of *Offenkundigkeit* might appear somewhat similar to the common law approach of judicial notice, there are significant differences. While the common law takes judicial notice only of very specific bits of information like dates, place names or the weather<sup>60</sup>, German courts take Judicial notice of much more general facts, like the fact that the German Communist Party “is an organization whose goals and acts directs itself against the constitutional order”<sup>61</sup>.

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<sup>55</sup> German Criminal Procedure Code (StPO), s 244 (2) (translation by author).

<sup>56</sup> Ibid, s 244 (3).

<sup>57</sup> Ibid, s 244 (3). The etymology of the word “Offenkundigkeit” (offen=open and kundig=known) describes the rationale of the law.

<sup>58</sup> Decision of the Federal Constitutional Court of Germany, BVerfGE 10, 177, 183 (translation by author).

<sup>59</sup> Rainier Keller “Offenkundigkeit und Beweisbeduerftigkeit im Strafprozess” (1989) Zeitschrift fuer die gesamte Strafrechtswissenschaft 398, 402.

<sup>60</sup> Graham Lilly *An Introduction to the Law of Evidence* (3ed, West Publishing Co, St Paul, 1996), 13.

<sup>61</sup> Lutz Meyer-Gossner *Strafprozessordnung* (46ed, Munich, Beck, 2003) 843.

*D Distinguishing from the Adversarial System? The United States*

Generally speaking, the adversarial system is deeply entrenched within the United States. All the more surprising is the success Mel Mermelstein had in convincing two courts in California to take judicial notice of the Holocaust<sup>62</sup>. The case concerned a promise by the Institute for Historical Review (IHR) to pay \$50,000 reward to anyone who could prove that Jews were gassed at Auschwitz. Mermelstein wrote a letter to the editors of the LA Times and others including The Jerusalem Post. The Institute for Historical Review wrote back, offering him \$50,000 for proof that Jews were, in fact, gassed in the gas chambers at Auschwitz. Mermelstein, in turn, submitted a notarized account of his internment at Auschwitz and how he witnessed Nazi guards ushering his mother and two sisters and others towards gas chamber number five. Despite this, the IHR refused to pay the reward. Mermelstein subsequently sued the IHR for breach of contract, anticipatory repudiation, libel, injurious denial of established fact, intentional infliction of emotional distress, and declaratory relief.

The noteworthy fact about this case is less the outcome of the case – which led to a settlement on the eve of the trial in 1985 – but more the fact that Johnson J took judicial notice of the Holocaust, stating that<sup>63</sup>:

Under Evidence Code Section 452(h), this court does take judicial notice of the fact that Jews were gassed to death at the Auschwitz Concentration Camp in Poland during the summer of 1944. It just simply is a fact that falls within the definition of Evidence Code Section 452(h). It is not reasonably subject to dispute. And it is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. It is simply a fact.

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<sup>62</sup> *Mermelstein v IHR* LA County Superior Court No C 356 542 (filed 19 February 1981), available at <http://frank.mtsu.edu/~baustin/revision.htm>.

<sup>63</sup> *Ibid.*

However, that ruling is hard to explain. It appears to be in violation of America's common law system, which traditionally leaves factual issues for the jury<sup>64</sup>. Then, on the other hand, the question may be raised whether a court would not be also willing to accept that slavery happened, that Japanese were detained during the Second World War or that American soldiers were captured and tortured during the Vietnam war, all equally undisputable historic facts.

### ***E Canada: Unwillingness to Take Judicial Notice of the Holocaust***

In the case against Canadian denier Ernst Zundel<sup>65</sup> (which I will talk about in detail later in this paper), Locke J refused to take judicial notice of the Holocaust. Therefore Zundel was able to use his two trials to spread denial propaganda. Most of his evidence - including, for example, testimony that Auschwitz had a swimming pool - came in to show that Zundel, accused of "knowingly spreading false news," had an "honest belief" in the propaganda he disseminated. The decision by Locke was criticised as creating the impression that the Holocaust was not an indisputable fact, as stated by Canadian law Professor Irwin Cotler<sup>66</sup>:

Could the courts have taken judicial notice of the existence of the Holocaust as a historical fact? As many of you know, judicial notice is a principle of evidence; courts are authorized to take judicial notice of matters which are common knowledge and about which reasonable people would agree. One would have hoped, indeed argued, therefore, that the Holocaust is at the very least such a matter. One might draw a disturbing inference if judicial notice of the Holocaust was not taken: Maybe the Holocaust isn't a matter of common knowledge and it is not a matter about which reasonable people would agree.

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<sup>64</sup> Robert Kahn *Holocaust Denial and the Law* (New York, Palgrave MacMillan, 2004), 25.

<sup>65</sup> *R v Zundel* [1987] 35 DLR (4<sup>th</sup>) 338.

<sup>66</sup> Gerald Tishler, Alan Dershowitz, Arthur Berney et al "Debate: Freedom of Speech and Holocaust Denial" (1987) 5 Card L R 559, 562, 563.

It must however be observed that Locke J had no intentions to dispute the historic facts of the Holocaust whatsoever<sup>67</sup>. Rather, he felt the obligation to weigh the obviousness of the Holocaust against the defendant's right to fair trial. The Court of Appeal agreed with Locke J's reasoning, stating that<sup>68</sup>:

[I]f the jury on the evidence concluded that the existence of the holocaust was so notorious as to be indisputable by reasonable men and women, that would be a circumstance, but only a circumstance, from which the jury might infer that the appellant knew that the pamphlet was false, but the jury would not be required to draw that inference. However, if the trial judge had taken judicial notice of the existence of the Holocaust, he would have been required to so declare to the jury and direct them to find that the Holocaust existed, which would have been gravely prejudicial to the defence in so far as it would influence the drawing of the inference concerning the appellant's knowledge of the falsity of the pamphlet. In our view, the judge exercised his discretion judicially in refusing to take judicial notice of the Holocaust.

In the end, Locke J's refusal to take judicial notice of the Holocaust had nothing to do with sympathy of the weird ideas of the accused. Although the decision might not be indisputable, Locke J's decision was more about legal fairness towards the accused than about truth. And while that might not be the most favourable outcome, it is at least comprehensible.

#### ***F Interim Result***

To no surprise, the courts in the above discussed legal systems arrived at different results to the problem. However, what might be a little bit surprising is the fact that the distinction did not rely as heavily as expected on the distinction between common law and civil law, but rather more on the differences between

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<sup>67</sup> Robert Kahn *Holocaust Denial and the Law* (New York, Palgrave MacMillan, 2004), 38.

<sup>68</sup> *R v Zundel* [1987] 35 DLR (4<sup>th</sup>) 338, 393.

adversarial and inquisitorial system<sup>69</sup>. As a summary it can be said that it depended on three factors whether the judge would be willing to take judicial notice of the Holocaust: Firstly the evidentiary norms, secondly the procedural nature of the case at stake, and finally the political or social pressure. In the American case, the civil nature of the case allowed the judge to take judicial notice, as there were also other issues to be solved. The criminal nature of the case lead the Canadian court to the refusal of taking judicial notice, while the combination of inquisitorial system and politician and social pressure forced German courts to find a way to avoid discussing the Holocaust in court.

Professor Irwin Cotler once commented "that in every case in the United States or elsewhere, which involved suspected Nazi war criminals, there have been findings of fact about the Holocaust"<sup>70</sup>. Therefore he suggested that courts should use these precedents as a starting point to take judicial notice of a Holocaust. In my opinion this is an idea worth thinking about, as it limits one of the biggest dilemmas of battling Holocaust Denial in court: That it might be used as a forum for deniers to spread their hate even further and publicly.

#### **IV THE APPROACH OF THE EUROPEAN UNION**

European Union treaties impose a duty on the European Union to respect and protect the fundamental rights and freedoms of all citizens. This is deemed to be a general principle of law in the European Union<sup>71</sup>. One of these fundamental rights is the freedom of expression, and all citizens of the European Union are to be free from unlawful interference by public authorities of the European Union<sup>72</sup>. Nevertheless, there have been occasions where

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<sup>69</sup> Robert Kahn *Holocaust Denial and the Law* (New York, Palgrave MacMillan, 2004), 44.

<sup>70</sup> Gerald Tishler, Alan Dershowitz, Arthur Berney et al "Debate: Freedom of Speech and Holocaust Denial" (1987) 5 Card L R 559, 563.

<sup>71</sup> Treaty Establishing the European Community, 10 November 1997, 1997 OJ (C 340) 1, 103.

<sup>72</sup> Ibid, art 10.

regulations banning expression have been upheld by European courts<sup>73</sup>. Just recently, the ministers of the Council of the European Union have attempted to strike a reasonable balance the quest to regulate speech while valuing the freedom of expression. This was done through a framework of a regulation that is designed to combat racism by outlawing certain forms of expression<sup>74</sup>.

#### **A The Framework**

Following a series of racist and xenophobic motivated events all over Europe, the Commission of European Communities delivered a proposal to the Council of the European Union in November 2001. As various international agencies were seriously concerned about the origin of the events, the proposal was to create a framework for a regulation criminalizing certain forms of racist and xenophobic speech and to apply this regulation to all European citizens<sup>75</sup>.

The Commission - which is said to be independent, as it is made up a member from each Member State and the members are said to be independent as they are prohibited from "seek[ing] [or] tak[ing] instruction[] from any government or from any other body" in the performance of their duties<sup>76</sup> - studied and analyzed reports dealing with effects of racism and xenophobia<sup>77</sup>. Not only did they find that in virtually every member state of the European Union ethnic and racial minorities were subject to violent and hate related crime and discrimination<sup>78</sup>, but that also only few of the assaults were actually reported to authorities because the victims feared retaliation and were generally

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<sup>73</sup> See *Handyside v. United Kingdom* (1976) 1 ECHR 737, 754

<sup>74</sup> Council Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, art. 1, 26 February 2008

<sup>75</sup> Commission Proposal for a Council Framework Decision on Combating Racism and Xenophobia, at 2, COM (2001) 664 final (28 November 2001).

<sup>76</sup> Treaty Establishing the European Community, 10 November 1997, 1997 OJ (C 340) 1,103, art 213.

<sup>77</sup> Commission Proposal for a Council Framework Decision on Combating Racism and Xenophobia, at 2, COM (2001) 664 final (28 November 2001), at 2.

<sup>78</sup> *Ibid.*, at 3.



dissatisfied with the way authorities handled them<sup>79</sup>. As the Commission's main function is – alongside the guarding of treaties and execution of policy – the proposal of new legislature, the Commission addressed those problems by proposing a legislative framework which aimed to reduce racist and xenophobic feelings in Europe and particularly the number of assaults resulting from those feelings<sup>80</sup>. Since the Commission found that racism and xenophobia were (and are) severe violations of the fundamental principles of liberty, democracy and respect for human rights<sup>81</sup>, they suggested the criminal prosecution of aforementioned speeches by all member states<sup>82</sup>.

However, it took almost six years until the ministers of the Council of the European Union were able to reach a consent on the framework decision<sup>83</sup>. As it stands now, all intentional expression used to incite violence or hatred for racist or xenophobic purposes will be criminalized under the wording of the framework<sup>84</sup>. Additionally, the framework provides for the criminalisation of<sup>85</sup>

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.

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<sup>79</sup> Ibid.

<sup>80</sup> Ibid, at 2.

<sup>81</sup> Ibid, at 2.

<sup>82</sup> Ibid, at 6.

<sup>83</sup> Press Release, Council of the European Union, Framework Decision on Racism and Xenophobia (19 April 2007), available at <http://register.consilium.europa.eu/>

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

It is however within the member state's discretion to "choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting"<sup>86</sup>.

For reasons of parliamentary scrutiny, the framework still has to be formally adopted by the Council<sup>87</sup>. There is however a general expectation that remaining reservations will vanish, and that the law will be adopted soon<sup>88</sup>. From that point in time, all member states are required to follow the framework decision and to implement the proposed provisions into national law within two years, thus providing for national law with punishment of imprisonment between one and three years<sup>89</sup>.

It has been stated in the press release that both the Commission and the Council are of the view that neither the fundamental rights of European Union citizens nor the fundamental principles of European Union law, including the right to freedom of expression, have been modified by the framework decision<sup>90</sup>. They opined that racism and xenophobia were "direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law"<sup>91</sup> which were the basics for the foundation of the European Union and which are included in the Maastricht Treaty on European Union of 1992<sup>92</sup>. Both the Commission's proposal as well as the framework decision by the Council reflect the idea, that if racist and xenophobic expression

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<sup>86</sup> Ibid.

<sup>87</sup> John J. Garman "The European Union Combats Racism and Xenophobia by Forbidding Expression: An Analysis of the Framework Decision" (2008) 39 UTOLR 843, 845.

<sup>88</sup> Press Release, Council of the European Union, Framework Decision on Racism and Xenophobia (19 April 2007), available at <http://register.consilium.europa.eu/>

<sup>89</sup> Ibid.

<sup>90</sup> Commission Proposal for a Council Framework Decision on Combating Racism and Xenophobia, at 2, COM (2001) 664 final (28 November 2001), at 2.

<sup>91</sup> Ibid, at 2.

<sup>92</sup> Treaty on European Union, 7 February 1992, 1992 OJ (C 224) 1, [1992] 1 CMLR 719, 31 ILM 247.

would be accepted as protected under free speech doctrines, those very principles of the European Union would be endangered<sup>93</sup>.

However, the framework decision has received notable criticism. It has been commented that it is an attempt to regulate speech which is protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as the European Union Charter<sup>94</sup>. Though all member states had enacted some sort of legislation that condemned hate speech in some way prior to the framework decision, those legislations varied heavily amongst member states. Unsurprisingly, most criticism comes from countries whose legislation would be affected the most<sup>95</sup>.

## ***B Freedom of Expression as a Fundamental Freedom in the European Union***

### *1 European treaties and law*

The European treaties guarantee the fundamental right of freedom of expression<sup>96</sup>. The primary sources for the European Union law are the European Community Treaty<sup>97</sup> and the Maastricht Treaty on European Union<sup>98</sup>. However, those treaties are not the only source of law. As the first European Treaty, the "Treaty of Rome"<sup>99</sup> did not explicitly mention any general legal principles and as it did not refer to fundamental freedoms, the European Court of Justice – as the supreme authority concerning all aspects of community law - was required

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<sup>93</sup> Press Release, Council of the European Union, Framework Decision on Racism and Xenophobia (19 April 2007), available at <http://register.consilium.europa.eu/>

<sup>94</sup> John J. Garman "The European Union Combats Racism and Xenophobia by Forbidding Expression: An Analysis of the Framework Decision" (2008) 39 UTOLR 843, 846.

<sup>95</sup> John J. Garman "The European Union Combats Racism and Xenophobia by Forbidding Expression: An Analysis of the Framework Decision" (2008) 39 UTOLR 843, 846.

<sup>96</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10.

<sup>97</sup> Ilann Margalit Maazel "What Is the European Union" [2002] 16 BYU J Pub L 243.

<sup>98</sup> John J. Garman "The European Union Combats Racism and Xenophobia by Forbidding Expression: An Analysis of the Framework Decision" (2008) 39 UTOLR 843, 847.

<sup>99</sup> Treaty of Rome Establishing the European Economic Community, [1957] 298 U.N.T.S. 11.

to establish law by developing those principles by means of case law and reference to fundamental rights and freedoms<sup>100</sup>. Therefore, the European Court of Justice developed case law to aid in fields where there was a lack of law. This law was described by a former president of the European Court of Justice as “a general criteria which may be transposed from one case to another”<sup>101</sup> and which can be<sup>102</sup>:

[f]ound in a number of general legal principles whose aim and effect are both to guarantee the freedom of action given to the authority and to place such restriction on it as are necessary in order to avoid arbitrariness.

Historically, the European Court of Justice relied mainly on Articles 220, Article 230 (1) and Article 288 (2). While Article 220 states the duty of the European Court of Justice to ensure the observation of the law through interpretation and application of the treaty<sup>103</sup>, Article 230 (1) states that the courts have the right to check acts of the community’s institutions for lacks of competence, procedural requirements or general failures concerning the treaty or any rule of law or other misuse of powers<sup>104</sup>. In addition, Article 288 (2) forces the community to pay compensation for damages which were caused by its institutions in cases where no contractual liability is applicable. This is done by referring to “general principles common to the laws of the Member States”<sup>105</sup>.

However, that changed with the recognition of the requirement to respect fundamental rights – now Article 6 (2) of the Maastricht Treaty of the European Union – pursuant to the European Convention for the Protection of Human Rights and Fundamental Freedoms as a general principle of the law of the

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<sup>100</sup> John J. Garman “The European Union Combats Racism and Xenophobia by Forbidding Expression: An Analysis of the Framework Decision” (2008) 39 UTOLR 843, 847-848.

<sup>101</sup> John Tillotson, Nigel Foster *Text, Cases and Materials on European Union Law* (4ed, Routledge Cavendish, London, 2003) 223.

<sup>102</sup> *Ibid.*

<sup>103</sup> Treaty Establishing the European Community, 10 November 1997, 1997 OJ (C 340) 1, 103, art. 220.

<sup>104</sup> *Ibid.*, art. 230 (1).

<sup>105</sup> *Ibid.*, art. 288 (2).

European Union. The law was amended to recognise that under general understanding the European Union was founded on the principles of democracy, liberty and the respect for fundamental rights and freedoms as well as the rule of law<sup>106</sup>. Therefore, the European Court of Justice now uses three different sources when developing new principles of laws: Firstly the legal system and constitutional history of the member state, secondly the European Convention for the Protection of Human Rights and Fundamental Freedoms and thirdly the European Community Treaty<sup>107</sup>.

The European Convention for the Protection of Human Rights and Fundamental Freedoms lists in Articles 2 to 18 the main rights and freedoms<sup>108</sup> which are common to all members of the European Union and the Council of Europe. Freedom of Expression is ensured in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, stating that<sup>109</sup>:

[E]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

However, under Community law the freedom of expression is not an absolute freedom and is subject to "formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society"<sup>110</sup>. The European Convention for the Protection of Human Rights and Fundamental Freedoms even explicitly lists seven acceptable types of regulation, namely<sup>111</sup>:

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<sup>106</sup> John J. Garman "The European Union Combats Racism and Xenophobia by Forbidding Expression: An Analysis of the Framework Decision" (2008) 39 UTOLR 843, 848.

<sup>107</sup> John Tillotson, Nigel Foster *Text, Cases and Materials on European Union Law* (4ed, Routledge Cavendish, London, 2003) 225.

<sup>108</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 2-18.

<sup>109</sup> *Ibid.*, art. 10.

<sup>110</sup> *Ibid.*, art. 10 (2).

<sup>111</sup> *Ibid.*, art. 10 (2).

- [1] in the interests of national security,
- [2] territorial integrity or public safety,
- [3] for the prevention of disorder or crime,
- [4] for the protection of health or morals,
- [5] for the protection of the reputation or the rights of others,
- [6] for preventing the disclosure of information received in confidence, or
- [7] for maintaining the authority and impartiality of the judiciary.

## 2 *European case law*

This section will try to analyse the case law from European courts concerning the regulation of fundamental freedoms to provide a prediction whether the framework decision will survive legal challenges. Although the European Court of Justice has general authority to hear challenges to Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, most of the cases before that court have been concerning economical issues. Therefore, relevant case law is likely to come from the (European) Court of Human Rights<sup>112</sup>.

As Article 10 apparently does not “[provide] a coherent vision of freedom of expression”<sup>113</sup>, the decisions of the Court of Human Rights on free speech issues have been described – and criticized - as “largely inconsistent”<sup>114</sup>, especially because the court seems to have acted as a strong defender of the right in some cases while refusing to protect the right in other cases<sup>115</sup>. In *Castells v. Spain*<sup>116</sup>, the European Court of Human Rights found that Spain was in violation of Article 10 of the European Convention for the Protection of

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<sup>112</sup> Elizabeth F. Defeis “Human Rights and the European Union: Who Decides? Possible Conflicts between the European Court of Justice and the European Court of Human Rights” [2001] 19 Dick J Int'l L 301, 302-04.

<sup>113</sup> Sionaidh Douglas-Scott “The Hatefulness of Protected Speech: A Comparison of the American and European Approaches” [1999] 7 Wm & Mary Bill Rts J 305, 327.

<sup>114</sup> John J. Garman “The European Union Combats Racism and Xenophobia by Forbidding Expression: An Analysis of the Framework Decision” (2008) 39 UTOLR 843, 850.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Castells v. Spain* 14 EHRR 445.

Human Rights and Fundamental Freedoms when it prosecuted a parliament member for insulting the government. The court held that<sup>117</sup>

freedom of expression is as a general rule held to be essential in a democratic society.... [I]t is especially so for an elected representative whose very role is to act as a spokesman for the opinions and concerns of his constituents.

Using a community morality approach, the court provided less protection of freedom of expression interests in *Otto Preminger Institute v. Austria*<sup>118</sup> where the court permitted the banning of a film under an Austrian law because it offended Catholics. Still, the decisions of the court are described as “consistent in its application of a hard and steadfast rule when deciding challenges based on the protection of Article 10”<sup>119</sup>.

As the right to freely express your opinions “carries with it duties and responsibilities” and is therefore limited “to such formalities, conditions and restrictions as are prescribed by law and are necessary in a democratic society”<sup>120</sup>; this is the argument around which the Court of Human Rights circles to determine whether restrictions on freedom of speech are legal<sup>121</sup>.

The European Court of Human Rights applies a test which is split in two parts when deciding whether a regulation or a national court’s decision infringes with the right of free speech. Doing so, the court tries to examine whether the limitation is necessary to defend “a normally functioning society”<sup>122</sup>. As Article 18 of the European Convention for the Protection of Human Rights

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<sup>117</sup> Ibid.

<sup>118</sup> *Otto Preminger Institute v. Austria* [1994] ECHR 26.

<sup>119</sup> John J. Garman “The European Union Combats Racism and Xenophobia by Forbidding Expression: An Analysis of the Framework Decision” (2008) 39 UTOLR 843, 850

<sup>120</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10 (2).

<sup>121</sup> Susannah Vance “The Permissibility of Incitement to Religious Hatred Offenses under European Convention Principles” [2004] 14 Transnat’l & Contemp Probs 201, 206-09

<sup>122</sup> Ibid, 209.

and Fundamental Freedoms states that “the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been described”<sup>123</sup>, only the justifications listed in Article 10 (2) and described above<sup>124</sup> can be applied by the court<sup>125</sup>.

Therefore, the first step for a court would be to determine whether the limitation meets “the minimal standards of the rule of law” or is “prescribed by law”<sup>126</sup>. This means that the purpose of the limitation has to be legitimate under Article 10 (2) and would furthermore be void if it was too vague<sup>127</sup>. Additionally, a limitation or decision of a national court will be struck down if it appears to be arbitrary or “a bad faith abuse of power”<sup>128</sup>.

Best described as a test of proportionality, the court will then take a close look whether the limitation is “necessary” to protect a democratic society<sup>129</sup>. The consistent interpretation by the European Court of Human Rights on the definition of necessary is to determine whether there is a “pressing social need” as opposed to being simply useful or desirable<sup>130</sup>. This derives from a case<sup>131</sup> where the conviction of an English publisher who planned to sell obscene books in his possession was upheld by the court. When applying this test, the court tests whether the limitation is serving a “pressing social need” and is furthermore “rationally connected to the objective of the limitation, impairs the right as little as possible”, while being generally proportional to the purpose of

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<sup>123</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, art 18.

<sup>124</sup> See above, at IV B 1.

<sup>125</sup> John J. Garman “The European Union Combats Racism and Xenophobia by Forbidding Expression: An Analysis of the Framework Decision” (2008) 39 UTOLR 843, 851.

<sup>126</sup> Susannah Vance “The Permissibility of Incitement to Religious Hatred Offenses under European Convention Principles” [2004] 14 Transnat'l & Contemp Probs 201, 208.

<sup>127</sup> *Ibid*, 208.

<sup>128</sup> *Ibid*.

<sup>129</sup> *Ibid*.

<sup>130</sup> *Handyside v. United Kingdom* [1976]1 ECHR 737, 754.

<sup>131</sup> *Handyside v. United Kingdom* [1976]1 ECHR 737.



the objective of the limitation<sup>132</sup>. Generally spoken, a limitation will be struck down when the harm caused by the restriction is more severe than the harm caused by the speech, thus if one of them being gravely discriminatory in its effect on an identifiable group<sup>133</sup>.

As described above<sup>134</sup>, there has been a rise in the number of racial and xenophobic motivated incidents in Europe in the last couple of years. Still, the European Court of Human Rights seldom had to deal with hate speech. The main reason is that under Article 35 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, plaintiffs are required to exploit national courts before they can apply to the European Court of Human Rights<sup>135</sup>. This obviously consumes a lot of time, while the court has additionally been reluctant to defend free speech in cases concerning racial and xenophobic speech, thus demonstrating the importance of other values at stake<sup>136</sup>. In cases concerning hate speech aimed at Jews, Nazi or Skinhead propaganda, the court has consequently decided in favour of the limitation while balancing free speech<sup>137</sup>.

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<sup>132</sup> Susannah Vance "The Permissibility of Incitement to Religious Hatred Offenses under European Convention Principles" [2004] 14 *Transnat'l & Contemp Probs* 201, 209.

<sup>133</sup> John J. Garman "The European Union Combats Racism and Xenophobia by Forbidding Expression: An Analysis of the Framework Decision" (2008) 39 *UTOLR* 843, 852.

<sup>134</sup> See above, at IV A.

<sup>135</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 35.

<sup>136</sup> Susannah Vance "The Permissibility of Incitement to Religious Hatred Offenses under European Convention Principles" [2004] 14 *Transnat'l & Contemp Probs* 201, 229.

<sup>137</sup> See discussion in Sionaidh Douglas-Scott "The Hatefulness of Protected Speech: A Comparison of the American and European Approaches" [1999] 7 *Wm & Mary Bill Rts J* 305, 329-330, 346 (four decisions by the European Court of Human Rights concerning hate speech).

### 3 *Interim result*

Admittedly, there has been some criticism of the framework decision which should not be neglected<sup>138</sup>. Additionally, the decision has yet to be formally adopted, a move that is expected in the near future. However, given the aforementioned decisions by the European Court of Human Rights, even when there was no broad consent by Member States on the issue of hate speech, the apparent and most probable conclusion is that the court is very likely to uphold the then implemented law. This especially when looking at the European history with two big wars, one of them most prominently circling on racial issues. Most significantly, the European Court of Human Rights has held in an appeal by the French denier Roger Garaudy that<sup>139</sup>:

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

## V *GERMANY*

Undoubtedly, Germany's Holocaust Denial laws are among the strictest laws in the world. This section of the paper strives to examine the legislative

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<sup>138</sup> For an overview, see John J. Garman "The European Union Combats Racism and Xenophobia by Forbidding Expression: An Analysis of the Framework Decision" (2008) 39 UTOLR 843.

<sup>139</sup> Information Note No. 54 on the case-law of the Court, European Court of Human Rights, Strasbourg, June 2003.

background and how courts have dealt with the right to freedom of expression in cases concerning Holocaust Denial in the past.

### *A Legislative Background*

The Basic Law of the Federal Republic of Germany grants in Article 5 the freedom of expression. It states<sup>140</sup>:

(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.

Even taking only a very brief look at these two sections it becomes obvious that the German Basic Law does not grant an unlimited right to freely express one's opinion. There is ongoing discussion about the provision of "general laws", as this is a very broad term that needs constant interpretation as to when a law is "general".

There are three dimensions to the rights granted by Art. 5 of the Basic Law: an internal dimension (the development of opinion and artistic or scholarly ideas), a communicative aspect (the expression of opinion and creation of works of art or science), and an external dimension (the effect of opinions, art, or science on the addressee or the audience)<sup>141</sup>.

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<sup>140</sup> Basic Law of the Federal Republic of Germany, text Edition – status: December 2000 (official translation).

<sup>141</sup> See BVerfGE 30, 173, 189, Decision of 24 February 1971, (Mephisto).

Additionally to that, the German Criminal Code<sup>142</sup> provides a provision making it a criminal offence to publicly deny, approve or render harmless any of the crimes committed under the national socialistic regime. According to these provisions in the Criminal Code, not only Holocaust Denial but also other hate-related speeches are criminalised<sup>143</sup>. It is very noteworthy that under the German Criminal Code the pure Denial of the Holocaust is criminalized without the requirement of an intention to harm others<sup>144</sup>.

## *B German Courts*

German courts have in the past left little doubt that the denial of the Holocaust falls under section 130 of the German Criminal Code and that this section furthermore is consistent with the German Constitution. As there are numerous criminal cases, this section will be limited to the most significant and most controversial discussed cases.

### *I Criminal courts*

#### (a) Federal Republic of Germany v Deckert<sup>145</sup> I and II

Mr Deckert was convicted under section 130 of the Criminal Code for his denial of the Holocaust. The Supreme Court stated that the Holocaust was such an historic incontrovertible fact that there was no need of a hearing of facts on this matter. Furthermore it stated that the denial was an obvious attack on human dignity and that there was no reason to mitigate his sentence – as the

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<sup>142</sup> Criminal Code of the Federal Republic of Germany, s 130 (see Appendix).

<sup>143</sup> Winfried Brugger “The Treatment of Hate Speech in German Constitutional Law (Part I)” (2002) 3 GLJ 01, 17.

<sup>144</sup> Criminal Code of the Federal Republic of Germany, s 130 (3). This point will be discussed at a later stage of that paper, as it is a significant distinction from the suggestion by the European Union as well as the Canadian and New Zealand approach towards hate speech.

<sup>145</sup> *Germany v Deckert I* (15 March 1994) BGH (Federal Supreme Court) 1 StR 179/93 and *Germany v Deckert II* (15 December 1994) BGH 1 StR 656/94.

High Court previously had considered<sup>146</sup> - because of the defendant's firm belief in the correctness of his allegation. The reasoning of the High Court had led to a storm of protest in Germany's legal landscape<sup>147</sup> and consequently to the overruling of the judgment. It was stated that "one does not deserve mitigation who willingly defies the historical fact of the Holocaust"<sup>148</sup>.

(b) Federal Republic of Germany v Toebe<sup>149</sup>

Mr Toebe was a German-born Australian citizen who is the director of the "Adelaide Institute". From 1992 on he dealt with the Holocaust and submitted - from Australia - articles on the Internet in which he argued revisionist theses and denied the Holocaust. He argued the Holocaust to be a fiction of Jews to defame Germans politically and to enforce financial claims. It is noteworthy that Toebe's articles were written in German, this clearly aimed at a German audience. The Federal Supreme Court did not see a need to substantially deal with the question whether the publications of the defendant were criminal offences under section 130 of the Criminal Code. In the view of the Supreme Court this was a given. However the Court had to deal with the question whether Toebe could be convicted under German law, as he was neither a German citizen nor did he upload his publications in German territory. The court came to the conclusion that German law was applicable as the defendant wanted his publications to be read in Germany and therefore the place of success for his actions was Germany. This judgement evoked criticism especially because Holocaust Denial was not a criminal offence under Australian law. The main criticism was that this judgment created the

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<sup>146</sup> *Germany v Deckert*, High Court of Mannheim, (22 June 1994) (6) 5 KLS 2/92.

<sup>147</sup> Bertram "Annotation to the 'Deckert-case'" (1994) NJW 2494.

<sup>148</sup> *Germany v Deckert II* (15 December 1994) BGH 1 StR 656/94.

<sup>149</sup> *Germany v Toebe* (12 December 2000) BGH 1 StR 184/00, see also "Federal Court of Justice (BGH) Convicts Foreigner for Internet Posted Incitement to Racial Hatred" (2001) 2 GLJ no 8.

impression that the Supreme Court aimed at making Germany's moral measures applicable worldwide.

2 NPD (National Democratic Party of Germany) v Federal Republic of Germany<sup>150</sup> (*Constitutional Court of Germany*)

In this case the German Constitutional Court had to decide on a complaint by the NPD. The party had invited "historian" David Irving, a well-known and previously convicted revisionist to a public lecture. The competent authority imposed a condition on the party to ensure that no revisionist theses would be publicly proclaimed at this lecture. The party appealed against this order stating that it would violate the right of freedom of expression. The Court observed that<sup>151</sup>:

[opinions] are marked by the individual's subjective relationship to his statement's content. Opinions are characterized by an element of taking a position and of appraising. To this extent, demonstration of their truth or untruth is impossible. They enjoy the basic right's protection regardless of whether their expression is judged to be well-founded or unfounded, emotional or rational, valuable or worthless, dangerous or harmless. The basic right's protection also extends to the statement's form. An expression of opinion does not lose this protection by being sharply or hurtfully worded.

However the court upheld the order, stating that:

The object of the basic right protection of Art 5 (1) sentence 1 Basic Law is opinions. It is to them that the freedom to make statements and disseminate them refers. Opinions are characterized by the subjective relationship of the individual to the content of his statement. [...]

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<sup>150</sup> *NPD v Germany (Auschwitz lie)* (13 April 1994) BVerfGE 90, 241 (translation at <http://www.utexas.edu/law/academics/centers/transnational>).

<sup>151</sup> *Ibid*, 241, 247.

From this point of view, incorrect information is not an interest worthy of protection. The Federal Constitutional Court has thus consistently held that an assertion of fact known or proved to be untrue is not covered by the protection of freedom of opinion. [...]

The prohibited statement that there was no persecution of Jews in the Third Reich is an assertion of fact which is proved to be untrue according to innumerable eye witness reports and documents, the verdicts of courts in numerous criminal proceedings, and the findings of history. Taken by itself, an assertion of this content does not, therefore, enjoy the protection of freedom of opinion.

Not surprisingly this assumption was criticised heavily by numerous German scholars<sup>152</sup>. However even those academics come to the conclusion – but for a different reason – that the denial of the Holocaust should not be protected by the freedom of expression. In their view the freedom of expression is always competing with other fundamental rights such as human dignity - in this case the dignity of the victims of the Holocaust. Therefore the limitation of the freedom of expression is seen to be consistent with the German Constitution<sup>153</sup>.

## ***VI CANADA AS THE WORLD'S CENTRE OF HOLOCAUST LITIGATION***

Unlike numerous European countries and Israel, no common law countries have explicit Holocaust Denial laws so far. Nevertheless, despite lacking explicit Holocaust Denial legislation, common law jurisprudence had to deal with Holocaust Denial and especially Canada has emerged as the common law's centre of holocaust litigation<sup>154</sup>

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<sup>152</sup> Winfried Brugger "The Treatment of Hate Speech in German Constitutional Law (Part II)" (2003) 4 GLJ 1, 33.

<sup>153</sup> Ingo von Muench / Philip Kunig (ed) *Commentary to the German Basic Law* (5 ed, Beck, Munich, 2000) 388.

<sup>154</sup> Gerald Tishler, Alan Dershowitz, Arthur Berney et al "Debate: Freedom of Speech and Holocaust Denial" (1987) 5 Card L R 559, 560.

#### A R v. Zundel

For some time, Ernst Zundel, a German-born commercial publisher in Toronto, had not only been the chief disseminator of Holocaust Denial and hate propaganda in Canada, but also had been the chief exporter internationally of this material to centres in Europe and elsewhere. After she had suffered from a continuous stream of this material, one Holocaust survivor, Sabina Citron, wanted to place a sanction or complaint under the criminal code. At that time, Canada had a criminal provision which rendered illegal the dissemination of hate propaganda or that kind of communication other than private conversation which promotes hatred or contempt of an identifiable group<sup>155</sup>. She attempted to have Mr Zundel prosecuted under the hate propaganda provisions of the criminal code. However, under the section, the consent of the attorney general was required for purposes of prosecution<sup>156</sup>. Although the Attorney General was sympathetic with the concerns and the anguish of Holocaust survivors, he was nevertheless not willing to give his approval because he feared that the section of the criminal code was unenforceable and that a prosecution would fail. Unimpressed, Citron found another section of the Canadian criminal code, which was only invoked once before in the history of Canada. That provision made it an offence for someone to wilfully spread false news causing or likely to cause racial or religious intolerance<sup>157</sup>. Therefore, Zundel was prosecuted under that provision<sup>158</sup>. However, his appeal to the Canadian Supreme Court on

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<sup>155</sup> Canada's Hate Propaganda Act, R.C.S. ch. C-34, § 281.1-3 (1st Supp. 1970) provided in relevant part:

(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, is guilty of  
(a) an indictable offence and is liable to imprisonment for two years ....

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of  
(a) an indictable offence and is liable to imprisonment for two years ....

<sup>156</sup> *Id.* § 281.1(3).

<sup>157</sup> *Id.* § 177 (1970). This statute provided: "Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and is liable to imprisonment for two years"

<sup>158</sup> *R v Zundel* [1992] 2 SCR 731.



free speech grounds was successful<sup>159</sup>. The Court distinguished from *Keegstra*<sup>160</sup> reasoning that the "false news" offence was much wider<sup>161</sup>:

I do not assert that Parliament cannot criminalize the dissemination of racial slurs and hate propaganda. I do assert, however, that such provisions must be drafted with sufficient particularity to offer assurance that they cannot be abused so as to stifle a broad range of legitimate and valuable speech

The decision by the Supreme Court was however harshly criticised. An argument was made that the decision was not only 'the most shameful decision under the charter', but that the reasoning by the majority – which was delivered by McLachlin J – deserved "the Kafka prize for legal reasoning". Additionally, the decision would "read like, and form part of, Holocaust Denial literature itself"<sup>162</sup>. This is however not the strongest language in which the decision has been described. Especially the suggestion by McLachlin J that the denial of the Holocaust might be capable of serving the public has been described as "disgusting"<sup>163</sup>.

## **B R v Keegstra**

The leading common law case about hate speech and Holocaust Denial is the (Canadian) Supreme Court decision in *R v Keegstra*<sup>164</sup>. James Keegstra was a high school social studies teacher as well as the mayor of Eckville Alberta. Keegstra taught his students for years that Jews were "child killers" out to destroy Christianity and that Jews created the myth of Holocaust to gain

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<sup>159</sup> Ibid.

<sup>160</sup> *R v Keegstra* [1990] 3 SCR 697.

<sup>161</sup> *R v Zundel* [1992] 2 SCR 731, 743.

<sup>162</sup> Michael Mandel *The Charter of Rights and the Legalization of Politics in Canada* (Thompson Educational Publishing, Toronto, 1994) 369.

<sup>163</sup> Joel Bakan *Just Words: Constitutional Rights and Social Wrongs* (University of Toronto Press, Toronto, 1997), 96.

<sup>164</sup> *R v Keegstra* [1990] 3 SCR 697.

sympathy. He further taught them that the Holocaust never had happened. For these reasons he was prosecuted with wilfully promoting hatred under then Section 281(2) [which is now Section 319(2) of Canada's Criminal Code] which criminalizes the wilful public communication of extreme hatred against an identifiable group<sup>165</sup>. Decisively, the communication is deemed "wilful," therefore according a high standard of intention in terms of a criminal *mens rea* where an accused subjectively wants the promotion of hatred or foresees such a consequence as certain or considerably certain to result from their act<sup>166</sup>. Keegstra was convicted on the basis of his anti-Semitic and denial teachings, among them the claim that the Holocaust "was manufactured by the Jews to gain sympathy"<sup>167</sup>. Unsurprisingly, Keegstra appealed his conviction, claiming that the crucial provisions of the Canadian Criminal Code violated his rights under the Canadian Charter of Rights and Freedoms; especially, but not exclusively, his right to free speech<sup>168</sup>. Although the Supreme Court

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<sup>165</sup> Section 319 of the Canadian Criminal Code states:

- (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
    - (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
    - (b) an offence punishable on summary conviction.
  - (3) No person shall be convicted of an offence under subsection (2)
    - (a) if he establishes that the statements communicated were true;
    - (b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject;
    - (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
    - (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.
  - (6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.
  - (7) In this section, 'communicating' includes communicating by telephone, broadcasting or other audible or visible means;
- "identifiable group" has the same meaning as in section 318;
- 'public place' includes any place to which the public have access as of right or by invitation, express or implied;
- "statements" includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations.

<sup>166</sup> Karen Eltis "A Constitutional 'Right' to Deny and Promote Genocide? Preempting the Usurpation of Human Rights Discourse towards Incitement from a Canadian Perspective" (2008) 9 CDZJCR 463, 473.

<sup>167</sup> *R v Keegstra* [1990] 3 SCR 697, 714.

<sup>168</sup> The Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, enacted as Schedule B to the Canada Act 1982, ch. 11 (U.K.) states:

acknowledged that the Charter was in fact infringed, because even hate speech was a protected form of expression, they still upheld the conviction. The Supreme Court found that the limitation on the free speech right was justified in terms of Section 1 of the Charter because of minority rights to protection against group-vilifying speech<sup>169</sup>. The justices held that<sup>170</sup>:

Where [the Charter's balancing test] operates to accentuate a uniquely Canadian view of a free and democratic society [...] we must not hesitate to depart from the path taken in the United States [...] the special role to be given equality and multiculturalism in the Canadian Constitution necessitates a departure from the view, reasonably prevalent in America at the present, that the suppression of hate propaganda is incompatible with the guarantee of free expression

It is however noteworthy that the Supreme Court was not unanimous on this decision, and that the conviction was only upheld by a single vote.

Only four years later, Keegstra was convicted again<sup>171</sup> for the incitement of hatred. The appeal to the Supreme Court was solely based on the issue whether Section 319 (3) (a)<sup>172</sup> places a reverse onus on the accused and would therefore violate Section 11 (d) of the Canadian Charter, which contains the right to a fair trial<sup>173</sup>. As that was also an issue in the first decision against

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1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

<sup>169</sup> *R v Keegstra* [1990] 3 SCR 697, 743.

<sup>170</sup> *Ibid.*

<sup>171</sup> *R v Keegstra* [1996] 1 SCR 458

<sup>172</sup> Section 319 (3) (a) reads;

(3) No person shall be convicted of an offence under subsection (2)

(a) if he establishes that the statements communicated were true;

<sup>173</sup> The Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, enacted as Schedule B to the Canada Act 1982, ch. 11 (U.K.) states:

11. Any person charged with an offence has the right

d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal

Keegstra, the Supreme Court upheld the conviction in a very brief judgement, stating that “the decision of this court in *R v Keegstra* is a complete answer”<sup>174</sup>.

## VII HATE SPEECH AND FREEDOM OF EXPRESSION – A GENERAL OVERVIEW

The question whether hate speech should be regulated is one controversially discussed among legal researcher in nearly all jurisdictions. This section therefore aims to discuss the various reasons for and against regulating hate speech in general<sup>175</sup>.

### A The Harm Rationale

The potential harm caused by hate speech can generally be categorized into two groups: First, the harm that may be caused to the individual target, or the targeted group. Secondly, the harm that society as a whole may suffer from the hateful messages.

Hate speech is often described as undermining fundamental democratic values and creating an atmosphere of discrimination and potential violence<sup>176</sup>. For those reasons alone society would suffer. However, society also suffers because of the danger that the promotion of hate speech can lead to a lessened perception of the targets, thus their involvement in society being held in low esteem and therefore resulting in discrimination as well as unequal chances<sup>177</sup>. Furthermore, hate speech is regarded as an increase in the risk of hate crimes,

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<sup>174</sup> *R v Keegstra* [1996] 1 SCR 458, 459.

<sup>175</sup> As outlined above, II, the author is of the opinion that the denial of the holocaust is regularly connected with hate, and can therefore be considered to be hate speech.

<sup>176</sup> Juliet Moses “Hate Speech: Competing Rights to Freedom of Expression” (1996) 8 Auckland ULR 185, 195.

<sup>177</sup> A Regel “Hate Propaganda: A Reason to Limit Freedom of Expression” (1984) 49 Sask Law Rev 303, 308.

xenophobia and genocide<sup>178</sup>. This perception is recently supported by the Framework decision of the European Union<sup>179</sup>. Additionally, hate speech raises the risk of tensions not only between speakers and targets, but also between the speakers and those who disagree and between targets and non-targets<sup>180</sup>. It has even been argued that hate speech may cause the targets to react with violence towards the speakers or towards society which allows for the hate speech<sup>181</sup>. This perception might appear to be a little bit of a stretch at first, but isn't completely unrealistic given the recent world-wide experiences with the "Mohammed-cartoons" and the subsequent riots<sup>182</sup>.

The harm hate speech causes on the individual or the target group is owed to the fact that the speech is meant to degrade or denigrate them. It also advances the idea that the targets are inferior<sup>183</sup>. One commentator has argued that this generates an atmosphere where further hate or even violence towards the targets might appear acceptable<sup>184</sup>. It has been noted by other commentators that demeaning consequences of hate speech are capable of leading to lesser possibilities of the targets in work, school or other public areas<sup>185</sup> and that it has caused underachievement by targets in academic circumstances<sup>186</sup>. These are however indirect causes of the hate speech.

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<sup>178</sup> Jean Francois and Gaudreault DesBiens "From Sisyphus's Dilemma to Sisyphus's Duty? A Mediation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide" 46 McGill LJ 1117, 1119.

<sup>179</sup> See above, IV

<sup>180</sup> Richard Delgado "Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling" (1982) 17 Harv CR-CLL R 133, 134.

<sup>181</sup> Wojciech Sadurski *Freedom of Speech and its Limits* (Kluwer Academic Publishers, The Netherlands, 1999), 195.

<sup>182</sup> I am not suggesting that these cartoons contained hate speech; nevertheless the point made remains the same.

<sup>183</sup> Kent Greenawalt *Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton University Press, New Jersey, 1995), 59.

<sup>184</sup> Kathleen Mahoney "Hate Speech: Affirmation or Contradiction of Freedom of Expression" (1996) U ILL L R 789, 792.

<sup>185</sup> Catherine Lane West-Newman "Reading Hate Speech from the Bottom in Aotearoa: Subjectivity, Empathy and Cultural Difference" 9 Waikato LR 231, 232.

<sup>186</sup> J Aronsen, DM Quinn and S J Spencer "Stereotype Threat and the Academic Underperformance of Minorities and Women" in J K Swim and C Stangor (eds) *Prejudice: The Target's Perspective* (Academic Press, San Diego, 1998).

Among the more direct results of hate speech on the targets that have been reported is the reflection of targets on their social status, their immediate fear for safety and also – as remarked above – their potential engagement in violent riots<sup>187</sup>. In terms of Holocaust Denial, victims could fear that history might get forgotten and therefore fear an increased risk of repetition. Others have argued that hate speech may cause an immediate reaction of psychological and physical harm – like high blood pressure, insomnia or hypertension - on the targets<sup>188</sup>, as the speech is regularly insulting and therefore results in emotional suffering<sup>189</sup>. In the words of the Canadian Supreme Court<sup>190</sup>:

It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence. In the context of sexual harassment, for example, this Court has found that words can in themselves constitute harassment (*Janzen v. Platy Enterprises Ltd.* [1989] 1 S.C.R. 1252). In a similar manner, words and writings that wilfully promote hatred can constitute a serious attack on persons belonging to a racial or religious group, and in this regard the Cohen Committee noted that these persons are humiliated and degraded.

In *Living Word Distributors v Human Rights Action Group*<sup>191</sup> it was held by Thomas J that videos degrading homosexuals were capable of “psychologically scaring” and to “victimise and alienate a sizeable proportion of the population”<sup>192</sup>.

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<sup>187</sup> Laura Beth Nielsen “Subtle, Pervasive, Harmful: Racist and sexist Remarks in Public as Hate Speech” (2002) 58 *Journal of Social Issues* 265, 278.

<sup>188</sup> Gregory Herek “Victim Experiences In Hate Crimes Based on Sexual Orientation” (2002) 58 *Journal of Social Issues* 319.

<sup>189</sup> Larry Alexander “Banning Hate Speech and the Stick and Stone Defense” (1996) 13 *Const Comm* 71, 73.

<sup>190</sup> *R v Keegstra* [1990] 3 SCR 697, 746 (Dickson C.J).

<sup>191</sup> *Living Word Distributors v Human Rights Action Group* [2000] 3 NZLR 570.

<sup>192</sup> *Ibid*, 588.

## **B The Importance of Freedom of Expression**

The value of freedom of expression has been stated in courts numerous times. In the Ontario Court of Appeal it was stated by Cory J that “a democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions”<sup>193</sup>. It is said to be the most important democratic right, and that all other rights directly depend on the freedom of expression<sup>194</sup>. However, this is only part of the truth. First of all, equality is a right that is by many considered to be of the same value to democracy, and that hate speech is “inherently limiting of the concept of equality”<sup>195</sup>.

Furthermore, it is widely accepted that rights are not absolute<sup>196</sup>, and it has been stated in numerous cases that “individual freedoms are necessarily limited by membership of society and by the rights of others and the interests of the community”<sup>197</sup>. For example, freedom of expression is widely accepted to be limited by the laws of “defamation, blasphemy, confidentiality, confidential obligations associated with employment, copyright, contempt, incitement, official secrecy, sedition and noise pollution”<sup>198</sup>. One who wants to use his or her freedom of expression is therefore obliged to not infringe with the rights and freedoms of others<sup>199</sup>.

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<sup>193</sup> *R v Kopyto* (1987) 47 DLR (4<sup>th</sup>) 213, 226.

<sup>194</sup> Juliet Moses “Hate Speech: Competing Rights to Freedom of Expression” (1996) 8 Auckland ULR 185, 190.

<sup>195</sup> *Ibid.*

<sup>196</sup> Andrew Butler and Petra Butler and Andrew Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005), 119.

<sup>197</sup> *R v B* [1995] 2 NZLR 172, 182.

<sup>198</sup> Mandy Tibbey “Developments in Anti-Vilification Law” (2001) 21 Aust Bar Rev 1, 4,5.

<sup>199</sup> *Proceedings Commissioner v Archer* [1996] 3 NRNZ 123, 129, 130.

## C *Reasons for Protecting Freedom of Expression*

The regulation of hate speech and limitation of freedom of expression is opposed by people who believe that the possible harm caused by that speech is outweighed by the importance of freedom of expression<sup>200</sup>. The various approaches and reasoning for their views are discussed below.

### 1 *Marketplace of ideas*

Maybe the most famous modern theory addressing the importance of freedom of expression is the “marketplace of ideas” deriving from the writings of John Stuart Mill<sup>201</sup> and advocated by Holmes J in his famous and often-cited dissenting opinion in *Abrams v United States*<sup>202</sup>. Holmes argued that all truth or knowledge is derived from a free trade of ideas and that the legitimacy of these ideas is to be determined through competition. Furthermore, even false or harmful views are to be available to the public for evaluation to strengthen this system of trade and the system can not function in an effective way if some ideas are removed. Under that rationale freedom of expression is a necessity for the development of truth<sup>203</sup>. In his own words<sup>204</sup>:

But when men have realised that that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by a free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the

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<sup>200</sup> Catherine Lane West-Newman “Reading Hate Speech from the Bottom in Aotearoa: Subjectivity, Empathy and Cultural Difference” 9 Waikato LR 231, 236.

<sup>201</sup> See John Stuart Mill *On Liberty* (Penguin Books, London, 1968).

<sup>202</sup> *Abrams v United States* (1919) 250 US 616.

<sup>203</sup> Grant Huscroft “Defamation, Racial Disharmony and Freedom of Expression” in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995), 193.

<sup>204</sup> *Abrams v United States* (1919) 250 US 616, 630 (Holmes J dissenting) (emphasis added by author).



only ground upon which their wishes safely can be carried out. That at any rate is the theory of our constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, *unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.*

The theory of a marketplace of ideas especially had an enormous influence in the American jurisprudence, as it was also a primary focus in *New York Times v Sullivan*<sup>205</sup> as well as in *Reno v American Civil Liberties Union*<sup>206</sup>.

## 2 *The rationales of tolerance and self fulfilment*

Another idea as to why not limit freedom of expression is the thought that we have to tolerate all opinions, no matter how disgusting and offensive they might be to us, and that this would avert governments and states to control expressions, beliefs and ideas<sup>207</sup>.

Furthermore, a different approach is the justification for freedom of expression as a value of its own<sup>208</sup>. This idea is based on the conception that "the development of human personality and achievement of self-realisation are dependent on opportunities to form and communicate beliefs and thoughts to others"<sup>209</sup>. Accordingly, it was held in the Constitutional Court of South Africa that the intention of the right to free speech was not only the advancement of

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<sup>205</sup> *New York Times v Sullivan* [1964] 376 US 254.

<sup>206</sup> *Reno v American Civil Liberties Union* [1997] 521US 844.

<sup>207</sup> Lee Bollinger *The Tolerant Society* (Oxford University Press, Oxford, 1988).

<sup>208</sup> Ingo von Muench and Paul Kunig (eds) *Grundgesetz Kommentar* (5ed, Beck, Munich, 2000), art 5 para 1.

<sup>209</sup> Juliet Moses "Hate Speech: Competing Rights to Freedom of Expression" (1996) 8 Auckland ULR 185, 191.

truth, but also to permit people to arrive at their fullest potential<sup>210</sup>. Similarly, it was held in the Canadian Supreme Court that one of the underlying principles of free speech was the self fulfilment of the individual, which resulted in the reasoning that “all content regardless of its popularity, aesthetic or moral tastefulness” should be protected<sup>211</sup>.

### 3 *Freedom of expression as the “engine-room of a democratic state”*

The third and probably most political argument for the protection of free speech is the idea that it is an essential requirement to make the democratic process work; and that freedom of speech is therefore inherently linked to democracy<sup>212</sup>. It was therefore held by Rand J that “parliamentary government is ultimately government by the public opinion of an open society” and that this required “the condition of a virtually unobstructed access to and diffusion of ideas”<sup>213</sup>. Comparably, it was held by Brennan J in *New York Times v Sullivan* that<sup>214</sup>:

The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.

The High Court of Australia took a similar approach. They found that although freedom of expression was not explicitly protected by law, the right could nevertheless be derived from Australia’s commitment towards being a democracy<sup>215</sup>.

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<sup>210</sup> *Curtis v Minister of Safety and Security* [1996] 5 BCLR 609 (SACC).

<sup>211</sup> *R v Sharpe* [2001] 194 DLR (4<sup>th</sup>) 1 (SCC), para 141.

<sup>212</sup> *Switzman v Elbing* [1957] SCR 285, 306.

<sup>213</sup> *Switzman v Elbing* [1957] SCR 285, 306 (Rand J).

<sup>214</sup> *New York Times v Sullivan* [1964] 376 US 254, 269 (Brennan J, citing *Stromberg v California* [1931] 283 US 359, 369)

<sup>215</sup> *Nationwide News Pty Ltd v Wills* [1992] 177 CLR 1 (HCA).

It is however noteworthy that Brennan J based his reasoning not solely on the conception of democracy. Rather, he linked it with the theory of the marketplace of ideas<sup>216</sup> and held that<sup>217</sup>:

[A] profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.

#### ***D Criticism of these Approaches Concerning Hate Speech***

No matter how well-reasoned those approaches to freedom of expression are there are not surprisingly other theories that support limitation on this right, especially when it comes to hate speech. It has been stated numerous times that rights are not absolute, that "individual freedoms are necessarily limited by membership of society and by the rights of others and the interests of community"<sup>218</sup>. Nothing less has to be applied to hate speech.

The marketplace of ideas theory claims that free speech furthers society's knowledge and the advancement of truth. However, it fails to recognize that hate speech furthers discrimination, hate and intolerance. It is a tool to spread falsehoods to the gain of the hate-monger and to the harm of the target. Allowing complete freedom of expression mirrors the belief that the public will be able to distinguish between falsehood and truth<sup>219</sup>. Sadly however, while in the long run that belief may be true, history shows that especially in the short

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<sup>216</sup> See above, VII B 2 (a).

<sup>217</sup> *New York Times v Sullivan* [1964] 376 US 254, 270.

<sup>218</sup> *R v B* [1995] 2 NZLR 172, 182. See also Andrew Butler and Petra Butler and Andrew Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005), 119.

<sup>219</sup> Juliet Moses "Hate Speech: Competing Rights to Freedom of Expression" (1996) 8 Auckland ULR 185, 193.

term there is grave danger that falsehood will prevail<sup>220</sup>. As the Cohen Committee found<sup>221</sup>:

We are less confident in the 20th century that the critical faculties of individuals will be brought to bear on the speech and writing which is directed at them. In the 18th and 19th centuries, there was a widespread belief that man was a rational creature, and that if his mind was trained and liberated from superstition by education, he would always distinguish truth from falsehood, good from evil. So Milton, who said "let truth and falsehood grapple: who ever knew truth put to the worse in a free and open encounter". We cannot share this faith today in such a simple form. While holding that over the long run, the human mind is repelled by blatant falsehood and seeks the good, it is too often true, in the short run, that emotion displaces reason and individuals perversely reject the demonstrations of truth put before them and forsake the good they know. The successes of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by hysterical, emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field.

Neither the tolerance theory nor the self-fulfilment theory are plausible. The preaching of tolerance fails to recognize the harm caused in targets of hate speech. It has also been argued that tolerating hate speech would impose a too heavy burden on targets<sup>222</sup>. The "paradox of tolerance" is, as stated by Popper, that it leads to intolerance and that tolerance of hate speech results in even more hate speech and even more harm<sup>223</sup>. The communication of hate speech does not

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<sup>220</sup> L Summer "Should Hate Speech be Free Speech? John Stuart Mill and The Limits of Tolerance" 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), 133.

<sup>221</sup> Cited with approval in *R v Keegstra* [1990] 3 SCR 697, 747.

<sup>222</sup> Juliet Moses "Hate Speech: Competing Rights to Freedom of Expression" (1996) 8 Auckland ULR 185, 193.

<sup>223</sup> Karl Popper *The Open Society and Its Enemies* (Routledge and Kegan, London, 1962), vols 1, 2.

lead to self-fulfilment; it rather leads to a closed mind and prejudice. It is furthermore self-limiting, as the speaker lives in a "world of ignorance" and it refutes the rights of others to flourish<sup>224</sup>.

While freedom of expression may very well be the "engine-room" for democracy, the same cannot be said about hate speech. Instead of furthering and encouraging democracy, hate speech weakens democracy by discouraging others from participation<sup>225</sup>. Furthermore, hate speech leads to the disrespect of the opinions of the targeted, which can subsequently lead to a limitation of their possibility to be represented in the democratic process<sup>226</sup>.

Supporters of the above mentioned theories contend that freedom of expression is such a fundamental right that it should only be limited in cases of immediate danger to society. According to this "public-order test" a direct causation of harm by the speech is required, and the possible harm in the future is no legitimate reason to limit freedom of expression<sup>227</sup>. However, this theory does not acknowledge the psychological harm that can be caused or the harm that can be caused on the relationship between the targets and the general public.

Hate speech legislation is also rejected with the argument that this leads to a "slippery slope" towards censorship. But there is also another "slippery slope to be recognized: one that leads into a marketplace of ideas where bad ideas prosper and good ideas vanish<sup>228</sup>. A good example is the idea that is supported

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<sup>224</sup> Richard Delgado "Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling" (1982) 17 Harv CR-CLL R 133, 176.

<sup>225</sup> Juliet Moses "Hate Speech: Competing Rights to Freedom of Expression" (1996) 8 Auckland ULR 185, 193.

<sup>226</sup> Alan Regel "Hate Propaganda: A Reason to Limit Freedom of Expression" (1984) 49 Sask Law Rev 303, 308.

<sup>227</sup> Wojciech Sadurski *Freedom of Speech and its Limits* (Kluwer Academic Publishers, The Netherlands, 1999) 180.

<sup>228</sup> 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.

by some observers that the best method to combat hate speech would be to use counter speech<sup>229</sup>. However, that can cause other problems. Fighting back can cause even more hate speech and end in an unwanted spiral of hate<sup>230</sup>. And, especially in the case of Holocaust Denial, the argument has been made that countering the allegations could be undesirable for the reason not to give the deniers more attention than they deserve<sup>231</sup>.

Kathleen Mahoney expressed the argument that "hate propaganda is not legitimate speech. It is a form of harassment and discrimination that should be deterred and punished just like any other behaviour that harms people"<sup>232</sup>. I agree with that view, especially as hate speech brings little social value and grave harm. Nevertheless, it is indispensable that the regulation of hate speech must be balanced with the right to freedom of expression.

#### **VIII NEW ZEALAND AND ITS HATE SPEECH PROVISIONS**

New Zealand, like other common law countries, does not have explicit Holocaust Denial legislation. However, the Human Rights Act 1993 contains two provisions prohibiting hate speech<sup>233</sup>. Therefore, the purpose of this chapter will be to examine whether the denial of the Holocaust is capable of falling under the criminal hate speech provision.

Hate speech is commonly defined as a message that intends to denigrate or a degrade a group of people for reasons of their race, ethnic or national origin,

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<sup>229</sup> Ursula Cheer "Submission to the Select Committee Inquiry into the Operation of the Films, Videos and Publications Classification Act 1993 and Related Issues", 8

<sup>230</sup> Richard Delgado "Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling" (1982) 17 Harv CR-CLL R 133, 140.

<sup>231</sup> See above I.

<sup>232</sup> Kathleen Mahoney "Hate Speech: Affirmation or Contradiction of Freedom of Expression" (1996) U ILL L R 789, 792.

<sup>233</sup> Human Rights Act 1993, ss 61, 131.

religious belief, sex or sexual orientation, colour or their disability<sup>234</sup>. However, the criminal provision under the Human Rights Act 1993 is much narrower and more explicit. It reads<sup>235</sup>:

(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 illwill 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 illwill 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.

The origin for this section is Section 25 of the Race Relations Act 1971 (repealed), which was enacted as part of the requirement to comply with New Zealand's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>236</sup>. No prosecution can occur

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<sup>234</sup> Jean Francois and Gaudreault DesBiens "From Sisyphus's Dilemma to Sisyphus's Duty? A Mediation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide" 46 McGill LJ 1117, 1118.

<sup>235</sup> Human Rights Act 1993, s 131.

<sup>236</sup> International Convention on the Elimination of All Forms of Racial Discrimination (4 January 1969) 660 UNTS 195, art 4 (a).

without the consent of the Attorney-General<sup>237</sup>, which makes sense given the Attorney-General's unique role in ensuring that legislation does not infringe fundamental rights<sup>238</sup>.

It is noteworthy that the Section 131 of the Human Rights Act 1993 was never judicially considered, and that its predecessor, Section 25 of the Race Relations Act 1971, was only considered once by the courts<sup>239</sup>. However, the issue in this case was limited to the question whether the phrase "ethnic origin" could apply to Jews.

#### *A Section 131 of the Human Rights Act 1993*

The question remains whether Holocaust Denial is capable of falling under the requirements of New Zealand's hate speech provision.

##### *1 Effect*

I want to start out with what I would call the effect of the speech in question. Section 131 of the Human Rights Act 1993 is only "triggered" if the speech is "threatening, abusive or insulting"<sup>240</sup>. This is obviously a highly subjective element, as the speech could only be one of the above to the targets of the speech. One of the problems of this element is that it might turn out to be difficult to prove and might in some cases be inconsistent. There is at least a possibility that some people might find speech "threatening, abusive or insulting", while others might not be offended by the same speech<sup>241</sup>. It was

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<sup>237</sup> Human Rights Act 1993, s 132.

<sup>238</sup> Bill of Rights Act 1990, s 7.

<sup>239</sup> *King-Ansell v Police*, [1979] 2 NZLR 531.

<sup>240</sup> Human Rights Act 1993, s 131 (1) (a).

<sup>241</sup> Grant Huscroft "Defamation, Racial Disharmony and Freedom of Expression" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995), 204.



therefore commented that "the views of the very sensitive are not the appropriate yardstick by which to measure whether something is insulting"<sup>242</sup>. Therefore, the court (or Tribunal) has to determine the view of an ordinary sensible citizen to solve the issue<sup>243</sup>.

Another prerequisite is that the speech is "likely to excite hostility or illwill against, or bring into contempt or ridicule"<sup>244</sup>. This requirement reflects the real danger of hate speech: That it is capable of influencing the audience and to further its spread<sup>245</sup>. Accordingly, whether speech is likely to fulfil those requirements depends on the likelihood of its audience to be influenced<sup>246</sup>.

## 2 Intention

One significant element - and probably the one which is most difficult to prove - is the prerequisite of "intent to excite hostility or illwill against, or bring into contempt or ridicule any group of persons"<sup>247</sup>. This is undoubtedly a very high threshold of *mens rea*, and as it is a criminal provision, with good reason. However, proving a speaker's true intention will in some cases be difficult, and given the presumption of innocence in some cases maybe even impossible. On the other hand, the argument can be made that this requirement protects speakers who are simply misled by others and reasonably believe in the good nature of their statements and are thus not lead by hate towards the targets.

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<sup>242</sup> *Skelton v Sunday Star Times* [1996] 3 HRNZ 633, 660.

<sup>243</sup> *Proceedings Commissioner v Archer* [1996] 3 NRNZ 123, 128.

<sup>244</sup> Human Rights Act 1993, s 131.

<sup>245</sup> Grant Huscroft "Defamation, Racial Disharmony and Freedom of Expression" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995), 205.

<sup>246</sup> *Ibid.*

<sup>247</sup> Human Rights Act 1993, s 131

### 3 *Defences*

Section 131 of the Human Rights Act 1993 does not contain any defences. It has been commented that this might prove to be problematic, especially since the provision in question is a criminal one<sup>248</sup>:

Criminalization is the most extreme form of legislative response to a perceived problem, and as such demands the most stringent justification where the exercise of fundamental rights is concerned. The need for defences under this section is great.

There is therefore some concern that the provision might be overbroad and have a chilling effect on speech that would otherwise be legitimate<sup>249</sup>.

#### ***B Holocaust Denial under Section 131 of the Human Rights Act 1993***

Given the above stated requirements, it is now necessary to examine whether they would be met by Holocaust Denial.

First of all, I have little doubt that Holocaust Denial would “insult” a reasonable person, and would even be “abusive” in a wider sense. Denying the Holocaust deprives any victim of the Nazi crimes – but not only them; in some sort also those who fought to end those crimes in the Second World War – of a part of their history.

Much harder to grasp is the question whether Holocaust Denial is capable of being “likely to excite hostility or illwill against, or bring into contempt or ridicule any group of persons”. The argument could be made, and definitely has

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<sup>248</sup> Grant Huscroft “Defamation, Racial Disharmony and Freedom of Expression” in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995), 205

<sup>249</sup> Ibid; Juliet Moses “Hate Speech: Competing Rights to Freedom of Expression” (1996) 8 Auckland ULR 185, 201.

some merits – that we expect reasonable persons to know enough about the Holocaust to not be influenced by that sort of speech. However, seldom will those be the target of the speaker. Rather, the experience shows that Holocaust Denial is most often targeted at an audience which at least in parts already has some sort of bias against Jews (or other victims of the Holocaust). Furthermore, the example of Joel Hayward<sup>250</sup> proves that even academics with no anti-Semitic background – in fact, Joel Hayward claims to have Jewish origins – are endangered to be misguided by Holocaust Denial literature.

As stated above, the intention of a speaker will probably turn out to be difficult to prove. However, as discussed at the beginning of this paper<sup>251</sup>, in a lot of cases Holocaust Denial will go hand in hand with explicit hatred against Jews. Therefore, whilst acknowledging that not in every case the intent can be proven, there will remain a significant number of cases where such an intention should be not hard to prove. Concerning the “group of ethnic origin”, the Court of Appeal has left little doubt that the main target of Holocaust Denial, the Jews, are a group of ethnic origin and therefore fall under section 131 of the Human Rights Act 1993<sup>252</sup>.

Additionally, a close look at the precedents from Canada<sup>253</sup> and the similarity of the legislation<sup>254</sup> might help. Therefore, the conclusion that Holocaust Denial is capable of being hate speech at least in some occasions does not seem to be deceptive.

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<sup>250</sup> See above, I A

<sup>251</sup> See above, II

<sup>252</sup> see: *King-Ansell v Police*, [1979] 2 NZLR 531.

<sup>253</sup> *R v Keegstra* [1990] 3 SCR 697; *R v Zundel* [1992] 2 SCR 731; *R v Keegstra* [1996] 1 SCR 458.

<sup>254</sup> Canadian Criminal Code, s 319 (2).

## IX HATE SPEECH AS A JUSTIFIED LIMIT?

There can be no doubt that the regulation of hate speech imposes a limit on free speech. It has therefore to be determined whether such a limitation would be justified in terms of Section 5 of the BORA which provides that<sup>255</sup>:

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.

However, as the BORA is not supreme law, Parliament has the power to enact provisions that (unjustifiable) limit a right, whereas the courts have no power to strike down that legislation<sup>256</sup>.

### A General Observation

To determine whether a limitation on a right is justifiable, the Court of Appeal has set out a test in *Moonen v Film and Literature Board of Review*<sup>257</sup> which was just recently affirmed in *R v Hansen*<sup>258</sup> by the Supreme Court of New Zealand. This test derives from the decision by the Canadian Supreme Court in *R v Oakes*<sup>259</sup> which dealt with the Canadian provision similar to Section 5 BORA which requires limits on rights to be “demonstrably justified in a free and democratic society”<sup>260</sup>. The test reads as follows<sup>261</sup>:

In determining whether an abrogation or limitation of a right or freedom can be justified in terms of s 5, it is desirable first to identify the objective

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<sup>255</sup> Bill of Rights Act 1990, s 5.

<sup>256</sup> *Ibid*, s 4.

<sup>257</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16-17 (Tipping J)

<sup>258</sup> *R v Hansen* [2007] NZSC 7

<sup>259</sup> *R v Oakes* [1986] 1 SCR 103.

<sup>260</sup> The Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, enacted as Schedule B to the Canada Act 1982, ch. 11 (U.K.), s 1.

<sup>261</sup> *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9.

which the legislature was endeavouring to achieve by the provision in question. The importance and significance of that objective must then be assessed. The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective. A sledgehammer should not be used to crack a nut. The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right or freedom affected. Furthermore, the limitation involved must be justifiable in the light of the objective. Of necessity value judgments will be involved. In this case it is the value to society of freedom of expression, against the value society places on protecting children and young persons from exploitation for sexual purposes, and on protecting society generally, or sections of it, from being exposed to the various kinds of conduct referred to in s 3 of the Act. Ultimately, whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.

To put it in a nutshell, a limitation on a right is therefore justified, as Tipping J stated in *R v Hansen*, 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 “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”<sup>262</sup>.

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<sup>262</sup> *R v Hansen* [2007] NZSC 7, at para 104 (Tipping J).

## ***B Application of the Test on Hate Speech***

### *1 Sufficient importance of the limiting measure*

First of all it has to be determined whether the limitation of the right to freedom of expression is sufficiently important to justify the limitation. The objective of hate speech legislation is above all the protection of the society as well as of the target groups from the dissemination of hate speech. It was held by the Canadian Supreme Court that “an objective relates to concerns which are pressing and substantial”<sup>263</sup>. In this paper I have tried to explain some of the dangers imposed by the propagation of hate speech. Among others, hate speech may cause harm to the targets of the hate speech, most notably psychological harm. Targets of hate speech can feel inferior, degraded and denigrated. In the case of Holocaust Denial they might feel insulted because they are deprived of a part of their history. Additionally, hate speech is capable of reducing the relation between target groups and society, and it might harm the society as a whole by sending the message that a part of society is inferior to another part. This also poses the danger of leading to further hostility and discrimination. Hate speech is and should therefore be of great social concern and thus is of sufficient importance.

### *2 Rational connection between limiting measure and its purpose*

As stated above, the purpose of the hate speech provision is to protect the targets as well as society. Legislation should be “carefully designed” and neither arbitrary or unfair<sup>264</sup>. As the provision contains the requirement of “intent”, there is little danger that it might be used to cover situations which are beyond the purpose of the legislation. I am therefore satisfied that the criminal

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<sup>263</sup> *R v Oakes* [1986] 1 SCR 103, 138.

<sup>264</sup> *R v Oakes* [1986] 1 SCR 103, 139.

provision of the Human Rights Act 1993 is in rational connection with its objective; the protection of society and target groups.

### 3 *Reasonable little interference*

The interference with the right or freedom of expression is as little as possible if there was no alternative that was less intrusive but which would have a similar level of effectiveness<sup>265</sup>. Overseas experiences show that hate mongers will stop at nothing to spread their hatred. Through the requirement of intent it is ensured that only ill-willed speakers will be prosecuted; and the requirement of the Attorney-General's consent enhances that precautionous approach. I can see of no measurement which would be capable of having a similar effect on people willing to spread their hate. The interference with freedom of expression is therefore as little as possible.

### 4 *Proportionality*

The probably decisive portion of the test is the decision whether a limitation is reasonably proportional to the importance of the objective<sup>266</sup>. As outlined above, hate speech – and thus under certain circumstances Holocaust Denial – is capable of causing serious harm not only to its targets, but also to society as a whole and the democratic process. Therefore, under my understanding of the right to freedom of expression, the limitation imposed on the right by a reasonable hate speech provision like Section 131 of the Human Rights Act 1993 is significantly outweighed by the possible harm. Through the requirement of intention by the speaker and the requirement of the Attorney-General's consent it is guaranteed that legitimate speech driven by no bad

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<sup>265</sup> *R v Hansen* [2007] NZSC 7, at para 217 (McGrath J).

<sup>266</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16-17 (Tipping J).

intentions as well as speech that might be in the public interest will not be censored.

#### 5 *Interim result*

The limitation on freedom of expression imposed by the hate speech provision of Section 131 Human Rights Act 1993 appears therefore to be justified in light of Section 5 of the Bill of Rights Act 1990. However, even if a court would find an unjustified limitation, Section 4 of the Bill of Rights Act 1990 would still require the court to apply the hate speech provision.

### **X CONCLUSION**

Starting out with the research for this paper, my mind was pretty much set on a result: That Holocaust Denial is so evil and ill-minded that everybody who even dares to question any aspect of the Holocaust must and should be prosecuted, and that New Zealand's law had to be amended. Now, at the end of the research, I am not so sure anymore.

As concluded throughout the paper, prosecution of Holocaust Denial faces multiple problems. The first big one is the one described as the dilemma of proof. If there is no way of taking some sort of judicial notice of the Holocaust, the prosecution will be used by either intelligent deniers, or by their lawyers, who regularly have a history of denial themselves, to put the Holocaust itself on trial every time we go to court. The only possibility I see to avoid that in an adversarial country would be to use the by now numerous precedents. The problem of debating the Holocaust in court and allowing deniers a forum to publicly express their views is one of the reasons why some researches – among



them Deborah Lipstadt<sup>267</sup> or the Institute for Jewish Policy Research<sup>268</sup>, to name just a few – are not in favour of Holocaust Denial prosecution.

The biggest issue at stake is however freedom of expression. We are however not overly worried about outlawing defamation, some sorts of pornography or even hate speech, with the latter one still being the most discussed of those issues. I for my part struggle with seeing the real differences there. Professor Jeremy Waldron stated<sup>269</sup>:

[...] the issue is not just our learning to tolerate thought that we hate [...].

The harm that expressions of racial hatred do is harm in the first instance to the groups who are denounced or bestialized in pamphlets, billboards, talk radio, and blogs. It is not harm — if I can put it bluntly — to the white liberals who find the racist invective distasteful. Maybe we should admire some lawyer who says he hates what the racist says but defends to the death his right to say it, but this sort of intellectual resilience is not what's at issue. The question is about the direct targets of the abuse. Can their lives be led, can their children be brought up, can their hopes be maintained and their worst fears dispelled, in a social environment polluted by these materials? Those are the concerns that need to be answered [...].

In my eyes, prosecution of Holocaust Denial is not so much about truth or the suppression of the search for truth. It is much more about the underlying hate. This said I have to acknowledge that the German Criminal Law as well as the proposed European Law appears at first glance to be too broad, as they punish the pure denial as opposed to the underlying hate. In the end however the distinction is probably just a theoretical one. In Europe, with the memories of the Holocaust and the Nazi Regime still very much alive, it is nearly impossible to think of a denier who does not deny out of hate.

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<sup>267</sup> Robert Kahn *Holocaust Denial and the Law* (Palgrave MacMillan, New York, 2004), 12.

<sup>268</sup> See note 10.

<sup>269</sup> Jeremy Waldron "Free Speech & the Menace of Hysteria" (2008) 55 *The New York Review* 40, 44.

This leads to the way New Zealand ought in my view deal with deniers such as Irving<sup>270</sup> or Zundel. In my eyes - and coming back to the statement at the beginning of this conclusion I am pleasantly surprised by that - New Zealand's law would be fully capable of dealing with deniers. Furthermore, the requirement of "intention" makes it an even better law than Germany's legislation. Under German law, Joel Hayward would most probably have been convicted for the incitement of racial hatred. The German Criminal Code allows no other interpretation. New Zealand's law though would be capable of distinguishing between a young man who is simply misled - and as hard as it is to believe that he was just "wrong"; Joel Hayward deserves the benefit of the doubt - and people who aim at spreading hate. It is however a bit worrying that New Zealand's hate speech provisions have only been invoked once. One might hope that this is because New Zealand has no problems with hate speech, however, the number of 2017 race-based complaints to the Human Rights Commission<sup>271</sup> suggests otherwise.

I have argued in this paper that the prosecution of hate speech, and especially Holocaust Denial, should prevail over the nevertheless important right to freedom of expression. I would therefore wish - albeit the aforementioned risks of prosecution - that the Attorney-General would use his powers to invoke this important piece of legislation. It would be desirable if society - and the Attorney General - could see Holocaust Denial as what it in most instances is: An extremely perfidious form of hate speech.

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<sup>270</sup> Note: David Irving has previously been denied entry to New Zealand; see: Green Party Press Release "Irving decision is a blow for free speech" available at <http://www.scoop.co.nz/> (last accessed 28 September 2008).

<sup>271</sup> Human Rights Commission "Annual Report for the Year 2007" 29.

*Appendix:*

*Section 130 of the German Criminal Code: Incitement of the People*<sup>272</sup>

- I     Whoever, in a manner that is 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 punished with imprisonment from three months to five years.
- II    Whoever:
- 1     with respect to writings (Section 11 subsection (3)), which incite hatred against segments of the population or a national, racial or religious group, or one characterized by its folk 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 them;
    - b     publicly displays, posts, presents, or otherwise makes them accessible;

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<sup>272</sup> Translation by author

c offers, gives or makes 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 numbers a through c or facilitate such use by another; or

2 disseminates a presentation of the content indicated in number 1 by radio,

shall be punished with imprisonment of not more than three years or a fine.

III Whoever publicly or in an assembly approves, denies or renders harmless an act committed under the rule of National Socialism of the type indicated in Section 6 subsection (1) of the International Criminal Code (VStGB), in a manner capable of disturbing the public peace shall be punished with imprisonment for not more than five years or a fine.

IV Whoever publicly or in an assembly approves, renders harmless or justifies the national socialistic tyranny and arbitrariness in a manner capable of disturbing the public peace by harming the dignity of the victims, shall be punished with imprisonment for not more than 3 years or a fine.

V Subsection (II) shall also apply to writings (Section 11 subsection (3)) with content such as is indicated in subsection (III).

VI In cases under subsection (II), also in conjunction with subsection (IV), and in cases of subsection (III), Section 86 subsection (III), shall apply correspondingly.

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