

## WRESTING (RACIAL) EQUALITY FROM TOLERANCE OF HATE SPEECH

*"It has to be the thing you loathe that you tolerate, otherwise  
you don't believe in freedom of speech."*

- Salman Rushdie<sup>1</sup>

### INTRODUCTION

The trinity of freedom of opinion, expression and information<sup>2</sup> constitutes a centre of gravity in international human rights norms.<sup>3</sup> The importance of this polyvalent right to democracy is foundational; empowering; enlightening; facilitative. Its cardinal importance for individual self-fulfilment;<sup>4</sup> advancement of knowledge and attainment of truth in society; participation in democratic politics; promotion of transparency in government and of a fair and open legal system, is uncontested.<sup>5</sup> A constitutive right, it also serves a foundational purpose in the edifice of fundamental freedoms as it is instrumental in securing the realisation of other rights.<sup>6</sup> The arguments in favour of the basic principle that freedom of expression and its concomitant freedoms must be protected are therefore legion and incontrovertible. It is little wonder that the first-ever United Nations General Assembly Resolution referred to the right [to freedom of information] as the "touchstone" of all human rights.<sup>7</sup>

However, unanimity tends to prove elusive whenever efforts are made to trace the conceptual contours of the right to freedom of expression. While the existence of an impregnable inner zone of inoffensive speech is undisputed, disagreement tends to stymie attempts to fix the outer definitional demarcations of the right. Yet, as Ronald Dworkin has observed, "[I]t is the central, defining, premise of freedom of speech that the offensiveness of the ideas, or the challenge they offer to traditional ideas, cannot be a valid reason for censorship; once that premise is abandoned it is difficult to see what free speech means."<sup>8</sup> Thus, this intellectual gauntlet will have to be taken up

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<sup>1</sup> S. Rushdie, 'Secrecy and Censorship', in E. Hazelcorn & P. Smyth (Eds.), *Let in the Light: Censorship, secrecy and democracy* (Ireland, Brandon Book Publishers Ltd., 1993), pp. 26-38, at 36.

<sup>2</sup> In this article, the rights to freedom of opinion, expression and information shall henceforth be referred to collectively as the right to freedom of expression, purely for reasons of convenience. This is not to diminish the specificity of each in any way.

<sup>3</sup> Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights, Article 10 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Article 13 of the American Convention on Human Rights and Article 9 of the African Charter on Human and Peoples' Rights.

<sup>4</sup> This term has also been referred to as "self-realization" (Edwin C. Baker), "self-development" (Eric M. Barendt) and "self-actualization" (Owen M. Fiss).

<sup>5</sup> See generally, the writings of E. Barendt, T. I. Emerson, T. Scanlon, F. Schauer.

<sup>6</sup> For example, the rights to education, health, association, belief, etc.

<sup>7</sup> United Nations General Assembly Resolution 59(1), 14 December 1946.

<sup>8</sup> R. Dworkin, *Freedom's Law* (New York, OUP, 1996), p. 206.

before any attempts are made to accurately delineate the scope of the right to freedom of expression.<sup>9</sup> As another eminent commentator, Lee C. Bollinger, has observed: “[E]xtremist speech is the anvil on which our basic conception of free speech has been hammered out”.<sup>10</sup>

Why should hate speech be tolerated? What factors should determine the level of our tolerance? ‘Is there’, as Ursula Owen asks, “a moment where the *quantitative* consequences of hate speech change *qualitatively* the arguments about how we must deal with it?”<sup>11</sup> How tolerant should society be of extremist speech? In the words of Umberto Eco, ‘to be tolerant, one must set the boundaries of the intolerable’,<sup>12</sup> an apparently intractable challenge.

This article seeks to scrutinise the debate which has grown up around these questions through the thematic lenses of societal tolerance and its objective of eliminating discrimination. A crucial issue in contemporary legal thinking and practice is the coupling of the right to freedom of expression with the promotion of equality and the elimination of discrimination. Due consideration will be given to notions of tolerance; the emergence of an international pro-equality/anti-racist consensus; permissible restrictions on freedom of expression under international human rights law and the effectiveness of so-called ‘hate-speech’ laws in general. Negationism, a unique form of hate speech, shall also be examined. These issues will then be examined in an Irish context. Finally, a few tentative conclusions will be proffered.

#### NOTIONS OF TOLERANCE

Tolerance is a concept of complex, composite coloration: at least seven different shades of tolerance can be identified. These reflect, to a greater or lesser extent, the different intensities of meaning which the term conjures up for different people. Tolerance must begin with awareness; a consciousness of the other (person or opinion); but it must also go further than that. Mere awareness does not imply any degree of engagement with the other; it is still possible to damn him/her with indifference. The next shade of tolerance could therefore be said to be forbearance, which in turn leads on to a form of acceptance in the guise of non-discrimination. From this passivity, a more active form of acceptance – entailing affirmative efforts or measures - can emerge. Its manifestation is as equality. In its turn, equality is a precursor to full respect for the dignity of the other and full respect for the difference of the other.

In any event, all definitions of tolerance would have to comprise the notion of enduring practices or ideas to which one is personally opposed. It is extolled because of the perceived (libertarian) values of self-restraint and of deference to the autonomy

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<sup>9</sup> See T.I. Emerson, *The System of Freedom of Expression* (New York, Random House Publishing Company, 1970), p. 9: ‘In constructing and maintaining a system of freedom of expression the major controversies have arisen not over acceptance of the basic theory, but in attempting to fit its values and functions into a more comprehensive scheme of social goals. These issues have revolved around the question of what limitations, if any, ought to be imposed upon freedom of expression in order to reconcile that interest with other individual and social interests sought by the good society.’

<sup>10</sup> L.C. Bollinger, *The Tolerant Society* (New York, Oxford University Press, 1989), p. 4.

<sup>11</sup> U. Owen, ‘Hate Speech – The Speech That Kills’, *27(1) Index on Censorship* 32 (1998), at 37.

<sup>12</sup> U. Eco, ‘Tolerance and the Intolerable’, *23 (1&2) Index on Censorship* 47 (1995), at 53.

of others. But tolerance has its limits, for everything that is tolerated contributes to the shaping of the society in which we live.<sup>13</sup> Alexander Bickel warns against excessive tolerance because in an environment “[W]here nothing is unspeakable, nothing is undoable.”<sup>14</sup> This is particularly pertinent in the context of hate speech.

‘Hate speech’ is a term which refers to a whole spectrum of negative discourse stretching from hate and incitement to hatred; to abuse, vilification, insults and offensive words and epithets; and arguably also to extreme examples of prejudice and bias.<sup>15</sup> In short, virtually all racist and related declensions of noxious, identity-assailing expression could be brought within the wide embrace of the term. Various rationales exist for legal prohibitions on hate speech. Robert Post has enumerated the main ones: intrinsic harm; harm to identifiable groups; harm to individuals; harm to the market-place of ideas; harm to educational environment.<sup>16</sup> This list is not exhaustive and other authors prefer to focus on the identity-implicating nature of the offence and the ‘psychic harm’<sup>17</sup> caused by hate speech.

Bollinger brings tolerance and hate speech together in his tolerance principle of free speech, the starting-point of which is “an understood commitment to extraordinary self-restraint; coupled [...] with a willingness to be sensitive to context.”<sup>18</sup> He states that the “strong presumption in favor of toleration [...] can be overcome only after it is determined that the society has little or nothing to gain” from exercising tolerance, “and, by comparison, a great deal to lose.”<sup>19</sup> This is an allusion to the theory that hate speech – despite its moral repugnancy – can have some, limited, instrumental value to society.<sup>20</sup> Wojciech Sadurski, for instance, remarks that hate speech can, occasionally, sensitise the public to prevailing currents of racism in society, thus prompting a redoubling of efforts to eradicate it through educational and other initiatives.<sup>21</sup> He also notes that legal tolerance of such speech could allow us to challenge our closest-held convictions. Exposure to extremist view-points, the Mill-inspired argument runs, challenges us and forces us to re-examine our understandings, ideas and values by jolting us out of our unthinking complacency.<sup>22</sup> These liberal-minded, admittedly abstract theories, must not be lightly discounted. However, in the cut and thrust of policy formulation, they are often drowned out by clamouring for the prioritisation of consequentialist arguments.

Such arguments often explore, as Richard Delgado<sup>23</sup> has done, the far-reaching effects of hate speech targeting (racial) minorities: including the internalisation of insults by

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<sup>13</sup> A. Bickel, *The Morality of Consent* (USA, Yale University Press, 1975), p. 74.

<sup>14</sup> *Ibid.*, p. 73.

<sup>15</sup> J. Jacobs & K. Potter, *Hate Crimes: Criminal Law and Identity Politics* (New York, OUP, 1998), p. 11.

<sup>16</sup> R. C. Post, *Constitutional Domains: Democracy, Community, Management* (Massachusetts, Harvard University Press, 1995), p. 293.

<sup>17</sup> W. Sadurski, “Racial Vilification, Psychic Harm, and Affirmative Action”, in T. Campbell & W. Sadurski (Eds.), *Freedom of Communication* (England, Dartmouth Publishing Company, 1994), pp. 77-94, at 77.

<sup>18</sup> *Op.cit.*, p. 197.

<sup>19</sup> *Ibid.*

<sup>20</sup> R. Dworkin, *op. cit.*, p. 200.

<sup>21</sup> W. Sadurski, *op. cit.*, p. 78.

<sup>22</sup> F.S. Haiman, *Speech and Law in a Free Society* (USA, University of Chicago Press, 1981), p. 99.

<sup>23</sup> R. Delgado, “Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling”, 17 *Harvard Civil Rights-Civil Liberties Law Review* (1982), pp. 133-181.

victims (leading to a colouration of societal values and attitudes); negative psychological responses to stigmatisation (leading to humiliation, isolation and emotional distress); the reinforcement of social stratification, etc. And it *is* minorities who are the real victims of hate speech as it is generally thought that the privileges flowing from the entrenched, socially-advantageous position of the majority protect its members from hate speech. By analogy, Lilliputian arrows are unable to hurt a social Gulliver.

Any abstract analysis of *Bollinger's* tolerance of free speech principle fails to address many practical issues which would have to be scrupulously examined for the drafting of a legal framework to deal with hate speech. These would include: individual sensitivities to hate speech (in the event of the creation of a new tort for hate speech, should an egg-shell-skull rule or some other threshold apply?); group libel; whether a speech-action distinction should be recognised, or whether all expression (including symbolic speech) should be considered together, by virtue of its communicative impact.

#### GROWING INTERNATIONAL PRO-EQUALITY/ANTI-RACIST CONSENSUS

Two discernible pro-freedom of expression philosophies are currently vying with one another for supremacy in the world today. These can neatly be summarised as ‘the US and the Rest’. The high-absolutism of the protection afforded freedom of expression by the First Amendment to the American Constitution<sup>24</sup> is the sacred cow of the US Constitutional tradition. Uniquely, this protection extends in most instances to racist speech;<sup>25</sup> it is a protection that steadfastly ballasts the ultra-libertarian and individualistic ideals of US society. However, one person’s sacred cow is another person’s white elephant and this quip serves to point up the essence of the principal divergence in attitudes towards US First Amendment jurisprudence. At the international level (and also at the national level in most democratic countries throughout the world), the ideological imperative of freedom of expression is not allowed to ride roughshod over other human rights and laudable societal values. Prime examples of such rights are equality and non-discrimination. Rather, the right is nuanced to greater or lesser degrees: a certain balancing of competing rights is often deemed necessary or appropriate, as is evidenced by the consideration of *Jersild v. Denmark (infra)*.<sup>26</sup>

The first approach is rather unique in the extent to which it tends to protect expression of all sorts. It is the second approach, however, which has gained the greatest level of acceptance in international law. Although the modern genesis of the right to freedom of expression may be traced to the common conceptual crucible of Enlightenment thinking in Europe, the intellectual and practical evolutions which the concept has undergone in Europe and in the US have been far from identical. Kevin Boyle explains that this state of affairs has been heavily influenced by the fact that the US, a “drawing board” society built by immigrants made possible the assertion of new

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<sup>24</sup> The operative part of the First Amendment reads “Congress shall make no law [...] abridging the freedom of speech, or of the press [...]”

<sup>25</sup> See, for example, *Collin v. Smith*, 578 F. 2d 1197 (7<sup>th</sup> Cir. 1978) and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>26</sup> Judgment of the European Court of Human Rights of 23 September 1994, Series A, No. 298.

principles of democratic republican order.”<sup>27</sup> Far from being a “*tabula rasa* society”,<sup>28</sup> Europe has always taken acute cognisance of its bloody and troubled past and this preoccupation is reflected in its current-day judicial thinking. Whereas “the gravestones of monarchy formed the cornerstones of American democracy”,<sup>29</sup> modern Europe was built on ashes and corpses and many of those corpses did not even have gravestones erected to mark their passing. Hence, the long and sinister shadow of the hatred unleashed by Nazism in the last century continues to inform public and judicial policy-making in Europe.

Although originally conceived as a theory of freedom of expression specific to the First Amendment of the US Constitution, Oliver W. Holmes’s famous ‘marketplace of ideas’ metaphor (first enunciated in *Abrams v. US* in 1919)<sup>30</sup> has become a pre-eminent model for freedom of expression throughout the world. It is a theory which is built on a firm faith in the power of cognition and discussion for the advancement of ideas and thereby of society.<sup>31</sup> Detractors of the theory, however, are quick to point out that it ignores the overwhelming power of political and economic clout, not only within the market-place, but in defining the very structure of that market.<sup>32</sup> It is often criticised for being defunct in the modern age and the inappropriate application of an economic metaphor to a civil libertarian concern.<sup>33</sup>

It is said that there is nothing quite so powerful as an idea whose time has come and this is true of the rapidly-emerging right of equality. Described as one of ‘liberalism’s defining goals’,<sup>34</sup> equality is increasingly being recognised as the only matrix in which true political freedom can be achieved. The present structures of most systems of freedom of expression – despite anti-monopoly laws - tend to be asymmetrical, owing to (often extreme) imbalances in power and wealth within societies. One of the flagrantly inherent flaws of the market-place of ideas model is that it fails to recognise that the *status quo* is no level playing-field: it is riven by social inequalities, which are often the result of deep-rooted prejudicial attitudes and practices. To ignore this reality, and its history, is to tilt the terrain further in favour of those who already occupy advantageous positions. *Laissez-faire* politics regarding freedom of expression, while protecting the appearance of formal equality, do not address the issue substantively, in that equality of treatment for all is far from ensured. Reverse discrimination, or affirmative action is often required in order to redress existing structural biases and discriminatory practices.

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<sup>27</sup> K. Boyle, ‘Overview of a Dilemma: Censorship versus Racism,’ in S. Coliver (Ed.), *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (Essex, ARTICLE 19 & University of Essex, 1992), pp. 1-9, at 4.

<sup>28</sup> Address on 8 December 1999, Human Rights Centre, University of Essex, England.

<sup>29</sup> S. Curry Jansen, *Censorship: The Knot That Binds Power and Knowledge* (USA, Oxford University Press, 1988), p. 141.

<sup>30</sup> *Abrams v US*, 250 US 616 (1919).

<sup>31</sup> “But when men have realized 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 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 [...]” p. 361.

<sup>32</sup> R. C. Post, *op. cit.*, p. 328.

<sup>33</sup> See generally the arguments advanced by Cass R. Sunstein advocating “a New Deal for speech” in “Free Speech Now,” 59 *The University of Chicago Law Review* 255 (1992), at pp. 255-316.

<sup>34</sup> O. Fiss, *The Irony of Free Speech*, (Massachusetts, Harvard University Press, 1996), p. 10.

If one accepts this premise concerning the current structure of free speech models, and the observation that “truly democratic politics will not be achieved until conditions of equality are fully satisfied”,<sup>35</sup> two courses of action (at least) seem possible: internal and external regulation of the marketplace (or whatever the appropriate title for an agora for public discourse might be). It is submitted here that the latter option is preferable, for being a pre-emptive strike rather than a consequentialist parry. Achieving equality of access for all would, theoretically at least, ensure a fair combat for conflicting ideas. Moreover, regulating access is less intrusive on individual liberty and autonomy. Finally, the identification and prioritisation of the minority groups which would become the ultimate beneficiaries of affirmative action arguably presents fewer practical difficulties than an evaluative and taxonomic approach to prohibiting different kinds of expression.

Internal regulation would involve ensuring that “rules of civil discourse” would be upheld in order to prevent the market-place from degenerating into a “bullring”.<sup>36</sup> It would also involve attempts to achieve greater doctrinal and legal clarity *vis-à-vis* the categories of expression protected (and the degree to which they would be protected). As Geoffrey Marshall has observed (albeit in the context of the First Amendment), “[I]n the present climate it looks as if Free Expression (Ltd.) is overexpanded. It badly needs some measures of rationalisation to prevent the old firm from going out of business.”<sup>37</sup> However, the much-criticised practice of content-regulation of speech would have to be the overriding concern on account of the inherent subjectivity of the exercise and its potential for abuse.<sup>38</sup> According to international human rights law, any restrictions on expression must be clearly prescribed and narrowly-defined by law, pursue a legitimate aim, be proportionate to the achievement of that aim and be necessary in a democratic society on any one of a limited number of enumerated grounds (see further *infra*).

There has traditionally been, especially in the US, a ‘hostility to any attempt by government, however benignly intended, to regulate’<sup>39</sup> the operation of the marketplace of ideas, according to Eric Barendt. European States, on the other hand, have rarely suffered from such a pronounced regulatory shyness. The precise point at which State intervention becomes desirable or necessary is the source of much dispute.<sup>40</sup> Owen Fiss is of the opinion that such intervention is only permissible when it seeks to enrich public debate and enhance our capacity for collective self-determination.<sup>41</sup> Even then, he holds, it is permissible only pursuant to the State’s duty “to preserve the integrity of public debate [... and to] constantly act to correct the skew of social structure”.<sup>42</sup> This hostility is generally the product of fears born out of reflex rather than reflection. Government action or activism is typically equated with

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<sup>35</sup> *Ibid.*, p. 12.

<sup>36</sup> A. Bickel, *op. cit.*, p. 77.

<sup>37</sup> G. Marshall, “Press Freedom and Free Speech Theory,” *Public Law* 40 (1992), at 60.

<sup>38</sup> C.f. generally, D. Feldman, “Content Neutrality”, in I. Loveland (Ed.), *Importing the First Amendment – Freedom of Expression in American, English and European Law* (Oxford, Hart Publishing, 1998), pp. 139-172.

<sup>39</sup> E. Barendt, “The First Amendment and the Media”, in I. Loveland (Ed.), *op. cit.*, pp. 29-50, at 43.

<sup>40</sup> R. Craufurd Smith, *Broadcasting Law and Fundamental Rights* (Oxford, Clarendon Press, 1997), p. 112.

<sup>41</sup> O. Fiss, “Free Speech and Social Structure,” in E. Barendt (Ed.), *Media Law* (England, Dartmouth Publishing Co. Ltd., 1993), pp. 219-239, at 229.

<sup>42</sup> *Ibid.*, p. 230.

restriction and government inaction or restraint with freedom;<sup>43</sup> equations which fail to acknowledge the whole gamut of legislative and administrative options open to the competent authorities. State powers are both allocative and regulatory<sup>44</sup> and could be employed for a more ‘equitable distribution of access to means of expression’<sup>45</sup> (thus improving overall conditions of distributive justice in society).<sup>46</sup> Carefully-crafted regulatory measures could prove very conducive to the achievement of external and internal pluralism in the marketplace.<sup>47</sup> As Onora O’Neill points out: ‘[F]ree speech is inadequately realized unless there is guaranteed (if necessary, subsidized) access to the media for a range of viewpoints (alternatively for the viewpoints of a range of people), which ensures participation for a ‘multiplicity of voices.’<sup>48</sup>

The foregoing represents an admittedly summary overview of a selection of theories on media regulation. There is a certain symmetry between the concerns which they address and those reflected in the various formulations guaranteeing the protection of freedom of expression under international law.

## INTERNATIONAL LAW

### United Nations

In the immediate aftermath of the Second World War, a catalogue of fundamental rights inhering in all human beings was famously enunciated by the fledgling interstate organisation, the United Nations (UN). The Universal Declaration of Human Rights, 1948, contained a specific Article devoted to the right to freedom of expression, Article 19: ‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’ This right is also enshrined – and indeed fleshed out – in Article 19 of the International Covenant on Civil and Political Rights (ICCPR). It reads:

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

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<sup>43</sup> C. R. Sunstein, *op. cit.*, p. 264, 267.

<sup>44</sup> O. Fiss, *The Irony of Free Speech*, *supra*, p. 29.

<sup>45</sup> T. Scanlon, ‘A Theory of Freedom of Expression’, 1 *Philosophy & Public Affairs* 204 (1972), at 223/4.

<sup>46</sup> Jerome Barron would also favour legislative intervention in order to secure right of access: ‘Access to the Press – A New First Amendment Right’, in E. Barendt (Ed.), *Media Law* (cf *supra*) pp. 181-218, at 210.

<sup>47</sup> T. Gibbons, *Regulating the Media* (2<sup>nd</sup> Ed.) (London, Sweet & Maxwell, 1998), pp. 31,33.

<sup>48</sup> O. O’Neill, ‘Practices of toleration’, in J. Lichtenberg (Ed.), *Democracy and the Mass Media*, (USA, Cambridge University Press, 1993), pp. 155-185, at 158.

It is plain to see that the only restrictions on the right countenanced by this article are those which are “provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.” Nevertheless, Article 19 must be read in conjunction with Article 20, which further trammels the scope of the right. It provides for the prohibition by law of “any propaganda for war,” and - of crucial importance for present purposes - “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”

The UN Human Rights Committee (HRC) has deemed it necessary to elucidate the relationship between Articles 19 and 20, declaring the prohibitions enumerated in the latter to be “fully compatible” with the right to freedom of expression and indicating that such prohibitions are subsumed into the “special duties and responsibilities” upon which the exercise of the right (as *per* Article 19) is contingent.<sup>49</sup> It is therefore ironic that the HRC should repeatedly shirk opportunities to illuminate this difficult relationship in its jurisprudence. The case of *Faurisson v. France*<sup>50</sup> is one example of where it could have grasped the definitional nettle, but failed to do so.

This case arose from the conviction of Robert Faurisson, an academic, for the contestation of crimes against humanity (i.e., Holocaust denial). Crucial to the HRC’s finding that the conviction was not a violation of Article 19 were submissions by the French authorities that revisionist theses amounting to the denial of a universally-recognised historical reality constitute the principal [contemporary] vehicle for the dissemination of anti-Semitic views. The restriction on Faurisson’s freedom of expression was grounded in the deference pledged to the “respect of the rights or reputations of others” in Article 19(3) and was specifically intended to serve “the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism.”<sup>51</sup> While one Individual Opinion in the instant case posited that the statements on which Faurisson’s conviction was based remained outside the boundaries of “incitement” as envisaged by Article 20(2), it is submitted here that the issue could have been probed further.<sup>52</sup>

In a further ironic twist, the HRC mentioned the *Faurisson* case *en passant* in the recent case of *Ross v. Canada* (in which restrictions imposed on a school-teacher’s freedom of expression were held not to violate Article 19, as they had the purpose of protecting the “rights or reputations” of persons of Jewish faith, in particular in the educational sphere).<sup>53</sup> The teacher had been publishing anti-Semitic tracts outside of the classroom and was disciplined by being transferred to an administrative post. The HRC commented that the restrictions imposed on Faurisson “also derive support from the principles reflected in article 20(2) of the Covenant.”<sup>54</sup> This notion failed to achieve such prominence in the reasoning of the original case. There was no apparent need to consider the nexus between Articles 19 and 20 in another case treating

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<sup>49</sup> General Comment 11 (para. 2).

<sup>50</sup> Decision of 8 November 1996, Communication No. 550/1993.

<sup>51</sup> *Ibid.*, para. 9.6.

<sup>52</sup> *Ibid.*, Individual Opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein (concurring), para. 4. The Individual (concurring) Opinion of Cecilia Medina Quiroga also concurred in Evatt and Klein’s Individual Opinion, but the Individual (concurring) Opinion by Rajsoomer Lallah considers the suitability of applying Article 20(2).

<sup>53</sup> Decision of 18 October 2000, Communication No. 736/1997.

<sup>54</sup> *Ibid.*, para. 11.5.



colourably similar issues. In *J.R.T. and the W.G. Party v. Canada*,<sup>55</sup> the dissemination of anti-semitic messages by telephonic means was adjudged by the HRC to “clearly constitute the advocacy of racial or religious hatred” under Article 20(2).<sup>56</sup>

The mandatory provisions<sup>57</sup> of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) are also of instructive value when examining the interaction between freedom of expression and the elimination of racism. These provisions enjoin States Parties to the Convention, *inter alia*, to “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin...”<sup>58</sup> Nevertheless, the fulfilment of this obligation by States Parties must be achieved while having “due regard” to the principles embodied in the Universal Declaration of Human Rights and the rights explicitly set out in Article 5, ICERD.<sup>59</sup> “The right to freedom of opinion and expression” is among those rights specifically enumerated at Article 5.<sup>60</sup>

Despite the apparent symbiosis between freedom of expression and anti-racism on paper, international judicial and quasi-judicial bodies have regularly spurned the limited opportunities that have arisen for lengthy analysis of their compatibility with one another. Greater elucidation of this interface – which is actually quite problematic – can only come from the application of existing legal norms. It is submitted here that circumspection should temper the zeal that is likely to characterise the application of anti-racism provisions whenever they have the potential to encroach upon the right to freedom of expression. A main reason for advocating such an approach is that the delicate balancing of the rights involved has traditionally proved difficult under international law. Another central reason for such caution is the prevalent scepticism among freedom of expression experts about the effectiveness of laws aimed at restricting hate speech. It is often argued – cogently – that the potential for abuse of such laws by State authorities outweighs their potential or putative benefits. The logical corollary of this argument is that administrative, educational and other measures are often better-suited than purely legal provisions to the promotion of tolerance and non-discrimination.

In their recent Joint Statement on Racism and the Media,<sup>61</sup> the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, insisted that:

“Any civil, criminal or administrative law measures that constitute an interference with freedom of expression must be provided by law, serve a legitimate aim as set out in international law and be necessary to achieve that aim. This implies that any such measures are clearly and narrowly defined, are applied by a body which is independent of political, commercial or other unwarranted influences and in a manner

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<sup>55</sup> Decision of 6 April 1983, Communication No. 104/1981.

<sup>56</sup> *Ibid.*, para. 8(b).

<sup>57</sup> See, for example, General Recommendations VII (para. 1) and XV (para. 2) of the Committee on the Elimination of Racial Discrimination.

<sup>58</sup> Article 4(a), ICERD.

<sup>59</sup> Article 4.

<sup>60</sup> Article 5(d)(viii).

<sup>61</sup> 27 February 2001, available at: <http://www.article19.org/docimages/950.htm>

which is neither arbitrary nor discriminatory, and are subject to adequate standards against abuse, including the right of access to an independent court or tribunal.”

The Sisyphean task of combating racism has always been central to the activities of the United Nations. Indeed, the elimination of discrimination based on racial and other criteria has been one of the organisation’s main propelling forces ever since its inception. The recent World Conference against racism, racial discrimination, xenophobia and related intolerance, afforded the UN a timely – if not uncontroversial - opportunity to re-examine its vision and strategies *vis-à-vis* racism.<sup>62</sup>

The focus of the Declaration and Programme of Action of the World Conference<sup>63</sup> is broad and it reflects a diversity of thematic and regional priorities. The evident zeal of the language used in these documents augurs well for their effective implementation. While the stigmatisation and negative stereotyping of vulnerable individuals or groups of individuals are criticised in the Declaration (para. 89), it is simultaneously stressed that a possible antidote to such trends could lie in the robust exercise of the corrective powers of the media (para. 90). The promotion of multiculturalism by the media is a crucial ingredient of such an antidote (para. 88). These anxieties about the use and misuse of the media are equally applicable, if not moreso, to new technologies and in particular, the Internet (paras. 90-92). This is also borne out in the Declaration.<sup>64</sup>

The Programme of Action, for its part, revisits these themes, but in a manner that is mindful of their practical application. To this end, it calls for the promotion of voluntary ethical codes of conduct, self-regulatory mechanisms and policies and practices by all sectors and levels of the media in order to forward the struggle against racism (para. 144). It also advocates, within the parameters of international and regional standards on freedom of expression, greater (and where applicable, concerted) State action to counter racism in the media (para. 145). The dissemination of racist speech and the perpetration of similar racist acts over the Internet and via other forms of new information and communications technologies should merit particular attention (para. 147). A list of suggested practical approaches to relevant problems is then enumerated.<sup>65</sup>

## **Council of Europe**

Article 10 of the (European) Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by

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<sup>62</sup> See further, T. McGonagle, “Freedom of Expression and Limits on Racist Speech: A Difficult Symbiosis”, 13 *Interights Bulletin – A Review of the International Centre for the Legal Protection of Human Rights* p. 135 (No. 3, September 2001) at pp. 135-136; T. McGonagle, “Achieving global alliance against racism”, 2 *Metro Éireann* p. i (Special Supplement on the World Conference Against Racism, No. 6, October 2001), at pp. i, iii.

<sup>63</sup> A/CONF.189/WG.1/3.

<sup>64</sup> These issues are dealt with most extensively in paras. 86-94 of the Declaration.

<sup>65</sup> All of these issues are dealt with primarily in paras. 140-147 of the Programme of Action. See further, T. McGonagle, “World Anti -Racism Conference: Focus on Media”, *IRIS – Legal Observations of the European Audiovisual Observatory* 2002-2: 3.

public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

In its seminal ruling in *Handyside v. United Kingdom*, the European Court of Human Rights affirmed that freedom of expression ‘is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there would be no democratic society.’<sup>66</sup> The question of whether hate speech should be protected is particularly contentious.

The European Court of Human Rights – a source of much sterling jurisprudence on the right to freedom of expression<sup>67</sup> - has only once examined the interaction between freedom of expression and ICERD: in *Jersild v. Denmark*. In this case, also known as the “Greenjackets” Case, the Court found that the conviction of a journalist - for aiding and abetting in the dissemination of racist views in a televised interview he had conducted with members of an extreme right-wing group (“the Greenjackets”) – amounted to a violation of Article 10, ECHR. The Court’s consideration of Article 10, ECHR, in light of ICERD (and in particular Article 4 thereof)<sup>68</sup> was, however, regrettably summary and it failed to grapple with the substantive issues involved. It merely stated that it is not for the Court to interpret the “due regard” clause in Article 4, ICERD, but that “its interpretation of Article 10 of the European Convention in the present case is compatible with Denmark’s obligations under the UN Convention.”<sup>69</sup> Jersild’s conviction was held not to be “necess ary in a democratic society” and thus a violation of his rights under Article 10, ECHR. This was largely due to considerations of context and the importance of journalistic autonomy for the functioning of democracy. The positive obligations imposed on States Parties to ICERD by Article 4 were not deemed to have been contravened.<sup>70</sup>

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<sup>66</sup> *Handyside v. United Kingdom*, 7 December 1976, Series A, No. 24, para. 49.

<sup>67</sup> Gerard Hogan has rightly described the regime of protection of freedom of expression that has been developed pursuant to Article 10, ECHR, as ‘one of the great glories of the European Court’: G. Hogan, “The Belfast Agreement and the Future Incorporation of the European Convention of Human Rights in the Republic of Ireland”, 4 *The Bar Review* pp. 205-211 (No. 4, 1999), at p. 206.

<sup>68</sup> Article 4: ‘States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with *due regard* to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention [...]’ (emphasis added). Note that one of the rights enumerated in Article 5 is “[T]he right to freedom of opinion and expression” (Article 5(d)(viii)).

<sup>69</sup> *Jersild v. Denmark*, 23 September 1994, Series A, No. 298, para. 30. See also paras. 21, 28, 29, 31.

<sup>70</sup> Also of note here is the divisiveness of the judgment : the Court found in favour of a violation of Article 10 by twelve votes to seven.

Racism, as for example in *Glimmerveen & Hagenbeek v. The Netherlands* (racist leaflets),<sup>71</sup> and in *T. v. Belgium* (publication of Holocaust denial material in conjunction with a banned author),<sup>72</sup> is consistently held to be beyond the *ne plus ultra* of protected expression. These cases were held to be manifestly unfounded under Article 17 (Prohibition of abuse of rights), ECHR, and thus declared inadmissible by the (now-defunct) European Commission for Human Rights.<sup>73</sup> This article, an in-built safety mechanism, was designed in order to prevent provisions of the Convention from being invoked in favour of activities contrary to its text or spirit. It reads: ‘Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.’

The fate of inadmissibility has also awaited the veritable swathe of cases touching on Holocaust denial and related issues taken under the ECHR to date. Elements of Nazi ideology or activities inspired by Nazism have figured strongly in the bulk of this batch of inadmissibility decisions. The extent to which Nazism is incompatible with the ECHR can be gauged from the oft-quoted pronouncement of the European Commission for Human Rights in *H., W., P. and K. v. Austria*: ‘National Socialism is a totalitarian doctrine incompatible with democracy and human rights and [that] its adherents undoubtedly pursue aims of the kind referred to in Article 17.’<sup>74</sup>

This cast-iron pronouncement was further reinforced in the recent case of *Feldek v. Slovakia*,<sup>75</sup> the fulcrum of which was an article referring to the ‘Fascist past’ of a Government Minister. In finding that the sanctioning of the journalist who had written the article constituted a breach of Article 10, ECHR, the European Court stated categorically that it could not ‘subscribe to a restrictive definition of the term ‘fascist past’.’<sup>76</sup> It continued: ‘[T]he term is a wide one, capable of evoking in those who read it different notions as to its content and significance. One of them can be that a person participated in a fascist organisation, as a member, even if it was not coupled with specific activities propagating fascist ideals.’<sup>77</sup> Here, at least, the boundaries of free expression are precisely drawn. Expression that is in any way redolent of Nazism or its heinous goals is clearly beyond the pale of protected expression.

A more problematic case, as far as the boundaries of freedom of expression are concerned, was *Lehideux and Isorni v. France* (a case concerning an advertisement in a national newspaper, *Le Monde*, as part of a campaign for the rehabilitation of the memory of General Philippe Pétain: the advertisement presented the General’s life in a selective and positive manner, with certain dark chapters of the General’s life being conspicuous by the absence of any reference thereto).<sup>78</sup> In this case, the European

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<sup>71</sup> Appn. Nos. 8348/78 & 8406/78, 18 DR 187.

<sup>72</sup> DR 34 (1983), p.158.

<sup>73</sup> Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, ETS No. 155, led to the replacement of the European Commission for Human Rights and European Court of Human Rights with a restructured permanent European Court of Human Rights. Protocol No. 11 entered into force on 1 November 1998.

<sup>74</sup> Appn. No. 12774/87, 62 DR (1989) 216, at pp. 220/1. See further, *infra*.

<sup>75</sup> Judgment of the European Court of Human Rights of 12 July 2001.

<sup>76</sup> *Ibid.*, para. 86.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Lehideux & Isorni v. France*, 23 September 1998, Reports of Judgments and Decisions, 1998-VII.

Court again confirmed that protection would be withheld from remarks attacking the core of the Convention's values.<sup>79</sup> However, the impugned advertisement (as it did not amount to Holocaust denial or any other type of expression that would have prevented it from wriggling through the meshes of the Article 17 net) was held to be one of a class of polemical publications entitled to protection under Article 10.<sup>80</sup>

While the above-cited judicial pronouncements are useful, it is submitted that further authoritative illumination is required in order to clarify the status of performative speech which is offensive, but does not necessarily amount to one of the various forms of advocacy or incitement defined in the pertinent international instruments. This is one of the main upshots of the *Jersild* and *Lehideux and Isorni* cases.

There is at present no free-standing right to non-discrimination in the European Convention (Article 14 prohibits discrimination merely in relation to "the rights and freedoms set forth" elsewhere in the Convention<sup>81</sup>). In order to address this *lacuna*, Protocol No. 12 to the Convention was devised,<sup>82</sup> and was opened for signature on 4 November 2000. The pith of the Protocol is 'Article 1 – General prohibition of discrimination.' It reads: "(1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. (2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1." Protocol No. 12 will enter into force as soon as it has been ratified by ten Member States of the Council of Europe. To date, it has only been ratified by one: Georgia.

Meanwhile, following the recent opening for signature of the Council of Europe's Convention on Cybercrime on 23 November 2001, a preliminary draft of the First Additional Protocol to the Convention on Cybercrime on the criminalisation of acts of a racist or xenophobic nature committed through computer systems, was made public in February of this year. A major pillar of the draft text is devoted to measures to be taken at the national level. Among those envisaged is an obligation on each contracting State to "adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right", the making available or distribution of racist or xenophobic material (to the public) through a computer system, or the production of material for such purposes (Article 3). A similar obligation would rest on States to criminalise the acts of (i) threatening individuals or groups with the commission of a serious criminal offence through a computer system on account of distinctive characteristics of that individual or group, such as race and colour; and (ii) "directing, [supporting] or participating in activities [with the intent of/for the purpose of facilitating] a racist or xenophobic group to commit the offences" defined in the proposed Protocol (Article 4). Attempt and aiding and abetting in the commission of such offences should also be criminalised at the national level, according to Article 5.

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<sup>79</sup> *Ibid.*, para. 53. See also *Jersild v. Denmark*, *op. cit.*, para. 35.

<sup>80</sup> *Ibid.*, paras. 52, 55.

<sup>81</sup> "Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

<sup>82</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 177.

The Council of Europe's commitment to the struggle against racism is by no means restricted to its judicial organs and its conventions. The European Commission against Racism and Intolerance (ECRI) was established in 1993, for instance, and it was under its auspices that the preparations in Europe for last year's World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance were largely coordinated. ECRI's work has two main focuses: its so-called "country-by-country" approach (which involves the ongoing monitoring of relevant issues in Member States)<sup>83</sup> and work on general themes (which includes the elaboration of general policy recommendations, as well as the collection and promotion of examples of "good practice" in the struggle against racism).

## European Union

The repeated and resolute rejections of "the evil of racism and its associated negative passions of religious intolerance and general xenophobia" in the jurisprudence of the European Court of Human Rights *are* appropriate in the eyes of Conor Gearty, given that "the struggle against racism is a constituent element of the European identity."<sup>84</sup> This struggle is informing public and judicial policy to an unprecedented extent in a European Union (EU) whose erstwhile goals were primarily economic cooperation and the consolidation of peace through trade. However, as consistently held by the Court of Justice of the European Communities<sup>85</sup> and as laid down explicitly in the Treaty of Amsterdam, 1997, the EU is bound by the fundamental rights regime of the ECHR.<sup>86</sup> This growing commitment to the upholding of human rights was further consolidated by the proclamation of the Charter of Fundamental Rights of the European Union at the Nice European Council on 7 December 2000.<sup>87</sup>

The establishment of the European Monitoring Centre on Racism and Xenophobia (EUMC) as an autonomous body by the European Union in 1997 in the context of the European Year Against Racism has been heralded as a major advance. The *raison d'être* of the Centre is to play a leading role in the struggle against racism, xenophobia and anti-Semitism throughout Europe. As such, it has become a focal point for the EU campaign against racism and related intolerance. In June 2001, the EUMC launched its RAXEN Information Network. Comprising partnerships ("National Focal Points") in each of the EU Member States, the objective of the network is to enhance communication between Member States and the EUMC.

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<sup>83</sup> See, for example: Second Report on Ireland (Adopted on 22 June 2001), Doc. No. CRI (2002) 3 of 23 April 2002, European Commission against Racism and Intolerance.

<sup>84</sup> C. Gearty, "The Internal and External 'Other' in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe", in P. Alston (Ed.), *The EU and Human Rights* (New York, OUP, 1999), pp. 327-358, at 327.

<sup>85</sup> See, for example, Case 4/73, *Nold v. Commission* [1974], Judgment of 14 May 1974, ECR 491, para. 13; Case C-260/89, *Elliniki Radiophonia Tileorasi* [1991], Judgment of 18 June 1991, ECR I-2925, para. 41; Case C-353/89 *Commission v. The Netherlands* [1991], Judgment of 25 July 1991, ECR I-4069, para. 30.

<sup>86</sup> Article 6.2 (ex Article F.2) of the EU Treaty now reads: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." Article 29 (ex. Article K1) provides, *inter alia*, a specific legal basis for preventing and combating racism and xenophobia.

<sup>87</sup> OJ C 364 of 18 December 2000, p. 1.

The RAXEN Network is likely to prove pivotal to the EUMC's ongoing monitoring of the extent and development of racism and similar forms of intolerance, as well as its promotion of best practices to counter the rising tide of racism. The main responsibilities of the National Focal Points will be the establishment and maintenance of their respective national networks and information services. Relevant information will be collected and collated at the national level, *inter alia*, for the purpose of informing the recommendations and proposals of the EUMC. The exercise of data collection will initially prioritise specific issues: employment, racial violence, legislation and education.

Another EU initiative which seeks to tackle racism, but on this occasion in a more rounded and fundamental way, is the Proposal for a Council Framework Decision on combating racism and xenophobia (presented by the Commission).<sup>88</sup> The purpose of the Framework Decision will be, according to its draft first article, to lay down 'provisions for approximation of laws and regulations of the Member States and for closer co-operation between judicial and other authorities of the Member States regarding offences involving racism and xenophobia.' It goes on to define the terms 'racism and xenophobia' in draft Article 3: 'the belief in race, colour, descent, religion or belief, national or ethnic origin as a factor determining aversion to individuals or groups'. The key article of the Framework Decision, however, will be Article 4 – Offences concerning racism and xenophobia. In its draft form, it reads:

Member States shall ensure that the following intentional conduct committed by any means is punishable as criminal offence:

- (a) public incitement to violence or hatred for a racist or xenophobic purpose or to any other racist or xenophobic behaviour which may cause substantial damage to individuals or groups concerned;
- (b) public insults or threats towards individuals or groups for a racist or xenophobic purpose;
- (c) public condoning for a racist or xenophobic purpose of crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court;
- (d) public denial or trivialisation of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 in a manner liable to disturb the public peace;
- (e) public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia;
- (f) directing, supporting of or participating in the activities of a racist or xenophobic group, with the intention of contributing to the organisation's criminal activities.

Draft Article 5 enjoins Member States to ensure that 'instigating, aiding, abetting or attempting to commit an offence referred to in Article 4 is punishable.' Also of note is that draft Article 7 provides for aggravated sentencing when the perpetrator is acting in the exercise of a professional activity and the victim is dependent on that activity. Draft Article 8, then, stipulates that racist and xenophobic motivation may be regarded as an aggravating circumstance for the determination of penalties for offences.

By way of overview, it can be said that this Proposal is very comprehensive and uncompromising. When adopted, it is likely to prove to be the mainstay of future anti-

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<sup>88</sup> COM (2001) 664 final, Brussels, 28 November 2001.

racism action emanating from the EU. The only source of concern worthy of note for present purposes is its potential to curb the right to freedom of expression. This concern is not totally allayed by the draft preambular assurance that “[T]his Framework Decision respects the fundamental rights and observes the principles recognised in particular by the European Convention on Human Rights, in particular Articles 10 and 11 thereof, and by the Charter of Fundamental Rights of the European Union, and notably Chapters II and VI thereof”.

## NEGATIONISM

Holocaust denial is a *sui generis* type of hate speech. It is morally reprehensible for a number of reasons: it is a common and convenient vehicle for conveying anti-Semitic sentiments; it denies survivors recognition of the dignity-stripping devastation which defines the Holocaust; it minimises the suffering and ultimate fate of those who were murdered in pursuit of the Nazis’ programme of elitarian-inspired hatred; it amounts to hatred directed against a group and against individual members of that group and it reinforces trends of discrimination and persecution. And this is true of every group that was subjected to systematic annihilation under the Nazi regime – Jews, Communists, Gypsies, the Handicapped and others. In light of the harm caused by Holocaust denial, the case for legal prohibitions on such speech would appear to be socially imperative. The thesis that Holocaust denial should automatically be proscribed, irrespective of considerations such as intent, the time, place and manner of its delivery or its actual impact, is built on the premise that to allow Holocaust denial is, *ipso facto*, to confer a certain legitimacy on the content of this kind of speech.<sup>89</sup>

It is often the wont of so-called ‘revisionist historians’ and (extreme) right-wing politicians to seek to dress up their work or statements in the emperor’s clothing of ‘academic freedom’ and ‘freedom of speech’. Neither claim is of immediate relevance, however. Myriad sound bites seek to strike high-minded chords: the truth is unattainable; our conceptions thereof are doomed to relativity; no facts should be immune to challenge, to vigorous questioning, as this is a vector for the advancement of society; no belief should be allowed to be sclerotised in accordance with the prevailing currents of any time or creed. The high road to self-righteousness is paved with such platitudes, perversely chosen in the hope that their rhetorical resonance will distract from the main issues involved.

But these are no more than empty sound bites and their echo *is* hollow, for not all disputes concerning the veracity of established facts are of a similar nature. People of this ilk are often quick to liken their contestations of orthodox accounts of the history of the Second World War to Galileo’s dissent from the catholic, conventional wisdom of yesteryear which dictated that the sun revolved around the earth. However, the primordial difference between Holocaust denial and Galileo’s celebrated refusal to recant (“*eppur si muove!*”) is that the issue of hatred was not central to the debate in which the principles of modern astronomy finally triumphed. Doubting and questioning with a view to stimulating reflection and debate are laudable, but not when their propelling force is hatred.

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<sup>89</sup> A. Bickel, *op. cit.*, p. 73; R. Post; R. Eatwell, ‘The Holocaust Denial: a Study in Propaganda Technique’, in L. Cheles, R. Ferguson & M. Vaughan (Eds.), *Neo-Fascism in Europe* (New York, Longman Inc., 1991), pp. 120-146, at 123.



Such is the emotive content of any expression merely evoking the Shoah,<sup>90</sup> that the delicate judicial balancing of seemingly antipodal interests will be necessarily deferential to the rights and reputations of those affected by the harmful tendencies of such speech. Echoing the argument from truth<sup>91</sup> and Justice Holmes's dissent in *Abrams*,<sup>92</sup> Stanley Fish concedes that "although we ourselves are certain that the Holocaust was a fact, facts are notoriously interpretable and disputable; therefore nothing is ever really settled, and we have no right to reject something just because we regard it as pernicious and false."<sup>93</sup> However, he continues, "when it happens that the present shape of truth is compelling beyond a reasonable doubt, it is our moral obligation to act on it and not defer action in the name of an interpretative future that may never arrive."<sup>94</sup> In aggregate, this is recognition that conceptions of truth can only ever be relative and that ideas *can* be suppressed on the basis of their harmful content. The upshot of Fish's assertion is that the memory of those who perished in the Holocaust should never be jettisoned in favour of a cargo of spuriously-motivated arguments about the fallibility of any so-called 'truth'.

There are discernible similarities in the material facts of most of the negationist cases to have been brought before the European Commission for Human Rights. The applicants all sang from the same heinous hymn-sheet. Holocaust denial was their common refrain, but there were slight variations in the specific cadenzas of this distasteful orchestra, including: allegations that the Holocaust was invented for the purposes of extorting monetary compensation from the German authorities; aggressive advocacy of the reinstatement of National Socialism and the racial discrimination inherent in its philosophy; various Nazi-inspired activities; the sinister, spurious questioning of the scientific feasibility of mass gassing.

In *X v. FRG*,<sup>95</sup> it was held that to prohibit an individual from displaying pamphlets alleging that the Holocaust was "a lie" and a "zionistic swindle" "is a measure necessary in a democratic society for the protection of the reputation of others." The Commission focused not only on the pamphlets' distortion of relevant historical facts, but also on the attack they contained on the "reputation of all those who were described as liars or swindlers, or at least as persons profiting from or interested in such lies or swindles."<sup>96</sup> The conviction of a journalist for the publication of pamphlets aggressively advocating the reinstatement of National Socialism and the racial discrimination inherent in its philosophy, was held, in *Kühnen v. FRG*,<sup>97</sup> to be necessary in democratic society "in interests of national security and public safety and for protection of rights of others."<sup>98</sup> Similarly, in *Rebhandl v. Austria*,<sup>99</sup> the

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<sup>90</sup> See, for instance, the controversy (misplaced accusations of trivialisation of the Holocaust) which surrounded 'La vita è bella' (Italy, 1997), the Roberto Benigni film which won the Grand Prix at the Cannes Film Festival in 1998 and the Academy Award for Best Foreign Language Film in the same year.

<sup>91</sup> Attributable to both Milton and Mill, as well as forming the basis for Scanlon's Millian Principle.

<sup>92</sup> C.f. quote *supra*, especially the section referring to how "time has upset many fighting faiths..."

<sup>93</sup> S. Fish, *There's No Such Thing as Free Speech and it's a Good Thing, Too* (New York, OUP, 1994), p. 113.

<sup>94</sup> *Ibid.*

<sup>95</sup> Appn. No. 9235/81, 29 DR 194 (1982).

<sup>96</sup> *Ibid.*, p. 198.

<sup>97</sup> Appn. No. 12194/86, 56 DR 205 (1988).

<sup>98</sup> *Ibid.*, p. 205.

<sup>99</sup> Appn. No. 24398/94.

Commission upheld the conviction of the applicant for, *inter alia*, distributing “publications denying in particular the existence of the gassing of Jews in the concentration camps under the Nazi regime” on the basis of the public interest in the prevention of crime and disorder and the protection of reputations and rights. This, too, was the logic applied by the Commission in *Witzsch v. Germany*,<sup>100</sup> a case involving a conviction for disparaging the dignity of the dead. In this case, the language employed was more open-ended, as it spoke of “the requirements of protecting the interests of the victims of the Nazi regime”.

*H., W., P., and K. v. Austria*<sup>101</sup> dealt with convictions for acts performed by the applicants in connection with their membership of and leadership in Aktion Neue Rechte (ANR). The Commission held that legal prohibitions on activities inspired by National Socialism are “necessary in a democratic society in the interests of national security and territorial integrity and for the prevention of crime.”<sup>102</sup> It is perhaps noteworthy that the activities of the applicants involved the preparation and publication of pamphlets which described the Holocaust as a lie; propagated theories about alleged biological differences between races, principles of elitarianism and endorsements of Lebensraum and other National Socialist doctrines which constituted part of their own party’s manifesto. The most significant feature of this case was the Commission’s observation that “National Socialism is a totalitarian doctrine incompatible with democracy and human rights and that its adherents undoubtedly pursue aims of the kind referred to in Article 17.”<sup>103</sup> This is a very candid and important recognition of the hateful ideology that forms the bedrock of Nazism. It is, in effect, the equation of membership of the National Socialist Party with an espousal of all of its ideals. *Ochensberger v. Austria*<sup>104</sup> was another case challenging a conviction for National Socialist activities and was declared inadmissible on much the same grounds.

The Commission’s finding in *Honsik v. Austria*<sup>105</sup> is a carbon-copy of its finding in the *H., W., P. and K. v. Austria* application as exactly the same reasons are offered in attesting to the necessity of the conviction for social democracy. Furthermore, the incompatibility of National Socialism with democracy and human rights is reiterated. The conviction in the instant case was “pour avoir nié dans une publication la réalité du génocide perpétré dans les chambres à gaz des camps de concentration sous le régime national-socialiste.”<sup>106</sup>

In *Walendy v. Germany*,<sup>107</sup> the Commission refused to admit a complaint by the applicant about a search and the seizure of an unlawful publication containing an

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<sup>100</sup> Appn. No. 41448/98.

<sup>101</sup> Appn. No. 12774/87, 62 DR (1989) 216.

<sup>102</sup> *Ibid.*, p. 216.

<sup>103</sup> *Ibid.*, pp. 220/1. See p. 216 for almost identical language, and also *Nachtmann v. Austria*, Appn. No. 36773/97. This unsuccessful application was taken by the head of editorial staff of a periodical that published an article which grossly denied and minimised National Socialist genocide and other National Socialist crimes. Nigh-identical language is also employed in *Schimaneck v. Austria*, Appn. No. 32307/96.

<sup>104</sup> Appn. No. 21318/93, 18 EHRR-CD, pp. 170-172.

<sup>105</sup> Appn. No. 25062/94, 83-B DR 77 (1995).

<sup>106</sup> “[F]or having denied in a publication the reality of the genocide perpetrated in the gas chambers of the concentration camps under the National-Socialist regime” (author’s translation). *Ibid.*, p. 77.

<sup>107</sup> Appn. No. 21128/92, 80-A DR 94.

article which amounted to a denial of the systematic annihilation of Jews under the Third Reich. This, the Commission held, “constituted an insult to the Jewish people and at the same time a continuation of the former discrimination against the Jewish people.”<sup>108</sup> In *E.F.A. Remer v. Germany*,<sup>109</sup> the applicant’s suggestions that ‘le sort des Juifs sous le régime national-socialiste avait été ‘inventé’ de toutes pièces à des fins d’extorsion”<sup>110</sup> ensured that his attempt to challenge his conviction for incitement to hatred and to racial hatred was declared inadmissible.

Notwithstanding the Commission’s repeated refusals even to countenance speech involving Holocaust denial, or by extension, speech used by proponents of National Socialism in furtherance of their stigmatised brand of politics, one case which did manage to slip through the net and was duly considered by the Court in 1998 was *Lehideux & Isorni v. France*, discussed *supra*.<sup>111</sup> This judgment was a rare instance of freedom of expression outweighing the perceived harms of discourse which is colourably negationist, anti-Semitic or totalitarian, when these two potentially countervailing concerns were balanced on the judicial scales. Other highly-publicised cases centring on Holocaust denial have also originated in France.<sup>112</sup>

The application in *Marais v. France*,<sup>113</sup> declared manifestly unfounded by the Commission, arose out of an article entitled ‘La chambre à gaz homicide du Struthof-Natzweiler, un cas particulier’ (‘The homicidal gas chamber of Struthof-Natzweiler, a particular case’; author’s translation) written by the applicant for the periodical *Revision*. The Commission considered the content of the article to question ‘l’existence et l’usage de chambres à gaz pour une extermination humaine de masse.’<sup>114</sup> The conviction of Marais was pursuant to ‘l’article 24 *bis* de la loi du 29 juillet 1881’ (otherwise known as ‘la loi Gayssot’, 13 July 1990). A wave of anti-semitism swept through France in 1990, culminating in the desecration of tombs in a Jewish cemetery at Carpentras in August of that year. The Government’s response to this surge in anti-Semitism was the enactment of the so-called Gayssot Act. Also the fulcrum of the aforementioned case, *Faurisson v. France*, the Gayssot Act was intended to be a main plank in the French Government’s programme against racism and anti-Semitism; a hefty legislative sandbag to counter the rising tide of intolerance.

The so-called ‘revisionist historian’, David Irving, was mentioned in an application which was rejected by the European Commission – *Nationaldemokratische Partei*

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<sup>108</sup> *Ibid.*, p. 99.

<sup>109</sup> Appn. No. 25096/94, 82-A DR 117.

<sup>110</sup> “[T]he fate of the Jews under the National -Socialist regime had been ‘invented’ purely for the purposes of extortion” (author’s translation). *Ibid.*, p. 122.

<sup>111</sup> Reports, 1998-VII.

<sup>112</sup> These include (albeit only in the national courts) the conviction of Jean-Marie Le Pen, leader of the extreme right-wing party, *Le Front national*, for describing the Nazi gas chambers as “un point de détail” in the history of the Second World War. He was found guilty by the Cour de cassation (the French equivalent of the Supreme Court) in 1989 for the banalisation of constitutive acts of crimes against humanity (“banalisation d’actes constitutifs de crimes contre l’humanité”). See further, J. -Y. Camus, *Le Front National* (Toulouse, Editions Milan, 1998), p. 41.

<sup>113</sup> Appn. No. 31159/96, 86-A DR 184 (1996).

<sup>114</sup> “[T]he existence and use of gas chambers for mass human extermination” (author’s translation). *Ibid.*, p. 190.

*Deutschlands Bezirksverband Munchen-Oberbayern v Germany*.<sup>115</sup> At issue in the case was an imposition on the organisers of a meeting (at which Irving was due to speak) of an obligation to take appropriate measures to ensure that the Nazi persecution of Jews would not be denied or called into question during the meeting. At the national level, Irving was hoisted with his own petard when he took an unsuccessful libel action in the High Court in London against Deborah Lipstadt and Penguin Books over claims that he is a Holocaust Denier.<sup>116</sup> The claims were made in her 1994 book, *Denying the Holocaust: The Growing Assault on Truth and Memory*. The verdict of the trial judge, Mr Justice Charles Gray, left Irving's credibility as a historian in shards. The judgment was upheld on appeal<sup>117</sup> and Irving has since been declared bankrupt after failing to pay the GBP 150,000 costs arising from his unsuccessful libel action.<sup>118</sup>

If it is accepted that Holocaust Denial is a legitimate and proportionate, and indeed, necessary restriction on freedom of expression, this begs the question whether the same should be the case for speech seeking to minimise, trivialise or deny the occurrence of other genocides. This question is problematic as Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) does not include genocide-denial as one of its five enumerated "punishable" acts.<sup>119</sup> It is certainly a question deserving further exploration whether this definition could be extended to include genocide-denial. It is difficult to envisage different standards being applied to different genocides: international law would surely be above the egregious practice of hierarchising horror. In any event, the definition of genocide would have to be stringently applied. It is defined by Article 2 of the Genocide Convention as:

- ... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

*Prima facie*, a judicial focus on Holocaust denial may seem slightly anachronistic, as World War II and its atrocities very gradually recede into the collective memory and younger generations succeed previous generations, whose lives were closer to the tragedies and suffering of those years. Such an observation would, however, be simplistic. The heyday of Nazism did indeed span a fixed and finite period. However, its spectre continues to haunt modern times and the supposed values, or more accurately, the counter-values, of Nazism are immutable. These are counter-values against which society must always guard vigilantly. This analysis would appear to

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<sup>115</sup> Appn. No. 25992/94, 84-A DR 149 (1996).

<sup>116</sup> David J.C. Irving v. Penguin Books Ltd. and Deborah E. Lipstadt, Judgment of the High Court of Justice (Queen's Bench Division) of 11 April 2000.

<sup>117</sup> Judgment of the Court of Appeal of 20 July 2001.

<sup>118</sup> V. Dodd & D. D. Guttenplan, "Holocaust denier made bankrupt", *The Guardian*, 5 March 2002.

<sup>119</sup> The Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Article 3: "The following acts shall be punishable: (a) genocide [as defined in Article 2]; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide."

underlie the European Commission's finding in *Rebhandl v. Austria* (discussed *supra*) that "the applicant's publications ran counter one of the basic ideas of the Convention, as expressed in its preamble, namely justice and peace, and further reflect racial and religious discrimination."<sup>120</sup> According to this school of thought, Holocaust denial is but one, specific form of attack on justice, peace, equality, harmony and other venerated values of democracy.

#### THE EFFECTIVENESS OF HATE SPEECH LAWS

Scepticism abounds concerning the effectiveness of so-called 'hate speech' laws, so much so that it has even been suggested that blanket prohibitions on racially-motivated hate speech, far from being a "noble innovation", might amount to no more than a "quixotic tilt at windmills which belittles great principles of liberty."<sup>121</sup> This is due in no small measure to the infinite variety of forms, the "endlessly variegated shades of meaning,"<sup>122</sup> of racist speech. The circumvention of laws prohibiting or restricting speech has never been a problem for those intent on doing so.<sup>123</sup> "All regulation encourages evasion, but the very ambiguity of speech that makes law such a crude response further facilitates evasion," Richard Abel avers.<sup>124</sup>

He continues: "[R]acists translate hate into pseudo-science, substituting regression analyses for vulgarities."<sup>125</sup> It is relatively easy for a skilled polemicist to appropriate an entirely new lexicon in order to avoid legal prosecution for the dissemination of ideas deemed noxious to society. Codified terms become common currency. Gloves of velvet are worn on iron claws of hatred. The platitudes of political correctness are a mere smokescreen for more sinister intent. The nature of discourse is altered and it will be as esoteric or as exoteric as the level of complicity between speaker and listener will dictate. Talk of "cultural coherence", "traditional values", "the erosion of a core identity" and "preservation of national unity" are all loaded terms: they are the sheathed daggers of racist and xenophobic mentalities.<sup>126</sup>

The inventiveness of this verbal chameleonism cannot be matched by any legislation, as legislation, by definition, must be clear and precise. This fundamental imbalance in

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<sup>120</sup> The same reasoning and language were employed by the Commission in *D.I. v. Germany*, Appn. No. 26551/95; a case in which the applicant "historian's denial of the existence of gas chambers at Auschwitz had led to his conviction by the German courts under the relevant sections of the German Penal Code, for insult and for blackening the memory of the deceased.

<sup>121</sup> A. Bickel, *op. cit.*, p.71, quoting Jackson J. in *Kunz v. New York* 340 U.S. 290 (1951).

<sup>122</sup> R. Post, *op. cit.*, p.293; T. I. Emerson, *op. cit.*, p. 398: "Conflicts between groups will never be settled in litigation over the question whether one group has been defamed. The tactics of arousing racial, religious or class hatred are too subtle to be bound by such controls. The effort to use the judicial process for this purpose merely diverts attention and energies from far more important measures essential to resolve the underlying grievances."

<sup>123</sup> In her examination of censorship from a historical perspective, Sue Curry Jansen shows this to have been the case throughout the ages: "The language of Aesop became the *lingua franca* of the new republic [Republic of Athens]... They used the slippery edges of language to comply with the letter of the law of Inquisition, while boldly defying its spirit.", *op. cit.*, p. 69.

<sup>124</sup> R. Abel, *Speech and Respect* (London, Stevens & Sons/Sweet & Maxwell, 1994), p. 98.

<sup>125</sup> *Ibid.*, p. 100.

<sup>126</sup> These terms take "the place of outright appeals to racial prejudice; but although the language is softer and spoken more often than not by persons [...] innocent of consciously malign motives, it still serves racist ends in relation to which it stands as a code." – S. Fish, *op. cit.*, p. 13.

the conflict between law and racism goes a long way towards explaining the ineffectiveness of hate speech laws designed to promote equality and to eradicate discrimination in all of its many ugly guises. “If suppression is directed only at the crudest or most ‘odious’ messages, it will be dealing with the most superficial aspects of the problem of group prejudice and hatred, for the most odious are likely to be the least effective in accomplishing their purposes,” according to Franklyn S. Haiman.<sup>127</sup> “[G]roup prejudice and hatred when packaged in subtle or sophisticated communication wrappings,”<sup>128</sup> are not usually, therefore, susceptible to legal sanction.

Doubt may be cast over the effectiveness of hate speech laws for two reasons other than the recent trend towards deceptively sanitised racist speech. Firstly, it is very difficult to gauge the deterrent value of lending increased severity to legal sanctions when they involve an element of racial animus. Secondly, and more crucially, as Sandra Coliver argues on the basis of very comprehensive evidence, administrative and other informal measures targeting prevention and redress are often better-suited than legal remedies for the promotion of tolerance and non-discrimination. This thesis is bolstered by the observation that “[T]he flagrant abuse of laws which restrict hate speech by the authorities at precisely those times when an even-handed approach to conflict is crucial provides the most troubling indictment of such laws.”<sup>129</sup> Thus, she posits, “equality and dignity rights, as well as free speech rights, are best advanced by the narrowest of restrictions on hate speech” and “[t]he possible benefits to be gained by such laws simply do not seem to be justified by their high potential for abuse”.<sup>130</sup>

Stereotyping, particularly in the media, has invidious and attritive effects on the groups selected as its victims. The denigratory quotient of stereotyping is high: ‘press attacks on black people defy the very existence of a culture. At a minimum they redefine that culture in terms of deprivation, atrophy, and destruction.’<sup>131</sup> Notwithstanding the tendency of stereotyping to perpetuate existing societal inequalities and reinforce prejudices, warnings against the dangers of censoring such practices are not misplaced.<sup>132</sup> Any legislative provisions seeking to address a concept as definitionally elusive as stereotyping would, by necessity, be grounded in vagueness. Dangers inhere in any policy that would seek to punish generally derogatory media portrayals of groups (in contradistinction to incitatory speech) or take action against overt and subliminal racism in the media. Heed should therefore be paid to the cautionary note sounded by T. I. Emerson: ‘repression has no stopping place. Once begun, it can quickly move all the way to a totalitarian system.’<sup>133</sup>

The mainstream media – as well as the partisan, hateful organs of propaganda - are quite capable of peddling negative images of particular groups, or racist ideas. There

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<sup>127</sup> F. S. Haiman, *op. cit.*, p. 94.

<sup>128</sup> *Ibid.*, p. 88.

<sup>129</sup> S. Coliver, ‘Hate Speech Laws: Do They Work?’, in S. Coliver (Ed.), *op. cit.*, pp. 363-373, at 373.

<sup>130</sup> *Ibid.*, p. 363.

<sup>131</sup> C. Ginsburg, ‘Destruction of Local Cultures Through Mass Communications’, K. Mahoney & P. Mahoney (Eds.), *Human Rights in the Twenty-first Century: A Global Challenge* (Part 2) (Netherlands, Kluwer Academic Publishers, 1993), pp. 777-781, at 780.

<sup>132</sup> See further, O. O’Neill, *op. cit.*, p.164.

<sup>133</sup> T. Emerson, *op. cit.*, p. 724. See also Salman Rushdie’s comment: ‘You think you can give away one per cent of your freedom and you’ve still got 99 per cent, but actually, once you give away the first one per cent it’s very remarkable how fast the other 99 per cent goes’, S. Rushdie, *op. cit.*, p. 29.

can be no doubt whatever as to the incredible power wielded by the mass media.<sup>134</sup> For some commentators, this power is so great, and the role of the media of such importance to the democratic paradigm, that there exists a compelling case for a radical reappraisal for Montesquieu's tripartite division of State powers<sup>135</sup> which would see the institutionalisation of the media as a fourth organ of government. This model of the media is sometimes referred to as 'The Fourth Estate'.<sup>136</sup> A corollary of the power of the media is that the judiciary in many national and international jurisdictions shows itself to be deferential to the notion of media autonomy and self-regulation. The extensive jurisprudence of the European Court of Human Rights is the prime example of this deference.<sup>137</sup>

Spasmodic, and alas, systemic outpourings of racism have precipitated unprecedented media awareness of, and sensitivity to, the issue of race. This sensitivity, in its turn, has prompted the incorporation into journalistic codes of practice, ethics and house-style guides of principles and objectives aimed at ensuring a responsible treatment of subjects with potential for sparking social conflagrations.<sup>138</sup> The deleterious effects of negative stereotyping, prejudiced reporting and outright hatred have informed the drafting of these provisions. Heightened consciousness is equally being reflected in international norms that have been devised over the past few years, with the Johannesburg Principles being an obvious example.<sup>139</sup>

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<sup>134</sup> Noam Chomsky and Edward Herman's propaganda model considers the societal purpose of the media being "to inculcate and defend the economic, social, and political agenda of privileged groups that dominate the domestic society and the state. The media serve this purpose in many ways: through selection of topics, distribution of concerns, framing of issues, filtering of information, emphasis and tone, and by keeping debate within the bounds of acceptable premises." – E.S. Herman & N. Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (Great Britain, Vintage, 1994), p. 298. Stephen Sedley highlights the information- and communication-based power of the media: "[T]he mass media too have possession of large funds of information, and their power to manipulate or withhold it is no less than that of government. [...] There are today repositories of corporate power as capable as any State of invading the rights of individuals" – S. Sedley, "The First Amendment: A Case for Import Controls?", in I. Loveland (Ed.), *op. cit.*, pp. 23-28, at 26.

<sup>135</sup> More commonly known as the doctrine of separation of powers, this model for the division of State powers was first enunciated by Charles de Secondat, Baron de Montesquieu, in *De L'esprit des lois (The Spirit of the Laws)*, 1748. According to this doctrine, liberty is best safeguarded by the division of the legislative, executive and judicial functions of government between separate independent organs.

<sup>136</sup> One of its main proponents is Lucas A. Powe Jr. See, for example, his book, *The Fourth Estate and the Constitution: Freedom of the Press in America* (USA, University of California Press Ltd., 1992).

<sup>137</sup> See, for example, *Jersild v Denmark*, *op. cit.*; *Thorgeirson v Iceland*, Judgment of the European Court of Human Rights of 25 June 1992, Series A, No.239; *Oberschlick v Austria*, Judgment of the European Court of Human Rights of 23 May 1991, Series A, No. 204; *Bladet Tromso & Stensaas v. Norway*, Judgment of the European Court of Human Rights of 20 May 1999, Reports of Judgments and Decisions, 1999 and *Unabhängige Initiative Informationsvielfalt v. Austria*, Judgment of the European Court of Human Rights of 26 February 2002.

<sup>138</sup> Article 10 of the NUJ's Code of Conduct reads as follows: "A journalist shall only mention a person's race, colour, creed, illegitimacy, marital status (or lack of it), gender or sexual orientation if this information is strictly relevant. A journalist shall neither originate nor process material which encourages discrimination, ridicule, prejudice or hatred on any of the above-mentioned grounds." A specific section of the International Federation of Journalists, International Media Working Group Against Racism and Xenophobia (IMRAX), is responsible for conducting most of its anti-racism work.

<sup>139</sup> The Johannesburg Principles on National Security, Freedom of Expression and Access to Information – Principle 4. Prohibition of discrimination: "In no case may a restriction on freedom of expression or information, including on the ground of national security, involve discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, nationality, property, birth or other status."

It is incontestable that the power of the media can be used towards egregious ends. Rabid, racist rants targeting asylum-seekers and, in the case of Ireland, members of the Travelling Community, feature all-too-regularly in public life and in the media with varying degrees of prominence.<sup>140</sup> Equally incontestable is the fact that the media *can* play a role in the dissemination of hate speech, with *Radio Mille Collines* in Rwanda being an example of just how devastatingly influential propaganda can be in fomenting incitement to hatred and genocide.<sup>141</sup> It is no surprise that Article 20, ICCPR, and Article 3 of the Genocide Convention (see *supra*) explicitly prohibit such incitement.

## IRELAND

The policy preoccupations so manifest on the international scene are also replicated at the national level. The Prohibition of Incitement to Hatred Act, 1989, is the primary statute that addresses relevant issues in Ireland, but its shortcomings have been the subject of sustained criticism from anti-racism groups and others. Only a handful of prosecutions have been brought under the Act since its introduction and even fewer of these – ultimately – proved to be successful.<sup>142</sup> These statistics prompted the Minister for Justice, Equality and Law Reform to announce a comprehensive review of the legislation in September 2000, but as of yet, there has been scant evidence of active consultation with interested parties and members of the public generally in this connection.<sup>143</sup> The inefficacy of the Act has also led to it being described as a “toothless bulldog”.<sup>144</sup> This description is warranted.

However, without seeking to diminish in any way the social imperative of eliminating racism, it must be stated that the proposed revamping of the Act ought to be mindful of the potentially adverse effects any new and aggressive wording could have on the

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<sup>140</sup> For an analysis of this trend, see J. Hardy, “Zero Tolerance”, *The Guardian*, 25 March 2000. In Ireland, controversy has surrounded the nature of comments made in public by, *inter alia*, Áine Ní Chonaill, spokeswoman for the Immigration Control Platform; Mary Ellen Synon, journalist (formerly with *The Irish Independent*); Cllr. John Flannery (Fine Gael); Noel O’Flynn, T.D. (Fianna Fáil) (see further, ‘Fianna Fail Cork TD attacks ‘freeloader’ asylum -seekers’, *The Irish Times*, 29 January 2002); Cllr. Michael Guilfoyle (Fianna Fáil) (see further, G. Deegan, ‘FF councillor must be disciplined – group’, *The Irish Times*, 7 March 2002).

<sup>141</sup> Aryeh Neier, “Clear and present danger”, 27 *Index on Censorship* 57 (1/1998), at 59. See generally, *Broadcasting Genocide: Censorship, propaganda and state-sponsored violence in Rwanda, 1990-1994* (ARTICLE 19, England, 1996), *Deadly Marionettes: State-sponsored violence in Africa* (ARTICLE 19, England, 1997) and also M. Lenkova (Ed.), *‘Hate Speech’ in the Balkans* (Athens, International Helsinki Federation for Human Rights, 1998).

<sup>142</sup> According to An Garda Síochána Annual Report 2000, there were six offences in which proceedings were taken under S. 2 of the Act and four of these resulted in convictions being secured. See ‘Non-indictable offences – proceedings and persons convicted in 2000 (Drugs offences excluded)’, p. 111 of the Annual Report. Some of the higher profile cases involved Mayo Cllr. John Flannery, who was acquitted of inciting hatred against Travellers by Galway District Court on 1 March 1999 (see further, ‘Cou ncillor cleared of inciting hatred’, *The Irish Times*, 2 March 1999) and former bus-driver Gerry O’Grady (whose initial conviction (see J. Crosbie, ‘Bus driver convicted under Hatred Act’, *The Irish Times*, 15 September 2000 and C. Coulter, ‘Bus -driver fined IEP 900, placed on probation’, *The Irish Times*, 23 September 2000) was quashed on appeal by Dublin Circuit Court in March 2000: see further, N. Haughey, ‘New incitement to hatred law sought’, *The Irish Times*, 14 March 2000).

<sup>143</sup> See, however, submissions to the Department of Justice, Equality and Law Reform on the Prohibition of Incitement to Hatred Act by the National Consultative Committee on Racism and Interculturalism (NCCRI) (August 2001) and Pavee Point Travellers’ Centre (October 2001).

<sup>144</sup> ‘The O’Gr ady case has moved us forward’, Editorial, *Metro Eireann* (Vol. I, Issue 4), August 2000.



right to freedom of expression. The uninhibited exercise of the right to freedom of expression can allow it to play a crucial role in the furtherance of anti-racism strategies. This is widely recognised.<sup>145</sup> Only when there is a direct and incontrovertible nexus between particular forms of expression and actual harm or distress, should there be contemplation of curbing or, *a fortiori*, sanctioning, that expression.

The full title of the Act is “An Act to prohibit incitement to hatred on account of race, religion, nationality or sexual orientation”. In the ‘Interpretation’ section of the Act, the notion of ‘hatred’ is defined as ‘hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation’. Thus, the focus of the Act is broader than its summary title might suggest. The real lynchpin of the statute is, however, S. 2(1), which sets out that it will be an offence under the Act for a person:

- (a) to publish or distribute written material,
- (b) to use words, behave or display written material –
  - (i) in any place other than inside a private residence, or
  - (ii) inside a private residence so that the words, behaviour or material are heard or seen by persons outside the residence, or
- (c) to distribute, show or play a recording of visual images or sounds, if the written material, words, behaviour, visual images or sounds, as the case may be, are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred.

The operative notions here are those of intent and likelihood to stir up hatred and they are notoriously vague. They tread the very fine line separating potential for legislative flexibility from legislative uncertainty. The application of the Act in practice testifies to the interpretative difficulties stemming from this wording. First, the necessary *mens rea* or the necessary circumstantial likelihood are very difficult to prove in practice: hence, the infrequency with which the Act is successfully invoked before the courts.<sup>146</sup> In consequence, the Act also lacks any real deterrent value. Second, were the Act to be interpreted in a more aggressive manner, there would be a real danger that the very important outer reaches of the right to freedom of expression would be assailed (and the problems flowing from such a scenario have been explained at length *supra*). The Act therefore manifestly falls between two stools.

What is required is a profound recalibration of the policy objectives which inform the Act. Clear, thoughtful and watertight definitions will have to be chosen. A connection between expression and harm or other alleged negative consequences cannot simply be presupposed. Rather, a very strong causal link between particular instances of expression and evident adverse, proximate consequences ought to be proved as a prerequisite for punishing expression by the law. Thus, a crucial consideration will be

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<sup>145</sup> The most recent formal acknowledgement of this observation on the international plane is, perhaps, the World Declaration (see, in particular, paras. 88, 90, discussed *supra*).

<sup>146</sup> It should be noted in connection with the procedural dimension to the Act that, according to S. 8, “[W]here a person is charged with an offence under section 2, 3 or 4, no further proceedings in the matter (other than any remand in custody or on bail) shall be taken except by or with the consent of the Director of Public Prosecutions.”

the “nature and imminence”<sup>147</sup> of the impugned expression, which will necessarily vary from case to case. An Explanatory Memorandum could usefully accompany any revision of the Act. This could offer instructive insights into the purpose and principles of the Act; the real benefits of which could come on-stream in courtrooms at the implementation stage.

As argued *supra*, racist speech comprises an entire spectrum of negatively-motivated discourse. Its chameleon qualities afford it a flexibility which legislation cannot match. Thus, nuanced, subtle, subliminal racism is always likely to wriggle its way through the meshes of any legal definition. Given the increased sanitisation of racist language, its infinitely variegated hues and potential for sophisticated packaging, it is important to resist the obvious temptation to have recourse to the blanket-banning of racist speech (which could only be sure of sanctioning the crudest, vilest forms of racism in any case).

It is important to realise that one single statute simply cannot be a panacea for all the outpourings of hatred in a given society. One piece of legislation cannot simultaneously be the alpha and the omega of an entire nation’s war against racism; nor should it entertain any ambition to fulfil such a role. Greater attention should be paid to the wider context in which key pieces of legislation operate; greater reliance should be placed on (complementary) non-legal measures which aspire to the realisation of the same broad aims. Education must top the list of non-legal measures, owing to its potential for stimulating greater public consciousness of racism and empathy towards its victims. Billowing black smoke does not warrant societal intolerance or legislative repression, for this is too little, too late. Rather, the focus should be on fire prevention.

## CONCLUSION

Roger Errera posits that ‘preeminence must be given to respect for the dignity of the individual and concern for the rights of minorities’:<sup>148</sup> one of the principal strands in the conclusion of this article.<sup>149</sup> The lodestar ought to be greater commitment to the recent international trends mentioned at the outset and elaborated on in the *corpus* of this article, i.e., the coupling of freedom of expression with the promotion of equality and the elimination of discrimination. In a European context, the *Jersild* case represented a first, hesitant step towards the harmonisation of two cardinally important rights, even though the Court balked the opportunity to give lengthy analysis to the extent of the two rights’ compatibility with one another.

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<sup>147</sup> R. Gavison, ‘Incitement and the Limits of Law’, in R. C. Post (Ed.), *Censorship and Silencing: Practices of Cultural Regulation* (Los Angeles, The Getty Research Institute for the History of Art and the Humanities, 1998), pp. 43-66, at p. 52.

<sup>148</sup> R. Errera, ‘The Freedom of the Press: The United States, France, and Other European Countries,’ L. Henkin & A.J. Rosenthal (Eds.), *Constitutionalism and Rights: the influence of the United States constitution abroad* (New York, Columbia University Press, 1990), pp. 63-93, at 85.

<sup>149</sup> See also Errera’s comments: “... c’est la civilité qu’il s’agit de protéger par les armes du droit. Quelle forme de civilité? Celle qui veut qu’il ne soit pas licite de porter atteinte à la personne de l’autre et à ses droits à cause d’une particularité, constitutive de cette personne (ici l’origine nationale ethnique, raciale ou religieuse)...” – ‘La Cour européenne des droits de l’homme et les limites de la liberté d’expression: réflexions sur de singulières variations’, *Gazette du Palais*, 21, 22 juin 1995, pp. 37-42, at 39.

Holocaust denial is beyond the pale of socially acceptable speech and, accordingly, laws which would seek to keep it there are arguably more easily justified than hate speech laws *simpliciter*. Notwithstanding the imperative social objective of Holocaust denial laws, they must still be subject to close scrutiny. Like other hate speech laws, they should not be exempt from the requirements of clarity, precision and narrowly-stated definitions of the menacing phenomenon of racism. The same principles should apply to any possible revision of the Irish Prohibition of Incitement to Hatred Act.

Although racism - in all of its distasteful hues - is anathema to all right-thinking members of society, the objective of promoting equality and non-discrimination must not be allowed to subordinate or even subdue the right to freedom of expression. Rather, a considered balancing of these interests is what is required. Although these rights do, on occasion, find themselves at cross-purposes with one another, there nonetheless exists a real potential for synergic interaction between them in the shared struggle against racism.

***Tarlach McGonagle, LL.M.***  
Institute for Information Law (IViR),  
University of Amsterdam  
(March 2002)