

STRIKING A BALANCE

Hate Speech, Freedom of Expression and Non-discrimination

Edited by Sandra Coliver

**Contributing Editors
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ARTICLE 19, INTERNATIONAL CENTRE AGAINST CENSORSHIP

HUMAN RIGHTS CENTRE, UNIVERSITY OF ESSEX

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USA		CERD Convention	International Convention on the Elimination of All Forms of Racial Discrimination
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		UDHR	Universal Declaration of Human Rights
		UK	United Kingdom of Great Britain and Northern Ireland
		UN	United Nations
		US	United States
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ARTICLE 19, INTERNATIONAL CENTRE AGAINST CENSORSHIP

ARTICLE 19 takes its name and mandate from Article 19 of the Universal Declaration of Human Rights which proclaims the fundamental right to freedom of expression. ARTICLE 19 works impartially and systematically to identify and oppose censorship in its many forms, to defend the victims of censorship and to promote strengthened national and international standards for the protection of freedom of expression.

ARTICLE 19 monitors individual countries' compliance with international standards protecting freedom of expression, and regularly makes submissions to inter-governmental organizations such as the United Nations Human Rights Commission and Committee and the European Court of Human Rights. ARTICLE 19 has an international membership.

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THE HUMAN RIGHTS CENTRE, UNIVERSITY OF ESSEX

The Human Rights Centre, University of Essex, was established in 1983. Its purpose was to give a focus to research and teaching in Britain on international human rights. In 1989 the Centre was widened to involve, in addition to Law, the disciplines of Philosophy, Political Science and Sociology, with the object of encouraging interdisciplinary work.

The Centre, while global in its expertise and concerns, has a special interest in human rights in Europe and the Commonwealth. It is distinctive in the emphasis it gives to the integration of human rights theory and practice and in its concerns with international humanitarian law. The Centre has working relations with similar centres across Europe and worldwide.

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This book is the result of a Consultation of more than 30 experts from around the world, convened by ARTICLE 19 and the Human Rights Centre of the University of Essex, who met for two days to discuss the highly complex and controversial issue of the effectiveness of laws which prohibit "hate expression". The experts were divided into three working groups and each group was asked to address one of the following questions:

1. How have anti-hate expression laws worked in practice in various countries?
2. What kinds of expression, if any, should be prohibited, and can international standards provide any guidance in this area?
3. What are the most effective sanctions and remedies for hate expression?

Discussion was lively and intense and, predictably, few points of consensus were identified. One point on which agreement was resounding was that more research was needed. Various areas for further study were identified, including close examination of the experiences of a range of countries having different kinds of laws, different traditions, different economic, social and political conditions, and experiencing different degrees of inter-communal tensions. This book, born from these challenges and encouraged by the enthusiasm of participants who felt that the Consultation papers presented new information and insights, aims to contribute to the debate.

At the outset, we wish to make abundantly clear what we did *not* set out to accomplish. First, the book does not purport to be comprehensive or even representative. The fact that we have no papers from Africa, only a brief overview from Latin America, two papers on Eastern Europe, and two from Asia by no means reflects a lack of appreciation of the enormity of the tensions between national, ethnic and religious communities in many countries throughout those areas. Even among western democracies our country studies are not reflective of the full diversity of approaches to hate expression.

Second, the book focuses on the implementation and effectiveness of hate expression laws. Contributors were not asked to discuss other, possibly more effective, measures for responding to hatred, discrimination and violence.

Third, and relatedly, the book adopts a primarily legal approach to examining issues, rather than, for instance a sociological or political science approach. We are pleased to offer in Part V one paper each from a sociological and a political theory perspective.

Fourth, we did not ask contributors to address hate expression against groups identified by characteristics other than those included in the international standards: namely, national or ethnic origin, race, colour, descent and religion. In the event, few laws protect other groups from hate expression.

We also would like to make two definitional points. First, the terms "hate speech" and "hate expression" are used virtually interchangeably ("expression" reflects the terminology of the international standards while "speech" is more common in national jurisprudence) to refer to expression which is abusive, insulting, intimidating, harassing and/or which incites to violence, hatred or discrimination. The terms "hate speech laws" and, sometimes, "anti-hate speech laws" are used to refer to laws which prohibit one or all of three main categories of hate speech: group libel, harassment and incitement.

Second, the term "race", when used to refer to people, is highly suspect. As stated by the two UN Special Rapporteurs on Freedom of Opinion and Expression (in Chapter 6), a first step in seeking to promote tolerance and non-discrimination is to avoid

the use of such a term as 'race' which, when applied to human beings, has no scientific meaning. Unequivocal recognition of the human race as one and indivisible appears to be regarded as the indispensable preliminary for the struggle against racism.¹

Nonetheless, the term is used throughout this book because of its widespread acceptance - and the acceptance of related words such as racism and racist - in both common parlance and international law. "Race" here includes colour and descent as well as national and ethnic origin.²

The introductory chapters which follow elaborate the parameters of this book, highlight salient points of the country studies (Introduction) and set the context of the discussions, both in terms of principles (Chapter 1) and facts about hatred, discrimination and violence against minorities (Chapter 2).

The discussions of international standards are intended to be readily understandable to those who are not versed in international law (or law at all), and are of interest for their history of ideas as well as for their summaries of current interpretations of those standards. The chapter by the two UN Special Rapporteurs on Freedom of Opinion and Expression, drawn from a preliminary report they prepared for the UN in August 1991, proposes an innovative and narrow construction of the "hate-related" restrictions on free expression set forth in the international standards, which undoubtedly will contribute to the evolution of the interpretation of those standards.

The policy statements from organizations included in Part V illustrate how different human rights groups have come to terms with the dilemmas posed by hate speech. While we canvassed a large number of organizations concerned with hate speech it is a testament to the difficulty of the subject that relatively few produced statements and even fewer had statements in hand. As a result, the organizations represented in this book do not reflect the great diversity of organizations working on hate speech. Nonetheless, we are pleased that our inquiries prompted several of them to grapple with the issue.

We hope that this book may assist other organizations and individuals to clarify their own positions.

Sandra Coliver
Legal Officer, ARTICLE 19
May 1992

Since its inception in 1986, ARTICLE 19 has endeavoured to contribute to public debate on complex areas of freedom of expression. The balance between the fundamental right to freedom of expression and the right to equality is clearly one such area. Accordingly, in April 1991, ARTICLE 19 together with the Human Rights Centre of the University of Essex convened a two-day Consultation at which over 30 experts from around the world participated. The Consultation itself was a low budget affair with some of those attending covering their own travel costs; a testament, perhaps, to the great interest and concern about how to address the growing phenomenon of ethnic violence and hatred.

Aims and Contents of this Collection

Following the Consultation, and with the consensus of participants, we decided to compile a wider documentation of the laws by which hate expression is addressed, controlled or punished. A primary aim in publishing this collection is to pose core questions and to offer a wide range of viewpoints. These include: how have laws restricting expression been applied in practice?; what guidance do the international standards protecting both freedom of expression and equality offer? What evidence is there that laws can have an impact on hate speech, or whether such laws in fact promote non-discrimination? What too is the evidence that laws designed to curb hate speech may also be used to restrict the legitimate political exchange of ideas necessary to a democratic society?

This book has broken new ground. A number of contributors have undertaken original research on patterns of implementation in their countries. Others have brought together information not previously collected. Several have provided policy perspectives from countries, such as Sri Lanka and Russia, from which views on this issue are rarely received. Principled arguments for opposing all restrictions on hate expression unless necessary to prevent imminent unlawful action or face-to-face harassment, and the counter arguments, are systematically and cogently presented by the US contributors. Contributors from Europe as well as Australia and Canada discuss the variety of laws and their implementation which restrict hate expression and are seen to have value, even in liberal democracies, in order to safeguard equality and dignity. Contributors from Russia and Sri Lanka, facing inter-ethnic and communal tensions which have racked their regions with armed conflicts, suggest that narrowly-drawn restrictions might help to curb the violence.

Twenty-four papers examine the laws in 15 countries which regulate freedom of expression in the interests of racial, ethnic, religious and national harmony. Other papers discuss the apparent contradictions between different international standards which govern the rights to freedom of expression and equality and the interpretation of these standards by international bodies. The majority of contributors to this volume discuss the experiences in democratic countries, where freedom of expression is highly valued and protected by constitution and law and thus where the issue of hate expression is most hotly debated. Most papers share the view that laws which restrict free expression do not reduce hatred or violence. Others point to the lack of empirical evidence as to the relationship between hate speech and acts of violence.

Most contributors accept the premise that laws can serve a useful function, and that problems lie in selective or indifferent enforcement. Thus it is repeatedly

1 See para. 56 of their chapter in Part II.

2 The International Convention on the Elimination of All Forms of Racial Discrimination defines "racial discrimination" to mean discrimination based on "race, colour, descent, or national or ethnic origin".

maintained that the enactment of laws which restrict hate speech give "a clear message about acceptable standards" which will "eventually establish boundaries with which most people feel comfortable". But even here, the real problem in drafting laws which are sufficiently narrow and also effective is recognized. Questions were raised as to whether such laws may distract from the need for more effective measures, and some contributors worried about the ill-effects of successful prosecutions which create racist "martyrs" and those which result in acquittals appearing to vindicate their racist ideologies.

There is general endorsement of the strict implementation of mechanisms which fall into the category of social and cultural attempts to combat racism. Such mechanisms would include: education on respect for ethnic diversity; non-discrimination in housing, education and employment; the adoption of anti-racist strategies in schools, universities and the media; and increasing representation of ethnic, religious and racial minorities in key institutions such as police departments and the courts. These and various means to contain potential violence other than by restricting free speech are important themes in this book.

ARTICLE 19's Position

As a campaigning organization, ARTICLE 19 consistently protests the widespread violations of the right to freedom of expression, and recognizes that governments and organizations can and do use freedom of speech to promote opinions which are antithetical to the common standards of dignity underpinning the human rights movement.

ARTICLE 19 equally recognizes that laws, once on the statute book, can be and are used by governments to discriminate against minorities whether these be ethnic, religious or national. Even laws framed in a democracy, and however carefully drafted, may be used subsequently to suppress the fundamental right to freedom of expression. Such laws may be used to penalize members of oppressed communities who attempt to promote a counter viewpoint or to stifle speech advocating autonomy or other changes in government. It is, for example, discussed in this volume that laws against racist speech in South Africa have not been applied so as to ensure racial equality or to protect victims of racial abuse. In fact they were used and intended to be used as measures to stifle growing black opposition to an oppressive system; thus the government used the laws to punish the victims of its racist policies. Another contributor points out how a Soviet law which prohibited incitement to national racial hatred was regularly used to suppress dissident movements and human rights activists.

The guarantors of democracy are many, varied and precious; one such guarantor is the free exchange of ideas and opinions. What must be preserved at all costs are both democratic discussion and the channels for its daily practice. Unfortunately, at times, democratic discussion including hate speech (which may involve insult, invective and deeply offensive racial slurs) necessarily involves trampling on the ideas and beliefs held precious by others. ARTICLE 19's concern is that these slurs and insults be met at all times by counterclaims, arguments and discussion. To suppress such slurs is not to resolve the hatred but perhaps to drive it underground and thereby encourage acts of violence. We have been at pains to promote the view that speech should never be censored based on its content alone. Any restrictions on expression should be justified only by reference to its *impact* such as the likelihood of the expression leading directly to imminent lawless action.

ARTICLE 19 acknowledges the wide gulf between condemning ideas and criminalizing them. More simply put, we, in common with several contributors to

this work, do not believe that criminalizing expression could ever resolve the real problem of racism and racist discrimination. As one contributor has remarked, the law can play only a limited part in creating a humane and gentle society.

Quite apart from the real threat to freedom of expression, anti-hate speech legislation is notoriously difficult to interpret and enforce. "One must be realistic in assessing the difficulties involved in regulating hate speech" as one contributor writes. Any legislation in this area highlights problems of definition and interpretation; concepts such as "ridicule", "hostility" and even "hate" are open-ended, necessarily subjective and potentially dangerous in the exercise of power.

One of the areas discussed is that of religious intolerance. The rise of both Christian and Islamic fundamentalism in the US, Europe, the Middle East and Asia, and Jewish fundamentalism in Israel, is a worrying phenomenon if only because the adherents to these movements clearly attempt to impose upon the world a single truth and this necessarily outlaws contrary views. Perhaps the most notorious case is that of the *fatwa* or death sentence pronounced by the late Ayatollah Khomeini against the British author Salman Rushdie following the publication of the novel *The Satanic Verses*. In the thousands of articles which have been written on this case, the basic facts have become blurred: a man who has committed no crime in the country of which he is a citizen, has been condemned to death and, moreover, his death is actively sought by a foreign power because of the offence his work of fiction has caused Muslims. ARTICLE 19 unequivocally rejects the death sentence and constantly asserts the right of any individual to publish his ideas in a work of fiction.

At the same time we acknowledge that Muslims, amongst others, have every right to protest publicly about the book in question and to broadcast the nature of the offence and insult which they feel. Those on either side of this controversy must be free to express their ideas and beliefs and to discuss them with their critics on the basis of mutual tolerance, free from censorship, intimidation and violence.

Advancing the Debate

At the end of the Consultation, the view was expressed that the issues were too complex and the nexus between laws, protections and levels of hate speech too immeasurable to justify any definitive statement. There was also a consensus on the need for further study, especially of national experiences in trying to counter racial and religious hatred and violence; this volume is a first attempt. There was a common view that civil remedies were generally preferable to criminal sanctions.

In the final plenary session of the Consultation one participant long familiar with United Nations procedures said that the UN in its wisdom only recognized two types of meetings; those which were successful and those which were very successful! The Consultation, he said, fell firmly within the latter category. In retrospect, one of its successes has been that subsequent work has engendered this reference collection of the laws and practice from 15 countries. We do not claim that it is a comprehensive collection, but we very much hope that in publishing the volume at this time, we may stimulate further thought, discussion and publication. Meanwhile, ARTICLE 19 will continue to maintain a watching brief on hate expression and the way in which it is dealt with by various countries throughout the world.

Frances D'Souza
Director, ARTICLE 19
May 1992

PART I: Preliminary Considerations

OVERVIEW OF A DILEMMA: CENSORSHIP VERSUS RACISM

Kevin Boyle

This book grew out of a consultation at Essex University in April 1991. The purpose of the consultation was to explore the challenge set for defenders of freedom of expression by the promotion of racism through speech. The clear tenor of the consultation and of this collection is undoubtedly pro-freedom of expression, with the onus on those who would restrict this freedom to justify censorship in the interests of racial equality and the elimination of racial discrimination. The case for restriction on hate speech was made at the consultation and is also made in this book. Indeed, the majority of the papers assume the case for at least some restrictions on grounds of equality and dignity while conveying concern over the effects of any such restrictions on the values underlying free speech.

Nevertheless, it is possible to conceive of a different selection of materials and opinions which might operate from a starting point which favours equality and non-discrimination over freedom of expression. Such a work would certainly be useful in continuing the debate. However that may be, most of the articles, analyses and policy statements collected in this book seek to find a balance between the right to speak and the pursuit of racial, religious and communal justice and harmony, a balance that requires the least interference with untrammelled freedom of expression.

THE MEANING OF BALANCE

If the weights on the balance favour free speech, is the metaphor of balance appropriate? The actual position, it can be argued, is that two human rights are in conflict: the freedom to advocate distasteful opinions or to convey distorted or false information and the conflicting right not to be a victim of discrimination and prejudice.¹ On that analysis, to prefer freedom of expression is not to prefer the countervailing freedom from discrimination. One right is subordinate to the other. The balance metaphor, however, can be justified if some speech on some occasions is restrained and on such occasion the right to be free from discrimination is preferred to the free speech principle. It is in that sense that the title of the book, *Striking a Balance*, is justified. The search is for those circumstances and conditions in which one right should be preferred over the other. There is also a need to offer coherent justifications for which right is preferred in particular circumstances or else, from the stand-point of freedom of expression, there is a risk that limitation will encroach to the point where the right itself is threatened.

To point out that there are circumstances in which other interests should win out over freedom of expression is not inconsistent with a strong commitment to the value of freedom of expression. Equally to argue that the law should not interfere with certain kinds of antisocial speech or insulting and denigrating publication does not mean that free speech advocates are indifferent to the rights of racial or religious

¹ For a thoughtful and extensive discussion of the injuries caused by racist speech, see Richard Delgado's chapter in Part III.

minorities. To the contrary, they strongly believe that freedom of expression is a vital right in the struggle to defeat discrimination, bigotry and intolerance.

THE CHALLENGE OF RACISM

However influenced by standpoint, the protagonists in this debate will not dispute the evidence that the articulation of prejudice, the fomenting of hatred, the justification of discrimination and the denial of esteem for people distinguished by the dominant group because of their common origins, their religion or their colour has not abated in the modern world. The picture in Europe surveyed by Paul Gordon (in Chapter 2) is especially worrying. The entire moral basis of the integration of Europe is challenged by the new urge to limit immigrants and asylum seekers and the open espousal of racism and xenophobia by mainstream democratic political parties seeking to compete with the resurgence of fascist and racist movements. These movements have extended their traditional hostility to Jews and other citizen groups to immigrants and refugees from Asia and Africa as well as those crossing European borders from the former Eastern bloc.

This book was completed in the days following the acquittal by a jury of four white police officers in Los Angeles of the crime of assaulting a black man, Rodney King. An amateur videotape which showed the officers assaulting Mr King had been played repeatedly on television in the weeks and months before the trial. The verdict, which contradicted the evidence of sustained assault recorded in the film, led to an explosion of rage across the United States and to at least 50 fatalities and extraordinary devastation in California. The United States, which has given the greatest emphasis to the free speech principle, has discovered the depressing truth that a generation after the Civil Rights campaign, racism and poverty constitutes as massive a gulf as ever, separating the life chances of the black minority from those of the affluent white majority.

The different tendencies in the debate over the control of hate speech would equally accept the irrefutable evidence that moral indifference towards or active encouragement of manifestations of hatred leads to the destruction of civilized living, war and even holocaust. The entire and impressive structure of international human rights law since 1945 was built as a moral answer to the Nazi ideology of racism.

The greatest focus of human rights initiatives since 1945 has been on efforts to have the right to be free from invidious discrimination on grounds of race, gender or religious belief irreversibly accepted in the world. There have been significant advances in that campaign. The ending of the system of *apartheid* in South Africa, a political system built on racist theory, has been one of the major and profound steps along the road to the elimination of racism.

Over 125 states have ratified the main international treaty against racial discrimination, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD Convention). This Convention has deeply influenced the domestic laws of most states discussed in this book. It not only outlaws racist speech but also the practice of discrimination, *inter alia*, in employment, housing, the provision of services and other fields. States, by virtue of Article 2 of the Convention, are required to adopt a policy of positive action to eliminate racial discrimination including measures which promote understanding among different racial groups and assist minorities in social, economic, cultural and other fields. The creation of a public opinion against racial discrimination is evidenced in the general acceptance of these norms which limit the individual's contractual and property rights.

Public opinion in the United States and Europe (and, indeed, in India and several other Asian countries) has shown increasing resistance to so-called affirmative action policies (or "special measures" as called for in Article 1(d) of the CERD Convention) on behalf of excluded ethnic and religious minorities. The general perception has been that such measures lack fairness. Without examining the arguments here, it is nevertheless important to note that it is only at the extreme of public opinion that voices are raised against the general norm of non-discrimination which is firmly established in democratic societies.

But racism, racial discrimination and hatred have not yet been eliminated in the same democratic societies. The literature which seeks to explain the continued existence and indeed resurgence of racism, anti-Semitism and xenophobia strikes a tentative note. A recent United Nations report concluded that "the primary causes of racism and racial discrimination and apartheid are deeply imbedded in the historical past and are determined by a variety of economic, political, social and cultural factors."² Manifestations of racism on a global scale are linked in the study to "such areas as conquest, the search for captives for racial slavery, the imposition of racial exclusionary laws, colonialism and imperialism". Of particular interest are what the report calls the "two great paradoxes" of history: that racism actually increased as democracy expanded and that racism grew as science expanded. In the late nineteenth century "scientific racism" flourished, spawning false theories and doctrines used to justify the belief in the inherent inferiority of certain peoples or the superiority of others as determined by genetically transmitted differences of race.

We still live under the influence of these scientifically spurious ideas. Their persistence explains the debate over the use of law to seek to eliminate their influence.

Might not endorsement of policies which firmly penalize racial hate speech and publication contribute to that first goal of the human rights movement, that all people should be treated as entitled to equal respect and dignity regardless of their religion or national or ethnic origin? Would legal constraints on the expression or display of bigotry and prejudice towards those who are the victims of discrimination make a difference? Is censorship justified if it muzzles racism?

Much censorship down the centuries has been advanced for ideal causes to promote versions of the good or the truth, whether secular or religious. It has almost always ended in disaster in the constricting of debate, the suppression of dissent and the corruption of the truth. The advocate of freedom of expression has no difficulty in demonstrating the abuse of legal controls even on racial speech in contemporary history. The South African laws against racial hatred were used systematically against the victims of its racist policies.³ In Eastern Europe and the former Soviet Union laws against defamation and insult were vehicles for the persecution of critics who were often also victims of state-tolerated or sponsored anti-Semitism.⁴ The writer Salman Rushdie has been subjected for three years to persecution and a death sentence because his novel was declared an insult to Islam.

The crux of the dilemma for the free speech advocate is not a fear that the language of intolerance or hate may contain truth which should be heard but rather

2 *Political, historical, economic, social and cultural factors contributing to racism, racial discrimination and apartheid* (New York: UN, 1991).

3 See the chapters by Gilbert Marcus and Lene Johannessen in Part III.

4 See the chapter on the former Soviet Union by Stephen J Roth in Part III.

the old problem of *quia custodiet custodiet*? Who is to oversee the censor? No advocate of freedom of expression on human rights grounds could or does reject the values which underlie the norms of non-discrimination. Human rights are indivisible. The strong advocacy of anti-discrimination policy is a feature, for example, of the American Civil Liberties Union (ACLU) which, as Nadine Strossen points out, is more regularly engaged in the struggle against racial discrimination through court challenges than it is in fighting restrictions on hate speech in the same courts.⁵

Nevertheless, against the reality that we seem to know little about the causes and even less about the remedies for racial or religious prejudices and discrimination, could it be that advocates of freedom of expression need to rethink the justifications advanced for privileging speech? That question will be returned to at the end of this overview.

NATIONAL AND INTERNATIONAL STANDARDS

One approach to constructing an answer to the dilemma raised by hate expression is to examine what policies are in fact pursued by states, and what policies are mandated by the international code of human rights standards elaborated since 1945. That is the approach adopted in this book.

Part III, *Country Experiences*, cannot claim to be comprehensive (one might note in particular that it excludes the most populous of the world's states, China, a society which combines a traditional culture of xenophobia with total censorship). But for those countries which are examined, it is clear that they divide into the United States and the rest. In the United States the balance is unequivocally drawn in favour of freedom of speech. There is no federal regulation and minimal state regulation of hate expression. No other country has the equivalent of the First Amendment or the jurisprudence which has developed around it. In the other countries the balance is found through the acceptance that racist speech must be sanctioned under conditions prescribed by statute. The chapters in this book about the United States all address the contemporary context for discussion of the hate speech issue in that country; namely, college campuses. That debate concerns the compatibility of the constitutional values of freedom of expression with disciplinary codes that restrain abusive and insulting speech directed at members of groups identified by reference to such characteristics as ethnic or national origin, race, religion, gender and sexual orientation.

No other country entry discusses the issue of campus hate speech. This is not, presumably, because the phenomenon of racist expression in universities elsewhere in the world does not present a problem, but because such regulation would be unproblematic given the existence of constitutional and legislative standards which allow for the imposition of restraint by criminal or civil laws on hate speech. Explanations for the distinctive position of the United States must include its history as a society born in rebellion against, among other things, censorship. The fact that it was a "drawing board" society built by immigrants made possible the assertion of new principles of democratic republican order. In contrast, the European societies which the waves of immigrants left could not erase their histories of war, religious and ethnic quarrels and conflict.

The contrast may also be influenced by the different legal cultures, civil and common law, which have shaped mainland Europe and the United States. The First Amendment's injunction that "Congress shall make no law ... abridging freedom of speech or the press" reflects a distrust of federal regulation but also the attachment to the English traditions of negative liberty. In contrast, the Roman Law traditions of codification which have shaped European law do not equate regulation with restriction or repression. To the contrary, codification of freedom of expression rules including press codes, by specifying the scope of the right and identifying limits, are seen as positive guarantees of these freedoms. The English situation, where neither a formal constitutional guarantee of free speech nor detailed codes of law exist, may be considered the least satisfactory system from which to develop principled protection of rights in conflict.

It is worth noting that this contrast between the United States and the rest of the world has always been present at least in the post-war era. The efforts after World War II to establish a global code of freedom of information failed in large part because of the unbridgeable gulf between the then-Socialist states and the United States over the priority of right or duty and the role of the state in the regulation of freedom of speech and the press.

The most important early debates on this subject took place at the United Nations Conference on Freedom of Information in 1948. The key actors were the United States and the Soviet Union. The fruits of that conference included a draft set of guidelines for the world's press, a draft convention on freedom of information, a draft convention on the right to correction and a draft convention on the gathering and transmission of news.

The conference, although it achieved much, failed over a central problem: irreconcilable concepts of freedom and responsibility of the media. On the one hand, the United States insisted on the widest definition of freedom. It accepted that the press had to act responsibly, but it opposed any role for the state in ensuring truthful and ethical media standards. On the other hand, the Soviet delegates emphasized responsibility before freedom, and insisted on the right of the state to supervise the press.⁶ A chief concern of the Soviets was the suppression of war propaganda and incitement to national hatred. While the goal of elimination of war propaganda was shared by the US, at issue was the means. The US view was that greater freedom of all communications would be the best answer to distortion; the Soviets wanted state responsibility.

Ultimately, there was no way out of the deadlock over what the limits on expression are and how they are to be enforced. The conference failed but had influential effects for the modern debate over hate expression. Article 19 of the Universal Declaration was drafted at the conference, and the clause in Article 19 of the ICCPR that refers to the "special duties and responsibilities" in the exercise of freedom of expression can also be sourced to the debate at the conference. The United Nations Genocide Convention 1948 included as a punishable crime "direct and public incitement to commit genocide". (The long campaign to persuade the United States to ratify the Genocide Convention succeeded in 1988.) Lastly, the adoption of Article 20 of the ICCPR and its prohibition of war propaganda and expression which incites national, racial or religious hatred was added to the text of the ICCPR on the initiative of the Soviet Union and allied states, having been a clause first promoted by the USSR at the UN conference.

⁵ See the chapter by Nadine Strossen in Part III.

⁶ G Garbo *A World of Difference: The International Distribution of Information: The Media and Developing Countries*.

Article 20, paragraph 2 of the ICCPR, which is discussed in greater detail in Part II of this book, requires the prohibition of advocacy of national, racial or religious hatred which constitutes incitement to "discrimination, hostility or violence". The other international standard, Article 4 of the CERD Convention also discussed in Part II, goes further in requiring states parties to make punishable the dissemination of ideas based on racial superiority and to ban organizations which promote such ideas. As Professor Partsch makes clear in his chapter, the duties imposed by this article are to be implemented "with due regard to the principles embodied in the Universal Declaration of Human Rights". A number of states, for example the United Kingdom and France, have on ratification entered reservations or understandings to Article 4, all of which are to the effect that implementation of its requirements are subject to the state's own norms on the balance between freedom of opinion and expression and anti-discrimination policies.⁷ The CERD Committee has responded by calling for the full implementation of Article 4's requirements.

There cannot be said to be international consensus on the requirements of the article. The two least reconcilable positions are those of some members of the CERD Committee who call for comprehensive censorship of racism, thereby ignoring the "due regard" clause, and the national constitutional norm of the United States which rejects any law prohibiting incitement to discrimination or hostility. National laws in other countries outlined in this book represent a search for balance or harmony between those positions.

CONCLUSION

Is the US position then the only one for freedom of expression advocates to adopt? Does any "half-way" house sell the pass? The international and global standards are half-way houses. Freedom of expression is asserted as a standard which contracting states must guarantee, but they have equally clear authority to limit that freedom in the interests of promoting policies of racial equality and protection of ethnic and other minorities. However, so long as there is disagreement within the international monitoring bodies on the precise nature of states' commitments it is arguable that both freedom of expression and effective policies against racism are at risk. Similarly, unilateral interpretations by states through reservations to the international standards must weaken these standards. The fact that the United States as the most powerful country in the world has not ratified the CERD or ICCPR highlights the problem.⁸

The post-war efforts to achieve a comprehensive international protection of freedom of information, discussed briefly above, failed because of ideological polarization between the East and the West. In a new and welcome era in which there is no longer an ideological divide over human rights there ought to be a greater opportunity to reach international consensus both on the human rights challenges facing the world and on how to address them. Racism and racial discrimination, religious and ethnic conflict are among the most pressing of the challenges in all parts of the world. The importance of free and independent media for disseminating education on human rights and assisting the campaign against racism needs also to

⁷ See Annex B for the text of these and other reservations and declarations to Art. 4, as well as to Art. 20 of the ICCPR.

⁸ The US is expected to ratify the ICCPR in 1992, 16 years after it entered into force.

be reaffirmed. The case for a new international effort by governments to reconsider the agenda of further normative agreement on freedom of information through the CSCE, the United Nations and other fora should seriously be debated. The experience of the UNESCO-sponsored efforts on this subject of the 1970s may still arouse negative reactions to such a proposal. But this is a fundamentally changed world in which the questions of balancing freedom of expression and the demands of racial equality can be treated as an issue to be resolved within common commitments to democracy and human rights. It might also be added that the prohibition on war propaganda in Article 20 of the ICCPR could also have importance for the first time in examining the problem of the role of the media in ethnic and national conflict such as is being experienced at present in the former Yugoslavia.

Human rights organizations, both those working for racial justice and those dedicated to the defence of freedom of expression, could re-examine the types of arguments advanced for tolerating racist speech. If the presumption in favour of freedom of expression were replaced with a presumption in favour of non-discrimination what would the actual effect be? Would the results be necessarily damaging for free speech?

Some of the contributors in this book discuss the remedy of group libel as a defence against hate speech. The case of defamation of the individual is, however, a more interesting theoretical case to explore. The restraint on freedom of expression that the law of defamation in all countries represents is less controversial because it is seen as a conflict between two fundamental, individual rights, the right to a good name and freedom of speech. This conflict is also reflected in the international instruments. Where freedom of expression, typically freedom of the press, is given greater weight, that is invariably justified by some larger public interest in the communication. Thus the *Lingens Case* decided by the European Court of Human Rights followed the US Supreme Court's decision in *New York Times v. Sullivan* in allowing greater latitude to the media in criticizing politicians, even if this infringes their right to protection of reputation on the well-known ground that political figures must tolerate such criticism in the interests of strong political debate.

Applied to the issue of hate expression the libel standards might permit priority only to speech that was truthful or, in the case of the expression of opinions, what was a contribution to legitimate political debate.

Such an approach is not advocated here but is raised only to argue that it is incumbent on the supporters of freedom of expression to look more closely at the political justifications for the minimum restraint on anti-social hate expression. In what precise ways do the least controls on hate speech contribute to the overall social goal of equality and non-discrimination in a democratic society? There is a communal as well as an individual dimension to human rights and freedoms. Defence of the individual's right to promote racist views must not only be defended in terms of individual rights but in terms of the communal interests in equality.

Those who advocate suppression of the ideas of hate equally have a task to explain how effective such policies will prove or have proved. Beyond the declaratory effects of laws which outlaw racist statements, what evidence can be pointed to that, at least in isolation, suppression has deterred racism, intolerance and bigotry? There is evidence in this book of the abuse of restrictions which would justify the conclusion that little is gained and much is put at risk by punishing the expression of ideas however loathsome. The persistence of ideas of racial and indeed religious superiority within and between societies should engender scepticism that censorship is an answer. Perhaps what is needed is more, not less, attention to be paid to these ideas so that they can be confronted and understood. Dialogue

and democracy may prove in the long term more effective in understanding the anatomy of hate, and for that freedom of expression is a requirement. This book, with its extensive collection of sources and materials, may help to stimulate debate and further research on these questions, which are clearly needed.

Chapter 2

RACIST VIOLENCE: THE EXPRESSION OF HATE IN EUROPE

Paul Gordon

*... uncertain and afraid
as the clever hopes expire
of a low dishonest decade*
(W H Auden: "September 1, 1939")

At the end of the Maastricht summit in December 1991, the European Community's Council of Ministers was moved to issue a condemnation of racism and xenophobia, noting with concern that "manifestations of fascism and xenophobia are steadily growing in Europe, both in the member states of the Community and elsewhere". A few weeks later, a British court ruled that an asylum-seeker should not be removed to a country where he feared he would be persecuted: this country was not Sudan from which he had originally fled, but Germany where he had initially sought refuge. What the diplomatically worded declaration and the British judge's unprecedented ruling had in common was that they were both responses to the wave of racist violence that has been sweeping Europe, gathering pace over the past few years. In this chapter, I sketch a picture of the racially motivated violence that has been committed and continues to be committed throughout Europe, to illustrate the nature of such violence, to show who is affected and in what ways, and to try to relate this most devastating manifestation of racism and xenophobia to its wider context.

THE MEANING OF RACIST VIOLENCE

By racist violence, I mean acts of violence or abuse directed at people or their property which are motivated, at least in part, by racism, that is by hatred or contempt for people because of their skin colour, ethnicity, nationality or religion. (I deliberately avoid the word "race" here as a pseudo-scientific category. This is not, of course, to deny that a belief in its existence has consequences which are all too real - as this chapter shows.) We are now witnessing examples of such violence against people on all these grounds in every country of Europe, from the Atlantic to the Urals, from the Mediterranean to the Arctic Circle.

THE NATURE OF RACIST VIOLENCE

Anyone who is considered an "other" can be the object of racist violence whether this be on grounds of skin colour, ethnic origin, religion or culture. Frequently, of course, such grounds merge, as in the case of Arabs who may be attacked because of their religion, their ethnicity or their skin colour, or Jews who may be seen as

¹ General sources used for this article include the press cutting library of the Runnymede Trust; *Searchlight*; *Migration NewsSheet*; *Race & Class*, special issue "Europe: variations on a theme of racism", Vol. 32, No. 3 (January-March 1991); and G Ford, rapporteur of The Committee of Inquiry into Racism and Xenophobia, *Report on the Findings of the Committee of Inquiry* (European Parliament, 1990).

both culturally and religiously different. One should not look for pure grounds for such hate, but accept that many groups are in practice vulnerable to the expression of what we might loosely call "race hatred". In Europe at the present moment such groups include migrant workers and their families, refugees and asylum-seekers, Muslims, Jews and gypsies.

THE EXTENT OF RACIST VIOLENCE

It is impossible to quantify the extent of racist violence for the simple reason that few European states specifically monitor such acts. Even where this is done, for instance in Britain where all police forces maintain their own statistics of reported incidents, the official picture is incomplete, sometimes seriously so. Most victims of racist violence, it is established, do not report incidents either to the police or to other authorities and the extent of such under-reporting may be as much as 90 per cent.² In any event, to attempt to quantify the problem may be to miss the point, for racist violence affects not only those who are actually attacked but all those who may be attacked by virtue of their being members of the victim group. The impact of attacks, in other words, spreads far beyond the individual victims.

That said, it has been estimated that there are some 70,000 racist incidents in Britain each year, ranging from serious crimes such as murder, arson and physical assault to lesser offences of verbal abuse and criminal damage to property. Incidents reported to the police numbered just over 7,000 in 1990, an increase of 1,500 over the previous year.³ There have been 78 murders as a result of racist attacks since 1970, including 9 in the last three years. In Germany the federal police recorded some 1,800 criminal incidents against foreigners during 1991.⁴ While comparable data are not available from other countries, it is clear from press reports, accounts from minority groups themselves and other sources, such as the 1990 European Parliament inquiry into racism and xenophobia⁵, that racist violence, as defined above, is now widespread and increasing.

ATTACKS ON FOREIGNERS OTHER THAN ASYLUM-SEEKERS

Even before the widespread violence of autumn 1991 when the world watched in horror the daily attacks throughout Germany on migrants and asylum-seekers, migrants in Germany had been the target of numerous attacks. A Turkish youth was murdered in a racist attack in Berlin in 1989 and the same year four people were killed in an arson attack in Bavaria by a youth said to hate foreigners. In former East Germany, Mozambican and Vietnamese workers in particular were the target of attacks both individually and collectively through attacks on hostels. By autumn 1990, it was reported that black people could move around only in groups during the day and had to stay indoors at night because of the threat of attack.⁶

In France 20 foreigners were murdered between 1986 and 1990, all but one of whom was North African or of North African origin. In at least half of the cases, the motive appears to have been racist. The European Parliament report noted that racist attacks in France were unlikely to be reported unless they resulted in death or very serious injury.

In Eastern Europe, the collapse of the communist regimes unleashed hatreds that had previously been suppressed. In Bulgaria, 7,000 Vietnamese were deported in April 1991 in a panic response to a wave of racist attacks in Sofia and other cities. The Vietnamese embassy lodged formal protests over incidents including attacks in the street on its diplomats. Vietnamese workers have also been the target of skinhead violence in Czechoslovakia and in 1991 a commission to investigate attacks on gypsies was set up following a meeting between gypsy leaders and President Vaclav Havel's chief of staff. Gypsies migrating westwards to escape collapsing economies in Romania and Slovakia found themselves the subject of escalating attacks by gangs of skinheads. There were also reports of Arab diplomats being attacked in Prague, and in October a Turkish worker died in Pilsen as a result of a beating.⁷ In Hungary, the Martin Luther King organization estimated that there were between 60 and 80 attacks on Arab, African and Asian students during 1991. Many foreign students were reported to be carrying mace to protect themselves and to be staying indoors at night.⁸

Race hatred has also spread to countries which were previously thought to have little problem in this regard. In Italy, for example, a southern Italian migrant was beaten to death in Verona in 1989 and in the same year four African street vendors narrowly escaped death when fire gutted the caravan in which they were sleeping. The following year, riot police had to be brought into Genoa to restore order after attacks on Africans following the stabbing of nine people by a mentally ill Tunisian.⁹ In 1991, two Senegalese workers were killed and a third wounded when gunmen opened fire on their car with an automatic pistol. The three men had been taking a holiday in Rimini to celebrate the arrival of their residency papers.¹⁰

In Portugal, a government committee was set up in 1990 to investigate the situation of the country's minorities after an upsurge in skinhead violence against Africans. And in Denmark, two British students of Asian origin were forced to give up a year's placement after three days of racist threats. On their first evening in the country they were surrounded by a group of men who hurled racist abuse at them before they fled to their lodgings. The next days they were met with shouts of "Denmark for the Danes".¹¹

REFUGEES AND ASYLUM SEEKERS

As the number of people seeking asylum in European countries has increased owing to war, famine and persecution in Third World countries, so have European attitudes become more hostile, manifested in an alarming number of physical attacks on asylum-seekers across the continent.

2 C Brown, *Black and White Britain: the Third PSI Survey* (London: Heinemann, 1984).

3 *Hansard*, 6 June 1991, 3 July 1991.

4 *Germany Alert*, 28 November 1991.

5 G Ford, rapporteur for The Committee of Inquiry into Racism and Xenophobia, *Report on the Findings of the Committee of Inquiry* (European Parliament, 1990).

6 *Caribbean Times*, 4 September 1990.

7 *International Herald Tribune*, 15 October 1991.

8 *The Times*, 30 January 1992.

9 *The Independent*, 31 May 1990.

10 *The Guardian*, 7 September 1991.

11 *The Independent*, 20 August 1991.

The most dramatic single episode occurred in Germany in the autumn of 1991 when, over one weekend, there were more than 50 attacks, including one in which some 500 people gathered outside a refugee hostel in Hoyerswerda in Saxony and threw petrol bombs at it and at the police guarding it. The hostel dwellers eventually had to be removed to an army barracks for their own protection. In Saarlouis, on the French border, a young Ghanaian man lost his life in an attack on a hostel he shared with 20 others, and two Lebanese girls aged eight and six were seriously burned in an arson attack on a hostel in the Lower Rhine. In Saarbrücken a Tamil refugee lost his leg when skinheads laid him across a railway track where a train ran over him.¹²

In 1990 a Kurdish man was beaten to death in Freiburg and in Rorschach, three Tamils were shot at and one wounded as they walked home from work. In August 1991, a firebomb was thrown into a refugee centre in Schaffhausen and there were other reported firebombing incidents in Thun, Basel, Munchenstein. The German Federal Public Prosecutor counted 25 violent or suspicious incidents involving refugees or asylum-seekers in the first eight months of the year, including attacks with explosives and firearms.¹³

In 1987 in Louvain in Belgium, a refugee from Burundi was murdered by skinheads. In Britain, in January 1989 a young Somali refugee, then a student in Edinburgh, was killed by a white gang, and in January 1992 a Sri Lankan man who had fled the violence of his country died as a result of a racist attack in east London. In Switzerland, four Tamil refugees died in an arson attack in Graubünden in 1989. In Italy, in 1989 a South African refugee, Jerry Essan Masslo, was murdered in the southern town of Villa Literno. A few weeks before, a public petition with vast support had opposed local council plans to build a centre to house African seasonal workers. The petition called for a ban on black people.

Even countries with liberal records on asylum have witnessed an upsurge in attacks directed against refugees. In Denmark, there have been violent attacks on refugees themselves and on organizations and individuals supporting them. In Norway, a man was convicted in 1989 of conspiracy to bomb a hostel for refugees and the same year a bomb exploded in a Red Cross refugee centre in Eidsvoll. In 1990, Sweden witnessed a wave of arson and other attacks on refugee centres including five in less than a week in May in which 11 people were injured. And in Stockholm an Iranian political refugee, Jimmy Ranjbar, was shot dead by a sniper who had already injured four other foreigners.

The response of the authorities to such violence has not been to offer refugees real protection from such hatred but to espouse even more restrictive asylum policies.

MUSLIMS

It is difficult to identify attacks on people specifically because they are Muslims, as distinct from those on people because they are Asian, Arab or whatever and also Muslim, but it is clear that such attacks do take place and are increasing. In March 1990, for example, a mosque in Rennes was bombed in an apparent response to President Mitterand's denunciation of "crimes of stupidity, brutality and intolerance" in the wake of the violent death of three young men of North African origin

during the previous week.¹⁴ Following the start of the Gulf War, a Muslim taxi driver in the northwest of England was stabbed to death and there were reports of attacks on up to 20 mosques.

ANTI-SEMITISM

The present wave of racist violence has also involved an apparent resurgence of anti-Semitic incidents. Although there have always been such incidents, the past few years have witnessed a dramatic increase. The desecration of the Carpentras cemetery in May 1990 outraged the world and led to huge demonstrations and protests in France and elsewhere. A series of desecrations followed in Britain, although little notice was paid to the fact that the desecration of Jewish graves in north London had occurred some days *before* the Carpentras atrocity. Such incidents were not, therefore, simply imitating what had happened elsewhere, as was widely suggested at the time.

The same year, a Jewish cemetery in East Berlin was desecrated and the graves of Bertolt Brecht and his wife, Helene Wiegel, were daubed with the words "Jewish pigs". In 1991, the cemetery was desecrated for the third time when a swastika and bag containing a pig's head were left in prominent view. In St Gallen in Switzerland in July 1990, Jewish cemeteries were desecrated and headstones painted with the slogans "Death to the Jews" and "Heil Hitler". Jewish graves in Vienna's main cemetery were desecrated shortly before a visit by Tamar Kollek, wife of the mayor of Jerusalem. This was at least the 25th incident of desecration during the year in the Jewish section. The mayor of Vienna dismissed the incidents as "boyish pranks".¹⁵

The Gulf War precipitated a number of anti-Semitic incidents in Britain. In January 1991, a cemetery in Portsmouth was daubed with Nazi graffiti. The same month, the offices of a Jewish school in north London were extensively damaged by fire, and police extinguished a small fire on the roof of a synagogue in Staines. Jewish schools also reported an upsurge in the number of assaults on pupils. In France, molotov cocktails were thrown at a synagogue in Lyon, although only slight damage was caused. A synagogue near Strasbourg was also slightly damaged. In Paris, firebombs were thrown at a Jewish school. In Slovakia, a Jewish cemetery was desecrated in September 1991 following the inauguration in the area of a monument to Jewish victims of the Holocaust.

GYPSIES

The violent hatred experienced by Europe's gypsy population too frequently goes unnoticed. Yet gypsies, like other minorities seen as different or "other", face extensive violence. In Czechoslovakia, as mentioned above, complaints of attacks from gypsies led to the appointment of a government commission of inquiry in 1991. In Spain, the country's half million gypsies have been the target of numerous attacks. All over France, gypsies face routine harassment and discrimination.

¹² *The Times*, 16 October 1991.

¹³ *The Independent*, 12 August 1991.

¹⁴ *The Times*, 16 March 1990.

¹⁵ *International Herald Tribune*, 12 October 1991.

FASCIST INVOLVEMENT

It is tempting, when discussing racist violence, to seek to blame those who espouse racial hatred most loudly, namely, the members and supporters of fascist and other far right groups. Such groups offer an easy explanation for horrendous occurrences. Yet it is precisely for this reason that one must be wary of opting for this explanation. It is, of course, true that avowed fascists preach race hatred and espouse doctrines of racism, anti-Semitism and xenophobia. It is equally true that many fascists have been involved in acts of violence against minorities.

In France, for example, 16 neo-Nazis were convicted in 1991 of a series of bomb attacks against Arab immigrants in which one person was killed and 19 others injured. The two gang leaders were sentenced to four years' imprisonment. In Germany the same year, a gang of 15 neo-Nazis was accused of killing a Moroccan immigrant worker, Jorge Gomndai, who was thrown from a train in Dresden in March. Police had to protect mourners at his funeral from some 300 neo-Nazis armed with clubs, knives and tear gas. In Norway Arne Myrdal, the leader of the FMI (People's Party Against Immigration), was sent to prison for one year for his part in the bombing of an immigrant hostel and 11 members of the *Nasjonalt Folksparti* (NF) were sent to prison for bombing a mosque in Oslo. In Italy, a fascist death squad, possibly with military connections, is believed by police to have been responsible for nearly a dozen attacks since December 1990 on gypsy or immigrant targets which left 15 people dead and 21 injured. To these one should add the extensive evidence of fascist terror, either planned or carried out, since the 1970s aimed at political opponents and the destabilization of democratic governments.¹⁶

Despite such incontrovertible evidence that fascists are involved in the violent expression of hatred, the phenomenon of racist violence is far too extensive to be laid only at the door of fascist groups, which are often very small. This is not to underestimate the hatred which such groups stir up or the influence which they wield despite their small numbers. Rather, my point is that racist violence and hatred are phenomena which are wider in both origin and scope than the active membership or support of fascist groups.

INCITEMENT TO RACIAL HATRED

Similarly, it would be wrong to look to the availability of racist literature to account for racist violence. It is true that a considerable amount of such literature now circulates in Europe and that racism has spread to new technology with new-Nazi computer games such as *The Aryan Test* and *Anti-Turkish Test* available in Germany and other countries. Yet no simple causal connection between literature (or other material) and violence has been established. The most that can be said with any certainty is that racist literature probably provides encouragement to those who are already hostile to minorities and that it is sought out by racists. This is not to argue that laws against the expression of racist hatred are wrong or irrelevant. As Michael Banton argues in this volume, such laws can have an importance in redrawing the limits of what is acceptable in any society and in setting new standards of behaviour. I do, however, caution against viewing such laws as an

answer to the expression of racism. Racist literature and racist violence are both manifestations of the same problem and that problem is racism.

CLIMATES OF OPINION

To understand the growth of racist violence in any society it is necessary to understand the social and political climate in which it occurs. Racist violence is an expression of racism and flourishes in societies where racism has become respectable or at least is not widely and consistently condemned. Europe, it seems, is now such a society. According to a poll carried out in 1988, one European in three believes that there are too many people of another nationality or "race" in their country, while about one in ten people say they approve of racist movements and only 19 per cent say they disapprove completely. More than one in two respondents feel there are too many "others" (defined in terms of "race", nationality, religion, culture or social class), although such feelings are least evident in countries of emigration such as Portugal, Greece, Spain and Ireland.¹⁷ By 1991, public opinion seems to have hardened, with even higher proportions of people in several countries expressing the view that there are too many immigrants, including 63 per cent in the United Kingdom and about 55 per cent in France, Belgium and Germany. Not surprisingly, there is also increasing opposition to granting more rights to immigrants.¹⁸

Such a general picture is supported by evidence from particular countries. In France, a damning picture of racism was presented to the government by the National Consultative Commission on Human Rights in March 1990. Not since the war, Paul Bouchet, the Commission's president said, had people felt so free to declare openly their nationalistic opinions in preference to those on racial integration. It was considered all right now, the report said, for people to declare that they were racist. Although the report claimed that there had been no manifest upward trend in physical racist attacks, which oscillated between 43 and 70 a year since 1982, there had been a steep increase in verbal threats, such as tracts and graffiti. An opinion poll for the survey found that 76 per cent of French people believe there are too many Arabs in France and 71 per cent think that there are too many Muslims. A much smaller proportion, 46 per cent, believe that there are too many black people in the country.¹⁹ A September 1991 poll shows that more than 40 per cent of the population believe immigrants who commit crimes or are unemployed for more than a year should be sent "back home". The same poll places the fascist leader Le Pen at the top of the list of politicians thought to have the "best policies to solve the immigration problem".²⁰

In Germany in response to a *Der Spiegel* survey in 1989, 79 per cent of Germans said they believed there were too many foreigners in the Federal Republic. In Austria, according to an opinion poll in October 1991, one in five people believes that the rights of Jews in the country should be restricted and that Austria would be better off without the Jews at all, while one in two Austrians believes that the Jews are partly to blame for the persecution they have suffered.²¹

17 *Eurobarometer*, November 1989.

18 *Eurobarometer*, June 1991.

19 *The Times*, 28 March 1990; *Financial Times*, 30 March 1990.

20 *The Economist*, 28 September 1991.

16 See, e.g., R Hill and A Bell, *The Other Face of Terror: Inside Europe's Neo-Nazi Network* (London: Grafton Books, 1988).

Such attitudes of hostility towards foreigners have found political expression in support for fascist and other extremist parties. Across Europe, such parties which have emphasized their anti-foreigner policies have scored spectacular successes. In France, the fascist *Front National*, which calls for the expulsion of immigrants and an end to the "Islamification" of France, obtained two million votes in the 1989 elections for the National Assembly and its leader, Jean-Marie Le Pen, obtained four million votes (14.4 per cent) in the first round of the presidential election the same year. The organization now has 10 representatives in the European Parliament, one deputy in the National Assembly and several hundred local councillors.

In Germany, the far right Republikaner Party (REP), which advocates the repatriation of foreign workers, won six seats in the 1989 European Parliament elections with 7.1 per cent of the vote. The total vote for the far right was 2.6 million. In Berlin the REP won 7.5 per cent and 11 seats in the local parliament. It scored significant successes elsewhere, including nearly 10 per cent of the vote in Stuttgart and Mannheim, although its fortunes appear to have declined after German re-unification, and it failed to win enough support to gain any seats in the Federal parliamentary elections in 1990. In Belgium, the Vlaams Blok trebled its vote in 1991 taking 21 per cent of the vote in Antwerp and winning 12 seats while the National Front took one.

Even in countries with more liberal reputations there are worrying signs. In Denmark for instance, the so-called Progress Party, which promises to expel all Muslims and refugees, won 9 per cent of the vote in 1988, giving it 16 of the Parliament's 179 seats, while in Sweden the New Democracy party won 24 parliamentary seats in September 1991. It would be wrong to see all those who vote for extremist right-wing parties as die-hard fascists; many presumably vote for such parties in protest at the perceived failure of the traditional political parties to address their concerns. Nevertheless, it would be equally wrong not to see that all the parties mentioned above directly address the question of immigration and are openly racist. Support for them can and should be seen as a worrying expression of racism and xenophobia.

POLITICAL RESPONSES

Faced with manifestations of racism and xenophobia such as support for far right parties and violent attacks on minorities, politicians have a choice. They can choose to address such racism and confront it in a number of ways, for instance, through vigorous condemnation backed up by the law and education. In few cases, however, has this been the response. Or, as has been happening increasingly, politicians can remain silent or indeed contribute actively to a climate in which minorities are seen as a threat. In July 1991, for example, Liselotte Funcke, the head of Germany's Department for the Integration of Foreign Workers and their Dependents, resigned on the grounds that not enough was being done to curb racism, anti-Semitism and xenophobia. She was quoted as having said that the "silence from the Chancellery makes me wonder about the sort of priority given to the plight of foreigners in this country".²¹ A few months later in a speech marking the first anniversary of German re-unification, Chancellor Kohl failed to condemn the violence then taking place against refugees and migrants, making only passing reference to the need to show

"tolerance and respect towards foreign citizens".²³ At the same time, the German Interior Minister, Wolfgang Schaeuble, told an emergency debate of the federal parliament that asylum-seekers should be returned to any country which they had passed through on their way to Germany.

Other political leaders have gone even further, actively portraying minorities as a threat to their societies. In Britain, Margaret Thatcher, later to become Prime Minister, spoke in 1978 of people's fears that they would be "swamped" by immigrants; this sentiment was echoed recently by former French President Valéry Giscard d'Estaing who spoke of the "invasion" of France by immigrants and called for a new citizenship law based on "blood" and an end to the automatic right to citizenship by birth on French soil.²⁴ Across Europe, sections of the press accuse asylum-seekers of being "economic migrants" who are abusing the refugee system, and link immigrants to crime and other problems such as drug abuse and AIDS, while Muslims are accused of being anti-European.

At the level of policy, the dominant response to current problems has been to advocate increasingly restrictive immigration policies, especially concerning family reunion and asylum rights. Nor is this limited to national policies. At the level of the European Community too, increasing emphasis is being placed on the creation of "Fortress Europe" within which there will be greater freedom of movement for EC nationals at the expense both of the Community's "Thirteenth state" of several million immigrants, migrants and refugees and of those outside the EC who will find it increasingly difficult to get in.

It may, at first sight, seem logical for politicians to advocate restrictive immigration policies in response to perceived public concern about immigrants. In practice, however, what this does is to convey to people that they are right to feel concerned, that black and other minority people are a problem whose numbers must be restricted. Popular prejudices, in other words, are sanctioned by the state. Nor does this achieve the professed aim of improving relations among peoples. As the British experience shows, an immigration policy which states, in effect, that black and Third World people - those portrayed as outsiders - are a problem to be kept out, does not allay racism. Racist violence has not diminished as a result of the increasingly restrictive immigration policies adopted since 1962. Rather, a racially discriminatory immigration policy has made racism respectable and thus rendered increasingly precarious the situation of minorities who are already resident.

CONCLUSION

There is an alternative: to challenge racism in all its forms. This would include firm action by the police and others against the violent expression of racist hatred. But more is required. In order to change the environment in which racist hatred grows, governments must commit themselves to policies and practices aimed at encouraging respect for the human rights and dignity of those in society who are regarded as different.

21 *The Guardian*, 25 October 1991.

22 *The Daily Telegraph*, 13 July 1991.

23 *The Daily Telegraph*, 4 October 1991.

24 *The Guardian*, 24 September 1991.

PART II: International Standards

**RACIAL SPEECH AND HUMAN RIGHTS: ARTICLE 4 OF THE
CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL
DISCRIMINATION****Karl Josef Partsch**

This paper examines how the principle of freedom of expression can be reconciled with attempts to suppress racial discrimination. The main inspiration for such efforts is the International Convention on the Elimination of All Forms of Racial Discrimination (the CERD Convention), which was adopted by the General Assembly in 1965 (one year before the two International Covenants on Human Rights) and which entered into force in 1969 (seven years before the International Covenants). The CERD Convention has been in force since 1960 and had been ratified by 129 states as of January 1992.

Are the measures provided for in this Convention compatible with freedom of opinion and expression? Is it possible to strike a balance between the goal of eliminating racial discrimination, which has been accorded high priority by the international community, and "one of the most precious rights of man", as freedom of expression is described in the French Declaration of 1789?

Some general remarks are necessary at the outset. The Convention is an international treaty which imposes certain obligations on the states parties which have ratified it. The main principle to which it is dedicated, namely the elimination of racial discrimination, had already been addressed by Articles 1(2) and 55(c) of the Charter of the United Nations, Article 2 of the Universal Declaration of Human Rights (UDHR) and Article 2 of both International Covenants on Human Rights. Why then was a separate Convention on this matter needed? Frequently, it is said that the development of the Convention was a response to a revival of anti-Semitism.¹ The international concern regarding apartheid was also a motivating, if not the decisive, factor. Developing countries, together with socialist states, actively supported the Convention's drafting and adoption.

The CERD Convention elaborates to a much greater extent than the earlier instruments the obligations of states parties to eliminate all forms of racial discrimination, and provides for machinery to promote its observance. The CERD Convention leaves to the states parties the discretion to determine exactly how they will implement the Convention's obligations within their jurisdictions.

The monitoring of compliance with Convention obligations is entrusted to a Committee of 18 independent experts, elected by states parties, called the Committee on the Elimination of Racial Discrimination (CERD). States parties submit periodic reports to the Committee and send representatives to discuss reports with Committee members. The dialogue between representatives and the Committee is its most important working method, producing better results than written suggestions or recommendations could ever achieve.

¹ See, e.g., Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination", *Int. and Comp. Law Quarterly* 996, 997 (1966).

THE CONVENTION'S COVERAGE

Definition of Race

The fundamental concept of "race" is defined very broadly in Article 1(1). It includes "colour, descent, or national or ethnic origin". Article 1(1) thus refers not only to biological criteria, but also to social, cultural and historical elements. Articles 1(2) and 1(3) make clear that the Convention does not apply to distinctions between citizens and non-citizens, but that states parties may not discriminate against any particular nationality in granting citizenship.

The breadth of the Convention's definition of race avoids numerous controversies. Thus, for instance, although there is some dispute as to whether the scheduled castes in India constitute an ethnic group or merely a social group, they clearly are of a certain "descent" and thus must be regarded as a "race" within the sense of the Convention.

Other controversial questions nonetheless remain. Are tribes to be regarded as ethnic groups? What about indigenous populations? What about linguistic or religious groups? Although religion was included in initial drafts of Article 1(1), it was not included in the final text. As a general rule, a group's consciousness of its own separate identity determines whether it is a "race" for purposes of the Convention's protections. As stated by CERD in a 1990 general recommendation: "[T]he ways in which individuals are identified as being members of a particular racial or ethnic group ... shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned.² Whether the majority regards the group as different is also significant.

Definition of Discrimination

"Discrimination" is defined in Article 1(1) to mean "any distinction, exclusion, restriction or preference" on grounds of race, which "has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms". The Convention makes clear that it addresses discrimination not only in the political and economic arenas but also in the "social, cultural or any other field of public life". By this last element, the scope of the Convention is distinguished from non-discrimination clauses in other human rights instruments, whether national or international. The Convention is not limited to discriminatory acts by public authorities against the individual but covers the whole of public life. It therefore permits, and arguably requires, multifarious preventive and affirmative measures to assist potential targets of discrimination, as well as punitive measures against individuals who discriminate.

OBLIGATIONS OF STATES PARTIES

Article 2: Less Serious Acts of Racial Discrimination

Article 2(1)(d) provides:

² CERD, General Recommendation VIII, adopted on 21 August 1990, 45 GAOR Supp. 18, UN Doc. A/45/18, Chapter VII (1990).

Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization ...

The type of discriminatory act which must be prohibited is not specified. The provision is applicable to all kinds of acts, except in so far as the Convention makes special provision in other articles, such as for serious violations in Article 4. Thus, Article 2(1)(d) deals only with less serious cases: non-violent acts with a minor propagandistic effect and non-organized activities by private persons. This may explain why the drafters decided to leave entirely to the states parties decisions concerning how to implement the article. Appropriate measures include those of an administrative, conciliatory, disciplinary or educational nature. Of course, the Committee has rejected arguments by states parties that they are not required to take *any* measures on the ground, for instance, that discrimination does not exist in their countries.³

Legislation, in such cases, is necessary only "as required by circumstances", for example, if promotional measures have proved insufficient and it appears necessary to impose legal obligations in order to make the relevant persons responsible for their acts. Criminal sanctions do not necessarily have to be imposed. It may be sufficient to declare that certain acts are "unlawful". States have discretion to decide whether "all appropriate means" to prohibit acts addressed by Article 2 include, or do not include, restrictions on freedom of expression.

Article 4: Serious Acts of Racial Discrimination

Article 4 identifies discriminatory acts of particular gravity and obliges states "to adopt immediate and positive measures" to counteract them.⁴ Persons who commit acts identified in Article 4 must be punished, and organizations must be prohibited and restricted in their activities. This paper focuses on how Article 4 affects actions by individuals, acting alone.

The "with due regard" clause. The introductory paragraph of Article 4 declares that "States Parties ... undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, ... 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) shall take the specific measures set forth in paragraphs (a), (b) and (c).⁵ The emphasized clause, often called the "with due regard" clause, exercises an important influence on the content and range of the obligations of state parties set forth in the article's three subparagraphs. The clause was the outcome of a difficult

³ See D Mahalic and J Mahalic, "The Limitation Provisions of the Convention on the Elimination of All Forms of Racial Discrimination", 9 *Human Rights L. Q.* 74-101 (1987).

⁴ The full text of Article 4 is set forth in Annexe A.

⁵ Article 5 of the Convention provides that states parties "undertake to guarantee" equality in the enjoyment of the following rights: equal treatment by the law; security of the person; political rights; other civil rights (in particular, freedom of movement and residence, the right to leave any country and return, nationality, marriage, choice of spouse and ownership of property); freedom of thought, opinion and expression; freedom of peaceful assembly and association; economic, social and cultural rights; and the right of access to any public place or service.

compromise reached after days of discussion, drafting and redrafting. Its interpretation is, unfortunately, still highly controversial.

When the Convention was being drafted, the language recommended by the Commission on Human Rights was that "all incitement to racial discrimination resulting in acts of violence as well as all acts of violence or incitement to such acts" should be punished by law.⁶ Its draft remained very close to Article 20 of the International Covenant on Civil and Political Rights, containing also the elements of "incitement" and "violence".

Only in the Third Committee of the General Assembly was it proposed to declare a punishable offence all "dissemination of ideas and doctrines based on racial superiority or hatred" without regard to violence.⁷ Political and highly ideological elements were thereby introduced. Five Scandinavian delegations offered a counter-proposal. According to their text, a state party would be entitled to impose restrictions to implement Article 4(a) only if the restrictions respected fundamental human rights. Their first draft provided that states parties must take the requisite measures to combat discrimination "without limiting or derogating from the civil rights expressly set forth in Article 5."⁸ In order to make this clause more widely acceptable, it was reworded: "with due regard to the rights expressly set forth in Article 5". France then proposed an additional reference to the Universal Declaration.⁹ All three proposals were combined in a compromise version and finally adopted after abundant discussion.

There are three different schools of thought concerning the effect of the "with due regard" clause on the obligations of states parties:

- (1) states parties are not authorized to take any action which would in any way limit or impair the relevant human rights referred to in the "with due regard" clause;
- (2) states parties must strike a balance between fundamental freedoms and the duties under the Convention taking into account that the relevant guarantees are not absolute but subject to certain limitations authorized in the relevant instruments;
- (3) states parties may not invoke the protection of civil rights as a reason to avoid enacting legislation to implement the Convention.

To the first school of thought belongs the United States of America, which has signed but not ratified the Convention. On signature it declared:

The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution¹⁰

The declaration of the United Kingdom is less radical. It interprets Article 4 as requiring legislative action only when a state party considers it necessary, with due regard to the UDHR and the rights contained in Article 5, for achieving the

6 UN Doc. A/5921 (1965).

7 Amendment by Czechoslovakia, 20 GAOR, UN Doc. A/C.3/L.1220 (1965).

8 UN Doc. A/6181, para. 63 (1965).

9 Combal, 20 GAOR, UN Doc. A/C.3/SR. 1315, para. 69 (1965).

10 See also 20 GAOR, UN Doc. A/C.3/SR. 1318, para. 59 (1965).

objectives of Article 4. In the Third Committee, when Article 4 had been put to a vote, the UK abstained, and did not vote against, in the belief that the "with due regard" clause sufficiently safeguarded freedom of expression. The Committee later expressed the hope "that the reservation made by the UK on signing the Convention would be revised".¹¹

Canada has adopted the second perspective. In the Third Committee, the Canadian delegate, Mr Macdonald, requested the Committee "to devise a balanced legal formula which would allow the law to reach such offences without infringing human rights and freedoms".¹² Several states made similar statements when signing or ratifying the Convention.¹³ Austria and Italy declared "that the right to freedom of opinion and expression may not be jeopardized". Belgium stated that the obligations imposed by Article 4 "must be reconciled with [*inter alia*] the right to freedom of opinion and expression". France interpreted the clause "as releasing the states parties from the obligation to enact anti-discrimination legislation which is incompatible with the freedoms of opinion and expression" guaranteed by the UDHR and Article 5. Reliance on a declaration of this sort would quite clearly require a state to take into consideration not only the text and content of the right itself but also permissible limitations upon it. The same should be understood of declarations which include terms like "jeopardized" or "reconciled". The use of such terms should not be interpreted, as done in the Committee's Study of Article 4, to suggest that the respective states did not believe that any legislation should be adopted which restricted freedom of expression (which is the position of the first school of thought).

The third interpretation was maintained at a seminar on recourse procedures convened by the UN Human Rights Division in Geneva in July 1979. This school of thought denies that the "with due regard" clause has any influence on the obligations of states parties. It presupposes that freedom of expression can be reduced to zero by relying on the limitation clauses.¹⁴ This perspective fails to take account, however, of Article 30 of the Universal Declaration which does not permit the complete destruction of a human right through the exploitation of a limitation clause.

The Special Rapporteur for the Committee's Study on Article 4 seems to have had some sympathy for this perspective.¹⁵ However, in the introduction to the Study, issued as an official Committee document, it is stated: "It is clear that a balance must be struck between article 4(a) of the Convention and the right of free speech ...".¹⁶ The present author is of the opinion that such an interpretation is in conformity with the text and spirit of the Convention and adopts this position in the rest of this paper.

11 35 GAOR Supp. 18, UN Doc. A/35/18, para. 389 (1980).

12 20 GAOR, UN Doc. A/C.3/SR. 1315, para. 24 (1965).

13 Texts of the reservations, declarations and understandings are reproduced in Centre for Human Rights, *Status of International Instruments* UN Doc. ST/HR/3.99-126 (1988); see also Committee on the Elimination of Racial Discrimination, *Positive Measures Designed to Eradicate All Incitement to, and Acts of, Racial Discrimination*, (hereafter "CERD Study") (1986), also referred to as CERD/2, first printed as UN Doc A/CONF.119/10 in 1983.

14 See CERD Study, *supra* note 13, at para. 108 (discussing the general consensus of the seminar).

15 See *id.*

16 *Id.* at para. 4.

The "with due regard" clause does not have equal relevance for all of the various obligations states have under Article 4(a). Some of the restrictive measures have a direct connection with freedom of expression, others only an indirect one or even none at all.

These measures are now examined with special attention to the impact of the clause. Some examples from the practice of the Committee are quoted. The Committee rarely takes decisions as a whole except when preparing suggestions or recommendations. Thus, observations made by Committee members during the Committee's consideration of states reports mostly reflect the personal opinions of individual members, who may interpret the Convention in their own way and may be inclined to dismiss the significance of Article 4's introductory paragraph.¹⁷

Article 4(a): Acts by individuals. Article 4(a) prohibits the following acts:

- (1) all dissemination of ideas based on racial superiority;
- (2) all dissemination of ideas based on racial hatred;
- (3) incitement to racial discrimination;
- (4) all acts of violence against any race or group of persons of another colour or ethnic group;
- (5) incitement to such acts;
- (6) the provision of any assistance to racist activities, including the financing thereof.

When Article 4 was adopted, the clause concerning the prohibition of ideas based on racial superiority met with the strongest opposition. It is indeed hardly possible to define or even imagine the direct effect which the mere dissemination of ideas may have on the enjoyment of human rights or freedoms. The communication of ideas is protected by the right to freedom of expression. It is one thing to condemn certain ideas, as is done in Article 4's introductory paragraph, and quite a different thing to criminalize them. In the absence of the "with due regard" clause it would be necessary, according to the text of Article 4(a), to prohibit discussion. Even if one might easily do without the works of Count Gobineau, Houston Stuart Chamberlain and Richard Wagner, their suppression would be highly unfortunate. It is worth recalling the comment of the UN Secretary-General made during the General Assembly's discussion of this issue: "in the case of freedom of speech ... there are zones in which it is both very difficult and dangerous to draw the line between legitimate and illegitimate exercise of liberty".¹⁸

In seeking to restrict the expression of ideas based on racial superiority, care must be taken to ensure that freedom of expression is respected. Although some countries have copied the text of Article 4 in their penal codes, many others have abstained from including this restriction. Committee members who have criticized this abstention tend to minimize the import of the "with due regard" clause.

The second kind of conduct which is prohibited - namely, ideas based on racial hatred - raises issues different from ideas based on racial superiority. Hatred is an active dislike, a feeling of antipathy or enmity connected with a disposition to injure. If this disposition is actualized it may be an offence. The German Penal Code (Article 130(1)), for instance, prohibits "inciting hatred against certain groups

of the population", if it is done in a manner "liable to disturb the peace". When the Committee discussed Article 130(1), some members objected that the offence imposed a condition which did not appear in the text of Article 4(a).¹⁹ It is questionable whether the punishment of a not yet actualized idea of hatred is authorized by Article 29 of the UDHR, as being necessary to secure "due recognition and respect for the rights and freedoms of others" or to meet "the just requirements of ... public order". In his answer, Germany's representative justified the imposition of such a condition by referring to the "with due regard" clause.

On similar grounds, Committee members raised objections to Section 70 of the United Kingdom's Race Relations Act 1976 which required that a statement, to be prescribed as "incitement to racial hatred", must be "threatening, abusive or insulting."²⁰ Under Article 4(a), legislation may require racist statements to be of a certain intensity. Legislation cannot, however, require proof of an intention to stir up racial hatred or proof that racial hatred was actually stirred up as a result. The Committee welcomed the initiatives of France and the United Kingdom to abolish requirements to prove a subjective intention for acts of incitement.²¹

Acts which constitute "incitement to racial discrimination" pose less of a problem. Here a concrete act, defined in Article 1 of the Convention, is required. As the prohibition of racial discrimination is part of the public order, problems of an infringement of freedom of expression play a minor role. In instruments implementing Article 4(a), this offence should be clearly distinguished from the offence of dissemination of ideas based on hatred.

In practice the problem has frequently been raised as to whether intent is required. According to many penal codes, incitement to an offence is only punishable when committed with intent, unless the act of incitement is a special offence. Otherwise, merely negligent conduct is not punishable.

In some ways it is remarkable that Article 4(a) makes incitement to, and aiding or abetting, racial discrimination an offence when it does not require that racial discrimination itself be made punishable. Acts of direct discrimination are only covered by Article 4(a) if accompanied by the use of violence.

The fourth and fifth offences under Article 4(a) concern acts of violence. Such acts, which are treated as crimes in virtually all countries, do not need special explanation in this context. Even the fact that they might be committed in connection with the exercise of the right to free expression can hardly justify such acts.

The sixth offence, the financing of racist activities, although included in Article 4(a), mostly concerns organized activities, which are the subject of Article 4(b). Because this offence does not directly conflict with the right to freedom of expression, it will not be discussed here.

Criminal penalties. A final question is whether states are obliged, under all circumstances, to enact criminal provisions and to entrust their application to the courts (rather than, for instance, to specially constituted administrative bodies). Although the text seems to require this, it can be questioned whether criminal punishment is an appropriate means to eliminate racial discrimination. The danger

¹⁷ See Mahalic and Mahalic, *supra* note 3, at 74-101. The authors tend to treat the opinions of individual members as reflecting the consensus of the entire Committee.

¹⁸ 20 GAOR, UN Doc. A/C.3/SR. 1316, para. 4 (1965).

¹⁹ 32 GAOR Supp. No. 18, UN Doc. A/32/18, paras. 84 and 87 (1977).

²⁰ 33 GAOR Supp. No. 18, UN Doc. A/33/18, para. 339 (1978). Section 70 of the Race Relations Act 1976 has been replaced by Part III of the Public Order Act 1986.

²¹ CERD Study, *supra* note 13, paras. 95 and 130.

ARTICLE 20 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Ineke Boerefijn and Joanna Oyediran

exists that the offender found guilty of a discriminatory act, far from changing his attitudes, may become even more stubborn and confirmed in his convictions. Public proceedings in a court may also, inadvertently, provide the offender with the opportunity to publicize his racist views.

There are some countries which have provided for an elaborate system of conciliatory measures, taking into account the particular problems of particular forms of discrimination, for example, in employment, housing, advertising, publications, meetings, education and training. Proceedings are entrusted to human rights commissions which often work *in camera* and with flexible rules of procedure and proof in order to facilitate the achievement of an appropriate solution. They are entitled to order offenders to desist from similar acts or to satisfy and compensate the claimant. Such measures to promote understanding and tolerance and to combat prejudice are called for in Article 7 of the Convention. May such conciliatory measures not only supplement but also replace penal proceedings?

The Committee was confronted with this question in reviewing the reports submitted by Australia and Canada. The Australian Racial Discrimination Act 1975 is entirely limited to such conciliatory measures and does not provide for criminal measures. In this Act a great number of discriminatory acts are defined as "unlawful", but not criminally punishable. In defending this solution against objections raised by Committee members, the Australian representative argued that the reference to "penalties" included civil remedies. This argument was rejected by the Committee. The Australian government was repeatedly and with insistence requested to "abandon its reservation with regard to Article 4(a) of the Convention".

In Canada the promotion of racial hatred against an identifiable group is not only "unlawful" but also, in certain circumstances, punishable under criminal law. The dissemination of ideas, for instance, does not constitute a criminal offence and instead is dealt with by a Human Rights Commission which attempts to facilitate the negotiation of a voluntary settlement between the parties. The Canadian government has reported that about 80 per cent of substantive claims were resolved in this way.

Several Committee members objected to this lacuna in the implementation of Article 4 and referred to "the clear meaning of its mandatory provision". Most members, however, were impressed by certain decisions of the Canadian courts and by the announcement that the Minister of Justice was in favour of reviewing the relevant legislation. The Committee did not finally insist on its objections.

In principle, the Committee requires criminal sanctions for all of the offences mentioned in Article 4(a), without agreeing expressly that criminal sanctions can be substituted by conciliation procedures. However, it has displayed some flexibility on this point.

Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR) obliges states parties to enact legislation which prohibits "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".¹

THE DRAFTING HISTORY OF ARTICLE 20(2)

The drafting of Article 20 was debated extensively, and even the final text was controversial: it was adopted by 52 to 19 votes in the Third Committee of the General Assembly, with 12 abstentions. Several states parties made reservations and declarations concerning Article 20, including Australia, Belgium, Luxembourg, New Zealand and the United Kingdom.²

The Covenant's drafting history shows that there was considerable debate in the Commission on Human Rights as well as in the Third Committee as to whether the Covenant should include an article prohibiting advocacy of national, racial or religious hatred.³ In the Commission on Human Rights, France, in favour of the adoption of such an article, emphasized that the strong influence of modern propaganda on "the minds of men" rendered legislative intervention necessary. France did not consider the provisions of Article 19(3) (which permit restrictions on expression where prescribed by law and necessary to protect, *inter alia*, public order or the rights or reputations of others) to be adequate, as they did not impose upon states parties an obligation to prohibit the advocacy of national, racial or religious hatred.⁴

A number of arguments were put forward in the Commission against the adoption of such an article. Fears were expressed that its adoption might lead to abuse and would be detrimental to freedom of expression. It was also contended that legislation was not the most effective way to deal with the problem of national, racial and religious hostility and that, if propaganda should constitute a menace to public peace, Article 19(3) would be applicable.

The amendment submitted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed that only advocacy of national, racial and religious hostility which constituted an incitement to violence should be made a punishable offence. Despite criticism that "hatred" was a subjective notion not capable of being legally defined, an amendment proposed by the People's Republic of China was incorporated into the Sub-Commission's draft proposal so

1 The full text of Article 20 is reproduced in Annexe A.

2 The texts of the reservations and declarations are included in Annexe B.

3 The following summary of the drafting debate is drawn from M J Bossuyt, *Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987), 403 *et seq.*

4 The complete text of Article 19 is reproduced in Annexe A.

that incitement to hatred would also be an offence. This text was adopted by the Commission on Human Rights by 11 votes to three with three abstentions.

Although there was general agreement during the debate in the Third Committee that advocacy of national, racial or religious hatred and war propaganda were evils, similar arguments to those heard in the Commission were expressed for and against the adoption of a wide-ranging article. It was alleged by those opposed, including Ireland and the Netherlands, that governments would be able to invoke the article to impose prior censorship on all forms of expression and to suppress the opinions of opposition groups and parties. It was pointed out, moreover, that the article, in contrast to all the other substantive articles of the ICCPR, contained no provision setting forth any particular right or freedom. On the contrary, it could be used by governments to suppress the very rights and freedoms which the ICCPR was designed to preserve.

Those in favour argued that, in view of the state of the world, the international community as well as individual governments should prohibit all war propaganda and all advocacy of national, racial and religious hatred. Yugoslavia stated that a prohibition of only incitement to violence would not represent any progress in international legislation. Given that it was often acts of hostility or discrimination that led to violence, any propaganda which might incite such acts should be prohibited.

An amendment was proposed by 16 countries (Brazil, Cambodia, Congo, Ghana, Guinea, Indonesia, Iraq, Lebanon, Mali, Morocco, Philippines, Poland, Saudi Arabia, Thailand, United Arab Republic and Yugoslavia) which was accepted as the text of Article 20. Chile requested a separate vote on the phrase "discrimination, hostility or", but the phrase nonetheless was adopted by 43 votes to 21 with 19 abstentions. Paragraph 2 of Article 20 was adopted by 50 votes to 18 with 15 abstentions.

INTERPRETATIONS OF ARTICLE 20

Some international law experts view the prohibition of racist speech set forth in Article 20 as merely an elaboration of Article 19(3) of the ICCPR, or of Article 5,⁵ which provides:

Nothing in the present Covenant 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 recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

Others view Article 20(2) as a distinct and additional basis for permissible restrictions. All agree, however, that Article 20(2) permits restrictions only on freedom of expression and not on freedom of opinion, which is absolute (as stated in Article 19(1)).

Under Article 40(4) of the Covenant, the Human Rights Committee, which monitors the compliance of states parties with the provisions of the ICCPR, may adopt "general comments" on specific articles in order to provide guidance to states parties about what to include in the reports they are required to submit to the Committee. The general comments have, in practice, acquired the status of

⁵ See Türk and Joinet, at paras. 50-52.

authoritative interpretations. In its general comment on Article 20, published in 1983, the Human Rights Committee stated:

1. ... In view of the nature of Article 20, States parties are obliged to adopt the necessary legislative measures prohibiting the actions referred to therein. However, the reports have shown that in some States such actions are neither prohibited by law, nor are appropriate efforts intended or made to prohibit them. Furthermore, many reports failed to give sufficient information concerning the relevant national legislation and practice.

2. ... [Article 20's] required prohibitions are fully compatible with the right of freedom of expression as contained in Article 19, the exercise of which carries with it special duties and responsibilities. The prohibition under paragraph 1 extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations, while paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned. The provisions of Article 20, paragraph 1, do not prohibit advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence in accordance with the Charter. *For Article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation.* The Committee, therefore, believes that States parties which have not yet done so should take the measures necessary to fulfil the obligations contained in Article 20, and should themselves refrain from any such propaganda or advocacy.⁶

Three points set forth in that general comment are worthy of particular note. First, Article 20(1) - which, by its terms, outlaws "propaganda for war" - is interpreted narrowly; only advocacy which actually threatens an act of aggression or breach of the peace contrary to the UN Charter is prohibited. A "breach of the peace", mentioned in Article 39 of the Charter, has been interpreted to mean the use of some degree of armed force by one country against another. As the general comment makes clear, Article 20(1) does not prohibit advocacy of the right of peoples to self-determination and even independence, to the extent that they may be conceived to have such rights under the Charter.

Second, Article 20(2) imposes an obligation on states parties to enact a law which provides for "an appropriate sanction" in case of violation. The article, thus, does not require criminal penalties, at least not for less serious forms of hate advocacy.

Third, as of 1983 when the general comment was issued, the Committee was clearly dissatisfied both with the failure of states parties to enact appropriate laws and with their failure to report their laws and practice to the Committee.

The Committee has dealt with only one case in which Article 20 was directly invoked. In *J. R. T. and the W. G. party*, the authors of the communication, Mr T and the W. G. Party, had disseminated anti-Semitic views by playing pre-recorded

⁶ General Comment No. 11(19), 1983 *Annual Report of the Human Rights Committee*, 38 GAOR, Supp. 40, UN Doc. A/38/40, Annex VI (1983) (emphasis added).

messages on a telephone service which people could call and listen to.⁷ They continued to operate the service even after a Canadian tribunal had ordered them to stop. The Federal Court sentenced Mr T to one year's imprisonment and ordered the party to pay a \$5,000 fine for non-compliance with the verdict of the tribunal. Mr T and the W G party applied to the Human Rights Committee. The Committee, in ruling the application inadmissible, stated:

[T]he opinions which Mr. T. seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under Article 20(2) of the Covenant to prohibit.

ANOTHER APPROACH: ARTICLE 5 OF THE ICCPR

The Committee has not yet adopted a general comment on Article 5, but it has used this provision in a case concerning racist activities. The authors of the communication were M.A., a right-wing political militant and publicist, and his parents, brother and sister. At the time of submission, M.A. was serving a sentence upon conviction of involvement in reorganizing a dissolved fascist party. The authors did not specify which articles of the Covenant they believed had been violated but did allege that they believed M.A. had been convicted solely for his political opinions and his non-violent actions in seeking to persuade others to embrace his opinions. The Committee declared the application inadmissible on the ground that:

the acts of which M.A. was convicted (reorganizing the dissolved fascist party) were of a kind which are removed from the protection of the Covenant by Article 5 thereof and which were in any event justifiably prohibited by Italian law having regard to the limitations and restrictions applicable to the rights in question under the provisions of Articles 18(3), 19(3), 22(2) and 25 of the Covenant.⁸

CONCLUSION

The Human Rights Committee has approached the issue of racist speech in two ways. First, it has upheld the legitimacy of legislation on the basis that Article 20(2)'s prohibition of advocacy of racist ideas and acts is consistent with the right to freedom of expression and authorizes the enactment of criminal legislation. Second, the Committee has used Article 5 of the Covenant to uphold a conviction for activity which did not primarily involve advocacy, but rather involved the reorganization of a dissolved fascist party. The conclusion is that, one way or another, the Committee is likely to rule inadmissible any applications which challenge criminal convictions for making racist statements or engaging in racist activities (unless perhaps if the Committee considers the sentence to be disproportionate).⁹

⁷ Case No. 104/1981, *J. R. T. and the W. G. party v. Canada*, in the 1983 Annual Report of the Human Rights Committee, 38 GAOR, Supp. 18, UN Doc. A/38/40, Annex XXIV (1983). For a discussion of the Canadian proceedings, see John Manwaring's chapter on Canada; for a discussion of the Human Rights Committee's decision, see para. 59 of the chapter by Danilo Türk and Louis Joinet.

⁸ *M.A. v Italy*, No. 117/1981, inadmissibility decision of 10 Apr. 1984, in the 1984 Annual Report of the Human Rights Committee, UN Doc. A/39/40, Annex XIV (1984).

⁹ See paras. 100-03 of the chapter by Danilo Türk and Louis Joinet in which they suggest that imprisonment of any length may be a disproportionate sentence for crimes involving hate expression.

Chapter 5

ARTICLE 13(5) OF THE AMERICAN CONVENTION ON HUMAN RIGHTS

Joanna Oyediran

The American Convention on Human Rights (ACHR) was produced under the auspices of the Organization of American States and signed in Costa Rica on 22 November 1969. The ACHR has been ratified or acceded to by 23 of the 33 members of the OAS. Members which have not yet accepted its obligations include Brazil, Canada, Cuba and the United States.

OBLIGATIONS IMPOSED

Article 13 protects the right to freedom of thought and expression. It contains a more detailed elaboration of this right than any other regional or international human rights instrument. Article 13(2) specifically forbids prior censorship except in the case of public entertainments. Article 13(3) stipulates that freedom of expression may not be restricted by "indirect methods, ... such as the abuse of government or private controls over newsprint, [or] radio broadcasting frequencies".

According to Article 13(5):

Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

That obligation is narrower than the similar obligation contained in Article 20 of the International Covenant on Civil and Political Rights (ICCPR).¹ While Article 13(5) requires the prohibition of advocacy that constitutes incitement to violence, Article 20 of the ICCPR requires the much broader prohibition of advocacy that constitutes incitement to discrimination, hostility or violence.

Article 13(5) also prohibits a narrower spectrum of expression than does Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD Convention). Article 4 obligates states parties to declare dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination and violence to be "offences punishable by law", and to place wide restrictions on the activities of racist organizations.² Article 13(5), however, offers protection to a dramatically broader range of groups: it expressly mentions language and religion (not mentioned in the CERD Convention), and also makes clear that the enumerated grounds for protection are illustrative only.³

¹ Article 20 reads: "(1) Any propaganda for war shall be prohibited by law. (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

² See the discussion of Art. 20 of the ICCPR in the preceding chapter.

³ See Karl Josef Partsch's chapter on Art. 4 of the CERD Convention.

Article 13 is supplemented by Article 14 which declares:

"Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or make a correction using the same communication outlet"

This mechanism could possibly be used by defamed racial, ethnic and religious groups. However, Article 14 grants this right to "anyone", which may mean that it is not exercisable by groups. If this were to be the case, an identifiable individual would have to be defamed before any rights could arise under Article 14.

It should be noted that no states parties have entered reservations to Article 13(5) or to Article 14, and that neither the Inter-American Commission on Human Rights nor the Inter-American Court of Human Rights have had any occasion to interpret the obligations imposed by those articles.⁴

THE DRAFTING HISTORY OF ARTICLE 13(5)

Originally the draft text of paragraph 5 of Article 13 was identical to the wording of Article 20 of the ICCPR. However, the US delegation considered the draft text as it stood to be incompatible with the First Amendment to the US Constitution, which protects freedom of speech and the press. A recent decision by the US Supreme Court, *Brandenburg v. Ohio*, had ruled that the First Amendment only permitted the prohibition of advocacy of the use of force, violence or violation of the law when it was directed to inciting or producing imminent lawless action and was likely to incite or produce such action.⁵

There was, however, a general feeling that some type of prohibition upon war propaganda and hate speech should be retained. The paragraph was defended by both El Salvador and Honduras, which had recently been at war with each other, and whose delegates both expressed their belief that the press had exacerbated the tensions which led to war.

After considerable consultation and redrafting the US delegation proposed a compromise amendment which was found acceptable and became the text of paragraph 5. Propaganda and advocacy of hatred were to be considered as punishable offences only if they amounted to incitement to violence.

4 The Court has decided one case involving Article 13. In that case it ruled that Costa Rica's licensing requirements for journalists violated the guarantee of freedom of expression and information set forth in Article 13(1).

5 395 U.S. 444 (1969).

Chapter 6

THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION: CURRENT PROBLEMS OF ITS REALIZATION AND MEASURES NECESSARY FOR ITS STRENGTHENING AND PROMOTION

Excerpts from *Update of the Preliminary Report prepared for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (UN Doc. E/CN.4/Sub.2/1991/9, 16 July 1991)*

Danilo Türk and Louis Joinet, Special Rapporteurs

Editorial note: In March 1988, the UN Commission on Human Rights requested its Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereafter "Sub-Commission") to propose a study on the right to freedom of opinion and expression. The Commission is a body of 53 governmental representatives, which reports, via the Economic and Social Council, to the General Assembly. The Sub-Commission is a subsidiary body of 26 experts who are nominated by governments but who serve in their individual capacities.

Pursuant to a request by the Sub-Commission, Danilo Türk, then a member of the Sub-Commission, prepared a working paper on how to carry out such a study (UN Doc. E/CN.4/Sub.2/1989/26, 2^d June 1989). In accordance with his suggestion, the Sub-Commission requested Mr Joinet (who had written a working paper on the detention of persons for the exercise of their right to freedom of opinion and expression, *see* UN Doc. E/CN.4/Sub.2/1987/15, annex 1) to join Mr. Türk in preparing a preliminary report.

In their preliminary report (UN Doc. E/CN.4/Sub.2/1990/11), the two rapporteurs discussed the parameters of the right to freedom of opinion and expression, particularly with reference to Article 19 of the ICCPR; the limitations and restrictions which may regulate the right, particularly as set forth in Articles 19(3) and 20; and the measures to be taken to promote and strengthen the effective exercise of the right.

In the update of the preliminary report from which the following excerpts are taken, the rapporteurs examined at some length two issues of contemporary and pressing concern: freedom of expression versus the struggle against racial discrimination, and freedom of expression and information in armed conflicts (with particular reference to the Gulf War).

They also briefly addressed the issue of "prisoners of opinion". They commended the decision of the Commission on Human Rights to establish a working group of five experts to examine cases of arbitrary detention occurring in any part of the world (which held its first meeting in September 1991, elected Louis Joinet as its chair and has been authorized to meet three times annually); and noted the great importance of that development for the protection of the right to freedom of expression. In particular, they offered their view that:

[I]n the field of human rights, detention is a "high-risk" measure not only as a sanction which may be disproportionate to the requirements of the maintenance of public order, morality, etc., but also in that, like any universe of confinement, it carries the risk of leading to numerous violations of human rights. . . [A]ny arbitrary detention constitutes a violation [of human rights], and any detention of a person by reason of his opinions is by nature arbitrary ... unless that opinion was expressed

in defiance of a permissible restriction (defamation or advocacy of racism might be examples).

In these cases, however, the ... Rapporteurs [are of the] view that, even if the opinion expressed is open to sanction in virtue of a permissible restriction, *that sanction should never go so far as imprisonment.* (Paras. 21, 23; emphasis added.)

The Commission on Human Rights, in March 1992, welcomed the update and expressed concern about "the extensive occurrence in many parts of the world" of detention of, and discrimination against, persons who exercise the right to freedom of opinion and expression; the intrinsically linked rights of freedom of thought, conscience, religion, peaceful assembly and association, and to participate in the conduct of public affairs; and the right to promote and defend these rights and freedoms. The Commission invited the rapporteurs to submit a final report, including conclusions and recommendations, to the Sub-Commission at its August 1992 session.

The update reflects the views of the two rapporteurs. If the final report is accepted by the Sub-Commission, which is likely, it will then acquire additional status. Although the Sub-Commission is a non-governmental body, because the report will be the first UN document in many years to interpret at any length the UN standards concerning freedom of opinion and expression, it will have considerable persuasive influence. If the report is accepted by the Commission, which again is likely though perhaps with a few modifications, the report - and especially its conclusions and recommendations - will receive the imprimatur of an inter-governmental body. Confirmation by the General Assembly would add a further level of inter-governmental acceptance.

The report undoubtedly will assist the Working Group on Arbitrary Detention in determining when a detention is arbitrary, and may have some influence on the nearly completed drafting of a declaration on the rights and responsibilities of individuals, groups and organs of society to promote and protect human rights (popularly known as the Draft Declaration on Human Rights Defenders). The report may be considered in appropriate cases by the regional inter-governmental courts (of the Council of Europe, the European Community and the Organization of American States) as well as by national courts. Human rights campaigners may draw relevant portions of the report to the attention of governments which appear to have violated principles stated in the report.

In the excerpts which follow, the original style of headings and numbering of paragraphs has been retained; the one change from the original is that the abbreviations for treaties, declarations and inter-governmental bodies used throughout the book are also used here. In a few places, paragraphs have been inserted, set off by brackets, in order to complete or bring up to date discussions of international or regional jurisprudence. Where the discussion refers to concepts discussed in the preliminary report, relevant paragraphs from that report have been inserted, again set off by brackets.

I. FURTHER DEVELOPMENTS SINCE THE PUBLICATION OF THE PRELIMINARY REPORT

A. Response to the observations made in the preliminary report

6. [T]he rapporteurs wish to reaffirm categorically that freedom of opinion and expression is a fundamental right, respect for which affects the exercise of most other rights; the comments which follow should therefore be examined in the light of this categorically restated principle, which has the force of a rule; any permissible restrictions can only be by way of exception.

9. [T]he rapporteurs consider that the defence of a freedom necessarily entails readiness to tackle the obstacles in its path; it would be paradoxical, therefore, to imagine that a freedom could be protected without considering - if only in order to be forewarned against them - the restrictions that may be imposed on it; for, as comparative law teaches us, such restrictions occur even in the countries which consider themselves the most democratic.

10. There is no question but that the preliminary report, in reviewing the scope of the international instruments for the protection of that freedom (paras. 11-35), the better to emphasize their importance, and in describing the typologies of protection afforded by States Members of the United Nations (paras. 51-62), categorically confirms that freedom of expression and freedom of the press constitute fundamental rights.

11. Whether the rapporteurs will or no, however, this review of the relevant texts makes it clear *a contrario* that, taken as a whole, the international instruments concerning freedom of opinion and expression, rightly or wrongly - that is the whole point at issue - provide for possible limitations on condition that those limitations do not call into question the actual principle of the freedom protected. Admittedly the UN General Assembly, in its resolution 59 (I) of 14 December 1946, reaffirmed that "Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated".

12. The fact remains that the Universal Declaration of Human Rights (UDHR) of 1948, which in its article 19 protects freedom of expression, opinion and information, also contains in article 29 a general clause on restrictions permissible "in a democratic society".

13. The same applies to article 19 of the International Covenant on Civil and Political Rights (ICCPR), which covers the same ground.

14. Another reference: the case law of the European Court of Human Rights confirms, on the one hand, that freedom of expression constitutes one of the basic foundations of a democratic society, one of the prime conditions for its progress and for the full development of every individual; on the other hand it also emphasizes that freedom of expression may come up against the exercise of other freedoms and that it may not always be easy to set the fundamental rights and freedoms of the person in order of importance.

15. A study of current problems involved in exercising the right to freedom of opinion and expression thus unavoidably raises the question of restrictions on freedom of expression and information; that question can be evaded only by a very naïve reading of the international standards or by taking the view that the promotion of freedoms - and hence the promotion of freedom of opinion and expression - can be immediate, total and absolute, whereas history teaches us that it always develops as part of a process of democratization during which the limitations on it, from pressure of opinion to institutional reform, grow less and less restrictive.

16. It was therefore thought appropriate to suggest in the preliminary report that the principles affirmed by the set of international instruments on the protection and promotion of freedom of opinion and expression should be taken as a basis for reflection and for exploring the possible reconsideration of such restrictions and derogations, however "permissible" in a democratic society.

17. It would doubtless be possible to espouse the "pure principle" of the John Stuart Mill who on several occasions in the United States provided in the following terms a theoretical justification for the judicial interpretation placed on the First Amendment of 1791 to the Constitution: "The Congress shall adopt no law ... reducing freedom of speech or freedom of the press ...".¹ But it has to be admitted, in the words of Lord McGregor of Durris, President of the Advertising Standards Authority of London, at the Sixth International Symposium on the European Human Rights Convention and Freedom of Expression, that no democratic society has yet removed the obstacles to full freedom of expression, and it is improbable that any will do so in the near future.

18. From a realistic standpoint there can be no doubt that at the present time, as the many current processes of democratization testify, reflection about the concept of "democratic necessity" is in most cases a factor for progress inasmuch as such reflection tends towards the abrogation of rules inimical to freedom of expression or helps to forewarn us against arbitrary or impermissible restrictions. The whole value of such reflection lies precisely in combining the three criteria of legality, legitimacy, and democratic necessity in order to detect the actions of "those who seek to legitimize abuses against journalists and organs of information", it being understood that protection of freedom of expression cannot be limited to journalists alone.

19. A democratic society, as we have just pointed out, is in a process of continuous change; although that process includes phases of regression, it is also marked by long periods of advancement. The reference to a "democratic society" therefore presupposes, by its very nature, that restrictions on rights and freedoms will be continuously questioned, whether in order to oppose such restrictions or in order to reduce them by steadily entrenching the advances achieved. This will make it easier to understand why the rapporteurs deemed it important to emphasize this concept. In this sense, democracy is indeed a "tragic" political system, for it is "the only regime that openly faces the possibility of its self-destruction by taking up the challenge of offering its enemies the means of contesting it" (Castoriadis).

20. Hence the purpose of the preliminary report and of this update is not to endorse the system of "restrictions permissible in a democratic society" but to describe it, analyse the risks it presents, and consider how to reduce them as part of a push for more and more democracy. Consequently:

Firstly, the report was based on the premise that the right to freedom of opinion and expression should be interpreted extensively, in contrast to the limitations which might be imposed on it, and which should be interpreted restrictively; hence the need to formulate "restrictions on the restrictions";

Secondly, the report raised the question of derogations in exceptional circumstances by suggestion that, under such circumstances, the right to freedom expression and information ought perhaps to be placed in the hard core of inalienable rights (paras. 167 and 168), thus supporting the thesis that the system of restrictions necessary in a democratic society should lead to making freedom of expression an inalienable right, within the meaning of the report by Mrs N Questiaux, when a state of emergency is declared; in other words that, even in that event, it could not be subjected to restrictions beyond those permissible in a democratic society in normal times;

The rapporteurs accordingly thought that, since limitations could be regarded as permissible only if they respected the standards of a democratic society, it would be appropriate to concentrate on analyzing the concept of a democratic society which is discussed in chapter II of the preliminary report. They regard this standard and that of "democratic necessity" as essential factors in determining the limits to the permissibility of restrictions. In view of the current world process of democratization, special attention should be paid to these aspects of the exercise of the right to freedom of opinion and expression with the idea of ultimately developing a normative impetus which, by hemming in the limitations more and more closely, would change the relativeness of the right to freedom of opinion and expression into a right tending towards the absolute.

[Following are paras. 38-45 of the Preliminary Report:

(a) Permissible restrictions

38. [T]he problem of limitations on the right to freedom of expression requires very careful consideration. Article 19(3) of the Covenant, and article 10(2) of the European Convention, authorize restrictions on the right which they guarantee, as a consequence of "duties and responsibilities" under the European Convention and of "special duties and special responsibilities" under the Covenant. Article 13 of the ACHR refers solely to responsibilities. The African Charter simply stipulates, in article 9, that the right to express and disseminate opinions shall be exercised in the context of the laws and regulations, but does not spell this out expressly in the case of freedom of information. Chapter II of the Charter, which concerns the duties of the individual, does, however, contain several provisions authorizing restrictions in fairly broad terms.

¹ *Translator's note:* In the absence of the original text, this passage has been translated from the French.

(i) The principle of the legality of the restriction

39. Limitations which are not "prescribed by law" (article 10 of the European Convention), "provided by law" (article 19 of the Covenant) or "expressly established by law" (article 13 of the American Convention) and (purely for information) article 9 of the African Charter relating to laws and regulations are not admissible.

40. The requirement that there must be a prior law is determined strictly. According to the European Court, the law must be clear, accessible, precise and foreseeable, without, however, being excessively rigid (*The Sunday Times case*, para. 49, 26 Feb. 1979). Also, the world "law" is not to be understood in too formal a sense: under these provisions common law is in fact a law.

(ii) The principle of the legitimacy of restriction

41. Then, even when provided for by the law, a restriction is permissible only if it has in view one of the objects limitatively enumerated by the texts concerned. It is noteworthy that the wider a law is, the less its constitutive elements are defined, the more difficult it is to monitor respect for this second criterion which one could call "legitimacy", and the easier it is for a State to claim to have one of these objectives in view or to divert laws from the objective which they claim to pursue. From this point of view, the control of legitimacy is far from illusory; it is the natural extension of that of legality.

42. The Covenant, like the American Convention on Human Rights, is concerned with respect for the rights or the reputations of others, and protection of national security, public order, public health or morality.

43. The European Convention on Human Rights is more extensive in referring not only to national security and, somewhat redundantly, to territorial integrity or public safety and the prevention of disorder, but also to the prevention of crime. The protection of the reputation or rights of others is mentioned in the same terms. On the other hand, the Convention allows more numerous grounds for legitimacy when it authorizes restrictions "for preventing the disclosure of information received in confidence". One may think that public officials and members of the armed forces are concerned here, but there also arises the question of the protection of privacy, particularly concerning computerized files - and also "for maintaining the authority and impartiality of the judiciary". Finally, article 16 of the European Convention on Human Rights legitimizes restrictions on the political activity of aliens as follows: nothing in articles 10, 11 and 14 shall be regarded as "preventing the High Contracting Parties from imposing restrictions on the political activity of aliens".

44. The African Charter on Human and Peoples' Rights appears to offer less precise protection; while article 27 envisages the duties of the individual towards the family, security, the State, etc. and affirms that "the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest", apart from the fact that this concept of common interest is very wide, article 29 makes it a duty for the individual "to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in

general, to contribute to the promotion of the moral well-being of society". It should be noted that there is a specific reference to criteria of "cultural values"; culture and its preservation do not in fact appear in any other instrument as a justification for restrictions. It needs to be clarified by the future practice of the African Commission. Finally, on the level of principles, the economic well-being of a country should never justify restricting the freedom of expression.

(iii) The principle of democratic necessity

45. Finally, there is a third criterion, found only in the European Convention on Human Rights: that of "democratic necessity". Even when provided for by the law, even when pursuing *a priori* one of the objectives laid down, a restriction cannot be permissible if it does not respond to a democratic necessity which is interpreted by the European Court principally as requiring respect for the principle of proportionality, but also respect for the democratic principles of the pre-eminence of the law and of the range of fundamental rights it protects. These last two criteria can also be linked to the restrictions imposed in article 20 of the Covenant and in article 13, paragraph 5 of the American Convention on Human Rights, which prohibit propaganda for war and any advocacy of national or racial hatred. Restrictions corresponding to these three criteria are valid, for they do not encroach upon the essential substance of the right.]

II. CURRENT PROBLEMS //

A. Freedom of opinion and expression versus the struggle against racism

30. The complexity of the question becomes evident when we analyze restrictions placed on freedom of expression and information, the better to combat racial discrimination.

31. Such restrictions are acknowledged to be permissible in most of the relevant international texts; furthermore an increasing number of countries are allowing them or preparing to allow them, whether they are actually confronted with rising racism (especially in Europe, where it also takes the particular form of revisionism) or with discriminatory behaviour patterns, in particular associated with the stirring up of nationalist designs, or do so for a preventive or even educational purpose.

32. Thus the following countries have recently adopted or supplemented a specific body of legislation: Argentina (1988), Brazil (1985), China (1987), Colombia (1988), Cuba (1987), France (1990), Germany, Federal Republic of (1985), Senegal and Sweden (1989), United Kingdom (1986) and USSR (1990). The following countries have specific legislation in the drafting stage: Australia, Cameroon, Chile, Mexico, Netherlands, Niger, Spain, Sweden and Venezuela.

33. In addition the question of permissible restrictions on freedom of expression in the name of the struggle against racial discrimination has attracted the attention of several non-governmental organizations, some of them specialists in the protection of freedom of expression.

34. The NGO Article 19 recently held a conference on this subject (London, 27 and 28 April 1991). The monthly newsletter of the NGO Reporters Sans Frontières regularly publishes articles on the same topic. In a communication submitted to the Commission on Human Rights at its forty-seventh session, the NGO International Council of Jewish Women (ICJW) expressed concern at the fact that appeals to racial or religious violence were either tolerated or encouraged by certain authorities in the name of freedom of expression.

35. On the other hand a great many countries see no need for restrictions of this type, either because they claim that the phenomenon of racial discrimination is unknown to them or because they consider it dangerous to prepare "emergency" legislation on the subject and hold that the general provisions of ordinary law are sufficient.

1. What legitimacy can attach to restrictions "necessary in a democratic society" in order to combat racism?

36. The word "legitimacy" is used here in the same sense as in the preliminary report.

37. Generally speaking, freedom of opinion and expression and also freedom of information are protected; in view of this, the expression of racist ideas may perhaps be regarded as an act of disinformation that legitimizes limitations.

38. As the Inter-American Court of Human Rights aptly points out in a decision of 13 November 1985 (para. 70), a society which is not "well" informed is not a truly free society; the Court thus affirms the principle that the right to information requires that the information should be of a certain quality.

(a) The legitimacy, under the international law of human rights, of restrictions imposed to combat racism

(i) The relevant instruments

39. According to article 29 of the UDHR, restrictions on the rights it guarantees in general terms are permissible "solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare". As we pointed out in the preliminary report (paras. 41-44), most of the international instruments subsequently concluded have embodied, in varying degrees of detail, the same grounds for the legitimacy of restrictions.

40. The CSCE document of the Copenhagen Meeting on the human dimension reaffirms in paragraph 9.1 the right to freedom of expression. "This right will include freedom to hold opinions and to receive and impart information and ideas ... The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards."

41. In a general clause on restrictions, the document makes the following point in paragraph 24: "Any restriction on rights and freedoms must, in a democratic

society, relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law." Perhaps it would have been clearer to focus on the legitimacy of the objective?

42. The preliminary report (in paras. 124-26) also drew attention to the problems involved in interpreting the grounds for legitimacy (the rights of others, public order, State security and morality).

43. In the case of discriminatory measures, respect for the rights of others is directly concerned. The rights of others may be understood in this context to mean the right to equality but also the right to dignity and to protection against degrading treatment, or again the right to information.

On the other hand, recourse to the idea of "public order", the boundaries of which are often ill-defined, presents more of a problem; in view of its vagueness, there is a great temptation to [invoke] ... it in irrelevant circumstances, thus committing in reality a perversion of legitimacy.

44. The grounds for restrictions connected with State security will be specifically considered in section B, dealing with freedom of expression in situations of armed conflict.

45. The notion of morality appears *prima facie* to be in keeping with the spirit proper to anti-racist legislation; but it carries in embryo the risk of outlawing something which is merely not accepted by everybody. The idea of a moral consensus justifying restrictive measures may carry the germ of a moral dictatorship. There is no need here to labour the dangers inherent in the will to impose a moral order - Nazism is still in all our minds - or to emphasize how dangerous it would be to plead morality in order to restrict freedom of expression.

46. Among the grounds that may be advanced for restrictions, only the concept of the rights of others, the boundaries of which are fairly clearly defined, seems apt to justify the restrictions needed in the struggle against racism. Furthermore, from the standpoint of legal technique, the reference to the rights of others affords a better basis for the strictness desirable in defining offences inasmuch as the protection of those rights involves a prejudice, which might be no more than hypothetical, and hence a right to compensation, if only of a moral nature. The number of behaviour patterns concerned would thus be strictly limited and the risk of extending the field of repression to the criminalization of mere departures from the prevailing norm would be neutralized. Lastly, it is less dangerous to freedoms to impose restrictions with the aim of reconciling conflicting rights.

47. Moreover the explicit or implicit reference to the rights of others finds an echo in certain restrictive provisions laid down in the general interest by the international instruments.

48. Thus article 29, paragraph 3, of the Universal Declaration of Human Rights provides that "These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations". This provision is supplemented by article 30, which reads as follows: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any

activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

49. The International Covenant on Civil and Political Rights states the same principle in the same terms in its article 5, paragraph 1.

50. The American Convention on Human Rights lays down the same rule in its article 29: "No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein." The same applies to article 17 of the European Convention

51. ... [A]rticle 5 of the International Covenant and article 17 of the European Convention might justify, in the name of the rights of others, restrictive measures for the purpose of combating racial discrimination.

52. Furthermore attention [is] drawn to the scope of the principle embodied in article 20 of the International Covenant, which provides that: "Any propaganda for war shall be prohibited by law" and that "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". There can be no better way of legitimizing restrictions to combat advocacy of racial hatred and incitement to discrimination.

[Article 13(5) of the American Convention on Human Rights similarly provides that: "Any propaganda for war and any advocacy of national, racial or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any ground including those of race, color, religion, language, or national origin shall be considered as offences punishable by law." Article 13(5) is interesting because, on the one hand, it represents a narrower intrusion on freedom of expression than Article 20(2) of the ICCPR in that it only prohibits "incitements to lawless violence or to any other similar illegal action"; on the other hand, it requires that such incitements be considered offences, generally understood to mean criminal offences, whereas some experts maintain that Article 20 does not require criminal penalties.]

[Note should also be taken of Article 13 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (reproduced in Annexe A). Paragraph 1 guarantees the right of migrant workers and members of their families to freedom of expression subject, however, to paragraph 3(d) which permits limitations that are provided by law and are necessary "[f]or the purpose of preventing any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".]

53. The reader will need no reminder that the right to non-discriminatory treatment clearly constitutes a fundamental right of the human being, guaranteed by all the international instruments on human rights and the subject of a specific United Nations instrument which entered into force on 4 January 1969: the International Convention on the Elimination of all Forms of Racial Discrimination, known as the CERD Convention. Under article 4 of that Convention, the States Parties have undertaken to adopt positive measures designed to eradicate all incitement to racial discrimination. Such positive measures may involve restrictions on freedom of

expression, for the States undertake more specifically to: "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination," etc.

54. Thus this Convention does not confine itself to legitimizing restrictions; it goes on to state that in certain cases those restrictions may be backed by criminal penalties. It will be appropriate to return to this point and to give it special attention in connection with the criterion of democratic necessity which, in the interests of respect for human rights, presupposes *inter alia* proportionality of the restriction to the legitimate objective pursued. ... [A]rticle 20 of the ICCPR and article 4 of the CERD Convention [as well as article 13 of the ACHR and article 13 of the Migrant Workers Convention] constitute specific instruments legitimizing limitations of or derogations from freedom of expression by indicating precisely what behaviour patterns justify such restrictions.

55. Here again, what is meant is propaganda for or advocacy of hatred, incitement to discrimination, hostility and violence and the dissemination of ideas based on racial superiority or hatred. This list, which appears to assume that the culpable behaviour will receive some publicity, refers by implication to the notion of indoctrination and to that of false information or disinformation.

56. Is it fair to conclude from this that freedom of expression might find grounds for a limitation in the right to be well informed? In other words, the right to be well informed might serve as grounds for sanctioning the dissemination of revisionist ideas or of an ideology based on the superiority of a particular race.

On this last point it would be desirable that international instruments, before justifying measures that restrict freedom of expression, should perform their educational function properly by avoiding the use of such a term as "race" which, when applied to human beings, has no scientific meaning. Unequivocal recognition of the human race as one and indivisible appears to be regarded as the indispensable preliminary for the struggle against racism.

(ii) Decisions of international and regional authorities on protection

The Human Rights Committee

57. The Human Rights Committee has handed down few significant decisions on the subject. Of 18 selected decisions delivered by the Committee in connection with article 19, only two decisions relate to racism.

58. First case: Communication No. 117/81, *M.A. v. Italy*, was declared inadmissible *ratione materiae* by the Committee on 10 April 1984. The author of the request did not specify what articles of the Covenant he considered to have been violated. The facts were as follows: in 1971, when he was 15 years old, the applicant joined the Movimento Politico Ordine Nuovo; when this organization was disbanded in 1973 he joined the Movimento Sociale Italiano. After being prosecuted in 1974 [for attempting to reorganize a dissolved fascist party, which has been a crime in Italy since 1952] he was sentenced in 1976 to 4 years' imprisonment. Before the Committee the Italian Government relied *inter alia* on article 19, paragraph 3, of the Covenant, arguing that the protection of national security and public order was

a legitimate objective. The Committee took the view that the acts alleged against the applicants were of such a nature as to be removed from the protection of the Covenant by the operation of article 5 thereof and that in any case their prohibition was justified by article 19, paragraph 3.

59. Second case: Communication No. 104/1981, *J.R.T. and the W.G. Party v. Canada* (declared inadmissible by the Committee on 6 April 1983). The so-called "W.G." Party and J.R.T. were circulating, by transmitting tape-recordings over the telephone, particularly serious anti-Semitic messages. ... [J.R.T. was sentenced to one year's imprisonment and the Party was fined Can\$5,000] on the basis of the Canadian Human Rights Act, which declares it a discriminatory practice to communicate telephonically any matter likely to expose a person or persons to hatred or contempt by reason *inter alia* of their religion or "race".² The State Party held that the disputed provisions were designed to give effect to article 20 of the Covenant and that, in contrast, the author's "right" to communicate racist ideas was not protected by the Covenant.

60. The Human Rights Committee took the view that the ideas which the applicant sought to disseminate through the telephone system clearly constituted the advocacy of racial or religious hatred which Canada had an obligation under article 20(2) of the Covenant to prohibit. It should be noted that the Committee was guided in one of the decisions by article 19(3) and in the other by article 20, which directly legitimizes such measures without requiring it to be proved that the restriction applied on its authority is designed to protect the rights of others, public order or other legitimate objectives.

The European Commission of Human Rights

61. The European Court of Human Rights has made no explicit ruling on this question but defined the scope of article 17 of the European Convention in its very first decision (Lawless, 1 July 1961), stating that the purpose of article 17, in so far as it referred to groups or persons, was to make it impossible for them to derive from the Convention any right to engage in any activity or perform any act aimed at the destruction of any of the rights recognized in the Convention.

62. The European Commission, for its part, has delivered several interesting decisions. Firstly it should be noted that, unlike the United Nations texts, article 14 of the European Convention guarantees non-discrimination only in the exercise of a right specifically protected by the Convention.³ To widen this unduly narrow setting, the Commission tried, in virtue of article 3 which prohibits inhuman or degrading treatment, to give the protection of non-discrimination an independent scope of its own in these terms: "Without prejudice to article 14, discrimination based on race might under certain conditions constitute *per se* degrading treatment

2 [Ed. note: For a further discussion of the facts of this case, see the chapter on Canada by John Manwaring in Part III of this book.]

3 Recently, the Parliamentary Assembly of the Council of Europe again recommended that a general clause on non-discrimination should be introduced into the European Convention on Human Rights (Rec. 1134/1990), thus bringing it into line with the standards of the Covenant, which includes such a general clause.

within the meaning of article 3 of the Convention" (10 October 1970 - Ann 13, p. 995, *Asiatiques d'Afrique orientale*).

63. Reference will be made here to four of the Commission's decisions which are essential in this connection. The facts on which the first decision is based are very similar to those described in request No. 117/81 to the Human Rights Committee which has already been cited. The second case concerns remarks deliberately made during an election campaign. The last two cases are concerned with revisionism.

64. First case: Request No. 6741/74, *X. v. Italy*, concerning articles 10 and 11 of the Convention and also article 14. The Commission took the view that making it a criminal offence to engage in intrigue aimed at reconstituting a fascist party was necessary to public safety and to protection of the rights and freedoms of others. Combining article 14 with article 10, it held that a difference in treatment reserved to those who were guided by fascist ideology had a legitimate purpose: namely, to protect democratic institutions. An implicit reference to article 17 of the Convention should doubtless be seen in this.

65. Second case: Request No. D 8348/78 and 8406/78, *Glimmerveen and others v. Netherlands*. The aim was to obtain a finding of violation of article 10 of the Convention and of article 3 of the First Protocol guaranteeing free elections under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. The applicant was Chairman of the *Nederlandse Volks Unie*, a party supporting, in particular, the idea that it is in the general interest of a State for its population to be ethnically homogeneous. He was sentenced to two weeks' imprisonment for circulating tracts addressed to "Netherlanders of the white race" and containing such passages as the following: "The majority of our population have long since had enough of the presence in our country of hundreds of thousands of Surinamese, Turks and other immigrant workers - 'guest' workers as they are called - with whom, furthermore, there is nothing we can do here".

66. The authorities held that the content of the tract could not be described as factual information and that it constituted incitement to racial discrimination on the understanding that the notion of race included that of ethnic group. (The tracts were confiscated and the electoral lists bearing the applicant's name were invalidated.) The Government drew the Commission's attention to the international obligations of the Netherlands under the CERD Convention.

67. The Commission held that the duties and responsibilities referred to in article 10(2), found clearer expression in a more general provision, namely article 17 of the Convention.

68. The European Commission took both the CERD Convention and article 17 of the European Convention as its guide in ruling that the applicants might not invoke the provisions of article 10 of the Convention, and in declaring the request incompatible with the provisions of the Convention within the meaning of article 27(2), and therefore inadmissible (11 October 1979). The recourse to article 17, in the same way as recourse to article 5 of the International Covenant, made it unnecessary to prove legitimacy on grounds of public order, the rights and freedoms of others or other grounds.

69. The other two cases concern revisionism.

70. Third case: Request No. 92351/81, *X v. Federal Republic of Germany*. The applicant complained against a judicial decision forbidding X to exhibit brochures according to which the murder of millions of Jews under the Third Reich was a lie or a piece of Zionist trickery. The authorities were guided by the texts making defamation an offence and it was specified that the ban was limited to the denial of the murder of millions of Jews. The Commission held that the murder of the Jews was a "known historic fact" established beyond doubt by overwhelming proof of all kinds. It therefore considered that the protection of the reputation of others legitimized the restriction.

71. Fourth case: the case was more complex because the author of the request (No. 9777/82), *T v. Belgium*, was not the direct author of the revisionist remarks. The applicant was acting as the "author-publisher responsible" for the publication of a text written by a former leader of the Belgian Rexist movement, who had been convicted of communicating with the enemy and deprived of "the right to participate in any capacity in the running, administration, writing, printing or circulation of a newspaper or any other publication in the event that such participation is of a political nature".

72. This document, entitled "Letter to the Pope concerning Auschwitz", contained a commentary calling into question the reality of the extermination of millions of Jews at Auschwitz and elsewhere and reducing the enormity of the Nazi atrocities by comparison with other wartime atrocities. The domestic authorities took the protection of morality and the rights of others and the defence of order as their guide in sentencing the applicant to one year's imprisonment and a fine of 10,000 francs and declaring the offending brochures confiscated.

73. The European Commission observed that the applicant had been prosecuted, not as co-author of an offensive piece of writing, but for having participated in the publication of a piece of writing despite the fact that its author had been deprived of his rights. The Commission accordingly considered that the restriction on freedom of expression was necessary to the defence of order and to safeguard the authority of the judiciary.

74. Here article 10, paragraph 2, provided the Commission with sufficient grounds for legitimizing the restrictions. Does this mean that article 17 can only be relied upon when the threat to the democratic society reaches a certain degree of seriousness? This question will be considered later on during the appraisal of the criterion of the "democratic society" and its corollary, the criterion of proportionality.

[Ed. note: The following paragraph has been added]

The Committee on the Elimination of Racial Discrimination (CERD)

CERD has decided only one individual petition which alleged a violation of Article 4. In the case of *Yilmaz-Dogan v. Netherlands*, Yilmaz-Dogan, a Turkish national, brought an application against the Netherlands for failing to prosecute her employer. She claimed that her employer had made a racist statement in the course of

a court case her employer had brought against her. The Netherlands argued that its obligation under Article 4 was fully met by incorporation into the Penal Code of measures criminalizing racist speech and that Article 4 did not require it to prosecute every case. The Committee observed:

[T]he freedom to prosecute criminal offences - commonly known as the expediency principle - is governed by considerations of public policy ... [T]he Convention cannot be interpreted as challenging the *raison d'être* of that principle. Notwithstanding, it should be applied in each case of alleged racial discrimination, in the light of the guarantees laid down in the Convention.

The Committee found that the Netherlands had acted in accordance with these criteria and that there was therefore no violation of Article 4 or 6. 43 UN GAOR Supp. No. 18, Annex IV, UN Doc. A/43/18 (1988).]

(b) The legitimacy under municipal law of restrictions designed to combat racism

75. Here the rapporteurs have essentially referred, firstly to the reports submitted by States Parties to CERD, secondly to the report on freedom of the press throughout the world prepared by the NGO Reporters Sans Frontières in 1991, and lastly to the information collected at the conference already mentioned which was organized by the NGO ARTICLE 19.

76. Although almost all countries which have a written Constitution guarantee the right to equality and non-discrimination, the constitutional protection of that right is in most cases confined to nationals. Valid grounds for legitimacy must therefore be sought in individual statutes.

77. A number of countries consider, as we have already pointed out, that there is no need to refer to specific pieces of legislation in order to combat racism, either because offences under ordinary law make it unnecessary to have special legislation on the subject or because - according to them - they have no problem of racial discrimination. The question then arises whether such countries ought nevertheless to enact specific legislation even though it meets no criteria of legitimacy save that of abiding by the commitments made under the CERD Convention.

78. The criterion of democratic necessity, which is intended to preclude perversions of legitimacy, should not be used as a mere endorsement. For example, since a *coup d'état* in one country, the newspapers are no longer allowed to publish information which is "liable to inflame racial problems (between one ethnic group and another) or prejudicial to peace and order". Consequently most journalists are compelled to practise self-censorship, whereas the question is one that would be worth discussing democratically. In another country the head of the State security apparatus is said to have invited journalists "to write no more articles likely to upset the highest authorities of the country", thus progressively installing a mandatory prior censorship that makes it an offence to "publish articles dealing with social, regional and ethnic differences".

79. In contrast, several countries report that they have never, or almost never, had to apply provisions permitting restriction of freedom of expression on the grounds of the struggle against racism: Australia (5 of the 26 complaints filed between 1986

and 1987 for racial discrimination interfere with freedom of expression), Chile, Cuba, Hungary, India, Jordan, Luxembourg, Mongolia, Morocco, Norway, Pakistan and Philippines.⁴ Apart from countries with a "multiracial" and "multiethnic" composition,⁵ it appears to be mainly in European countries that restrictive provisions take into account the criterion of proportionality on which the application of the principle of democratic necessity is based.

80. The legitimacy of restrictions is thus assessed in a manner which varies widely from country to country, and it is noted that the principle of democratic necessity canalizes the scope of the other two principles, that of legality and that of legitimacy.

2. The scope of the principle of democratic necessity

81. The preliminary report drew attention to some criteria relating to the concept of the democratic society such as pluralism, tolerance and the spirit of openness.

82. It will be noted that these criteria are two-edged; they may equally well justify total freedom of expression as permit limitations on that freedom with a view to preserving it, without going so far as to maintain, for example, that in a free society tolerance requires us to tolerate the intolerable. The risk is that censorship or restrictions imposed on the expression of opinions held by the majority today to be intolerable may in reality catch only marginal ideas that might be legitimate tomorrow: no one knows in advance what social, moral or intellectual evolution may become desirable or possible for the future of mankind.

83. The principle of democratic necessity therefore needs to be defined in the light of comparative law and with reference to the rights expressly guaranteed by the international instruments on the protection of human rights.

84. Comparative law shows that many countries have adopted specific and restrictive bodies of legislation in order to combat racism. It should perhaps be mentioned that the First Amendment to the United States Constitution, cited by a handful of neo-Nazis who had been refused permission to demonstrate, enabled them to win their case. A recent decision by the United States Supreme Court, however, although directly concerned not with combating racism but with the right to information, shows that the American legal system also accepts limitations. The Supreme Court, on examining an appeal on grounds of unconstitutionality against a decision prohibiting the rebroadcast of recorded telephone conversations between General Noriega in prison in Miami and the outside world, confirmed the original judgement.⁶ Thus the highest legal authority in the United States, by not invalidating an injunction reductive of freedom of the press, confers on freedom of expression a relative and not absolute character.⁷

4 See the periodic reports to CERD.

5 Such as New Zealand; see, in particular, the CERD report of 19 June 1990 (CERD/C/1984/Add.5, paras. 194-98).

6 Decision of 18 Jan. 1990. Cited by Reporters Sans Frontières, 1991, p. 73. [Ed. note: the full citation is *Cable News Network v. Noriega and United States*, 111 S.Ct. 451 (1990).]

7 [Ed. note: For other limitations placed by US courts on freedom of speech, see the chapter by Richard

85. Lastly it should be noted that most specific bodies of legislation in so-called democratic States remain silent about the criteria that characterize a "democratic society", with particular reference to the pre-eminence of law and the criterion of proportionality; the same applies to the relevant international instruments.

86. There are three possible situations of principle. Does the pre-eminence of law require that offences should be precisely defined in all their constituent elements? Does the criterion of proportionality entail weighing legitimacy of restriction against legitimacy of expression? Lastly, does proportionality preclude unduly severe restrictions or, more specifically, does it fix a threshold which cannot be undercut without threatening the very existence of freedom of opinion and expression?

(a) The definition of offences and the pre-eminence of law as a democratic necessity

87. Defining racism in terms compatible with the principle of a democratic society is a complex and difficult undertaking, as will be apparent from a study of the relevant international instruments, namely the ICCPR and the CERD Convention.

88. The Human Rights Committee, in a general comment on non-discrimination (CCPR/C/21/Rev.1/Add.1), after mentioning the absence of any definition in the Covenant, reproduced the definition given in article 1 of the CERD Convention and took the view that the term "discrimination" as used in the Covenant should be interpreted on the same lines, that is to say, when it has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by all persons, on an equal footing, of all human rights and fundamental freedoms.

89. Discrimination, then, will be defined by its effect or intended purpose. The reference to "purpose" presents a difficulty, for in this field it is hard to distinguish from motive. In many legal systems, motive - which differs from intention - cannot be taken into account in defining an offence; taking it into account as a constituent element of an offence is generally regarded as characteristic of totalitarian societies, and considering only the effect irrespective of the intention is regarded as a characteristic of authoritarian societies. This aspect of the problem demonstrates once again the vital importance of the criterion of a democratic society as a condition for the satisfactory functioning of standards designed to combat racism and racial discrimination. Furthermore defining racial discrimination as discrimination based on "race" and "ethnic" origin would merely increase the difficulty: how, in a democratic society, can we even attempt to define "race" or "ethnic group"? Besides, article 20 of the International Covenant calls for the prohibition of any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Here incitement is made the main punishable act. Similarly, article 4 of the CERD Convention requires States to make it an offence, apart from the dissemination of ideas, to engage in incitement to, provocation of and assistance in racist activities.

Delgado in Part III of this book.]

90. While the last-mentioned behaviour falls within the traditional definition of complicity, the definition of racist activities as the principal act remains an open question, while the idea of dissemination appears to require the existence of some form of publicity to represent the material element.

91. As to restrictions, the reports of States Parties to the CERD Convention show that in most instances they are couched in somewhat vague terms. Few countries mention publicity as representing the material element (Austria, Barbados, Denmark and Kuwait). For some, publicity is not even a constituent element (Sweden). Similarly, few countries refer to intention (Austria, Barbados, Belgium, Denmark and New Zealand). Some legislations work on the basis of the element of intention, a reversal of the burden of proof (France and United Kingdom).

92. Aggravating circumstances may be prescribed for non-specific offences, depending on the motive (Argentina) or the intended victim (Algeria). In the case of specific offences, publicity may also be accepted as an aggravating circumstance (Czechoslovakia).

93. Lastly, some legislations feature revisionism (France and the Federal Republic of Germany). French law in particular defines revisionism by express reference to the definition of crimes against humanity given in article 6 of the Charter of the Nürnberg Tribunal annexed to the London Agreement.

94. The Rapporteurs are in favour of an exchange of views with CERD, at a forthcoming meeting, on the definition of offences.

(b)The criterion of proportionality as applied to the legitimacy of restriction and the legitimacy of expression

95. Applying the principle of proportionality necessarily entails passing a value judgement on the ideas expressed, which is not the least of the difficulties - indeed, not the least of the dangers - of imposing restrictions. The interest of the person to whom the expression is addressed is taken into account.

96. Whatever degree of precision the legislator may achieve, the decisive role remains that of the judge. Even so, as we have just seen, the French Act just quoted (1990) referred back to the definition given in the Charter of the Nürnberg Tribunal and further provided that penalties would be applied only for disputing the reality of crimes against humanity whose perpetrators had been convicted by a French or an international court; the purpose of this was to avoid a situation in which, in a press trial instituted to investigate whether writings or remarks fell within the scope of the Act, the judge would find himself having to act as an historian, which would be clearly outside his competence.

97. Before the Act in question was passed in 1990, the judge (in the Faurisson case) had already found it necessary to specify that "it was not for him to confirm history or, in consequence, to take sides for or against the theses put forward by the accused", and he confined himself to a finding of defamation.

98. Can it be argued that only deliberate disinformation could justify restrictions? Between the extremes of avowed opinion and true information by way of disguised opinion, tendentious information and information about opinions, the difficulty of appraisal will be readily apparent.

(c)The criterion of proportionality as applied to the extent of the restriction by comparison with the seriousness of the behaviour

99. Article 4 of the CERD Convention enjoins States Parties to declare that the behaviour patterns it defines are offences. In most so-called democratic States, however, an offence can be defined, as we have seen, only through the characterization of an element of intention; and it is specifically this element of intention that imparts a degree of seriousness to the offending behaviour.

100. The aforementioned article 4 no more specifies the nature of the criminal penalties required than their degree of seriousness. In this connection, the question of imprisonment calls for some discussion inasmuch as it raises a problem of principle with regard to the criterion of proportionality. Can the abuse of expression really justify deprivation of liberty? Furthermore, apart from the fact that some legislations analyzed in the reports of States Parties to the CERD Convention set the maximum penalties very high, and when we know to what abuses resort to imprisonment can give rise, ought not this form of penalty to be called seriously into question in the context of the present report?

101. Does not the trial that precedes the passage of sentence rather than the penalty itself, perform an educational function which is essential in this connection? Resort to the penalty of imprisonment also raises the question of its effectiveness. In view of its gravity, is there not a risk that the judges will either be reluctant to impose that penalty where they have found the perpetrator guilty, or be wary about finding that offences have been committed - which, as we have seen, is a possibility in view of the somewhat vague definition of the offences. The difficulty is illustrated by the regrettable example of a decision taken by Belgian judges who refused to qualify the term *bougnoule* as racist and decided that it meant "badly dressed".

102. But the non-effectiveness of a criminal penalty greatly reduces its educational and preventive function (see the report of the Council of Europe on decriminalization, 1980) when it ... produces the opposite effect to that intended.

103. Suspension of the right to be elected or *a fortiori* of the right to be a newspaper editor - other criminal penalties which can be contemplated - raises serious questions, in particular when the offender is not directly to blame, which in the case of newspaper editors is most often the case. The rapporteurs' opinion is that these penalties should be imposed only as a deterrent, i.e., at the end of a period of multiple recidivism, implying that the offender called upon to cover the offending passages with his responsibility has in a sense been repeatedly warned to cease and desist.

104. On the other hand the right of reply - regarded as a criminal penalty, not merely as civil redress, and very widely extended to associations - and publication of the convicting judgement would not present any difficulties with regard to the principle of proportionality; the rapporteurs encourage these measures.

105. To conclude on this point, the rapporteurs wish to emphasize that resort to criminal penalties - accompanied by the reservations just expressed - should form part of a comprehensive policy which gives priority to the educational and preventive approach.⁸

⁸ In this connection mention may be made of the lines pursued in France by the National Advisory Commission on Human Rights which, in its report to the Prime Minister (1990), addresses itself essentially to prevention and gives punishment only a quarter of the chapter on responses to racism.

CSCE STANDARDS ON INCITEMENT TO HATRED AND DISCRIMINATION ON NATIONAL, RACIAL OR RELIGIOUS GROUNDS

Stephen J Roth

Human rights have been at the centre of the discussions in the Conference on Security and Co-operation in Europe (CSCE, popularly known as the Helsinki Process) from the outset. They were, in fact, one of the main concerns of the Western countries participating in the CSCE, while the countries of what was then the Communist bloc emphasized considerations of disarmament and other security issues. A third bloc, the Neutrals and Non-Aligned states, supported the West on the issue of human rights.¹ The different interests were finely balanced and the CSCE has advanced by a certain linkage between them or by, what is called in the Helsinki parlance, a "balanced progress".

Commitments to respect and observe human rights were already written into the fundamental document of the CSCE, the Helsinki Final Act of 1975.² Popular belief had it that human rights were embodied in the so-called Third Basket of the Final Act. In fact, they were laid down in Principle VII, one of the basic ten principles of the Helsinki Process (which appeared in the First Basket); the Third Basket rather dealt with "Co-operation in the Humanitarian and Other Fields", and attempted to give practical effect to some of the human rights obligations through human contacts and co-operation between the participating states and their peoples.

FREEDOM OF EXPRESSION

Although freedom of expression was undoubtedly one of the rights that was suppressed with particular severity in the Communist countries, the two human rights on which Western demands focused in the initial stages were freedom of religion and the right to leave (freedom of emigration). Thus, in the Helsinki Final Act freedom of expression was not expressly mentioned. Rather, some vague phrases on the "importance of information" and "dissemination of information", as well as on "the aim to facilitate the freer and wider dissemination of information", were included in the Third Basket's sub-section on "Information".

As the process advanced, more and more new rights were written into the adopted documents.³ In this respect, the CSCE process was more a *mirror* than a

¹ The original participants in the CSCE were the following 35 countries: Austria, Belgium, Bulgaria, Canada, Czechoslovakia, Cyprus, Denmark, Finland, France, German Democratic Republic, German Federal Republic, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, The Holy See, Turkey, United Kingdom, United States of America, USSR, Yugoslavia. With the disappearance of the GDR the number fell to 34, but subsequently Albania, the three Baltic States, twelve Republics of the Commonwealth of Independent States (Russia replacing the USSR), Croatia and Slovenia have been admitted, so that the number of participants as of March 1992 was 51.

² 14 *International Legal Materials* (hereafter *ILM*) 1292 (1975).

³ The most important documents in the period before the Eastern European revolution were the Concluding Document of the Madrid Follow-up Meeting of 1983 (reproduced in 22 *ILM* 527 (1983)) and the Concluding Document of the Vienna Follow-up Meeting of 1989 (reproduced in 28 *ILM* 527 (1989)).

creator of the improvement of relations between East and West.⁴ The documents could include just as many rights as the "state of play" between the two blocks would permit.

Thus, in 1989 at the Vienna Follow-up Meeting, it was possible to elaborate slightly the Final Act's provisions on information in these terms:

They [the participating states] will make further efforts to *facilitate the freer and wider dissemination of information of all kinds*, to encourage co-operation in the field of information and to improve the working conditions for journalists.

In this connection and in accordance with the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and their relevant international commitments concerning seeking, receiving and *imparting information of all kinds*, they will ensure that individuals can freely choose their sources of information (emphasis added).⁵

The reference in this wording to the International Covenant on Civil and Political Rights (ICCPR), however, throws light on an insufficiently appreciated aspect of the Helsinki Final Act. Freedom of expression is included in the Act, although not explicitly. The Act contains a commitment by the participating states, in Principle VII, to "fulfil their obligations as set forth in the international declarations and agreements ..., including *inter alia* the International Covenants on Human Rights, by which they may be bound". This is strengthened by an additional commitment in Principle X to "fulfil in good faith their obligations under international law" including "those obligations arising from treaties and agreements ... to which they are parties". These provisions mean that the participating states that have ratified the ICCPR are bound *also through the Helsinki Final Act* by Article 19 of that Covenant on freedom of expression. Thus, freedom of expression has been a CSCE-protected right from the outset, even if the Helsinki Final Act, for obvious political reasons, had to avoid making this explicit in 1975 and could include it only *sub rosa*.

The changes in the USSR and in Eastern Europe expressed themselves to their full extent only at the Copenhagen Meeting of the Human Dimension of the CSCE held from 5-29 June 1990. The Document adopted at this meeting included a clear-cut undertaking on freedom of expression, in language reminiscent of Article 19 of the ICCPR. Therein, the participating states reaffirmed that:

everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards.⁶

4 However, at the critical stage of the Eastern European changes in 1989-1990, the Helsinki Process emerged as a strong contributing factor to the reforms. For instance, the Hungarian government justified its decision to open its borders for East German refugees to leave for the West at least in part by claiming that it was bound to do so by commitments it had undertaken in the CSCE Vienna document regarding the free exercise of the "right to leave".

5 The Vienna Concluding Document, para. 34 (in the sub-section on "Information" in the section on "Co-operation in Humanitarian and Other Fields").

6 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE of 29 June 1990, Chapter II, paras. 9-9.1, reproduced in 29 *ILM* 1305 (1990).

This commitment was subsequently repeated in other CSCE documents, including the one adopted by the CSCE Summit in Paris in November 1990, which was signed by all the heads of states or governments of the participating states.

CURTAILING FREEDOM OF EXPRESSION ON ACCOUNT OF NATIONAL, RACIAL OR RELIGIOUS HATRED

As the right to freedom of expression was not overtly expressed in CSCE documents prior to the 1990 Copenhagen meeting, it is not surprising that protection against manifestations of national, racial or religious hatred did not find a place in the earlier CSCE agreements either. One can hardly formulate the restriction of a right before the right itself is proclaimed. In fact, except for provisions on non-discrimination, now an obligatory item in any human rights document, the CSCE did not deal with national chauvinism, racist hostility or religious bigotry in any context before 1990.

More surprising than the absence from *documents* is the almost complete absence of these issues even from the *discussions* in the CSCE prior to Copenhagen. Certainly, Western countries did not raise them, while Soviet block countries referred to them only as rejoinders to Western complaints about human rights violations in the East. On the principle that the best defence is an attack, Eastern delegates referred, with propagandistic exaggeration, to the situation of the Blacks in the USA, neo-Nazis in Germany and anti-Semitism in various Western countries.

There are a number of reasons why the West did not turn its attention to the problem of racism earlier. One was that it had more urgent human rights business to attend to, such as religious freedom and emigration. Second, *détente* was not sufficiently advanced to raise the issue, linked, as it is, to freedom of expression. But, third, and perhaps most importantly, xenophobia and racism were not regarded as such serious threats by the West in the late 1970s and in the early 1980s as they later became.

The one exception was the issue of anti-Semitism in the Soviet Union which was regularly raised by Jewish organizations in various Western countries and, on their urging, occasionally by Western delegates at CSCE meetings. Soviet anti-Semitism was strongest in the 1970s and 1980s and Jewish organizations submitted reports on it to all major CSCE conferences (or, more precisely, to the delegates attending them).⁸ This Jewish "lobby" was probably the only one which, prior to Copenhagen, drew attention to the subject of racism in the CSCE.

At the Copenhagen meeting, together with the provisions on freedom of expression quoted above, detailed provisions were also adopted on the subject of national, racial and religious hatred. By paragraphs 40 through 40.7 of the Conference's document, the participating states unequivocally condemn "totalitarianism, racial and ethnic hatred, anti-semitism, xenophobia and discrimination ... as well as persecution on religious and ideological grounds"; recognize the particular problems of Roma (gypsies); pledge to take effective measures, including the adoption of laws, "to provide protection against any acts that constitute incitement

7 Charter of Paris for a New Europe, 21 November 1990, reproduced in 30 *ILM* 190 (1991).

8 Detailed reports on the Position of Soviet Jewry were submitted by an umbrella organization of Jewish communities called the World Conference on Soviet Jewry on the occasion of the follow-up meetings in Belgrade in 1977 and Madrid in 1980, the Ottawa Meeting of human rights experts in 1985 and the 1986 Vienna Follow-up Meeting. The reports invariably contained a chapter on "Anti-Semitic Propaganda". (The reports were prepared by the Institute of Jewish Affairs in London, and the author of this article was their editor, working in co-operation with Dr Lukasz Hirszowicz and Dr Howard Spier of the Institute.)

to violence against persons or groups based on national, racial, ethnic or religious discrimination, hostility or hatred, including anti-semitism"; commit themselves to protect persons and groups (and their property) who may be "subject to discrimination, hostility or violence as a result of their racial, ethnic, cultural, linguistic or religious identity"; pledge to "promote understanding and tolerance, particularly in the fields of education, culture and information"; and recognize the right of individuals and groups to initiate and support legal complaints against acts of discrimination.

These paragraphs in the Copenhagen Document were endorsed by subsequent CSCE meetings. The Paris Summit of November 1990 included in its Charter the following statement:

We express our determination to combat all forms of racial and ethnic hatred, anti-Semitism, xenophobia and discrimination against anyone as well as persecution on religious and ideological grounds.¹⁰

The CSCE meeting on National Minorities held in Geneva from 1-19 July 1991 also adopted a number of provisions on the subject which, although largely a repetition of those agreed upon in Copenhagen, contain some new elements.¹¹

One new element in the Geneva document is the recognition that there has been a "proliferation of acts of racial, ethnic and religious hatred, anti-Semitism, xenophobia and discrimination". The document includes, for the first time, mention of religious *hatred*. (The Copenhagen document spoke of "persecution on religious ... grounds".) In Geneva the participating states stressed "their determination to condemn, *on a continuing basis*" acts based on race hatred, anti-Semitism, etc. This is a commitment to a consistent policy, not just a one-time pronouncement.

Moreover, the Geneva text not only repeats the Copenhagen commitment to adopt appropriate laws against these phenomena but adds that the participating states will also adopt "policies to enforce such laws". This is an extremely useful addition since existing laws against race hatred are often not sufficiently enforced. The word "policies" underscores the afore-mentioned commitment to action on a "continuing basis". The Geneva report also adopted an entirely novel concept of heightening awareness of prejudice or hatred and improving law-enforcement by monitoring relevant statistical data.¹²

In contrast to the CSCE meetings in Copenhagen, Paris and Geneva, the Moscow Meeting of the Conference on the Human Dimension (CHD) (10 September to 4 October 1991) adopted an incitement clause only in relation to migrant workers.¹³ But it included another interesting provision in its Document by which the participating states "recognize that effective human rights education contributes to combating intolerance, religious, racial and ethnic prejudice and hatred, including against Roma, xenophobia, and anti-Semitism."¹⁴ This provision on anti-racist education is, of course, not directly related to curtailing freedom of expression on grounds of hatred and discrimination, but it is not entirely irrelevant either.

9 The full texts of these paragraphs are reproduced in Annexe A.

10 Charter of Paris, note 7 *supra*.

11 The texts of these provisions are reproduced in Annexe A.

12 This was introduced by the US delegation, following the pattern of the US Hate Crime Statistics Act of 23 Apr. 1990, 28 USC 534.

13 Paragraph 38.1 of the Document on the Moscow Meeting of the Conference on the Human Dimension (CHD) of the CSCE (4 October 1991), reproduced in Annexe A.

14 *Id.* at para. 42.2.

In a similar way, the CSCE Cracow document in 1991 included, as its Article 31, a provision that also relates to education against prejudice and hatred in the specific context of monuments and sites of past persecutions, particularly of the Holocaust of European Jewry:

The participating states will strive to preserve and protect those monuments and sites of remembrance, including most notably extermination camps, and the related archives, which are themselves testimonials to tragic experiences in their common past. Such steps need to be taken in order that those experiences may be remembered, may *help to teach present and future generations of these events*, and thus ensure that they are never repeated.¹⁵

ASSESSMENT OF THE CSCE STANDARDS

The detailed provisions of the Copenhagen meeting, reproduced in Annexe A, contain a number of useful declarations and commitments on the part of participating states on the subject of racial, religious and other forms of hatred. They include:

- condemnation (paragraph 40);
- measures of protection (40.2);
- promoting of understanding and tolerance (40.3);
- educational measures (40.4);
- remedies (40.5 & 40.7); and
- international commitments (40.6 & 40.7).

However, from the point of view of this article, the commitment of particular interest is the one contained in paragraph 40.1 regarding incitement. Regrettably, the wording of this commitment falls short of international standards (notably, Article 20 of the ICCPR and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD Convention)).¹⁶

The commitment undertaken by CSCE participating states is only to introduce legislation against "incitement to violence", but not against "incitement to discrimination, hostility or violence" (as stipulated in Article 20 of the ICCPR), nor against "dissemination of ideas based on racial superiority or hatred" (as demanded by Article 4 of the CERD Convention). "Incitement to violence" is much narrower than "incitement to discrimination, hostility or hatred", even if, according to the Copenhagen language, such violence must be based on "national, ethnic or religious discrimination, hostility or hatred, including anti-Semitism". It means that, if incitement to discrimination or hostility does *not* lead to violence, and it is unclear whether such violence must follow immediately or may occur some time after, the incitement is not outlawed by the CSCE wording.

This obvious departure from the international formulae is all the more inconsistent because paragraph 40.1 of the Copenhagen text refers to a commitment of participating states "in conformity with their international obligations". In this respect it is relevant to note that out of the original 34 participants in the CSCE (leaving aside the GDR and the new "intake"), 26 had ratified both the ICCPR and

15 Document of the Cracow Symposium on the Cultural Heritage of the CSCE Participating States (6 June 1991), (emphasis added).

16 The texts of these provisions are reproduced in Annexe A.

the CERD Convention as of 1 January 1992. These states, therefore, clearly have express "international obligations" in this respect.¹⁷

The explanation of why the CSCE regulation of hate speech or literature should be more lenient than the corresponding provisions in any other international document is to be found in the consensus rule of the CSCE. That rule made it possible, indeed unavoidable, for the well-known US opposition to the criminalization of hate propaganda to prevail. Based on the US Supreme Court's interpretation of the First Amendment to the US Constitution, over the last three decades, the US delegates would only accept legal measures against so-called "performative speech", that is, speech that is integrally involved in bringing about illegal action - in this case incitement to violence.

The concession made to the Americans of including an escape clause for them in the words "in conformity with their constitutional systems" did not prove to be sufficient. The US delegation was concerned not only with the impact any prohibition on incitement to hatred would have on its own domestic position; they also thought it necessary to safeguard against such restrictions in other countries. The Canadian delegation submitted proposals both in Copenhagen and Geneva calling for stronger measures against hate speech which virtually all other countries were ready to support. The US delegation, however, was unwilling to appreciate that what may be appropriate for Chicago or Los Angeles may not be adequate for Moscow, Bucharest or Warsaw.

Another weakness of the CSCE texts is that they do not address the issue of racist organizations. The drafters of the CSCE documents should have been guided in this respect by Article 4(b) of the CERD Convention.¹⁸

However, one provision in paragraph 26 of the Moscow document admits (as do provisions in previous documents) that restrictions on freedom of expression *may be* imposed "in accordance with international standards", thus upholding the justification for any country which desired to follow the requirements of the ICCPR and the CERD Convention to do so.

An interesting feature of the CSCE provisions is that, for the first time in any international instrument, they mention anti-Semitism and the problems of Roma as specific forms of racism.¹⁹ In the case of Roma this is entirely new; in regard to anti-Semitism, there were two previous attempts in the United Nations in 1964 and 1967 to have "anti-Semitism" included in a text, but they failed because the USSR at that time insisted that "Zionism" had to be mentioned together with "anti-Semitism".²⁰

17 Status of ratifications by J-B Marie in 4 *Revue Universelle des Droits de l'Homme* 45 (1992).

18 See Annexe A for text of Article 4(b).

19 Previously, only apartheid had been singled out for mention.

20 The two incidents occurred during the drafting of the Convention on the Elimination of All Forms of Racial Discrimination and the drafting of the (still abortive) Convention on Religious Intolerance, respectively. They are described in S J Roth "Anti-Semitism and International Law", 13 *Israel Yearbook of H.R.* 208, 210-11 (1982).

RELIGIOUS INTOLERANCE AND THE INCITEMENT OF HATRED

Kevin Boyle

INTRODUCTION

Questions of balancing public order and religious harmony with the right to freedom of expression are particularly sensitive in many societies.¹ They are questions which this book does not fully address for reasons of space and their complexity. The subject deserves fuller and separate treatment.

This chapter will provide in outline an account of the international standards on freedom of religion and the initiatives taken at the international level to combat religious discrimination and intolerance. It will also briefly illustrate the types of restrictions to be found in the national law (and almost invariably in the penal law) of many countries which limit freedom of speech in matters of religion or belief. From the outset it must be said that many of these laws cannot be reconciled with the international standards on either freedom of religion or freedom of expression.

The experience of religious discrimination, intolerance and persecution has been a feature of human existence throughout recorded time. All evidence points to the conclusion that religious intolerance, the expression of hostility between religions and different denominations or divisions within particular religions, is increasing rather than decreasing in the modern world. This is a reality in all parts of the world, developed and developing. Conflict over rival ideas as to the meaning of life as expressed in the world's religions has been perhaps the chief spur of war, suffering and conflict in history. Ideology based on atheistic convictions in this century has sought the elimination of religious belief with enormous costs in human lives. Today, religious revivalism allied with nationalism is a cause of continuing conflict and suffering. One expert has commented: "[M]any fundamentalist leaders encourage the development of an exclusivist character in particular religious and ethnic communities and classify 'outsiders' as inferior."²

The struggle to achieve religious liberty has been a fundamental aspect of the emergence of the modern world. Freedom of expression is the child of freedom of religion and the two remain intimately connected. Both rights remain precarious and are far from achieving universal acceptance. Censorship remains the norm in many countries and the right to proclaim alternative ideas of religious truth which contradict the orthodox or established version can still lead to persecution and death.³

1 See Chapter on India by Venkat Eswaran and Chapter on Northern Ireland by Therese Murphy.

2 T van Boven "Advances and Obstacles in Building Understanding and Respect between People of Diverse Religions and Beliefs," 13 *Human Rights Quarterly* 438 (1991).

3 See, e.g., the cases of alleged torture and death in Egypt at the hands of security forces of an "apostate" who converted from Islam to Christianity, the persecution of Baha'is and the Christians in Iran, Muslims in Burma, Buddhist Monks in Tibet, and the detailed evidence of persecution, murder and disappearances among Shi'a religious leaders in Iraq; in the Report submitted to the Commission on Human Rights by Mr Angelo Vidal d'Almeida Ribeiro, Special Rapporteur on "Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/1992/52 (18 Dec.1981).

On the international plane, combating intolerance and discrimination towards others on grounds of their different religions or beliefs (which includes protection of non-theistic beliefs), has been a central theme of the international human rights movement since the establishment of the United Nations. A distinction can be drawn between national and international measures to secure the positive freedom of religion or belief, including the elimination of discrimination and the more difficult subject of combating the manifestation of intolerance expressed in acts which are intended or which have the effect of arousing hatred and persecution of others of a different religion or belief.⁴

In examining the current rise of violence against minorities in Western Europe, it is often difficult to isolate religious prejudice as the motivation for discrimination rather than racial, ethnic and cultural prejudice. But the identification of many immigrants as Muslims is undoubtedly a source of the hostility experienced by them. In other regions of the world where conflict between communities persists, religious difference is often one factor which combines with ethnic differences to exacerbate tension especially where one group is identified as a national minority. The challenge to national stability, public order and the rule of law to which such inter-communal differences can give rise are real, as the chapter on India makes clear. It is also clear that the role of law in restraining sectarian tension and conflict is secondary to the role of education and to positive policies supported by state and faith communities to eliminate discrimination and promote tolerance and dialogue.

Many religions make exclusive claims to truth. As history continues to record, many of the followers of different religions deny freedom of conscience to others. The problem is exacerbated when religion is linked to the state as an official religion. This was the case historically in "Christendom" and formally continues to be the case in some countries. It is also a current reality with the Islamic religion. Many of the restrictions placed on freedom of expression in national laws and constitutions are aimed at the protection of state religions from criticism or challenge of any kind. Examples of such restrictions are given below.

INTERNATIONAL ANTI-DISCRIMINATION STANDARDS

The condemnation of discrimination on religious grounds is found in the United Nations Charter, the Universal Declaration of Human Rights, the two International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, as well as in a host of other human rights texts. The "freedom of thought, conscience and religion" guaranteed in the ICCPR for example, includes a prohibition of discrimination on the grounds of religion or belief, the right to manifest religion in worship and observance and the right to adopt a religion or belief of choice (Article 18). The Human Rights Committee which oversees implementation of this Covenant does on occasion raise questions related to Article 18 in the examination of state reports and has considered several complaints of violations of freedom of conscience or religion under the Optional Protocol.⁵

4 See E Odio Benito, *Elimination of all forms of intolerance and discrimination based on religion or belief*, Human Rights Studies Series No. 2 (New York: UN 1989), para 15.

5 See *id.*, Odio Benito Study, Annex.

The CERD Convention might have encompassed concern with religious discrimination, given that hostility directed at minorities is often aimed at their entire culture including religion and language as well as colour. Moreover, the Convention originated as a response to a rash of anti-Semitism in the 1950s in Western Europe, and the Committee for the Elimination of Racial Discrimination (CERD) has always included anti-Semitism within its concerns. Nevertheless, the definition of racial discrimination in the Convention does not include religion and a proposal to include religious discrimination was finally dropped in the drafting of the Convention.⁶ Religious discrimination and hatred currently is a relatively marginal issue for the Committee, although likely to become increasingly important.⁷

At least one reason that racial and religious discrimination issues were kept separate was that the subject of freedom of religion or belief had been on the agenda of the United Nations as a special concern virtually from its beginning.⁸ It remains a concern. Depressing evidence of religious conflict, discrimination and intolerance has been recorded annually since 1986 in the reports of the Human Rights Commission's Special Rapporteur on the subject.⁹

The 1981 UN Declaration

An important step in standard setting on religious intolerance and discrimination occurred in 1981 when the General Assembly adopted without a vote the Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion or Belief. The achievement of a Declaration owed much to the untiring efforts of non-governmental organizations (NGOs) representing virtually all major religions and beliefs. In its preamble the Declaration states that "religion or belief for anyone who professes either, is one of the fundamental elements in his conception of life, and that freedom of religion or belief should be fully respected and guaranteed".¹⁰ It is significant that the Declaration does not seek to define religion or belief. This is because no definitions could be agreed upon, as none could be agreed upon when the texts of Article 18 of the Universal Declaration and Article 18 of the ICCPR were drafted. However, the understanding was that the international guarantee of freedom of conscience covered all theistic, atheistic and agnostic beliefs.

Work on the Declaration, along with a draft Convention, had commenced in 1962 following a request to the Commission on Human Rights from the General Assembly. The Commission decided to give priority to a declaration and requested the Sub-Commission to prepare it. A preliminary draft prepared by the Sub-Commission was considered by the Commission at its twentieth session in 1964. The Commission prepared and adopted a draft convention by 1967. No further action,

6 See Professor Partsch, Chapter 3.

7 For a summary of CERD's examinations of discrimination against religious minorities, see Odio Benito's Study, *supra* note 4, Annex, para 4.

8 *Id.*, paras 1-10.

9 See the Ribeiro Report, *supra* note 3.

10 For a detailed analysis of the 1981 Declaration see DJ Sullivan "Advancing The Freedom of Religion or Belief Through the UN Declaration on The Elimination of Religious Intolerance and Discrimination," 82 *Amer J Int'l Law* 487-520 (1988).

however, was taken until 1972. In that year, work began on a fresh attempt to agree upon a declaration, the question of a convention not being pursued. The Declaration was finally adopted on 25 November 1981.

That it took almost two decades to agree upon a Declaration of eight articles is testament to the sensitivities and complexities for many states in endorsing the principle underlying the Declaration, tolerance for the diversity of religions and beliefs in the world. Since the adoption of the 1981 Declaration there has been periodic discussion on reviving the idea of a Convention on religion and belief. However, despite the efforts of NGOs, spearheaded by those representing religious constituencies, this has not occurred and is unlikely to happen soon.¹¹ Many consider that the greater polarization in the world over questions of religion might entail a Convention which was weaker in its principles than the 1981 Declaration.¹²

Although the 1981 Declaration couples intolerance with discrimination in its title, it is primarily concerned with the question of discrimination. Thus it has no clause equivalent to Article 4 of the CERD Convention on incitement to religious discrimination or hatred, although in other respects it follows the structure of that treaty. The draft convention and early drafts prepared by the Sub-Commission of what became the 1981 Declaration did have an anti-incitement clause.¹³

The relevant clauses of the draft declaration prepared by the Sub-Commission in 1963 read:

All incitements to hatred or acts of violence whether by individuals or organizations against any religious group or persons belonging to a religious community shall be considered an offence against society and punishable by law and all propaganda designed to foster or justify it shall be condemned.

In order to put into effect the purpose and principles of the present Declaration all States shall take immediate and positive measures including legislative and other measures to prosecute and/or to declare illegal organizations which promote and incite to religious discrimination based on religion.¹⁴

The preliminary draft of the proposed convention contained the following clause on incitement:

State Parties shall ensure equal protection of the law against promotion or incitement to religious intolerance or discrimination on the grounds of religion or belief. Any incitement to hatred or acts of violence shall be considered an offence punishable by law and all propaganda designed to foster it shall be condemned.¹⁵

The text of the draft convention adopted by the Commission on Human Rights in 1967 began with the same first sentence as the earlier draft and continued as follows:

11 For an appraisal of the arguments on moving towards a Convention, see Working Paper prepared by Mr T van Boven for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1989/92 (11 July 1989).

12 For various NGO and expert views, see J Salzberg, *The Question of A UN Convention on Religious Intolerance: A Feasibility Study* (Washington, D.C.: 1990).

13 I am grateful to Donna Sullivan for assistance with research on this section.

14 UN Doc. E/3873 (1964).

15 UN Doc. E/CN.4/920.

Any act of violence against the adherents of any religion or belief or against the means used for its practice, any incitement to such acts or incitement to hatred likely to result in acts of violence against any religion or belief or its adherents shall be considered as offences punishable by law. Membership in an organization based on religion or belief does not remove the responsibility for the above mentioned acts.¹⁶

States that placed their objections to these various drafts on the record did so on lines similar to those raised in the debates over Article 4 of the CERD Convention.¹⁷ For example, Sweden expressed a concern that the proposals to penalize speech and association infringed its national standards of freedom of expression and association. The United Kingdom considered that the Declaration should not purport to create legal obligations and on that ground found the clause on incitement in the early draft of the Declaration unacceptable.

In the event, no anti-incitement clause was included in the final text of what became the 1981 Declaration. As already noted, the idea of a parallel Convention was shelved in 1972.

The extension of the Declaration to include beliefs other than religious (at the insistence of the then Eastern bloc countries) would have created considerable difficulties over the adoption of an incitement clause. The Declaration's protection of beliefs would have entailed that the reach of any anti-incitement provision based on the declaration could include, for example, the protection of beliefs of a political nature.

Article 20 of the International Covenant on Civil and Political Rights

Article 20 of the ICCPR, discussed in Chapter 4, offers the only international standard that specifically concerns speech which incites religious hatred.¹⁸ Article 20 prohibits, *inter alia*, the advocacy of "national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". The Human Rights Committee (which monitors compliance with the ICCPR) has adopted a general comment for the guidance of states parties in drafting reports they are required to submit to the Committee periodically. The comment makes clear that states are to enact laws which provide sanctions, though not necessarily criminal, for advocacy of religious hatred. While this obligation should constitute an adequate international guarantee, comments made by Committee members suggest that many countries do not appear to take their obligations under Article 20 seriously.¹⁹

16 UN Doc. A/8300, Annex III.

17 See Chapter 3 by Prof. Partsch on the drafting history of Art. 4.

18 It should be noted that a regional instrument, the American Convention on Human Rights, contains a provision similar to Article 20 of the ICCPR. See Chapter 5 on Article 13(5) of the ACHR.

19 See discussion of Article 20 in Chapter 4.

NATIONAL LAWS ON RELIGIOUS INTOLERANCE AND DISCRIMINATION

A comprehensive study of national laws concerned with the elimination of discrimination and intolerance on grounds of religion or belief is yet to be undertaken. There is an equal lack of systematic study of the compatibility of such laws with international standards including both the requirements of the 1981 Declaration and the prohibition of religious incitement and hatred in Article 20 of the ICCPR. A further question is how far laws that impose restrictions on speech and publication are compatible with the international standards of freedom of expression. Further research on all these subjects is necessary.

What is known from United Nations and NGO reports is that serious violations of both freedom of conscience and religion, in particular the rights of religious minorities, and the rights of adherents of non-dominant religions or sects occur in many parts of the world. One source of these violations is the enforcement of laws which ostensibly protect religion and the expression of religious belief. As noted above, such laws divide into those which are in principle or in practice aimed at defending the dominant position of majority religions, typically offences of blasphemy or insult, and laws aimed at the protection of minority faiths often from the intolerance of the dominant religion.

The Offence of Blasphemy under Christianity

The rationale for these offences was to punish error, heresy or other challenges to the established truth.²⁰ In cases of Christianity the separation of church and state in many Western countries led to the abolition of the offence or to its becoming obsolete. In Britain, however, where there remains an established church, the apparently obsolete offence of blasphemous libel proved to be capable of revival. In 1977 the first prosecution for blasphemy in over 50 years was successfully brought by a private citizen.²¹ The object of the prosecution was a poem depicting Christ as a homosexual in a magazine called "Gay News". The legal interest in the case was the question whether the intention of the poet, a respected writer, in composing the poem was material to guilt. The House of Lords, the highest appellate court in the UK, held that it was not. It was sufficient if it was intentionally published and it produced shock or resentment among Christians. Lord Scarman offered a definition of the offence:

Every publication is said to be blasphemous which contains any contemptuous reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, or the Bible or to the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be

20 S Curry Jensen, *The Knot That Binds Power and Knowledge* (Oxford: Oxford University Press, 1988), 46-59; *The Crime of Blasphemy Why it Should Be Abolished* (The International Committee for the Defence of Salman Rushdie London, 1989); N Walter, *Blasphemy, Ancient and Modern* (1990).

21 *Whitehouse v. Lemon*, [1979] A.C.617.

applied is as to the manner in which doctrines are advocated and not as to the substances of the doctrines themselves.²²

The conviction was challenged before the European Commission of Human Rights as a violation *inter alia* of Article 10 of the European Convention on Human Rights (ECHR) which guarantees freedom of expression. The Commission, however, declared the application inadmissible.²³ It decided that the restriction imposed upon the applicant's freedom of expression was necessary under Article 10(2) for the protection of the rights of others. People had a right not to be offended in their religious feelings by publications. The Commission was equally peremptory in dismissing arguments (under Article 14 of the ECHR) that the blasphemy law was discriminatory in its effects since it privileged the beliefs of the established Anglican Church but offered no such protection from offence to feelings for adherents of other faiths. Stated the Commission:

The applicants cannot complain of discrimination because the law of blasphemy protects only the Christian but no other religion. This distinction in fact relates to the object of legal protection, but not to the personal status of the offender.²⁴

It is doubtful if such a narrow interpretation of the non-discrimination clause in the Convention conforms to the spirit of the 1981 UN Declaration, while the Commission's decision on the free speech point rather confirmed the concerns of many that it is one of the Convention's weaker guarantees. Meanwhile the decision of the national courts provoked considerable criticism and a majority of the Law Commission, the official law reform body, recommended the abolition of the offence without replacement. The minority favoured reform of the law to ensure that it protected the religious feelings of believers of all faiths. The majority considered this to be unnecessary and impracticable because of the problem of defining religion for purposes of any new offence.²⁵ In the event, no action was taken.

Controversy in Britain over the blasphemy laws was rekindled in the wake of the publication of *The Satanic Verses* in September 1988. The campaign against the book by British Muslims resulted ultimately in the notorious edict or *fatwa* by Ayatollah Khomeini on 14 February 1989, sentencing the author Salman Rushdie to death. As the author who was forced into hiding under police protection has no doubt ruefully considered, the verdict was an extreme expression of the same principles in Islam as had been defended on behalf of Christianity in the *Gay News* conviction.²⁶ The punishment in that case, however, was a fine and followed a trial, not as in Salman Rushdie's case a sentence of death without trial in violation of international law. The plight of Salman Rushdie is a revisit to the Western

22 *Id.* at 685.

23 *Gay News v. United Kingdom* 5 EHRR 123 (1983).

24 *Id.* at 128.

25 S Lee in *Law Blasphemy and the Multi-Faith Society* (Inter-Faith Network and Commission for Racial Equality, 1989), 2-15.

26 The text of the *fatwa* was reported by the announcer on Radio Teheran on 14 Feb. 1989, as follows: "In the name of God Almighty. There is only one God, to whom we shall all return. I would like to inform all the intrepid Muslims in the world that the author of the book entitled *The Satanic Verses*, which has been compiled, printed and published in opposition to Islam, the Prophet and the Koran, as well as those publishers who were aware of its contents have been sentenced to death. I call on all zealous Muslims to execute them quickly, wherever they find them, so that no one will dare to insult the Islamic sanctions. Whoever is killed on this path will be regarded as a martyr, God willing." (The Observer, 19 Feb. 1989).

world of the ferocity of the religious laws it had known in the Middle Ages. It is also a continuing reminder of the very limited extent to which freedom of conscience and artistic expression is in fact respected or protected in this modern world of global and instant communications.

An attempt to prosecute Salman Rushdie and his publishers in the British courts for the offence of blasphemous libel failed in March 1989.²⁷ The magistrate dismissed the summons which had been brought by a Muslim, on the ground that blasphemy protected only Christianity. On appeal the case was also dismissed on the same ground and an application to the European Commission on Human Rights was equally unsuccessful.²⁸

Laws of Insult in Islamic Countries

The continued existence of an offence protecting only the majority Christian faith in Britain from speech which insults or outrages religious feelings and its acceptance by the institutions under the ECHR as compatible with European human rights standards, at the least makes criticism by Europeans of the mirror image of such laws in Islamic countries as they apply to Christians open to the charge of double standards and hypocrisy. The situations can be distinguished as laws protecting the prerogatives of Islam are enforced against other faiths with greater vigour and are associated with the violation of other human rights in addition to freedom of religion and freedom of expression. Nevertheless, critics undeniably are undermined to a degree by the persistence and even growth of anti-Muslim sentiment and discrimination in Britain and elsewhere in Europe.

An example can be cited from among many such Islamic laws from the 1991 Report of the Special Rapporteur of the UN Human Rights Commission on Religious Intolerance.²⁹ The following offence was added to the Penal Code of Egypt in 1982:

A penalty of imprisonment for a period of not less than six months and not more than five years or a fine of not less than LE 500 and not more than LE 1,000 shall be imposed on any person who exploits religion in order to promote or advocate extremist ideologies by word of mouth, in writing or in any other manner with a view to stirring up sedition disparaging or belittling any divinely-revealed religion or its adherents or prejudicing national unity or social harmony.

The Rapporteur brought to the attention of the Egyptian government a range of alleged violations of the religious freedom of Christians (who comprise 10 percent of the population), including violations resulting from the application of this offence. In 1989 the law was invoked to issue a warrant for the arrest of Ms Nahid Muhammed Metwalli, a principal of a high school in Helmeit Al-Zatoun, who had converted to Christianity and who was accused by the authorities of having produced a tape recording "concerning her conversion to Christianity and her apostasy from Islam in which she disparaged Islam and criticized the Holy Quran". However, the warrant was not executed since the principal had not been seen since

27 *R. v. Chief Metropolitan Stipendiary Magistrate ex parte Choudhury* [1990] 3 W.L. R. 986.

28 *Choudhury v. The UK*, Application No. 17439/90.

29 Ribeiro Report, *supra* note 3, 11-15.

July 1989. She was believed to have been murdered by her husband when she converted.

A number of other teachers from the school were arrested for conspiracy to convert Muslims to Christianity at the school and for circulating the tape recording "in a manner that showed contempt for the Islamic religion". The teachers were allegedly tortured by members of the national security force following their arrest. Another person unconnected with the school who converted to Christianity allegedly died from torture following bouts of interrogation and rearrests between June and August 1989. The government's reply to the enquiries from the Special Rapporteur amplified certain facts about the cases and other concerns raised, cited constitutional provisions on religious freedom and described the allegations of killings and torture as "purely hypothetical". The arrests and proceedings had been commenced under the offence in the penal code because of the danger that "the contents of the tape recording could cause a deterioration in inter-communal relations that might threaten the country's stability and security".³⁰

The Special Rapporteur's report details many other illustrations of persecution of minority faiths in different countries and of any religious expression in such countries as Vietnam. His report also expresses deep concern over the plight of Salman Rushdie and over the imposition of the death sentence "from the highest authority of the Islamic Republic of Iran" for writing a book "expressing views considered to be offensive by followers of Islam".³¹

Other Illustrations of Restrictions on Incitement to Religious Intolerance in National Laws

Examples of special laws on incitement of religious hatred or intolerance are discussed in the chapters on India and Northern Ireland. Many other countries have similar laws. The following examples are drawn from the report, *Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief*, prepared by Odio Benito, Special Rapporteur of the UN Sub-Commission.³²

Her report identified offences in the penal laws of 13 states (Czechoslovakia, Denmark, France, Iraq, Jordan, Madagascar, Mauritius, Panama, Portugal, Spain, Sudan, Sweden and the Syrian Arab Republic) which replied to a questionnaire in which she asked for information about laws which prohibit "the defamation of a religion or belief, or of its members or leadership individually or collectively by ridicule or scorn, contempt or insulting language, with a view to diminishing their stature and exciting feelings of enmity or hatred or ill-will between them, or incitement to such acts."

Illustrations include Israel's law which prohibits "publishing material or uttering words or other material which are calculated to outrage the religious feelings or beliefs of other persons" and Spain's law concerning "carrying out acts of profanation that offend legally protected religious susceptibilities".

Examples from the former Soviet states clearly reflect a hostility towards religion: "encroachment on the person and rights of the citizen under the pretext of

30 *Id.* at 13, para. 28. For example, serious sectarian conflict arose in the district of Sanabou in Egypt in May 1992 following the murder of 12 Christians and one Moslem. *The Guardian*, 5 May 1992.

31 *Id.*, para. 150.

32 *See supra* note 4.

performing religious ceremonies" (Ukrainian SSR); organizing or directing a group whose activity conducted in the guise of propagating religious beliefs or performing religious ceremonies is harmful to citizens' health or otherwise encroaches on their personal rights or which incites citizens to refuse social activity or performance of civic duties or seeks to attract minors to such groups" (USSR).

An appreciation of the efficacy of such laws in checking religious intolerance would require considerable research in different countries. Further study would also benefit the understanding of how the application of anti-religious incitement laws impacts on the right to freedom of expression, including freedom of press and publication.

Church and State

The separation of church and state is not specifically required by international standards but the onus is on those who defend the ideas of fusion or special relationships between a preferred religion and the state to demonstrate how such relationships can be compatible with a full implementation of the requirements of the 1981 Declaration. It must be said that nothing in history or contemporary experience anywhere in the world encourages the thesis that the formal linkage between the state and any single religion or secular ideology is compatible with tolerance and understanding of the freedom of conscience of those who differ. The global objective of true religious liberty, through the elimination of discrimination and intolerance, will require more fundamental change in attitudes and within religions than can be achieved by law alone. It is for that reason that the 1981 Declaration emphasizes dialogue between religions and beliefs and education for tolerance and understanding of the diverse "explanations of the meaning of life and how to live accordingly".³³ Freedom of expression is a vital right to enable that long term educational process to succeed.

CONCLUSION

As with racist speech, the only safeguards that laws prohibiting religious hate speech will be applied to defend the freedom of religion or belief (including the rights of minority religious groups) are to be found in democratic institutions, including an independent judiciary. It is ultimately the courts which must undertake the task of ensuring in practice that such laws are enforced so as to balance the right to freedom of expression and the right of individuals not to be the victims of intolerance. However, where the law itself favours one creed, as where a religion is established by the state, it is difficult to see how laws aimed at the elimination of incitement and discrimination can be other than ineffective at best and a source of abuse of human rights at worst. In contrast to the duties of the state to condemn theories of racial superiority and inferiority, the international standards do not require countries to condemn the claims of religions to exclusive truth (although they do require the elimination of any discrimination on the basis of religion or belief, and the prohibition of bigotry and intolerance towards those who follow different faiths).

³³ *Id.*, para. 18.

Whatever legitimate justifications can be advanced for restraining speech that denigrates the beliefs of individuals, including on such grounds as the protection of equality, religious freedom, public order and community harmony, punishment of speech because it challenges doctrine or dogma or insults God, religious figures or authorities, or the state should be condemned as censorship. The existence of offences such as blasphemy or insult to an established or paramount religion should continue to be challenged.

PART III: Country Experiences

RACIAL VILIFICATION: THE AUSTRALIAN EXPERIENCE

Kate Eastman

Racial vilification and racist violence have attracted a great deal of attention in Australia in recent years. In 1991 the Australian Human Rights and Equal Opportunity Commission released its report on the National Inquiry into Racist Violence (NIRV). The Inquiry, initiated by the Race Discrimination Commissioner, was in response to the apparent increase in racist attacks on members of Australia's ethnic community. The federal government has recently announced that it would act on the report's findings and change the law.¹ State governments and broadcasting authorities are also reviewing laws dealing with vilification. In short, both the law and community attitudes are responding to a perceived need for change and better means of dealing with racist violence.

The traditional approach to dealing with the problem of racial vilification has relied on both criminal and civil laws. Anti-discrimination laws in more recent times have created new statutory remedies providing avenues of complaint and resolution by conciliation for victims of racist attacks. Racial vilification is used here to describe public racist activities which include racist speech, graffiti, statements, gestures, writings and publications which are intended to promote or incite racial hatred.

Australia is a party to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD Convention). Both international treaties create international legal obligations for Australia to prevent racial discrimination.

This paper investigates the various approaches for dealing with the problem of racial vilification in Australia by examining the anti-discrimination, civil and criminal laws.

AUSTRALIA'S CONSTITUTION AND FEDERAL SYSTEM

Australia is governed as a federation. The Commonwealth of Australia consists of a central government in Canberra, six state and two territory governments. The Constitution delimits the powers between Canberra and the states. Section 51 of the Constitution specifies the areas where the central government has power to regulate, while the states pick up the remaining areas. In the event of a conflict between federal and state laws, Section 109 of the Constitution stipulates that the federal laws will prevail over any inconsistent state laws.

In 1900 when the Constitution was drafted, there was no concept of human rights as we know it today. As a result, the protection of civil and political rights was not specifically allocated to either the central government or to the states. Unlike the USA and Canada, nations which also have a federal system of government, Australia does not constitutionally guarantee these rights by a Charter or Bill of Rights.

¹ *Sydney Morning Herald*, 16 March 1992, 3.

In Australia, protection of human rights falls into the domain of international, criminal, civil and administrative law. Both Canberra and the states have responsibility. Canberra has attempted to minimize disparities between the states in the area of human rights by relying on its constitutional "external affairs" power (under Section 51) to implement international standards such as those included in the CERD Convention and the ICCPR, but made reservations to these Conventions to cover situations when federal issues arise. The Commonwealth government's power to enter into international treaties means that it must have the power to ensure that Australia adheres to its international obligations by implementing the relevant domestic laws.² The external affairs power does not act as a blanket for Canberra's power to legislate. Human rights protection in Australia involves complex issues of constitutional law in addition to the more general substantive and procedural laws. The dual responsibility between Canberra and the states for human rights is reflected in the myriad of laws at both the state and federal levels. There are often many gaps in the law, and racial vilification is a typical example of where regulatory power is not clearly attributed to either the states or the Commonwealth.

THE FEDERAL RACIAL DISCRIMINATION ACT

The Racial Discrimination Act (RDA) 1975 is a federal act which implements Australia's obligations under the CERD Convention. The RDA makes discrimination unlawful on the grounds of race, colour, descent and national or ethnic origins in the areas of equality before the law (Section 10), access to places and facilities (Section 11), housing and accommodation (Section 12), provision of goods and services (Section 13), the right to join trade unions (Section 14), employment (Section 15), and advertisements (Section 16). It does not specifically cover the area of racial vilification, although a provision to prohibit racial hatred was included in the original Race Discrimination Bill.³ Racial vilification and racial violence is not unlawful discrimination under the RDA and victims have no direct redress under the RDA.

Rights of Victims Under the RDA

Discrimination is defined in Section 9(1) of the Act in identical terms to Article 1(1) of the CERD Convention. Unlawful discrimination is not a criminal offence; rather, a person who is a victim of unlawful discrimination has the right to lodge a complaint with the Human Rights and Equal Opportunity Commission (HREOC). The right to complain is vested in the person aggrieved (victim) or by another person acting on the aggrieved person's behalf.

Complaints are investigated by the Race Discrimination Commissioner. After initial investigation the complaint will either be dismissed, if unfounded, or referred to conciliation where all parties will be required to attend. The RDA provides the Race Discrimination Commissioner with the power to use interim measures to obtain information and documents and require compulsory attendance at concilia-

2 *Koowarta v. Bjelke-Peterson & Others* (1982) 153 CLR 168. See also G Triggs, "Australia's Ratification of the ICCPR: Endorsement or Repudiation?", 31 *Int'l and Comparative Law Quarterly* 278 (1982).

3 P Bailey, *Human Rights: Australia in an International Context* (Butterworths, 1990), 209-11.

tion conferences. If a party fails to comply with any of the Race Discrimination Commissioner's instructions that person may be liable to fines ranging from Aus\$ 1,000 to 10,000 (US\$ 750 to 7,500).

Most disputes are resolved by conciliation resulting in a private, confidential settlement. If the complaint is not settled by conciliation then the Race Discrimination Commissioner reports to HREOC which then conducts an inquiry into the complaint. An inquiry is conducted in a quasi-judicial manner by hearing. The adjudicator is usually the President or another Commissioner - the Human Rights Commissioner, Sex Discrimination Commissioner or Privacy Commissioner. The adjudicator's determination is not binding on the parties, and appeal to the federal court is necessary to enforce the recommendations. Recommendations may include an award of financial compensation to the victim of unlawful discrimination.

The National Inquiry Into Racist Violence (NIRV)

The Race Discrimination Commissioner also has power under the RDA to conduct investigations or hold inquiries not arising from a complaint. The NIRV is an example of the investigatory power into race related issues which may not fall under the areas providing right of complaint. As the NIRV Report explains:

The National Inquiry into Racist Violence was initiated by the Human Rights and Equal Opportunity Commission following representations to it about an apparent increase in the incidents of racially motivated violence in Australia. In any society, racist violence is the most serious expression of racism. The inquiries and investigation of racist violence have, therefore, necessarily involved an examination of racism in our community.⁴

The NIRV found that the problem of racist violence needed to be addressed on several levels. The report traces the history of racist violence in Australia, the demographic history of racist violence against Australian Aborigines, people of non-Anglo ethnic origin and people opposed to racism.

The report makes 18 findings which can be summarized as follows:

- Racist violence, intimidation and harassment against Aboriginal people is an endemic social problem resulting from racist attitudes and practices which pervade public and private institutions. The problem is one of racism in Australia rather than isolated acts of violence. (Findings 1-5.)
- Racist violence on the basis of ethnic identity in Australia has not reached the level experienced in other countries. Racist violence is usually perpetrated by young, male Anglo-Australians on the basis that the targets of the racist intimidation and harassment are visibly different. (Findings 7-10.)
- In public places, the violence is unprovoked and on a "one-off" basis, while neighbourhood incidents are often the result of sustained campaigns. (Findings 11-12.)
- Public authorities, on the whole, do not respond effectively to reports of racist violence. (Findings 14.)⁵

4 Human Rights and Equal Opportunity Commission, *Report of National Inquiry into Racist Violence in Australia* (Canberra: AGPS, 1991), xvii.

5 *Id.* at 213, 219-220, 224.

The report concludes that further legislation is required in order to stem rising racist violence⁶ as well as to implement Australia's obligations under the ICCPR and the CERD Convention.⁷

The NIRV Report and Freedom of Expression

Although the report details evidence of racial violence it contains very little discussion about the values of protecting freedom of expression or of the arguments made by free expression proponents that limitations on racist speech (often a form of political speech) could set dangerous precedents. Rather, the report focuses on the acceptance of limitations on freedom of expression in various contexts:

The Inquiry recognizes that this is a difficult area which requires the striking of a balance between conflicting rights and values. The right to free speech, for example needs to be weighed against the value placed on the rights of people from different ethnic backgrounds to enjoy their lives free of harassment or violence. The evidence presented to the Inquiry indicates that some people are deliberately inciting racial hostility and particularly in the case of racist graffiti and poster campaigns, getting away with it. ... In recommending the amendment of the RDA to prohibit the incitement of racial hostility, the Inquiry is not talking about protecting hurt feelings or injured sensibilities. Its concern is with conduct which adversely affects on the quality of life and well-being of individuals or groups who have been targeted because of their race. The legislation would outlaw public expressions or acts of incitement, not private opinions. As in the case of defamation laws, the context, purpose and effects of the words or material need to be considered before determining whether or not they are acceptable under the Act. Saving clauses should make it clear that the legislation will not impede freedom of speech in the following forms: private conversation and jokes; genuine political debate; a fair reporting of issues or events; literary and other artistic expression; and scientific or other academic opinions, research or publications.

The threshold for prohibited conduct needs to be higher than expressions of mere ill-will to prevent the situation which occurred in New Zealand, where legislation produced a host of trivial complaints. The Inquiry is of the opinion that the term "incitement of racial hostility" conveys the level and degree of conduct with which the legislation would be concerned.

Civil Remedies

The NIRV concluded that resort to civil remedies was "fraught with both legal and practical difficulties".⁸ In particular, it stated that:

6 *Id.* at 269.

7 *Id.* at 294.

8 *Id.* at 29.

The Inquiry has found little, if any, evidence to suggest that the victims and targets of racist violence or harassment have had recourse to existing remedies existing at common law for general forms of interference with rights to the integrity of the person's reputation or property."⁹

The civil remedies available to victims of racial vilification include compensation for defamation, assault, trespass and nuisance. Reliance on defamation laws in Australia is difficult because of the costs involved in initiating civil litigation and the time and court delays in reaching a resolution. At present defamation laws in Australia are not uniform and are currently subject to review. Any reforms are expected to promote greater uniformity among the states.

STATE ANTI-DISCRIMINATION LAWS

In May 1989, the New South Wales Parliament adopted the Racial Vilification Amendment to the NSW Anti-Discrimination Act (ADA), the first law in Australia to provide criminal and civil remedies for incitement to racial hatred.¹⁰ The state parliaments of Victoria, South Australia, Western Australia, Queensland and the Australian Capital Territory have enacted Equal Opportunity or Anti-Discrimination Acts. None, however, contain provisions which establish civil or criminal remedies for racial vilification.

The Tasmanian Anti-Discrimination Bill 1991, passed in the Lower House of the Tasmanian Parliament on 15 November 1991, includes a racial vilification provision, Section 18, which, if enacted, would create a civil cause of action for any "public act that promotes or expresses, on the ground of the race of a person or a group of persons, hatred, ... serious contempt or ridicule of that person or group of persons".

Western Australia recently introduced a bill which would make racist harassment unlawful. The Equal Opportunity Amendment Bill (WA) 1991, which had a second reading on 28 November 1991, would prohibit racial harassment in the areas of employment, education and accommodation. Racist harassment under the bill occurs when a person threatens, abuses, insults or taunts another person on the ground of race and the target of the taunts reasonably believes that objecting to such treatment would disadvantage him or her in employment, education or accommodation.

In August 1990 the WA Parliament passed the Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Act 1990, making it a criminal offence for a person possessing and/or publishing material to incite racial hatred or harass a racial group. Offences are limited to written or pictorial material, including posters, graffiti, signs, placards, newspapers, leaflets, handbills, writings, inscriptions, pictures, drawings or other visible representations. In September 1990 three members of the ultra-right wing Australian Nationalist Movement were convicted of more than one hundred offences although, as of 1991, no prosecution under the 1990 amendments had been initiated.

9 *Id.* at 277.

10 See Sharyn Ch'ang's discussion of the Amendment in this section.

PROPOSALS FOR REFORM

The NIRV examined models of anti-racist legislation by looking at the United Kingdom, Canada, United States of America, European civil law countries, New Zealand, New South Wales Racial Vilification Legislation, Western Australian Criminal Code Amendments and the former Human Rights Commission's proposals as models for new anti-racist legislation. The NIRV concluded that:

It has become necessary to take legislative action to outlaw certain kinds of racist conduct. It is therefore now appropriate for Australia to take steps to remove any qualification placed upon its ratification of the CERD Convention and implement all obligations arising under it.¹¹

Accordingly, the NIRV recommended that the federal government withdraw the qualifications to full acceptance of the obligations under Article 4(a) of the CERD Convention which the government had declared when it ratified the treaty¹², and that it pursue the following legislative reforms:

- Amendment of the Federal Racial Discrimination Act 1975 to prohibit racist harassment and incitement of racial hostility, and to provide for civil remedies similar to those already provided for racial discrimination.
- Amendment of the Federal and State Crimes Act to enable courts to impose higher penalties where there is a racist motivation or element in the commission of an offence.
- Extension of the prohibition of racial discrimination in the enjoyment or exercise of human rights or fundamental freedoms in Section 9 of the RDA to cover discrimination against those who have advocated against racism and supported anti-racist causes, and inclusion of coverage for such advocates in any new provisions for remedies for incitement of racial hostility and harassment.
- Amendment of the Federal Racial Discrimination Act to provide that discrimination against or harassment of a person on account of that person's religious beliefs be prohibited where the religion is commonly associated with persons of a particular race or races or of a particular ethnic group or groups and is used as a surrogate for discrimination or harassment on the basis of race or ethnicity.¹³

The report also recommended changes in policy concerning education and community relations.

CONCLUSIONS

The Australian approach to dealing with racial vilification is extremely patchy in terms of both the content of the law and the means of enforcement. There is a great disparity between theorizing about what the law should be and what the law actually is. There is confusion at the grass roots level as to whether acts of racial vilification or racially motivated crimes should be treated as crimes or merely discrimination

subject to civil redress, and whether these matters should be dealt with publicly or privately by conciliation.

The disparities may be a result of inaction by victims who are reluctant to turn to the police and are unaware of statutory remedies. The NIRV recommendations are comprehensive but represent a clear preference for criminalizing racist speech. Australia must be wary of adopting new criminal laws where it already has ones which will deal with the problem. More evidence is needed of the effects of conciliation as a means of resolving racial problems. Conciliation offers a quick, cheap and relatively simple means of resolution compared to expensive civil litigation or public criminal action. Conciliation also provides the victims with control over the direction and course of proceedings. It may provide more than just financial compensation by facilitating harmonious community relations. The "remedy" must fit the situation and circumstances of each incident.

11 Id. at 296.

12 See Annexe B for the text of Australia's declaration on ratifying the CERD Convention.

13 NIRV Report, *supra* note 4, at 299-300.

AUSTRALIA: THE ROLE OF THE MEDIA IN PERPETUATING RACISM

Kitty Eggerking

RACISM IN AUSTRALIA

From the first days of white colonization racism has flourished in Australia. As one commentator has noted, Australian racism is of two sorts, against two distinct groups and for two distinct purposes:

We are dealing with two distinct, though interlocking, processes: the first is the colonial land grab, which dispossessed the Aboriginal people, and which was based on physical and cultural genocide. The second is the process of labour recruitment, migration and settlement, necessary to provide a workforce for an emerging industrial society. The first process is one of destruction; the second is one of incorporation.¹

Throughout the 200 years of white Australian history, racism has been part of the national culture, and the tradition continues, as two important reports published in 1991 show. Both provide ample evidence of the harassment, discrimination and the all-too-frequent racial hatred endured by Aboriginal people and migrants, particularly those from non-English speaking and non-Christian backgrounds.

One report was issued by the federal Human Rights and Equal Opportunity Commission (HREOC) following a two-year National Inquiry into Racist Violence (NIRV). NIRV "was motivated by a widespread community perception that racist attacks, both verbal and physical, were on the increase" in 1988, ironically the year of Australia's bicentenary, the official theme of which was "living together".²

The other report is that of the Royal Commission into Aboriginal Deaths in Custody (RCADIC), convened in 1987 "in response to a growing public concern that the deaths in custody of Aboriginal people were all too common and [that] public explanations were too evasive to discount the possibility that foul play was a factor in many of them".³ The report found that, in seven years from 1980 to 1987, 99 Aboriginal people died in police or prison custody, including 11 women, the youngest of whom was 14 when she hanged herself in a cell. The mean age of these 99 people was 32; 43 of the 99 grew up away from their families, the result of successive official policies of assimilation and integration.

The multi-volumed RCADIC report portrays in great detail and with great empathy the patterns of discrimination, the lack of opportunities and the hopeless circumstances of most Aboriginal people. While Aboriginal people make up one per cent of the population, they represent 26.8 per cent of Australia's prison population. According to the Commissioners, "race relations are at the heart of the ... deaths in custody of Aboriginal people", and the 99 deaths must be seen "in the

context of the radically unequal relations that operate between Aboriginal society and the dominant non-Aboriginal society".⁴

ROLE OF THE MEDIA

The NIRV and RCADIC reports both address the role of the media in the perpetuation of racism. For NIRV the media "is central to shaping community attitudes" and has a "significant role" to play "both in communicating and soliciting the ideas, fears and regrets of racism and in informing and educating Australians about each other".⁵ While noting the media's positive contribution "in exposing injustices or highlighting the problems faced by Aboriginal communities" as "a most important one", NIRV characterizes the contribution of the media in race relations in the following manner:

The perpetuation and promotion of negative racial stereotypes, a tendency towards conflictual and sensationalist reporting on race issues and an insensitivity towards, and often ignorance of, minority cultures can all contribute to creating a social climate which is tolerant of racist violence.⁶

Elliott Johnston, Chairman of the Commission, on the other hand noted that there had been:

a very considerable change in treatment of Aboriginal people and Aboriginal issues by much of the media over the [two-year] life of the Commission. ... Newspapers carry many more stories about Aboriginal achievement, and they usually present it in quite a warm and supporting way.⁷

Some commentators are of the view that racial stereotyping in the media is a form of institutional racism and not simply the result of the ignorance, lack of sensitivity or actual bias of individual reporters. One Western Australian journalist wrote in a submission to RCADIC:

Racial stereotyping and racism in the media is institutional, not individual. That is, it results from news values, editorial policies, from routines of news gathering that are not in themselves racist or consciously prejudicial. ... A story featuring Aboriginals [*sic*] is simply more likely to be covered, or more likely to survive sub-editorial revision or spiking if it fits existing definitions of the situation.⁸

We at the Australian Centre for Independent Journalism agree with this view, but would add that the failure of individual journalists to uphold professional standards and the industry's ethical principles, as expressed in the Australian Journalists' Association's Code of Ethics and the Australian Press Council's Principles, also contributes to stereotyping and racism in the media. Studies of examples of racist reporting confirm that glib news criteria, insolent disregard of their audience, inadequate news gathering (press releases from powerful interest groups all too often forming the main source for a story) and insufficient attention to detail and

1 S Castles, et al., *Mistaken Identity: Multiculturalism and the Demise of Nationalism in Australia* (Sydney: Pluto Press, 1990), 16.

2 Human Rights & Equal Opportunity Commission, *National Inquiry Into Racist Violence* (Australian Government Printing Service (AGPS), Canberra 1991), 6.

3 Royal Commission into Aboriginal Deaths in Custody (RCADIC), *Report* (AGPS: Canberra, 1991), Volume 1, 6.

4 *Id.*, Volume II, 154.

5 *Id.*, Volume I, 355.

6 *Id.*, Volume I, 356.

7 *Id.*, Volume IV, 57.

8 *Id.*, Volume II, 185-86.

nance, on both an individual and an institutional basis, are among the chief causes of racist reporting.

MEDIA REGULATION

Commercial radio and television is regulated by the Australian Broadcasting Tribunal (ABT), established by the Broadcasting Act 1942 (Commonwealth), which conducts licence renewal hearings, upholds broadcasting standards and has formal procedures for complaint resolution. Section 16(1)(d) of the Broadcasting Act provides that it is a function of the Australian Broadcasting Tribunal to, among other things: "determine the standards to be observed by licensees in respect of the broadcasting ... of programmes."

Pursuant to this directive the Tribunal has set certain programme standards which include: Interim Television Programme Standards (ITPS), 12 September 1991 (regulating licensees of commercial television stations); Radio Programme Standards (RPS), 12 September 1991 (regulating licensees of commercial and public radio stations); and Children's Television Standards (CTS), 18 June 1991 (regulating licensees of commercial television stations in the transmission of children's programmes and advertisements). These programme standards include proscriptions against the transmission of any programme which:

- (a) is likely to incite or perpetuate hatred against, or
- (b) gratuitously vilifies, any person or group on the basis of ethnicity, nationality, race, gender, sexual preference, religion or physical or mental disability (ITPS 3 and RPS 3); or
- (c) may "demean any person or group on the basis of ethnicity, nationality, race, gender, sexual preference, religion, or mental or physical disability" (CTS 10).

The Australian Broadcasting Corporation (ABC), an independent, government-financed corporation modelled on the British Broadcasting Corporation (BBC), is regulated under its own legislation. Nonetheless, it is required to take account of the ABT standards.⁹ The Special Broadcasting Service, established in 1980 to provide multicultural television and multilingual radio services for minority communities at present is held accountable by provisions contained in the Broadcasting Act, but soon will have legislative status similar to that of the ABC.

In keeping with the British tradition, the press has long resisted government regulation, and instead subscribes to self-regulation through the Australian Press Council (APC). The Aims, Principles and Complaints Procedure of the Australian Press Council (1989) includes the following in its charter: "The publication of material disparaging or belittling individuals or groups by reference to their ... race, nationality, colour or country of origin ... is a breach of ethical standards."

In addition, the Australian Journalists' Association (representing 90 per cent of full-time journalists) is supposed to hold its members in check through adjudication of alleged breaches of its Code of Ethics.

For residents of New South Wales (NSW) an additional avenue for complaints regarding matters of race, including against the media, is the Racial Vilification Amendment, discussed by Sharyn Ch'ang in this section.

COMPLAINTS AGAINST THE MEDIA

Of the sundry bodies and mechanisms charged with regulating the media and with redressing the grievances of the public, only the ABT and the APC publicize details of resolved cases. In its 14 years of operation through 1991, the APC received a total of 3,230 complaints, 15 per cent of which it has decided to adjudicate. Of the approximately 480 adjudicated cases, some 56 concerned the issue of race, and of these 21 were upheld.

Clause 8 of the APC's Principles states that "the publication of material disparaging or belittling individuals or groups by reference to their sex, race, nationality ... is a breach of ethical standards". On occasion, however, the APC has shown that it has a limited understanding of the concept of racism. An Aboriginal group complained to the APC over the use of the word "black" in a headline. While noting that "care is needed in the use of the word 'black' to avoid any racist connotation", the APC stated the following as a reason for avoiding the term:

The Press Council agrees that the use of the term "Blacks" to describe Aborigines may be inappropriate because so many Aboriginal people are of mixed descent and could not be accurately described as being black.¹⁰

It should be noted that part of the Aboriginal definition of Aboriginality includes anyone who identifies as being Aboriginal. Thus, the very act of assessing the degree of blackness may be perceived as racist:

Hesitation on the part of the dominant culture to classify part-Aborigines as Aborigines can be better understood in terms of the racist nature of race relations in Australia and political strategy.¹¹

The Australian Broadcasting Tribunal received 12,333 complaints during the five-year period ending in June 1990. Of these, 1,860 were complaints about racism, although it should be noted that in one year alone, 1987-1988, 1,638 complaints were lodged against one Sydney talk-back show host, Ron Casey, who conducted a personal campaign against Asian immigration.¹² Removing this anomaly, the average number of racist complaints per year was 44, or around 2 per cent of total complaints.

Complaints against another Sydney talk-back host, John Laws, present an even more instructive example of how race relations are handled because Laws challenged the ABT's authority all the way to the High Court. In March 1987 Laws, in eight separate programmes, commented on Aboriginal policy, culminating in an extraordinarily rude exchange with an Aboriginal caller:

I'll tell you what, Stewart. I think that you are so typical of so many of your race. You're belligerent, you're a bully, you're a loud mouth, you're ill informed and you're plain bloody stupid.

Complaints were lodged with the ABT, and in November 1987 the Tribunal "found that Laws had breached broadcasting standards on three days in March" and also

¹⁰ APC, *Annual Report* (1989), 53.

¹¹ R Robinson, "The Politics of Identity", in J Sherwood (ed.), *Multicultural Education: Issues and Innovations* (Perth: Creative Research, 1981), 127.

¹² In two 1987 programmes, Casey referred to staff in Chinese restaurants as "chinks" and "weeds", suggested that violence towards such staff was appropriate and referred to Japanese as "rotten little slant eyed devils to the North screwing us down". The ABT found that Casey had breached Radio Programme Standard 3 (RPS 3) in both programmes and ordered that all of his future broadcasts were to be subjected to a 10-second time lag before going to air, with a senior journalist having the power to censure Casey's material by pressing a "dump button" before any potentially offending material could be broadcast.

LEGISLATING AGAINST RACISM: RACIAL VILIFICATION LAWS IN NEW SOUTH WALES¹

Sharyn Ch'ang

announced that it would conduct an inquiry. In February 1988 Laws launched an appeal against both decisions under the Administrative Decisions (Judicial Review) Act in the federal court, which found in favour of Laws. The ABT appealed to the full bench of the federal court, which overturned the earlier decision.¹³ Laws sought, and was granted, leave to appeal to the High Court, which dismissed the appeal in July 1991.

Following the High Court's decision, the ABT again announced an inquiry, calling for submissions on how to deal with Laws. The President of the NSW Anti-Discrimination Board sought leave to intervene in the ABT inquiry on the ground that breach of RPS 3 created the elements of an offence under Sections 20C and 20D of the Anti-Discrimination Act.¹⁴ In November 1991, a federal court held that the President did not have standing to intervene in ABT proceedings.¹⁵ This case illustrates the problem of numerous regulators in overlapping fields; it is to be hoped that, in time, their roles will be clarified and their actions better co-ordinated.

CONCLUSION

The Press Council does not believe that it is the press's function "to educate society on what is politically correct", and its chairman, David Flint, further argues "that an accounting body cannot direct the press towards what it believes to be a politically correct agenda, however noble, however sincere".¹⁶ Yet, clearly, as the outcry against Ron Casey shows, the community at large is tired of ill-informed and racist outbursts. Perhaps society is in a position to educate the media. It is no longer acceptable to insist on blanket freedom of expression; that expression must be qualified and balanced against other, sometimes competing, rights and obligations, in this case the right to be free from racial vilification and defamation. Professor Flint's fears of an omnipotent "accounting body" are clearly unfounded if the ABT's approach to inquiries and complaint handling is any indication. Regulation through an official body at least guarantees access to the courts, whereas anyone wishing to pursue a complaint through the APC must waive his or her right to legal action. An umbrella "accounting body", however, does not need to be a statutory body. What is necessary, from the public's point of view, is that there be one body to deal with complaints quickly and effectively.

The Australian Centre for Independent Journalism is currently developing a training manual which will discuss and re-evaluate issues of professionalism as well as alert journalism students and young journalists to Australia's cultural diversity and to the different issues and problems confronting minority groups. By such means we hope to nurture a new generation of journalists, though we are also keenly aware of the need to encourage editors and other senior personnel to re-assess their practices. We are encouraged in this endeavour by the fact that both the NIRV and RCADIC reports, released subsequent to the commencement of our project, recommend the inclusion in journalism courses of issues of cultural diversity.

13 See *Laws v. ABT* (1988) 81 ALR 372; (1990) 93 ALR 735.

14 See Sharyn Ch'ang's discussion of Sections 20C and 20D in the following essay.

15 *Mark v. Australian Broadcasting Tribunal*, decision by Mr Justice Davies, unreported (22 Nov. 1991).

16 APC Newsletter (Aug. 1991), 3.

INTRODUCTION

The Anti-Discrimination (Racial Vilification) Amendment Act No 48 of 1989 (hereafter "Racial Vilification Amendment") came into operation in New South Wales on 1 October 1989 as an amendment to the Anti-Discrimination Act 1977 (NSW) (hereafter "the Act"). It was the first law in Australia to declare vilification on the ground of race to be unlawful. Serious racial vilification is made a criminal offence and less serious acts are made subject to civil or administrative remedies. Until adoption of this Amendment, victims of racial vilification in Australia had no specific remedy under any state or Commonwealth laws.²

In Australia, where multiculturalism is a declared policy of, and publicly advocated by the Australian government,³ racial conflict of whatever cause is incompatible with such policies and contrary to the aim of maintaining law and order in society. In recognition of this, and in the wake of Australia's increasing racial, ethnic and cultural diversity resulting from ongoing immigration programmes, the primary intention of the NSW government's introduction of the Racial Vilification Amendment was for the provision of appropriate remedies to redress racially vilifying conduct in the short and longer term, and reinforce the concept of the social unacceptability of racial vilification.⁴

The debate concerning the introduction of the racial vilification law was predictably controversial. Despite the bipartisan support for the bill and the consistent backing from racial, ethnic, Aboriginal, Jewish, Islamic and Asian organizations, it took nearly two years to finalize and pass into law. During this time, the antagonists challenged the philosophy of "legislating" against racism, and expressed their fear concerning the infringement of free speech. The resulting amendment is therefore the product of extensive political and social consultation.

Two years have passed since the introduction of the Racial Vilification Amendment in NSW. Other states in Australia are following NSW's initiative.⁵

1 The assistance of the NSW Anti-Discrimination Board is gratefully acknowledged. However, the views expressed are solely those of the author.

2 Other Australian laws provide remedies for racial discrimination, e.g., Anti-Discrimination Act 1977 (NSW) and Racial Discrimination Act 1975 (Cth [Commonwealth]); for individual defamation, e.g., Defamation Act 1974 (NSW); and for such crimes as offensive language and sedition, e.g., Section 24D of the Crimes Act 1974 (Cth).

3 "Multiculturalism" is a complex social and policy concept connoting both a description of Australian society and a prescription of how Australians ought to behave. It is relatively recent policy, defined in the National Agenda for a Multicultural Australia published by the Department of the Prime Minister and Cabinet, Office of Multicultural Affairs (AGPS 1989). The Agenda includes three aspects: cultural identity, social justice, and economic efficiency.

4 John Dowd, then Attorney-General for NSW, Second Reading Speech, Hansard, NSW Legislative Assembly, 7491 (4 May 1989).

5 See discussion by Kate Eastman of various state laws and proposals, in this section.

and the federal government is similarly considering recommendations regarding the enactment of national provisions outlawing incitement to racist violence and racial hatred.⁶

On 6 November 1991, the NSW Premier, Nick Greiner, announced a formal, high-level, state government inquiry into the effectiveness of the Racial Vilification Amendment. While a comprehensive assessment may thus be expected in the near future, it is possible at this time to make a preliminary assessment of effectiveness and possible inadequacies based on data collected by the NSW Anti-Discrimination Board (ADB) and interviews with various officials.

This study, first, provides a snapshot of the current social and race relations climate in Australian society at large, which makes clear the timeliness and social relevance of the Racial Vilification Amendment. Second, the objectives of the Amendment as stated by the NSW government during the debate on its adoption are outlined, and the provisions of the legislation within the framework of the ADB's complaint determination process, described. The success of the legislation in fulfilling the government's objectives is evaluated, and questions of interpretation and possible ambiguities of the legislation are discussed. Based on ADB data, this study also discusses the category of offender against which the greatest number of racial vilification complaints have been lodged in the first two years of operation of the racial vilification law, namely, the media. Lastly, an attempt is made to address the important but contentious issue of balancing the right to freedom of speech against the protective role of the law which must also ensure the individual's right to a dignified and peaceful existence free from racist harassment and vilification.

RACIAL VILIFICATION - IS THERE A PROBLEM?

It is not within the scope of this study to examine the necessity of the NSW racial vilification law. Such an investigation was conducted by the NSW government which found that a need did exist. A citizen's perspective is provided by Betty Hounslow of the NSW Public Interest Advocacy Centre:

The resilient old roots of prejudice and destructive nationalism are being fed by many streams - by the agendas of the New Right and the Old Right, and the spread of certain forms of extremely conservative fundamentalist Christianity. We are witnessing a resurgence in neo-Nazi activity, including the crudest forms of racism being directed against Asian and Jewish people. The League of Rights is still extremely active especially in rural areas, promoting racial theories similar to those of the Nationalist Government of South Africa or the former Nazi regime of Germany, opposing non-white immigration and fanning the flames of homophobia, anti-Semitism and nationalism

The leaders of these forces are well organized. They have developed an extensive network of political, religious and social groups, putting out vast quantities of material and investing lots of time and energy at grass roots level to convince people that their warped vision and ideas

are rational and relevant to our time. When the more respectable purveyors of subtle forms of racism (the Howards, Ruxtons, Morgans and Blaineys) are added to this landscape, the picture looks grim indeed.⁷

Concerning the more extreme manifestations of racist activity, the 1991 National Inquiry into Racist Violence in Australia conducted by the Human Rights and Equal Opportunity Commission concluded that while serious racist violence is not an endemic problem in Australia, the social conditions which give rise to racially motivated violence and incitement to hatred must be confronted before they become significant threats to society. The Inquiry recommended that "changes to our laws and institutions and in community attitudes should occur now, before our problems become serious ones".⁸

THE OBJECTIVES OF THE RACIAL VILIFICATION AMENDMENT

After several attempts at formulating suitable amendments, in December 1988 the NSW government published draft legislation and a *Discussion Paper on Racial Vilification and Proposed Amendments to the Anti-Discrimination Act 1977*. The key objectives of the draft legislation were:

- to provide redress for victims of serious forms of racial vilification - not covering trivial matters such as racist jokes;
- to provide protection for members of all racial and ethnic groups - not just minority groups as was initially recommended in the first draft of the legislation;⁹
- to balance the conflict of rights - the right to free speech and the right to a dignified and peaceful existence free from racist harassment and vilification;
- to provide a first line of redress for racial vilification by means of conciliation and education in order to promote a quick and harmonious resolution of complaints;
- to prosecute criminally only serious racially offensive conduct;
- to maintain a clear distinction between the functions of conciliation and prosecution during the adjudication process; and
- to utilize the existing structure for investigation and conciliation of complaints under the Anti-Discrimination Act. It was considered that the unique experience of the ADB in the area of racial discrimination generally, and the likelihood that most instances of racial vilification would come first to the attention of the ADB, that the ADB's direct involvement was both logical and essential.

7 B Hounslow, "The New Racial Vilification Legislation in NSW", 139 *Civil Liberty* 3 (Christmas 1989).

8 NIRV Report, *supra* note 5.

9 A "minority group" was defined in an earlier draft of the bill to be constituted by race or the possession in common of linguistic, religious, social or cultural features, according to John Dowd, *supra* note 3, at 7489.

6 See Australian Law Reform Commission, *Discussion Paper 48, Multiculturalism: Criminal Law* (May 1991), (x)-(xi) and Part 4, 32-45; and Human Rights and Equal Opportunity Commission, *Report of National Inquiry into Racist Violence in Australia*, hereafter "NIRV Report" (AGPS:Canberra, 1991).

RACIAL VILIFICATION - AN OVERVIEW OF THE NSW LEGISLATION

Reflecting the NSW government's objectives outlined above, the 1989 Amendment to the NSW Anti-Discrimination Act 1977 established two causes of action: a civil action rendering vilification on the ground of race unlawful (Section 20C), and a criminal offence of serious racial vilification (Section 20D).

Section 20C: Elements of an Unlawful Act

Section 20C(1) of the Act declares:

It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons, on the ground of the race of the person or members of the group.

Section 20C(2) exempts certain activities and provides that the following are not unlawful:

- (a) a fair report of a public act referred to in subsection (1); or
- (b) a communication or the distribution or dissemination of any matter comprising a publication referred to in Division 3 of Part 3 of the Defamation Act 1974 [absolute privilege] or which is otherwise subject to a defence of absolute privilege in proceedings for defamation; or
- (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

In order for an action to be protected on one of these grounds it must be done reasonably and in good faith.¹⁰

The government explained that the Section 20C(2) exceptions were included "to achieve a balance between the right to free speech and the right to an existence free from racial vilification and its attendant harms".¹¹ However, some critics view these exceptions as an overly liberal compromise which favours freedom of speech at the cost of considerably diminishing the protective benefit the racial vilification legislation could potentially confer.

Section 20D: Elements of a Criminal Offence

Section 20D(1) declares:

A person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group, by means which include

- (a) threatening physical harm towards, or towards any property of, the person or group of persons; or
- (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

¹⁰ *Id.* at 7490.

¹¹ *Id.*

The maximum penalties for violating Section 20D(1) are: for an individual, 10 penalty units (1 penalty unit = A\$100/US\$77), 6 months' imprisonment or both; and for a corporation, 100 penalty units.

The obvious differences between Section 20C and Section 20D are the additional element of a threat of or actual physical harm to a person(s) or property; the requisite element of intent for the Section 20D criminal offence; and the lack of any statutory defence against an offence for serious racial vilification.

In keeping with the aim of the legislation to prosecute criminally only very serious offensive conduct, and to maintain a clear distinction between the functions of conciliation and prosecution, a person cannot be prosecuted for an offence under Section 20D(1) without the consent of the Attorney-General of NSW (who may delegate his power of consent to the Director of Public Prosecutions for NSW) upon reference by the President of the ADB. If a decision is made by the President to refer a matter to the Attorney-General, the President must immediately advise the complainant of his or her right to request the President to refer the complaint to the Equal Opportunity Tribunal (EOT) for judicial determination. From this point, the ADB can play no part in the prosecution process and is limited to an advisory and reporting role.

Determination of a Racial Vilification Complaint: Conciliation, Civil Action or Prosecution

Determination of a racial vilification complaint is generally a multi-step process.

Following receipt of a written complaint from a person (or representative body on behalf of a named person) of a vilified racial group, the ADB President first conducts an investigation into the complaint (pursuant to Section 89). The Act gives no guidance in defining an investigation, nor does it grant the ADB any special powers, for instance, to compel the production of documents or the giving of statements under oath.¹² However, investigative activity has been understood to include checking whether the complaint is covered by the legislation; deciding whether the allegations of racial vilification can be substantiated; and then, if appropriate, obtaining witness statements, informing the respondents (if identifiable) of the allegations of racial vilification and seeking the respondents' reply to the allegations.¹³

After this initial investigation, but prior to any attempt to resolve the complaint by conciliation,¹⁴ Section 89B(1) of the Act requires the President to consider whether an offence may have been committed under Section 20D.

If the President considers that the evidence does not support a criminal charge and that the complaint may be resolved by conciliation, the President must endeavour to conciliate the matter (Section 92(1)). If a complaint cannot be resolved by conciliation, or any conciliation attempt is unsuccessful, the President must refer

¹² S Mark, "Is Conciliation of Racial Vilification Complaints Possible?", *Without Prejudice* 5 (June 1991).

¹³ Information obtained in discussion with Nancy Hennessy, Senior Legal Officer, NSW Anti-Discrimination Board (November 1991).

¹⁴ Conciliation is the name given to the general process of settling conflict by bringing disputing parties together to reach a voluntary and mutually satisfactory agreement.

the complaint to the EOT together with a report relating to any inquiries made by the President into the complaint (Section 94).

If at any time during the consideration of a complaint by the President or the EOT, the complaint is considered to be "frivolous, vexatious, misconceived, lacking substance, or for any other reason should not be entertained", the President or the EOT has the power to decline or dismiss the complaint (under Section 90(1) or Section 111(1)).

It is notable that during the period from 1 October 1989 to 30 June 1991, although 781 written complaints of unlawful racial vilification were lodged with the President, none were referred by the President to either the EOT for civil adjudication or to the NSW Attorney-General for criminal prosecution.

If the President considers that an offence may have been committed under Section 20D, the President must refer the complaint to the Attorney-General for NSW (Section 89B(2)). Such referral must be made within 28 days of receipt of the complaint (Section 89B(3)). Once a referral to the Attorney-General is made, the President may not endeavour to resolve the complaint by conciliation. However, the President is required to notify the complainant of the referral to the Attorney-General and of the complainant's right to require the President to refer the complaint to the EOT for civil adjudication. The EOT may stay an inquiry into the civil component of the complaint until any proceedings for the alleged criminal offence have been completed.

If the Attorney-General decides to prosecute, the case is decided summarily by a single magistrate of a local court (Section 125). If the Attorney-General decides not to prosecute, the civil component of the complaint is referred back to the EOT for civil adjudication.

After holding an inquiry into a racial vilification complaint, if the EOT finds the complaint substantiated, the EOT has the power to order the respondent to:

- publish an apology in respect of the complaint; and/or
- publish a retraction in respect of the complaint (pursuant to Section 113(b)(iia)); and/or
- develop and implement a programme or policy aimed at eliminating unlawful discrimination (pursuant to Section 113(b)(iib)); and/or
- pay damages to a complainant, with an upward limit of A\$40,000 (Sections 113(2) and (3)).

Where either a retraction and/or an apology are ordered, the EOT may also give directions concerning the time, form, extent and manner of publication. The intention underlying the terms of such power is to allow the EOT to tailor its orders to the perceived needs and resources of the respondent and contribute to the public education aim of the racial vilification legislation. The EOT's power to direct how damage awards, if any, are to be applied, for instance, funding of an education programme, also ensures that the social education function of the legislation is not lost by awarding large damages to individuals.¹⁵

The scope and flexibility of the remedies for racial vilification are very similar to some of the current and previous recommendations concerning remedies for defamation as reviewed by various Australian federal and state law reform bodies. For example, in 1979, the Australian Law Reform Commission recommended that

court-ordered corrections - which would enable a judge to specify the content and details of the time, form, extent and manner of publication of the correction - be included as a discretionary remedy in a defamation proceeding. In 1991, a joint review of defamation laws by the Attorneys-General of Queensland, New South Wales and Victoria proposed court-recommended correction statements as an alternative to the rising levels of monetary damages frequently awarded in defamation cases.¹⁶ It was acknowledged that "correction statements promptly inserted or broadcast by a publisher may be very effective in partially, or even in some cases fully, restoring reputation and assuaging damaged feelings".¹⁷

The NSW Defamation Bill 1991 now incorporates a proposal for court-recommended correction statements. Given the similar nature of damage arising from defamation and racial vilification - namely, injury to reputation - the convergence in approach to remedy is a welcome recognition of that similarity.

ANALYSIS OF THE ELEMENTS OF SECTIONS 20C AND 20D

In addition to the arguably broad exceptions in Section 20C(2), there are several other preconditions which must be satisfied before alleged acts of racial vilification will be found unlawful or criminally sanctionable. The following comments are equally applicable to both sections 20C and 20D.

What Constitutes a "Public Act"?

The alleged act must be a "public act", defined in Section 20B of the Act to include

- (a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material; and
- (b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or displaying of clothing, signs, flags, emblems and insignia; and
- (c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.

The conduct encompassed by the racial vilification law is clearly intended to be limited to "public" acts and does not include communications or other conduct in private, such as over-the-back fence or telephone communication between two individuals. However, despite the apparent detail with which "public act" is defined, its coverage remains ambiguous due to the law's failure to define the word "public". There are at least three possible interpretations.

The broadest interpretation of "public" would include communication or conduct heard or witnessed by a third person (who arguably must be of a different race to the person being vilified, *see* below) in a private environment, *e.g.*, at a person's home. Alternatively, such communication or conduct must be before a

¹⁶ Attorneys-General of Queensland, NSW and Victoria, *Reform of Defamation Laws Discussion Paper No. 2* (1991).

¹⁷ *Id.* at para 7.1.

¹⁵ NSW Government, *Discussion Paper on Racial Vilification and Proposed Amendments to the Anti-Discrimination Act 1977* (December 1988), 4.

third person, but not in a totally private setting, e.g., in a restaurant. Third, "public" may require the communication or conduct to be to the public at large, e.g., the soapbox preacher in the public park. Publications and broadcasts by the media obviously fall within the category of public acts, while conversations solely between neighbours do not.

Based on ADB data, over the 21 month period from 1 October 1989 to 30 June 1991, the second most identifiable source of offender against whom racial vilification complaints were lodged (the first being the media, discussed below) are complaints classified by the ADB as arising in the context of neighbour disputes. Complaints in this category accounted for 12 of 72 (16.6 percent) of the written complaints in the first nine months (Period 1) of the Amendment's operation (oral complaints were recorded only beginning with Period 2). Neighbour complaints increased to 20.2 percent (19 of 94) of the written complaints in the next 12 months (Period 2), and accounted for 47 of the 314 oral complaints (the largest single category, with only 36 oral complaints made against the media). This represents an increase in the incidence of neighbour complaints from Period 1 to Period 2 which, if the trend continues, may warrant closer examination.

It is not assumed that all these complaints have in fact been accepted by the ADB as falling within the ambit of racial vilification. However, the President is duty-bound to investigate all written complaints and it would be of interest to know how these complaints have been handled. Have they been withdrawn by the complainant, declined¹⁸ or conciliated by the President, or handled otherwise?

Such information was not available at the time of writing. However, it is understood that most complaints falling into the Neighbour Disputes category have been declined by the President pursuant to Section 90(1) on the basis that they are lacking in substance.¹⁹ This is partly because, in neighbour dispute cases, "the racial taunts and abuse often flow during heated arguments about something other than the racial background of the protagonists", for instance, the overhanging tree branches, smoke from the barbecue next door or water run-off from the property up the street.²⁰ Such complaints are therefore unlikely to fall within the "on the ground of race" element of the causes of action. While there have been no judicial decisions in relation to racial vilification, it has been held in relation to other disputes that "on the ground of" means that the actionable consideration (race) must have a "proximate bearing" on the act charged as discrimination. Moreover, race must have a "causally operative effect upon the decision to commit or the committing of the act of discrimination".²¹ The legislation therefore appears to require the identification of race as a primary cause of the racial vilification complaint.

A second difficulty with the Neighbour Disputes category of complaints is that even if the complaint discloses a racially vilifying act, the act often occurs between two individuals outside the presence of any third person or of any third person of a qualifying status (that is, of a different race to the person vilified). The ADB has no authority to pursue complaints of such nature.

18 "Declined" means that the President is satisfied that the complaint is frivolous, vexatious, misconceived, lacking in substance or for some other reason should not be entertained.

19 Nancy Hennessy, *supra* note 13 (November 1991).

20 S Mark, *supra* note 11.

21 *Director-General of Education & Anor v. Breen & Others* (1984), EOC 92-015, No. 75,429 (Street, CJ).

Complaints falling into the category of Neighbour Disputes are therefore frequently candidates for referral by the ADB to Community Justice Centres (CJC) for resolution. CJs provide an alternative to court adjudication. They deal with minor criminal or civil disputes by mediation. When a complainant has not yet been through a local CJC, this may be a satisfactory alternative. However, in those instances where the CJC has failed to resolve a problem and a complainant then seeks redress via the offices of the ADB, the complainant will find that there exists no satisfactory legal remedy.

Although the government purpose excluded trivial acts of racial vilification when delimiting the objectives of the racial vilification law, given the apparently high incidence of complaints in the Neighbour Disputes category, does this lack of remedy reveal a shortcoming of the amendments? At the very least, the data discloses an area of social conflict which warrants consideration as to the efficacy of some remedial action. The NSW government enquiry could usefully research and address this question.

Incitement

In addition to being "public", an act, to constitute vilification, must "incite" hatred of or contempt for the complainant. At least one other person must be present of a different "race" than the potentially vilified complainant who might be incited to hate the race of the complainant. There is otherwise no cognizable damage or cause for compensation.

Thus, if racially vilifying statements were made by one person to, say, twenty people of the same "race" in a public park, therefore meeting the "public act" criterion, unless one accepts an argument that a person can be incited to hate his or her own race, there is again no sanctionable act of racial vilification.²² Such an interpretation poses a severe constraint upon the potential of the Amendment and, accordingly, some critics urge that merely expressing hatred towards a person or group of persons on the ground of race should be punished as well as acts which "incite" or "promote" hatred. Indeed, Sections 20C and 20D of the original draft Anti-Discrimination (Amendment) Bill 1989 made it unlawful for a person, by a public act "to promote or express hatred towards ..." rather than "incite hatred towards ..." This more broadly defined activity of "promoting or expressing" racial hatred would overcome the requirement of incitement of a third person of a different race than the complainant, without changing the spirit, purpose and operation of the racial vilification law.

Severity of the Racial Vilification

A third prerequisite for legal action is for the public act to incite "hatred towards, serious contempt for, or severe ridicule of" the complainant. The severity of the racial vilification required to constitute even a civil wrong reflects the government's intention not "to cover matters of a trivial nature". However, it is not clear what degree of severity is in fact legally redressable. Racial jokes, said with the light-heartedness of socially undiplomatic people, were not within the contemplation of

22 J Seeman, "Racial Vilification Legislation and Anti-Semitism in NSW: The Likely Impact of the Amendment", 12 *Sydney Law Review* 596 (1990).

the legislation. At the other extreme, racially vilifying acts with a likelihood of inciting or threatening violence are clearly covered.

Severity, and its varying degrees, is obviously subjective, and the context of the public act is therefore important. Factors to be considered include the place where the act occurred, what was said or done before and after the act, the general social environment (for instance, during the Gulf crisis in 1991, there was an increase in the number of reported complaints); and the style of the language or flamboyancy of the conduct (for instance, one would expect cartoons and humorous articles to be less likely to constitute racial vilification than blunt editorial comment, but this may depend upon the depiction in the cartoon and even its juxtaposition to other material in the publication).

"Race" - A Contemporary Definition

An understanding of the breadth of the meaning of "race" is pivotal to the cause of action for racial vilification. Summarizing the essence of the complicated definitional problem, Colin Tatz, Professor of Politics at Macquarie University explains:

acts committed against groups because of their religion, ethnic origin or culture are of the same order and species of behaviour as acts committed in the name of race. Race-ism is a common and intuitively understood term. It comes more easily off the tongue than ethnic-ism, cultural-ism, religious-ism, tribal-ism. It is vital that we do not confine the concept and practice of racism to action involving only people of different physical (that is, anatomical) races.²³

Section 4 of the NSW Anti-Discrimination Act 1977 broadly defines "race" as including "colour, nationality and ethnic or national origin". This definition roughly follows that set forth in the CERD Convention, namely, that "race" includes "colour, descent, or national or ethnic origin".²⁴ While Section 4's ambit is broad, concern has been voiced that it may not include what has been referred to in the 1988 Discussion Paper on Racial Vilification as "ethno-religious" groups. However, both John Dowd, the then-Attorney General of NSW, and Steve Mark, the ADB President, were of the opinion that precedents from New Zealand and Great Britain, ruling that Jews are to be recognized as a "race" for purposes of protection against racial discrimination and incitement, should be followed.²⁵

Moreover, the Human Rights Commission has stated that, in cases where "race" may be at issue, it is likely that a complainant's genuine self-proclamation of racial or ethnic origin would be accepted.²⁶

Individual and Group Racial Vilification

Unlike defamation law which protects the reputation only of individuals, the Racial Vilification Amendment recognizes attacks upon "a person or group of persons".

23 C Tatz, "The Evil of Racism", 15 *Australian Journal of Forensic Science* 67 (1983).

24 See E.W. Vierdag, *The Concept of Discrimination in International Law with Special Reference to Human Rights* (The Hague: Martinus Nijhoff, 1973), 90.

25 See *King-Ansell v. Police* [1979] 2 NZLR 531; *Mandla v. Dowell Lee* [1982] 3 WLR 932, on appeal [1983] 2 WLR 620.

26 Human Rights Commission *Annual Report* (1981-1982), 44-45.

Section 88 of the 1977 Act allows a "representative body" to lodge a complaint on behalf, and with the consent, of an individual or individuals of the racial group concerned (discussed below).

The "of the racial group concerned" requirement for lodging a complaint means that only a member or members of the vilified racial group may lodge a complaint. The Crown Solicitor's Office has reportedly advised the ADB that Section 88(1) does not require that complaints be filed by, or on behalf of, the direct "victim" of racial vilification; the complainant must merely be a member of the vilified racial group.²⁷ However, this condition automatically precludes persons of a non-vilified racial group, who may well be affronted or offended by racist acts, from directly benefiting from the Racial Vilification Amendment. Indeed, the ADB has received some complaints and inquiries from individuals about racially offensive "public acts", e.g., racially vilifying posters in a public place, but because such complainants were not of the racially vilified group, the ADB had no formal authority to investigate the complaint. This appears somewhat contrary to the spirit of the racial vilification legislation which was enacted to educate the public and to reduce racial tension in society.

The Australian Law Reform Commission (ALRC), in its 1979 report on defamation and privacy,²⁸ was unable to arrive at a unanimous view on the question of group defamation. While the Commission received a number of submissions from ethnic community groups in favour of a proposal for allowing group defamation, and two members of the Commission supported a provision for permitting a member of a group to obtain an order for correction, declaration or injunction (but not damages) in respect of group defamation, the Commission's final view in relation to group defamation was that the advantages of sanctioning generalized racial slurs and the educative value of legislation did not outweigh the difficulties of providing an apt remedy and the risks of abuse of the law by feuding racial or religious groups.

The provision of a representative complaint mechanism for racial vilification is therefore relatively innovative. While it is clear that the majority of verbal and written racial vilification complaints received by the ADB have been lodged by individuals, a number of written complaints have been lodged by representative bodies (although the ADB was unable to provide the precise numbers).

The inclusion of a mechanism enabling organizations to file representative complaints was predicated on the assumption that many individuals lack the confidence to complain directly to a government organization, particularly in racial vilification cases, where individuals may be hampered by difficulties with the English language and may be further deterred by the often intimidating nature of racial vilification. These potential complainants often need the assistance of their own community organizations to aid them in the complaint making process.²⁹

While this assumption was reasonable, the apparently low incidence of complaints lodged by representative bodies raises several questions: for example, do potential and actual individual complainants know that their complaint may be lodged by a representative body? Are such organizations in fact able to assist the

27 NSW Anti-Discrimination Board, *Racial Vilification Policy Document* (15 July 1991).

28 ALRC, *Report No. 11, Unfair Publication: Defamation and Privacy* (1979).

29 Discussion Paper on Racial Vilification, *supra* note 14, at 4.

individual complainant when approached to do so? Are the few complaints that have been lodged so far by representative bodies seen to be of a more severe nature than those lodged by individuals? Are complaints lodged by representative bodies more likely to fall within the ambit of the Act and therefore more likely to be conciliated or prosecuted, rather than declined or withdrawn? With appropriate data, answers to these questions may provide some insight into the success or failure of representative complaint procedures.

The Section 20C(2) Exceptions

There are three categories of acts which are exempted from civil liability. The first is a "fair report of a public act". The ADB's advice is that "to be fair, the report must be free from embellishment or comment that could itself amount to racial vilification".³⁰

Arguably, the obvious subjectivity inherent in such a notion of "fairness" provides considerable room for the media to report without close attention to the potential for promoting negative stereotypes and inciting ridicule or contempt.

The second exemption from the racial vilification provisions extends to any publication which is entitled to an absolute privilege, a concept imported from defamation law. All statements made in the course of parliamentary or court proceedings and all documents submitted to, or published under the authority of, parliaments or courts, are accorded absolute privilege and thus may not form the basis of an action for racial vilification. This exemption is not controversial.

The third exception broadly excuses racially vilifying public acts if such acts are done "reasonably and in good faith" for "academic, artistic, scientific or research purposes", or "in the public interest". The press urged adoption of this exemption as being necessary to protect comment and opinion by journalists as well as by persons interviewed.³¹

Concern has been expressed that the first and third exemptions are so broad that many of the most insidious forms of racist expression could escape the ambit of the law by canny legal argument.

Is There a Requirement of Intent?

Section 20C does not include an express requirement of intent to incite hatred, contempt or ridicule. However, where the alleged vilification involves distribution of materials to the public, under Section 20B the distributor must have knowledge of the nature of the materials' contents. Section 20B clearly was intended to exempt innocent distributors such as newsagent proprietors and letterbox delivery workers.

In contrast, Section 20D(1) expressly require proof of intent to commit the offence of serious racial vilification.

30 See NSW Anti-Discrimination Board, *Racial Vilification - Key Points for Media Personnel* (August 1990).

31 Australian Press Council, *Submission on Racial Vilification to NSW Government* (April 1989). It is appreciated that on occasion, a journalist or broadcaster may have little or no control over statements made by interviewees in live-to-air interviews. In such cases, the mere broadcasting of a racially vilifying statement would constitute a "public act" by the broadcasting station, but may reasonably fall within the Section 20C(2)(C) exception. This would not, of course, exempt the individual interviewee from prosecution for racial vilification.

Efficacy of Criminal Sanctions

The absence, so far, of any criminal prosecution for racial vilification in NSW raises two obvious questions. Have there been no complaints of such severity to warrant criminal prosecution? Or does the legislation set a threshold of proof which is so high that convictions would not be possible even in serious cases?

From discussion with the ADB's Senior Legal Officer³² it appears that there have been at least some cases which, on their facts, would constitute serious racial vilification. The main reasons for the lack of criminal prosecution include the complainant's unwillingness to participate in the prosecution of the offence, inability to identify the offender, or pursuit of an action for assault or other criminal offence instead of racial vilification.

Prior to enactment of the racial vilification law, certain ethnic community organizations argued that only criminal sanctions would satisfactorily curtail racial extremists. However, widespread concern for the preservation of civil liberties in general and freedom of speech in particular, led the ADB to conclude that if only criminal sanctions for racial vilification were available, a community backlash would likely result.

Summarizing the experience of the United Kingdom, New Zealand and Canada, where racial vilification is treated as a criminal offence only, the ADB stated that: "present enforcement problems, particularly where complaints are investigated by the police, lead to a tendency towards narrow interpretation by the courts; and reveal a general reluctance to convict."³³

It is too early in the operation of the legislation to pass judgement as to the effectiveness of its criminal provisions. Although racial violence or the threat of such violence appropriately comes within the ambit of the criminal law, the absence of referrals to the Attorney-General over the last two years highlights questions about relevance and efficacy of the criminal provisions.

In light of the Australian Law Reform Commission's current inquiry into whether the Crimes Act 1914 (Cth) should be amended to create an offence of incitement to racial hatred and racist violence, and ongoing consideration of the introduction of racial vilification laws in other Australian States, a more detailed analysis of the reasons why criminal prosecutions have not ensued from complaints lodged with the ADB should be undertaken.

RACISM AND THE MEDIA

Despite the controversy surrounding the introduction of the 1989 Racial Vilification Amendment, there was widespread consensus that acts of racial vilification and hatred should be condemned. Even the voices of opposition to the bill, such as the Australian Press Council (APC), vigorously supported the "widespread community consensus that racial vilification or incitement to racial hatred is a serious matter and an infringement of the right of all citizens to a dignified and peaceful existence free from harassment and vilification."³⁴

32 Nancy Hennessy, *supra* note 12.

33 NSW Anti-Discrimination Board, *Proposal to Amend the Anti-Discrimination Act to Render Racial Vilification Unlawful* (July 1988).

34 Australian Press Council, *supra* note 30.

Although the media were not the only group opposed to the racial vilification law, they were the most vocal. This opposition was clearly expressed by the APC in two papers, one on racial vilification submitted to the NSW government (April 1989), and the other, on the Incitement to Racial Hatred Bill, submitted to the Western Australian government (May 1990).

The APC is a voluntary association of organizations and persons involved with the Australian press. One of its objects is to "make representations concerning freedom of the press". The Council was active in the debate on the issue of the introduction of the NSW racial vilification legislation, urging that such laws would unduly inhibit free speech and the media's freedom to report on racial issues.

Freedom of Speech - Important But Not Absolute

The APC's starting point was its recitation of Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 19 of the Universal Declaration of Human Rights.³⁵ However, these international documents which enshrine freedom of expression as a fundamental human right clearly recognize that certain restrictions may legitimately be imposed upon free speech in order to promote social harmony and public order.³⁶

Likewise, democratic jurisdictions which guarantee freedom of speech by written constitution (the United States) or by custom and common law (the United Kingdom and Australia) qualify this right by laws such as those concerning contempt, defamation and confidentiality.

The APC's principal concern was "the impact of the proposed [racial vilification] legislation [on freedom of speech]".³⁷ In particular, it was alarmed by the potential [the law] will have for establishing a precedent for other well intended proposals to restrict freedom of speech that may have a very severe and detrimental effect on our basic freedoms.³⁸

The expression of caution against a gradual proliferation of other restrictions on free speech is a legitimate one, for the preservation of our right to free speech is important. However, of itself, and in the context of an increasingly multicultural Australian population, this author does not believe that the argument is sufficiently persuasive to deny protection from racial vilification for the individual or the group to which he or she belongs. As for other laws which the APC fears may be introduced, such as those to sanction vilification on such grounds as religion or sexual preference, these must be considered on a separate basis with due consideration given to the proper balance to be struck between the restraint of free speech that such laws may impose and the social benefit that such laws may bestow.

The Media - Shaping Social Opinion and Attitude

The Press Council maintains that ethnocentrism and racial vilification result from deep-seated prejudices learned in childhood and does not accept the proposition

35 See Annexe A for texts of Article 19 of the ICCPR and of the UDHR.

36 See Danilo Türk's & Louis Joinet's discussion of the international standards in Part II of this volume.

37 APC Submission on Racial Vilification, *supra* note 30, at para. 14.

38 *Id.*

that the mass media contribute significantly to racial conflict in Australian society.³⁹ While no one would deny that racial conflict is the result of a number of forces, the mass media are often identified as primary protagonists in promoting racist attitudes in Australia, albeit inadvertently at times.

As one commentator has remarked:

According to many groups within the community, the media has been guilty, on various occasions, of pandering to racist feelings in the community, even if they have not encouraged them. For example, Aboriginal groups argued at the Human Rights Commission Enquiry into Racist Violence that their "number one enemy" was the media. The media were responsible for creating negative feelings about places like Redfern (in Sydney) where a lot of Aboriginals lived, and promoted stereotypes of them as being criminal, drunk and unemployed.⁴⁰

Similarly, Carl Harbaum, Chairman of the Federation of Ethnic Communities and Councils of Australia, commenting on the media in the context of the social impact of immigration in Australia, stated:

[The press] has a pivotal role to play in the development of images and opinions about our society and the people who make it up. This vehicle has not always used its ability to influence and shape opinions with wisdom and balance. In debates on immigration and multiculturalism it is more often than not the extreme positions that are presented by the press. Any hint of racial tensions or behaviour that can be deemed "un-Australian" tends to be highlighted and blown out of proportion.⁴¹

Complaints of Racial Vilification Against the Media

While the media have claimed that their contribution to racial hostility "should not be over emphasized"⁴², the data provided by the ADB identifies the media (print, radio and television) as constituting the principal category of offender of the racial vilification law. Written complaints against the media in Period 1 accounted for 20 (27.7 per cent) of the 72 written complaints, of which 13 were against the print media and 7 were against radio and television. In Period 2, complaints against the media comprised 38 of the 94 written complaints (40.4 per cent) and 36 of the 314 oral complaints. (Oral complaints against the media for several months of Period 2 did not specify whether they were against print or electronic media.) The generic matter of complaint varied from comments in editorials to cartoons, newspaper articles and racist and immigrant-inspired jokes.

The large number of complaints against the media and the 90 per cent increase in complaints in Period 2 over Period 1 do not necessarily mean that the media is

39 *Id.* at para. 6.

40 K Laster, "A Justified Omission?", 14 *Legal Service Bulletin* 258 (1989). A recent example of media reporting which generated considerable public awareness of contemporary Australian racism, was the ABC television documentary *Cop It Sweet* (telecast March 1992). A number of press articles followed. For example, "National Disgrace: the ugly faces of Australian racism", *Sydney Morning Herald*, 13 Mar. 1992.

41 C Harbaum, "The Social Impact of Immigration: A FECCA View", 5 *BIR Bulletin* 9, 10 (December 1991).

42 APC Submission on Racial Vilification, *supra* note 30, at para. 6.

responsible for committing the most or most serious offences. There clearly are other possible explanations.

First, as with the Neighbour Disputes data, relevant information concerning the final disposition of these complaints was not available, so it is difficult to assess whether these complaints against the media were of legal substance, and if so, the severity of the racial vilification.

Second, while these figures represent the number of written complaints lodged, there may be multiple complaints against the same publication or broadcast, so that the actual number of offensive publications may be less than the total number of complaints.

Third, the data does not account for the prevailing social environment in which the complaints against the media were made. For instance, the ADB notes that during the outbreak of hostilities in the Persian Gulf in early 1991, which attracted extensive media coverage, there was an increase in tensions between Jewish and Arab communities in NSW and a coincident increase in written and verbal complaints of racial vilification.

What the currently available data do indicate is that the media are major perpetrators of racially vilifying public acts, and that they consequently constitute an obvious target for further education regarding compliance with the racial vilification law. Although the ADB publishes a fact sheet specifically for the media, this provides only superficial guidance. It may be that the most cost-effective allocation of the ADB's education resources would be to educate the media as to their social, moral and now legal obligation to refrain from promoting negative stereotypes and inflaming prejudice, and to contribute to building positive attitudes about different minority communities.

Media Self-Regulation

Despite the objections raised by free speech lobbyists against the 1989 racial vilification law, there is so far no evidence of any inhibitory effect of the law on the media. This is due in part to the fact that there were, and remain, several media programme standards and codes of ethics which predate the racial vilification law that similarly call for restraint in publishing material which may give rise to negative racial or religious stereotypes, prejudice or vilification.

Although some of the media's own regulations (such as the APC Guidelines) are advisory in nature and have no enforcement provisions, the breach of other standards (such as the Australian Broadcasting Tribunal (ABT) standards) may have considerable constraining impact, for instance, the removal by the ABT of a radio or television station's licence to broadcast. Where a breach of the rules regarding the publication of racially inflammatory statements has been found to occur, as in cases involving Australian radio broadcasters Ron Casey and John Laws, the ABT has taken steps to reprimand their offensive action.⁴³

The intention of the press and broadcasting standards is clearly the same as the racial vilification law - both the law and the media standards aim to promote responsible journalism - and both reflect two fundamental principles - that the right to freedom of expression is not absolute and, that "all citizens have a right to a dignified and peaceful existence free from racial harassment and vilification".⁴⁴

The difference is that the racial vilification law provides potentially more powerful remedies and is applicable to all members of the NSW community who make public statements and not just to the media.

LEGISLATING AGAINST RACISM - WHAT VALUE?

Although the Press Council accepts that some action is required to combat racial vilification in society, it argues that a legislative response is inappropriate, given that the nature of the problem is one whose resolution involves attitudinal and cultural change. In support of this proposition, the Press Council has relied upon arguments propounded by the former Chief Justice of Australia, Sir Harry Gibbs⁴⁵ and an American civil libertarian, Franklyn S Haiman.⁴⁶ In essence, their respective arguments are that virtues such as tolerance, decency and fairness, each of which contributes to a non-racist society, are qualities which cannot be fostered by the imposition of legislative sanctions but rather require education and encouragement by example.

Placed in a proper perspective, both arguments have merit. It is undoubtedly true that, to some degree, the problems of racism in society are attributable to our cultural and social upbringing. Likewise, education must, and does, play a vital role in encouraging a change of individual and social attitudes and thinking. However, these arguments do not justify the failure to sanction racial vilification. The law does not hold itself out to be a panacea for all the ills that have permeated societies of all ages. It is only in tandem with education and sanctions that we can hope to reduce the incidence of racial vilification and incitement to racial hatred in society.

Indeed, it is only by virtue of the existence of the racial vilification law that organizations, such as the ADB and other authorities, are empowered to promote compliance with the law through community education programmes, seminars, talks and the production and distribution of written information. Unfortunately, without this legal imprimatur, general community education and awareness campaigns now conducted by the ADB would not have the resources to operate.

Relying upon results in other areas of the ADB's operations, which have led to a diminution of complaints and greater compliance,⁴⁷ the ADB projects that the process of complaint resolution under the racial vilification legislation (which lays emphasis on education and conciliation rather than punishment) will, in time, be successful in bringing about changes in both behaviour and attitude of offenders rarely achieved by the imposition of penalties alone.⁴⁸

44 APC Submission on Racial Vilification, *supra* note 30.

45 Sir Harry Gibbs, "Brotherhood by Example or Decree", Inaugural International House Lecture (18 October 1988).

46 F S Haiman, *Freedom of Speech* (New York: National Text Book Company, 1976).

47 Anti-Discrimination Board, *supra* note 32.

48 D Fraser, "It's Alright Ma, I'm Only Bleeding", 14 *Legal Service Bulletin* (1989) 69, who is of the opinion that a "[r]acist and victim cannot participate in a conciliation process because they do not share a common ground". Instead, Fraser urges that only through "the real and immediate intervention of victims and their supporters in concrete actions against the racists can true feelings of authenticity, mutuality and solidarity find an anchor in the daily existence of the disempowered members of our community".

43 See discussion by Kitty Eggerking in the preceding essay.

CONCLUDING REMARKS

For a society of which it has been said that "racism is the most important single component of Australian nationalism"⁴⁹, and one which today is moving towards multicultural plurality at a determined pace, the initiative taken by the NSW government in enacting the Racial Vilification Amendment is both timely and appropriate.

While legislation alone cannot change deeply ingrained attitudes, the moral force of the law can be used to create an environment where certain behaviour is declared to be socially unacceptable. The emphasis upon resolution of a racial vilification complaint by conciliation rather than by reliance upon punitive measures is regarded as a preferable remedial treatment. This approach encourages the educative and prophylactic aspects of the legislation to moderate social behaviour.

There is no evidence so far that free speech has been substantially circumscribed by the Racial Vilification Amendment. In relation to the media, given the broad exceptions of Section 20C(2), the impact of the law is reduced to curbing only the most sensational or reprehensible forms of journalism. The empirical data thus far collected suggests that the media are the chief perpetrators of racially vilifying conduct. If, over time, this indication is verified, any restraint that the racial vilification law may place upon the media would be soundly justified. The relatively high incidence of complaints classified as arising from neighbour disputes should also be monitored, for at present this also appears a fertile ground for racial vilification.

Although the racial vilification law has been in operation for over two years, it is still somewhat premature to draw conclusions regarding the overall impact and effectiveness of the amendments in reducing racial vilification. To date, there have been no racial vilification complaints referred to the EOT or the Attorney-General. If this record is maintained, it may be concluded that the law is taking its desired effect. Alternatively, the process and preconditions to prove unlawful or serious racial vilification may be too onerous. Again, only time and a close monitoring of the complaints and dispositions will tell.

It would be ideal if one could identify specific criteria for objectively measuring the impact and success of the Racial Vilification Amendment since its introduction in October 1989. This is not possible for many reasons, not the least of which is the lack of data on the incidence of racial vilification pre-October 1989. However, in addition to providing a forum and opportunity for redress for victims of racial vilification, one of the practical consequences of the racial vilification law has been to provide institutions such as the ADB with a legitimate charter to monitor the incidence of racial vilification. It is critically important that such bodies are allocated the appropriate resources to do this and also to fulfil the NSW government's paramount legislative objective of community education.

Despite some apprehension as to the short term effectiveness of the racial vilification law arising from the ambiguities in the drafting of Sections 20C and 20D, and the hedging restrictions in section 20C(2), both the spirit and substance of the racial vilification law deserve support. The legislation tackles a difficult and

sensitive social problem, publicly condemning racial vilification as socially, and now legally, intolerable.

On balance, the racial vilification law, consistent with our right to live a peaceful existence with dignity, respect and equal opportunity, makes a positive contribution to the betterment of multicultural Australia. It is hoped that, if the long term focus on community education produces the desired result, the need for such legislation in NSW and throughout Australia will, with time, diminish.

49 H McQueen, *A New Britannia* (Melbourne: 1970), 42.

LEGAL REGULATION OF HATE PROPAGANDA IN CANADA

John Manwaring

INTRODUCTION: RACISM IN CANADA

Canada is often described as a peaceful, tolerant and moderate society. But this description only captures part of the reality. The public and private discourse of respect, tolerance and moderation is distorted by the static of considerable racism. For all of its history, beginning with the first contacts of the colonial powers with the native peoples of North America, Canada has also been shaped by bigotry, prejudice and discrimination. The native peoples were deprived of their lands and herded, impoverished, on to reserves where they live in poverty on the margins of society. Québécois and francophones outside Québec have long been treated as second class citizens. Jews were denied access to housing, careers, education, clubs and social life. The Canadian government turned its back on European Jews in their hour of greatest need because of anti-Semitism on the part of politicians, government officials and powerful interest groups.

Black Canadians, who have lived in Canada since its inception, find they have no place in its history. They too have been marginalized and impoverished. Asians brought in to build the railways at the turn of the century found themselves the target of discrimination tolerated as well as perpetrated by the government. Japanese-Canadians, many of them Canadian by birth, were deprived of their property and herded into camps during World War II. Recent arrivals are the target of racist speech and discrimination because of their skin colour or religion.

Against this backdrop of government sanctioned and "genteel" racism, it is not surprising that extreme forms of racist ideology have found a fertile ground even if only on the margins of society. Prior to the war, European fascism found support in Canada. Since the war, similar groups regularly resurface in various forms. Some are home-grown organizations; and some have links with extremist right-wing groups in the United States and Europe. They are often set up as branches or affiliates of foreign organizations. Sometimes, the foreign groups themselves try to move into Canada.

ANTI-HATE LEGISLATION AND THE CANADIAN CONSTITUTIONAL STRUCTURE

Canada is a federal regime with governmental powers divided between the central government and the provinces. All jurisdictions have human rights legislation of general application dealing with discrimination on a wide variety of grounds including race, religion, ethnic or national origin and sex. Several jurisdictions now include sexual orientation as a prohibited ground of discrimination. The federal and all provincial governments have adopted legislation specifically dealing with racist speech and hate propaganda. At the time much of this legislation was adopted, it was extremely difficult to challenge laws on the ground that they infringed fundamental rights. Although fundamental rights such as freedom of speech were considered of great importance, they were not of constitutional status. A major

change occurred in 1982 with the adoption of the Charter of Rights and Freedoms as part of the Constitution Act, 1982.¹

The Charter embodies a tense compromise between classic individual rights and freedoms on the one hand, and collective rights to equality² and cultural identity on the other.³ Section 1 sets forth a general formula for balancing competing rights and governmental interests. It reads:

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

Section 2(b) guarantees freedom of expression in the following terms:

Everyone has the following fundamental freedoms:

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

The Charter has radically altered the constitutional framework within which governments can use their legislative powers to attack racist speech and acts. As a result of this constitutional reform, those accused of hatemongering can now challenge both provincial and federal legislation. This means that the regulation of racist speech and acts must be more carefully tailored to respect individual rights than before 1982. The onus is now on government to justify its regulation of speech.

FEDERAL CRIMINAL LAWS AGAINST HATE PROPAGANDA

In the late 1960s there was an upsurge in racist activity in Canada. This resulted in considerable pressure on the federal government to criminalize hate propaganda. The government named a strong committee to study the issue chaired by Maxwell Cohen, then Dean of the Faculty of Law of McGill University, and including among its members future Prime Minister Pierre-Elliott Trudeau and Mark McGuigan, who became Justice Minister and later a judge of the Federal Court of Appeal.

The committee issued a report which found that existing law was inadequate to deal with the problem of racist speech and recommended adoption of new legislation. These recommendations proved controversial and provoked considerable debate. Much of the opposition was based on arguments stressing the importance of freedom of speech. A bill was introduced in 1969 by the newly elected Liberal government and passed on 13 April 1970 after amendment. As a result, the Criminal Code includes what is now Section 318 which provides for a penalty of up to five years' imprisonment for advocacy of genocide⁴ and Section 319 which

1 The Constitution Act, 1982 was enacted as Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11.

2 Section 15 reads in relevant part: (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

3 Section 23 guarantees minority language educational rights. Section 27 reads: This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

4 Section 318(1) reads: "Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years."

Section 318(2) defines genocide to mean:

"any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,

(a) killing members of the group; or

provides for a penalty of up to two years' imprisonment for "inciting hatred against any identifiable group where such incitement is likely to lead to a breach of the peace" (Section 319(1)) or for "wilfully promot[ing] hatred against any identifiable group ... by communicating statements, other than in private conversation" (Section 319(2)).⁵

The supporters of this legislation argued that the infringement of free speech rights was minimal. Sections 318(3) and 319(6) require the consent of the Attorney-General for prosecutions under Section 318(1) and 319(2) (but not 319(1)), thus providing a procedural check on abuse of the sections. The defences to the crime of wilful promotion of hatred (set forth in Section 319(3)) were designed to permit good faith comment on issues of public or religious concern and to allow truth as a defence as well. Thus, it was felt that the danger of frivolous or vexatious criminal charges was reduced to a minimum and that legitimate expression would not be discouraged.

These provisions are supplemented by other sections of the Criminal Code. Racial violence and public disorder, for example, may be dealt with under assault and public disturbance provisions. Of particular interest is Section 181 which deals with the spreading of false news.⁶ This section has a long history and was not aimed particularly at racist speech. There is no requirement that the Attorney-General consent to the laying of charges, nor are there any enumerated defences.

Prosecutions Under the Criminal Code Prior to the Charter

Prosecutions under these Criminal Code provisions have been extremely rare. Until recently, the provincial Attorneys-General were reluctant to lay charges on the

ground that it would be very difficult to prosecute anyone successfully under the sections, given the defences available. The truth defence, it was felt, was a particularly difficult hurdle to overcome.

Section 319(2) was used against two francophone rights activists who distributed a pamphlet purporting to be the work of an anti-French organization. Their purpose was to provoke the francophone population into greater militancy in its demands for French language schools. They were convicted at trial but in 1979 their conviction was overturned on appeal. The Ontario Court of Appeal held that the word "wilfully" in the section meant that there had to be a "specific intention to promote hatred".⁷ This case has provided ammunition for the civil rights argument that the section would be used by government officials to suppress legitimate political dissent rather than hate propaganda (which, for instance, may aim to intimidate members of identifiable groups rather than promote hatred against them) but could be used to prosecute political dissidents (who may aim to stir up hatred of a dominant group).

Section 181 also has a chequered history and has been used only rarely. At the beginning of this century it was used against an American who posted a sign advertising a closing sale in which he stated that he was leaving Canada because Americans were not wanted in Canada. This was considered false news going against the public interest because Canada was at that time actively seeking immigrants.⁸

Another prosecution was brought for the publication of a pamphlet critical of the treatment of Jehovah's Witnesses in Québec. The Québec Government adopted a number of discriminatory measures prior to World War II. The Québec Court of Appeal held that the section had to be interpreted restrictively to require intent to disturb established order or to resist authority, and thus overturned the conviction.⁹

In another case, the section was used to prosecute an underground newspaper which published a parody of an established Montréal newspaper, *The Gazette*. The parody included a story to the effect that the mayor of Montréal had been killed by a drug-crazed hippie. The accused were convicted at trial but their convictions were reversed on appeal because they did not cause any injury to the public interest despite the embarrassment caused to the newspaper editor.¹⁰

Challenges to Hate Speech Laws Under the Charter

The constitutionality of these criminal law provisions has been challenged on the basis of the Charter of Rights and Freedoms. The first case was *R. v. Zundel* in which Section 181 was challenged as a violation of Section 2(b)'s guarantee of freedom of expression. The Supreme Court granted leave to appeal in November 1990 but has not yet decided the case on the merits. In *R. v. Keegstra* and *R. v. Andrews*, Section 319(2) was challenged as a violation of Section 2(b) and, in addition, the defences enumerated in Section 319(3) were challenged as violations of Section 11(d) of the Charter which enshrines the right to a fair trial and the

7 *R. v. Buzzanga and Durocher*, (1979) 49 C.C.C. (2d) 369.

8 *R. v. Hoaglin*, (1907) 12 C.C.C. 226 (N.W.T.S.C.).

9 *R. v. Carrier*, (1951) 104 C.C.C. 75, applying *R. v. Boucher*, [1951] S.C.R. 265.

10 *R. v. Kirby*, (1970) 1 C.C.C. (2d) 286 (Qué. C.A.).

(b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction."

Section 318(4) defines "identifiable group" to mean: "any section of the public distinguished by colour, race, religion or ethnic origin."

5 Section 319 reads, in relevant part:

(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.

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

(a) if he establishes that the statements communicated were true; (b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject; (c) if the statements were relevant to any subject of public interest, the discussion of which was for public benefit, and if on reasonable grounds he believed them to be true; or (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

(7) In this section "communicating" includes communicating by telephone, broadcasting or other audible or visible means; "identifiable group" has the same meaning as in section 318; "public place" includes any place to which the public has access as of right or by invitation, express or implied; "statements" includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations."

6 Section 181 reads: Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and is liable to imprisonment for two years.

presumption of innocence. The Supreme Court of Canada, by narrow majorities, upheld the constitutionality of Section 319(2).

The Offence of False News: *R. v. Zundel*¹¹

Ernst Zundel is a notorious Toronto-based extremist who is said to be "one of the world's biggest purveyors of Nazi propaganda".¹² He began distributing Holocaust denial pamphlets during the 1970s. One such pamphlet was sent to all the members of the federal Parliament, Catholic priests in Québec and Ontario, Protestant ministers in Ontario, the Ontario media and to high school history teachers in Ontario. This campaign of vilification provoked considerable anger especially among victims of Nazi persecution living in Canada. Representatives of these communities lobbied the Ontario government to lay charges under the hate propaganda provisions of the Criminal Code. The Attorney-General was reluctant to do so believing that the chances of successful prosecution were slim, and that a trial would make a martyr of the accused and provide him with a platform for his views.

Frustrated by the government's refusal to act, the Canadian Holocaust Remembrance Association decided to take the initiative. Because prosecution under section 319(2) requires the consent of the Attorney-General of the province, this group decided to lay private charges under Section 181, which does not require the Attorney-General's consent. In the face of considerable public pressure, the Crown eventually took over the prosecution.

The trial was lengthy and received intensive media coverage in Canada and considerable publicity throughout North America and Europe. Because truth is a defence to the charge of false news, Zundel used the trial as an opportunity to attempt to prove that the Holocaust had not happened. His lawyers called such notorious anti-Semites as Robert Faurisson. The Crown called survivors of the concentration camps to testify about their experiences. Expert historians were also called as witnesses. The jury convicted Zundel of wilfully publishing a statement that he knew to be false by publishing a pamphlet contesting the Holocaust. He was acquitted of a second charge involving the publication of a pamphlet alleging an international conspiracy to promote hatred against Muslims. Despite some concerns that the trial would provide Zundel with a platform for wider dissemination of his views, research indicated that the trial did not result in either increased sympathy for Zundel or increased anti-Semitism.¹³

Zundel appealed against this conviction to the Ontario Court of Appeal which allowed the appeal and ordered a new trial. The court rejected Zundel's constitutional challenge to Section 181 but agreed with his arguments that procedural mistakes had been made at trial.¹⁴

Moreover, the court held that the Crown, in order to prove the offence of spreading false news, had to show that the accused made an assertion of fact which was capable of being false and that the person making the assertion knew that it was false at the time of its publication. A conviction could not be based on a statement of opinion (354). The Crown, however, did not have to prove actual harm; the likelihood of harm would be sufficient.

These demanding requirements for conviction under Section 181 were crucial to the court's decision that it did not violate Section 2(b) of the Charter. The court noted that the right to freedom of expression is not absolute, and that certain well-defined and limited classes of speech, including obscenity, libel and knowingly false statements are not constitutionally protected. Although some such statements may be of some social value, their possible value is outweighed by society's interest in order and morality. The court adopted the "residue" theory of freedoms which holds that a freedom, as opposed to a right, is that unregulated area which is left after it is determined what area is regulated. The court accordingly concluded:

The nub of the offence in Section 177 [now Section 181] is the wilful publication of assertions of a fact or facts which are false to the knowledge of the person who publishes them, and which cause or are likely to cause injury or mischief to the public interest. It is difficult to see how such conduct would fall within any of the previously expressed rationales for guaranteeing freedom of expression. Spreading falsehoods knowingly is the antithesis of seeking truth through the free exchange of ideas. It would appear to have no social or moral value which would merit constitutional protection. Nor would it aid the working of parliamentary democracy or further self-fulfilment. In our opinion an offence falling within the ambit of Section 177 lies within the permissibly regulated area which is not constitutionally protected. It does not come within the residue which comprises freedom of expression guaranteed by s. 2(b) of the Charter.¹⁵

The court also held that Section 181 was valid under Section 1 of the Charter. The court considered that the objective of the section - racial and social harmony - was important and that Section 181 offered a reasonable means of deterring the spread of false news.

This decision was rendered before the Supreme Court had rejected the "residue" theory of freedom of expression in the *Keegstra* and *Andrews* cases (discussed below). The Supreme Court in those cases concluded that the "residue" theory could potentially justify excessive restrictions on freedom of expression. If the Charter freedom is the residue that is left after regulation then all regulation would be permissible and the Charter protection would be deprived of meaningful content.

11 (1987) 35 D.L.R. (4th) 338.

12 *Globe and Mail*, 15 June 1983.

13 See Weiman and Winn, *Hate on Trial: The Zundel Affair, the Media and Public Opinion in Canada* (Oakville: Mosaic Press, 1986).

14 The court held that the trial judge had erred by preventing the defence from asking potential jurors questions during jury selection relating to their religious and moral beliefs; failing to direct the jury that the Crown had to prove that Zundel knew that the statements in the pamphlet relating to facts were false, and not merely that he displayed reckless disregard for their truth; admitting certain evidence such as an American military film narrated by an unidentified person which related facts not indicated by the film's images; and not allowing Zundel to introduce various items of evidence,

including books in the German language, some photographs allegedly showing that the Holocaust could not have happened, and models of the camps built on the basis of Robert Faurisson's plans which allegedly prove that there were no gas chambers or that the camps could not have been used to murder millions of people.

15 35 D.L.R. (4th) at 364.

Wilful Promotion of Hatred: *R. v. Keegstra*¹⁶

The facts of the *Keegstra* case are unusual and very disturbing in that the accused was a teacher as well as mayor of his community, and not simply a member of the "lunatic fringe". The facts are summarized in the judgement of then Chief Justice Dickson:

Mr. James Keegstra was a high school teacher in Eckville, Alberta from the early 1970s until his dismissal in 1982. In 1984 Mr. Keegstra was charged under section 319(2) [then section 281.2(2)] of the Criminal Code with unlawfully promoting hatred against an identifiable group by communicating anti-semitic statements to his students. He was convicted in a trial before McKenzie J. of the Alberta Court of Queen's Bench.

Mr. Keegstra's teachings attributed various evil qualities to Jews. He thus described Jews to his pupils as "treacherous", "subversive", "sadistic", "money-loving", "power hungry" and "child killers". He taught his classes that the Jewish people seek to destroy Christianity and are responsible for depressions, anarchy, chaos, wars and revolution. According to Mr. Keegstra, Jews "created the Holocaust to gain sympathy" and, in contrast to the open and honest Christians, were said to be deceptive, secretive and inherently evil. Mr. Keegstra expected his students to reproduce his teachings in class and on exams. If they failed to do so, their marks suffered.

The defence made a preliminary application to quash the charges on grounds including violations of Sections 2(b), 11(a), 11(b) and 11(d) of the Charter. This application was dismissed by the trial judge, Mr Justice Quigley. Noting that freedom of expression is not absolute and does not include the wilful promotion of hatred, he ruled that:

Section 281.2(2) [now section 319(2)] of the Code cannot rationally be considered to be an infringement which "limits freedom of expression", but on the contrary it is a safeguard which promotes it.¹⁷

In the alternative, he ruled that, if Section 319(2) did infringe freedom of expression, then it was a reasonable limitation and demonstrably justified in a free and democratic society. Hate propaganda can cause harm to both targeted groups and society in general, and the prevention of such harm is a valid objective. Moreover, the law is consistent with both Canada's international obligations and legislation in other free and democratic countries.

On appeal, the Alberta Court of Appeal accepted defence arguments that the Criminal Code provisions violated both Section 2(b) and the right under Section 11(d) to be presumed innocent. The Court accordingly quashed Keegstra's conviction.

The Crown appealed to the Supreme Court of Canada, which allowed the appeal in a sharply divided decision, with four judges upholding the hate provisions of the Criminal Code and three dissenting. Chief Justice Dickson delivered the majority judgement.

On the issue of Section 2(b), Chief Justice Dickson reiterated the philosophy of freedom of expression that the Court had developed in a number of cases, namely, that Section 2(b) must be given a broad and liberal interpretation. It protects all forms of expressive activity - political speech, artistic expression, individual self-expression, intellectual search for truth and even commercial speech.¹⁸ In deciding whether there has been a violation of Section 2(b), it is necessary to use a "bifurcated approach". First, the court must ask whether the activity of the person contesting the government action falls within the protected Section 2(b) sphere. If it does, then the court must determine if the purpose of the impugned government action was to restrict freedom of expression. If it was, Section 2(b) has been violated. If the purpose was not to restrict expression, Section 2(b) would not be violated unless the person contesting the government measure could demonstrate that the effect of the measure was to restrict expression which "supports rather than undermines the principles and values upon which freedom of expression is based." Because Section 319(2) aims to restrict hate speech on the basis of its content, it clearly infringes Section 2(b).

In contrast to Section 2(b), Section 1 requires a balancing of competing rights and interests. Chief Justice Dickson noted that Section 1 does not create a rigid and technical test. Rather, the courts, when applying Section 1, must be guided by the values and principles fundamental to a free and democratic society as embodied in, but not limited to, the rights and freedoms expressed in the Charter. Furthermore, the balancing must always be carried out in a specific factual context.

Mr Justice Dickson recalled the *Oakes* test, which requires the party, usually the government, seeking to defend a measure which violates one of the Charter's rights or freedoms, to convince the court that the impugned measure has an objective of pressing and substantial concern and that the measure is proportionate to that concern.¹⁹ To establish that the measure is proportionate, the party must show that the measure is rationally related to the objective pursued, that it impairs the right or freedom to the least degree possible, and that the benefits of the infringement outweigh the restrictive effects.

Applying the *Oakes* test, Justice Dickson found that the government objective in enacting Section 319(2) is of substantial and pressing concern. Hate propaganda causes considerable harm both to the targeted groups and to the fabric of society. Canada had ratified the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights and thus had international obligations to prohibit hate propaganda. Sections 15 and 27 of the Charter show the great importance attached to equality, dignity and diversity. As a result, there is, in this case, "a powerfully convincing legislative objective ... to justify some limit on freedom of expression."

Justice Dickson furthermore concluded that Section 319(2) is proportionate to the legislative objective in enacting it. Hate propaganda has relatively little value. There is little chance of its being proved true. It is inimical to the democratic aspirations embodied in a political system which places a high value on freedom

16 *R. v. Keegstra*, [1990] 3 S.C.R. 697; reversing (1988) 60 Alta.L.R. (2d) 1; reversing (1984) 19 C.C.C. (3d) 254.

17 (1984) 19 C.C.C. (3d) 254, 268.

18 The cases include: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 103; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Ford v. Québec (Attorney General)*, [1988] 2 S.C.R. 712; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; and *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.

19 *R. v. Oakes*, [1986] 1 S.C.R. 103.

of speech. Protection of speech which promotes hate is not an integral part of the democratic process.

There is a rational connection between Section 319(2) and the objective of suppressing hate propaganda. While it is true that the effect of Section 319 is impossible to measure with precision, suppressing hate propaganda is nonetheless likely to reduce the harm to targeted groups and to society at large. The argument that trials of hatemongers may legitimize hatred is not convincing. Members of the targeted groups are likely to be vindicated and reassured by the use of the criminal law to punish those who vilify them. Trials are a means whereby values important to a free and democratic society are publicized and reinforced in the public consciousness. The failure of German laws to stop the rise of Hitler is not proof to the contrary; the causes of fascism in Germany were complex.

Moreover, Section 319(2) is carefully circumscribed in order to minimize impairment of freedom of speech. The word "wilfully" imposes a heavy burden of proof on the Crown. This mental element requires more than mere negligence or even recklessness as to result. It is only met where the accused subjectively intends to promote hatred. In addition, the section excludes private conversation. The requirement that the Crown need prove only the likelihood of harm rather than actual harm is reasonable owing to the virtual impossibility of establishing actual harm (short of a breach of the peace, addressed in Section 319(1)).

While the term "hatred" is somewhat vague, it is clear that it refers to only the most intense form of antipathy. The defences found in Section 319(3) significantly reduce the danger of overbreadth and vagueness, and reflect Parliament's particular interest in protecting all forms of possibly legitimate expression. Although government officials might be overzealous and arbitrary in applying the section, the possibility of illegal police or government action cannot decide the issue of constitutionality. The availability of other means of attacking racism does not automatically preclude recourse to the criminal law. It is obvious that a multitude of strategies must be used to rid society of hate propaganda and foster more tolerant attitudes among Canadians.

In concluding that the benefits of Section 319(2) outweigh its restrictive effects, Justice Dickson held that the infringement of expression in this case was not extremely serious. On the one hand, the expressive activity was relatively unimportant, the provision is narrowly drawn, and the impairment of individual freedom was not of a highly serious nature. On the other hand, the objective of promoting equality and dignity was of substantial importance.

Justice Dickson dealt only briefly with the Section 11(d) argument because the arguments essentially were the same as those concerning Section 2(b). He held that Section 11(d) was violated since Section 319(3)(a) places the onus of proof on the accused to prove that his statements were true. However, this shifting of the burden of proof is justified under Section 1 because of the importance of the objective of Section 319(2) and the fact that the defence of truth is available even if the expression is harmful. It would be difficult for the Crown to prove the falsity of hate propaganda, and the defence only operates where the Crown has already proved beyond a reasonable doubt an intent to promote hatred which causes harm. A different allocation of the burdens of proof would undermine the valid objectives Section 319(2) seeks to promote.

In her dissenting opinion, Mme Justice McLaughlin, joined by two other justices, does not disagree with the *approach* followed by the majority. Rather, she disagrees with the majority's assessment of the magnitude of the harm caused by hate propaganda and the impact of the Criminal Code's provisions on freedom of

expression. The dissenters deplore racism and hate-mongering speech but do not believe that principled distinctions can be drawn between such speech and forms of legitimate political expression which involve crude language and may be premised on racist opinions.

Furthermore, Section 319(2) is overly broad and vague. The term "hatred" covers a wide range of expression and is inherently subjective. The expression "wilful promotion" does not cure the section's overbreadth because legitimate political speech may include statements which wilfully promote hatred against an "identifiable" group. The defences do not narrow the ambit of the offence adequately because they do not contain any criteria for the evaluation of the reasonableness of different theories, political or otherwise, and the reference to the "public interest" provides no guidance to the courts. Thus, the chilling effect of the law may be substantial, and artists, scientists, academics and others may curtail their expression for fear of prosecution.

The dissenters noted other means of attacking the problem of hate propaganda, such as human rights legislation, which would be less intrusive of freedom of expression. Section 319 presents a serious threat to freedom of expression, whose putative benefits are outweighed by its likely detrimental effects both in chilling free speech and providing a platform for bigots and racists.

The dissenters reached a similar conclusion regarding Section 11(d)'s presumption of innocence. Placing the burden on the accused of proving the truth of his or her statements violates that presumption. Moreover, an accused who lacks resources may be unable to mount an adequate defence. Proving the truth of a statement may be as difficult as proving its falsehood. The shifting of the traditional allocation of the burden of proof from the Crown to the accused does not clearly produce a benefit in terms of reducing the spread of hatred or encouraging social harmony.

The 4-3 split on the Court in this case does not augur well for the clarity and stability of the Court's jurisprudence. The subsequent resignations of the two "progressive" judges, Chief Justice Dickson and Madam Justice Wilson exacerbate the possibility that the Court's rulings on the constitutionality of the regulation of hateful speech will change with the philosophic make-up of the court.

*R. v. Andrews*²⁰

The Supreme Court issued its judgment in the *Andrews* case at the same time as that in *Keegstra*. The issues in this case were identical. The accused were members of a white supremacist organization known as the Nationalist Party of Canada. They belonged to the party's central committee responsible for publishing and distributing the group's news sheet, the *Nationalist Reporter*. After a legal search of the homes of the accused, 89 items were seized including copies of the *Nationalist Reporter*, subscription lists and stickers with racist slogans. These items contained assertions of white superiority with racist and anti-Semitic overtones on issues such as immigration, "race-mixing", and the Holocaust. The accused were charged under Section 319(2) with the promotion of hatred and convicted at trial in 1985. Their appeal to the Ontario Court of Appeal was rejected although the sentences were

²⁰ *R. v. Andrews*, [1990] 3 S.C.R. 870; dismissing the appeal from (1988) 65 O.R. (2d) 161, 43 C.C.C. (3d) 195 (Ont. C.A.).

reduced. The accused appealed to the Supreme Court. The Supreme Court rejected the appeal for the reasons given in the *Keegstra* case.

The Canadian Human Rights Act

The Canadian Human Rights Act is limited in its application to undertakings within areas of federal jurisdiction, including the federal civil service, federally regulated banks, telecommunications and inter-provincial transportation.²¹ The Act prohibits discrimination on grounds of "race, religion, sex, national or ethnic origin, age, marital status, family status, disability or conviction for an offence for which a pardon has been granted" in, amongst other matters, employment and the provision of services.²²

The Act grants a person who has been the target of discrimination the right to file a complaint with the Canadian Human Rights Commission.²³ Complaints may also be initiated by the Commission itself.²⁴ If the complainant or the Commission has reasonable grounds for believing that a person or agency is engaging or has engaged in a discriminatory practice in violation of the Act, the Commission will investigate the complaint.²⁵ If the investigator assigned to the case determines that the complaint appears to be well-founded, a report is made to that effect.

On receipt of the report, the Commission has a number of options. It can approve any settlement reached during the investigation. If it is to be approved, the settlement must remedy the discrimination, compensate the complainant for any prejudice such as lost wages, and, if possible, educate the discriminator to correct his or her behaviour. If no settlement was reached during the investigation, the Commission can refer the case to one of its staff conciliators.²⁶

If conciliation fails and the person violating the Act refuses to correct the discrimination, the Commission can refer the complaint to an independent Tribunal.²⁷ A complaint cannot be referred to a Tribunal unless the party or parties alleged to have violated the Act have been given notice of the complaint and informed of the evidence which will constitute the basis of the decision to name a Tribunal. The party or parties must be given an opportunity to respond. If the Commission decides to refer the complaint to a Tribunal, the latter will hold a hearing. There is a possibility of an appeal to a three member Review Tribunal.²⁸ The Tribunal and the Review Tribunal are subject to judicial review of the substance of their decisions as well as any procedural matters.

If there is a finding of a violation of the Act, the Tribunal can issue a cease and desist order and require that the violator take measures to correct the discrimi-

nation and compensate the complainant.²⁹ If the violator refuses to respect the order, the Tribunal can file it with the federal court. On filing, the order becomes the equivalent of a court order and the violator can be held in contempt if he or she refuses to obey. The penalty for contempt may be imposed only after the violator has been given the opportunity to show cause why he or she should not be held in contempt and has been found in a judicial proceeding to have disobeyed the cease and desist order. The maximum penalty is a \$5,000 fine or one year's imprisonment.

The provisions relating to hate propaganda in the Canadian Human Rights Act concern the use of telecommunications equipment for the purpose of transmitting hate messages. Section 13(1) prohibits the use of telecommunications facilities to promote hatred of any person or persons on the basis of a prohibited ground of discrimination.³⁰

The prohibited grounds are set out in Section 2 of the Act, quoted above. This legislation is designed to prevent, in particular, the use of the telephone system to disseminate hate messages.

Conciliation procedures will be irrelevant in these kinds of cases. Inadvertent broadcasting of racist messages would seldom be the subject of a complaint. It is hard to imagine a situation in which an individual or group would repeatedly use telecommunications facilities to communicate such messages without intending to do so. Thus, the Commission will almost inevitably be forced to issue a cease and desist order to put an end to the violation of the Act.

The Charter Challenge: *Canada (Human Rights Commission) v. Taylor*³¹

The defendants in this case operated a recorded telephone message service which could be reached by any member of the public who dialled the number. The Human Rights Commission investigated this service over a two-year period. During that time at least thirteen different messages were broadcast in this manner. They were recorded by Taylor, the leader of the Western Guard Party, located in Toronto. The messages were changed from time but their basic theme was the same, namely, to warn the callers "of the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles."³² Jews were also accused of perversion, laziness and drug use, and of being responsible for the international spread of communism. The phone service was promoted by the distribution of small cards with a maple leaf symbol and a suggestion to call the number.

The defendants were the object of a complaint initiated by the Commission itself. A tribunal was named to hear the complaint. The alleged violators did not

21 S.C. 1976-77, c. 33 as amended.

22 *Id.* at Section 2.

23 *Id.* at Section 40(1).

24 *Id.* at Section 40(3).

25 *Id.* at Section 43.

26 *Id.* at Section 47.

27 *Id.* at Section 44(3) and Sections 49 to 54.

28 *Id.* at Sections 55 and 56.

29 *Id.* at Section 53(2).

30 Section 13(1) reads: "It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination."

31 *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892.

32 Case No. 104/1981, *J.R.T. and the W.G. Party v. Canada*, in Human Rights Committee, *Annual Report* (1983), UN Doc. A/38/40, Annex XXIV.

appear at the hearings. The tribunal found on the basis of the evidence gathered by the Commission's investigative staff that the defendants had violated Section 13(1) of the Act. A cease and desist order was issued. The order was filed in conformity with the Act with the Federal Court of Appeal. No effort was made by the violators to have the order set aside. They simply ignored it.

In 1980, the Commission applied to the Federal Court for an enforcement order. The Court found the appellants in contempt, sentenced Taylor to one year's imprisonment and fined the Western Guard Party \$5,000. The judge, however, suspended the contempt order and the penalties imposed on the condition that the appellants discontinue the message service. They did not. In June 1980, the judge lifted the suspension of sentences. Taylor and the Party appealed. The Federal Court of Appeal initially stayed the execution of sentences but, in February 1981, dismissed the appeal. An application for leave to appeal to the Supreme Court was denied. Taylor began serving his sentence in July 1981.

Taylor and the WG Party then submitted a communication to the Human Rights Committee of the United Nations, alleging that their rights under Article 19 of the International Covenant on Civil and Political Rights (ICCPR) had been violated.³³ The Committee found that "the opinions which Mr. T. seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under Article 20(2) of the Covenant to prohibit."³⁴ The Committee accordingly declared the communication inadmissible.

After Taylor's release, the message service resumed. In 1983, the Commission applied once again to the Federal Court for a contempt order. In the meantime the Charter had come into effect. Thus, the appellants chose to challenge the validity of Section 13(1) in light of Section 2(b) of the Charter. The Trial Division of the Federal Court rejected the application³⁵, and the Federal Court of Appeal denied the appeal.³⁶ Taylor and the Western Guard Party appealed to the Supreme Court of Canada.

The appeal in the *Taylor* case raised issues similar to those raised in the *Keegstra* and *Andrews* cases. The majority and dissenting judges of the Court reiterated their reasoning given in detail in those cases and summarized above. The conclusions are virtually identical. The majority found that Section 13(1) of the Human Rights Act violates Section 2(b) of the Charter but is justified under Section 1. The dissenting judges agreed that Section 2(b) is violated but disagreed with the weighing of the competing factors in the Section 1 analysis.

The justices commented on three differences between Section 13(1) of the Human Rights Act and Section 319 of the Criminal Code in the determination of proportionality. First, Section 13(1) does not include an intent requirement. Second, it does not include the defence of truth set forth in Section 319(3). Finally, it applies to private conversation. Counsel for the appellants and for intervening parties contesting the constitutionality of the section argued that these differences were

fatal to the constitutionality of Section 13(1), regardless of the result in the *Keegstra* case, because they rendered the section overbroad and vague.

The majority rejected these arguments. It held that human rights legislation is not designed to deal with intentions but focuses on effects. This is reasonable because so much discrimination is systemic rather than individual and intentional. If an intent requirement were imported into human rights legislation this would defeat the remedial purpose of the legislation. Significantly, human rights legislation creates remedial procedures which do not carry the same stigma or impose the same burdens as criminal proceedings. The aim is to compensate the victim and correct the discrimination rather than to punish the violator. Thus, Section 13(1) satisfies the minimal impairment branch of the *Oakes* test.

Moreover, the absence of a truth defence does not mean that the legislation is overbroad. The majority in the *Keegstra* case did not say that the truth defence was vital to its conclusion that the legislation was constitutional. The legitimacy of a restriction upon a Charter right depends on the evil to be corrected, and there is no reason in appropriate circumstances why prohibitions of truthful statements cannot be justified under Section 1. Just as the focus on remedying the effects of discrimination justifies the lack of an intent requirement, so does it justify the absence of a truth defence.

The fact that Section 13(1) applies to private telephone conversations does not, in the opinion of the majority, make the section overbroad. The purpose of these messages is to reach and persuade a sizeable section of the public. The use of recorded phone messages is particularly effective because they attract impressionable individuals and feed them hate propaganda in a situation in which neither they nor anyone else can question its content or challenge the speaker. This form of communication of hatred is particularly insidious. The use of the word "repeatedly" in Section 13(1) means that the section only applies to a series of messages or what can be characterized as "public, large-scale schemes for the dissemination of hate propaganda".³⁷ The conversations may, in a technical sense, be private but they are an integral part of a "public" activity.

The dissenters find that the words "hatred" and "contempt" are vague and lack any precise meaning in the absence of statutory definitions. The section significantly impairs freedom of expression and the costs of its application outweigh its doubtful impact in reducing racism, prejudice and discrimination.

PROVINCIAL HUMAN RIGHTS LEGISLATION

The provinces have used their exclusive jurisdiction over property and civil rights matters to legislate extensively in the field of human rights. Provincial human rights acts prohibit discrimination in areas such as housing, employment and the provision of services on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, handicap and receipt of public assistance. While procedures vary somewhat from province to province, most provinces have created human rights commissions to enforce legislation. These commissions have broad investigative powers, and conciliation with a view to changing the discriminator's behaviour and compensat-

33 See the discussion of this case by Danilo Türk and Louis Joinet in paragraph 59 of their chapter in Part II of this collection. The text of Article 19 is reproduced in Annexe A.

34 See *W. G. Party v Canada supra* at note 32. The text of Article 20 is reproduced in Annexe A.

35 (1984) 6 C.H.R.R. D/2595.

36 [1987] 3 F.C. 593, 37 D.L.R. (4th) 577.

37 (1990) 3 S.C.R. 892 at 939.

ing the targeted individual is the typical and preferred approach. Only the recalcitrant offender will be brought before a tribunal.

All of the provincial human rights codes and acts prohibit one narrow category of hate speech; namely, the publication or public display of "any notice, sign, symbol, emblem or other similar representation" with intent to infringe, or to incite infringement of, a fundamental right. The courts of Queen's Bench in Manitoba and Saskatchewan have both ruled that these prohibitions are to be construed very narrowly.³⁸ An employment or rental advertisement indicating that only whites or Christians need apply would be unlawful as would use of Nazi or other racist symbols. However, advocacy of racist or other hateful ideas would not.

A few provinces have adopted legislation specifically addressing the issue of hate propaganda. In 1981, British Columbia adopted the Civil Rights Protection Act which makes the promotion of hatred on the basis of colour, race, religion, ethnic origin or place of origin a tort actionable by the person, or by any member of the class of persons, against whom the conduct or communication was directed.³⁹ The person bringing the action does not need to prove damages; the court may award exemplary damages. The damages may be awarded to the person bringing the action or to any person or organization which represents the interests of the class of persons.⁴⁰ The commission of an act prohibited by the statute is also an offence which makes the violator liable to a fine of not more than \$2,000 or to imprisonment for not more than six months. As of January 1992, there have been no reported cases involving this legislation.

Manitoba has included a section dealing with group libel in its Defamation Act.⁴¹ This section has greater drawbacks than the British Columbia statute. The burden is placed on individual members of targeted groups to initiate the action. The remedy is limited to an injunction and representative organizations do not have standing to sue. There is no provision for damages. The cost of an application may be high. The awarding of costs is seldom sufficient to cover the actual costs of such proceedings. Not surprisingly, the section has seldom been used.

New Brunswick's Human Rights Code has been used to restrain the activities of Malcolm Ross, the author of several books which argue that the Holocaust was a fraud. Although Ross was a teacher, in contrast to the *Keegstra* case, there was no evidence that he used the classroom to promote his anti-Semitic views. In 1989 after the local Jewish community failed to convince the provincial government to prosecute Ross under Section 319(2) of the Federal Criminal Code, a parent laid a complaint with the New Brunswick Human Rights Commission against the School Board which employed Ross. It was alleged that the School Board was discriminating against students of Jewish background by continuing to employ Ross because his presence as a teacher created an atmosphere of hatred in the schools.

38 *Warren and Chapman*, (1984) 11 D. L. R. (4th) 474; *Saskatchewan (Human Rights Commission) v. Engineering Students Society* (1989) 56 D. L. R. (4th) 604.

39 S.B.C., c. 12, Section 1.

40 *Id.* at Section 3(2).

41 R.S.M. 1987 c. D.20, Sec. 19(1) reads: "The publication of a libel against a race or religious creed likely to expose persons belonging to the race, or professing the religious creed, to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people, entitles a person belonging to the race or professing the religious creed, to sue for an injunction to prevent the continuation and circulation of the libel; and the Court of Queen's Bench may entertain the action."

The Board of Inquiry appointed to consider the case concluded, in August 1991, that the School Board had violated the Human Rights Act since its continued employment of Ross as a teacher was counterproductive to the creation of "a discrimination-free environment". The Board of Inquiry accordingly ordered the School Board to suspend Ross for eighteen months without pay and to try to find him a non-teaching position during that period. If such a situation could not be found, the School Board was to dismiss him. The School Board was ordered to terminate Ross's employment immediately if he did not cease publishing anti-Semitic materials. In addition, the New Brunswick Department of Education was instructed to develop and promote multicultural education policies in schools and to create a system of periodic appraisals of the overall quality of race relations in the school environment.⁴² Ross filed an application for judicial review which was heard by the trial court in the fall of 1991. The trial court upheld the decision of the Board of Enquiry that there had been a violation of the Human Rights Act. However, the court modified the remedial order to strike out the restriction on Ross's right to publish his anti-Semitic views if he continued in the employ of the school board in a non-teaching capacity. As of April 1992, an appeal from this judgement was before the New Brunswick Court of Appeal.

CONCLUSION

The hate propaganda provisions of the Canadian Criminal Code and Human Rights Act have survived constitutional challenges. This result is encouraging for those who hope to see the federal and provincial governments more actively involved in fighting the spread of virulent expressions of racist, sexist and religious hatred. For many years, the hate propaganda laws appeared to be of little value: there were virtually no prosecutions of hatemongers and prosecutors justified their reticence to press charges by pointing to the dubious constitutionality of the hate speech laws and the difficulty of proving the elements of the offences. Now, government officials no longer are able to use doubts about the constitutionality of these provisions to justify any failure to prosecute.

Another encouraging aspect of the recent cases is the importance judges have attached to the detrimental impact of hate speech on its victims. The majority of the justices of the Supreme Court weighed this harm heavily in upholding the constitutionality of anti-hate propaganda provisions under Section 1 of the Charter. This recognition of the reality of harm will likely serve as a precedent for similar cases in the future.

However, the provisions of the Criminal Code are very demanding. While it is not easy to satisfy all their requirements, any effort to amend these provisions to facilitate prosecution entails the risk of renewed constitutional challenges. Given the changing make-up of the Supreme Court, it is possible that the minority views expressed in the *Keegstra* and *Taylor* dissents could now be shared by a new majority. If this is true, the chances of amended hate provisions surviving a constitutional challenge are reduced.

The overview of provincial legislation in the previous section shows that, while the provinces clearly have the power to take action against hate propaganda, few have adopted legislation to do so. The few statutes which directly address the

42 *Attis v. New Brunswick (School District 15)* (1991) 121 N.B.R. (2nd) 1; 15 C.H.R.R. D/339.

problem have proved of little value to targeted groups. They place a heavy burden - both financial and psychological - on members of the targeted groups by privatizing the problem. One of the important functions of legislation in the realm of hate is the expression of societal disapproval of racism and bigotry and collective support for the targeted groups. Human rights legislation and criminal laws serve this purpose better than do group libel statutes, which require private prosecution.

The human rights commissions, as community representatives, could use their expertise and resources to reduce the amount of hate propaganda in circulation and educate the general public about racism. If they did so, individuals and representative organizations would be spared the financial and other burdens entailed by legal action. The more flexible procedures available under human rights legislation including conciliation increase the possibility of speedy and adequate remedies with less of the risk presented by criminal trials of making martyrs of the hatemongers which may give their views greater credibility. Cases currently before human rights tribunals indicate that the provincial commissions are beginning to take their roles more seriously.

PRINCIPLES AND PERSPECTIVES ON HATE SPEECH, FREEDOM
OF EXPRESSION AND NON-DISCRIMINATION:
THE CANADIAN EXPERIENCE AS A CASE-STUDY IN
STRIKING A BALANCE

Irwin Cotler

In his speech to the Copenhagen Conference on the Human Dimension in June 1990, the then Foreign Minister of the former Soviet Union, Edouard Shevardnaze, warned about the "gathering storm" of racial incitement. It is perhaps not surprising then that the Concluding Document of the Copenhagen Conference contained the most comprehensive mini-code to combat incitement to racial hatred, hostility, and discrimination that has ever found expression in any international agreement.¹

As it happens, the two years since the Copenhagen Conference have witnessed a literal explosion of racial and religious incitement in democratic societies in Europe, Canada, the United States, Latin America and Asia against vulnerable minorities in their midst. The legal remedies invoked to combat such incitement have been the object of constitutional challenges in regions around the world, triggering a series of *cause-célèbres* this past year: the *Le Pen* case in France, the *Radio Islam* case in Sweden, the *Smirnov-Ostashvilli* case in the former Soviet Union, the Minnesota "*Cross Burning*" case in the United States, and the historic trilogy in Canada - for which *Keegstra*² is metaphor and message - to name but a few.

Indeed, this article is being written against the backdrop of the most celebrated litigation involving hate speech, freedom of expression, and non-discrimination in the history of Canadian jurisprudence. For in December 1989, three cases³ involving freedom of expression and hate propaganda were joined for hearing challenges to the constitutionality of Canada's anti-hate legislation as being an unconstitutional infringement of the freedom of expression guarantee of the Canadian Charter of Rights and Freedoms.

In each of these cases, there were two central issues before the court, which are likely to be the central concerns of any court in a democratic society called upon to decide a racial incitement case: first, whether incitement to racial hatred is protected expression; and, second, even assuming that racial incitement is *prima facie* protected speech, whether it can nonetheless be subject to reasonable limitations, prescribed by law.

An appreciation of this incredible array of litigation reveals a little known but compelling socio-legal phenomenon: that Canada has become an international

1 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Article 40.4, reproduced in Annexe A. Admittedly, the Copenhagen formula is somewhat weaker than the relevant international provisions in that it prohibits acts that constitute incitement to violence rather than acts that constitute incitement to discrimination, hostility or violence. But it also broke new ground in several respects. See Chapter 7 by Stephen Roth. As Thomas Buergenthal stated, the Copenhagen meeting represented "a new public order for Europe".

2 *R. v. Keegstra* [1991] 2 W.W.R. 1 (S.C.C.), [1990] 3 S.C.R. 697.

3 *R. v. Keegstra*; *R. v. Andrews & Smith* [1990] 3 S.C.R. 870; *Human Rights Commission v Taylor* [1990] 3 S.C.R. 892.

centre for racist/hate propaganda litigation in general, and Holocaust denial litigation in particular.

The Canadian experience has generated one of the most compelling and instructive sets of legal precedents respecting this "genre" of litigation in the world for a variety of reasons. First, there exists a dynamic and dialectical encounter between the rise in the publication of hate speech, on the one hand, and the emergence in Canada of a comprehensive legal regime to combat it on the other, coupled with a Rights Charter invoked by both the hatemongers and the victims. Second, the Supreme Court of Canada has articulated a series of principles and perspectives which may help to pour content into what First Amendment scholar Fred Schauer has called the "multiple tests, rules and principles" reflecting "the [extraordinary] diversity of communication experiences ...".⁴

What follows is a distillation of some of these interpretive principles and perspectives which should be useful to advocates, activists, judges and scholars in appreciating the considerations that ought to be factored into any analysis of hate speech, freedom of expression and non-discrimination and, correspondingly, in attempting to strike a balance.

1. "Chartering" Rights: The Constitutionalization of Freedom of Expression

The adoption by Canada of a Canadian Charter of Rights and Freedoms in 1982 was regarded by the then Minister of Justice, Mark MacGuigan, now a judge of the Federal Court of Canada, as the "most significant legal development in Canada in the second half of the 20th century". The present Chief Justice of the Supreme Court of Canada, the Right Honourable Antonio Lamer, characterized the enactment of the Charter as a "revolutionary" act parallel to the discoveries of Pasteur in science.

Section 1 sets forth the fundamental premise for balancing competing rights and governmental interests:

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

Section 2(b) guarantees "everyone ... freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

In the words of the Court, the rights and freedoms guaranteed by the Charter, such as freedom of expression, are to be given "a generous and liberal interpretation" as befits constitutionally entrenched rights. The Constitution, said the Court, in its paraphrase of Paul Freund, "should not be read like a last will and testament, lest it become one".⁵

This by no means suggests that the Canadian experience is irrelevant to societies that do not have an entrenched Charter of Rights. As stated by the Supreme Court,

[The notion] that freedom to express oneself openly and fully is of crucial importance in a free and democratic society was recognized by Canadian Courts prior to the enactment of the Charter; ... [f]reedom of

expression was seen as an essential value of Canadian Parliamentary democracy.⁶

In a word, freedom of expression was regarded as a "core" right even before the advent of the Charter, a perspective that ought to be instructive for societies without a constitutionally entrenched Bill of Rights.

What the Canadian experience demonstrates is that a constitutionally entrenched Charter of Rights invites "a more careful and generous study of the values informing the freedom,"⁷ and therefore commends itself to those concerned with a more enhanced promotion and protection of human rights generally. Even in the absence of a Charter, however, freedom of expression may well be treated as if it were a constitutionally protected freedom.

2. The Scope of Freedom of Expression and the "Purposive" Theory of Interpretation

In the view of the Canadian Supreme Court, the proper approach to determining the ambit of freedom of expression and the "pressing and substantial concerns" that may authorize its limitation is a *purposive* one. In *Keegstra*, the Court reiterated the three-pronged rationale for freedom of expression that it had earlier articulated:

- (1) seeking and attaining truth is an inherently good activity;
- (2) participation in social and political decision-making is to be fostered and encouraged; and
- (3) diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom a meaning is conveyed.⁸

Hatemongering, according to the majority of the Supreme Court constitutes an assault on these very values and interests. First, hatemongering is not only incompatible with a "competitive marketplace of ideas which will enhance the search for truth", but it represents the *very antithesis* of the search for truth in a marketplace of ideas.⁹ Second, it is antithetical to participation in democratic self-government and constitutes a "destructive assault" on that very government.¹⁰ Third, it is utterly incompatible with a claim to "personal growth and self-realization"; rather, it is analogous to the claim that one is "fulfilled" by expressing oneself "violently".¹¹ Citing studies showing that victims of group vilification may suffer loss of self-esteem and experience self-abasement¹², the Court found that incitement to racial

6 *Keegstra*, *supra* note 2, at 27.

7 *Id.*

8 *Id.* at 28.

9 *Id.*, per Grange, J.A., at 181-84.

10 *R. v. Zundel* (1987), 580 R. (2d) 129 at 155-56, and quoted with approval on this point in *R. v. Andrews and Smith* (1988) 28 O.A.C. 161, to the effect that "the wilful promotion of hatred is *entirely antithetical* to our very system of freedom" (emphasis added).

11 *See Irwin Toy Ltd v A G of Quebec* [1989] 1 S.C.R. 927, 970.

12 *See* empirical data respecting the harm to target groups as summarized in *Report of Special Committee on Hate Propaganda in Canada* (1966), 211-215; findings of the Ontario Court of Appeal in *R. v. Andrews and Smith*, *supra* note 2, per Cory, J., at 171; and empirical data cited in M Matsuda, "Public Response to Victim's Search: Considering the Victim's Story," 87 *Michigan L. Rev.* 2320

4 F Schauer, Book Review, 56 *Univ. Chicago L. Rev.* 397, 410 (1989).

5 *Hunter v Southam* [1984] 2 S.C.R. 145, 155.

hatred constitutes an assault on the potential for "self-realization" of the target group and its members. It is not surprising, then, that the Court anchored its reasons for judgement in the "catastrophic effects of racism."¹³

3. Freedom of Expression and the "Contextual" Principle

A third principle, or building block as Mme Justice Bertha Wilson characterized it, is that of the "contextual" principle. The context of a case is of crucial importance, and the validity of challenged legislation must be assessed in terms of its effects as well as its purpose. Hate speech targeted against a disadvantaged minority or other vulnerable group will be treated differently than hate speech directed at a person from the majority culture.¹⁴

In the matter of hatemongering - whether the interpretive principle adopted is the purposive or the contextual one - interpretations converge, and the judicial "balancing" outcome is struck in favour of the right of disadvantaged minorities to be protected against group vilification, while maintaining an "expansive" and "liberal" view of freedom of expression itself as a core right.

4. Freedom of Expression in a Free and Democratic Society

According to Supreme Court doctrine, the interpretation of freedom of expression must involve not only resort to the purposive character of the Charter's freedom of expression guarantee, but also "to the values and principles of a free and democratic society".¹⁵ Such principles, said the Court, are not only the genesis of rights and freedoms under the Charter generally, but also underlie freedom of expression in particular. These values and principles include "respect for the inherent dignity of the human person ... [and] respect for cultural and group identity."¹⁶ Accordingly, anti-hate legislation should be seen not as infringing upon free speech but as promoting and protecting the values and principles of a free and democratic society.

5. Freedom of Expression in the Light of "Other Rights and Freedoms"

The Supreme Court has also determined that the principle of freedom of expression must be interpreted in the light of other rights and freedoms sought to be protected by a democracy like Canada.¹⁷ The purpose, and often the effect, of hate speech is to diminish, if not deny, the rights and freedoms of others. Indeed, hatemongering

(1989).

13 *Keegstra*, *supra* note 2, at 51.

14 See Justice B Wilson, "Building the Charter Edifice: The First Ten Years," Conference Paper, Tenth Anniversary of the Charter (Ottawa, April 1992), 6 (discussing hate speech, and also mentioning that, for similar reasons, the Court balanced freedom of expression considerations in a case involving advertising directed at children differently than it did in other advertising cases).

15 *Keegstra*, *supra* note 2, at 34.

16 *R. v. Oakes* (1986) 24 C.C.C. (3d) 321 (S.C.C.) at 346.

17 *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 583 ("[t]he purpose of the right or freedom in question [freedom of expression] is to be sought by reference to ... the meaning and purpose of the other specific rights and freedoms with which it is associated").

is the very antithesis of the values and principles underlying these rights and freedoms. Accordingly, a reading of freedom of expression in the light of other rights and freedoms supports an interpretation that hate speech lies outside the ambit of protected expression.

6. Freedom of Expression, the Principle of Equality and the Harms-Based" Rationale: Hate Propaganda as a Discriminatory Practice

As a corollary, if freedom of expression is to be interpreted in the light of other rights and freedoms, a core associated right is that of equality. The purpose and effect of racist hate speech, above all else, is to diminish or deny equality and dignity to the target of the vilification. In the words of Professor Kathleen Mahoney:

In this trilogy of cases, the majority of the Supreme Court of Canada articulated perspectives on freedom of expression that are more inclusive than exclusive, more communitarian than individualistic, and more aware of the actual impacts of speech on the disadvantaged members of society than has ever before been articulated in a freedom of expression case. The Court advanced an equality approach using a harm-based rationale to support the regulation of hate propaganda as a principle of inequality.¹⁸

According to the Supreme Court, the concern of a democratic society with racist speech is not "simply the product of its offensiveness, but stems from the very real harm which it causes".¹⁹ The harm is two-fold, and extends both to members of the target group and to society as a whole:

Essentially, there are two sorts of injury caused by hate propaganda. First, there is harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence The derision, hostility, and abuse encouraged by hate propaganda have a severely negative impact on the individual's sense of self-worth and acceptance A second harmful effect of hate propaganda which is of pressing and substantial concern is its influence upon society at large [T]he threat to the self-dignity of target group members is thus matched by the possibility that prejudicial messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups.²⁰

7. Freedom of Expression and the Multi-cultural Principle

In the view of the court, freedom of expression, and limitations on that freedom such as anti-hate legislation, must be interpreted in a manner that both preserves and enhances Canada's multi-cultural heritage. The Court determined that anti-hate legislation is not only necessary to protect the members of the target group, but also "to prevent the destruction of a multi-cultural society".²¹

18 K Mahoney, "R v Keegstra: A Rationale for Regulating Pornography?" 37 *McGill Law Journal* 242.

19 *Keegstra*, *supra* note 2, at 42.

20 *Id.* at 43.

8. Freedom of Expression in a Comparative Perspective

In determining whether incitement to racism is a protected form of expression, resort may be had not only to the values and principles of a free and democratic society such as Canada, but to the legislative experiences of other free and democratic societies. An examination of the legislative experiences of other free and democratic societies clearly and consistently supports the position that racist hate speech is not entitled to constitutional protection.²²

9. Freedom of Expression, Hate Propaganda and International Law

In the words of the Supreme Court, international law may be regarded as "a relevant and persuasive source"²³ for the interpretation of rights and freedoms under the Charter. The Supreme Court noted that "no aspect of international human rights has been given attention greater than that focused upon discrimination"²⁴ and furthermore accepted that "the CERD Convention and the ICCPR demonstrate that the prohibition of hate-promoting expression is considered to be not only compatible with a signatory nation's guarantee of human rights, but is as well an obligatory aspect of this guarantee".²⁵

10. Freedom of Expression and the Principle of "Abhorrent Speech"

It is important to distinguish between offensive *political* speech - which targets the government, its institutions, and public officials - and abhorrent, racist speech intended to promote hatred and contempt of vulnerable and disadvantaged minorities. The hatemongering at issue in *Keegstra* - and in analogous cases - can be distinguished on principled grounds from legitimate political speech directed against public officials as in the *Sullivan* case²⁶, or against "the world at large" as in the *Cohen* case²⁷. Prohibiting racist speech is not an instance of a government legislating in its own self-interest regarding its political agenda, but an affirmative responsibility of governments to protect the inherent human dignity and equal standing of all its citizens.

CONCLUSION

These, then, constitute the principles respecting freedom of expression, hate speech and non-discrimination as articulated by the Supreme Court of Canada in the recent historic trilogy of cases symbolized by *Keegstra*. But an appreciation, or invocation,

21 *Id.*

22 *See, e.g.,* Committee on the Elimination of Racial Discrimination, *Positive Measures Designed to Eradicate All Incitement to, and Acts of, Racial Discrimination* (UN 1986).

23 *Slaight Communications Inc. v Davidson* [1989] 1 S.C.R. 1038, 1056-1057.

24 *Keegstra*, *supra* note 2, at 45.

25 *Id.* at 47.

26 *New York Times v. Sullivan*, 376 U.S. 254 (1964).

27 *Cohen v. California*, 403 U.S. 15 (1971).

of these principles or factors need not be limited to the Canadian jurisdiction only. Rather, just as Canadian courts, and counsel appearing before them, have drawn upon principles grounded in comparative and international perspectives to help strike a balance, so too may courts and counsel of other free and democratic societies - and those aspiring to become ones - draw upon the Canadian experience.

Chapter 14

SOURCES OF INTER-ETHNIC DISCORD THROUGHOUT THE FORMER SOVIET UNION

Yuri Schmidt and Tanya Smith

INTRODUCTION

Inter-ethnic problems throughout the Commonwealth of Independent States¹ today are unprecedented, acute and complex. Examination of such problems yields no satisfactory solutions and reveals difficulties in the current consideration of these problems by the courts.

In 1991, the newspaper *Moscow News* investigated emerging conflicts in 76 "hot spots" in the Soviet Union. These conflicts were fuelled by prior administrative divisions of territory and current attempts to take control away from central authority. Conflicts involving local territorial disputes continue to grow, and are penetrating various structures of the governments and armed forces. In the majority of regions there has been increasing evidence of varying degrees of anti-Semitism and anti-Russian feeling.

One does not need to search long for the reasons for the escalation of inter-ethnic hostility. Social order in the former Soviet Union, like the existence of the Communist regime, was supported by terror, with the purpose and effect of suppressing rights and freedoms of individual citizens as well as entire nationalities. The nationality policies of Bolshevism aimed to overcome inter-ethnic differences by forcibly obliterating them and by prohibiting freedom of culture, religion and even linguistic self-expression.

The Communist regime not only destroyed the most prominent and active representatives of different nationalities, but carried out a widespread policy of genocide and massive extra-judicial repression. Numerous nationalities were subjected to forced deportation, a policy pursued in order to punish those whom Stalin considered "guilty". Banished from their homelands, these nationalities were forced to assimilate in an attempt to destroy their national and ethnic identities.

The destruction of ethnic identity was further promoted by the arbitrary change of the administrative territorial structure, the redrawing of borders between republics and of regional borders within republics and the destruction or reorganization of autonomous ethnic communities.

In recent years some of the former Communist Party *nomenklatura* have changed their strategy and, rather than trying to prevent the growth of movements for national autonomy, seem instead to welcome or even promote inter-ethnic strife in the hope of preserving their own powers. They have used methods which have created tension in inter-ethnic relations and which display jealousy, and suspicion of, and disrespect for, the rights of citizens of other nationalities.

The downfall of the totalitarian regime has lifted the lid on suppressed inter-ethnic conflict. However, the past system of control has not yet been replaced

by a legitimate political and legal system. Although the authorities now in power claim to want to prevent ethnic and racial hatred, in practice this aim is rarely pursued.

This paper does not attempt to be comprehensive. Rather, it describes some of the common characteristics of the inter-ethnic problems, discusses the laws which continue to govern inter-ethnic strife and examines how these laws have been applied in practice.

INTER-ETHNIC PROBLEMS

Nationalities Residing in Their Native Territories

In several former Soviet republics such as Moldova (Moldavia) and the Baltics (Estonia, Latvia and Lithuania), the traditional nationalities still live in their native territories. However, for several years, people in these areas have felt the effect of forced Russification. The increasing percentage of ethnic Russians and other newcomers in these republics has placed the native populations in danger of being transformed into minorities in the lands of their birth, threatening the loss of their national cultures, traditions and languages.

With the decline of Communist Party repression, these territorial nationalities sought their independence as a means of preserving their cultures and protecting their rights. The decision of Lithuania, Latvia, and Estonia to leave the Union posed a great threat to the Soviet centre, and especially to the Communist Party *nomenklatura* in these republics. The local *nomenklatura* responded by restricting activities related to independence: the promotion of ideas of nationalist rebirth, the use of native languages and the granting of citizenship. They used their powers to persuade the public that independence movements were of a discriminatory and even fascist nature, and to promote inter-ethnic tension.

Displaced Populations

Populations that were displaced during the Stalin era have experienced two major problems. For many of them, there simply has been no place to which they could return. Their ancestral homelands are occupied by other people, some of whom were themselves deported from other regions. For example, the Meskitan Turks of Georgia, forced to move to another part of the Soviet Union, now have little hope of returning to their native territory.

When members of nationality groups are able to return to their ancestral homelands frequently, the local *nomenklatura* play on local residents' fears that returning populations will claim sovereignty over their former territories and will deny the residents their rights. Such is the case, for example, throughout the Crimea.

Division of Populations by Artificial Borders

Conflicts were also created by the construction of arbitrary borders and the separation of ethnic and national groups into different republics. Aspirations for re-union were, and continue to be, restricted. The most acute problems of this type are occurring in Nagorno-Karabakh and Ossetia, artificial borders dividing political control of the local populations have resulted in armed conflicts.

¹ Throughout this paper, the terms "Soviet Union" and "Soviet" are used when referring to events which occurred or conditions which existed before the dissolution of the Union in December 1991, and the terms "Commonwealth of Independent States" and "Commonwealth" are used when discussing events and situations after formation of the Commonwealth.

Forced Union of Different Ethnic Populations

Inter-ethnic conflicts are the outcome not only of artificial division of nationalities but also of the artificial union of different nationalities into a single political-administrative entity. This has happened through the deportation of peoples and the forced assimilation of neighbouring populations. The worst situations have occurred not in those regions where there is a multi-ethnic society, but where two distinct nationalities are controlled by one government.

RELEVANT LAWS

Racism, discrimination and incitement to national, racial and religious hatred were prohibited in the constitutions and laws of the former Soviet Union and the fifteen republics. These laws, for the most part and to the extent that they have not been superseded, continue to be applied by the states of the Commonwealth.

Article 34 of the 1977 Constitution of the Soviet Union declared that all citizens were "equal before the law without distinction on grounds of origin, social or property status, race or nationality, sex, education, language, attitude to religion, type or nature of occupation, domicile or other circumstances." Article 36 reiterated that "citizens ... of differing races and nationalities have equal rights". In particular, Article 36(3) provided:

Any direct or indirect limitation of the rights of citizens or establishment of direct or indirect privileges on grounds of race or nationality, and any advocacy of racial or national exclusiveness, hostility or contempt, are punishable by law.

Article 52(1) prohibited "incitement of hostility or hatred on religious grounds", and Article 64 declared that "It is the duty of every citizen of the USSR to respect the national dignity of other citizens, and to strengthen the friendship of the nations and nationalities of the multinational Soviet state."

The All-Union Act on Criminal Liability for State Crimes, implementing the above constitutional provisions, was adopted in 1958 and amended in 1989. All of the Soviet republics incorporated the Act into their criminal codes (differing only in the numbers of the articles). Incitement to national or racial hatred was prohibited by Article 11 of the Criminal Liability Act and by Article 74 of the Criminal Code of the Russian Republic.

Both articles provided:

(1) Deliberate acts aimed at inciting national or racial hatred or discord, the denigration of national honour and dignity, and any direct or indirect limitation of the rights of, or the establishment of direct or indirect privileges for, citizens on grounds of their race or nationality shall be punishable by imprisonment for a period of up to three years or a fine of up to 2000 roubles.

(2) The same acts, when accompanied by violence, deception or threats, or when committed by officials, are punishable by imprisonment of up to five years or a fine of up to 5,000 roubles.

(3) Acts falling within parts 1 and 2 of this Article, when committed by a group of persons or when involving loss of human life or other grave consequences, are punishable by imprisonment of up to 10 years.

On 2 April 1990, the Supreme Soviet of the USSR adopted a law entitled "On the enhancement of the responsibility for encroachment on the national equality of citizens and the violent encroachment of the integrity of the territory of the USSR".

The preamble explains that the law's purpose was to abolish acts of nationalist and separatist associations which advocate discrimination against citizens on the basis of nationality. The law prohibits such associations, including political parties, organizations and mass movements, which incite nationalist or racial hostility, discord or disrespect, or use force against ethnic, racial or religious groups. Those who participate in such associations can be detained under administrative law for up to 15 days or fined up to 10,000 roubles. Criminal sanctions may be imposed for "public calls for the violent overthrow of the integrity of the territory of the USSR and Soviet Republics".

In the authors' opinion, the Law of 2 April 1990 places excessive restrictions on the right to association. Article 634 of the Criminal Liability Act is less restrictive, prohibiting only the perpetration of a crime on the ground of national or racial hatred or contempt. The 1990 law was passed in an effort to take steps to address the increasing inter-ethnic tension at that time.

IMPLEMENTATION OF LAWS PROHIBITING RACIST SPEECH

Criminal Law

During the long period of Soviet power, statistics on criminal activity were kept secret. Now, although the prohibition on the publication of statistical data has been removed, very little concrete data exists. For this reason, it is unclear how widely laws corresponding to the Criminal Liability Act on incitement to national and racial hatred (such as Article 74 of the Criminal Code of the Russian Republic) were applied in the former Republics.

The first part of Article 74, prohibiting non-violent acts aimed at provoking ethnic or racial hatred, has not been enforced in practice. Words and non-violent acts are virtually never prosecuted. The law is applied almost exclusively in conjunction with responsibility for other crimes, such as murder, rape or assault.

Prosecutions under Article 74 in connection with acts of violence include the following examples. In 1990, fifteen people were reportedly tried in Tadjikistan under the third part of Article 74 (group provocation of ethnic or racial hatred) for a bloody pogrom in Dushanbe. In Uzbekistan, several people were convicted for racially motivated violence in Fergana, Osh. It has not been possible to learn whether anyone was tried under an analogous law in Azerbaijan following the mass killings of Armenians in the cities of Sumgait, Baku and Gyndzh in 1990.

Torez Kolumbegov, the elected leader of the recently proclaimed Southern Ossetian Soviet Democratic Republic (South Ossetia was formerly an enclave of the Soviet Republic of Georgia), was charged with incitement of ethnic discord on 9 April 1991 in Tblisi, Georgia for acts relating to South Ossetia's declaration of independence. These included making a statement at a rally that "the only good Georgian is a dead Georgian", and the prevention of the celebration of Georgian holidays in Ossetia. Other charges against Kolumbegov included plotting murder, carrying a concealed weapon and abuse of official authority. The case went to trial before the Supreme Court of Georgia in October 1991 and was continued until December. The Court never pronounced judgement and in January 1992 Kolumbegov was released as part of a general amnesty of political prisoners.

There is only one case known to have been decided solely under the first part of Article 74. It involved Konstantin Smirnov-Ostashvili, one of the leaders of a "nationalistic patriotic" group called *Pamyat* (Memory). In 1990, he was sentenced to two years' imprisonment for his words and non-violent acts, which were found

to be degrading to the dignity of Jewish people, when he led the forceful disruption of a meeting of a writers' organization called *Aprél* (April).² Oddly, the charges against Smirnov-Ostashvili did not include responsibility for the violence at the *Aprél* meeting. Even though Smirnov-Ostashvili admitted that *Pamyat* was an anti-Semitic organization which calls for the "de-Zionization" of Soviet society and for discrimination against Jews, no criminal or administrative proceedings have been brought against *Pamyat* under the third part of Article 74 or the USSR Law of 2 April 1990.³

The conditions of the former Soviet society and government have resulted in high social tension. There is an increasing tendency to hold people of other nationalities accountable for economic and social problems. Because it is impossible to prosecute criminally every manifestation of racism, in order to maintain the rule and force of law it is essential to prevent arbitrariness in its application. This can be best accomplished, in the authors' opinion, by narrowing the prohibition against racist expression to the strict formulation of "systematic or maliciously intended acts" instead of the current formulation of "intentional acts". The Soviet situation differs from the situation in other countries (such as the United Kingdom and the Netherlands) where the level of racist expression is lower and where, accordingly, looser definitions of prohibited forms of hatred may be appropriate.

Civil Law

The right to bring civil proceedings to defend ethnic and personal dignity is provided for in Article 7 of the Fundamental Civil Law of the USSR. In practice, however, the courts have extended the right to honour and dignity only to individuals and not to ethnic groups. In the first few months of 1991, Moscow trial courts declined to hear any of the more than ten cases brought by ethnic Chechins against the magazine *Glasnost*, published by the Soviet Communist Party Central Committee. The petitioners asserted that an interview in *Glasnost* with an anonymous official from the Soviet Ministry of Internal Affairs, who discussed the activities of the "Chechin mafia" in Moscow, insulted the ethnic dignity of Chechins. The courts held that there was no right to redress for an ethnic group.

The Media

Racist expression in the media continues to be a severe, unresolved problem throughout the states of the Commonwealth. The mass media's dissemination of racist expression could be deemed to be made with malicious intent, particularly in light of the existing social conditions and high ethnic tensions.

A group of City Council members and social activists in St. Petersburg have tried unsuccessfully to bring criminal charges under the first part of Article 74 against A. Nevzorov, the commentator on the widely popular television investigative news programme, *600 Seconds*. Their complaint was based on a series of

2 Smirnov-Ostashvili died in prison in May 1991, reportedly by suicide.

3 *Pamyat's* programme includes advocacy of prohibitions on Jews working in many areas of government service, being granted higher education degrees and working in academic institutions. The extremists in *Pamyat* have called for the direct use of force against Jews and punishment of Jews by *Pamyat* members.

programmes in January 1991, watched by approximately 70 million viewers, in which Nevzorov commented on the violent events in the Baltics. The complaint charged that Nevzorov intentionally used his popularity and talent to exacerbate ethnic tensions and to incite people of Russian nationality to hatred and hostility towards Lithuanians, Latvians and Estonians.

The Courts

The lack of independent, effective courts is a particularly serious threat to human rights during this time of increasing inter-ethnic tension. Article 6 of the CERD Convention imposes a duty on states parties to provide competent courts which provide effective protection from racial discrimination.⁴ In practice, this obligation is not fulfilled. Soviet courts have traditionally been dependent on the government and Communist Party apparatus to such an extent that it has been virtually impossible to receive an impartial, fair determination by a Soviet court in any case involving parties of different nationalities. In such cases, Soviet courts have invariably been pressured to make judgements based upon political issues that cannot properly be decided in a court. Moreover, various declarations of independence and sovereignty at different governmental levels have left courts and lawyers to struggle with unanswered questions concerning which laws apply and what powers various courts have.

CONCLUSION

To reduce the inter-ethnic distrust and animosity which have built up over lifetimes and, in some cases, centuries, will require a great deal of time, public education and government commitment to reversing the past policies of favouritism and discrimination, especially in education, employment, language, culture, government service and place of residence. In addition, criminal and civil restraints on speech which incites hatred as well as violence are necessary to address the most destructive, immediate impacts of ethnic hostilities. Drafting appropriate laws and ensuring that they are enforced with even-handedness and determination are among the greatest challenges facing the states of the former Soviet Union today.

4 The Soviet Union was a party to the CERD Convention. The Russian Federation and several other republics have expressly accepted the Soviet Union's treaty obligations in the field of human rights.

ADDITIONAL COMMENTS ON ANTI-RACISM LAWS
IN THE FORMER SOVIET UNION

Stephen J Roth

THE COMMONWEALTH OF INDEPENDENT STATES

It is too early to assess how far the independent member states of the new Commonwealth (as well as the Baltic republics) will incorporate into their own legislation the Soviet laws (discussed in these comments as well as in the preceding contribution by Schmidt and Smith) which protect against racist and/or religious incitement. Their legislation has not yet developed and is so far largely unknown.

It must be hoped that they will not permit their laws to fall below the Soviet norms which existed at the time of the dissolution of the Union. This expectation is particularly justified on account of the Declaration of Human Rights and Freedoms adopted in September 1991 which was part of the post-*putsch* process that led to the creation of the CIS and was endorsed by ten of the Republics (all except Georgia and Moldavia).

FORMER SOVIET LAWS

Laws Limiting Freedom of Speech

As noted in the preceding essay by Schmidt and Smith, Article 11 of the All-Union Criminal Liability Act, which prohibits incitement to national and racial hatred, was amended in 1989. Some of the changes are welcome, particularly the addition that when incitement is accompanied by violence or is committed by a "group of persons" a more severe punishment is available. The outlawing of an "act" instead of "propaganda and agitation", as in the previous version, also strengthens the law; "act" obviously embraces more than propaganda and agitation. Furthermore, acts defined in Article 11 are now regarded as "Especially Dangerous Crimes Against the State". However, the term "deliberate action" may turn out to make convictions more difficult by demanding evidence of direct intent to arouse racial hostility or dissent. While the earlier version included the requirement that the propaganda or agitation be "for the purpose of arousing hostility", the addition of the word "deliberate" seems to put even more emphasis on the guilty intent (*mens rea*). The requirement of specific intent is a feature of many corresponding Western laws, which often weakens their effectiveness.

Professor F J M Feldbrugge, an eminent expert on Soviet law, writes that, where intent to arouse racial hostility or dissent was not proved, the offender could only be convicted for insults (under Article 131 of the Soviet Criminal Code) or hooliganism (under Article 206)¹. It is interesting to note that he thereby proposed to invoke articles of the Criminal Code in the fight against racial hatred which, in the pre-Gorbachev era, had been regularly used to suppress the dissident freedom movement and its activists.

1 *Encyclopaedia of Soviet Law*, Vol. 2 (1973), 571.

An additional safeguard against the expression of racist views is provided by the USSR Law on the Press and Other Mass Information Media of 12 June 1990 which contains the following provision:

Article 5: Impermissibility of abuse of the freedom of speech

The use of mass information media ... to make propaganda for ... racial, national or religious exclusivity or intolerance, to disseminate pornography, or to incite the commission of other criminally punishable acts is not permitted.

The use of the mass information media to interfere in citizens' personal lives or infringe their honour and dignity is not permitted and is punishable in accordance with the law.²

The first paragraph, prohibiting the use of mass information media to promote racial exclusivity and intolerance, is unambiguous. Whether the protection of citizens' honour and dignity, contained in the second paragraph, could be applied against group defamation, is less clear.

Laws Curtailing Freedom of Association

Until recently, the principal provision regarding freedom of association was Article 51 of the 1977 USSR Constitution which allowed such freedom "in accordance with the aim of building Communism", a restrictive qualification, by now also outdated, and not the ideal formula to curb racism. New provisions outlawing racist associations have been adopted in the Soviet Law of 2 April 1990 (mentioned by Schmidt and Smith) and in a further Soviet Law on Public Association of 9 October 1990. The second paragraph of Article 3 reads, in part:

The creation and activity of public associations whose purpose or *modus operandi* is ... propaganda for war, violence and brutality, the incitement of class and also racial, national and religious discord, and the perpetration of other crimes punishable under criminal law are prohibited ...³

Public associations may be dissolved by a court "in the event of a public association engaging in actions which go beyond the purposes and tasks determined by its statutes or which break the law ..." (Article 22, in connection with Article 21). This provision permits, in my view, the banning of organizations which disseminate ideas based on racial hatred.

Laws Curtailing Freedom of Assembly

Freedom of assembly is protected in Article 50 of the 1977 USSR Constitution. Some new provisions were adopted under *perestroika*. On 28 July 1988, the Presidium of the Supreme Soviet of the USSR passed a decree "On the procedure for the organization and conduct of meetings, rallies, street marches and demonstrations in the USSR"⁴ which made all assemblies subject to prior authorization

2 *Vedomost SSSR* (1990), No. 26, 492, *Izvestiya*, 21 June 1990, translation in BBC Monitor, SU/0806/C2/1.

3 *Vedomost SSSR* (1990), No. 42, 839, *Pravda*, 16 October 1990, translation in BBC Monitor, SU/0910/C1/1.

4 *Izvestiya*, 29 July 1990, translation in BBC Monitor, SU/0219/B/1.

by the authorities. However, the criteria for authorization are not spelled out, so that it is entirely at the discretion of the authorities whether or not to allow an assembly. The only guidance in this respect is provided by Article 50 of the 1977 Constitution, which guarantees freedom of assembly "in accordance with the interests of the people, and in order to strengthen and develop the socialist system"

So far, the authorities' power to restrict meetings has been used only against dissidents and democratic organizations; it could be used against meetings for a hate-mongering purpose, like those organized by *Pamyat*, given that these hardly are "in the interests of the people" or strengthen the socialist system. It may be hoped that the Commonwealth states will adopt provisions which permit them to restrict assemblies which are like to incite racial violence or hatred.

The Declaration of Human Rights and Freedoms

On 5 September 1991, the Congress of the USSR People's Deputies adopted a Declaration of Human Rights and Freedoms which, despite its designation as a "Declaration", had the full force of law.⁵ (Its Article 2 states: "The provisions of this Declaration are directly effective ... and are of a higher rank than ordinary laws".) Its rapid adoption was undoubtedly the result of the atmosphere prevailing after the defeat of the August *putsch*.

Professor Schweissfurth expresses the view that, although the Declaration does not include a provision which expressly states that it is to be substituted for the catalogue of rights and duties contained in the Soviet Constitution of 1977, it must be regarded as replacing that catalogue; in other words, that the Declaration amounts to a revision of the Constitution and has a higher rank than ordinary laws.⁶ Indeed, Schweissfurth regards the Declaration of such historic importance that he calls it the Russian *Déclaration des droits de l'homme*.⁷

On the issues of racist expression and racist organizations, the Declaration has little to say - at least in an explicit form. It naturally includes among its human rights catalogue "the right to the freedom of speech and to an unimpeded expression of opinions and convictions and to their dissemination orally or in a written form" (Article 6); the right to assembly (Article 8); and the right "to unite ... into public organizations" (Article 9). As is usual in declarations of this type, the document contains relatively few restriction clauses (which is a welcome relief from such earlier restrictions on constitutionally guaranteed rights as "in the interest of society or State" and "in order to strengthen and develop the socialist system"). The former strong linkage in the Soviet Constitution between rights and duties also disappeared. The Declaration contains only a very general phrase: "Every person bears constitutional duties, the discharge of which is essential for the normal development of society" (Article 1(1)).

5 Russian Text in *VSNDVS SSSR* (1991), No. 37, 1083, and in *Izvestiya* (7 September 1991); the translation used in this article is from TASS release (6 September 1991). A useful commentary to the Declaration has been published by T Schweissfurth, "Moskau nach dem Putsch-Debakel: Die Deklaration der Rechte und Freiheiten des Menschen vom 5 September 1991" (Moscow after the debacle of the *putsch*: the Declaration of the Rights and Freedoms of Men), 18 *Europäische Grundrechte Zeitschrift*, Nos. 18-20, 409 (Nov. 1991).

6 Schweissfurth, *supra*, at 412.

7 *Id.* at 414.

However, the Declaration includes the following general limitations on rights:

The exercise of the rights by the citizens should not run counter to the rights of other people. (Article 19(3).)

The execution of rights and freedoms is incompatible with actions harming state and public security, public order, public health and moral integrity [public morals], [and the protection of] human rights and freedoms. (Article 30.)

These provisions may be interpreted to permit restrictions on freedom of expression, association or assembly where necessary to prevent racist or religious incitement.

APPLICABILITY OF INTERNATIONAL LAW

The Soviet Union ratified, and thus was bound by, international agreements (including the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination) that require states parties to adopt laws against hate-mongering, racist organizations. Whether these treaties automatically became part of Soviet law is an unresolved question. As Professor Butler states: "Few questions of law have engendered wider differences of opinion and approach in Soviet legal doctrine than the relationship between international treaties and Soviet legislation".⁸

Moreover, while some Fundamentals of Legislation on different subjects (such as Public Education and Civil Legislation) contain the stipulation that international treaty provisions have priority over inconsistent domestic legislation, such a rule is missing from the Fundamentals of Criminal Legislation. On the other hand, Article 29 of the 1977 USSR Constitution and corresponding provisions of the constitutions of the republics provide that "relations of the USSR with other states shall be built on the basis of good faith fulfilment of obligations arising from generally recognized principles and norms of international law and from international treaties concluded by the USSR".⁹

It is worthy of note that the Soviet Law on Public Association (discussed above) stipulates (in Article 25) that "if any international treaty of the USSR determines rules different to those contained in this law, the laws of the international treaty apply". It is also significant that Article 1 of the Declaration of Human Rights and Freedoms reaffirms that all laws must be in conformity with the international human rights treaties by which the government was bound and by "international norms" in general. Further international provisions (not legally binding but certainly representing a serious political commitment) were adopted in various documents produced by the CSCE process (discussed in Part II of this book and reproduced in Annexe A).

8 W B Butler, *Soviet Law*, 2nd ed. (London: 1988), 397.

9 *See id.* at 56. The wording in Article 29 is taken from Principle X of the Helsinki Final Act.

DENMARK: RACIST SNAKES IN THE DANISH PARADISE

Lene Johannessen

This arresting title was given to an article written by Jacques Blum, a cultural anthropologist at the University of Copenhagen in the newspaper *Akluet* on 28 January 1985. The article warned about the rise of attacks on immigrants in Denmark, and it began the process of awakening complacent Danish public opinion to the new and growing phenomena in their country of racism, xenophobia and violence directed against foreigners. The prime targets, as elsewhere, are immigrants and the alleged "mass influx" of refugees. In reality, less than three per cent of the inhabitants of Denmark are foreigners, and many come from other Scandinavian or European countries. It is estimated that only about 100,000 people living in Denmark come from non-European countries.

The media's concern to force a country justly proud of its liberal plural ethos to accept that things had changed resulted in the prosecution of a television journalist and editor in 1985 for aiding and abetting the dissemination of racist speech. A *Danmarks Radio* television programme had broadcast an interview with members of the Green Jackets, a skinhead youth gang, who made racist statements on the air. The convicted journalist complained to the European Commission of Human Rights in Strasbourg, citing his right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The case, which is currently pending, directly raises the relationship between Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD Convention) and the ECHR's guarantee of freedom of expression, particularly the rights of the media to report information and opinion of legitimate public interest, however offensive.

THE PENAL LAW ON RACIST SPEECH

Article 266b of the Danish Penal Code provides:

Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin or religion shall be liable to a fine or to imprisonment for any term not exceeding two years.

This offence was originally inserted in the Penal Code in 1939 in response to the growing racism and anti-Semitism emanating from Hitler's Germany. In 1971 it was amended to fulfil the requirements of Article 4 of the CERD Convention. The Committee experts who proposed the draft offence were aware that the law could reach a broad range of expression but considered that the principles of freedom of expression should be balanced with the objective of widening the ambit of protection against racially discriminatory views:

[N]ecessary respect must be observed with regard to freedom of expression which should also be granted with regard to expressions

1 The texts of Art. 10 of the ECHR and Art. 4 of the CERD Convention are set forth in Annexe A.

concerning racial groups etc, and which Article 4 of the Convention aims to protect, among other ways, by referring to the Universal Declaration of Human Rights. ... Furthermore, the above-mentioned expressions 'degrading comments or treatment' must be interpreted in a way in which less coarse incidents cannot be considered to fall within the scope of the article.²

The proposed offence, with certain amendments, was adopted by Parliament on 4 June 1971. Denmark ratified the CERD Convention on 4 December 1971.

CONSTITUTIONAL STANDARDS

No issue of compatibility with the constitutional protection of freedom of expression arises from Article 266b. The 1953 Danish Constitution includes protection of the right to freedom of expression. Article 77 declares:

All persons shall be entitled to publish their thoughts in print, in writing and in speech provided that they may be held answerable in a court of justice. Censorship and other preventive measures shall never again be introduced.

Traditionally, this provision has been interpreted as guaranteeing only freedom from prior restraint (formal protection) and not freedom from subsequent civil or criminal sanction (substantive protection). Thus, in principle, Parliament could enact legislation compatible with the Constitution which severely curtailed freedom of expression, provided it did not involve prior restraint. However, there has been a recent trend in the courts to uphold some substantive protection in matters concerning the public interest even in cases involving controversial speech and expression which may be damaging to the rights or reputations of others.³

THE GREEN JACKETS CASE

There have been relatively few prosecutions under Article 266b. In the early 1980s a local right-wing politician was convicted for claiming in a public speech that immigrants "bred like rats". However, the one case under the article, mentioned above, which caused the greatest debate was the Green Jackets prosecution.

In July 1985, Danish National Television (*Danmarks Radio*) broadcast an interview with members of a group of youths, called the Green Jackets. In the broadcast, members of the Green Jackets expressed extreme views of a racist nature, including support for the practice of eugenics.

The interviewer, Jens Olaf Jersild, with the approval of the editor of the programme, Lasse Jensen, intended the programme to be an informative portrait of the group, however unpleasant its views, in order to stimulate greater public awareness of the existence of the group and the dangers it posed. In 1985 the existence of violent racism in Denmark was unknown to the public at large, and the journalists thus considered it to be a matter of public interest to have this group

2 *Betaenkning* No 553/1969 om Forbud mod Racediskrimination, 34.

3 See *Pressefrihed og Personlighedsret* (Press Freedom and the Rights of the Individual) (Copenhagen: Gyldendals Forlag, 1988); and the decision of the Supreme Court in *Ugeskrift for Retsvaesen* (1989), section 399.

exposed on television. The interviewer and the editor did not in any way indicate support for the Green Jackets and their views.

Apart from the racist expressions, the programme gave an account of the social background of the members of the group, along with details of the various group members' criminal activities, also of a non-racial nature. The programme also included an interview with a social worker from the Green Jackets' neighbourhood. The broadcast was part of a news and current affairs programme on Danish National Television, known for its investigative and non-sensationalist journalism.

Following the broadcast of the programme three members of the Green Jackets were charged with and convicted of making statements "publicly or with the intention of wider dissemination" which threatened, insulted or degraded members of other racial or ethnic groups, in violation of Article 266b.

Jersild and Jensen were charged and convicted of complicity in making the statements public, and were fined 1,000 Danish Crowns (US\$150) and 2,000 Danish Crowns, respectively. The members of the Green Jackets were each already subject to sentences for other criminal activities and thus were given no supplementary sentences in this case.

Jersild and Jensen appealed their convictions to the High Court, which upheld the convictions, and subsequently to the Supreme Court of Denmark. The Supreme Court, by majority decision, held that freedom of expression in this case did not outweigh the legitimate interest in protecting members of minority groups against racist propaganda. It found that Jersild and Jensen had assisted in disseminating the racially discriminatory remarks and therefore upheld their convictions.

Following the Supreme Court decision a case was brought before the European Commission of Human Rights on behalf of the journalist, Jens Olaf Jersild. The case raises important questions concerning permissible restrictions on the right to free expression. The main question is whether, assuming that a state may prohibit racially inflammatory statements, the state may also legitimately prohibit a journalist or other members of the public from reporting those statements to a broader audience.

An underlying question is whether Article 4 of the CERD Convention, which prohibits, among other matters, dissemination of racially inflammatory statements, conflicts with Article 10 of the ECHR. The European Commission and Court of Human Rights have never squarely addressed these questions. However, it is this author's view that ECHR jurisprudence prohibits the conviction of the Danish journalists (while permitting the conviction of the Green Jackets members), because the journalists did not intend to promote, and were not found to have promoted, support for the statements disseminated.⁴ Furthermore, informing the public about matters that could affect democratic rights, such as the activities and views of a self-proclaimed racist and violent group, whose activities had not been sufficiently dealt with by the authorities prior to the broadcast, arguably lies at the heart of the role of the press in a democratic society. The decision by the European Commission of Human Rights is expected some time in 1992.

AMENDING LEGISLATION

The Danish Parliament, subsequent to this case, amended the law concerning media liability in a way which excludes liability for journalists unless, by publishing racist ideas, they intend to "threaten, insult or degrade" people. The new Media Liability Law, which entered into force on 1 January 1992, in effect reverses the decision in the *Jersild* case. It extends the principles in the Press Law of 1938 to apply also to the electronic media. Consequently, the full complicity rules with respect to criminal liability set out in Section 23 of the Criminal Code do not apply. With respect to an offence under section 266b, offensive remarks made by named persons on a TV broadcast will be the sole responsibility of those who expressed them, according to Section 18 of the new Act. Had the law applied in 1985, neither the programme's editor nor the journalist would have been liable. In other words, the 1991 Media Liability Act confines responsibility for proscribed expression in the electronic media to their author.

⁴ For a discussion of relevant decisions of the European Commission, see the chapter by Danilo Türk and Louis Joinet in Part II of this collection.

Chapter 17

IN DEFENCE OF CIVILITY: RACIAL INCITEMENT AND GROUP LIBEL IN FRENCH LAW

Roger Errera

France is one of the countries that has laws against racial incitement and group libel, and uses them. The aim of this chapter is to explain how and why such statutes have been adopted and accepted, what their content is, to what extent they are used by civil rights associations and other groups, and how they are enforced by the state and the courts. The chapter concludes with an assessment of the wider jurisprudential and social issues.

THREE PERIODS OF REFORM

The introduction of any reform into a given legal system is, *per se*, a valid subject of inquiry. What is the origin of a reform? How and why is it one day accepted by those who have the decision-making power, namely the government, Parliament and the main political parties? Answers to these questions are important to an understanding of how and why laws against racial incitement and group libel have been progressively introduced in France since 1939. The political and social situations and perceptions of the problem of racial incitement have played a vital role; so too have purely legal factors, relating first to domestic and, more recently, to international law. Discussion of this short history can be conveniently divided into three periods: 1939, too little, too late; 1945-1972, the slow erosion of the legal status quo; and 1972-1992, the era of fundamental reforms.

1939: Too Little, Too Late

Just as at the time of the Dreyfus Affair,¹ the mid- and late 1930s were a time when racial incitement, group libel, xenophobia and, in particular, anti-Semitism, reached extreme heights in France.² The names of such "classic" authors of anti-Semitic literature as Maurras, Céline, Rebatet, Brasillach and Daudet are familiar enough. The extreme views of these writers, who advocated murder or mass disenfranchisement, are striking. Such feelings permeated French society and even emerged from the pens of so-called "moderate" or "delicate" authors, such as Giraudoux.³

A few months before the outbreak of World War II this situation brought a legal response from the government; until then libel, both a tort and a crime under French law, only protected individuals. Libel was, and continues to be, thus defined: "Any public allegation of a fact which is an attack (*une atteinte*) on the honour or on the reputation of a person."

1 The best recent book on the Dreyfus case is J D Bredin's *L'Affaire*, (Paris: 1983).

2 See, e.g. R Schor, *L'opinion française et les étrangers, 1914-1939* (Paris: 1985).

3 See *Pleins Pouvoir* (Paris: 1939), criticizing whatever can "corrupt a race" at 62; mentioning "the American race" at 63 and denouncing violently the laxity of French immigration policy during the 1930s, adding: "We fully agree with Hitler in proclaiming that a policy achieves its higher form only if it is a racial one", at 76.

Using the powers granted to it by a statute of 19 March 1939, the Daladier government introduced an offence of group defamation into French law⁴ which made the libel, with intent to incite hatred between citizens or inhabitants, of a group of persons belonging, by their origin, to a given race⁵ or religion punishable by a period of imprisonment of between one month and one year and a fine of between 500F (US\$100) to 10,000F.

The reform was too little and came too late. The wording of the statute did not allow private parties to use it effectively against racist and anti-Semitic authors. The law was infrequently used,⁶ and was repealed by the Vichy Government as soon as it came to power in August 1940. A few weeks later the first law directed against the Jews was adopted.

1945-1972: The Slow Erosion of the Legal Status Quo

After World War II and the revelations about the Nazi extermination camps, the quasi-disappearance of anti-Semitism and racism was short-lived. By the early 1950s two trends could be discerned. First, the official anti-Semitism in the Soviet Union and its satellites, exemplified by the Prague Trials of 1952 and the notorious "Doctor's plot", found an echo in France. In addition, pro-Vichy elements felt freer to speak. From 1967 onwards, in the context of the Arab-Israeli conflict, "anti-Zionism" became a new dimension of anti-Semitism, in France as elsewhere. The 1939 statute, which had been reinstated, was thus put to the test. The outcome was not a positive one, for several reasons.

Procedural Limitations. Locus standi was restricted under the 1939 statute. The State Prosecutor could bring an action, but the ministers responsible and the *Parquet* (the state prosecution service) showed little inclination in general to bring proceedings. Individuals had no standing to initiate an action unless they were named or an explicit reference was made to them in the allegedly libellous statement. Associations also did not have standing, unless they could prove that they had themselves been harmed or had suffered loss.

The Wording of the Statute. Group libel was an offence only if an author intended to incite hatred between groups. This was not easy to prove. Besides, at that time neither discrimination on the grounds of race or religion, nor incitement to discrimination was an offence. Moreover, the protection afforded by the statute extended only to groups of persons belonging, by their origin, to a given race or religion; national origin was excluded.

4 *Décret-loi* (delegated legislation) of 21 Apr. 1939.

5 This seems to have been the first appearance of the word "race" in a modern French statute.

6 For example, the law was used against Darquier de Pellepoix and another journalist who were sentenced to a fine and to a prison term. See M R Marrus and R O Paxton, *Vichy et les Juifs* (Paris: 1981, 1990 ed.), 392; English ed.: *Vichy France and the Jews* (New York: 1981), 283. Darquier de Pellepoix, a rabid anti-Semite, was appointed General Commissar for Jewish Affairs by Pétain in 1942. Sentenced to death *in absentia* after the war, he died in Spain.

7 Statute of 27 Aug. 1940.

Interpretation by the Courts. The courts seemed somewhat reluctant to enforce fully the 1939 statute and to grasp its scope and *raison d'être*, as if such a law was, in a way, alien to the main body of the law of the land. Many decisions construed it so narrowly as to deprive it of any use.⁸ However, by the end of the 1960s, the growing severity of some verdicts indicated a clearer awareness of the issue and of the uses of such an instrument.⁹

1972-1992: The Era of Fundamental Reforms

The origins of the 1972 reforms well illustrate the interplay of domestic and international, legal and non-legal factors in bringing about a change in the law. On the domestic scene dissatisfaction with the wording and the working of the extant law was widespread. Civil rights associations and political parties were active in the drafting of new texts. Another impetus was the emergence and growth of racial incitement against foreign workers, mainly in the form of allegations that they posed a threat to security, public health and public expenditure.

The primary external factor was legal in nature: in 1971 France ratified the CERD Convention,¹⁰ with certain reservations and declarations.¹¹ During the debate in Parliament the government declared that French law was in conformity with the Convention, and that new legislation did not seem necessary.¹² This was not so, as noted by the rapporteur in the Senate.¹³

States parties are bound by Article 2(1)(d) of the CERD Convention to prohibit racial discrimination; they are also obliged by Article 4 to outlaw any dissemination of ideas based on racial superiority or hatred and any incitement to racial discrimination. They must also declare illegal and prohibit any organization which incites racial discrimination. The meaning of discrimination under Article 1(1) is wide, including discrimination on grounds of national origin. On all of these bases French law was not in compliance with the Convention.

Less than one year later Parliament passed the statute of 1 July 1972 which, in amended form, remains today the basis of current French law on group libel and racial incitement. The statute makes discrimination on ethnic, national, racial or religious grounds an offence, whether committed against an individual, an association or a company, unless there is a *motif légitime* (legitimate reason).¹⁴ The new

8 For example, a Mr R. had been sued and convicted for group libel for anti-Semitic writings. The lower court, however, had omitted to say whether the aim of such writings had been the one mentioned in the statute. The court of appeal held that the author had invited the readers to a "sound distrust of Jews", considered as "foreigners", and was in favour of "anti-Semitism in the French style", a "measured and reasonable anti-Semitism", with "fair and necessary statutes". Such terms, the court added, were an appeal to "reason", not to passion. Besides, the author himself contrasted his ideas to the "ignoble German racist persecution". R. was acquitted on these very dubious grounds. C. A. Paris, 26 Mar. 1952, *Roos Ministère public, Recueil Dalloz* (1953), 352.

9 In Nov. 1969, the editor of *Le Charivari* was prosecuted by the State and ordered by a Paris court to pay a fine of 10,000F for publishing an outrageously anti-Semitic special issue in 1967. *See Le Monde*, 16 Oct. and 6 Nov. 1967. In June 1969 the Paris court of appeal sentenced the publisher and the co-author of an anti-Semitic "anti-Zionist" tract to a fine. *See Le Monde*, 16 Nov. and 7 Dec. 1968 and 27 June 1969.

10 Statute of 28 May 1971.

11 For the text of France's reservation concerning Art. 4 see Annexe B.

12 *See J. O. Sénat*, sitting of 18 May 1971, 441.

13 *Id.* at 439.

law amends two other statutes: the 1901 statute on associations and the 1881 statute on the press. Under the statute on associations the normal procedure for dissolving an association involves an application to the civil court.¹⁵ The 1972 statute amends the 1936 law (*see note 15*) by permitting the government to ban associations which incite to discrimination, hatred or violence on the grounds mentioned above, or which disseminate ideas or theories tending to condone or encourage such acts.

The main thrust of the 1972 reforms relates to the 1881 statute on the press. Three important changes were made. First, incitement to discrimination, hatred or violence against a person or a group of persons on grounds of origin or because of their belonging or not belonging to a given ethnic group, nation, race or religion was made an offence, punishable by up to one year's imprisonment and/or a fine of 2,000F to 300,000F (Article 24 of the 1881 statute, as amended). For the first time incitement could be prosecuted, irrespective of group libel.

Second, the scope of the old law was extended by the use of the words "not belonging" and "ethnic group or nation" and the definition of group libel in Article 32(2) was simplified.

Third, rules of procedure were made less stringent granting *locus standi* to bring proceedings, whether criminal or civil, to any association dedicated to opposing racism which had been in legal existence¹⁶ for at least five years at the date of the incident. If individuals are attacked, the association may proceed only with their permission.¹⁷

1972-1992: Piecemeal Reforms or a Consistent Pattern?

The statute passed in 1972 has been amended several times, and additional reforms have been adopted, either by Parliament or through government decisions. Before assessing these changes it is necessary to explain why the law has been amended so often during the past 20 years. Two factors must be mentioned.

First, the ratification by France of a number of international human rights treaties containing clauses relating - directly or indirectly - to the issue of discrimination and racial incitement necessitated legal reforms. These treaties were the European Convention on Human Rights (*see* Article 14); the International Covenant on Civil and Political Rights (*see* Articles 20 and 26); the International Covenant on Economic and Social Rights; the UNESCO Convention on Discrimination in Education (*see* Articles 1-3); the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child.

14 Penal Code, Arts. 187-I and 416.

15 In addition a statute of 10 Jan. 1936 empowers the government to ban, by decree, particular types of associations, including those involved in inciting armed demonstrations in the streets, paramilitary organizations, associations directed against the integrity of the territory of the Republic (*i.e.*, separatist ones) or against the Republican form of government.

16 Under French law, an association exists legally, *i.e.*, becomes a legal person, as soon as its founders have declared it to the *préfecture* (local State authority). Such a declaration includes the name of the association, its object and address, the by-laws and the names of the president and founders (statute of 1 July 1901 on associations). No other restrictions may be added. This is a constitutionally protected freedom; *see* the Conseil constitutionnel's ruling of 17 July 1971, 29.

17 *See* Code of Criminal Procedure, Art. 2-I, and legislation relating to the protection of the environment or of consumers.

Second, new reforms have been a response to a clear and unmistakable resurgence of public expressions of xenophobia, group libel, racial incitement and related pronouncements. Depending on circumstances, situations and speakers, the targets are either immigrants, especially those from North Africa and from other African countries, or Jews.

Appearances thus are deceptive: although legislation has been adopted in a disorderly and piecemeal fashion, the amendments reflect a consistent response to the phenomenon of racism and anti-Semitism in France. From the 1972 law, reforms have developed in four directions.

The standing of associations has been extended. A statute of 10 January 1983 permits associations legally in existence for five years, and which campaign on issues of war crimes or crimes against humanity, to institute criminal proceedings against the perpetrators of such crimes, against those who vindicate war crimes or collaboration crimes, or against persons who defile buildings or tombs. They also have *locus standi* to bring actions for libel or insult.¹⁸ A statute of 13 July 1990 gives certain associations, for example, those which represent the interests of concentration camp inmates, the right to bring criminal proceedings in cases of vindication of war crimes or crimes against humanity, or of denial of the Nazi genocide of the Jews.

A statute of 3 January 1985 gives associations which campaign against racism the right to initiate proceedings in cases of homicide, violence or criminal damage motivated by ethnic, racial or religious discrimination. Such associations are also granted the right by this law to bring criminal proceedings in cases of race discrimination and related offences not only, as previously, in cases of racial incitement.¹⁹ In 1987 the same right was given to associations dedicated to assisting victims of discrimination.²⁰ The statute of 13 July 1990, mentioned above, also grants civil rights associations legally existing for five years a right of reply in the press, as well as in the broadcast media, in cases of group libel. If the libel relates to individual persons, the association may act only with their agreement.²¹

The scope of unlawful discrimination has been expanded. Unlawful discrimination now covers sex discrimination. Clauses prohibiting economic discrimination on ethnic, racial or religious grounds have been strengthened by the statute of 7 June 1977. The possibility of proving a legitimate reason in cases of discrimination on the grounds of sex, race or family situation in hiring or dismissal has been abolished by statutes of 13 July 1983 and 30 July 1987. Discrimination against any legal person is now prohibited by a statute of 30 July 1987.

The wearing or public display of Nazi badges or emblems has been prohibited. The decree of 18 March 1988 prohibits the public wearing or display of uniforms, badges or emblems recalling those worn or displayed either by

18 Code of Criminal Procedure, Arts. 2-4 and 2-6.

19 *Id.*, Art. 2-1.

20 *Id.*

21 It should be noted here that the French law on the press has included, since 1881, a right of reply whenever an individual or a legal person has been mentioned or referred to clearly.

members of organizations declared criminal pursuant to Article 9 of the Statute of the International Military Tribunal (IMT) contained in the 1945 London Agreement, or by a person sentenced by a French or an international court for having committed crimes against humanity within the meaning of the statute of 26 December 1964.²² At the Nuremberg Trials several organizations were declared criminal: the *corps* of the Nazi party leaders, the SS, the SD and the Gestapo. There is an exemption under the statute for films, shows or exhibitions which involve historical presentation.

New limitations on freedom of expression have been added. To vindicate war crimes as distinct from crimes against humanity, has been an offence since 1951.²³ The vindication of crimes against humanity was made an offence by a statute of 31 December 1987, which amends Article 24 paragraph 5, of the 1881 law on the press.

A new offence has been introduced by a statute of 13 July 1990: the contestation of the existence of one or several crimes against humanity. The definition of such crimes is, again, that set forth in Article 6 of the Statute of the Nuremberg agreement. Such crimes must have been committed in one of the two following contexts: either by members of organizations declared criminal pursuant to Article 6 of the IMT Statute, in other words, those crimes against humanity committed during World War II; or by a person declared guilty of such crimes by a French or an international court.

A statute of 16 July 1949 empowers the government to ban the public display or sale to minors of publications which present a danger to young people on a number of grounds, including pornography and violence. In 1987 the promotion of discrimination or of racial hatred was made a new ground.²⁴

IMPLEMENTATION OF THE LAW OVER THE PAST 20 YEARS

Twenty years after the adoption of the statute of 1 July 1972, some assessment of its impact may be ventured. It is necessary to remember, however, that, whereas a week may be a long time in politics, 20 years is a short time in law. One must also bear in mind that the 1972 statute has been extensively amended.

The laws described above, although adopted by different political majorities in Parliament between 1972 and 1990, now have cross-party acceptance. None of the political parties represented in Parliament has ever advocated their repeal or their restriction. Their political and social legitimacy is unassailable, and the courts have been aware of this fact.

The existing legal instruments *are* implemented. Although one might perhaps wish for more comprehensive and consistent implementation, it must be remembered, however, that *no* law, especially a criminal law, is ever automatically applied. A decision must always be taken either by the *Parquet* or by associations to institute proceedings. That decision is, in turn, influenced by a number of factors,

22 Decree of 18 Mar. 1988, now Art. R.40-3 of the Penal Code.

23 For a rare example of case law, see the decision of the Cour de cassation (criminal section) relating to *Le Pen*, Cass. crim. 14 Jan. 1971, *Recueil Dalloz* 1971, 101.

24 Statute of 31 Dec. 1987, amending Art. 14 of the Statute of 1949.

including, the likelihood of securing a conviction, and various political considerations.

As regards the case law, we still lack a systematic and exhaustive study of all relevant court decisions that would enable us to adopt firm conclusions on the policy of the courts. A general impression suggests that cases are being decided more quickly than before, an important factor in this type of case. Verdicts, which may encompass both criminal penalties and an award of damages (decided by the *same* court in the course of the same action under French law) tend on the whole to be more severe than previously. It is obvious that, with a few exceptions, the judges are taking the 1972 law seriously.

The first case brought in the courts under the 1972 law illustrates how the statute has been enforced. The case became a national and even an international *cause célèbre*. On 22 September 1972 the news bulletin *URSS*, published in Paris by the information service of the Soviet Embassy, published an article entitled "The school of obscurantism", signed by M Zandenerg. It started with a mention of the massacre at Deir Yassin, a Palestinian village where in 1948 the population was massacred by members of the Jewish Irgun and Stern groups, affirmed that the same tragedy continued in the Occupied Territories, and added that Israeli schoolboys were taught early to massacre Arabs. The author went on to discuss the "holy writings" used in Israeli schools and the values taught there. The rest of the article, purportedly an "exegesis" of the *Shulhan Aruh*, in reality was no more and no less than a rehash of the notorious Protocols of the Elders of Zion. These were a forgery of the Tsarist secret police at the beginning of the century, and proclaimed that the Jews were bound to dominate the world, to exploit and ultimately kill all other people. This, the author insisted, was the only "moral" of the "Zionist society". Such were the precepts taught to generations of Israelis. The last two sentences stated: "These laws of Judaism are written in the regulations of the Israeli army; their transgression is a breach of discipline. They constitute the very essence of the Zionist State policy."

Two civil rights associations sued the editor of *URSS* for group libel and racial incitement. The hearings were highly interesting. The court rejected the argument that the bulletin, as a publication of the Soviet Embassy, was protected by diplomatic immunity. The editor, a French communist, confessed publicly that he never read the texts published in his bulletin. Nonetheless, he was convicted for group libel and racial incitement. He was ordered to pay two fines, to publish the judgement in *URSS* and to pay the cost of its publication in six newspapers. The lesson was not lost.

Prosecutions for racial incitement seem to be more frequent than those for group libel. Civil rights associations have been very active in this field, using the power given to them by the law to instigate prosecutions and to claim damages. The grant of standing to private associations is a distinctive characteristic of the French legal system.

Convictions tend to be either for racial incitement directed against foreign workers²⁵ or for anti-Semitism.²⁶ Group libel actions have included proceedings

25 For examples of convictions see Grenoble *Cour d'appel* (C.A.), 9 July 1973 and Grenoble (*Tribunal de grande instance* (T.G.I.)), 18 Dec. 1973, *Recueil Dalloz* 1975, 489; Paris T.G.I., 22 Feb. 1979, *Le Monde*, Feb. 24, 25 and 26 and Apr. 3, 1979; Paris T.G.I., 12 Nov. 1980, *Le Monde* 16-17 Nov. 1980. M Courtine, a well-known gastronomic columnist, in criticizing Chinese cooking commented on the "excessive number of Chinese people in France" and "their inconsiderate naturalization" and "bacillar proliferation" (a vocabulary used by the Nazis half a century ago). See also Paris T.G.I., 4

against a store that sold dolls representing the stereotyped Jew²⁷ and against the publisher and author of an article attacking second generation immigrants.²⁸ In an unusual case, Mgr Lefebvre, a former Catholic archbishop who had been suspended *a divinis* by the Pope was convicted and sentenced for group libel and racial incitement against the Muslim community.²⁹ Proceedings are often based on both incitement to hatred or violence against a group as well as group libel, so that the making of clear-cut distinctions between decisions is not always easy.

Acquittals are as interesting to study as convictions. Some result from the very constraints of the law. For example, libel against an individual or a group is defined in French law as an allegation of *fact* which stains the honour or the reputation of the person or group. In 1989 Jean-Marie Le Pen, leader of the extreme right-wing party, *Front National*, denounced, in *Présent*, an extreme right-wing newspaper, "les grandes internationales (big internationals) like the Jewish one", who contribute to the creation of an "anti-national mind". He was prudent enough to add that this did not mean all *Internationales* nor all Jews. He was acquitted regardless of however offensive his pronouncements might have been for international Jewish organizations.³⁰

Other acquittals seem to rest on a minimalist construction of the 1972 law, coupled with a misreading of the CERD Convention. An example is the case brought against the editor of a right-wing monthly, *Pour un ordre nouveau*, who was sued for inciting racial hatred. He had published an article violently attacking immigrant workers, which referred to the "black ghettos", the "idle people looking with hatred at the rare intruders with a white skin", "a sordid world", and "an army of ultra-poor and underpaid mercenaries" whose only aim once in France was to "fill their pockets before returning to their country". The court acquitted him, in a decision which makes strange reading. The court noted, and deplored, that discrimination, hatred and violence against immigrant workers are facts, "unfortunately". The court quoted Articles 1 and 2 of the CERD Convention, but not Article 4, which was the most relevant. It affirmed the importance of freedom of opinion and expression in France and concluded that anyone is free to publish a study on immigration accompanied by his or her own conclusions, so long as he or she does so in "good faith" and within the limits of the law. The court recognized that opinions may vary on this issue and decided that it was not the rôle of the courts to be arbiters of such controversies. Although the court regretted the article's "lack of restraint" and found "formulations that may be thought to be excessive", it found in it no appeal to violence against foreign workers and no incitement to racial hatred towards them. The court of appeal quashed the judgement.³¹

July 1988, *Le Monde*, 8 June and 7 July 1988.

26 See, e.g., Rennes T.G.I., June 12 1975, *Le Monde*, 14 June 1975; Paris T.G.I., 11 Dec. 1979, *Droit et Liberté*, Jan. 1980; T.G.I. Strasbourg, 11 July 1978, *Le Monde*, 5 and 12 July 1979 (Mr Iffrig, an early "revisionist", denounced in his newspaper, *Elsa*, the "myth of 6 million Jews killed by the Germans"); T.G.I. Paris, 28 Mar. 1989, *Le Monde*, 14 Jan. 1978 and 2 and 30 Mar. 1979, upheld on appeal, *Le Monde*, 7 June 1980; T.G.I. Paris, 25 May 1982, *Le Monde*, 27 May 1982 (typical example of anti-Israeli article using classic anti-Jewish themes); see also Lyons C.A. 29 June 1989 (anti-Semitic declarations of a maverick catholic priest).

27 See *Le Monde*, 14 Feb. 1985.

28 See *Le Monde*, 4 May 1990.

29 *Id.*, 14 July 1990 and 23 Mar. 1991.

30 Paris T.G.I., 31 May 1991, *Le Monde*, 21-22 and 24 Apr. and 9 June 1991.

"Revisionism" as a Form of Racial Incitement

In several countries (for example, Canada, France, the UK and the US) the denial of the Nazi genocide of the Jews has been the subject of innumerable books, essays and articles.³² Such writings are not only a perverse expression of anti-Semitism but also an aggression against the dead, the survivors and society at large. Their aim is the destruction of the dead's only "grave", that is, our memory, and the erosion of all awareness of the crime itself. Such an aggression is not to be tolerated. Authors, editors and publishers of such material should not escape with impunity.

Four categories of legal instruments have been used in French law against "revisionism".

Administrative restrictions. The statute of 17 July 1949 empowers the Minister of the Interior to take the following steps against a publication presenting a danger to young people because of its incitement to racial discrimination and hatred: prohibition of sale to minors, prohibition of public display and prohibition of any advertisement for such material. Action taken by the Minister must respect due process and be based on reasoned grounds. These powers have already been used against "revisionist" journals.³³

Civil proceedings. First, interlocutory remedies may be sought. Under Article 809 of the Code of Civil Procedure, the president of the civil court may order in *référé* (interlocutory proceedings) any steps that are necessary to prevent imminent harm or to put a stop to a *trouble manifestement illicite* (a manifestly unlawful wrong).³⁴ Such sweeping powers are used by the courts to protect privacy and other rights.

A recent example of their use took place in 1987. On the eve of the trial in Lyons of Klaus Barbie, a former Gestapo official who was accused of crimes against humanity, a new "revisionist" journal, *Annales d'histoire révisionniste*, was launched. A text on "The myth of the Jew's extermination" contained the following sentence: "To doubt the historical reality of the extermination of the Jews is not only legitimate, it is a duty, for it is a duty to look for historical truth". A civil rights association, the LICRA (Ligue internationale contre le racisme et l'anti-sémitisme) and four concentration camp inmates' associations asked a court, in interlocutory proceedings, to order the suspension of the distribution of the journal. The next day the president of the Paris court ordered that all copies of the journal be impounded and its distribution be suspended. Eleven days later in a second decision he affirmed that the public exposure and distribution of such a journal, the only aim of which was the negation of the Jews' massacre, amounted, in the circumstances, to a

deliberate act against the victims of Nazism and all Jews in general. Such an act was bound to be perceived and resented as a racial incitement and could cause disorder and violent reactions. On these grounds he temporarily prohibited the distribution and sale of the journal.³⁵

On 12 September 1987, Le Pen declared, in a radio interview, that the mass gassing of the Jews was "a point of detail". In interlocutory proceedings the Versailles court held that such a statement constituted a "manifestly unlawful wrong" for survivors and their families and "an abuse of the exercise of freedom of expression which, far from being an absolute one, has ... among its limits ... respect for essential values which can equate, as is the case here, to the notion of legitimate interest protected by the law." Le Pen was later ordered to pay more than 900,000F in damages, a valid and appropriate conclusion to four years of litigation.³⁶

Second, a civil action for damages may be brought against authors and exponents of "revisionist" themes. One of the leading exponents of "revisionism" in France, Robert Faurisson, has been successfully sued in this way. In 1978-79 the LICRA and several other associations launched a civil action against him, based on what he had published in two Paris daily newspapers, *Le Matin* and *Le Monde* (in the latter by using his right to reply). In French law the editor is legally responsible for whatever is published in the newspaper. The Paris court, in a well reasoned judgement, distinguished carefully the role of the courts from that of the historian; it emphasized that judges are not and should not be historians or rule on disputes among historians. The latter are free to publish their views on whatever subject, the court held, but if they do so, like anyone else, they are under a legal responsibility. Faurisson said that the Jews' genocide, and the existence of the gas chambers, were "one and the same historical lie, which made possible a huge political and financial swindle". In doing so, he failed, the court held, to respect the obligations of prudence, objectivity, circumspection and intellectual neutrality. The associations suing him, whose aim was to oppose racism and to protect the memory of concentration camp inmates, had suffered a moral wrong. Faurisson was ordered to pay compensation.³⁷

In 1989 an assistant professor at the Lyons III University named Notin published in a journal an article containing virulent xenophobic and anti-Semitic ramblings, including a reiteration of "revisionist" theses on the gas chambers.³⁸ As well as being punished in disciplinary proceedings described below, the Paris civil court, deciding an action brought by a civil rights association, ordered him to pay damages. An action for group libel, however, failed.³⁹

31 Paris T.G.I., 23 Feb. 1974, *Gaz. Pal.*, 6 June 1974, 21; The court of appeal quashed the judgement on 17 June 1974, *Le Monde*, 19 June 1974.

32 For an excellent analysis of "revisionism" see P Vidal-Naquet, "Un Eichmann de papier: Anatomie d'un mensonge," in *Les Juifs, la mémoire et le présent* (Paris: 1981), 193.

33 *Annales d'histoire révisionniste* (three prohibitions, ministerial *arrêté* of 2 July 1990; *Revue d'histoire révisionniste* (same measure, same date); *Révision* (decision of 14 June 1990).

34 See R Errera, "Recent developments in the French law of the press in comparison with Britain," in D Kingsford-Smith and D Oliver, eds., *Economical with the Truth: the Law and the media in a democratic society*, (Oxford: ESC Publishing Ltd, 1990), 67. On *référé* proceedings see R Perrot, *Institutions judiciaires*, (Paris, 1989 3rd ed.).

35 T.G.I. Paris, 14 and 25 May 1987, *Amicale d'Auschwitz, et autres c. NMPP*, *Gaz. Pal.*, 1, 1987 I 369.

36 Versailles C.A., 18 Mar. 1991, *Le Pen c. UNADIF; Revue trimestrielle des droits de l'homme* (1991), 53. For a list of Le Pen's convictions on the grounds of racism and anti-Semitism, see, P A Taguieff, ed., *Face au racisme, I. Les moyens d'agir* (Paris, 1991), 235.

37 LICRA et autres c. Faurisson, Paris TGI, 8 July 1981, *Recueil Dalloz* (1982), 59, note Edelman. Noam Chomsky wrote the preface to the book in which Faurisson published his defence, supporting Faurisson's absolute right to publish his views. See R Faurisson, *Mémoire en défense contre ceux qui m'accusent de falsifier l'histoire: La question des chambres à gaz*, preface by N Chomsky (Paris, 1980). See also N Chomsky, "The Faurisson affair: his right to say it" in *The Nation*, 28 Feb. 1981.

38 B Notin, "Le rôle des médiats (sic) dans la vassalisation nationale: omnipotence ou impuissance," *Economie et société*, série "Hors série", (8, 1989), 117, 121, 123 and 128.

39 Paris T.G.I., 11 July 1990; *Le Monde*, 13 July 1990; confirmed on appeal, Paris C.A., 15 May 1991.

"Revisionism" in universities. This topic deserves a separate analysis. What is to be done when exponents of "revisionism" teach and study in universities? (In France, with the exception of a few Catholic universities, all universities are state institutions and staff members have the status of civil servants). Should specific steps be taken? The issue is linked with that of the nature and limits of academic freedom, and the responsibilities and powers of universities and, ultimately, of the government. There have been two recent incidents. On 15 June 1985, Roques, an agronomist, presented a university doctoral dissertation at the university of Nantes. The subject was "The confession of Kurt Gerstein: Comparative studies of several versions".⁴⁰ The real subject, Gerstein's manuscript being a pretext, was a repetition of "revisionist" views. It emerged a few months later that a number of procedural rules and requirements had been knowingly violated by Roques and those academics who had helped him. One of them was professor Rivière, his supervisor, a professor of medieval literature.

In spring 1986 the Roques case became public. On 28 May, M Devaquet, the Secretary of State for Higher Education and an academic himself, made a strong statement before the National Assembly. He denounced the "revisionist" thesis, declared that what the *jury de thèse* (the panel empowered to decide on the merits of the candidate) had done could not but reflect on all academics, announced that he had ordered an inquiry into the *procedural* aspects of the case, and made clear that, however odious, the subject and content of a doctoral dissertation were not the business of the Minister of Education.⁴¹

Two decisions were then taken by academic and government authorities. First, on 30 July 1986, the Minister of Education suspended Professor Rivière for one year, using an old but still valid statute of 1880. This decision was upheld by the Conseil d'Etat, France's supreme court for administrative law.⁴² At the same time, the acting president of Nantes University annulled the presentation of Roques' dissertation on the ground of grave procedural irregularity and fraud. This step was also upheld by the courts.⁴³ In its report on Nantes University, published in 1991, the National Committee in charge of assessing the universities mentioned the affair.

After the publication of Notin's article, mentioned above, the official subsidy to the journal was withdrawn;⁴⁴ the editor claimed not to have seen the article before it had been published and that it had been inserted without his knowledge. In a circular he requested subscribers to tear it out of the journal.⁴⁵ The University Board condemned Notin's article. On 18 July 1986, the University Disciplinary Board decided to suspend Notin from all teaching and research activities for one year and withheld half of his salary. On appeal the national Board of discipline quashed, on 15 March 1991, the decision on procedural grounds and instead deprived Notin of

40 State doctorates are distinct from university ones; the latter are delivered by the universities under their own responsibility and have traditionally had less standing. Gerstein, a German officer and a witness of gas chamber executions, wrote a report on what he saw. He committed suicide while in jail in Paris in 1945.

41 J.O.A.N., 28 May 1986, 1st sitting, 1325. On the Roques scandal see J Tamerro, "Henri Roques: mention très bien," *CERAC* (June 1986).

42 Conseil d'Etat, *Rivière*, 7 Feb. 1990, 27.

43 *Id.*, Roques, 10 Feb. 1992.

44 *Le Monde*, 18-19 Feb. 1990.

45 Prof. Destanne de Bernis, declaration, *Le Monde*, 28-29 January 1990.

promotion for two years. The University assigned him to documentary activities from the fall of 1991 onwards.

The lesson of these episodes, without precedent in French academic history is clear. It was expressed by the president of another Lyons university: academic freedom is not absolute and does not allow academics to profess, *qua* professors, any opinion without being answerable for it before their peers. It is for universities or research institutions to take the necessary steps promptly whenever the occasion arises. This is the price to be paid for academic autonomy and freedom.⁴⁶

The criminal law. In 1990, as stated above, a new law made denial, indeed even *contestation* of the Nazi genocide of the Jews an offence. Such a move was both unnecessary and unwise. Unnecessary because French law contains already, as shown, the relevant remedies. Unwise because to dispute the existence of a fact, albeit, the worst of crimes, should not be made an offence, if only because judges are not historians⁴⁷ and because this cannot be the province of criminal law. Besides, a prosecution would offer an additional platform to "revisionists" to propound their views with impunity.

The new law was tested in 1991. Faurisson was prosecuted by several associations for repeating, in an interview given in September 1990, his well-known views that "the myth of the gas chambers is a *gredinerie* [wicked act]" and that there are "excellent grounds for not believing in this policy of extermination of the Jews or in the magic gas chamber, and I will not be trotted around a gas chamber". Faurisson intended, as defendant, to repeat his views in court. Counsel for the associations asked the court to forbid him from doing so and to exclude the public. Both petitions were rightly rejected. The court, after declaring the 1990 statute compatible with Article 10 of the European Convention on Human Rights, added that "the necessary limits to freedom of expression include respect for the memory of victims and the total rejection of any racial discrimination, a discrimination which was one of the main foundations of Nazism." The court found him guilty. Faurisson was ordered to pay a fine of 100,000F, suspended for five years. This means that if he repeats his views during that period he will have to pay the fine. The editor of the monthly which had published the interview was ordered to pay a fine of 30,000F, to pay 20,000F in damages to each of the 11 associations suing him and the costs of publication of the judgement in four daily newspapers (15,000F each).

WHY LAWS AGAINST RACIAL INCITEMENT AND GROUP LIBEL ARE NECESSARY

The idea of having laws against racial incitement and group libel is, on the whole, a rather recent one, and it is by no means universally accepted. In some Western countries they are often challenged as a matter of principle on the basis of a quasi-absolutist conception of freedom of expression. In systems which adhere to such a conception (most notably, the United States⁴⁸) the laws mentioned above

46 Prof. Cusin, "'Révisionnisme' et libertés académiques", *Le Monde*, 17 May 1990.

47 See JD Bredin, "Le droit, le juge et l'historien," *Le Débat*, Nov. 1984; G Kiejman, "L'histoire devant ses juges", *ibid.*; M Reberioux, "Le génocide, le juge et l'historien," *L'Histoire* (Nov. 1990), 92.

48 See references in the United States section of the bibliography.

tend to be regarded as unconstitutional. It cannot be denied that the USA has produced a profound and illuminating literature on the foundations of freedom of speech and on its legal, political and social status; every scholar and practitioner elsewhere owes a debt to it. But this is not, at any rate, the system that prevails in most European countries today, for a number of historical, political and legal reasons that are well known and cannot be developed here.⁴⁹

Another, less principled, ground for rejecting such laws is scepticism about their effectiveness. Some critics of the laws say that "racism" and its public expression have such deep underlying social and psychological roots that the belief that they can be suppressed by legal means is, at best, illusory. Others use the familiar argument, "Where do we draw the line?", and emphasize the fact that such provisions can have a wider or a narrower interpretation.⁵⁰

I suggest that laws against racial incitement and libel are necessary and that they are useful for the following reasons. First, such laws are needed to defend the basic civility of our society. We should not allow attacks against a person or a group of persons on racial, ethnic, national or religious grounds. The history of our societies in the 20th century fully legitimizes the use of legal instruments against what is, and is meant to be, an aggression.

Such an aggression is two-fold. It is directed, first, against certain individuals or groups, causing psychological and moral harm and damaging individual or collective reputations. In other words it is an outright attack on the *rights* of these people and, ultimately, on their sense of identity and of participation in society on an equal footing with those belonging to the majority culture.

Second, such an aggression is directed against the whole body politic and its social and moral fabric. This element was accepted as early as 1939 by the authors of the first French law on group libel. The preamble of the 1939 statute declares explicitly that the creation of group libel as a tort and as an offence is necessary not only to protect the groups under attack but also "the whole national collectivity".⁵¹ A great American lawyer, Alexander Bickel, has forcefully expressed this fundamental idea in a telling way:

There is such a thing as verbal violence, a kind of cursing assaulting speech that amounts to almost physical aggression, bullying that is no less punishing because it is simulated. This sort of speech constitutes an assault. More, and equally, important, it may create a climate, an environment in which conduct and actions that were not possible before become possible ... *Where nothing is unspeakable, nothing is un-doable.*⁵²

49 For a general study of freedom of expression in Western countries see, e.g., F Castberg, *Freedom of Speech in the West: A Comparative Study of Public Law in France, the United States and Germany* (Oslo and London: 1960); R Errera, "The Freedom of the Press: the United States, France and other European countries," in L Henkin and A J Rosenthal, eds., *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (New York: 1990); E Barendt, *Freedom of Speech* (Oxford: 1985); P Lahav, ed., *Press Laws in Modern Democracies: A Comparative Approach* (New York and London: 1985).

50 See, e.g., G Marshall, "Press Freedom and Free Speech Theory," *Public Law* 40, 56 (1992).

51 See text in 4 *Dalloz périodique* 1939 4.351.

52 A M Bickel, *The Morality of Consent*, (New Haven and London: 1975), 72-73 (emphasis added).

A FINAL ASSESSMENT

Racist ideologies and conduct, their nature and how to react to them have been the subject of much discussion in France. A survey of recent developments and of the wider context leads to the following remarks:

1. There is, it seems, a marked renewal and increase of xenophobic, racist and anti-Semitic expressions and writings, not only emanating from extremist or maverick elements, but also from leaders of important political movements. One political party, the *Front National*, has based its propaganda on such themes.
2. Anti-Semitism, in addition to its classic themes, has developed two more: "anti-Zionism" and "revisionism".
3. The main thrust of the persistent campaign and agitation against foreign workers and immigrants in general is based on certain identifiable themes: the notion that France is being "invaded"; that immigrants are a drain on resources in terms of allowances, welfare etc.; that their children destroy the quality of the education system; that immigrants are the main source of insecurity and unemployment; and that, if it does not take some sort of action, France could lose its cultural identity and values.⁵³
4. The classic responses and arguments of civil rights associations seem to have lost their effectiveness. P A Taguieff is right to highlight the "crisis of anti-racism" and of its rhetoric.⁵⁴ Society in the 1980s and 1990s is more complex for everybody, including politicians, social workers and civil rights activists. Hence the present malaise.
5. This being said, the role of legal instruments remains a crucial one. We need them as a vehicle by which society can express its values and the limits of what it will tolerate. In order for such statutes to be adopted there must exist a political will. International law and sound human rights instruments may be an important dimension, especially in countries, like France, which have a "monist" legal system where, once ratified and published, a treaty takes precedence over domestic statutes. More law does not always mean better law, however. Before adopting new legislation it is necessary to assess how the existing arsenal is used and to review the case law. The choice between civil and criminal law also is important. Certain forms of behaviour or expressions have to be made offences, of course, but we should not forget that civil law offers more flexibility.

53 A Duraffour and G Guittoneau, "Des mythes aux problèmes: l'argumentation xénophobe pris au mot", in P A Taguieff, ed., *Face au racisme, I. Les moyens d'agir* (Paris: 1991), 127 et seq.

54 "Les métamorphoses idéologiques du racisme et la crise de l'antiracisme," in *Face au racisme, supra* at 13.

6. The rôle of civil rights associations is a vital one: there are obvious limits to what individuals or target groups may or might be willing to do. The same can be said of public authorities when deciding whether to bring proceedings. Most of the case law described above would simply not have existed if French law had not empowered certain associations to bring civil and criminal proceedings.

Chapter 18

INCITEMENT TO NATIONAL AND RACIAL HATRED: THE LEGAL SITUATION IN GERMANY

Rainer Hofmann

INTRODUCTION

Europe is presently experiencing a strong, and in many aspects frightening, revival of openly nationalistic and xenophobic tendencies. This statement applies in particular to many of the former socialist countries of Eastern Europe where, subsequent to the collapse of socialist rule, conflicts between different nations have arisen again, resulting in outbreaks of violence against members of minority groups or even, in the case of what used to be Yugoslavia, outright war. Fortunately, such developments of massive and widespread violence have not occurred as yet in Western Europe.¹

There is, however, quite a considerable increase in support for political parties which call, with clearly racist undertones, for restrictions on further immigration of aliens in general and asylum-seekers in particular, and which oppose measures to improve the situation of existing alien populations.² Acts of violence against aliens and asylum-seekers are reported with increasing frequency in Austria, France, Germany and the United Kingdom. Reports of racist violence have even come from societies once considered almost immune to violent xenophobia, such as Sweden. These developments clearly pose a serious threat to the peaceful internal order of the societies concerned, and constitute gross and flagrant violations of basic human rights and the fundamental principles of tolerance and pluralism upon which Western democracies are founded.

Such developments raise with utmost urgency questions as to the legal and political relationship between freedom of speech, an essential element of any democratic constitutional order, and the need to protect the people who are targets of violent acts instigated by incitement to national or racial hatred. This question relates, moreover, to the fundamental problem as to whether and to what extent provisions of criminal law penalizing racist speech should be enacted in order to prevent the outbreak of violence against persons defined by their nationality or ethnicity, and whether and to what extent such provisions, once enacted, prove to be effective as regards the achievement of this aim.

A completely satisfactory answer to these questions, in particular the latter one, presupposes the existence of pertinent in-depth studies, preferably performed by experts in legal sociology. Since I am a constitutional lawyer and not a sociologist, this report is confined to a descriptive analysis of the relevant provisions of the German Criminal Code, their implications under German constitutional law and the relevant court practice. I do not assess Germany's compliance with its

¹ Since violence in Northern Ireland and the Spanish Basque Country seems to be characterized by acts of politically motivated terrorism, these situations should, at least in the present context, be considered as fundamentally different.

² Examples include the 1991 general elections in Belgium and Sweden, and the recent regional elections in France and the German *Länder* of Baden-Württemberg and Schleswig-Holstein.

obligations under various international human rights treaties;³ rather, my examination is confined to Germany's internal legal order. I will not venture into any evaluation as to whether the recent outbreaks of violence against asylum-seekers throughout Germany could have been completely, or even partially, prevented if there had been "tougher" anti-racist legal provisions. Nor will I discuss whether the wide media coverage of such acts of violence and the negative reaction of the general public have had an unwelcome counter-effect, as some commentators have suggested, of encouraging even more violent acts against aliens and asylum-seekers.

FREEDOM OF EXPRESSION AND INCITEMENT TO NATIONAL AND RACIAL HATRED IN GERMANY

There can be no doubt that freedom of opinion and speech constitutes an essential element of any democratic society. On the other hand, it is equally obvious that rights and freedoms can be, and in fact are, abused to the detriment of other persons and their basic human rights. This explains why most constitutions and all international human rights instruments provide for the possibility of lawfully restricting freedom of speech.⁴

The German experience as regards the abuse of rights and freedoms has been particularly traumatic; abuse of the right to free expression contributed considerably to the demise of the Weimar Republic, and human rights were totally suppressed by the National Socialist regime. These experiences had a deep impact upon the drafting of the *Grundgesetz*, the Constitution of the Federal Republic of Germany, and subsequent legislation. In particular, a fundamental aspect of the German constitutional order is the concept of *wehrhafte Demokratie* (militant democracy) which not only allows for but even demands limitations on the exercise of human rights by those persons who abuse such rights in order to destroy the democratic order of the country. The notion of *wehrhafte Demokratie* can only be understood if one takes into consideration Germany's recent history.⁵

"Nothing in the present Covenant may be interpreted as implying for any ... 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 recognized herein ..."

3 For an excellent discussion of Germany's compliance with Art. 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, see Rüdiger Wolfrum, "Das Verbot der Rassendiskriminierung im Spannungsfeld zwischen dem Schutz individueller Freiheitsrechte und der Verpflichtung des einzelnen im Allgemeininteresse," (The Prohibition of Racial Discrimination in the Area of Tension between the Protection of Individual Rights and the Obligation of the Individual towards the Common Interest), in E Denninger et al., eds., *Kritik und Vertrauen: Festschrift für Peter Schneider* (1990). Prof. Wolfrum concludes that, by and large, Germany has implemented its obligations under the CERD Convention, but more as a result of the practice of the courts than the activities of the legislature. *Id.* at 525. Some lacunae remain, such as the failure to prohibit the exclusion of ethnic and national groups from public establishments. *Id.*

4 See, e.g., Art. 19(3) and Art. 20 of the ICCPR; Art. 10(2) of the ECHR; Art. 13 of the ACHR; and Art. 9(2) of the ACHPR, the texts of which are reproduced in Annexe A.

5 For this reason, this concept of a "militant democracy" is generally considered to permit greater restrictions on individual rights in the interest of protecting the rights of others than is permitted by Article 5(1) of the ICCPR which reads, in relevant part: "Nothing in the present Covenant may be interpreted as implying for any ... 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 recognized herein ..."

Article 5 of the *Grundgesetz*, the provision which protects freedom of opinion and expression, expressly permits limitation of the right "by the provisions of the general laws".⁶ The "general laws" include the Criminal Code.

Article 9(2), Article 21(2) and Article 18 of the *Grundgesetz* go much further. Article 9(2) outlaws associations whose activities aim to undermine the criminal law, the constitutional order or international understanding.⁷ However, contrary to what might be deduced from its actual wording, this provision is generally construed not to outlaw *per se* associations which conduct such activities but rather to authorize administrative decisions outlawing these associations. The relevant provisions stipulating the legal conditions for such decisions and regulating procedural questions, including means of recourse to administrative tribunals, are to be found in the *Vereinsgesetz* (Act on Associations) of 5 August 1964.⁸ According to Section 3 of this law, the decision to outlaw such an association is to be taken by the *Bundesminister des Innern* (Federal Minister of the Interior) and to be published in the *Bundesanzeiger*. Financial assets and other properties of such associations may be seized and confiscated. Since 1964, there have been only 12 such decisions, eight concerning extreme right-wing groups and four concerning extreme left-wing groups. It should be added that, according to prevailing opinion, the competent minister of the interior acts within a margin of appreciation when deciding whether to outlaw an association.

Under Article 21(2) of the *Grundgesetz* political parties may be declared unconstitutional by the Federal Constitutional Court if their objectives include the obstruction or abolition of the democratic order.⁹ The power to institute such proceedings before the Federal Constitutional Court is vested with the *Bundestag* (Federal Parliament), the *Bundesrat* (Federal Council), which represents the Governments of the *Länder*, and the Federal Government.¹⁰ The Federal Constitutional Court may also order that all assets and properties of such political parties be seized and confiscated.¹¹ The organs competent to institute such proceedings operate within a margin of appreciation in deciding whether to take such a step. In the 1950s

6 Art. 5 reads:

"(1) Everyone shall have the right to freely express and disseminate his opinion by speech, writing and pictures and to freely inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.

(2) These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honour.

(3) Art and science, research and teaching, shall be free. Freedom of teaching shall not absolve from loyalty to the Constitution."

Translation published by the Press and Information Office of the Federal Government (Bonn: 1987)

7 Art. 9(2) reads: "Associations, the purposes or activities of which conflict with criminal laws or which are directed against the constitutional order or the concept of international understanding, are prohibited."

8 *Bundesgesetzblatt* I, 593 (1964), as subsequently amended.

9 Art. 21(2) reads: "Parties which, by reason of their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany, shall be unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality."

10 See Section 13 No. 2 of the *Bundesverfassungsgerichtsgesetz* (Act on the Federal Constitutional Court), in the wording of 12 Dec. 1985, in connection with Section 43, *Bundesgesetzblatt* I, 32 (1989).

11 *Id.* Further regulations in this context are to be found in Sections 32 and 33 of the *Parteiengesetz* (Act on Political Parties) in the wording of 3 Mar. 1989.

it was generally considered that such political parties should be outlawed. Thus, in 1952 the Sozialistische Reichspartei¹² (generally perceived as a successor to the National Socialist Party) and in 1956 the Kommunistische Partei Deutschlands¹³ were declared unconstitutional. In contrast, the opinion prevailing since the mid-1960s, when the Nationaldemokratische Partei Deutschlands and the Deutsche Kommunistische Partei were founded, is that extremist parties should be countered politically rather than banned by a decision of the Federal Constitutional Court.

Article 18 of the *Grundgesetz* declares that individuals who abuse the exercise of their basic human rights, including freedom of expression, "in order to combat the free democratic order", forfeit those rights.¹⁴ Again, such a decision is to be taken exclusively by the Federal Constitutional Court in a proceeding which may be instituted by the Federal Parliament, the Federal Government or a *Land* Government. This provision has, however, been of minor practical relevance. Only two proceedings have been instituted under this article, the first one in 1960 against the former president of the Sozialistische Reichspartei, Otto-Ernst Remer, and the second one in 1974 against Dr Gerhard Frey, a known right-wing publisher. Both cases were dismissed by the Federal Constitutional Court because neither individual was found to be a threat to the democratic order.¹⁵ Given the historical background to the drafting of the *Grundgesetz*, it is evident that these articles were intended to give a solid anti-fascist foundation to the new Federal Republic. Subsequent practice, notably influenced by the "Cold War", reveals, however, a broader anti-totalitarian aim directed against both left-wing and right-wing extremism.

Among Germany's numerous legal provisions limiting human rights in general and freedom of speech in particular, the Criminal Code contains several provisions which effectively restrict racist speech. The provisions, their constitutional implications and relevant court practice are discussed in the following sections.

The Pertinent Provisions of the German Criminal Code

The pertinent provisions of the *Strafgesetzbuch* (German Criminal Code) are Articles 130 and 131, both of which constitute serious crimes against "public peace", and Article 185 which makes punishable "insult" or offences against personal honour.

Article 130. Article 130 replaced a provision of the Criminal Code of the German Empire which penalized breaches of the public peace by incitement to class

12 Judgement of 23 Oct. 1952, *Bundesverfassungsgerichtsentscheidungen* (BVerfGE) (Decisions of the Federal Constitutional Court) Vol. 2, 1 *et seq.*

13 Judgement of 17 Aug. 1956, BVerfGE Vol. 5, 85 *et seq.*

14 Art. 18 reads: "Whoever abuses freedom of expression or opinion, in particular, freedom of the press (Art. 5(1)), freedom of teaching (Art. 5(3)), freedom of assembly (Art. 8), freedom of association (Art. 9), privacy of posts and telecommunication (Art. 10), property (Art. 14), or the right to asylum (Art. 16(2)) in order to combat the free democratic basic order, shall forfeit these basic rights. Such forfeiture and the extent thereof shall be pronounced by the Federal Constitutional Court.

15 See Judgement of 25 July 1960, BVerfGE Vol. 11, 282 *et seq.* (Remer case); and Judgement of 2 July 1974, BVerfGE Vol. 38, 23 *et seq.* (Frey case). Presently, Dr Frey is president of the Deutsche Volksunion, an extremist right-wing political party which, in the regional elections of 5 April 1992 in Schleswig-Holstein, obtained more than 6 per cent of the votes.

hatred.¹⁶ The new version was adopted in 1960 as a legislative reaction to a wave of desecration of synagogues and cemeteries in 1959 and 1960. These events brought about a radical change in the legislative atmosphere and swept away all arguments that such specific legislation was neither necessary nor desirable.¹⁷ The motivation behind the new version of Article 130 was the appreciation that, although the courts in most cases were able to impose punishment under the prevailing law, that law did not "strike at the core of the evil ... that is, the attack on humanity, human dignity, and general public peace."¹⁸ Thus, rather than being concerned exclusively with the protection of private or group honour, safeguarded by the provisions concerning *Beleidigung* (criminal libel) in Article 185, the new version of Article 130 aims to promote the public interest in safeguarding public peace.¹⁹

The key notion of Article 130 is the concept of *Menschenwürde* (human dignity), enshrined in Article 1(1) of the *Grundgesetz* as a fundamental principle of the German Constitutional order.²⁰ Prohibited are attacks on human dignity which are likely to breach the public peace, committed in the form of acts of particular gravity against parts of the population.²¹ The proscribed acts consist of:

- (1) incitement to hatred, which is described as "stirring up enmity in an invasive manner, beyond mere rejection or contempt";
- (2) provocation to violent or arbitrary acts, described as "acts of violence or lawlessness against personal freedom"; and
- (3) insult, ridicule and defamation, which must amount to more than "mere expression of disrespect" or "disparaging assertions, the truth or untruth of which cannot be proven".²²

The concept of an attack on human dignity presupposes an attack "on the core area of the victim's personality, a denial of the victim's right to life as an equal in the community" or a person's treatment as an inferior which has the effect of excluding him or her from the protection of the constitution".²³ It should be stressed,

16 Art. 130 reads: "Whosoever attacks the human dignity of others in a manner liable to disturb the public peace by:

1. inciting hatred against a certain part of the population,
 2. inciting to violent or arbitrary acts against such part of the population, or
 3. insulting, maliciously ridiculing or defaming such part,
- shall be punished by a term of imprisonment of not less than three months and not exceeding five years." (Author's translation.)

17 See, in particular, Von Bubnoff, "Commentary on Article 130 StGB", in *Strafgesetzbuch, Leipziger Kommentar* (10th ed. 1988), Vol. IV; Schafheutle, *Das Sechste Strafrechtsänderungsgesetz, Juristenzeitung* 15 (1960), 470 *et seq.*; Wolfrum, *supra* note 3, at 521-23. For an excellent presentation in English, see E Stein, "History Against Free Speech: The New German Law Against the Auschwitz - and Other - Lies," 85 *Mich. L. Rev.* 277, 282 (1986).

18 Schafheutle, *supra* note 17, at 471.

19 This is a well-established interpretation in German jurisprudence and doctrine. See, e.g., Von Bubnoff, *supra* note 17, at No. 1; and Lackner, "Commentary on Article 130 StGB", in *Strafgesetzbuch* (18th ed. 1989), 648 *et seq.*, with further references.

20 Art. 1(1) provides: "The dignity of man shall be inviolable."

21 It should be mentioned that this notion not only includes German citizens belonging to an ethnic, linguistic, racial, religious or social minority, but also aliens residing in Germany such as, e.g., migrant workers; see Von Bubnoff, *supra* note 17, at No. 3 *et seq.* and Lackner, *supra* note 19, at No. 2, both with further references.

22 Stein, *supra* note 17, at 284.

23 See, Von Bubnoff, *supra* note 17, at No. 4; and Lackner, *supra* note 19, at 3; both with further references.

moreover, that Article 130 applies not only to attacks on human dignity which in fact breach or threaten the public peace but also to attacks which might result in a sense of threat among persons belonging to the particular group under attack, on the one hand, or in an increase in an existing predisposition to commit such attacks among those persons likely to be incited to acts of verbal or physical violence, on the other hand.²⁴

Article 131. Article 131 was introduced into the Criminal Code in 1973 as part of the Fourth Law to Reform the Penal Code.²⁵ It penalizes the dissemination, display and production of depictions "of violence against people in a cruel or otherwise inhuman manner" with the intent to glorify or seek to minimize the cruelty or to incite racial hatred. Reports on contemporary events or history are expressly exempted from punishment by Article 131(3). Violations are punishable by up to one year's imprisonment or a fine. The objective of Article 131 is the maintenance of social harmony to which incitement to racial hatred is considered to pose a serious threat.

Article 131 was introduced because the government was of the view that Article 130 did not adequately implement Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (which entered into force for the Federal Republic of Germany on 15 June 1969), notwithstanding the fact that many scholars considered that racially motivated acts were punishable under other provisions of the Criminal Code.

Prosecutions under Article 131 are comparatively rare. This might be explained by the fact that large parts of the German legal community²⁶ in the field of criminal law consider this provision, due to its rather vague wording, problematic with respect to the fundamental principle of *Bestimmtheitsgrundsatz* (legal certainty) enshrined in Article 103(2) of the *Grundgesetz*.²⁷ On the other hand it should be emphasized that German legal doctrine unanimously holds that publications of an anti-Semitic character are prime examples of "writings" in the sense of Article 131,²⁸ notwithstanding that there is some discussion as to whether the sale of "classical anti-Semitic works" such as books by Chamberlain or Gobineau, would be prohibited by this provision.²⁹

24 See Von Bubnoff, *supra* note 17, at No. 5, with further references.

25 Art. 131 of StGB reads: "(1) Whosoever 1. disseminates, 2. publicly exhibits, posts, demonstrates, or otherwise makes accessible, 3. offers or makes available or accessible to a person below the age of eighteen, or 4. produces, procures, supplies, keeps in stock, offers, advertises, recommends, undertakes to import into, or export out of, the territory in which this law applies, in order to use them, or pieces derived from them, in the manner indicated in numbers 1 to 3 above, or to enable others to do so, writings, sound or picture recordings, illustrations or representations which show acts of violence against people in a cruel or otherwise inhuman manner and this in order to glorify or to seek to minimize the cruelty of such acts of violence or to incite racial hatred, shall be punished by a term of imprisonment of up to one year or by a fine. (2) Whosoever disseminates, by radio broadcasts, such representations as indicated in sub-paragraph 1 will be penalized in like manner. (3) Sub-paragraphs (1) and (2) do not apply when the act is in the service of reporting on current events or history. (4) Sub-paragraph (1) is not to be applied if done by the legal guardian of the person involved." (Author's translation.)

26 See, e.g., Von Bubnoff, *supra* note 17, at No. 1.

27 This principle requires that penal laws are to be worded in such a clear and unambiguous way as to exclude, to the extent possible, any doubt as to whether a certain behaviour falls under a given penal provision.

28 See Von Bubnoff, *supra* note 17, at No. 19.

Article 185. Article 185 has been part of the Criminal Code since 1875. It makes punishable an offence against personal honour.³⁰ According to Article 192, proof of the truth of a statement is no defence under Article 185 "when the insult arises from the manner in which the assertion was made or disseminated or from the circumstances in which it was made".

Until 1945, the *Reichsgericht* (German Supreme Court) consistently refused to apply Article 185 to insults against Jews as a group. This approach changed in 1949. In the leading decision on this matter,³¹ the Federal Supreme Court confirmed that the Jewish citizens of the Federal Republic of Germany have become "at least since the special legislation of the National Socialist State ... a sharply demarcated group" who consequently may be insulted as a group.³² So far, there have been no decisions of the Federal Supreme Court extending the applicability of Article 185 to other racially or ethnically determined groups.³³

Subsequent to a sharp increase in extremist right-wing activities including, in particular, the publication of pseudo-scientific writings attempting to prove that there had been no concentration camps and that the number of Jews and other people murdered in those camps had been grossly exaggerated (the so-called "Auschwitz-lie"), legislative attempts to deal with these writings were initiated in the early 1980s. The main legal problem to be solved arose from the wording of Article 194 of the *Strafgesetzbuch* which required a private petition to initiate prosecution under Article 185. After a lengthy and rather animated debate in the media and in Parliament,³⁴ the 21st Law Modifying the Criminal Law finally came into effect on 1 August 1985.³⁵

The new law eliminates the need for a private petition for prosecutions in cases where the insult was made in a document which was publicly disseminated or accessible, or in an assembly, or in broadcasting, if the insulted individual is a member of a group which was persecuted under the National Socialist or another violent and arbitrary dominance, and if that group is at the time of the act a part of the population of the Federal Republic of Germany.³⁶ The new wording of Article

29 *Id.* at No. 26.

30 Art. 185 reads: "Insult shall be punished by a term of imprisonment of up to one year or by a fine, and, if the insult is committed by a physical act, by a term of imprisonment of up to two years or by a fine."

31 Judgement of 18 Sept. 1975, *Bundesgerichtshof in Zivilsachen* (BGHZ) (the Official Collection of Decisions of the Federal Supreme Court in Private Law Matters) Vol. 75, 160 *et seq.* It should be stressed that in the case in question the proceedings were founded under a provision of the German Civil Code, seeking compensation for the tort of defamation. This decision confirmed and clarified the previous jurisprudence of the Federal Supreme Court's Criminal Law Panels, in particular the decisions of 28 Feb. 1958, *Entscheidungen des Bundesgerichtshofs in Strafsachen* (BGHS) (the Official Collection of Decisions of the Federal Supreme Court in Criminal Matters) Vol. 11, 207 *et seq.*, and the decision of 21 Apr. 1961, BGHS Vol. 16, 49 *et seq.*

32 See Stein, *supra* note 17, at 301-03.

33 See Lackner, *supra* note 19, Commentary on Article 185 StGB, *Vorbemerkung* No.2, with further references. Compare the application of Arts. 130 and 131 to various ethnic, national and social groups, including Gypsies, black students, and migrant workers. See *infra*, notes 51-52.

34 See Stein, *supra* note 17, at 305 *et seq.*

35 21 *Strafrechtsänderungsgesetz* in *Bundesgesetzblatt* I, 965 (1985).

36 Art. 194 now reads: "(1) Prosecution for insult shall be instituted only upon petition. When the act is committed by disseminating or by making publicly accessible a writing (Article 11, paragraph 3), or in an assembly or by means of a broadcasting, a petition is not required, if the insulted person was persecuted as a

194 has met with considerable criticism from German criminal lawyers for being too vague. Lawyers have also criticized the requirement that the person insulted must be an individual who was personally a victim of such persecution.³⁷

Implementation of the Provisions of the *Strafgesetzbuch*. Articles 130 and 131 have been of limited importance for the actual work of the German courts. In 1982 only 12 per cent of prosecutions against right-wing extremists took place under these provisions. Forty-four per cent of prosecutions were brought under Articles 86 and 86a of the Criminal Code for the dissemination of propaganda and the use of emblems of anti-constitutional organizations; 32.5 per cent of charges were brought for violations of articles of the Criminal Code connected with violence. The remaining 11.5 per cent of prosecutions were divided between convictions for criminal defamation under Article 185 and for condemnation of the President of the Federal Republic, the State, its symbols and constitutional organs under Article 90.

It is perhaps worthy of note that there has been no imbalance in prosecution of left and right-wing activities. For instance, in 1987, 1,855 prosecutions related to left-wing extremism and 1,447 cases to right-wing extremism.

The Prohibition of Racist Speech as a Problem of Constitutional Law

To penalize certain cases of public speech and publications due to their racial connotations obviously raises problems under constitutional law with regard to the guarantee of freedom of expression. As mentioned above, the particular German experience of abuse of such rights as the rights to freedom of expression and association resulted in the introduction into the *Grundgesetz* of a provision allowing rights to be limited "by the general laws". For foreign lawyers, in particular those familiar with the jurisprudence of the United States Supreme Court concerning freedom of speech, it might be surprising that there has in fact been very little scholarly discussion as to the compatibility of Articles 130, 131 and 185 of the *Strafgesetzbuch* with Article 5(1) and 5(2) of the *Grundgesetz*. Generally speaking, German constitutional and criminal lawyers share the opinion that acts by private persons likely to incite racial hatred are not protected by the right to freedom of speech.

member of a group under the National Socialist or another violent and arbitrary dominance, if the group is a part of the population and if the insult is connected with such persecution. However, there shall be no prosecution *ex officio* if the injured person opposes it. The opposition may not be withdrawn. If the injured person dies, the right of petition and of opposition passes to the next of kin as specified in Article 77, paragraph 2.

(2) If the memory of a deceased person is disparaged, the next of kin as specified in Article 77, paragraph 2 shall have the right to lodge a petition. If the act is committed by disseminating or by making publicly accessible a writing (Article 11, paragraph 3), or in an assembly or by means of a broadcasting, a petition is not required, if the insulted person was persecuted as a member of a group under National Socialist or another violent and arbitrary dominance and the disparagement is connected with it. However, there shall be no prosecution *ex officio* if the person entitled to lodge a petition opposes it. The opposition may not be withdrawn."

37 See Lackner, *supra* note 19, Commentary on Article 194 StGB No. 2, with further references. For a thorough discussion of the new law see Stein, *supra* note 17, at 314 *et seq.*, and Kohler, "Zur Frage der Strafbarkeit des Leugnens von Völkermordtaten", *Neue Juristische Wochenschrift*, Vol. 38, 2389 (1985), *et seq.*; Ostendorf, "Im Streit: Die Strafrechtliche Verfolgung der 'Auschwitzlüge'", *Neue Juristische Wochenschrift*, Vol. 38, 1062 (1985), *et seq.* and Vogelgesang, "Die Neuregelung zur sogenannten 'Auschwitzlüge' - Beitrag zur Bewältigung der Vergangenheit oder 'Widerliche Aufrechnung'?", *Neue Juristische Wochenschrift* Vol. 38, 2388 (1985), *et seq.*

Obviously, this general statement does not mean that there are no legal problems as to whether a specific conviction under Articles 130, 131 or 185 will be constitutional, bearing in mind that, according to the established jurisprudence of the Federal Constitutional Court, in situations where human rights conflict, these rights have to be balanced in such a way as to permit only those limitations which are necessary to protect the core of the conflicting rights. Moreover, this jurisprudence can only be understood in the light of Article 19(2) of the *Grundgesetz* which expressly prohibits violations of the *Wesensgehalt* (basic core) of a given human right.³⁸

Under German constitutional law, the power to declare a law in breach of the *Grundgesetz* and therefore null and void, is vested exclusively with the Federal Constitutional Court. So far, this Court has not been called upon to decide whether Articles 130, 131 or 185 are unconstitutional as such. Nor is such a development to be expected. From a more practical point of view, however, cases may arise in which the Court is called on to decide whether the application of these provisions in a specific case amounts to a violation of the speaker's or author's constitutionally protected right to freedom of expression. The Court would have jurisdiction because, under German constitutional law, any person who alleges that his or her human rights have been violated by public authority is entitled to file a *Verfassungsbeschwerde* (constitutional complaint) with the Federal Constitutional Court.³⁹

It is perhaps surprising that there has been only one reported case in which the Federal Constitutional Court was in fact faced with such a challenge. In the case, the applicant had been found guilty of an attack on human dignity in conjunction with incitement to race hatred by carrying, at a public event, a sign which read:

I, a donkey, still believe that Jews were "gassed" in German concentration camps. I, a donkey, believe the "gassing" lies and want to pay, pay, pay to Israel. I, a donkey, still believe the propaganda lies of the "victors".⁴⁰

In a preliminary proceeding, the screening committee of the Federal Constitutional Court rejected the application on the ground that it had no prospect of success, since the interpretation and application of Articles 130 and 131 by the competent courts did not disclose any violation of basic rights.⁴¹ The Court also rejected the allegation that the lower courts had violated the applicant's human rights by disregarding his offers of "evidence". The Court held:

The applicant, who does not deal even with the numerous generally accessible sources about the mass destruction of the Jews, not to speak of trying to reach an independent opinion through a thorough consider-

38 Art. 19(2) reads: "In no case may the essential content of a basic right be encroached upon."

39 See Art. 93(1) No. 4a of the *Grundgesetz* which reads: "The Federal Constitutional Court shall decide: ... on complaints of constitutionality, which may be entered by any person who claims that one of his basic rights or one of his rights under paragraph (4) of Article 20, under Article 33, 38, 101, 103, or 104 has been violated by public authority. As to this topic see, e.g., Oellers-Frahm, "Review of Constitutionality of Legal Norms and Acts of Public Authorities in the Federal Republic of Germany," in Bernhardt & Beyerlin, eds., *Reports on German Public Law and Public International Law* (1986), 49 *et seq.*

40 For a discussion, see Stein, *supra* note 17, at 287.

41 Decision of 27 Apr. 1982, reported in 35 *Neue Juristische Wochenschrift* 1803 (1982).

ation, is not impaired either in his right to a hearing nor to an effective protection of law when the courts judge this mass destruction to be commonly known and consider irrelevant the mere offering of the names of individual witnesses.⁴²

If the courts competent to decide criminal matters consider the question of constitutionality at all, they usually declare that defendants accused under Articles 130 and 131 are not in a position to invoke the guarantee of freedom of speech in Article 5(1) of the *Grundgesetz*.⁴³ Although this could be challenged as incorrect from a strictly constitutional law point of view on the ground that such defendants have claims under the limitation clause of Article 5(2) the criminal courts have consistently assumed the constitutionality of Articles 130 and 131.

Another problem to be mentioned in this context concerns the relationship between Articles 130 and 131 and Article 5(3) of the *Grundgesetz* which provides that "Art and science, research and teaching, shall be free."⁴⁴ Prevailing legal opinion, shared by the courts,⁴⁵ regards incitement to racial hatred as, by definition, beyond the scope of what might be considered to be art, science, research or teaching within the meaning of Article 5(3). This approach is based upon the argument that, since the fundamental aim of the *Grundgesetz* is the protection of human dignity, art, science, research and teaching may not violate human dignity. It goes without saying that this approach could raise considerable problems if applied strictly.⁴⁶

The Pertinent Practice of the Courts

Courts dealing with charges brought under Articles 130 and 131 will usually have to decide upon the following issues: What is an attack on human dignity? When is an act likely to breach public peace? What constitutes incitement to race hatred? Which groups of persons are to be considered a race for purposes of Article 131, or a "part of the population" for purposes of Article 130?

In what might be considered the leading case in this context, the *Bundesgerichtshof* (Federal Supreme Court) in 1981 developed its definition of an "attack on human dignity".⁴⁷ In that case, the defendant was charged with distributing a pamphlet which denied the occurrence of the Holocaust in particularly vile language, and suggested that the Jews had tortured and blackmailed others to give false testimony. The trial court convicted the pamphleteer of a violation of Article 131 but not of the more serious charge under Article 130. The Federal Supreme Court upheld the conviction under Article 131 and ruled that Article 130 had also been

violated. The Court confirmed that an "attack on human dignity" exists only if it is directed against the *unverzichtbar kern* (unrenounceable core) of the personality of another person, against him as a human being, and only if it denies his value as a human being.⁴⁸ Such an attack had been committed in this case because the pamphlet "was apt to provoke an emotional, hostile stance toward the Jews." The argument that Jews in Germany should not reasonably feel threatened by such a pamphlet was not considered relevant.

The Court furthermore ruled that Jews form a race for purposes of Article 131, although based upon reasoning which reflects a greater interest in genetic characteristics than is found in the jurisprudence of many other European countries. The Court declared that the concept of race hatred

proceeds from merely an approximate anthropological classification of humanity into human races, that is, according to common hereditary, predominantly physical characteristics, as a starting point for a theory pursuant to which biological diversity of the "races" is supposed to be the cause of their relative superiority or inferiority and corresponding different value. The emotionally heightened hostility of the provocation against the Jews is one of the phenomena of the incitement to race hatred which the lawmaker wanted to include in article 131.⁴⁹

The notion "parts of the population" found in Article 130 has been interpreted by German courts so as to include German citizens belonging to an ethnic, linguistic, racial, religious or social minority,⁵⁰ and also to aliens residing in Germany.⁵¹

As to the question of the conditions under which an act is to be considered likely to breach public peace, the Federal Supreme Court held in its decision of 21 April 1961⁵² that the act in question does not in fact need to breach public peace or to constitute an imminent and concrete threat to public peace. It is sufficient if there are objective grounds for believing that the publication will shatter confidence in legal security, even if this is felt only by that part of the population against which the publication is directed.⁵³

Although trial court opinions are generally not published, trial courts have been inclined to acquit defendants of charges of anti-Semitism under Articles 130 and 131 while state appellate courts and the Federal Supreme Court have tended to

42 This translation is taken from Stein, *supra* note 17, at 287.

43 For references see, e.g., Stein, *supra* note 17, at 288.

44 See *supra* note 5, for full text of Article 5(3).

45 For references see Von Bubnoff, *supra* note 17, at No. 26.

46 For instance, Shakespeare's treatment of Shylock could remove the Merchant of Venice from the category of "art". Another problem which has not yet been dealt with by German courts concerns the legal standing of anti-Semitic publications of doubtful scholarly foundation, such as the works of Chamberlain or Gobineau, or the large number of older publications which present "scientific" evidence of the inferiority of people of colour.

47 Judgement of 14 Jan. 1981, BGHSt, reported in *Neue Zeitschrift für Strafrecht* (1981), at 258; for a discussion in English, see Stein, *supra* note 17, at 291-92.

48 This definition is firmly established in German jurisprudence. See Von Bubnoff, *supra* note 17, at No. 4; and Lackner, *supra* note 19, at No. 3; both with further references.

49 Translation taken from Stein, *supra* note 17, at 292. This definition is well-accepted in German doctrine. See, Von Bubnoff, *supra* note 17, at No. 18 and Lackner, *supra* note 19, at No. 3, both with further references.

50 Jews are considered to form a "part of the population" for purposes of Art. 130, see BGHSt (*Entscheidungen des Bundesgerichtshofs in Strafsachen*, the Official Collection of Decisions of the Federal Supreme Court in Criminal Matters) Vol. 21, at 371 and Vol. 31, at 226), as are Gypsies, see Oberlandesgericht Karlsruhe, reported in 39 *Neue Juristische Wochenschrift* 1276 (1986).

51 For instance, black students are protected by Art. 130, see Oberlandesgericht Hamburg, reported in 28 *Neue Juristische Wochenschrift* 1088 (1975), as are migrant workers, see Oberlandesgericht Celle, reported in 23 *Neue Juristische Wochenschrift* 2257 (1970)). In contrast to the protection afforded to these groups against incitement to hatred, there are lacunae in the law which have permitted the barring of such groups as blacks and Turks from restaurants and other public establishments. See Wolftrum, *supra* note 3, at 525.

52 BGHSt Vol. 16, 49 *et seq.*; for a discussion in English, see Stein, *supra* note 17, at 293.

53 This principle is well accepted in German doctrine. See Von Bubnoff, *supra* note 17, at No. 5; and Lackner, *supra* note 19, at No. 4; both with further references.

reverse the acquittals. One commentator has speculated about this pattern of judicial interaction:

For one thing, trial judges are generally of a younger generation, without oppressive memories and - understandably - without a sense of personal guilt. Lacking extensive experience, they may feel less confident in handing down convictions for a distinctly political crime. Perhaps they also are more in tune with local attitudes than the higher-level judiciary, and are less responsive to the national policy that has reflected both the recent historical experience and a sensitivity to international considerations.⁵⁴

CONCLUSION

In the author's opinion, Articles 130 and 131 of the *Strafgesetzbuch*, which make punishable racist speech and incitement to racial hatred, constitute an acceptable attempt to strike a fair balance between the state's obligation, resulting from Article 1(1) of the *Grundgesetz*, to protect human dignity, and its obligation, resulting from Article 5 of the *Grundgesetz*, to protect freedom of speech. Obviously, this statement does not mean that the practice of German courts in interpreting and applying these provisions of the Criminal Code in specific cases does not call for critique. However, it is submitted that the jurisprudence of the Federal Supreme Court appears largely satisfactory.

In this author's opinion, it would be to overestimate the role of the courts if the recent, and increasing, cases of violence against non-Germans, and in particular asylum-seekers, in Germany were to be taken as proof of the failure of the judiciary or of the laws. Obviously, it remains to be seen what the reaction of the courts will be and whether police and prosecuting authorities will act as promptly and efficiently as necessary.⁵⁵ Thus, notwithstanding the undoubted importance of criminal law in the fight against racial hatred, it seems as if profound changes in the political climate with regard to aliens in general and asylum-seekers in particular are of even greater significance. Substantial parts of the German political establishment and public opinion, although unequivocally condemning acts of violence, openly promote the idea that "something has to be done against the abuse of the right to asylum" and that "Germany is not a country of immigration". As long as such public statements continue, and are not met with equally forceful statements about the need to respect the human dignity of all those within Germany's borders, it is hardly surprising that certain parts of the population, although still very small, are attracted by groups which aggressively proclaim nationalistic and neo-Nazi ideologies.

⁵⁴ Stein, *supra* note 17, at 299.

⁵⁵ According to a report in *Süddeutsche Zeitung* of 5 Dec. 1991 at 7, in the first trial against participants of the riots directed against Romanian asylum-seekers in the city of Hoyerswerda (Saxony) on 21 Sept. 1991, the *Kreisgericht Bautzen* sentenced a person to a term of 15 months' imprisonment (not suspended) for a breach of Art. 125a of the StGB (*Schwerer Landfriedensbruch*, an especially aggravated breach of the peace) in conjunction with a breach of Art. 130 of the StGB.

Chapter 19

ADVOCACY OF NATIONAL, RACIAL AND RELIGIOUS HATRED: THE INDIAN EXPERIENCE

Venkat Eswaran

Incitement to religious and communal hatred has been an issue of considerable concern in India over the years. Most recently, in 1991 it captured headlines following a spate of well-publicized violent clashes, mostly - but by no means exclusively - between Hindus and Muslims, in different parts of the country. These clashes, which have claimed thousands of lives, have been seen by many as a real and growing threat to the survival of the nation itself as a cohesive, secular entity.¹

Whatever the reasons for this upsurge in violence - and they are too numerous and far too complex to be discussed in the present paper - there can be no denying that it has begun to call in question India's oft-repeated claim to be one of a handful of polities in the world which has managed to accommodate an incredibly diverse mix of ethnic, religious, linguistic and cultural backgrounds in its population without compromising its commitment to a liberal, pluralistic form of government. The legitimacy of that claim cannot of course be disputed as even a cursory glance at some basic statistics will show: the burgeoning population, currently estimated at some 863 million, consists of at least six major religious groups², many of which are further divided into dozens of sub-groups; this population is spread over some 25 states and seven "union territories" which together occupy an area of 3.29 million sq.km.; as well as the 15 officially recognized languages, some 1,652 dialects are spoken in the country.

Given this enormous diversity - and concomitant tensions that are inevitable in a society, large parts of which have been rigidly stratified by the infamous caste system - the job of the Indian lawmaker has not been an easy one. Even during British times, legislators had to walk a tightrope in containing communal and other pressures within the framework of a basically free society - a task which confronted the founding fathers of the republic with added urgency soon after independence. The lessons of the Partition - which saw the worst communal violence in the subcontinent's history, claiming an estimated 600,000 lives - had to be reconciled with the founding fathers' avowed commitment to a democratic form of government in which the citizens would enjoy all the traditional freedoms, including freedom of expression and assembly. This central objective informed the labours of the Constituent Assembly which set out to draft India's Constitution in 1947.

THE CONSTITUTIONAL POSITION

It is generally agreed that the drafters of the Indian Constitution succeeded in striking a fair balance between freedom of speech and the containment of its abuse

¹ By contrast, advocacy of national and racial hatred are not contentious issues in India. As such, this paper will not attempt to address those issues but will confine itself to a discussion of the problems arising from the advocacy of religious, communal and caste-based hatred.

² Hindus - 82.64%; Muslims - 11.35%; Christians - 2.43%; Sikhs - 1.96%; Buddhists - 0.71%; and Jains - 0.48%. The remaining 0.43% of the population includes other religious groups, e.g., Zoroastrians and Jews.

by legally acceptable means. They accomplished this by including in the chapter on Fundamental Rights (India's Bill of Rights) a clause (Article 19(1)(a)), which stated simply that "All citizens shall have the freedom of speech and expression," and then qualifying that right with a subsequent clause which reads as follows:

Nothing in sub-clause (a) in clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interest of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence.³

Most people found this formula unexceptional. However, when the constitutional drafters, in a clear expression of their belief that even freedom of speech must yield to public order, included a provision (Article 22) in the same chapter allowing for preventive detention, several voices of dissent were heard. In the event, those voices were overruled by the majority who felt, in the words of one leading constitutional expert, that doctrinaire logic must be tempered with a little practical wisdom if a Bill of Rights is not to be converted into a "suicide pact".⁴ The indiscriminate manner in which preventive detention powers have sometimes been used in the four decades that have followed has, not surprisingly, led several commentators to question the wisdom of that approach.

However that may be, once the parameters of free speech were set by the Constitution, it fell on the Supreme Court and the 17 High Courts in succeeding years to perform the delicate task of determining how far specific statutory provisions - and executive action taken under them - were in conformity with those parameters. The case law that has followed is indicative of a generally sound and consistent approach on the part of the courts.

FREE SPEECH AND INCITEMENT: THE STATUTORY PROVISIONS

Criminal Law in India has existed in a comprehensively codified form since 1860 when the Indian Penal Code was enacted by the colonial Legislative Council. Recognized largely as the handiwork of Lord Macaulay, the Code has undergone remarkably few changes over the decades and is considered just as effective in dealing with crimes today as it was over a century and a quarter ago. Its provisions have been supplemented by the Code of Criminal Procedure, first enacted in 1898 and substantially revised in 1973.

There are five major provisions in the Penal Code which affect freedom of expression and incitement to hatred and discrimination on grounds, among others, of religion, race, language and caste. The first of these, Section 153A, makes it an offence, *inter alia*, for any person to promote or attempt to promote, whether by the use of words (spoken or written) or by signs or by other visible representations, "disharmony or feelings of enmity, hatred or ill-will between different religious,

racial, language or regional groups or castes or communities." The offence is punishable with imprisonment for up to three years or with a fine or with both.

A related provision, Section 153B, proscribes the making or publishing of imputations or assertions which:

- (a) imply that "any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the Constitution of India as by law established or uphold the sovereignty and integrity of India"; or
- (b) suggest that "any class of persons shall, by reason of their being members of any religious, racial, language or regional group or caste or community, be denied or deprived of their rights as citizens of India"; or
- (c) cause or are likely to cause "disharmony or feelings of enmity or hatred or ill-will between such members and other persons".

These offences are also punishable with imprisonment for up to three years or with a fine or both. An amendment introduced in 1969 provided for enhanced punishments - imprisonment for up to five years with or without a fine - if the offences under Sections 153A or 153B are committed in a place of worship.

In a catena of decisions handed down both before and after independence, the courts have held that the essence of the offence under Section 153A is malicious intention. Such intention can be gathered either from the offending words themselves or from extraneous evidence. In ascertaining intention, the offending article must be read as a whole, and such circumstances attending the publication as, for example, the class of readers for whom the article is primarily intended and the state of feelings between the different classes or communities at the relevant time must be taken into account.⁵

A degree of latitude must be given for bona fide expressions of criticism. If the words complained of are couched in temperate, dignified and restrained language, and do not have a tendency to insult the feelings or convictions, however deeply held, of any section of the people, no offence is committed.⁶ Similarly, it would be an abuse of Section 153A to seek to punish or proscribe products of serious historical research even if some of the facts unearthed as a result of such research were unpalatable to followers of a particular religion.⁷ Finally, for an offence to be established under this section, the words complained of must be aimed at a well-defined and readily ascertainable group having some permanence or stability and sufficiently numerous and widespread to be designated a class.⁸

Another provision which punishes incitement is Section 295A of the Penal Code. This section makes it an offence for anyone "with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India" to

5 *State of Bihar v. Ghulam Sarwar*, All India Reporter (1965) Patna, 393; *Gopal Vinayak Godse*, Criminal Law Journal (1971) Bombay, 324; *Baburao Patel v. The State*, All India Reporter (1980) Supreme Court, 763.

6 *The State v. Ganpat Vasudeo Behere*, Criminal Law Review (1978) Maharashtra, 178.

7 *Varsha Publications (P) Ltd.*, Criminal Law Journal (1983) Bombay, 1446; *State of Uttar Pradesh v. Lalai Singh Yadav*, All India Reporter (1977) Supreme Court, 202.

8 *Parker J. in Charles Mascarenhas* Criminal Appeal No. 431 of 1932, decided on 15 Sept. 1932, Bombay High Court (unreported).

3 Article 19(2). The original version of Article 19(2) only included laws that related to "libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State."

4 H M Seervai, in *Constitutional Law of India*, 3rd ed., Vol. 1 (Tripathi: Bombay), 492.

insult or attempt to insult the religion or religious beliefs of that class whether by words (written or spoken) or by signs or by other visible representations.

The offence is punishable with imprisonment for up to three years or with a fine or with both. Introduced in 1927 to undo the effects of a Lahore High Court judgement⁹ which held that Section 153A could not be used to punish attacks against deceased religious leaders like the Prophet Mohammed, however scurrilous and in bad taste such attacks might be, its constitutional validity was tested in a landmark case in 1957.¹⁰ In that case, it was argued that insults to the religion or religious beliefs of a class of citizens may not always or necessarily lead to public disorder and therefore a law making such insults punishable could not be described to be in the interest of public order as defined in Article 19(2) of the Constitution. The Supreme Court rejected the argument, holding that the section, in so far as it sought to penalize certain activities which had a tendency to cause public disorder, was a law which imposed "reasonable restrictions" within the meaning of Article 19(2).

As with Section 153A, the courts have held that malicious intent for an offence under Section 295A can be inferred from the circumstances surrounding the publication of the offending words.¹¹ Rational criticism made in good faith, even if it has a tendency to wound the feelings of some followers of a particular religion, is not punishable especially if the object of such criticism is to facilitate social reform by administering a shock to the followers of the religion. The courts have often stressed that it is not so much the *matter* of discourse as the *manner* of it which is crucial in determining whether an offence has been committed under Section 295A. The offending words should therefore be such as will be regarded by any reasonable person as grossly offensive, provocative and maliciously and deliberately intended to outrage the feelings of any class of citizens.¹² Truth is not a defence to a charge under this section.¹³

A much wider provision of law aimed at protecting religious sensitivities is contained in Section 298 of the Penal Code which makes it an offence for any person "with the deliberate intention of wounding the religious feelings of any [other] person" to utter any word or make any sound or gesture in the hearing or sight of that other person or to place any object in the sight of such person. Conviction for this offence can lead to imprisonment for up to one year. As can be seen, this section is only concerned with spoken words and as such cannot be used to punish words published in written form. It was intended, according to its authors, primarily to prevent intentional insults being proffered in the course of religious discussion. In order for an offence to be established under the section, it must be proved that the words complained of were uttered not in the heat of debate but with premeditation.¹⁴ Most of the reported case law under this section seems to relate to such forms of insult as placing the carcass of a cow (held sacred by the Hindus) in a public

place rather than to insults contained in speech. Despite its potential for abuse, the section has not generated much controversy.

The fifth provision in the Penal Code which deals with incitement and free speech is Section 505. Clause (2) of this section reads as follows:

Whoever makes, publishes or circulates any statement or report containing rumour or alarming news with intent to create or promote, or which is likely to create or promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, shall be punished with imprisonment which may extend to three years, or with fine, or with both.

If the offence is committed in any place of worship, the offender may be subjected to an enhanced punishment of imprisonment for up to five years, with or without a fine. The section does, however, make an exception for statements, rumours or reports made by a person who, having reasonable grounds to believe them to be true, makes or publishes them in good faith.

In a judgement delivered in 1962, the Supreme Court rejected a challenge to this section's constitutional validity by holding that the restrictions imposed by it were in the interest of public order and therefore within the ambit of permissible legislative interference with the guarantee of free speech contained in Article 19(1)(a).¹⁵ Judicial dicta have, however, stressed the need for this section to be construed strictly in favour of the accused. As declared in a 1959 decision, unless the words complained of amounted to "incitement to an offence", their authors could be held guilty of an offence under Section 505.¹⁶

The aforementioned provisions of the Penal Code are, as noted earlier, supplemented by law contained in the Code of Criminal Procedure. Section 95 of this Code, for instance, allows the forfeiture by the state of publications suspected of containing matter proscribed by Sections 153A, 153B and 295A. For a forfeiture order to be valid, however, the government is obliged to state the grounds of its opinion clearly and exhaustively.¹⁷

As well as prohibitions contained in the Penal Code against religious or communal hate speech, Indian Electoral Laws also come down with a heavy hand against the use of such speech. Under Section 124(5) of the Representation of the People Act 1951, for instance, it is an offence for any candidate or his representative to make a "systematic appeal to vote or refrain from voting on grounds of caste, race, community or religion" or to use or appeal to religious and national symbols, such as the national flag, for furthering the candidate's electoral prospects. A challenge to this provision was turned down by the Supreme Court in 1954 on the basis that it did not constitute an unreasonable restriction on the right conferred by Article 19(1)(a).¹⁸

Yet another provision of the law which needs to be noted in the present context is Section 11 of the Customs Act 1962. Clause (1) of that section allows

9 *Raj Paul*, All India Reporter (1927) Lahore, 590.

10 *Ramji Lal Modi v. State of Uttar Pradesh*, All India Reporter (1957) Supreme Court, 620.

11 *P Ramaswamy*, 2 Criminal Law Journal of India (1962), 146.

12 *Shiv Ram*, Criminal Law Journal of India (1955), 337.

13 *Henry Rodrigues*, 2 Criminal Law Journal of India (1962), 564.

14 *Narayan Das*, Indian Law Reports, Cuttack Series (1952), 199.

15 *Kedar Nath Singh v. State of Bihar*, All India Reporter (1962) Supreme Court, 955.

16 *Kalicharan Mohapatra v. Srinivas Sahu*, Criminal Law Journal of India (1960), 497.

17 *Nand Kishore Singh v. State of Bihar*, All India Reporter (1986) Patna, 98.

18 *Jamuna Prasad v. Lachchi Ram*, All India Reporter (1954) Supreme Court, 686.

the government to make an order prohibiting either absolutely or conditionally the import or export of goods (including books and other publications) on being satisfied that it is necessary to do so for any of the purposes specified in clause (2). Among the purposes specified in the latter clause are: the maintenance of the security of India, the maintenance of public order and standards of decency or morality, the fulfilment of obligations under the Charter of the United Nations for the maintenance of international peace and security, the prevention of dissemination of documents containing any matter which is likely prejudicially to affect friendly relations with any foreign State or is derogatory to national prestige, and any other purpose conducive to the interest of the general public (emphasis added). This law became the focus of attention recently when it was used effectively to ban Salman Rushdie's controversial novel *The Satanic Verses*.

The state is also empowered to ban certain organizations, including organizations that may be engaged in espousing extremist religious views. Such a power is usually contained in laws that have as their stated objective the prevention of public disorder or the preservation of national unity and integrity. These laws have occasionally been used to ban fundamentalist religious or communal organizations which, in the opinion of the authorities, are engaged in "anti-national" or subversive activities. In 1990, for instance, nearly a dozen Islamic groups were declared illegal under Jammu and Kashmir's Criminal Law Amendment Act 1983 on the grounds that they were building up "an atmosphere of subversion and terrorism" and "challenging the sovereignty, integrity and unity of India". The groups included a women's social organization and a public welfare trust engaged in running 157 schools in Kashmir.

Finally, the Cinematograph Act 1952, which provides for prior-censorship of motion pictures, allows (through guidelines laid down under Section 5B) the banning or restriction of films which in the opinion of the censors contain "visuals or words contemptuous of racial, religious or other groups" or which "promote communal ... attitudes". This provision of law has occasionally been considered by the courts. In a 1988 case, for example, the Supreme Court was asked to adjudicate on a plea to ban a highly acclaimed TV serial *Tamas*, which dealt with the traumatic events surrounding the pre-independence partition of India, on the ground that it might inflame communal passions in the country.¹⁹ The Court, after carefully considering various relevant factors, including the educative value of the film, its sober tone and its fidelity to historical facts, refused to sanction the ban. In doing so it affirmed the principle laid down in an earlier case that any apprehension of the outbreak of religious or communal violence must be judged by the standards of "reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who smell danger in every hostile point of view."²⁰

The Supreme Court adopted a similar view in a 1989 case involving a Tamil feature film which questioned the wisdom of caste-based reservations in employment and education.²¹ Reversing a state high court decision to deny the film a certificate for unrestricted exhibition on the grounds that it might lead to violent demonstrations by members of the lower castes whose sentiments had been hurt by

the film, the Court held that denial of a film certificate would be tantamount to "a surrender to blackmail and intimidation". Freedom of expression, said the Court, cannot be held to ransom by an intolerant group of people. Any restriction of free speech "must be justified on the anvil of necessity and not [on] the quicksand of convenience or expediency".

It is conceivable that, with the proliferation of private video newsmagazines which often address sensitive communal issues with a forthrightness impossible on state-controlled television, questions touching upon the effect of censorship guidelines on free speech may arise with increasing frequency before the courts. The constitutional validity of pre-censorship of films itself has been upheld by the Supreme Court.²²

USE OF RESTRICTIVE PROVISIONS IN PRACTICE

The Indian government's record of the use of powers contained in the provisions outlined above is a mixed one. Law enforcement officials, at least in the years immediately following independence, were seen to show a healthy restraint in invoking these powers and to confine their use to the most pressing circumstances. Recent years have, however, seen a less discriminating approach. This is attributable in part to the increasing incidence of communal violence and indeed to other forms of tension nationwide even as resources for the law enforcement agencies became more and more stretched. Equally importantly, there has been a marked increase in political interference in the administration and greater exploitation of religious, communal and caste-oriented feelings for party political ends.

It needs to be stated of course that law and order in India is the joint responsibility of the state and central governments.²³ Each state maintains its own police force, but the federal government reserves the right to deploy centrally maintained paramilitary forces such as the Central Reserve Police Force (CRPF), the Central Industrial Security Force (CISF) and the Border Security Force (BSF) as well as the army in certain circumstances. There is a general consensus of opinion that recent years have seen a marked increase in the use of the army and paramilitary forces to deal with situations of civil unrest, often with less than satisfactory results, including infringements on freedom expression and peaceful assembly. An example frequently cited by human rights groups is that of Kashmir where the large-scale deployment of federal troops has been accompanied by sweeping curbs on media reporting.

To some extent, therefore, the uneven national record of the use of restrictive laws to curb incitement to religious and communal hatred is attributable to the manner in which those laws are implemented by the state governments, some of which have been seen to behave less responsibly than others. In the western Indian state of Maharashtra, for instance, there have been quite a few disturbing examples of the misuse of such laws. In May 1989 the Bombay police filed a complaint under Section 505(2) of the Penal Code against *The Sunday Observer* after that newspaper carried an article which suggested that a central investigation agency was examin-

19 *Ramesh C. Dalal v. Union of India*, All India Reporter (1988) Supreme Court, 775.

20 Vivian Bose J. in *Bhagwati Charan Shukla v. Provincial Government*, All India Reporter (1947) Nagpur, 1.

21 *S. Rangarajan v. P. Jagjivan Ram & Ors.*, Judgements Today (1989) (2) Supreme Court, 70.

22 *Khwaja Ahmed Abbas v. Union of India*, All India Reporter (1971) Supreme Court, 481.

23 Although public order falls within the State List in India's Constitution, criminal law, criminal procedure and preventive detention for reasons connected *inter alia* with the maintenance of public order are matters covered by the Concurrent List.

ing possible links between one of the city's senior police officers and some Sikh terrorists. Lawyers and human rights groups argued that, even if the story was incorrect, the proper course of action to follow would have been for the officer concerned to file a suit against the paper for defamation and, if he felt particularly strongly, a criminal complaint as well (for under Indian law defamation is actionable both as a tort and as a crime). The resort to Section 505 was, they said, a clear abuse of the law aimed at intimidating the media. The same state government has also on several occasions used powers under Sections 153A or 295A to ban books under pressure from parochially-minded groups even where the books in question could not reasonably be considered to pose a threat to public order.

Another charge commonly levelled against state governments in general concerns the alacrity with which they have resorted to preventive detention and other "special" laws, ostensibly to prevent communal clashes, but in reality to curb dissent. This is clearly delicate ground on which to tread, as shown, for example, by events in Ayodhya which, in 1991 became the epicentre of a series of violent clashes over the location of an ancient mosque. Although there is general agreement that the arrest of the leaders of that agitation in October 1991 was unobjectionable given their inflammatory speeches and the real danger of large-scale violence between Hindus and Muslims had the agitators been allowed to proceed unhampered, there is some truth to the charge that state governments have often been indiscriminate in the use of preventive detention laws to incarcerate political opponents and stifle dissent.

The state of Gujarat offers another good example. In 1990 no fewer than 5,292 cases were reportedly registered in the state under the Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA), many, if not most, of which were concerned with communal skirmishes which could easily have been dealt with under ordinary law.²⁴

In November 1990 the Punjab government used special legislation to detain without charge some 500 men and women who were scheduled to attend a meeting in the city of Anandpur to discuss peaceful political reform and the position of the Sikh community. It is believed that many of the 15,000 to 20,000 persons reportedly held under preventive detention or other special laws in Punjab at any given time have been detained as a result of their peaceful and legitimate exercise of freedom of expression.

As controversial as has been the use of preventive detention laws by state governments, even more controversial has been their resort to curfew powers, often to suppress dissent. Kashmir is an obvious example. Apart from the grave hardship caused to residents of that state by round-the-clock curfews that have sometimes continued for days, several allegations have surfaced pointing to the abuse of curfew powers to prevent free speech. On 21 May 1990, for instance, police reportedly started firing indiscriminately into a 10,000-strong procession of people who were accompanying the body of a prominent cleric through the streets of Srinagar. No fewer than 47 mourners were killed and over 200 wounded. This incident, as well as several others, was seen by human rights activists as indefensible, considering that there was neither any provocation nor any threat of imminent danger from the assemblage who were merely exercising their right to dissent and to assemble peaceably. It is a measure of the paranoia that characterizes the

government's response to the troubles in Jammu and Kashmir that Indian forces were reported to have arrested a large number of people in the state simply for listening to Radio Muzaffarabad broadcasting from Pakistan-occupied Kashmir in February 1990.²⁵

A more serious charge that has been levelled against both central and state governments is that they have, either through neglect, incompetence or deviousness, created the conditions in which communal violence thrives. Punjab provides a classic example. Before the agitation that triggered the current turmoil in the state, Hindus and Sikhs lived in perfect harmony. But when, by a combination of political chicanery and persistent unresponsiveness to the legitimate demands of its people, the Congress government of Mrs Indira Gandhi allowed the situation to develop into a state of near civil war, relations between the two communities changed dramatically. Mutual distrust became the order of the day, manifested in acts of intercommunal violence. This provided the perfect excuse for the government to impose ever increasing curbs on all freedoms, including the freedom of expression. The Punjab example is an especially noteworthy one because, unlike the case of Kashmir, the standard explanation of historical animosity between certain communities (e.g., Hindus and Muslims), trotted out by apologists for the government, does not hold water.

Arguably, seldom has the culpability of the Indian government in abusing laws restrictive of free speech under the pretext of containing religious hatred been more evident than in New Delhi's decision of 5 October 1988 to ban *The Satanic Verses*. The decision, contained in a notification under Section 11 of the Customs Act, was taken soon after some self-appointed leaders of the Muslim community (who, on their own admission, had not read the book) started a campaign demanding such a ban. It was, in the words of one leading commentator, an "abject and unthinking surrender ... to elements of intolerance and, worse, to phantoms of fear about the outbreak of communal violence."²⁶ The decision was taken without the slightest regard to the principles of natural justice in that neither the author nor any of the other affected parties were given an opportunity to present their views before or after the ban was imposed.

PROPOSALS FOR REFORM

It would be naive to imagine that the ills outlined above are susceptible to an easy solution. Many of the problems are so deeply rooted that nothing short of fundamental reform in social and economic policy can bring about meaningful results. Attempts at tinkering with the laws, in the absence of such fundamental reform, are doomed to failure, as the experience of the past forty years has so amply illustrated.

That is not to argue, of course, that there is no scope for legal reform. Indeed, a strong case can be made for narrowing the definition of some of the offences listed in "anti-terrorist" laws such as the Terrorist and Disruptive Activities Act, which have been criticized by most human rights groups as being too vaguely worded. Similarly, stricter guidelines should be laid down for the use of force, especially lethal force, by police and paramilitary forces and for the deployment of the army

²⁵ *Foreign Broadcasts Information Service*, USA (6 Feb. 1990).

²⁶ S J Sorabjee, "Ban on Rushdie's latest book - A pernicious precedent", *Indian Express* (14 Oct. 1988).

in crowd and riot control operations. These steps could go a long way towards correcting some of the more common abuses, provided of course that care is taken to achieve the right degree of precision in redrafting the laws and guidelines. As problematic as is vagueness in criminal legislation, over-precision also can be seriously counterproductive, leading as it does to a whole range of other, less manageable, concerns.

Legal reform will have to be accompanied by a root-and-branch overhaul of government policy and attitudes towards the security services. Few will deny that morale in the police and some of the paramilitary forces has seen a sharp decline over the years. As well as poor service conditions and increasingly unrealistic expectations of their role in a rapidly changing society, police officers have been subjected to growing political pressures in recent years. Recruitment policy too must take its share of the blame, for one of the major complaints in recent years has centred around the use of police and paramilitary forces drawn largely from certain communities, usually the majority community, in dealing with sensitive communal situations. A typical example is provided by the deployment in May 1987 of the predominantly Hindu Provincial Armed Constabulary (PAC) in the northern Indian city of Meerut where large-scale violence had broken out between Hindus and Muslims. On that occasion, members of the PAC allegedly committed mass carnage, leaving scores of Muslim men, women and children dead. Even if incidents such as these are not premeditated, it would help enormously if the government showed greater sensitivity to public perceptions by, for example, deploying forces drawn from a wider range of communal backgrounds in sensitive situations.

Important as the above mentioned reforms are, their role is at best palliative. A more honest approach to tackling the overall problem would focus on its root causes, namely, widespread lack of civic consciousness engendered by mass illiteracy and ignorance, and crippling poverty, which has all but sapped the basic norms of civilized behaviour in Indian society. Neither of these ills can be cured by "quick fixes"; both require imaginative long-term planning, considerable patience, and, above all, the political will to make unpopular decisions.

Education is an obvious priority. So far the noble constitutional goal of free and compulsory education for all children up to the age of fourteen (set forth in Article 45) has remained a distant dream. Even at the end of nearly half a century of political independence, no more than 36.2 per cent of the population is literate. Cynics have argued that the average Indian politician has a vested interest in keeping the electorate illiterate. Whether or not one subscribes to that view, there can be no denying that the record of successive governments in the matter of education has been abysmal. Few factors have contributed as much to the destructive manipulation by politicians of public opinion and attitudes, especially in sensitive areas like religion and caste, as widespread illiteracy.

As important as improving education, if not more so, is the eradication of poverty. It may be tempting to underestimate, or even dismiss, the role of affluence in combatting communal tensions, but there is ample evidence to suggest that poverty and the lack of economic opportunity form the most important factors in fomenting communal unrest. Successive Indian governments have ignored this basic truth, with calamitous consequences. For all the strident socialist rhetoric that has emanated from New Delhi and the state capitals over the years, India continues to be one of the fifteen poorest nations in the world, with an annual per capita income of less than US\$ 200 and with more than half its population living below a conservatively-defined poverty line. This, for a country endowed with a super-abundance of natural and human resources, is unforgivable. While there can be

room for debate about the relative merits of different economic systems to achieve a fairer distribution of wealth in the population, there can be little argument about the need to create that wealth in the first place. Unless the lot of the weakest section of Indian society - and this includes most minority communities - is significantly improved in the not too distant future, the prospects for peace and stability in the country as a whole are very bleak indeed. The malaise gripping modern day India was best summarized by a leading commentator thus: "We have too much government and too little administration; too many public servants and too little public service; too many controls and too little welfare; too many laws and too little justice."²⁷

To highlight these shortcomings is not to belittle or ignore the substantial success India has achieved in containing the various centrifugal forces that have been at work for decades in this incredibly diverse society. Indeed, as the introductory paragraphs of this paper conceded, that success is remarkable, considering India's generally close adherence to the basic norms of democratic pluralism. Without detracting from the importance of that achievement, this paper has attempted to point out, however cursorily, that there are nonetheless several areas which affect the realm of free speech where reforms are urgently needed if India is to live up to its commitments in both domestic and international law.

²⁷ N A Palkhivala, in *We, the People* (Bombay: Strand Book Stall, 1984), 5.

CRIMINALIZATION OF RACIAL INCITEMENT IN ISRAEL¹

Eliezer Lederman and Mala Tabory

Rabbi Meir Kahane, founder of the American Jewish Defense League (JDL), emigrated to Israel in 1971 and succeeded in sharpening and aggravating anti-Arab sentiments among his followers. He established a political-racial movement, Kach, whose platform advocates the expulsion of Arabs from Israel and the reestablishment of a theocracy, to be run solely by Jewish religious law. Kahane expounded these views in dozens of books, pamphlets, articles and posters, as well as in public appearances, and gradually gained a degree of popular support for his extremist racial views, culminating in his election to the Knesset in 1974 as a one-man party.²

This article will examine the political and legal responses to Kahane's racist provocations.

CONTESTED PARTICIPATION IN KNESSET ELECTION

The Central Election Committee in 1984 refused to place the Kach party on the ballot because it found that the "implementation of the party's principles would constitute a threat to the maintenance of the democratic regime in Israel and is liable to bring about the disintegration of the public order."

The Kach party appealed to the Israeli Supreme Court. The Court expressed its aversion to the party's racist and anti-democratic principles, but unanimously reversed the Central Election Committee and ordered the party's inclusion on the ballot.³ The Court reasoned that because political rights, especially the right to vote and be elected to office, are among the most basic rights, any infringement of them must have an appropriate legal foundation. Since Israeli electoral laws at that time did not disqualify a party's participation in elections because of its aims, tendencies or members' views, the Court concluded that the Election Committee had exceeded its authority in denying the Kach party's eligibility for the election.⁴

1 This chapter was adapted by the editor from an article of the same title published in 24 *Stanford J. Int'l L.* 55-84 (1987), with the permission of both authors and the journal. This version is the sole responsibility of the editor.

2 The Kach party received 25,907 votes - about 1.2 percent of the 2,073,321 votes cast in the 1984 elections. See Notice on Election Results in the Eleventh Knesset, 3082 *Yalkut Hapirumin* [Y.P.] (Government Notices) 3006 (2 Aug. 1984). [Ed. note: Rabbi Kahane was murdered in New York in December 1990.]

3 *Neiman v. Chairman of the Central Election Comm.*, 39(2) *Piskei Din* [P.D.] 225, 237 (Election App. 1984) (*Piskei Din* is the Israeli Supreme Court reporter). Because of the importance of the issue, a Supreme Court panel of five justices heard the case, rather than the usual panel of three.

4 The Court explicitly noted that the party's principles contradict "the world of Judaism ... [and] absolutely negate the basic tenets of individual and national morality, Israel's Declaration of Independence, and the foundation of contemporary enlightened democracies ...". *Id.* at 302 (opinion of Alon, J). Nonetheless, the Court determined that "so fateful and far-reaching a decision as denying someone's right to be elected to the Knesset for ideological motives must be taken with the approval of the majority of the public, through the Legislature, and in accordance with clear limits and definitions set by the Legislature." *Id.* at 303 (opinion of Alon, J) (emphasis omitted); see also *id.* at 286 (opinion of Ben-Porat, Deputy CJ); *id.* at 330 (opinion of Beisky, J); *id.* at 321 (opinion of Barak, J).

Chief Justice Shamgar had greater reservations concerning legal limitations on the right to be elected, even in the case of racist parties. He found that legitimizing the suppression of unpopular opinions

LIMITING KACH PARTY ACTIVITIES

After his election to the Knesset, Kahane intensified his provocative public statements, calling for the persecution of the Arab residents of Israel. He also began a series of visits to Arab communities with the stated aim of "persuading" the local inhabitants to emigrate from Israel to some other, Arab, country. The police were forced to intervene at times to quell the resulting confrontations between Kahane and angry Arab villagers.

In response to Kahane's violent fanaticism, the Israeli government and the Knesset adopted measures to limit Kahane's racial incitement on two complementary planes: internal parliamentary decisions to curtail Kahane's use of Knesset membership privileges, and external legislative acts to criminalize racial incitement and to prevent the election of future racist parties. The Knesset's measures affected increasingly large and overlapping segments of the population in a pattern which for analytical purposes, is easily analogized to the layers of a pyramid.

Deprivation of Parliamentary Privileges

The pyramid's narrowest layer had a singularly personal character. In an internal decision, the Knesset abrogated Kahane's parliamentary privilege of complete freedom of movement; Kahane's status reverted to that of any ordinary citizen. Relying on their broad power to preserve the peace, the police could now restrict Kahane from entering Arab towns and villages to espouse his platform, whenever the police considered this activity dangerous.

The Knesset also decided to deprive Kahane of his franking privileges. The Knesset took this additional step after discovering that Kahane was abusing his privilege by sending letters to Israeli Arabs advising them to give up their rights as citizens or to emigrate.

Restricting Parliamentary Activity

The second pyramidal layer, another internal administrative measure, widened restrictions on all Knesset members, including Kahane. The Knesset amended its procedural rules to allow the Speaker to reject debate on any bill which is "racist in its essence or denies the existence of the State of Israel as the State of the Jewish people."⁶

The Knesset passed this measure following another controversy over Kahane. Under Knesset procedure, a member may introduce a private bill for debate by submitting it to the Speaker for approval. Kahane proposed two racist bills: the first would have denied Israeli citizenship to all non-Jews, forbidden them from residing in Jerusalem and rescinded their right to vote and their eligibility to hold public

poses a greater threat to democracy than the threat posed by persons holding such opinions. He reasoned that "those who widen the circle of bodies who want to prevent participation in the electoral process increase the impact of such legislation on the continued existence and fulfillment of our basic democratic concepts." *Id.* at 278. The Chief Justice preferred to confront unpopular opinions rather than outlaw them. *Id.* at 277-79.

5 For a protocol of the debate and vote against Kahane, see 100 *Divrei Haknesset* [D.H.] 885, 11 *Knesset*, 36th mtg., 25 Dec. 1984.

6 Rules of Procedure of the Knesset Amend., § 134(C), 3271 *Y.P.* 772 (17 Nov. 1986).

office; the second sought to create separate public beaches for Jews and non-Jews, prevented non-Jews from residing in Jewish neighborhoods without the consent of the Jewish residents and forbade Jews from marrying or having sexual relations with non-Jews. The Knesset Speaker rejected these bills, which led Kahane to appeal to the Supreme Court.

The Court overturned the Speaker's decision, holding that under existing Knesset rules the Speaker and the Presidium could not prevent debate on a bill because of "a reservation, powerful as it may be, as to its political-social content," so long as the bill sought to implement the political aim for which that Knesset member had been elected.⁷ However, the Justices did not rule out the possibility of narrowing the power of individual Knesset members to "turn the legislative wheels" by amending the Speakers' powers so as to restrict debate on such proposals.⁸ Following political negotiations, the Knesset amended its rules and gave the Speaker the authority to reject racist bills.

Limiting the Possibility of Re-election

The third level of the pyramid, a formal legislative act, prevents racist parties from standing for election to the Knesset. An overwhelming majority of the Knesset voted in favor of amending the Basic Law to forbid a party from participating in elections "if its aims or deeds, explicitly or implicitly deny the existence of the State of Israel as the State of the Jewish people, deny the democratic character of the State, or incite to racism."⁹

This act reaches farther than the administrative measures mentioned earlier. First, on the practical level, while the previous measures were short-term responses to pressing political problems, the Knesset's amendment of the Basic Law demonstrates its intention to find long-term solutions to racism. The amendment applies to all potential candidates of present and future political parties, thus encompassing more people than did previous measures which only affected elected officials. Second, on the doctrinal level, the amendment shows the legislature's willingness to restrict the right to be elected to office and the right to freedom of political expression and association, which are fundamental in every democratic society. The enactment of these restrictions into the Basic Law, a chapter of Israel's future constitution, indicates the legislature's concern over racism's social and ideological destructiveness. Had the amendment been in force prior to the 1984 elections, the Kach party would not even have been permitted to put forward a candidate list.

Extending the Criminal Law Sphere

The fourth stratum, the pyramid's base, affects the entire population through the criminalization of certain modes of racist behavior.¹⁰ In 1986 the Knesset amended

the Penal Law to define racial incitement and the possession of racist material as criminal offenses punishable by three to five years' imprisonment.

Although the amendment to the Penal Law intends to advance and reinforce Israel's democratic regime, the restriction of individual rights raises a number of concerns. First, the criminal law may not be the proper means for regulating racist behavior. Second, limiting freedom of expression causes uneasiness, especially where the regulation takes the form of criminal sanctions. Furthermore, some religious groups expressed reservations that the criminalization of racial incitement might cast shadows on certain religious writings and prayers.

The amendment emerged as a hard-fought compromise that diluted the original bill so much that some who had supported the initial draft cautioned against the final version, and even Kahane, against whom the law was aimed, voted in favor of it. Under these circumstances, one may question whether the act makes a real contribution to existing legal structures combatting racism and whether it will reinforce the desired norms of behavior.

THE PROVISIONS OF THE 1986 ENACTMENT

The new sections of the Penal Law provide:

144A.

In this article - "Racism" means persecution, humiliation, vilification, the display of enmity, hostility, or violence, or the causing of animosity towards a community or parts of the population, all by reason of color or racial affiliation or national-ethnic origin;

"Publish" has the meaning assigned to this term in Section 2 and includes (1) distribution or public presentation of written or printed material, including drawings, pictures, photographs or images; (2) words spoken at a public place or at a public gathering or that can be heard in a public place; (3) radio and television broadcasts.

144B.

(a) A person who publishes anything with the purposes of stirring up racism is liable to imprisonment for five years.

(b) For the purposes of this section, it shall be immaterial whether or not the publication leads to racism and whether or not it is true.

144C.

(a) The publication of a correct and fair report of an action as referred to in section 144B shall not be regarded as an offense under that section provided that it is not done with the purpose of inciting to racism.

(b) The publication of a quotation from religious writings and prayer books or the observance of a religious ritual shall not be regarded as an offense under section 144B, provided that it is not done with the purpose of bringing about racism.

144D.

A person who has in his possession, for distribution, a publication prohibited by section 144B, with a view to stirring up racism, is liable for imprisonment of one year, and the publication shall be forfeited.

⁷ *Kahane v. Speaker of the Knesset*, 39(4) P.D. 85, 93 (High Ct. 1984) (opinion of Barak, J).

⁸ *Id.* at 94.

⁹ Basic Law: The Knesset § 7A, amended in Basic Law: The Knesset Amend. No. 9, 1155 Sefer Hahukim [S.H.] 196 (1985).

¹⁰ Penal Law Amend. No. 20, 1191 S.H. 219 (1986).

An information for an offense under this article shall only be filed with the written consent of the Attorney General.

THE SCOPE OF THE 1986 ENACTMENT

General

A preliminary examination of the wording of the new legislation reveals its restrictive nature and goals. In enacting the amendment, the Knesset did not intend, as did the drafters of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD Convention), to confront directly all forms of racism. Rather, the Knesset sought to limit the struggle to a specifically defined facet of the problem - racial incitement. The law creates two related offenses: a prohibition against publishing material with the purpose of inciting racism (Section 144B), and a prohibition against possession of any racist publication with intent to distribute it so as to bring about racism (Section 144D).

The publishing and possession offenses belong to the category of criminal offenses dealing with endangerment because of their preventive nature. Preventive prohibitions transform modes of behavior likely to cause the commission of serious offenses into independent breaches of the criminal law. In the present case, although the legislature primarily intended to prevent the possible negative influence of a racist publication on its audience, the legislature determined that possession of racist material with intent to distribute in itself constitutes a criminal offense. Similarly, for the crime of incitement, it is immaterial whether or not publication actually leads to racism. In short, racist behavior by listeners or readers and effect on the public are not constituent elements of the crimes of racial incitement and possession of racist material.

Enlarging the Scope of the Prohibition

The enactment prohibits the possession or dissemination of material with the purpose of racial incitement; it does not make the perpetration of an actual racist act into a criminal offense. However, combining the new enactment with general principles of criminal law may expand the scope of liability for inciting racism. For example, a person may incite racist behavior by persuading someone else to commit ordinary offenses based on racism, such as assault of a racist character. Under the law of complicity, if the person persuaded does commit the criminal act, both the inciter-persuader and the perpetrator-persuadee will bear responsibility as parties to the assault. Moreover, nothing prevents liability from attaching to the inciter-persuader for any other offense committed by the persuadee, even if the offense was "not committed in the way counselled or is not the offense counselled, so long as the facts constituting the offense actually committed are a probable consequence of carrying out the counsel."¹¹ Thus, liability for both the underlying offense and any related crimes may ultimately fall on the inciter-persuader, in addition to his newly enacted responsibility for uttering remarks that incite racism.

¹¹ Penal Law, 1977 § 29, L.S.I. (special volume) 16.

The combination of the new enactment and criminal conspiracy law further expands liability for racial incitement. The Penal Law states that "[a] person who conspires with another to effect an unlawful purpose [or] to effect a lawful purpose by unlawful means" is liable to imprisonment for two years. An otherwise lawful but undesirable, act perpetrated by one individual could become a conspiracy if two or more individuals agree to perpetrate it. The new enactment may place racist conduct within the category of acts that one can conspire to commit. Therefore, although the new law does not criminalize the actual racist act, the state may prosecute both the inciter and the perpetrator for their agreement to undertake the act.

Effectiveness and Clarity of the Prohibitions

Notwithstanding possible expansion of an inciter's liability for underlying racist conduct through general principles of criminal law, the legislature evidently wanted to limit the new law's scope and usage. For example, realizing that abuse of the new enactment could curtail both freedom of expression and association, the legislature justifiably restricted prosecutions under the new law to those to which the Attorney General consents in writing. Similar written consent limitations are included in other Israeli law. The legislature's inclusion of additional restrictions in the law against racial incitement, however, may diminish the law's effectiveness or at least require reference to general principles of penal law for clarification. Moreover, the exceptions to racial incitement listed in Section 144C appear unnecessary in view of the legislature's narrow definition of the prohibitions themselves.

The definition of racism. The new law's definition of racism (in Section 144A) raises two problems of degree: the definition includes only racist behavior against groups, not against individuals; and the definition ignores the milder but more pervasive manifestations of racial discrimination. The problem of confining the definition of racism to behavior directed against "a community or parts of the population" may be illusory. The law could not be interpreted to allow racial incitement against individuals because every racist act against an individual is conduct against a racial group. If the inciter directs a racist remark against the individual because of the individual's association with a particular group, the remark constitutes a racist act toward an entire community. Thus, the statement "Don't elect X because of his skin color Y" is equivalent for the law's purposes to the statement "Don't elect people with skin color Y," because the substitution of Y by any other individual community member will not change the intent of the first statement. Both statements incite racist acts against a community, thereby falling within the law's reach.

The other problem is more troublesome. The law prohibits incitement of only the most overt and blatant forms of racism by defining racism as "persecution, humiliation, vilification, the display of hostility, enmity or violence, or the causing of animosity" on the basis of race, color or national-ethnic origin. The definition ignores racism's less extreme and more widespread manifestations and may exclude instances of racist discrimination which arise in hiring practices, business dealings or in rendering services. Although common forms of discrimination may appear less acute, they constitute the core of the racial problems.

Incitement of severe discrimination against an individual based on his ethnic origin, race or religion may result in humiliation or degradation of the individual

and fall under the new law. For example, asking hotel owners to exclude members of a certain race may constitute an offense within the law's definition of racism. However, not every act of discriminatory incitement objectively involves the humiliation or degradation of a community, and not every act of severe discrimination originates in a subjective purpose to humiliate or degrade a community. Although asking landlords for preferential treatment for members of their own religion because of a moral responsibility to their co-religionists discriminates against members of other religions, such a statement might not violate the new law because it neither carries with it the required objective act of degradation nor the necessary subjective intent of inciting racism.

The new law's definition of racism is more restrictive than the definition of racial discrimination in Article 1 of the CERD Convention. Along with other parties to the Convention, Israel committed itself to "eliminat[e] racial discrimination in all its forms," and defined racial discrimination to encompass "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin" The Convention's definition includes the subtle forms of racial discrimination that fall outside the scope of the new law. A comparison of the international and Israeli definitions of racism, though, does not accurately reveal the new law's restrictive nature because the definitions derive from different contexts. While the Convention naturally sought to be all-inclusive and shaped its definition accordingly, the drafters of the new enactment defined racism for the more limited purpose of determining modes of behavior which are severe enough to warrant penal sanctions. Neither the Convention nor common sense require that "racial discrimination in all its forms" be combatted through the imposition of criminal liability.

The *mens rea* requirement. The mental element required for the offenses of racial incitement and possession of racist materials demands careful examination. The legislature defined the prohibition against incitement as "publish[ing] anything with the purpose of inciting to racism" (Section 144B), and the prohibition of possession as "possession, for distribution, [of] a publication ... with a view to stirring up racism" (Section 144D). The expressions "with the purpose" and "with a view" requires that a specific, high level of intent direct the act of publication or possession.

A 1987 Supreme Court decision on Kahane's freedom of speech reveals disagreements between the justices regarding the required *mens rea* for racial incitement. In overturning the Israeli Broadcast Authority's refusal to broadcast Kahane's views and activities unless they were "clearly newsworthy,"¹² the Court considered *in dicta* whether the Broadcast Authority may prospectively prevent broadcast of a racist speech where the speech would be criminal under the new enactment. Justice Barak found that the Broadcast Authority may exercise prior restraint only where the racist speech creates a "near certainty of a real injury to the public order".¹³ Although Justice Barak explicitly reserved opinion on whether the broadcast of a racist speech would violate the new law, his overall analysis of the issue and his reference to the defense of publishing "a correct and fair report of an

action" indicates his belief that the Broadcast Authority would not commit an offense by broadcasting such a speech¹⁴. Justice Barak apparently believed that knowledge that a racist speech will be broadcast does not constitute the necessary *mens rea* for racial incitement; he would interpret the expression "purposely" to include only direct intent.

Justice Bach, on the other hand, disagreed and made the distinction that in broadcasting an edited report, instead of a live report, the Broadcast Authority knowingly includes the racist statement and "makes itself an accomplice"¹⁵ to racial incitement. Justice Bach would find such knowledge sufficient to form the *mens rea* for racial incitement and would preclude the defense of publishing "a correct and fair report" because the defense is only available for publications "not done with the purpose of bringing about racism."¹⁶ Thus, Justice Bach interprets the term "with the purpose" to include indirect intent proven by the knowledge rule. Justice Bach's broad interpretation of the term "purposely" does not suit the enactment's explicit language as well as does Justice Barak's interpretation, however. By concluding that knowledge is sufficient to prove purpose, Justice Bach's interpretation would significantly reduce a newspaper's or broadcaster's ability to report racist incidents since most journalism is comprised of edited reports.

The high level of *mens rea* required by the new enactment seems less problematic for possession of racist publications because the prosecutor can prove the crime's mental basis by means of the factual presumption. After a thorough factual investigation, courts may presume that the accused intended the natural result of his acts because the expression "with a view to stirring up racism" is similar to other terms that express the requirement of specific intent. Successful prosecution of the crime of racial incitement will be more difficult because of the necessity to prove purpose to incite racism. The courts may not reject outright the possibility of using the factual presumption to show purpose. However, since the requirement of purpose for racial incitement is so unique and exacting, the courts will presumably use the utmost caution when invoking the factual presumption.

The substantive and evidentiary problems involved in analyzing and determining the existence of the mental state necessary for the crime of racial incitement may create a substantial barrier to enforcement of the new enactment in the Israeli judicial system.

Racist Organizations

The new enactment does not explicitly mention racist organizations. The CERD Convention mandates that signatories shall "declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law."¹⁷ The Convention and Israeli law differ in that the Convention prohibits both the existence of and participation in racist organizations, while Israeli law only criminalizes the conduct of racial

¹⁴ *Id.* at 75.

¹⁵ *Id.* at 75-77.

¹⁶ *Id.*

¹⁷ CERD Convention, Art. 4(b).

¹² *Kahane v. Executive of the Broadcasting Authority*, 41(3) Piskei Din 255, H.C. 399/85, slip op. at 3 (High Ct. July 27, 1987).

¹³ *Id.* slip op. at 54.

incitement, not the racist organization itself. The new enactment apparently does not prohibit the existence of a racist organization which neither disseminates material with the intent to incite racism nor possesses such publications for distribution to bring about racism. Moreover, the new law does not expressly prohibit passive membership in an organization that incites racism.

Nevertheless, the difference between the Convention and the new enactment is significantly smaller than exists in theory. A racist organization would encounter tremendous difficulties receiving legal registration in Israel. The registration procedures for non-profit societies and for non-profit companies require a detailed report of the society's goals in its instruments of incorporation.¹⁸ Israeli law empowers registrars to refuse registration for any entity, "if any of its objects are illegal."¹⁹ A request to incorporate an organization with the express purpose of promoting racial incitement or for possession of racist material for distribution would presumably be denied.²⁰ Moreover, should the incorporation of such a non-profit society or company somehow succeed, its unlawful purpose may serve as a cause for its dissolution by court order, even if the association has not yet begun to implement its aims.²¹

THE CONTRIBUTION OF THE NEW ENACTMENT TO THE STRUGGLE AGAINST RACIAL INCITEMENT

The public and parliamentary debates that accompanied the new law's genesis explain its cautious and restrictive character. The law's features render it more effective against severe, direct and clear-cut cases of racial incitement than in offering satisfactory solutions to more complex and ambiguous instances of racism. Under these circumstances, the question arises whether the new enactment contributes significantly to the struggle against racism.

The contribution of the new enactment to the substantive law of racial incitement is relatively modest.²² Long-standing provisions of the criminal law concerning defamation and sedition addressed racial incitement against groups prior to the new law's adoption. While the defamation and sedition laws were not intended to deal exclusively with racism, their broad scope certainly encompasses racial incitement; in practice, however, these laws have never been so applied.

The Defamation Law authorizes the Attorney General to bring a criminal action for libel where the publication is undertaken "with intent to injure" an individual or a group.²³ The statute covers aspects of racial incitement by defining

defamation as the publication of anything which may lower an individual or group in the estimation of others or expose them to hatred, contempt or ridicule. The Defamation Law further prohibits publication that may bring a group into disrepute because of acts, conduct or qualities attributed to it or because of its origin or religion.²⁴ The Penal Law provisions against sedition provide a second category of acts that covers aspects of racial incitement. The Penal Law defines "sedition" as any act that "promote[s] feelings of ill-will and enmity between different sections of the population"²⁵ and authorizes the Attorney General to prosecute anyone who publishes, prints, imports, reproduces or possesses any publication of a seditious nature.²⁶

On the public and political level, however, the new law has reinforced anti-racist ideology and influenced modes of behavior through its normative proscription against racism. As an educational-ideological tool of the legal system, the criminal law seeks to steer individual actions so as to ensure society's continuity and to safeguard its values, way of life and opportunities for development. If the message against racism in the defamation and sedition laws was general and obscured, the new law clarifies it explicitly with respect to racial incitement. Non-legal social institutions, especially educational and informational institutions that underline social trends, may see the new enactment as a symbol and banner, despite its shortcomings on the doctrinal and practical levels.

18 See *Amutot* Law, 1980 § 2, 34 L.S.I. 239 (*amutot* are non-profit societies); Companies Ordinance §5, 1983 L.S.I. 764 (new version) (in Hebrew).

19 *Amutot* Law, 1980 §3, 34 L.S.I. 239; see also Companies Ordinance, 1983 §17, 1983 L.S.I. 761 (new version) (in Hebrew).

20 Section 3 of the *Amutot* Law also forbids registration of a non-profit society "if any of its objects negates the existence or democratic character of the State of Israel." *Amutot* Law, 1980 §3, 34 L.S.I. 239.

21 Furthermore, if the organization or its controlling officers incite racism or possess racist material, their actions would constitute independent and separate offenses for themselves and for the organization.

22 In this context, see Lerner, "Israel Adopts Bad Law Against Racism," 20 *Patterns of Prejudice* (Oct. 1986), 52.

23 Defamation Law, 1965 §§4, 6, 19 L.S.I. 254-55.

24 *Id.* at §1(1)-(2), (4), 19 L.S.I. 254.

25 Penal Law, 1977 § 136(4), L.S.I. (special volume) 45.

26 *Id.* at §§ 134(a)-(c), 135, L.S.I. 44-45.

Chapter 21

LEGISLATION AGAINST RACIST INCITEMENT IN ISRAEL:
A 1992 APPRAISAL

Joshua Schoffman

Almost seven years have passed since the Israeli Knesset amended the Basic Law: The Knesset (hereafter "Knesset Basic Law") to prevent racist parties from participating in parliamentary elections, and the law criminalizing racist incitement is now in its sixth year.¹ It seems appropriate at this time to assess these two laws and to inquire whether they have achieved their stated objectives.

It is immediately obvious, upon review of the record, that the efficacy of each of the two laws is widely disparate. While the election law achieved exactly what it was meant to do, at least with regard to racist parties, the racist incitement law has not been used at all to combat racist speech.

RESTRICTIONS ON RACIST POLITICAL PARTIES

Section 7A of the Knesset Basic Law was amended in the wake of the election to the Knesset of Meir Kahane, leader of the overtly racist Kach party.² The attempt by the Central Elections Committee in 1984 to disqualify Kach without specific legislative authority, was thwarted by the Supreme Court, which accepted the appeal of Kach, along with the appeal of the Democratic List for Peace (disqualified on other grounds). The 1985 amendment was meant to supply the missing statutory authority.

The first test of the new law came in 1988 when the elections for the Twelfth Knesset were held. The Central Elections Committee ruled, as it had in 1984, that the Kach party could not participate in the election. This time, however, the decision was grounded on Sections 7A(2) and (3) of the Knesset Basic Law which disqualify the candidate list of any party whose aims or deeds include incitement to racism or the denial of the democratic character of the State of Israel. Kach appealed to the Supreme Court, and the appeal was rejected by a unanimous five-judge panel. The Court's assessment of the racist nature of the Kach party was no different than it had been four years earlier when the Court roundly condemned the racism inherent in the Kach platform. Rather, the decision to uphold the disqualification of the party, contrary to the previous decision in 1984, was based on the change in the law. Chief Justice Shamgar, writing for the Court, held:

Our clear conclusion is that the [Kach] list was rightly disqualified by the Central Elections Committee, since its publications, speeches, proposals and activities include both racist incitement and the denial of the democratic nature of the State, as stated in section 7A. ...

Its aims and actions are patently racist: systematic, inflammatory actions along national-ethnic lines which cause hatred and strife, the

call for violent denial of rights, systematic and wilful humiliation of certain parts of the population, defined by nationality and ethnic origin and their degradation in ways that are frightfully similar to the worst examples of what the Jewish people have experienced - all these are enough, in light of the evidence presented to us, to justify the finding of racist incitement.³

The ban on racist parties brought with it a similar provision regarding candidate lists which deny "the existence of the State of Israel as the State of the Jewish People" (Section 7A(1) of the Knesset Basic Law). This served as the basis for another attempt to disqualify the predominantly Arab Democratic List for Peace (DLP). This attempt failed, but not by much. The Central Elections Committee, one day after its ruling on Kach, decided by a vote of 20 to 19 not to disqualify the DLP under Section 7A(1). Eleven of the dissenting members appealed to the Supreme Court. A sharply split Court dismissed the appeal.⁴ Three justices on the panel of five held that since the platform of the DLP calls for the creation of a Palestinian state alongside the State of Israel, the appellants had not met the burden of showing, by clear and convincing evidence, that the list crossed the line between legitimate, though extremist, political views and those that undermine the existence of the State and which are grounds for disqualification. One of the justices in the majority noted that he reached this conclusion with much hesitation, and pointed out that since the Central Elections Committee had ruled in favour of the DLP, after serious deliberation, only the most weighty considerations should bring the Court to intervene in that decision.⁵ It is not unlikely that if one vote on the Committee had shifted to the detriment of the DLP, the Supreme Court would have let that decision stand, and the DLP, along with Kach, would have been prevented from standing for election.

Section 7A did, then, serve the purpose of ending the one-term tenure of Meir Kahane and his Kach Party and removing from Israel's Parliament the most overt and repugnant expressions of racism. There was, of course, a price to be paid. Aside from the objection that can be raised to any barriers which limit the representation of part of the population, Section 7A, born of political compromise, included the first legislative pronouncement that Israel is the "State of the Jewish people." This clause seems to be more far-reaching than the common usage of the term "Jewish State"; if Israel is the State of the Jewish people, one can infer that it is not the State of its non-Jewish citizens. This provision came very close to disqualifying the DLP, in the name of "even-handedness", after the removal of Kach from the ballot.

It can also be argued that the banning of an overtly racist party helped legitimize more subtle forms of racism. Meir Kahane, the sole representative of Kach in the Eleventh Knesset, was a pariah in the lawmaking body. His bills, reminiscent of the notorious Nuremberg Laws, were not put on the Knesset agenda. Virtually all members of the Knesset walked out when Kahane took the floor, and no major party would consider him an acceptable coalition partner. When Kach was disqualified, a new party, Moledet, entered the Twelfth Knesset with two members. Despite its platform which calls for the transfer of the Arab population

1 See the preceding chapter by Eliezer Lederman and Mala Tabory for an extensive discussion of these laws and the events which led to their adoption.

2 For the relevant language of Section 7A as amended, see the text accompanying note 8 in the preceding chapter.

3 Election Appeal 1/88, *Neiman v. Central Election Committee*, 42(4) Piskei Din 177 at 197.

4 Election Appeal 2/88, *Ben Shalom v. Central Elections Committee*, 43(4) Piskei Din 221.

5 *Id.* at 251.

(the platform is careful to speak of "voluntary transfer" or transfer agreed upon between Israel and Arab states), Moledet joined the ruling coalition and its leader was appointed to be a Minister without Portfolio.

The next test of Section 7A is expected before the elections for the Thirteenth Knesset in June 1992. The son of the assassinated Meir Kahane has announced that he will head a list which will follow in the footsteps of Kach, called Koach (a word meaning "power", and also an acronym in Hebrew for "Kahane Hai" - Kahane Lives). Lawyers for the "new" party are advising it concerning the drafting of the platform and the rhetoric of the party leaders, to ensure that the list does not run afoul of Section 7A. It remains to be seen whether the Central Elections Committee will "lift the veil" and view Koach as the alter ego of the Kach, and disqualify it for the same reasons. Whichever decision is reached, the Supreme Court will almost surely be called upon again to make the final determination.

While Section 7A of the Knesset Basic Law dealt only with the approval or disapproval of candidate lists in Knesset elections, the Knesset recently took a further step to ban racist parties altogether. On 8 March 1992, the Knesset passed the Political Parties Law, 5752-1992.⁶ Under this law, political parties must register with the Registrar of Parties. Section 5 of the law states:

5. A party will not be registered if there is in its aims or actions, explicitly or implicitly, one of the following:

- (1) the denial of the existence of the State of Israel as a Jewish and democratic state;
- (2) incitement to racism;
- (3) a reasonable basis for the conclusion that it will serve as a cover for illegal activity.

It is interesting to note that in the bill brought to the Knesset floor by the Law and Constitution Committee, there were two versions of Section 5; one copied Section 7A of the Knesset Basic Law exactly, while the other left out incitement to racism altogether.⁷ In the end, racist incitement was included as a ground for not registering a party, while the problematic phrase "State of the Jewish people" was replaced by the description of Israel as a "Jewish and democratic State", a characterization more in line with the principles of the Israeli Declaration of Independence.

LAW AGAINST INCITING TO RACISM

In contrast to Section 7A of the Knesset Basic Law, Section 144B of the Penal Law, which created the offence of "inciting to racism", has remained, for all intents and purposes, a dead letter.⁸ A review of reported decisions and press reports, together with an informal inquiry to the office of the State's Attorney, have failed to uncover a single case in which charges were brought under Section 144B. It seems that there has been only one case in which a person was convicted under that section, after being charged with a more serious offence and entering a plea bargain. Remarkably, though perhaps not surprisingly, the defendant was an Arab, accused of distributing anti-government propaganda. Wa'il Abd el-Gani Omri was arrested on 15 January

1991, on the eve of the Gulf War, for handing out leaflets in the Arab city of Nazareth. The leaflets denounced the United States and Israel as its ally for war-mongering against Iraq, and promised that the glorious nation of Iraq and the Arab people would cut off the hand of the imperialists. The leaflets also accused the Israeli Mossad of infiltrating the PLO and killing leaders of that organization. Omri was charged with sedition and with expressing support for a terrorist organization. After two weeks of pre-trial detention and several months of partial house arrest, the defendant agreed to plead guilty to incitement to racism. The judge, in imposing a sentence of six months of community service in lieu of imprisonment, and a one year suspended sentence, wrote that the accused had crossed the line that divides protected speech from incitement, particularly since the leaflets were handed out at a time when war was imminent. The judge made no reference to racism, however, and no attempt was made to make a connection between the leaflets and the offence to which the accused pleaded guilty.⁹

ASSESSMENT OF ANTI-INCITEMENT LAW

The complete absence of prosecutions under Section 144B against the Jewish racists that the law was intended to restrain, and the ironic utilization of this section in the prosecution of an Arab who distributed an anti-government harangue, are telling. I would argue that this demonstrates not a lack of resolve by the prosecuting authorities, but rather the shortcomings of the law itself, which was ill-advised unnecessary and counterproductive. While the law as passed was poorly worded even a more carefully drafted law of this sort would not have significantly advanced the goal of combating racism.

What the law against incitement did was to create the illusion of progress in the campaign against racism. The energies of the progressive forces which were horrified by the rise of Kahanism were channelled to the advocacy of a law against racist speech. The law was passed by the Knesset with the knowledge that it would not affect racist action, such as discrimination in housing and employment, which is a serious problem in Israel today. A bill was introduced in the Knesset to provide those who suffer from employment discrimination on the basis of race or national origin the same remedies afforded to those who are the victims of sex discrimination.¹⁰ Though no significant objection to the bill has been raised, it has been languishing in committee for years, and the Twelfth Knesset adjourned without acting on it. Once the Knesset had been seen to strike a blow against Kahanism the every-day problems of discrimination could wait.

Trying to implement Section 144B would probably only have made matters worse. Not only would prosecutions have given the racists an additional platform from which to air and defend their views, but it is quite likely that the courts would have given the law a narrow interpretation, on free speech grounds. An acquittal of a charge of racist incitement would give the impression of official legitimization of the espoused views.

The efforts to fight racism should be concentrated on racist and discriminatory actions and not on racist speech, no matter how objectionable. Legal action against

⁶ Sefer HaHukim 5752 (1992), 190.

⁷ Hatsaot Hok (Draft Bills) 5752 (1992), 106.

⁸ For the text of Section 144B, see the preceding chapter.

⁹ Criminal Case (Nazareth) 19/91, *State of Israel v. Omri*, unpublished decision (23 May 1991).

¹⁰ The Association for Civil Rights in Israel was active in drafting the bill and continues to urge adoption.

racist speech cannot be expected to eradicate or diminish racism. In fact, the toning down of racist rhetoric makes those ideas more acceptable to parts of the community to whom the cruder forms of racist incitement are objectionable. This seems especially true in Israel, where ideas and proposals which invite comparison to Nazi ideology are condemned and rejected almost unanimously, while forms of racism which speak not of racial inferiority but of political expediency can find receptive audiences. Given the very limited effect, if any, of laws against racist speech, the overriding principle of free speech should prevail.

It should be noted that the opinion expressed above is not that of the Israeli human rights community as a whole. Most human rights activists and organizations supported the bill against racist incitement and, while not all are pleased with the version finally passed, they have not called for its repeal. The Association for Civil Rights in Israel (ACRI), while continuing to emphasize the need to combat both private and governmental discrimination (and itself drafting laws and bringing lawsuits to do so), supported the bill. Although members and officials of the organization were split on the issue, the majority felt that racist speech is not worthy of constitutional protection and that the symbolic value of legislation against racist incitement, showing the repudiation of those ideas by the nation's supreme representative lawmaking body, was reason enough to enact the law.

An appraisal of the racist incitement law depends then on one's view of the advisability of that law in the first place. Those who view its importance in terms of its symbolic value may be satisfied that its purpose has been served, even if it fell into disuse immediately upon its enactment. Those who opposed it to begin with can point to its record of non-implementation as proof that it at best is ineffectual and at worst could lend itself to abuse.

Chapter 22

LAWS AGAINST RACIAL AND RELIGIOUS HATRED IN LATIN AMERICA: FOCUS ON ARGENTINA AND URUGUAY

Stephen J Roth

OVERVIEW

The countries of the Latin America sub-continent have been rather late in adopting legislation curbing incitement to racial hatred. In other parts of the world countries introduced such laws in the 1960s or 1970s¹, many as a result of the adoption of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD Convention) in 1965 and the International Covenant on Civil and Political Rights (ICCPR) in 1966. In Latin America, the first laws expressly directed against race hatred were passed in the 1980s.

The reasons for this different approach to the issue of racism and religious intolerance are manifold. One is that Latin America - partly because of its almost complete linguistic uniformity - has for a long time perceived itself as a monolithic or at least a monocultural, society. This was never quite true; minorities - both religious and ethnic - existed, even if they did not have the decisive impact on society which they have had in Europe. But responsiveness to their needs was slow and notions like religious ecumenism and cultural pluralism came late. A second reason is that many groups which in Europe might have been treated as "minorities" whether because of their lesser numbers or their non-dominant positions, in Latin America were treated as "indigenous people", whose rights were approached in different ways.² Latin American states, being countries of immigration, were generally reluctant to accept the concept of "minorities" and adopted instead the notion of a *crisol de razas* (melting pot). However, probably the most important reason for the delay is that civil liberties in general have been realized more slowly in Latin America than in Europe, at least in the period since the founding of the United Nations.

Brazil adopted legislation in 1985, Cuba in 1987, Argentina in 1988, and Uruguay in 1989. Chile, Mexico and Venezuela have considered specific legislative proposals at different times.³ Following is a brief discussion of the laws against religious and race hatred in Argentina and Uruguay.

ARGENTINA

As part of the democratization of the country after the defeat of the military junta the Argentine Republic adopted the following law on 3 August 1988:

Article 1. Whoever arbitrarily prevents, obstructs, restrains or in any way undermines the full exercise on an equal basis of the fundamental rights and prerogatives recognized by the National Constitution, will be

1 For instance, the United Kingdom introduced race hatred laws in 1965, Canada in 1966, Germany in 1970 and France in 1972.

2 For a discussion of the current status of indigenous people see N Lerner, *Group Rights and Discrimination in International Law*, 99-114 (1991).

3 Report by Danilo Türk and Louis Joinet, UN Doc. E/CN.4/Sub.2/1991/9, para. 32, excerpted in Part II of this volume.

obliged, at the request of the injured party, to desist from the discriminatory act or to cease carrying it out and to pay damages for the moral and material prejudice caused.

This article is considered particularly to apply to discriminatory acts or omissions carried out for such reasons as race, religion, nationality, conviction, political or trade-union opinion, sex, economic position, social status or physical characteristics.

Article 2. Any offence punishable under the Penal Code or its by-laws will be increased by a minimum of one third and a maximum of half of the penal scale applicable to such offence if it is committed for the persecution or because of the hatred of a race, religion or nationality, or for the purpose of destroying in whole or in part any national, ethnic, racial or religious group. In no case may the legal maximum for the type of punishment in question be exceeded.

Article 3. Those who participate in an organisation or spread propaganda based on ideas or theories of superiority of one race or of a group of persons of a particular religion, ethnic origin or colour for the purpose of justifying or promoting racial or religious discrimination in any form will be punished by a prison term of one month to three years.

The same punishment will be incurred by anyone who in whatever way encourages or incites to persecution or hatred of a person or group of persons for reasons of their race, religion, nationality or political views.⁴

The law deals both with discrimination (Article 1) and with propagation of and incitement to hatred (Article 3). An interesting feature of the law is Article 2, a typical "enhancement clause" (providing for enhanced penalties for crimes motivated by hostility directed against a particular group). This type of provision is not included in most European race laws but is becoming increasingly popular in the United States where traditional forms of hate-speech legislation (curbing speech based on the expression's content) are unconstitutional.⁵

In an obvious reference to the Genocide Convention, the enhancement of punishment for ordinary crimes applies in particular if they are committed "for the purpose of destroying in whole or in part any national, ethnic, racial or religious group".⁶

Article 3 is clearly based on Article 4 of the CERD Convention. It incorporates:

- a) Article 4(a)'s prohibition against spreading "ideas based on racial superiority or hatred" but, interestingly, adds ideas based on religious superiority;
- b) Article 4(b)'s prohibition against participating in organizations engaged in such activities;
- c) a prohibition against encouragement or incitement "to persecution or hatred" - a formula that goes even beyond the wording of the CERD Convention.

4 See S J Roth, "Legal Developments: Argentina," 22 *Patterns of Prejudice* 17-19 (No. 3, 1988).

5 See Ronna Greff Schneider's discussion of United States statutes and jurisprudence elsewhere in this volume.

6 Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (78 U.N.T.S. 277).

Contrary to many similar laws in other countries, these prohibitions are not made dependent on the "intent" of the hatemonger, nor on the likely result of his action, which tend to vitiate the force of many such laws elsewhere.

Though the CERD Convention clearly served as a model, a fundamental divergence is the Argentine law's inclusion of religion among the grounds of prohibited discrimination and hatemongering. This may reflect the influence of the American Convention on Human Rights (ACHR) which prohibits "advocacy of national, racial or religious hatred". Some drafting flaws, however, are evident in the way the prohibited grounds change from article to article. Thus, "discrimination" for purposes of Article 1 applies particularly (but not exclusively) to race, religion, nationality, conviction, opinion, sex, economic and social condition and even physical characteristics. Article 3's clause on "incitement to persecution or hatred" is limited to race, religion, nationality and political views. The grounds for enhanced criminal penalties under Article 2 are restricted to race, religion and nationality but, where an offence aims at genocide, "ethnic group" is added. Finally, in regard to "theories of superiority" only race, religion, ethnic origin and colour are mentioned.

This inconsistency is not easy to understand but it may in part be due to the different wordings of the various international instruments from which some of the formulas were obviously borrowed. Certain categories of discrimination like "descent", which appears in the CERD Convention, or "language" and "social origin" (clearly not the same as "social status" used in Article 1) which are contained in the Universal Declaration of Human Rights and in the ICCPR, are absent. On the other hand, this is probably the first law which explicitly prohibits discrimination on grounds of "trade-union opinion" or "physical characteristics" (though in regard to the latter there exist labour laws which outlaw discrimination against disabled people and even introduce affirmative action in their favour). Some of the unusual categories included in the Argentine law may reflect the influence of the ACHR which, in its first article, ensures protection against discrimination on grounds, *inter alia*, of "political or other opinion, national or social origin, economic status, birth or any other social condition."

The adoption of the law was greatly expedited by the example of the Province of Formosa. On 11 May 1988, the legislative body of that Province passed its own anti-race hatred law (Law 741) and at the same time adopted Declaration 295 which called on the Chamber of Deputies of the National Congress to adopt speedily the federal anti-discrimination law.

URUGUAY⁷

Uruguay has constitutionally ensured the equality of all its citizens since the republic's independence, from the first constitution of 1830 to subsequent constitutions of 1918, 1934 and 1951, up to the present one promulgated in 1967.

Uruguay's Criminal Code includes a provision, Article 149, which makes incitement to class hatred an offence against public order, punishable by a fine. The term "class" has been interpreted as applying to any plurality of persons who have a collective identity; consequently "class" in this context has been construed to include racial groups. Furthermore, Article 6 of Decree-Law No. 10,279 of No-

7 This section is largely based on the author's article, "Legal Developments: Uruguay," 23 *Patterns of Prejudice* 40-42 (No.2, 1989).

vember 1942 bans participation in racist organizations, making it an offence to "promote, constitute, organize or lead associations, entities, institutions or groups tending to promote or impose racial strife or hatred". Uruguay ratified the CERD Convention by Law 13,670 of 1 July 1968.

Yet various sectors of the population, in particular the Jewish community, were of the opinion that these laws did not sufficiently protect against racist incitement. Thus, new provisions were introduced in December 1988 primarily at the instigation of the Jewish community and passed as Law No. 16,048 on 6 June 1989 by a unanimous vote of the Chamber of Representatives. The law added Articles 149.2 and 149.3 to the Criminal Code and amended Article 149 as follows:

Article 149 Instigation of disobedience of the Laws

Whoever publicly or by any means suitable for dissemination instigates the disobedience of the laws shall be punished by a fine of 29 to 500 UR.

Article 149.2 Incitement to hatred, contempt or violence against specified persons

Whoever publicly or by any means suitable for dissemination incites any person to hatred or contempt or any form of moral or physical violence against one or more persons by reason of the colour of their skin, their race, religion, or national or ethnic origin, shall be punished by imprisonment of between three and eighteen months.

Article 149.3 Commission of acts of hatred, contempt or violence against specified persons

Whoever commits acts of moral or physical violence, of hatred or contempt against one or more persons by reason of the colour of their skin, their race or national or ethnic origin, shall be punished by imprisonment of between six and twenty-four months.

Like the Argentine law, the law of Uruguay goes further than the requirements of the CERD Convention by including religion among the protected groups or categories. The Uruguay law also follows the Argentine pattern in outlawing "incitement to hatred" *per se* without reference to "intent" or "result".

In one respect -- by outlawing "acts ... of hatred or contempt" (Article 149.3) -- the Uruguay law may extend further than virtually any other anti-racism law. The term "acts" is not defined and, in this general formulation, appears to cover much more than the acts defined in other laws, such as speech, literature, pictorial representation or even "behaviour" (as in the British law) or "gestures" (as in the Canadian law).

Another novel feature of the Uruguay law is its prohibition of "acts of moral violence". It is thus one of the very few laws which expressly recognizes the pain which members of an attacked group may suffer through the indignity of racist words or acts.

INCITEMENT TO NATIONAL, RACIAL AND RELIGIOUS HATRED:
LEGISLATION AND PRACTICE IN THE NETHERLANDS

Ineke Boerefijn

INTRODUCTION

In the Netherlands, as in most West European countries, members of ethnic minority groups are, generally speaking, disadvantaged. This holds true, *inter alia*, in the labour market, in housing and in education. Despite the introduction of a number of government policies to improve the situation, the problem remains.

Although various reasons can be given for this situation, discrimination clearly is one factor. In this chapter, I focus on racial discrimination in relation to freedom of expression and do not address the wider, and more fundamental, issue of racial discrimination in general. In particular, I discuss the nature and effectiveness of the legal remedies which are available in the Netherlands against racist speech.

It may be argued that the term "race" is in itself discriminatory. There is only one human race and every distinction made on the basis of race is scientifically inaccurate and morally unjust. However, it is a term generally accepted when discussing discrimination issues. Accordingly, in this chapter I use the term "race" (as do the Dutch courts) to refer to ethnic or national origin, colour or descent.¹

LEGAL FRAMEWORK

Article 1 of the Dutch Constitution includes a general prohibition of discrimination and an obligation of equal treatment. However, it must be borne in mind that courts, including the Supreme Court, may not rule legislation to be unconstitutional. That limitation is remedied in part by the fact that courts may directly apply certain provisions of international treaties, including anti-discrimination provisions in the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD Convention). Because the Netherlands does not have a comprehensive anti-discrimination act, international non-discrimination provisions are frequently invoked before the courts. The Parliament is currently considering adoption of an Equal Treatment Bill to elaborate the constitutional protection of non-discrimination.

Criminal Law

Although there is not yet a comprehensive anti-discrimination act or a single judicial tribunal which concerns itself with complaints of discrimination, several criminal provisions prohibit racist acts. These were enacted following the Netherlands's ratification in 1971 of the CERD Convention.

¹ A Dutch court set forth this definition of race in rejecting a defendant's claim that he was not guilty of racial discrimination since the discrimination was directed against Turks and thus was based on national origin, not race (Supreme Court, 1 July 1986, RR 86/87 No. 128).

Section 137 of the Criminal Code, concerning "Crimes Against Public Order", provides in relevant part:

- (c) Any person who, by means of the spoken or written word or pictorially, deliberately gives public expression to views insulting to a group of persons on account of their race, religion or conviction or sexual preference, shall be liable to a term of imprisonment not exceeding one year or to a fine not exceeding 10,000 Dutch guilders (US\$5,550).
- (d) Any person who, by means of the spoken or written word or pictorially, deliberately and publicly incites to hatred of or discrimination against other persons or to violence against persons or the property of others on account of their race, religion or conviction or sexual preference, shall be liable to a term of imprisonment not exceeding one year or to a fine not exceeding 10,000 guilders.
- (e) Any person who, for reasons other than the provision of factual information:
 - (i) Makes public an utterance which he knows or has reasonable cause to suspect is insulting to another group of persons on account of their race, religion or conviction or sexual preference or which incites to hatred of or discrimination against others or to violence against the person or property of others on account of their race, religion or conviction or sexual preference; or
 - (ii) Distributes any object which he knows or has reasonable cause to suspect contains such an utterance to anyone other than upon that person's request, or has in his possession any such object with the intention of distributing it or making it public, shall be liable to a term of imprisonment not exceeding six months or to a fine not exceeding 5,000 guilders.
- (f) Anyone who participates in, or provides financial or other material support for, activities directed towards discrimination against persons on account of their race, religion, conviction, sex, or sexual preference, shall be liable to a term of imprisonment not exceeding one year or a fine not exceeding 5,000 guilders.²

As far as incitement to discrimination or hatred is concerned, for purposes of establishing guilt it is sufficient that the expression might have led to such behaviour; it is not necessary to prove that it actually occurred. It is the nature of the expression itself which is crucial, not the actual effect.

Civil Law

Apart from the Criminal Code provisions, no legislation has been adopted which specifically concerns racial discrimination. In situations which fall outside the scope of the Criminal Code, creative use has been made of other provisions, such as Article 1401 of the Civil Code which deals with tort actions. The Civil Code also requires employers to behave as "good employers", which implies that they should not discriminate against employees. Under the Civil Code, dismissal may not be "manifestly unreasonable", which also implies a prohibition of discrimination.

² This text incorporates an unofficial translation of an amendment to the Code to include sexual preference which came into force on 1 Feb. 1992.

APPLICATION OF THE CRIMINAL CODE

The Criminal and Supreme Courts have interpreted relevant provisions of the Criminal Code in a number of cases. The courts take as their starting point the right to freedom of expression. This freedom may be limited if the provisions of prohibition of discrimination are violated. In a case in which the defence stated that conviction would infringe the defendant's right to freedom of expression, the court stated that the right to freedom of expression could be limited, but only insofar as was necessary for the protection of the right of the groups mentioned to be protected from insult.³

An expression is considered to be insulting within the meaning of the Criminal Code if it is distressing and affects the honour and reputation of the person concerned. Article 137(c) states that the expression must be insulting towards "group of persons" on account of their race. In practice, this has not prevented successful actions on behalf of individuals. The essence of the provision is that the individual is insulted because he or she belongs to a certain ethnic group. The Supreme Court has considered that phrases such as "a German Jewess - who apparently has not been exterminated" and the "aggressive and fighting German Jewess" are phrases which, it would be clear to the average reader, are insulting to the Jewish population as a whole.⁴

In order to determine whether a phrase is insulting, the courts have looked at the context in which the language or images were placed. They have considered the text as a whole, and any title and illustrations.

While the criminal law authorizes the banning of political parties, in practice the government has been reluctant to do so. Thus, the racist agenda of the Centre Democrats, a right-wing party, has not been deemed sufficiently explicit for it to be prosecuted. The Centre Democrats have held one seat in the Second Chamber of Parliament for several years and have occupied seats on several municipal councils. (Their influence, however, is negligible because their colleagues in Parliament and on the municipal councils tend to refuse to cooperate with them. Individual members of the party, nonetheless, are regularly prosecuted and fined. For instance, several members were fined for using erroneous facts and encouraging a negative view of ethnic minorities in criticizing the government's policy towards foreigners and asylum-seekers.⁵

A CASE DEALT WITH BY BOTH THE CIVIL AND CRIMINAL COURTS

On occasion, cases have been dealt with by both the civil and criminal courts. In one case, a married couple, both evangelists, stated in their religious journal that all Jews had condemned themselves because, according to the Bible, some exclaimed during the trial of Jesus: "his blood come upon us and our children". By this statement, according to the couple, "they have called upon them the blood that has been shed by Jesus for their salvation" and "this judgment has haunted them throughout the centuries, where they have been hated, persecuted, extinguished in

³ Court of Appeal, 10 Mar. 1983, RR No. 43.

⁴ Supreme Court, 26 June 1984, RR No. 69.

⁵ Amsterdam Court of Appeal, 10 Mar. 1983, RR No. 47.

a brutal way, in the Second World War 6 million Jews". On the basis of this publication, both civil and criminal proceedings were initiated. The civil court of first instance discussed the limitations on the right to manifest religious convictions:

Everyone has the right freely to choose his religion or belief, and therewith freely to express his opinion, subject to his responsibility under the law. This responsibility also implies respect for the constitutional right of others to be safeguarded against unlawful discrimination on the ground of race or religion. Such discrimination occurs when distinctions are made between Jews - merely on the ground of their being Jewish - and non-Jews, in a defamatory, degrading, distressing or intolerant manner.⁶

The Supreme Court confirmed this judgement, stating:

The Court has, by putting first everyone's right to manifest his religion or belief, rightly judged that the limits imposed on this freedom "subject to everyone's responsibility before the law" also implies that the Civil Code can impose restrictions on the way in which this freedom is used. As far as Article 9 of the European Convention on Human Rights is concerned, which is invoked by the couple, the same conclusion is drawn.⁷

In criminal proceedings it was also found that the boundaries of the right to freedom of expression and religion had been crossed and that the statements, even though manifesting religious belief, were insulting and unnecessarily distressing. The court of first instance stated that, because of the seriously distressing character of the accused's statements, the penalty of imprisonment should be imposed. The couple should, however, be regarded as "offenders by conviction" who had not committed the crime purposefully. The court, finding that the defendants had not intended to commit a criminal act, did not impose a penalty.

In acquitting the couple outright, the Court of Appeal, in the first instance, stated:

The limits on the right to freedom of religion would have been crossed if the manifestation of religious belief had been insulting, and therefore unnecessarily distressing. This cannot be said of their statements. . . .

It is unmistakable that the intention of the couple was absolutely pure and in no way designed to be insulting while, for the reader of the complete text of the publications, the conclusion is not obvious that the writing has an anti-Semitic or racist character.⁸

Cassation followed because, according to the Public Prosecutor, the Court of Appeal had given a wrong interpretation of the term "insulting".⁹ The Supreme Court agreed:

It follows from the wording of Article 137(e) that the answer to the question whether an expression was insulting to a group of people on

6 President of the Zwolle Court, 13 Sept. 1985, RR No. 103.

7 Supreme Court, 5 June 1987, RR 86/87 No. 155.

8 Arnhem Court of Appeal, 29 Sept. 1986, RR 86/87 No. 154.

9 Cassation is a form of appeal which examines only whether a judicial decision comports with constitutional or other fundamental principles. The system in the Netherlands is, in short, as follows: if the Supreme Court decides in cassation that a court of appeal has made a wrong decision, the case is referred back to a differently constituted Court of Appeal which deals with the matter. The Supreme Court does not itself render the final decision.

account of their race and/or religion depends on the nature of the expression and not also upon the intention of the publisher. A statement such as "all that happened to the Jews, including the persecution and the murder of 6 million Jews by the Nazi-regime is their own fault", has to qualify as insulting within the meaning of the Criminal Code, whatever the reason(s) why the persons concerned are of the opinion that it is all the fault of the Jews themselves.¹⁰

The case was then referred to another Court of Appeal, which decided that the accused knew, or should have known, that the expressions made were insulting to Jews on account of their race and/or religion and/or belief. In accordance with the judgement given by the Supreme Court, the Court of Appeal did not take into account the intentions of the accused. However, it did consider intention in determining the penalty. The Court ruled:

The acts committed by the accused are of such a serious nature that, in principle, immediate imprisonment should be imposed.

For the following reasons, the court sees fit to impose a suspended sentence of imprisonment. It is accepted by the Court that the accused did not intend to insult Jews.¹¹

The accused were sentenced to two months' imprisonment, suspended for two years. The leniency of the sentence is all the more remarkable in light of the Court's finding that:

After the publication of the journal under discussion, and having received the complaints about the insulting nature of this publication, they published a new issue of it, of a similarly insulting nature. Moreover, the accused in no way gives the impression that in manifesting her belief she wanted to moderate the insulting character of the publication by taking into account the feelings of Jews.¹²

CRIMINAL LAW VERSUS CIVIL LAW

Criminal law outlaws certain types of racist speech and the dissemination of material which contains racist views. Civil law remedies are also available. Although this system of dual liability may seem complicated and inefficient, it has certain advantages. The criminal law is generally regarded as a remedy of last resort. Criminal proceedings are time-consuming, and the persons who were the targets of the racist speech have hardly any influence on the conduct of the trial. The possibility of direct involvement may be a good reason to opt for civil instead of criminal proceedings.

In addition to this more or less psychological aspect, there is also the issue of the results of the proceedings. The outcome of civil and criminal proceedings will not always be the same. Criminal courts are bound by the text of the Criminal Code, which is, naturally, very strict, whereas civil courts may use various provisions of the Civil Code, which are of a sufficiently general nature that the courts have ample scope for interpretation. There have been a number of cases where a criminal court

10 Supreme Court, 18 Oct. 1988, NJ 1989, 476.

11 Leeuwarden Court of Appeal, 16 Mar. 1989, NJ 1989, 810.

12 *Id.*

decided that no crime had been committed under Article 137 of the Criminal Code, but where a civil court nevertheless decided that the action was illegal.

Civil proceedings provide the victim with the opportunity to obtain personal relief. In civil cases, the court may fashion remedies as it thinks fit. It can, for instance, order that there be no further dissemination of racist views, it may order a fine (which it may suspend), and/or it may order compensation to the victim. Civil verdicts, however, do not carry as strong a message of condemnation as do criminal verdicts, particularly because, unlike in such countries as the United States, civil awards are no more than nominal in the absence of physical or financial injury.

Figures show that very little use has been made of the Criminal Code provisions. One of the reasons is that some victims prefer to seek civil remedies. There are, however, various other factors which discourage victims from filing criminal complaints. First, there is the problem of delay: up to two years may elapse between the registration of a complaint and the actual hearing. Second, groups and individuals who have lodged complaints with the police often feel that they receive an inadequate response, and that their complaints are not taken seriously. Even when the police respond, the Public Prosecutor may not. Third, many people who are discriminated against do not know how to initiate criminal proceedings.

This situation has been improved somewhat in recent years by the establishment of local organizations to collect information on cases of discrimination and to undertake action. Some of these groups have the authority to lodge complaints before the courts on their own behalf and/or on behalf of a victim. It is much less daunting for a complainant to approach people involved in such a project than to go to the police, and the project staff have the expertise to know the most effective ways to seek relief.

THE ATTITUDE OF THE DUTCH GOVERNMENT TOWARDS PROHIBITING RACIST SPEECH

Both the right to equal treatment and the right to freedom of expression are guaranteed by the Dutch Constitution, in Articles 1 and 7 respectively. These rights are viewed as being of the same importance; no hierarchy has been established. The government explained its approach to balancing these rights in its Eighth Periodic Report to the Committee on the Elimination of Racial Discrimination (CERD), which monitors compliance with the Convention:

The principle of non-discrimination, freedom of expression and the right to freedom of association and assembly are anchored in the Netherlands Constitution as civil and political rights of equal validity. They are not accorded different priorities. The same is true of all other civil and political rights. The Constitution itself imposes no limitations on the exercise of civil and political rights, although it does provide for the possibility of imposing limitations on certain civil and political rights via an Act of Parliament. In cases where civil and political rights are found to be in conflict, they are weighed against each other within the framework of Parliament's constitutional authority to impose limitations on them. In this way it is possible for the boundary between one civil and political right and another to be laid down in law. The government believes that this constitutional system guarantees a carefully balanced relationship between the exercise of one right and respect for another.

In particular, freedom of expression, religion, belief, association and assembly and the right to demonstrate are liable to conflict with the prohibition of racial discrimination as provided for in the Convention. The Netherlands government is of the opinion that the prohibition of racial discrimination cannot be subordinated to other fundamental freedoms. This view is reflected in Dutch legislation. Pursuant to the prohibition of racial discrimination, the Dutch legislature has imposed limitations on civil and political rights by prohibiting public expressions of racist views ...

It should be noted that the policy of the Netherlands government on the elimination of racial discrimination is aimed at bringing about a change in social attitudes, partly by means of publicity, with a view to eliminating racial discrimination in both public and private spheres.

Finally, we would note that under the Dutch legal system, the question of whether or not the exercise of one basic right has in fact violated another basic right is a matter for the courts to decide. Thus, in cases of racial discrimination the courts decide on a response under criminal or civil law.

The failure of the Dutch government to take a principled stand prioritizing the right to protection from discrimination over the right to freedom of expression is blamed by many as being one of the reasons why few complaints are lodged with the Public Prosecutor. The mere adoption of provisions outlawing racist speech is insufficient if it is not complemented by a clear policy of prosecution. Critics of the government's restrained and sometimes erratic prosecution policy contend that it fails to comply with the Netherlands' obligations under the CERD Convention.

CONCLUSION

By ratifying the ICCPR and the CERD Convention, the Dutch government accepted the obligation to adopt legislation which prohibits incitement to racial and religious hatred and dissemination of racist speech. Naturally, this obligation is not fulfilled by mere inclusion of a few provisions on racist speech in the Criminal Code. It is necessary that a policy be followed which gives effect in practice to the spirit of the statutory provisions. As a matter of policy more criminal proceedings should be brought. The police and the Public Prosecutor should become more involved with the problem of racist speech and should be in regular contact with local anti-discrimination groups to discuss the steps which need to be taken.

RACIAL HOSTILITY: THE SOUTH AFRICAN EXPERIENCE

Gilbert J Marcus

INTRODUCTION

During the heyday of apartheid, liberal South African academic lawyers argued that "in a racially diverse society there is clearly a need for laws which prohibit incitement to racial hatred".¹ As apartheid now approaches its demise, the African National Congress (ANC) has declared its support for laws which prohibit the incitement of racial hatred. The ANC's standpoint is neither new nor surprising. The Freedom Charter, adopted in 1955 and for many years the cornerstone of ANC policy, while guaranteeing to all "their right to speak, to organize, to meet together, to publish, to preach, to worship and educate their children" also provides that the preaching and practice of national, race, or colour discrimination and contempt shall be a punishable crime.² In the ANC's Constitutional Guidelines similar sentiments are expressed. Basic rights and freedoms such as "freedom of association, thought, worship and the press" are guaranteed, but it is specifically provided that "the advocacy or practice of racism, fascism, Nazism or the incitement of ethnic or regional exclusiveness shall be outlawed".³

The draft Bill of Rights published in 1990 by the ANC's Constitutional Committee is the clearest pronouncement by the organization on the subject of racial defamation.⁴ Article 4 of the Bill provides that "there shall be freedom of thought, speech, expression and opinion, including a free press which shall respect the right of reply". However, paragraphs 3 and 4 of Article 14 specifically envisage a derogation from these guarantees. They provide:

3. The State and all public and private bodies shall be under a duty to prevent any form of incitement to racial, religious or linguistic hostility and to dismantle all structures and do away with all practices that compulsorily divide the population on grounds of race, colour, language, or creed.

4. With a view to achieving the above, the State may enact legislation to prohibit the circulation or possession of materials which incite racial, ethnic, religious, gender or linguistic hatred, which provoke violence,

or which insult, degrade, defame or encourage abuse of any racial, ethnic, religious, gender or linguistic group.

The fundamental rights and freedoms contained in the Bill of Rights are to be guaranteed by the courts of law which are to have the power to declare invalid "any law or executive or administrative Act" which violates the Bill of Rights.⁵ While the Bill of Rights specifically envisages the right of the State to regulate "the manner in which the fundamental rights and freedoms shall be exercised" and to limit such rights in a manner "deemed necessary in an open and democratic society",⁶ it is significant that laws of the sort envisaged by Article 14 will be immune from attack for violation of the guarantee of freedom of expression.

That the ANC should envisage anti-incitement laws is not surprising. The history of racism in South Africa has left deep scars. The racial laws, together with the security edifice which necessarily had to be constructed to maintain the system, have resulted in untold suffering, humiliation, degradation and death itself. As Albie Sachs, member of the ANC Executive Committee, has stated:

One has to bear in mind that in South Africa the question of race has played a crucial and terrible role in the lives of people. So much insult and indignity have been involved that it is an extremely sensitive area in which the issues go well beyond speech. They touch souls. The defamation of the black population has been associated with conquest and repression, murder, torture, tear-gassing and so on. To make a provocative and inflammatory racial attack in a situation where people are ready to use violence goes beyond arguing a political vision.⁷

What is perhaps more surprising is that South Africa has had laws aimed at criminalizing the fomentation of racial hostility for over 60 years. It is ironic that such laws should exist in a country where government policy and practice, more than anything else, have been responsible for inflaming racial passions. Strangely, therefore, there appears to be a measure of consensus between the ANC and the South African government on the need to censor the propagation of racial hatred. But in a democracy, laws facilitating censorship require careful scrutiny. Opponents of such laws persuasively argue that they are open to shocking abuse and that the advantages of free and open exchange of ideas are preferable to suppression.⁸ For those who hold such views, the South African experience of the use of racial hostility laws provides a graphic and chilling example of the abuse and intolerance which underlies much of censorship. This paper does not address the cogent arguments in favour of such laws. It merely sets out to demonstrate that, in the absence of sufficient safeguards, laws prohibiting the propagation of racial hatred can be employed as a formidable weapon of censorship by a government bent upon the stifling of dissent.

1 J Dugard, *Human Rights and the South African Legal Order* (1978), 177. See also A S Mathews, *Law, Order and Liberty in South Africa* (1971), 211.

2 For a history of the Freedom Charter, see G J Marcus, *The Freedom Charter: A Blueprint for a Democratic South Africa*, Centre for Applied Legal Studies, Occasional Paper No. 9 (1985); and R Sutner and J Cronin, *Thirty Years of the Freedom Charter* (1986).

3 The Constitutional Guidelines are reproduced in the *Road to Peace* (ANC Department of Political Education, 1990). The same publication contains the Harare Declaration of August 1989 which forms the basis of the negotiations between the ANC and the South African government. The Harare Declaration affirms the right of all people "to form and join any political party of their choice, provided that this is not in furtherance of racism".

4 *A Bill of Rights for A New South Africa* (Centre for Development Studies, 1990).

5 Article 16.

6 Article 15(2).

7 A Sachs, "The Gentle Revenge at the End of Apartheid," 19 *Index on Censorship* (No. 4, 1990), 3.

8 See Nadine Strossen's article, below. See also A Neier, *Defending My Enemy* (1979); A Borovy, *When Freedoms Collide* (1988); L Bollinger, *The Tolerant Society* (1986).

THE GENESIS OF THE RACIAL HOSTILITY LAWS

The first measure dealing with incitement to racial hostility was introduced in 1927. Section 29(1) of the Native Administration Act of 1927 made it a criminal offence to "[utter] any word or [do] any other act or thing whatever with intent to promote any feeling of hostility between natives and Europeans".⁹

Three years later the Riotous Assemblies and Criminal Law Amendment Act of 1914¹⁰ was amended by the Riotous Assemblies Amendment Act of 1930¹¹ in order to provide for the prohibition of gatherings and publications which were calculated to engender feelings of racial hostility. Existing powers to exclude persons from particular areas upon conviction pursuant to Section 29 of the Native Administration Act were extended, by the insertion of a new Section 1(12) into the Riotous Assemblies and Criminal Law Amendment Act, to give the Minister a power of exclusion in circumstances where he concludes that "any person is in any way promoting feelings of hostility between the European [and non-European] inhabitants of the Union". A person not born in South Africa who was convicted of any of these newly created offences could be deemed an undesirable inhabitant of the Union by the Governor-General and deported.¹²

In 1950, the Suppression of Communism Act was passed.¹³ The principal object of this act was to declare the Communist Party of South Africa to be an unlawful organization. Section 1 of the Act defined communism, with subsection (d) specifically designating communism as:

any doctrine or scheme...which aims at the encouragement of feelings of hostility between the European and non-European races of the Union the consequences of which are calculated to further the achievement of any object referred to in paragraph (a) [the establishment of a despotic system of government based on the dictatorship of the proletariat] or (b) [bringing about any political, industrial, social or economic change within the Union by the promotion of disturbance or disorder].

Section 2 of the Act empowered the Governor-General to declare certain organizations to be unlawful "without notice to the organization concerned" if he was "satisfied", *inter alia*, that the organization engaged in activities which were calculated to further the achievement of any of the objects referred to in Section 1. The Act also made provision for the compilation of a list of persons "who are or have been office bearers, officers, members or active supporters of the organization which has been declared an unlawful organization".¹⁴ By 1965 it became a criminal offence to print, publish or disseminate any speech, utterance, writing or statement or any extract therefrom made or produced or purporting to have been made or

9 Act 38 of 1927. The title of the Act has changed over the years according to the racial nomenclature in vogue at any particular time. The word "Native" in the title was replaced by "Bantu" which in turn was replaced by "Black".

10 Act 27 of 1914.

11 Act 19 of 1930.

12 *Id.*, Section 1(16).

13 Act 44 of 1950.

14 *Id.*, Section 4(10).

produced anywhere at any time by any person whose name appeared on the list.¹⁵

In 1956, a new Riotous Assemblies Act was passed.¹⁶ According to the long title, its object was among other things "to consolidate the laws relating to riotous assemblies and the prohibition of the engendering of feelings of hostility between the European and the non-European inhabitants of the Union". All the provisions contained in the 1914 Act and the amendments introduced in 1930 were retained. However, certain additional features concerning the control of racial hostility were introduced. For example, once the Minister had prohibited any gathering, having formed the opinion that there was reason to apprehend that feelings of hostility would be engendered between Europeans and any other section of inhabitants of the Union, persons who convened, presided at or addressed such a gathering or who were involved in the printing, publishing or distribution of notices of the meeting were guilty of a criminal offence unless they could satisfy the court that they had no knowledge of the prohibition.¹⁷

In 1963 the Publications and Entertainments Act was passed.¹⁸ It contained a prohibition on the printing, publishing, manufacture, making or production of any "undesirable publication" which was defined to include, *inter alia*, "publications which brought any section of the inhabitants of the Republic into ridicule or contempt, were harmful to relations between any sections of the inhabitants of the Republic, or were prejudicial to the safety of the State, the general welfare, or peace and good order".¹⁹ Such publications could also be prohibited from being distributed.²⁰ In 1974 the whole system of censorship established by the Publications and Entertainments Act was entirely overhauled with the passing of the Publications Act.

The next development in the law relating to racial hostility came in 1967 with the passing of the Terrorism Act.²¹ Section 2(1)(a) of the Act provided that any person who

with intent to endanger the maintenance of law and order in the Republic ... commits any act or attempts to commit, or conspires with any other person to aid or procure the commission of or to commit, or incites, commands, aids, advises, encourages or procures any other person to commit any act ... shall be guilty of the offence of participation in terroristic activities.

Section 2(2) created certain presumptions. It provided that, if in any prosecution for an offence contemplated in subsection (1)(a), it could be proved that the accused committed the act alleged in the charge, and that the commission of such act had or was likely to have had certain results, including "to cause, encourage or further feelings of hostility between the white and other inhabitants of the Republic", the accused would be presumed to have committed such an act with intent to endanger

15 Section 11(g) *bis* of Act 44 of 1950 as amended by Section 8 of Act 15 of 1954, Section 10 of Act 76 of 1962, Section 5 of Act 37 of 1963 and Section 15 of Act 8 of 1964.

16 Act 17 of 1956.

17 Section 2(4).

18 Act 26 of 1963.

19 *Id.*, Section 5(1)(a) read with Sections 1 and 5(6).

20 *Id.*, Section 5(1)(a).

21 Act 83 of 1967.

the maintenance of law and order in the Republic, unless it was proved beyond reasonable doubt that he did not intend such a result.

In 1974, adoption of Section 1 of the Second General Law Amendment Act 94 of 1974 extended the original prohibition contained in Section 29 of the Native Administration Act to criminalize the uttering of words or the performance of acts "with intent to cause or encourage or foment feelings of hostility between different population groups of the Republic". Additionally, the penalties for violation of this prohibition were increased.

The Internal Security Act of 1982, which revised and consolidated South Africa's security laws, retained the substantive content of most of the existing laws concerning racial hostility.²² The general prohibition on causing, encouraging, or fomenting feelings of hostility between different population groups is found in Section 62 of the Act. It is virtually identical to Section 1 of the Second General Law Amendment Act of 1974. The newly created offence of "subversion" contained in Section 54(2) of the Act provides, *inter alia*, that any person who, with intent to achieve the object of bringing about or promoting "any constitutional, political, industrial, social or economic aim or change in the Republic", causes, encourages or foments feelings of hostility between different population groups or attempts to do so, shall be guilty of the offence of subversion. The Minister is authorized by Section 48(3) to prohibit gatherings in order to prevent the causing, encouraging or fomenting of feelings of hostility between different population groups.

Section 29 of the Native Administration Act of 1927 remains in force, and the Publications Act of 1974 contains the same prohibitions which were contained in the Publications and Entertainments Act of 1963.

The question of racial hostility, perhaps not surprisingly, found its way into regulations promulgated pursuant to the various nationwide states of emergency that were in force in South Africa between 1986 and 1991. The original definition of "subversive statement" was defined to mean a statement which contains anything which is calculated to have the effect or is likely to have the effect of "engendering or aggravating feelings of hostility in the public or in any section of the public or any person or category of persons towards any section of the public or person or category of persons."²³ Although the Natal Supreme Court found this clause too "unintelligible" and declared it void for vagueness,²⁴ the Appellate Division effectively reversed the decision on the ground that, by virtue of the "ouster clause" contained in the Public Safety Act 3 of 1953, the Natal Court had no power to invalidate any regulation promulgated pursuant to the Act on grounds of vagueness.²⁵ Emergency regulations were promulgated in August 1987 which empowered the Minister of Home Affairs to close down newspapers temporarily and authorized him to consider whether there had been a systematic or repeated publishing of matter in a way which, in his opinion, had or was calculated to have the effect:

22 Act 74 of 1982. The Act repealed, *inter alia*, most of the Riotous Assemblies Act of 1956, the Suppression of Communism Act of 1950 and amendments thereto, the Terrorism Act of 1967 and Section 1 of the Second General Law Amendment Act of 1974.

23 Regulation 1(viii)(d) of Proc. R109, Government Gazette 10280 of 12 June 1986.

24 *Metal & Allied Workers Union v. The State President*, 1986 (4) SA 358 (D) at 372 D-E.

25 See *Staatspresident v. United Democratic Front*, 1988 (4) SA 83d (A).

of stirring up or fomenting feelings of hatred or hostility in members of the public towards a local authority or a security force, or towards members or employees of a local authority or members of the security force, or towards members of any population group or section of the public.²⁶

THE RATIONALE FOR CENSORSHIP

The development of the laws relating to racial hostility was both logical and predictable. The logic is this: a category of speech to be banned is identified; offenders are prosecuted; publications containing the offensive material are banned; gatherings at which the offensive ideology may be propagated are prohibited; potential and past offenders are prohibited from having their words quoted or disseminated in any form whatsoever; and organizations which stand for prohibited ideology are banned.

That this was all predictable emerges clearly from a reading of the parliamentary debates in 1927. The Native Administration Bill was introduced to the Union Parliament by the then Prime Minister and Minister of Native Affairs, General Hertzog. It was an attempt, among other things, to impose a uniform system of black administration throughout South Africa. An examination of the parliamentary debates reveals that the proponents of the measure had several aims in mind.

The dominant theme of the debates was fear of the growing organization of the black working class. Clements Kadalie and his Industrial and Commercial Workers Union (ICWU) figured prominently in the speeches of most speakers. The mobilization of the working class and the articulation of opposition to the government were perceived to constitute a real threat to the white way of life. *Stemming the spread of such noxious doctrine was to be achieved, inter alia, by the creation of the criminal offence of fomenting feelings of racial hostility between "natives and Europeans".*²⁹

The perceived susceptibility of black people to manipulation was another dominant theme in the debates.³⁰ Certain speakers expressed concerns that

26 Regulation 7A(1)(a)(iv) of Proc. R123, *Government Gazette* 10880 of 28 August 1987, repeated in virtually identical terms in the subsequent declarations of states of emergency.

27 Black trade unions were regarded as anathema to the South African government for decades. In fact it was not until 1979 that black trade unions enjoyed legal recognition for the first time. The emergence of the ICWU in the twenties was a remarkable phenomenon whose growth was perceived to be a major threat to the ruling class. See H Bradford, *A Taste of Freedom* (1988).

28 See the remarks of Mr Nel, House of Assembly Debates, 2 May 1927, Cols 3030-3032: "The spread of an insidious and poisonous propaganda based upon a gloomy hatred of the capitalist or landlord class which is artificially being pumped into the natives through the most unclean pipes of socialism and bolshevism. The spirit of lawlessness and communism is being engendered throughout South Africa amongst the native races. The doctrines of bolshevism and socialism find among the natives a rich soil. It is growing far more rapidly than people realize."

29 This was not the only method envisaged by the Native Administration Bill. In addition, it provided for a system of forced removals of individuals and whole tribes by Presidential decree. See G J Mouton, "Section 5 of the Black Administration Act: The Case of the Bahwena ba Magopa," in C Mouton and K O Regan, eds, *No Place to Rest: Forced Removals and the Law in South Africa* (1990).

30 See comments of Mr Swart, stating that blacks, like schoolchildren, were to be protected from a "dangerous" doctrine because "the mentality and understanding of the ordinary South African is not such that he can distinguish between sensible and silly doctrine. The ordinary natives of this country cannot listen to Kadalie, Moti and others and judge for themselves what is right." *House of Assembly Debates*, 2 May 1927, Col 3011. See also similar comments of Mr Nicholls, *House of Assembly Debates*, 24 June 1927, Col 5756.

ideology of men such as Kadalie would be used to agitate the blacks of South Africa and unite them in opposition to the government.³¹ The broad powers conferred by the proposed measures were seen as an ideal tool to repress these "agitators" and their dangerous doctrines.

The debates did contain some opposing voices of reason. Mr Reyburn argued that the creation of hostility was not a crime except when it leads to a breach of the peace. He pointed out that "the creation of feelings of hostility is done every day: probably some of the speeches delivered here today have done that."³² Mr Payn pointed out that one must realize the cause of the unrest and deal with it; namely, that "the blacks have no organized body to make their views felt and heard in this House and in the country."³³

THE LAW IN PRACTICE

Prosecutions for Fomenting Racial Hostility

The implementation of Section 29 of the Native Administration Act shows just how pernicious a law it was. There are only 14 reported cases dealing with prosecutions under the Act and one case dealing with a prosecution in terms of the Second General Law Amendment Act of 1974. The majority of these cases occurred within five years of the promulgation of the Act. There were obviously many prosecutions beyond those which are reported. Prosecutions for this offence are instituted in magistrates' courts whose judgements are never reported. Only if a case reaches the Supreme Court on appeal might it be reported, and then only if it establishes a precedent or is for some other reason considered important.

For example, one case which was never reported was the prosecution of Clements Kadalie for a speech threatening an ICWU campaign to burn passes. He was acquitted. The Lydenburg Branch Secretary of the ICWU, Abdul Mahomed, was not so fortunate. He was convicted under the Act for a speech in which he declared that blacks must "fight the government" and "get our freedom" and "expel the white man from our land." For this he was not only fined 15 pounds but also deported back to Zanzibar.³⁴

In *R. v. Mote*,³⁵ the indictment alleged that the accused had made a speech in which he had said the following:

General Hertzog at the last parliament session passed a diabolical act called the Native Administration Act. ... If the municipality or government are not going to give us more land or wages, we are going to revolt against this so-called Christianity and hypocrisy. Today I cannot under-

31 See comments of Dr van Broekhuizen: "Men are going about the country stirring up the natives. You have meetings held everywhere. Kadalie calls the white man the enemy of the kaffir, and he calls the pass law the law of slavery. ... Not only have we got the native agitator, but we have also got the danger of the communist. ... The native as a child of nature is being swayed by these men as easily as the wind sways trees. These demagogues, as I call them, are doing a tremendous lot of harm." *House of Assembly Debates*, 29 Apr. 1927, Col 2980.

32 *House of Assembly Debates*, 16 June 1927, Col 5177.

33 *House of Assembly Debates*, 24 June 1927, Col 5745.

34 Bradford, *supra* note 27, at 149 and 175.

35 1928 OPD 150.

stand General Hertzog. ... In 1914 and 1919 General Hertzog fought for the Dutch-speaking people and today they are better off than we are. ... The ICWU have been preaching too long, this is the time we want to accomplish things and not preaching. I was a fool that I did not let my people rebel against the government. The day is coming when I am going to march my forces against the government in revolt.

The indictment was challenged on the ground that it did not disclose an offence. The court ruled that, if the accused had indeed made the speech then he could be guilty of a crime, and so dismissed the challenge.

In *R. v. Rulashé*,³⁶ the accused had acted as an interpreter of the speech of one Mackay and was convicted under Section 29(1) of the Act. The translated speech was to the effect that "the Americans would arrive next month and the big fight would begin, that no natives were to join the European forces". It went on to state that "when the Americans take over South Africa all natives would be released from dipping their cattle and paying taxes and that South Africa would be a free country as far as natives were concerned". The conviction was upheld on appeal.

In *R. v. Dumah*,³⁷ the first accused had made a speech in which he stated that

he had come to investigate certain matters in regard to slavery which had been practised in the location at Memel in the past, and I will put a stop to these practices without consideration for the party concerned. The residents of the location had been *sjambokked* [whipped] by the municipal employees and assisted by the police.

The second accused had made a speech in which he charged the town clerk of wrongfully refusing permission to hold a meeting in the location and said that he would hold a meeting without permission. He accused the town clerk of "robbing the people of the location for years". The indictment was dismissed on the grounds that the words did not refer to the general body of Europeans but only to particular people.

In *R. v. Brown*,³⁸ the accused had made a speech in the following terms:

You remember how the natives were shot down under the Union Jack at Bulhoek, Port Elizabeth, Bondelswartz rebellion, South West Africa, and on the Rand in 1922. Excuse me cursing. To hell with King George to hell with General Hertzog, to hell with General Smuts. We shall bury the lot of parliamentary parasites six feet under the ground.

On appeal he was acquitted on the basis that he did not intend to promote hostility.

In *R. v. Bunting*,³⁹ Sydney Bunting, a candidate in a general election for members of the House of Assembly, his wife and an interpreter were charged under the section. They were all members of the Communist Party. In his speech, the first accused stated, among other things, that

the property, land and machinery of the whole world became concentrated in the hands of a few property owners, while the great mass of the people in every country were driven from the land. General Hertzog said that if the natives were given equal rights in this country, then the

36 1928 EDL 376.

37 1928 OPD 152.

38 1929 CPD 221.

39 1929 EDL 326.

whites would have to get out of the country. When that day came, the whites would for the first time play a decent, useful, reasonable and honourable part in the country. It was ridiculous to pretend that the Communist Party was out to create hostile feeling between white and black. One of their members the other day was brought before the court, because a foolish reporter had made him say that whites must be driven into the sea.

The accused was acquitted on the basis that this speech did not exceed "the bounds of criticism as to constitute an utterance intended to create a feeling of hostility between the native and European races."⁴⁰

James Thaele, a president of the Western Cape Branch of the African National Congress, was also charged under the Act.⁴¹ During the course of a speech Thaele had said such things as "we shall not have justice of the white man", and "now we are only used for kitchen boys and girls, and that after thousands of us were killed"; "you are slaves and you do not know it". He went on to state:

We want the white man's authority to survey the land. This land belongs to the aboriginal races, historically, fundamentally and formally. Watch the white man. Do not hate or bite him, watch him. The white man comes slow but sure, he pushes you down and when you are down he is happy.

The court found that these words showed a hostile intention. In finding the accused guilty, the court made allowance "for the natural exuberance of the native agitator and politician". The court noted that "they are rather inclined to speak this way, and we have to be careful in judging them, not to judge them by our own standards".⁴² A fine of fifteen pounds to be paid in instalments was imposed and in default of payment, three months hard labour.

The accused in *Diamond v. R.*,⁴³ was not charged with uttering any words with intent to promote feelings of hostility, but was alleged to have typed, prepared, published or distributed certain circulars in Zulu and addressed these to the organization of communists of South Africa in general. In the face of the uncontradicted evidence of the accused that he was unable to speak, read or write Zulu, it was impossible to infer that he was involved in preparation of the circular in question. The precise contents of the circular do not appear from the reported judgement save that Judge Mathews observed that the circular

goes further than even unrestrained criticism of the government, its officials and the laws specially affecting natives. It suggests unlawful agitation and invites the natives to whom it is addressed to resort as natives to acts which can only bring them in conflict with the Europeans.⁴⁴

The accused in *R. v. Ncwangu*,⁴⁵ was charged with distributing copies of a circular headed: "Communist Party of South Africa. To the suffering or troubled people on

40 *Id.* at 339.

41 *R. v. Thaele*, 1930 CPD 332.

42 *Id.* at 338.

43 1933 NPd 380.

44 *Id.* at 386.

45 1933 NPd 579.

the locations and farms". The document was described by Judge Lansdown as the main a violent attack upon, and grossly inaccurate statement of terms of Native Service Contract Act No. 24 of 1932.⁴⁶ Judge Mathews described document in greater detail:

It opens with a statement as to the coming into operation of the recently enacted Native Service Contract Act. It proceeds to state that the effect of such operation is that "thousands and thousands of natives working on Dutch farmers' farms will be forced to sign a contract"; and it purports to state the effect of such a contract. It states also that the effect of the native breaking the contract or of a failure on his part to comply with his master's wishes when he has signed it is that his master may tie him, or an inmate of his kraal, whether male or female, to a wagon wheel and thrash any such contract breaker; further, that the contract means lasting slavery and famine for the natives generally. The enforcement of the Act by the authorities is then foreshadowed in extremely exaggerated and intemperate language, as resulting in the driving of natives from the lands on which they have lived and which they have cultivated for years. The remedy suggested is concerted action by natives in the form of refusal to sign any such contract, resistance against arrest and a refusal to pay poll tax.⁴⁷

The sentence of six months' imprisonment with hard labour was confirmed.

The accused in *R. v. Vanga*,⁴⁸ was sentenced to six months imprisonment with hard labour for disseminating "certain communist doctrines amongst natives by distributing and circulating a certain pamphlet titled *To the Transkeian Peasantry*". The pamphlet in question stated that the Communist Party of South Africa suggested that committees of poor people should be formed to conduct campaigns on certain immediate demands, namely:

- (a) For the confiscation of all land belonging to European landlords and rich farmers; for the abolition of reserves and territories, and the right of natives to reside anywhere they wish; confiscation of cattle, implements, etc of European landlords and farmers and distribution among native peasantry. ...
- (b) Confiscation of all grain lying idle in stores, for free distribution among the poor ...

The court found that the spreading of the doctrine of the "confiscation of European cattle and implements, and the distribution thereof among the native peasantry was calculated to provoke hostility between European and native. The court reduced the sentence to four months' imprisonment with hard labour.

In 1950, nearly twenty years after this batch of cases, two further cases were reported: *R. v. Nkatlo*⁴⁹ and *R. v. Sutherland*.⁵⁰ In one, Nkatlo was convicted on two counts of contravening the section arising out of speeches made under auspices of the African National Congress and the Communist Party. He

46 *Id.* at 580-81.

47 *Id.* at 583-84.

48 1932 EDL 219.

49 1950 (1) SA 26(C).

50 1950 (4) SA 66(T).

acquitted on appeal. In *Sutherland*, the manager and editor of the *Sunday Express* as well as a cartoonist employed by the newspaper, were convicted for publishing a cartoon which was described as follows:

The cartoon is headed "Won't You Come In?". ... [T]he central figure is that of the Prime Minister, Dr Malan. He is bowing to two natives representing the Protectorates and indicating a portal on his right. He is clearly extending the invitation to come in. Within the portal, which represents the Union, is depicted a European in the act of brutally assaulting a native. Immediately to the rear of the European there is the prone figure of a native who has been either killed or rendered insensible.⁵¹

Judge Murray, in acquitting the appellants, accepted that the cartoon "was a symbolic expression of opinion, not to be taken literally".⁵²

The next group of reported cases comes from the 1970s. In *S. v. Kubheka*,⁵³ some pamphleteers were convicted for publishing statements which, according to the magistrate, grouped together "so-called historical facts ... to create the impression that they form a pattern of recurring acts of sadism committed by whites against blacks".⁵⁴ The pamphleteers were acquitted on appeal. In *S. v. Singh*,⁵⁵ several men were convicted for statements made at a meeting to commemorate those who had died at Sharpeville. Judge Leon observed that "the language used by the appellants was of such a nature that it would inevitably have aroused strong feelings of hostility on the part of those to whom the remarks were addressed. The speeches were not an attack on the government or the legislature or the laws of the country but were clearly aimed at the white race as a whole, and would be certain to arouse feelings of hostility against the white man."⁵⁶ Accordingly, the convictions were affirmed.

The case of *S. v. Mbiline*,⁵⁷ is the only reported case of a prosecution under Section 1 of the Second General Law Amendment Act of 1974. The charge arose out of the distribution of a pamphlet entitled *Heroes of Yesterday, Martyrs of the Struggle* published by the Black Peoples Convention. It called upon people to observe a week of mourning in commemoration of all those who had sacrificed their lives for the struggle. Much of the pamphlet was devoted to the Sharpeville uprisings and other incidents, including the events of 1976 in Soweto, in which black people had been shot by the police. The appellants were acquitted on appeal.

The pernicious impact of the statute was somewhat blunted by the attitude of the courts, which managed to mitigate some of the potentially harsh effects of the law principally in three ways. First, the courts have held that the absence of actual intent to promote feelings of hostility constitutes a complete defence notwithstanding the fact that, objectively viewed, the words in question

51 *Id.* at 69 H.

52 *Id.* at 74 A.

53 1974 (3) SA 443(N).

54 *Id.* at 444 A.

55 1975 (1) SA 330 (N).

56 *Id.* at 338 H.

57 1978(3) SA 131(E).

may have precisely that effect. Thus, in *Bunting's* case,⁵⁸ Judge Graham observed that:

before a person can be found to have contravened the section, there must be proof that such utterance, etc, was accompanied with an intention "to promote any feeling of hostility" between the two races. The necessity of such a qualification is obvious, for otherwise no person, be he politician, historian, pressman, or educationalist, could discuss matters of vital interest to both Natives and Europeans without risking a prosecution. It is clear that [this] was not the intention of the Legislature ...⁵⁹

Secondly, the court distinguished between an attack upon an individual of particular race and an attack upon the race as a whole, holding that only the latter fell within the ambit of the prohibition.⁶⁰ Finally, the courts recognized that a measure of latitude must be allowed for freedom of expression on matters of public importance.⁶¹

Bannings Under the Publications Act of 1974

The system of censorship established by the Publications Act of 1974 is comprehensively discussed by Lene Johannessen elsewhere in this book. I would, however, like to add a few comments on the operation of the Publications Act and the Publications Appeal Board (PAB). The PAB has had to grapple with the reality that race is and has long been the central issue in South African politics. Its difficult task has been to reconcile tolerance of relatively robust political debate with the sensitivities of the various "sections" of the community. The PAB, however, has sometimes shown an inability to appreciate black aspirations for a society free from racial oppression or to grasp the extent to which racial discrimination has victimized and humiliated the black population. There is sometimes a tendency on the part of the PAB to conflate an attack upon the political system with an incitement to racial hostility.

A review of the decisions of the PAB reveals a dearth of cases in which insult to the black population was truly an issue.⁶² Perhaps this is not surprising. The political structure of South Africa is predicated upon a system of racial oppression. Insult to and degradation of black people is a natural and inevitable by-product of such a system. Reform initiatives by the government have not diffused racial tensions within the country. Indeed, they have spawned a militant and vociferous right-wing. In recent times South Africa has witnessed right-wing marches through

58 *Supra* note 39.

59 *Id.* at 332. Similarly, in *Sutherland's* case, *supra* note 53, Justice Murray stated at 71: "An individual who *bona fide* believes that a certain state of affairs constitutes a social disease requiring drastic reform might well use language which was likely to inflame feelings of hostility on the part of victims against the persons responsible for the state of affairs. Nevertheless if there was a reasonable possibility (not necessarily a probability) that his object was in truth the amelioration of conditions and the eradication of what he honestly considered to be an evil, he would clearly not have been shown to have had as his purpose the promotion of hostility."

60 *See, e.g., Brown, Nkatlo, Sutherland and Singh, supra* notes 38, 409, 50 and 55, respectively.

61 *See, e.g., Sutherland case, supra* note 50.

62 As Lene Johannessen points out in note 53 of the following chapter decisions dealing with satirical reviews, such as *Separate Development*, 104/80 and *Academy Awards*, 67/81, were not seriously concerned with protecting blacks from ridicule or contempt.

major cities at which the swastika has been displayed and at which virulently racist sentiments have been expressed. Right-wing literature is freely available and although not immune from the system of censorship, has been allowed to flourish with little hindrance.⁶³

Closures of Newspapers Under Emergency Powers

In August 1987 the State President, exercising his emergency powers, promulgated extensive new censorship measures.⁶⁴ The purpose of these regulations was to confer powers on the Minister of Home Affairs to deal with periodicals which systematically or repeatedly published "subversive propaganda" calculated to have various effects. Seven categories of effect were specifically mentioned including: stirring up or fomenting feelings of hatred or hostility in members of the public towards a local authority or a security force, or towards members or employees of a local authority or members of a security force, or towards members of any population group or section of the public.⁶⁵

If the Minister formed such a view and in addition believed "that the effect of publishing such matter could be to cause a threat to the safety of the public or to the maintenance of public order or [to] cause a delay in the termination of the state of emergency", he was authorized (after issuing a series of preliminary warnings and adhering to other procedural safeguards) to order the closure of the periodical for a period not exceeding three months at a time or he could insist that all future publications be vetted in advance by a specified person.⁶⁶ An order of prohibition or the appointment of a censor had to be preceded by written notice stating the grounds of the proposed action and affording interested parties an opportunity to make representations in connection therewith.⁶⁷

Several newspapers were closed down pursuant to these emergency powers.⁶⁸ The closure of *New Nation*, a weekly newspaper with a predominantly black readership, provides a case in point. Although the fomentation of racial hostility was only one of the many factors which the Minister was authorized to take into account, the exercise of his powers demonstrates the extent to which the evaluation of what constitutes "stirring up or fomenting feelings of hatred or hostility" can be manipulated to silence what would ordinarily be regarded as legitimate and even innocuous criticism.⁶⁹

63 The fact that right-wing attacks upon the black population have not been the subject of appeals before the PAB does not mean that such attacks have escaped the attention of the censorship authorities. The weekly *Government Gazettes*, which list prohibitions imposed by publications committees, include a number of reports of the banning of right-wing literature.

64 Proc. R123 *Government Gazette* 10880 of 28 August 1987. Similar regulations were promulgated in subsequent states of emergency. Regulations mentioned in this section were published in the above issue of the *Gazette*.

65 Regulation 7A(1)(a).

66 Regulation 7A.

67 Regulation 7A(4).

68 Publications which were ordered to close under emergency powers included the newspapers *New Nation*, *The Weekly Mail*, *South*, and *Grassroots*.

69 For an overview of the closure of *New Nation*, see G J Marcus, "Fanning Revolution, Unrest and Violence: A Case Study of Censorship under the Emergency", 2 *Harvard Human Rights Yearbook*

An article which referred to the "occupation" by the South African Defence Force of schools in the black townships was said to be an attempt "to stir up or foment feelings of hatred or hostility in members of the public towards a security force". A review of a play concerning a fanatical and racist former policeman in which it was suggested that there were people like him all over the country and "they are just as twisted and dangerous", was considered by the Minister to have "the effect of stirring up or fomenting hatred towards a security force". A number of articles were objected to by the Minister on the basis that they contained "derogative (*sic*) or negative statements with regard to the police".

One such article stated that the treasurer of a trade union did not intend to report an incident of arson to the police because previous reports of such incidents had not resulted in any police investigation. An advertisement placed by Catholic workers in West Germany which urged "either the end of the system of detention for political reasons or that all detainees be put on an impartial trial instantly allowing them access to a legal counsellor of their own choice" and in which the author exhorted the government "to abolish torture throughout the country" was said to foment feelings of hatred towards the security forces since it suggested "that there is torture throughout the country" and was in addition "made without any facts to substantiate it". Another article was said to stir up or foment feelings of hatred and hostility towards the Security Forces "by *inter alia* referring to security actions and raids". Despite making extensive representations to the Minister in which the absurdity of his evaluation was pointed out, the newspaper was closed down for three months.

CONCLUDING OBSERVATIONS

There are several important lessons to be learned from the South African experience of the laws relating to racial hostility. The selective prosecution of offenders and the banning of publications must be understood within the context of the undemocratic political structures in South Africa. In such a system, the law lacks legitimacy and is often used as an instrument of repression.

It is evident from the parliamentary debates that the original law preventing the fomentation of racial hostility had nothing to do with a desire to ensure racial equality or to protect victims of racial abuse. It was intended as a measure to stifle the growing opposition by blacks to an oppressive system. Similarly, the system of censorship operates in a socio-political environment which tolerates and indeed fosters racial abuse. It is hardly surprising, therefore, that the law enforcement agencies have chosen not only to turn a blind eye, but to pursue the victims of injustice rather than the perpetrators.

The implementation of the law also highlights problems of definition and interpretation. Concepts such as "ridicule", "contempt", "harmfulness", and "hostility" are potentially open-ended and susceptible to widely divergent interpretations. In giving meaning to such concepts, the political preferences and general life experiences of the adjudicators will inevitably have a profound influence. The experience of the censorship system and particularly the implementation of emergency powers illustrates how dangerous subjectivity can be in the exercise of power. In the case of the emergency regulations, the protean definitions coupled

with inadequate legal controls effectively conferred dictatorial powers upon the Minister of Home Affairs. What was particularly chilling was the Minister's assertion when the new package of emergency measures was unveiled, that a system of "scientific evaluation" would be employed to determine whether newspapers were promoting violent revolution. This assessment was to be facilitated by a panel of experts whose names, with one exception, were kept secret.⁷⁰ In this way, an attempt was made to give a veneer of respectability to a process which was ultimately arbitrary.

In conclusion, it is perhaps worthwhile to contemplate how a significant number of white South Africans have come to possess passionately held views about the superiority of their race and the inferiority of all others. I would suggest that the pervasive system of censorship in South Africa must carry a large measure of responsibility for the fostering of such attitudes. By censorship I have not included merely the banning of books but broader censorship practices such as the compilation of school curricula, the selection and omission of news by government controlled media, and the wide range of legal constraints on democratic activities. It is measures such as these which have induced the fear and ignorance which are invariably associated with racist attitudes.

SHOULD CENSORSHIP OF RACIST PUBLICATIONS HAVE A PLACE IN THE NEW SOUTH AFRICA ?

Lene Johannessen

INTRODUCTION

That South Africa has for more than four decades been ruled under an explicit policy of racial separation is well known. The racist nature of apartheid has caused endless suffering, abuse and violations of the most basic human rights. Nevertheless, South African law has, over the years, included numerous provisions aimed at preventing racial hostility, all of which appear to be race-neutral. All reported cases, however, concern prosecutions of people on the left wing of the political spectrum. frequent incidents of racial abuse directed towards individual blacks or black groups have not been the subject of prosecution.

The Publications Act 42 of 1974 contains provisions aimed at preventing the publication of anything which could be perceived as incitement to racial hostility or which amounts to an expression of ridicule or contempt for a section of the population. These provisions also appear to be race-neutral. Closer scrutiny of their application, however, reveals that they have been almost exclusively used to prevent the airing of anti-apartheid views.

This paper outlines the application of the Publications Act with regard to publications with an allegedly racist content, on the basis of decisions taken by the Publications Appeal Board (hereafter referred to as the PAB). PAB decisions published by the Centre for Applied Legal Studies at the University of the Western Cape are not generally accessible to the public at large. For the purpose of this paper, 92 decisions, from 1975 to 1989, involving allegedly racist publications, have been examined.¹ Examples from these case studies will be followed by a discussion of the role of laws prohibiting incitement to racial hatred in preventing and suppressing racism and of whether there is a need for such provisions in post-apartheid South Africa.

THE PUBLICATIONS ACT, NO. 42 OF 1974

The Act is the successor to the Publications and Entertainments Act, No. 26 of 1963 which, in its ten years of existence, was responsible for the prohibition of 8,000 publications.² Amendments to the Act were passed in 1977, 1978, 1979 and 1980. The Act covers publications, objects, films and public entertainments. Newspapers published by members of the Newspaper Press Union are exempted from the Act's provisions.³

⁷⁰ See *Pretoria News*, 3 Sept. 1987, and G J Marcus, "Fine Distinctions: Scientific Censorship and the Courts," 4 *South African Journal on Human Rights* 82 (1988).

¹ All references to decisions of the PAB in this work will be to the case number followed by the year. As most PAB decisions are very short, no reference will be made to page numbers.
² *House of Assembly Debates*, Vol. 53, Cols. 64-65, August 13 1974.
³ Section 47(1). Such newspapers are subject to the disciplinary jurisdiction of the South African Media Council.

The Act contains a three-tier system of functions: (1) the Directorate is responsible for administrative functions; (2) the Publications Committees make initial decisions of "desirability" (that is, compatibility with the Act); and (3) the PAB decides appeals from committee decisions.

The Directorate

The Directorate is composed of a director, deputy director and assistant directors appointed by the Minister.⁴ Each member has a vote; a quorum consists of two people, the chairperson exercising a casting vote. The Directorate is responsible for facilitating the work of the committees. It decides on the number of committees it deems are necessary (which may vary from time to time), assigns cases to the committees and submits questions from them to panels of experts. Any "person" may submit a publication to the Directorate, and the Directorate is required to submit the publication, without delay, to the appropriate committee.⁵

The Publications Committees

The publications committees determine the desirability of publications submitted to them. Each committee is composed of a chairman and at least two other persons.⁶ Committee members must be, in the opinion of the Minister, fit to perform functions entrusted under the Act by reason of their educational qualifications and knowledge.⁷ The Act provides for the creation of Coloured and Indian Advisory Committees but, noticeably, none for Africans.⁸ These bodies serve to advise the ordinary committees only concerning films exhibited to Coloured and Indian persons. "Political" publications are dealt with by a special committee.

In the case of periodicals, if a committee deems an edition to be undesirable and is of the opinion that subsequent editions are likely to be undesirable, it may prohibit the distribution of all subsequent editions unless the periodical is published under the authority of a special permit.⁹ A committee is also empowered to prohibit the possession by any person of any publication which has been found to be "radically" undesirable.¹⁰ Committee may also prohibit the importation, except on authority of a permit issued by the director, of publications or objects which are published by a specific publisher, or which deal with any specific subject, if it is of the opinion that such publications or objects are undesirable or are likely to be undesirable. A committee may, at any time, withdraw such prohibitions.¹¹

4 Section 2(2)(a).

5 Sections 10(1)(a) and 11(1)(a).

6 Section 4(2).

7 Section 5(2).

8 Sections 6 and 7.

9 Section 9.

10 Section 9(3).

11 Section 9(4).

Since the 1986 amendment of the Act, the committees have been empowered to impose conditions on the distribution of publications or objects which have been declared undesirable.¹²

Not a great deal is known about the committees since their deliberations are closed to the public, and the identities of their members are kept confidential. Their deliberations, committee members are not required to have regard to the rule of justice designed to guarantee a fair trial.¹³ Furthermore, there are strong indications that certain committees disregard, or pay insufficient attention to, the guidelines laid down by the PAB. Although committee decisions may be corrected by the PAB, this is an insufficient safeguard, given the relatively small number of publications that go to appeal.¹⁴ Once a committee has made a declaration of desirability, prohibited possession of a publication or found all future editions to be undesirable, the Directorate, the person who submitted the publication to the committee or any person who has a direct financial interest, may appeal to the PAB.

Statistics for the period 1976-1982 reveal that the general public accounts for between 5 and 9 per cent of the submissions per annum; publishers account for between 8 and 10 per cent, and police and customs officials together submit between 78 and 84 per cent.¹⁵

Since neither police nor customs officials have any interest in appealing against such bannings, only the Directorate of Publications and persons with direct financial interest in the publication are likely to do so, with the result that only a small proportion of all banned publications are the subject of appeal.

The PAB

The PAB consists of a minimum of seven members whose chairperson must have some legal experience and who has a casting vote in addition to a deliberative vote.¹⁶ The Chairperson may suspend a declaration, prohibition or decision of the PAB has determined an appeal.

The PAB may either confirm or set aside committee decisions or may impose conditions on the distribution of a publication.¹⁷ Following an appeal to the PAB there is no further right of appeal. However, the Act provides for the review of previous decisions after a lapse of two years,¹⁸ thereby accommodating changing community standards and perceptions. There are several instances of publications initially found to be undesirable which were unbanned after re-submission two or more years later.

12 Publications Amendment Act, No. 60 of 1986, Section 15(8)(a).

13 See, *S. v. Moroney* 1978 (4) SA 389 (a) at 403.

14 See, L Silver, "Who are the Custodians? A Closer Look at Publications Control," 98 *South African Law Journal* (hereafter "S.A.L.J.") 105 (1981).

15 L Silver, "Trends in Publications Control: A Statistical Analysis," 100 S.A.L.J. 520, 522 (1988).

16 Section 35 as amended by the Publications Amendment Act, No. 60 of 1986.

17 Section 23(5), Section 23(5)(b)(ii) grants the PAB the right "to impose in addition to that condition conditions". The PAB has ruled that it is indeed authorized to add conditions on appeal; see *Savage Beach* (12 June 1990), *Days of Thunder* (10 September 1990) and *Delta Force II* (6/11/90).

18 Section 15.

The Publications Act provides for the appointment of a committee of experts to advise the PAB in respect of its adjudications.¹⁹ Prospective members of this committee are designated by the Minister and should be experts in art, language or literature and suitable to advise the Appeal Board in respect of publications.²⁰ The PAB has increasingly made use of advisory opinions by committees of experts.

SECTION 47(2) OF THE PUBLICATIONS ACT

Publications are assessed according to a standard of undesirability as defined in the Act. Section 47(2) of the Act provides:

For the purposes of this Act, any publication or object, film, public entertainment or intended public entertainment shall be deemed to be undesirable if it or any part of it

- (a) is indecent or obscene or is offensive or harmful to public morals;
- (b) is blasphemous or is offensive to the religious convictions or feelings of any section of the inhabitants of the Republic;
- (c) brings any section of the inhabitants of the Republic into ridicule or contempt;
- (d) is harmful to the relations between any sections of the inhabitants of the Republic;
- (e) is prejudicial to the safety of the State, the general welfare or the peace and good order;
- (f) discloses with reference to any judicial proceedings -
 - (i) any matter which is indecent or obscene or is offensive or harmful to public morals;
 - (ii) any indecent or obscene medical, surgical or physiological details the disclosure of which is likely to be offensive or harmful to public morals.

For the purpose of this paper, only (c) and (d) dealing with racist speech will be discussed. However, a number of the cases discussed also involve (e), underlining the fact that in the South African context race relations and politics invariably overlap. The PAB, when it considers the interests that are violated in a political work or the effect of such a work, frequently blurs the distinction between (d) and (e). Consequently, these paragraphs are on occasion applied simultaneously. The decision in *Al Zahf Al Akhdar* 55/81 is a good example:

It appears that although the publications are anti-Marxist, they nevertheless strongly support revolutionary socialism. They also reveal a hostile attitude towards South Africa in so far as they support the enemies who are at war with South Africa. The publications are also strongly in favour of revolution by the masses. Some of them also employ their strong rejection of racism as an instrument to polarise blacks and whites and to foment animosity against white South Africans.

One of the few guidelines to interpretation of all provisions in the Act is provided in section 47(1), which states: "in the application of this Act the constant endeavour of the population of the Republic of South Africa to uphold a Christian view of life

shall be recognized." Given the diversity of the cultural and religious backgrounds of the various sections of the population in South Africa, this provision runs counter to the views and values of a large proportion of the population.

Another clause, Section 47(4), states: "[i]n determining whether any publication ... is undesirable, no regard shall be had to the purpose of the person by whom that matter was produced or distributed."

The lack of guidelines, the vagueness of the term "undesirability", and the fact that other terms essential for interpretation of the section can be so widely construed render Section 47(2) highly susceptible to abuse. Because of the section's vagueness, the political and adjudicatory philosophy of the PAB Chairman assumes undue importance. The judgements of Mr Justice Snyman, first Chairman of the PAB, were viewed as draconian by human rights lawyers and journalists, and his pronounced views on the role and function of art often angered artists and students of literature.²¹ In contrast, his successor, Professor J C W. van Rooyen, who served from 1980-1990, attempted to lay down proper legal guidelines for the adjudication of publications, to some extent reducing the danger of the intrusion of purely subjective criteria. However, certain committees disregard or pay insufficient attention to the guidelines laid down by the PAB.

Freedom of Political Expression

The PAB has expressed support for the right to freedom of expression in general and to freedom of political criticism in particular. In a 1982 decision it referred to freedom of speech as "one of the cornerstones of our society".²² The PAB has extended freedom of speech to the sphere of political comment, including comment on the racial policies of South Africa.²³ The PAB has relied on Supreme Court cases to support its view that political criticism is permitted. For instance, in *Die Afrikaner* the PAB relied on the following dictum of Ogilvie Thompson in *S. v. French-Beytag*:

It is important to bear in mind throughout the present inquiry that not only is the appellant *not* on trial for his political views, but also that the mere expression even in somewhat intemperate terms, of views opposed to the provisions of certain existing legislation or to the policies of the government relating to separatist development is not necessarily to be equated with the crime of participation in terrorist activities created by the Act.²⁴

The Clear and Present Danger Doctrine

The PAB claims to be guided by the "clear and present danger doctrine" formulated by the United States Supreme Court. Under this doctrine, the government may curtail subversive speech only if the words of the speaker, objectively viewed, are intended or likely to produce imminent and serious violence or unlawful acts.²⁵ The PA

21 6 *South African Journal on Human Rights* (hereafter "S.A.J.H.R.") 426 (1990).

22 *The Struggle for Land*, 178/82.

23 See, e.g., *A Chip of Glass Ruby*, 28/83.

24 *Die Afrikaner*, 2/80 (quoting *S. v. French-Beytag* 1972 (3) SA 430 (A)).

25 See *Brandenburg v. Ohio* 396 U.S. 444 (1969).

19 Section 35A(1).

20 Section 35B(3).

has stated that for a finding of undesirability there must be a clear threat to protected interests.²⁶ According to one commentator:

The Publications Appeal Board, despite its claim, does not use this test to guide its censorship decisions. Indeed it seems unaware that the doctrine is given this interpretation. If South African use of the doctrine has any American analogue at all, it is to those widely discredited "Cold War" days when the clear and present danger doctrine was used to suppress speech and imprison members of the Communist Party.²⁷ ... [T]he Board's claimed reliance on the American clear and present danger doctrine seems little more than pretence, an attempt to make South African censorship more palatable by linking it with American standards of freedom.²⁸

The Absolute Necessity Test

According to the PAB, it presumes that the Publications Act was intended to encroach upon freedom of speech no more than is "absolutely necessary". Thus, it has interpreted subsections (c), (d) and (e) to require that publications which are to be banned must be "offensive" and "revolting" and not merely "annoying".²⁹ The question which the PAB addresses therefore "is not whether a book, etc. is necessary but whether prohibiting it is necessary (essential)."³⁰ A publication which may cause a slight strain in relations between different groups but would not pose a serious threat to public order thus would not be prohibited under paragraphs (c) or (d).³¹

"Or Any Part": A Contextual Approach

Section 47(2) provides that a publication may be found undesirable if any part of it is found undesirable. The PAB, however, has interpreted this provision narrowly and thus has ruled that "when a publication is to be judged it must ... be judged as a whole and ... isolated words or passages should not be read out of context."³²

"Section of the Inhabitants"

According to the PAB a "section of the inhabitants" for purposes of subparagraphs (c) and (d) is a substantial number of people who, as a result of an inherent characteristic or characteristics, regard themselves as a distinctive community and are accepted as such by the rest of the community.³³

²⁶ *Mapatsula*, 110/88.

²⁷ See, e.g., *Dennis v. United States*, 314 U.S. 252 (1941).

²⁸ MM Cheh, "Systems and Slogans: The American Clear and Present Danger Doctrine and South African Publications Control," 2 *S.A.J.H.R.* 30 (1986).

²⁹ E.g., *Heartland*, 43/82, annex pp. 26-27.

³⁰ *Id.*

³¹ JCW van Rooyen, *Censorship in South Africa* (Juta & Co. Ltd., 1987), 99.

³² *SASPU National*, 105/83.

The PAB has repeatedly invoked the dictum of Justice Steyn in *Buren Uitgewers (edms) Bpk v. Raad van Beheer oor Publikasies* to determine that criticism of whites, especially of Afrikaners, brings a work within the ambit of both (c) and (d).³⁴ The black community also forms a "section of the inhabitants",³⁵ as does the Jewish community.³⁶ The clause, however, does not protect the interest of individuals even if they are leaders of a particular community.³⁷ The PAB has ruled, for instance, that politicians are not protected as a section of the community.

With regard to the derogatory references to politicians, the Board has come to the conclusion that they do not fall within the ambit of its functions. The Publications Act protects the interests of the community as a whole or of sections of the community. Although the community or sections of it can, in some cases, be brought into contempt through individuals, this is not the case in the present matter.³⁸

Nor do the police form a section of the inhabitants within the meaning of Section 47(2)(c).³⁹ A religious community may be considered a "section of the inhabitants" for purposes both of subparagraphs (b) (regarding blasphemy) and (c) (regarding "ridicule or contempt").⁴⁰

Subparagraph (c): "Ridicule or Contempt"

The PAB has ruled that ordinary scorn or political criticism does not suffice to warrant a finding of undesirability.⁴¹ The concept of "ridicule and contempt" for purposes of subparagraph (c) is applied when one group only is belittled. When two groups are ridiculed, the resulting insult may foment animosity or hostility between "sections of the inhabitants", particularly in creating racial hostility between blacks and whites. Publications which address more than one group thus usually are addressed under subparagraph (d).⁴²

During Professor van Rooyen's chairmanship of the PAB from 1980 through 1990, the PAB overturned a significant number of committee decisions ruling publications undesirable under subparagraph (c). Because committee decisions are not published it is difficult to assess the percentage of cases which were overturned on appeal but it seems fair to say that the committees failed to apply many of the guidelines set forth by the PAB during that period. In several PAB decisions, the

³³ *Total Freedom*, 72/76. See also, Van Rooyen, *supra* note 31, at 90.

³⁴ *Buren Uitgewers (edms) Bpk v. Raad van Beheer oor Publikasies* 1975 (1) SA 379 (c) at 423 B-C. See also *Articles of Faith*, 15/83.

³⁵ See, *It's a Boy*, 159/82.

³⁶ *\$48,000 Reward*, 202/82.

³⁷ *Pace*, 191/83; *Famous Dead Man*, 181/86; *Head Office*, 71/86.

³⁸ *Academy Awards*, 67/81.

³⁹ *Store Up the Anger*, 101/80. See also, *The Dawn Comes Twice*, 144/76.

⁴⁰ *Death of A Princess*, 50/80.

⁴¹ *Heartland* 43/83, quoting *S. v. Tanteli*, 1975 (2) (SA) 772 (T), 774 (E): "It must, however, be observed that the word "insult" does not in this context bear its ordinary meaning, but is used with a narrow meaning of degrading, humiliating or ignominious."

⁴² See, e.g., *Academy Awards*, 67/81; *A Separate Development*, 104/80; *The Grass is Singing*, 103/80.

PAB has quoted a committee's reasoning, thus making clear the committee's failure to apply the appropriate tests.

For instance, in *Head Office*, 71/86, the committee ordered the excision from a film of a photograph of Inkhatha leader, Chief Mangosuthu Buthelezi:

The use of the photograph in a context such as this would in the South African context be offensive to a great many people. Buthelezi is the leader of the Zulu people, with which the majority of them identify. Although he isn't named in the film and is indicated as the leader of a mythical people, the committee is of the opinion that the parody the film proved could conceivably cause anger in the combustible South African situation. Furthermore, it comes very close to ridiculing a meaningful section of the South African public by ridiculing its leader.

The PAB on the other hand found that:

the photograph in question is shown only fleetingly and it is obviously not meant as an attack on the Zulu people. Even if one regards it as a jibe at blacks, the Board is of the opinion that it is not sufficiently strong to warrant an intervention by the law.

Subparagraph (d): Harmful to Relations Between Sections

For a work to fall within the ambit of subparagraph (d) the first issue that the PAB considers is whether the publication leads or contributes to a violation of harmonious relations between sections of the inhabitants of the Republic. That question is decided in the light of the "probabilities" and the likely readership of the publication.⁴³

The PAB under Professor van Rooyen's leadership upheld principles of freedom of expression and refused to declare undesirable under subparagraph (d) publications and statements which called for change or protested government actions. In the words of Professor van Rooyen:

Freedom of expression finds its roots in our common law and has been strengthened by Western democratic thinking during the last two centuries. The PAB has therefore held that since the term "harmfulness" in s 47(2)(d) is rather vague it should be interpreted in the light of the common law and obvious practical necessity, which makes the communication of grievances - political or otherwise - even though these may be one-sided, the very lifeline of a heterogeneous, multiracial society-in-transition such as our own The mere creation or strengthening of a point of view foreign to government policy or even the creation of a feeling of discontent towards another section would not be sufficient for a finding of undesirability. The animosity generated must be of such a nature that it is likely to erupt into or contribute towards hostilities, thus affecting public order, the consideration of which underlies this paragraph.⁴⁴

As was the case with decisions of undesirability made pursuant to subparagraph (c), there similarly are wide differences in the way the committees and the PAB

43 *Staffrider*, 122/80; *Learn and Teach*, 41/82.

44 Van Rooyen, *supra* note 31, 102-03. See also *Pace*, 191/83, and *Heartland*, 43/82.

have applied subparagraph (d). For instance, in *Cry Freedom*, 93/88, the PAB found that the committee in question had mistaken its functions:

[I]ts concern in 'demonstrating that South Africa is politically mature, unbiased and fair by allowing all points of view for public screening' is, of course, commendable, but smacks of policy-making (para 3); the same holds true in regard to para 7, where the committee implies that the passing of the film might be regarded as a demonstration of the seriousness of 'all South Africans' about achieving peaceful reform; see also para 9 where greater 'awareness' and 'improved race relations' are cited in the committee's reasons. These are commendable goals, but again, such considerations fall outside the ambit of the committee's task, which is to determine whether the film is 'harmful' to race relations.

The Likely Reader

The van Rooyen Board's introduction of the concept of the likely reader as a factor in determining the undesirability or otherwise of a political work is one of the most noteworthy departures from the reasoning of the first PAB under J H Snyman's chairmanship.⁴⁵ From 1974 to 1978 the test applied was whether or not a work would influence the average, decent-minded person to revolutionary or lawless conduct. The work's likely effect upon a substantial number of persons in the South African community was also to be determined.⁴⁶

According to the PAB under van Rooyen, in order to determine a work's potential effect it is necessary to decide who would be its likely audience, reasoning that a work will have a greater effect if it likely to be read by a mass audience rather than by a circumscribed and sophisticated one. The extent of the likely audience is calculated, *inter alia*, by the artistic or literary merit of a work.⁴⁷

The following decision illustrates how the PAB has used the concept of the likely readership in deciding on undesirability under (d):

The sometimes violent attacks on whites in America could, no doubt, be equated with an attack on whites in general and might conceivably have a deleterious effect on race relations in South Africa, but only if the book were to be read widely here. This is extremely unlikely. This is not a book for the masses and it is almost certain to have an extremely restricted readership consisting, for the most part, of theologians, sociologists and, perhaps, historians.⁴⁸

The nature of a work is another relevant factor in determining its likely audience, and thus in determining undesirability. Academic works, for example because of their limited readership, are likely to be given a wider margin of appreciation than T-shirts and pamphlets. The PAB has also stated that "audio-vis

45 See, *A Chip of Glass Ruby*, 28/83; *Die Afrikaner*, 42/80.

46 L Silver, *A Guide to Political Censorship in South Africa* (Centre for Applied Legal Studies, Witwatersrand University, 1984), 63.

47 The Supreme Court authority for this approach is to be found in *Buren Uitgewers (edms) Bpk., supra* note 34.

48 *For My People*, 22/86.

ual or auditory works" are more likely to be found undesirable than the written word.⁴⁹

Halt All Apartheid Tours concerned a T-shirt bearing that logo, above the image of a black man lying on his back with outstretched arms chained to the ground while a white and a black team play cricket on his chest. The PAB stated:

A shirt of this nature, carrying its message to everyone with whom the wearer comes into contact, must have even greater effect than a pamphlet ... The message remains that of discrimination by whites against blacks and the blunt, almost brutal way in which it is represented will ... cause or heighten ill-feelings against whites amongst a substantial number of blacks.⁵⁰

As mentioned above, a committee of experts may assist the PAB in its estimation of the artistic or literary merit of a work. Since 1988 there have been one black, one coloured and one Indian member of the PAB, but very few non-white members on the committees of experts. Thus, in the past, and to a lesser extent since 1988, the determination of the probable effect of a publication upon its likely audience has been made from a white perspective, notwithstanding the fact that, in many cases, the likely audience of the publication in question has been black.⁵¹ As observed by Gilbert Marcus, such a process ensures "that Black writers will inevitably be placed at a disadvantage by having their works assessed by people with an inadequate understanding and appreciation of African literature."⁵²

The PAB has discussed to what extent the political climate, at any given time, should have an impact on its decisions. It has stated:

The problem is, however, that the interests which the Act seeks to protect might be said to be more vulnerable at certain times than at other times. The likely readers could for example be more prone to a particular kind of reaction in a situation of war than they might be at other times. The Board must, however, independently come to the conclusion that this is indeed the case, and it is not entitled simply to take judicial cognisance of the fact that the State of Emergency has been declared and that this necessarily makes particular interests vulnerable. An allegation that certain interests are more vulnerable must be looked upon with circumspection, and only after careful analysis and possibly even evidence should a conclusion be reached that these interests are indeed more vulnerable.

In *Roots* 170/84, a majority of the PAB ruled the series to be undesirable, quoting the "present unrest in South Africa" as a factor which was taken into consideration, but noted that under different circumstances it might arrive at a different decision. In 1986, a committee endorsed the minority's view and passed the series on re-submission.

49 *Heartland*, 43/82 annexe.

50 *Halt All Apartheid Tour*, 36/83.

51 The first occasions on which the PAB had the benefit of expert advice from blacks was in *House of Hunger*, 79/83; *Why Are We So Blessed*, 80/83; and *Two Thousand Seasons*, 81/83.

52 G Marcus, "An Examination of the Restrictions Imposed on the Press and Other Publications which Appear in Practice to Affect Members of the Black Group More Severely than Other Groups," *Human Sciences Research Council*, 18.

SHOULD THE NEW SOUTH AFRICA BAN RACIST SPEECH?

Of the 92 cases studied for the purpose of this paper, very few can be interpreted as protecting the rights and reputations of the black majority in South Africa⁵³ and only a few cases discuss the protection of the Muslim and Jewish communities.⁵⁴ The absence of cases dealing with publications from professed racist organizations such as the *Afikaner Weerstand Beweging* (AWB) and the Conservative Party, as well as any publication arguing for the legitimacy of apartheid, is noticeable. It is argued here that any publication in support of a policy which precludes sections of a society from the political and economic sphere on the basis of their race constitutes the ultimate contempt for these sections of society.

The vast bulk of decisions dealing with subparagraphs (c) and (d) concern the publication of the political grievances of people who, for decades, have been denied basic political and economic rights. The fact that in a number of the cases the PAB has overruled a decision of undesirability by publications committees does not alter the overall impression that, over the years, the provisions in the Publications Act have been used almost exclusively to censor or to try to censor anti-apartheid publications. Thus, despite the wording of the Act, the application of the provisions cannot be considered to have been race-neutral.

As mentioned above, the PAB Chairperson's personality has, to a large extent, determined the level of censorship under the Publications Act. Under van Rooyen, the PAB tried to introduce "reasonable censorship", which led to a more lenient attitude towards intellectual and/or academic literature. According to South African novelist, Nadine Gordimer, this can merely be seen as a realization that

in a country where the masses are neither book-literate nor have libraries which would help them to become so, serious literature, whether by black or white writers, at home or from abroad, and no matter how potentially 'inflammatory', reaches only a section of the population that already has contact with such influences. But the principal reason for apparent leniency is that a vast proportion of the masses is newspaper-literate, media-literate, and therefore the focus of state information and thought control must be the media.⁵⁵

Another prominent South African novelist, André Brink, states: "[I]t would be futile to argue that there is a case for 'reasonable censorship'. This is not casuistry: it is blatantly false. Censorship *per se* is unreasonable and pernicious."⁵⁶

It is also clear that the general climate concerning freedom of expression has improved markedly since the political reforms initiated in February 1990. In a August 1990 interview in the *Weekend Mail*, the PAB's present chairman, Lou Pienaar, said:

53 I do not consider cases like *Joburg, Sis*, 3/78, *A Separate Development*, 104/80 and *Academy Awards*, 67/81 -- which banned publications on the grounds that they ridiculed black people -- to be truly concerned with protecting blacks from ridicule. Those works would likely be perceived by most of the black readers not to be ridiculing or vilifying them but merely to be satirizing the living conditions of black people under apartheid.

54 See, *The Message*, 158/77; *Yassir Arafat*, 43/78; *The Death of a Princess*, 50/80; *\$48,000 Reward*, 202/82.

55 N Gordimer, "Censorship and Its Aftermath", 19 *Index on Censorship* 14 (No. 7, 1 1990).

56 A Brink, "Censorship and Literature", in T Coggin, ed, *Censorship* (Johannesburg: South African Institute of Race Relations, 1983), 48.

It is generally agreed by all concerned, media, lawyers, anti-censorship groups and Pienaar himself that, at least for the time being, the days of heavy-handed political censorship are over. Little more than a month ago, the unheard of happened: the Directorate of Publications, which for years has religiously issued lists of banned publications each Friday, had nothing to issue.

In the past three months, only one political publication has been brought to the attention of the Appeal Board - a Pan Africanist Congress pamphlet which was passed without further ado.⁵⁷

More recently a number of previously banned publications have been unbanned. What was considered undesirable, sometimes even radically undesirable, not long ago can now be freely published, distributed and possessed, without a comma being altered in the statute book. This change in stance does not reflect a sudden change in attitudes among the population in general, but is confirmation that race-neutral provisions like (c), (d) and (e) can be interpreted in a fundamentally different way depending on the current political inclinations of the government.

Is it possible to draft provisions of this kind in a form which would avoid making a future democratic South Africa vulnerable to the arbitrary abuse of censorship, of allegedly racist publications, by any government?

How would "racist" speech be defined? When would words be "likely" to cause racial hostility? Would we analyze the likelihood of racial hostility according to the perspective of a "reasonably prudent person", or from the subjective views of the targeted groups, whoever they may be at any given time? Do we really want the government deciding which words are offensive and which are not, especially when their own interests may be affected? As difficult as it is to tolerate racist expressions, one must be realistic in assessing the difficulty involved in regulating such behaviour. In the words of Professor R George Wright:

If a suitable definition of racist speech can be settled upon, the problems of interpreting and applying the legal standard to concrete situations begins. One possible approach, of course, is that of a continuing censorship bureaucracy. In the end, history teaches us that the 'boundaries of the forbidden' cannot reliably be drawn.⁵⁸

John Dugard writes that "[i]n a racially diverse society there is clearly a need for laws which prohibit incitement to racial hatred."⁵⁹ However, he acknowledges the difficulties inherent in such laws:

However desirable such laws may be there is always the danger that they will be used mainly against blacks who express themselves forcefully about legitimate political and socio-economic grievances rather than against whites who cause feelings of racial hostility by racially abusive comments.

As recognized by the PAB and the South African courts, race issues and politics substantially overlap in South Africa. As a result, even valid political dialogue in South Africa involves questions of race. Regulation of "racist" speech and publications would, therefore, inevitably chill political debate within the country.

⁵⁷ *Weekly Mail*, 31 August 1990; reproduced in 6 *S.A.J.H.R.* 435 (1990).

⁵⁸ R G Wright, "Racist Speech and the First Amendment," 9 *Miss. Coll. Law Rev.* 23 (1988).

⁵⁹ J Dugard, *Human Rights and the South African Legal Order* (Princeton: Princeton University Press, 1978), 177.

Assuming any regulation could be narrowly drafted, and even assuming it was fairly applied (dubious assumptions, not least in the light of the way the Publications Act has been applied over the years), it is argued that regulation of racist speech in South Africa would compromise the nation's attempt to achieve democracy. Criticism by black citizens against a "white" government would inherently involve questions of race, as would criticism by whites against a "black" government. Regulations which even narrowly regulated comments creating "hatred" between the races could be used to persecute *bona fide* political comment.

This scenario need not inevitably occur. Perhaps a future democratic government will have learned the bitter lessons of the past and will not repeat the mistakes of their former oppressors under a different guise. However, we cannot merely hope and trust that future governments will pursue democratic ends by democratic means. We have to ensure a legal framework which can guarantee fundamental rights, like freedom of expression, independently of the personalities of those in power at any given time. This, it is argued, is not achieved by preserving or creating censorship legislation which allows for potentially draconian abuse. As Nadi Gordimer said, in a recent interview in the *Weekend Mail*, on the question of abolition of present censorship provisions:

Definitely [the censorship legislation should go] As you will see from the Gazette every week, little fiction is banned. So the government isn't taking any notice of writers But the fact is that the laws are there. I hope we in COSAW and the cultural sections of the ANC and the other liberation movements will be alert to this because, who knows, it just may be that the laws will be left on the statute book, and there they will be, just waiting to be used in a new South Africa.⁶⁰

A case for censorship of racist speech could be made if such censorship did, in fact, eliminate the effects of racist attitudes. However, the evil manifested in racist speech is not the sight or sound of the words themselves but the racist attitudes which underlie them. It is highly doubtful whether censorship is an efficient way of curbing and preventing racial hatred. The problem lies in racist attitudes, not in their free communication. I have yet to see a survey which convincingly proves that racist attitudes can be reduced by censorship.⁶¹

Denise Meyerson writes on the subject of intolerance and prohibition of racist views:

Finally, there is Marcuse's argument for intolerance, namely that tolerance of that which is evil serves the cause of oppression. ... Marcuse's view ... overlooks the costs of intolerance. First, to drive an evil view underground can actually increase its strength; whereas to debate it out in the open is more likely to bring home its abhorrent nature. It is precisely those on the left, who, after all, believe there is a truth about the awfulness of racism, who should be optimistic about the power of debate and argument to demonstrate that truth. They came to their views

⁶⁰ *Weekend Mail* supplement, 22 February 1991.

⁶¹ This is based on the assumption of a democratic society; in non-pluralist countries where the massive government propaganda in favour of racism, as was the case in Nazi-Germany and has been the case in South Africa, this of course will have the effect of promoting racist views. In this case however, the propaganda as such is not the root of the problem, but rather the undemocratic nature of the government as a whole; the success of the racist propaganda is then merely a symptom of government structure, which allows for only one view to be presented.

by reason, and since they do not believe themselves to be intellectually superior, should trust in reason rather than the police force as the better weapon against falsehood. Secondly, it is only too easy for censorship laws to be put to different uses from those originally intended and if we are happy for them to be deployed in one way, we make it much easier for them to be deployed in other, more frightening, ways later. And a final consideration here is that, to the extent that racial animosities will continue to plague us, it is better to let them be played out at the level of words rather than to bottle them up, thereby not only increasing their virulence, but also making more likely a more dangerous kind of discharge. Forced, as we are, to weigh up evils here, we should therefore conclude that tolerance is more beneficial than costly.⁶²

Racist or non-racist publications may incite violence, and provisions to restrict such publication and prosecute the authors can rightfully form part of a state's legislation. Thus, a commitment to free expression does not preclude a government from combatting racial hostility and violence within narrowly applied time, place and manner restrictions. Blanket prohibitions on racist speech would, however, almost inevitably be over-inclusive and act as a restraint on political dialogue. Consequently, there seems little justification for formulating pre-emptive censorship restrictions exclusively aimed at allegedly racist publications.

If, however, a decision is made to adopt provisions similar to those in the Publications Act, it is crucial that an explicit public interest defence be incorporated in order to exempt legitimate political expressions and media coverage of race-related issues, and thus secure the free flow of information and ideas. A public interest defence would protect the airing or reporting of legitimate political views, however deplorable or offensive such views might appear to be to some members of society. A public interest defence protecting the expression of legitimate political views would not, however, apply to the advocacy of violence, racial or otherwise. The risk of restricting legitimate political debate thus would be substantially reduced.

Conclusion

The above discussion raises four points which cast serious doubt on whether continued censorship of allegedly racist publications will well serve a post-apartheid South Africa aiming to eliminate racist attitudes.

First, it has been shown how unequally the provisions in the Publications Act have been applied in the past, despite their apparently race-neutral wording and despite Professor van Rooyen's struggle to develop a jurisprudence of "reasonable censorship", recognizing freedom of expression as a fundamental right.

Second, it is argued that there is an inherent risk of similar abuse and unequal application of the provisions in the future, due to the difficulty of drafting narrow provisions and of drawing the line between acceptable and unacceptable expression.

Third, it is contended that provisions which regulate racist speech would inevitably restrict political dialogue. This is especially true in the South African

context, where race-related issues overlap so substantially with political issues in general.

Lastly, there is no proof that censorship does, in fact, prevent the spread of racist attitudes. Adolf Hitler was banned in 1925 by the Government of Bavaria, but this did not prevent him from pursuing his anti-Semitic objectives.

These points refute the argument that non-regulation of racist speech provides a platform for racists. A primary concern should not be the racist's individual rights and freedoms but, rather, to try to find the best way to secure a basis for democratic development. The reality of racism must be approached in a constructive way rather than by merely imposing rigid censorship in the unsupported belief that it can cure the effect of racist attitudes.

On this basis it is a matter of concern to note that the ANC's draft Bill of Rights, although guaranteeing the right to freedom of expression and information, includes a wide-ranging provision allowing the state to restrict racist speech.⁶³ Although this provision, in seeking to combat racial discrimination, pursues a legitimate aim, it leaves great room for abuse and could permit the censorship of any publications which could be considered insulting to a racial or a religious group.

In conclusion, I quote the words of John De J. Pemberton:

Just as Clemenceau advises that war is too important to leave to the generals, so decisions may start from the belief that race tensions are too serious to leave to law enforcement officers. Despite the enormous risks inherent in uninhibited speech about racial, ethnic and religious groups, the risks inherent in suppressing such speech are ultimately much greater.⁶⁴

62 6 S.A.J.H.R. 397 (1990).

63 Article 4 and Article 14 of the draft ANC Bill of Rights.

64 J Pemberton, "Can the Law Provide a Remedy for Race Defamation in the United States?", 14 N.Y.L. Forum 48 (1968).

INCITEMENT TO INTER-ETHNIC HATRED IN SRI LANKA

Sunila Abeysekera and Kenneth L Cain

INTRODUCTION

The theoretical parameters of the debate over freedom of expression generally, and "hate speech" specifically, are familiar, and indeed have formed an important chapter in the jurisprudence of liberalism. Analysis is traditionally bounded on the one hand by the notion that liberty is best guaranteed when society is exposed to a diversity of competing ideas, and that restraint of free expression deprives a free body politic of the debate that is, ultimately, its life's blood. On the other hand, society is obligated to ensure its own survival and free expression must, at the margins, be curtailed to ensure social order; in its classic formulation, liberty must concede to restraints in order to protect the very freedom guaranteed.

The challenge, of course, is to draw the line - to define the threshold at which the fundamental freedom must be compromised, on the one hand, by society's interest in order and stability and, on the other, by the rights of individuals, especially those who belong to a disfavoured minority, to be physically secure and free from intimidation and harassment. Specifically, when do words exit the category of expression and enter the restricted category of, for example, incitement? There is no dearth of learned attempts to articulate just such a threshold. Justice Holmes' formulation is one of the most frequently quoted:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.¹

THE CONTEXT OF THE DEBATE IN SRI LANKA

Limitations on Expression in the Interest of Public Order

In a society such as Sri Lanka the context of this dilemma, often quite literally a question of life and death, is of a substantially different character than the context of stability and security which produced the classic Anglo-American formulations. Indeed, as Lord Sumner himself understood:

The words, as well as the acts, which tend to endanger society differ from time to time [and, we would add, from place to place] in proportion as society is stable or insecure in fact, or is believed by its members to be open to assault.

In the unstable, violent and repressive context of Sri Lankan society, the question is profound and its appropriate resolution crucial to Sri Lanka's future. Freedom of expression is meaningless unless it includes the freedom to challenge and indeed to provoke. The right merely to agree and to conform is an empty freedom. However, it is just such challenges and provocations that in a divided society, not

unreasonably, can and will be perceived as a direct threat to a tenuous public order. Inherent in the notion of public order in the Sri Lankan scenario of virtual ethnic civil war (between the majority Sinhalese government forces and militant minority Tamils, generally limited to the north and east of the country) is the suppression of militant minority aspirations, which are seen by the majority most emphatically as an assault on that very "public order". Furthermore, Sri Lanka has only recently overcome a bloody Maoist insurgency in the South, led by an organization, the JV (*Janatha Vimukthi Peramuna*), whose rights to political participation and freedom of expression had previously been proscribed by the government.

In this scenario, the government claims that suppression of the militant expression of minority aspirations is necessary for the preservation of "public order". The security forces of the Sinhala-dominated state engage in a militarized campaign against the Tamil militant group, the Liberation Tigers of Tamil Eelam (LTTE); the state must justify the war effort while purporting to seek a political and democratic solution to the conflict. Opposition political groups and parties are vociferously critical of the state, alleging that it is granting concessions to the Tamil people; the birth of several Sinhala rights organizations in the past months is but one manifestation of this trend. The minority communities, Tamil and Muslim, direct their energies to the creation of groups and organizations that will protect and preserve their identity, which they see as being under attack by both the state and non-state entities.

Thus, in the context of Sri Lanka's ethnic and social divisions, the right to dissent, the most fundamental democratic right, is as precious as it is under attack.

The Need to Safeguard the Rights of Vulnerable Minorities

A second, even more complex and volatile tension exists between the need to guarantee freedom of expression and the need to safeguard the interests of minority ethnic and religious communities. It is of crucial importance to understand the manner in which this tension has been "resolved" in Sri Lanka: on the one hand the state enjoys unfettered discretion to restrict expression which it determines is likely to inflame inter-ethnic tensions or violence; on the other hand, the government selectively invokes free expression values in order to justify its tolerance of provocative and unambiguously racist speech by militantly chauvinistic elements among the Sinhalese majority.

In the past fifteen years, we have witnessed the polarization of the Sri Lankan community on ethnic and religious lines. Given the militarization of the ethnic conflict into a virtual civil war in the past seven years, the question of freedom of expression, and the safety of vulnerable minorities, has become a crucial variable in the complex, contemporary, political constellation. The growing hostility between different ethnic and religious groups living on the island has led to justifiable fears that unrestricted freedom of expression of the majority is enabling chauvinists and those who would incite armed conflict to disseminate propaganda that negates the principles of pluralism and directly threatens several minority communities.

Incitement of Hatred Against Minorities

The above themes are illustrated by the hostile tone of press reports in the leading dailies that surfaced in February 1992, primarily in response to proposals for a resolution of the conflict put forward by Mr S Thondaman, a senior Cabinet Minister in the present government and a trade union leader among the Tamil

¹ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

workers in the plantation sector. Responses to the proposals were couched in language that was hostile not only to Mr Thondaman as an individual (and as a Tamil) but also to the Tamil community in general. Statements of a Sinhala-Buddhist exclusivist nature triggered fears that an escalation of anti-Tamil sentiments could destroy not only all prospects for peace or devolution of power but, as has happened in the past, could threaten the very physical safety of Tamils throughout the country. Press reports of the various responses to the Thondaman proposals tended to portray the ethnic conflict as a military struggle between the state and the LTTE which could only be resolved militarily, rather than as a manifestation of justifiable demands of the Tamil minority for equal rights. Those who hold such views are engaged in an ongoing campaign of vilification of groups and organizations, both local and foreign, that are supportive of a peace process which includes a ceasefire, negotiations and devolution of power to the minority communities.

For example, a headline in the Sinhala daily newspaper, *Divayina*, which is probably the largest circulation daily in the country, said on 25 February of this year, "The only solution to the question of Tamil extremism is war." The next day *Divayina* published an article which included this analysis: "What we have in the north and east today is a Tamil racist uprising. It uses terrorist tactics. Their demands are racist and anti-Sinhala." In a frontal assault on pluralism, the *Divayina* of 20 February headlined a report on a public meeting thus: "It is a grave error to identify this country which has a Buddhist heritage as multi-religious or multi-ethnic."

These examples of the Sinhala press advocating war as the only possible means of resolving the ethnic conflict and promoting the idea of Sinhala-Buddhist exclusivity illustrate the complexities of developing an appropriate threshold of restraint on hate speech. These widely disseminated views must be understood in the context of war in the north and east and the profound vulnerability of minorities in the rest of the country.

Government Selectivity in Enforcing Anti-Incitement Laws

The rights of all Sri Lankans, but most acutely of minorities, are constantly under attack on the grounds of "security" and "national interest", often motivated by logic exemplified by the above quoted passages of *Divayina*. Clearly, a convincing case could be made for the theoretical justification of restricting speech that incites racial animosity, such as that which appears almost daily in the mainstream Sinhala press. In practice, however, the state uses its restrictive powers selectively, and majority prejudices are widely disseminated, while minority expression is dramatically restricted, particularly under the guise of "national security" emergency legislation. Therefore, any theoretical justification for restraint of racist speech immediately loses its force in the face of the practical realities of utter and profound lack of good faith on the part of the government in enforcing the anti-censorship laws. The Sri Lankan government's unwillingness to undertake to protect all of its citizens, the tragedy of our society, on the one hand undermines legitimate principles of restrictions on hate-speech, and on the other hand permits majority-inspired incitement to be widely disseminated.

THE LAW AND ITS APPLICATION

Article 14(1)(a) of the Fundamental Rights chapter of the Sri Lankan Constitution provides: "Every citizen is entitled to the freedom of speech including publication."

Article 15(2) of the same chapter, however, broadly empowers the government to apply limits on the exercise of this freedom:

The exercise and operation of the Fundamental Right declared and recognized by Article 14(1)(a) shall be subject to such restrictions as may be prescribed by law in the interest of racial and religious harmony or in relation to ... incitement to an offence.

The restrictions set forth in Article 15(2) are broader than those permitted by the ICCPR which states that fundamental rights may be restricted only if necessary to promote specific interests which are enumerated very clearly in the Covenant. Indeed, as the Sri Lankan Supreme Court stated in 1982:

the operation and exercise of the right to freedom of speech are made subject to restrictions of law not qualified by any test of reasonableness. Neither the validity nor the reasonableness of the law imposing restrictions is open to question.²

A number of Emergency Regulations have been issued under the broad authority conferred by Article 15(2). For example, Article 14(1) of the Emergency Regulations prohibits publication of any material which, in the view of a "competent authority",

would or might be prejudicial to the interests of national security or the preservation of public order or the maintenance of supplies and services essential to the life of the community or of matters inciting or encouraging persons to mutiny, riot or civil commotion or to commit breach of any law.

Section 120 of the Sri Lankan Penal Code provides as follows:

Whoever by words, either spoken or intended to be read ... excites or attempts to excite feelings of disaffection to the President or to the Government of the Republic, or excites or attempts to excite hatred to or contempt of the administration of justice ... or attempts to raise discontent or disaffection amongst the people of Sri Lanka, or to promote feelings of ill will and hostility between different classes of such people, shall be punished with simple imprisonment which may extend to two years.

Emergency Regulation 26 expands the already restrictive language of Section 120 and broadens the scope of criminalized speech to the point that, in effect, dissent is outlawed. These comprehensive and draconian regulations are supplemented by a catch-all provision, 26(g), the overbreadth of which speaks for itself:

Any [expression is an offence if the competent authorities determine that it] excites or attempts to excite or incite the inhabitants of Sri Lanka or any section, class or group of them to do or omit to do any act or thing which constitutes a breach of any Emergency Regulation.

Furthermore, Regulation 26 intensifies the penalty for an offence to "rigorous imprisonment which shall not extend to more than 20 years."

Emergency Regulations have been in effect virtually continuously for 20 years, during which time the edifice of Sri Lankan civil liberties has crumbled before the ubiquitous powers of the "competent authorities". The Supreme Court has conspired in this tragic degeneration.

² *Malalgoda v. Attorney General*, (1982) 2 SLR 777.

In the case of *Visvalingam v. Liyanage*, the competent authority, acting under the powers of the Emergency Regulations, ordered the closure of a Tamil newspaper, the *Saturday Review*, which had carried stories highlighting alleged brutality by the Sri Lankan police and army. The competent authority argued that the closure was reasonable because:

The *Saturday Review* is blatantly communalistic and constantly highlighted grievances and injustices committed against the Tamil community which were capable of arousing communal feelings among this community and encouraged conduct prejudicial to the maintenance of public order and security.

The government's rationale for closing the newspaper illustrates the extent to which dissent has been restricted in Sri Lanka. If highlighting grievances and injustices is a cause for closing a newspaper, it is difficult to imagine what meaningful form of dissenting speech would fall outside the reach of the competent authority. In upholding the constitutionality of the *Saturday Review*'s closure, Judge Soza wrote:

[A]t times when ethnic hatreds are mounting, curbs are necessary. At times of grave national emergency headline exposure of Army and Police atrocities will not help the cause of peace and public security. It can cause deep resentment, fan passion, provoke defiance. It can set off a chain reaction of violence, and violence begets violence. It happened before our very eyes. (Emphasis added.)

These very words, though justifying restriction of free speech, in fact well state the process by which tension is heightened when a basic speech right, such as publishing an opposition newspaper, is restricted. Anger and frustration are surely better expressed on the pages of a newsweekly than on the streets or in the jungle.

THE DILEMMA

In theory, the notion of providing substantial restrictions on the recognized right of free speech is not necessarily pernicious. In a volatile society, in which vulnerable minorities can and have been brutalized by zealous opponents, a policy of vigilant regulation of hate speech is not, *prima facie*, meritless. In more stable democracies, laws and practices which allow unrestricted freedom of expression involve far lesser risks of creating an environment in which violence is likely to erupt suddenly. In this sense, a stable democracy can "afford" a highly expansive interpretation of the freedom, such as that propounded in this volume by the ACLU,³ because the threat that violence will ignite is in fact quite low. In contrast, it is clear that in Sri Lanka hate speech does indeed pose a substantial risk of instigating very real and very bloody upheaval.

However, while broad powers to restrict freedoms, such as those provided by Article 15(2), may be theoretically justifiable, in practice, in the case of Sri Lanka, these powers ultimately defeat the stated purpose of protecting public order. Overly broad censorship of dissenting, provocative, challenging and even hate-filled expression in fact merely inflames the very passions and hatreds which sought a non-violent outlet in the censored speech.

In other words, granting unfettered discretion to the authorities to promote "harmony" is ultimately more destabilizing than the hate speech itself. Inevitably,

the very freedom to dissent will be prohibited and, in an unstable and violent society, censorship of dissent will only beget more instability and violence. It is axiomatic in our jurisprudence that freedom of speech does not extend to the right to yell "fire" in a crowded theatre and thereby instigate a panic. But what if the authorities distort that unassailably legitimate limitation to prevent, for example, a whole class of suspected "potential instigators" from entering the theatre at all? In the name of promoting calm inside the theatre, have not the authorities guaranteed upheaval on the street outside?

OUR POSITION

Our position is not an abstract, civil libertarian view; indeed we recognize the theoretical justification for restraints on hate speech in a tense and violent society where members of a minority group are in constant danger of physical attack and deprivation of other rights. However, we have found that regulation of speech, in the unfettered hands of the "competent authority", particularly when empowered by sweeping Emergency Regulations and motivated by a majority bias, ultimately defeats the stated regulatory purpose of protecting public order. In these circumstances, therefore, we believe that only hate speech which clearly incites to imminent illegal action can justifiably be restricted. Dissent and indeed hate will eventually be expressed; sadly, in Sri Lanka, we have witnessed far too much evidence that censoring hate from public discourse only banishes it to more deadly fora.

We therefore would define these two categories of speech as "incitement" and thus as forms of discourse to be prohibited: (1) advocacy of group hatred calculated or likely to result in violence against a minority group or calculated or likely to result in an escalation of the threat of violence; and (2) advocacy of a solution to the ethnic problem which includes the destruction or elimination in any form or manner of the distinct identity of a minority group.

It is incumbent upon the legislature to ensure that the above forms of expression, and only the above or similarly described forms of expression, are prohibited. Prohibition of such speech is necessary to ensure that basic protections are extended to all citizens.

CONCLUSION

Sri Lanka has a long history of violence directed at minorities. In an unhappy, recurring cycle, minority demands for the realization of aspirations such as language parity, federalism, constitutional recognition and a secular state have been received with rage and violence from belligerent elements within the majority. The majority characterizes these outbursts, which punctuate post-independence Sri Lankan history, as natural and understandable, if lamentable responses to "provocative" minority aspirations. The minorities' demands for protection and recognition as distinct entities are denounced, in the rhetoric of the rejectionist element within the majority, as an offence to the majority and indeed an affront calculated to inflame communal passions. This rhetoric not only rationalizes and excuses mob violence but, even more insidiously, it attributes the blame to the victims.

Thus, members of the minority perceive the state's failure to restrict speech which incites hatred against them as a *denial* by the state of the minority's legitimate group rights. That is, legislative inaction, in these circumstances, symbolizes the state's unwillingness to protect the minority's most basic rights to physical safety

³ See the ACLU's policy statement in Part IV and also the chapter by Nadine Strossen in Part III.

and, *a fortiori*, the utter denial of more abstract collective identity rights. Legislative inaction in restricting speech which incites the mob, or indeed which merely implies that the mob is at liberty to form and to take action, tragically, can be and has been a death sentence for vulnerable minorities.

Achieving the balance, the tension of which has been manifest throughout this discussion, between protecting the victims of hate speech and permitting a legitimate forum for dissent and the expression of grievances is the profoundly difficult challenge which confronts all human rights activists committed both to equality rights and to the right to freedom of expression.

THE UNITED KINGDOM'S COMPLIANCE WITH ARTICLE 4 OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

Joanna Oyediran

INTRODUCTION

The United Kingdom has a number of laws which place restrictions on racist speech. As a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD Convention) the UK is, according to Article 4, under an obligation to enact such legislation. This paper aims firstly to discuss the extent of British compliance with Article 4, and secondly to assess whether the British government has arrived at an appropriate balance between the need to act against racism and the protection of other interests, such as freedom of expression and freedom of association.

The British government ratified the CERD Convention in 1969. It has since submitted 11 reports describing how it has implemented the Convention to the Committee on the Elimination of Racial Discrimination (CERD). The Committee is composed of 18 experts charged with monitoring compliance with the Convention. Over the years many members of CERD have criticized the UK and claimed that it has failed to implement Article 4 fully.

The UK's position on legislation to restrict racist speech and organizations stands half-way between that of the United States and that of the rest of Europe. The traditional US position, with its strong commitment to freedom of speech, only regards restrictions in this area as legitimate if they guard against a likely breach of the peace, while British law will restrict racist speech if it is likely to stir up racial hatred on the grounds that racial hatred can, in the long term, lead to a breakdown in public order. But, in contrast to France, Italy and Austria, the UK does not go so far as to criminalize the expression of views which "merely" insult or vilify racial groups, except in certain very limited contexts. The UK's policy aims to protect the rights of everyone to express opinions, no matter how repugnant they may be, as long as they do not lead to violence. The proscription of racist organizations, required by Article 4(b) of CERD, has never seriously been on the British government's agenda.

GOVERNMENT ACTION IN PROSCRIBING RACIST SPEECH

The seriousness of verbal attacks on racial and ethnic minorities has in fact been recognized by the common law for centuries. However, its main concern has not been the direct impact of such attacks upon members of minority groups, but the possibility that such attacks would provoke disorder. The prevention of disorder has remained the predominant justification for legal restrictions on racist speech up to the present day.

The common law offence of seditious libel regarded such speech as a threat to the security of the state, penalizing "an intention ... to raise discontent or disaffection among Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects".¹ However it was generally accepted that an intent to incite violence had to be proved in order to secure a

conviction. In 1947 a man who published a newspaper article attacking British Jews and suggesting that violence might be necessary to make them feel responsible towards the country in which they lived, was acquitted of seditious libel, presumably because the jury found no intent to provoke violence.² Other common law offences, such as public mischief and criminal libel, have not proved particularly satisfactory in prompting action against racist speech.³ Nor does the civil law make it possible for members of an ethnic or racial group to sue for libel as a group.⁴

Section 5 of the Public Order Act 1936 (now Section 4 of the Public Order Act 1986), enacted in part in response to the activities of the British Union of Fascists, marks the first parliamentary attempt to deal with racist speech. It makes the use of threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned a criminal offence.⁵ Conviction for this offence may be punished by a fine of up to UK£2,000 (US\$3,600) or by imprisonment for up to six months. In 1963 this provision was used to prosecute Colin Jordan for an anti-Semitic speech at a public meeting which was followed by violence.⁶ He appealed against conviction arguing that his speech would not have received a violent reaction from a reasonable audience and that only a reaction from this type of audience should be the test for the likelihood of causing a breach of peace. His appeal was rejected and his conviction upheld, the Divisional Court pronouncing that Jordan must take his audience as he found them, reasonable or not. But Section 5 could not be used against speech unlikely to cause an immediate breach of the peace. And, since it was directed against any type of speech threatening the peace, it did not condemn racist speech *per se*.

Incitement to Racial Hatred

England, Scotland and Wales. The first piece of legislation which tried to tackle the problem of racist speech in particular was Section 6 of the Race Relations Act 1965, which made "incitement to racial hatred" illegal if the accused intended to incite racial hatred, if the language used was threatening, abusive or insulting and if the language used was actually likely to stir up racial hatred. The provision was so hedged with restrictions, in deference to freedom of speech, that Lord Scarman described it as "an embarrassment to the police" in his report on the Red Lion Square Disorders, which grew out of confrontations between racist and anti-racist groups. In several cases, it had proved difficult for the prosecution to demonstrate beyond reasonable doubt that the accused intended to incite racial hatred.⁸

1 J F Stephen, *Digest of Criminal Law* (1883), Art. 93.

2 *R. v. Caunt* (1947) *Times*, 18 November, C Cr Ct (Crown Criminal Court). Reference to law reports in *The Times* or *The Independent* indicates that no report has been digested in the official or commercially produced law reports.

3 P M Leopold, "Incitement to Hatred - The History of a Controversial Criminal Offence," *Public Law* 389, 391 (1982).

4 *Knuppfer v. London Express Newspaper Ltd.* [1944] AC 116.

5 Leopold, *supra* note 3, at 392.

6 *Jordan v. Burgoyne* [1963] 2 QB 744.

7 Cmnd. 5919, para. 125.

In 1976 a revised offence was inserted as Section 5A into the Public Order Act 1936 by Section 70 of the new Race Relations Act, reaffirming the traditional British view that the problem of racist speech is primarily one of public order. Section 70 abolished the requirement to prove intent to incite racial hatred. Instead it became sufficient for the prosecution to show that racial hatred was likely to be stirred up in all the circumstances.

Following the overhaul of the Public Order Act in 1986, the offence of incitement to racial hatred was again reformed. Part III of the new Act created two separate crimes of incitement to racial hatred, one by using written material and the other by using words or behaviour. A new offence of possession of racially inflammatory material was introduced in order to bring within the reach of the law those who produced racist publications but did not actually distribute them. The law was extended to cover recordings, and broadcasting and cable authorities, with the exception of the BBC and IBA. For the first time an arrest power was given to the police. Section 164 of the Broadcasting Act 1990 removed the exemptions for the BBC and the IBA. Conviction on indictment (in the Crown Court) is punishable by a maximum of two years' imprisonment or an unlimited fine or both. Summary conviction (in a magistrates' court) can be punished by up to six months' imprisonment or a fine of up to £2,000 (\$3,600).

Despite this history of reform many of the weaknesses of the 1965 law survive remain. "Hatred" is an extremely vague word to be included in legislation and suggests a very high level of emotion. Moreover, it is difficult to prove that hatred is likely to be stirred up. Its inclusion in the legislation has had unintended consequences. In 1978 two men were prosecuted for making grossly offensive speeches in which they referred to black people as "wogs", "coons", "niggers" and "black bastards".⁹ They argued in their defence that sympathy rather than hatred was likely to be stirred up, so insulting were the speeches made. The jury acquitted them. The alternative requirement of intent to incite racial hatred may not solve the problem either. A defendant would still be free to argue that racist comments were said as a joke rather than with intent to encourage hatred.

The requirement that the language used be threatening, abusive and insulting is also problematic since it effectively excludes from the ambit of the law statements phrased in moderate language. Members of the Racial Preservation Society were prosecuted for publishing articles in their journal *Southern News* which argued in favour of the racial superiority of white people, the repatriation of black people and the dangers of miscegenation.¹⁰ They were acquitted, probably because the jury did not find the tone of the articles to be threatening, abusive or insulting.

The prosecution now must show either that an intent to incite racial hatred existed or that it was likely to be stirred up. The former test has been reinstated in order to secure convictions against those who communicate their opinions through anti-racist organizations and other people unlikely to be stirred to racial hatred by people who already hold such opinions.¹¹ However, this alternative requirement does not plug the legal loophole since the defendant may be able

8 *E.g.*, *R. v. Hancock* (1968) *Times*, 29 March, C Cr Ct.

9 *R. v. Read* (1978) *Times*, 7 January, C Cr Ct.

10 *R. v. Hancock*, (1969) *Times*, 29 March, C Cr Ct.

11 P Thornton, *Public Order Law* (1987), 64.

argue successfully that he lacked such an intent, by arguing, for example, that he only intended to intimidate members of an anti-racist organization.

Prosecution may still be brought only with the consent of the Attorney-General, one justification for this being that the law should only "deal with the major malefactor and not with the tiny unimportant man who uses offensive language."¹² The role of the Attorney-General has also been explained as serving to ensure that there are no prosecutions which would violate the right to freedom of expression.¹³ However, this requirement raises the unsatisfactory possibility of decisions to prosecute being subject to political influence.¹⁴ Ideally the question of a possible infringement of the right to freedom of expression should be considered by a court of law rather than a political officer like the Attorney-General. Of course, a British court would have no power to strike down a conviction which violated freedom of expression. Once again, the inadequacies of a legal system which lacks a charter of enforceable rights are exposed.

Few prosecutions for incitement to racial hatred have been brought: since 1986 there have been only 18 prosecutions in England and Wales for incitement to racial hatred, according to the Special Casework Division of the Crown Prosecution Service. From the beginning of 1986 to the end of 1990 the Commission for Racial Equality received 494 complaints about printed material alone and recommended prosecution in 55 cases.¹⁵ There is a large discrepancy between the number of legitimate complaints made and prosecutions brought, suggesting that the law is not being properly enforced. If it is not, Part III of the Public Order Act cannot be expected to have the necessary deterrent effect. In 1990 the Home Affairs Committee of the House of Commons, in its report on racial violence and harassment in the UK, pronounced itself dissatisfied with the British government's explanations for the small number of prosecutions under Part III and with its attempts to monitor how the legislation has worked.¹⁶

Normally the Attorney-General receives the criticism for failing to enforce the law. However, it is not only the Attorney-General who presents an institutional hurdle to the prosecution of a case of incitement to racial hatred. A complaint to the Attorney-General will be referred to the relevant local police station. That station may or may not be willing to investigate a complaint, depending upon many factors, such as financial resources and level of commitment to good race relations. If sufficient evidence is found the police may then refer the case to the Crown Prosecution Service (CPS) which will decide whether to prosecute. The CPS is said to be interested in prosecuting for incitement to racial hatred only if there is an 80 per cent chance of success. In contrast, in most criminal cases the CPS will proceed with a prosecution if there is only a 50 per cent chance of a conviction. If the CPS agrees to prosecute it will seek the consent of the Attorney-General. Given their

12 D G T Williams, "Racial Incitement and Public Order," *Criminal Law Review* 320, 325 (1966).

13 P Gordon, *Incitement to Racial Hatred* (London: The Runnymede Trust, 1982), 18.

14 W J Wolfe, "Values in Conflict: Incitement to Racial Hatred and the Public Order Act 1986," *Public Law* 85, 91 (1987).

15 This information is contained in the Annual Reports of the Commission for Racial Equality from 1986-1990.

16 House of Commons Select Committee on Home Affairs, *First Report of the Home Affairs Committee Session 1989-1990 - Racial Attacks and Harassment* (London: 1990), para. 32.

influential role in dealing with race hatred cases, the police and the CPS must share some of the blame with the Attorney-General for failure to enforce the law properly.

Of the 18 prosecutions brought in England and Wales since 1986, according to the Special Casework Division of the Crown Prosecution Service, 16 resulted in convictions. The majority of penalties imposed were non-custodial.

Bound over to keep the peace ¹⁷	2
Conditional discharge	2
Fine of £100 (US\$180)	1
Fine of £400 (US\$720)	6
Nine months suspended jail sentence	1
Eight months jail sentence, of which six months suspended	1
Two months jail sentence	1
One year jail sentence	2

Given the lack of detail concerning most of these cases, the fact that sentencing policy, especially in magistrates' courts, is greatly influenced by local factors, and the small number of prosecutions, it is not possible to detect any trends on the basis of these punishments.

Despite the reforms of 1986, the offence of incitement to racial hatred remains a weak and ineffective provision. Proposals for a new, broader offence of exposing members of racial minorities to hatred, ridicule or contempt, the suggestion of the Commission for Racial Equality, or for extending the offence so as to make the advocacy of discrimination and repatriation illegal, the suggestion of Ealing Community Relations Council, were rejected in the Green Paper on the Public Order Act 1936 on the grounds that such legislation would criminalize the expression of opinions regardless of the manner or circumstances in which they were expressed, an unacceptable proposal in a democratic society.¹⁸

Northern Ireland. It should be noted that the legislation on incitement to racial hatred which applies in Northern Ireland is somewhat broader. It is an offence to "arouse fear" as well as to stir up hatred, according to the Northern Ireland (Public Order) Act 1987. It is an offence under the Order to stir up hatred or arouse fear against religious groups as well as against racial groups. Since the original legislation was adopted in 1970, there has been only one prosecution, for incitement to religious hatred, and this resulted in an acquittal.¹⁹ This seems remarkable given that Northern Ireland witnesses far more sectarian conflict than any other part of the UK.

17 A bind-over involves the payment of a sum of money as a surety that the defendant will keep the peace. A bind-over can be breached without the commission of a subsequent offence, if the defendant fails to keep the peace during a specified period. He may then have his surety forfeited and re-sentenced for his original offence.

18 *Review of the Public Order Act 1936 and Related Legislation* (London: HMSO, 1980), para. 109 Cmnd. 7891.

19 See B Hadfield, "The Prevention of Incitement to Religious Hatred - An Article of Faith," *Northern Ireland Legal Quarterly* 231-249 (1984).

Section 3 of the Football (Offences) Act 1991

Section 3 of the Football (Offences) Act 1991 makes it a crime to take part in "chanting of an indecent or racist nature" at a designated football match. Racist speech in this context means "matter which is threatening, abusive or insulting to a person by reason of his colour, race, nationality (including citizenship) or ethnic or national origins". Conviction under Section 3 can result in a fine of up to £400 (US\$720). This new offence was justified by the government on the grounds that indecent and racist chanting in the noisy and volatile atmosphere of a football match was a potential risk to public order.²⁰ Section 3 is more narrowly defined than Section 5 of the Public Order Act 1986: it covers only indecent and racist speech. However, there is no need to prove that the chanting was likely to cause harassment, alarm or distress.

The first case under Section 3 was against Paul Phillip, a football supporter whom the police had seen making monkey noises and singing racist songs. The magistrates' court ruled that the prosecution had failed to prove a constituent element of the offence - that Phillip had been "chanting", defined by the magistrates as "repeated uttering of words or sentences in concert with at least one other person". The prosecution had offered no evidence that other people had been acting in concert with Phillip, and therefore the charge was dismissed.²¹

Public Order as a Justification for Laws Against Racist Speech

Part III of the Public Order Act and Section 3 of the Football (Offences) Act, as noted above, have been justified on the ground that they are necessary to maintain public order. One commentator has made a sound argument that the wording of the legislation in Part III is inconsistent with such an aim.²² He points, for example, to the criminalization of speeches made with intent to incite racial hatred, regardless of whether they could possibly have that effect, as unjustifiable in terms of public order. He does not seek the complete dismantling of the legislation, but thinks there are better justifications that could be made for it, such as the need to stop the creation of an atmosphere conducive to racially motivated violence.

It might be asked why protection of public order has traditionally been such a central justification for British legislation which restricts racist speech. First, fighting between groups can undermine the authority of the state. It is no accident that the offence of sedition was passed down to us from a more autocratic age. Sedition deals only incidentally with the impact of group hatred on individuals and communities; its main concern is the threat that disharmony causes to public order and state security. The provisions on incitement to racial hatred similarly do not recognize the pain and suffering endured by members of ethnic minorities as worthy of legislative action. Thornton speculates that offensive words and behaviour by white people directed at black people would only constitute an offence under the 1986 Act if they were likely to stir up racial hatred amongst other white bystanders.²³

²⁰ *Hansard*, Vol 189, col 732, 19 April 1991.

²¹ *Times*, 2 December 1991.

²² Wolfe, *supra* note 14, at 94-95.

²³ Thornton, *supra* note 11, at 62-63.

Second, maintenance of public order is in the interests of all elements of society, a more palatable justification to many people for restricting rights than protection of a perhaps unpopular minority. Troyna has criticized the British media for emphasizing and condemning the violence of the National Front rather than the racist policies which it advocates.²⁴ The same criticism could be levelled at British legislation, the main concern of which is the maintenance of public order: it has the wrong emphasis, the politically easy emphasis. Until very recently the law ignored the harassment endured by black people who were targets of racist speech, which existed regardless of the presence of white people.

Drafters and backers of anti-incitement legislation assumed that white people form the main target audience of the racists and fascists. However there is a great deal of evidence to suggest that racists and fascists are at least as interested in targeting members of ethnic minorities.²⁵ Racist speech and literature is employed as a form of intimidation. It can be a form of racial harassment, an abuse of the right to freedom of expression with the aim of intimidating and restricting target groups in the enjoyment of their rights. Racial harassment in the workplace, in the home and in the street may restrict members of target groups in their freedom of movement, expression, association and assembly, and in their right to practise their religion.

Section 5 of the Public Order Act 1986

British laws in general and race hatred laws in particular do not address the impact of racist speech on the members of the vilified group. There have, however, been two recent initiatives. Section 5 of the Public Order Act 1986 states:

- (1) A person is guilty of an offence if he:
- (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
 - (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.²⁶

The White Paper on the Public Order Act stated that this offence would criminalize behaviour directed against those who might feel vulnerable, including members of ethnic minorities.²⁷ Section 5 deals with an area not squarely covered by the offence of incitement to racial hatred - namely verbal harassment. It should be noted that this new offence is directed against offensive conduct in general, and not racist conduct in particular. Section 5 is highly controversial because its concern is not that public order will be endangered, but that emotional distress will be caused. Smith argues:

²⁴ B Troyna, "Reporting the National Front: British Values Observed," in C Husband, ed., "Race" in Britain: Continuity and Change (London: Open University Press, 1982) 259, 272-3.

²⁵ See *The Sunday Times*, 6 March 1988 (reporting on how 30,000 copies of *Holocaust News*, a virulently anti-Semitic news-sheet had been sent to people with Jewish names, hand delivered in Jewish communities and openly sold in shopping centres).

²⁶ This offence is only triable summarily. Conviction can result in a fine of up to £400.

²⁷ *Review of Public Order Law* (London: HMSO, 1985), para. 3.22. Cmnd. 9510.

The victims being weak, vulnerable, or simply law abiding are not likely as a result to resort to violence, however great the provocation by threats, abuse or insults. Yet the experience to which they have been subjected is one of which it is proper for the criminal law to take notice.²⁸

The aim of Section 5, to take action against those who intimidate the vulnerable, is laudable. However, Section 5 can be, and already has been, used in very different and much more controversial contexts: to prosecute students who tried to put up a satirical poster of the then Prime Minister, Margaret Thatcher, demonstrators who ran onto a cricket pitch to protest against cricketers playing in South Africa, and a demonstrator outside Downing Street.²⁹ Can any of these prosecutions really be seen as an attempt to protect the weak and vulnerable? The loose wording of Section 5 means that it can be abused. The protection of legitimate concerns has been used as an excuse for enacting an unacceptably broad provision.

The Malicious Communications Act 1988

The Malicious Communications Act 1988 is another recent piece of legislation which tackles verbal racial harassment. When introducing the bill in the House of Commons, Andy Stewart M.P., said that such communications had been "a common weapon against our ethnic minorities, who have suffered the indignity of receiving grossly offensive articles, such as excrement, through the letter box, with the explicit intention of causing distress and anxiety."³⁰ The Act makes it an offence to send a letter or article which is threatening or contains a message which is indecent or grossly offensive, or which is false, if the intention of the sender is to cause distress or anxiety. Cases can only be brought in the magistrates' courts. A person convicted of this offence is liable to a fine of up to £1,000 (US\$1,800). In Scotland, which has a separate and very different legal system from England and Wales, the common law offence of causing a breach of the peace has successfully been used to prosecute individuals who have sent racist material to anti-racists.³¹

Exclusion Orders

Under Section 3 of the Immigration Act 1971 the Home Secretary has a discretionary power to exclude aliens from the UK. This power has been used on several occasions to prevent anti-Semites and other racists from entering the UK. In 1986 the American Muslim leader of the Nation of Islam, Louis Farrakhan, well known for his anti-Semitic views, was banned from entering the country.³² In 1990 the Home Secretary barred Manfred Roeder, head of the extreme nationalist organization German Citizen's Initiative, who had been invited to attend the annual rally

28 A T H Smith, *Offences against Public Order* (1987), 118.

29 *R. v. Marylebone Justices ex parte Gatting and another* (1990), *The Independent*, 19 January; *McMahon and another v. D.P.P.* (1988), *Times*, 18 January. See also P Thornton, *Decade of Decline: Civil liberties in the Thatcher Years* (London: The Civil Liberties Trust, 1989), 37.

30 *Hansard*, H.C., Vol 127, col 607, 12 February 1988.

31 See No. 194 *Searchlight*, 6 September 1991.

32 *Times*, 17 January 1986.

of the British National Party.³³ An exclusion order was issued in 1991 against Fra Leuchter, a leading Holocaust revisionist, in order to prevent him from speaking at a neo-Nazi rally in London.³⁴

Racist Violence

English law does not specifically penalize racially motivated violence. The desirability of creating a new offence of racial harassment has been discussed recently because of concern about the growing number of racist attacks in the UK. The government's attitude is that existing remedies are sufficient. It believes that introducing such an offence would make the task of punishing attackers more difficult because the prosecution would have the additional burden of proving beyond reasonable doubt the racial motivation of the attack.³⁵ The many states of the United States which have adopted "racial enhancement laws", where proof of the racial motivation of an attack attracts a greater penalty, have not, however, experienced such problems.³⁶ The British government has, instead, instructed the police to investigate cases where evidence exists that an attack is racially motivated with a view to obtaining evidence for prosecution for a more serious offence, such as assault occasioning actual bodily harm or a public order offence.³⁷

THE OBLIGATION OF ARTICLE 4(B) OF THE CERD CONVENTION TO PROSCRIBE RACIST ORGANIZATIONS

There is no British legislation specifically directed against racist organizations. Sections 1 and 2 of the Public Order Act 1936 were, however, passed in part to restrict the activities of the fascist organizations of the 1930s. Section 1 makes it an offence for a person to wear a political uniform in a public place and section 2(1)(b) makes it an offence to organize or train people so that they can be used in the display of force in furtherance of a political object. Neither section seeks to ban organizations. Section 1 has been used to prosecute uniformed fascists and members of the Ku Klux Klan.³⁸ A conviction was secured under Section 2(1)(b) against Colin Jordan and John Tyndall, prominent extreme right-wing activists, for training a neo-Nazi force.³⁹ Sections 1 and 2 are neutrally worded and are not aimed against racist organizations *per se*, but against the types of behaviour in which they tend to indulge.

In several of its periodic reports to CERD the British Government has made statements of which the following is illustrative:

33 *The Independent*, 6 October 1990.

34 No. 198 *Searchlight*, December 1991.

35 Home Office, *Racial Attacks and Harassment: The Government Reply to the Third Report from Home Affairs Committee Session 1985-86* (1986), 409.

36 See discussion of US enhancement laws by Ronna Greff Schneider, elsewhere in Part III of this collection.

37 *Tenth Periodic Report of the United Kingdom to the Committee on the Elimination of Racial Discrimination*, UN Doc. CERD/C/172.Add.11 (1988), para. 35(vi).

38 *R. v. Wood* (1937) Sol. Jo. 108; *Times*, 8 October 1965, CCA.

39 *R. v. Jordan and Tyndall* [1963] Criminal Law Review 124.

Successive United Kingdom governments have taken the view that provided they are within the law, people should have the right to form political organisations and that this right should be denied only in exceptional circumstances. Legal proscription, is therefore, confined to organisations avowedly dedicated to terrorism and the violent overthrow of the State (in practice organisations connected with Northern Ireland).⁴⁰

The activities of racist groups are not considered to be an exceptional circumstance justifying proscription, even when they cause disorder. In its 1980 review of the Public Order Act 1936, the government refused to consider banning the National Front or the Socialist Workers' Party despite the level of the disorder that had resulted from clashes between them in the late 1970s.⁴¹

Proscription of organizations is restricted to those that are allegedly terrorist, according to the British government.⁴² The government's distinction between measures to be taken against racist organizations and measures to be taken against groups that the British government regards as terrorist may at first seem right and proper, but a second look shows the issues involved to be substantially similar. An estimated 70,000 racist incidents occur in the UK each year. A substantial number of these are instigated by members of racist and fascist organizations in order to *terrorize* members of minority groups. Are the activities of organizations like the British National Party so different from those of organizations proscribed under the Prevention of Terrorism (Temporary Provisions) Act (PTA) and under the Northern Ireland (Emergency Provisions) Act?

It has never been the British government's view that proscription actually prevents terrorism. In his review of the PTA 1974 Lord Jellicoe explained that proscription "enshrines in legislation public aversion to organizations which use and espouse violence as a means to a political end."⁴³ Jellicoe sympathized with those who saw proscription as an unjustifiable violation of human rights but argued against legalization on the grounds that this would make the government appear lenient towards the organizations then banned under the PTA. He also felt that the ban on displays of support for proscribed organizations was necessary in order to prevent the violence and disorder that he thought such activities would provoke. When introducing the Prevention of Terrorism Bill Lord Jenkins stated his belief "that the public should no longer have to endure the affront of public demonstrations in support of that body [the IRA]".⁴⁴

Looking at these statements, three main justifications by the British government for banning terrorist organizations become evident: proscription is firstly seen as symbolically expressing official condemnation of terrorism; secondly, it is seen as a way of suppressing views deemed extremely offensive to the general public; and thirdly it is regarded as a necessary measure to prevent the violent reaction that

40 UK Report to CERD, *supra* note 37, at para. 36.

41 Review of the Public Order Act 1936 and Related Legislation (London: HMSO, 1980), 11. Cmnd. 7891.

42 See Sections 27-29 Northern Ireland (Emergency Provisions) Act 1991 and Sections 1-3 Prevention of Terrorism (Temporary Provisions) Act 1989.

43 Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976 (London: HMSO, 1983), 80. Cmnd. 8803.

44 Hansard, 27 November 1974.

expression of such views might provoke. Proscription of racist organizations could be justified on similar grounds: racism is also an extremely offensive idea which is important to condemn officially, and history, from the Battle of Cable Street in the 1930s to the Red Lion Square Disorders of the 1970s, powerfully demonstrate that racist speech can provoke a violent backlash. The British government has argued against proscription of racist organizations on the ground that it would be anti-democratic. But many commentators have demonstrated how the proscription of terrorist organizations has stifled democratic activity. Liberty, a broad-based civil liberties organization, records that Provisional Sinn Fein and Clann na Poblachta (L'hEireann, the political wings of the banned Provisional IRA and the official IRA) restricted their legitimate political activities after the passing of the PTA.⁴⁵ Nor can the government argue that it is only using an anti-democratic means to counter an anti-democratic activity, namely terrorism. It has been shown that British legislation has not prevented violence, but rather has succeeded only in restricting political debate, the type of activity which a democracy normally seeks to protect.

The British government's refusal to ban racist organizations undermines its arguments for banning terrorist organizations. The primary targets of terrorist organizations are the state and its agents. The primary targets of racist organizations are members of minority groups. In its willingness to proscribe terrorist groups, but not racist groups, the British government is sending a message that it will adopt draconian powers to campaign against organizations which oppose the state, but will not place the same restrictions upon groups which campaign against the presence in the UK of black people, Jews and other minorities, often those people who have the least power to protect themselves.

THE UNITED KINGDOM'S COMPLIANCE WITH ARTICLE 4 OF THE CERD CONVENTION

Although the UK has been heavily criticized by many members of CERD for its lack of compliance with Article 4, the UK has done very little to adapt its legislation in response to such criticism. In the declaration which it submitted when it signed the CERD Convention, the UK interpreted Article 4:

as requiring a party to the Convention to adopt further legislative measures in the field covered by sub-paragraphs (a), (b) and (c) of the Article only in so far as it may consider with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of the Convention ... that some legislative addition or variation of existing law and practice in those fields is necessary for the attainment of the end specified in the earlier part of Article 4.⁴⁶

It should be noted that this statement was an interpretative declaration and not a reservation intended to limit formally the extent of the UK's obligations. While the UK clearly is right that it must show "due regard" to the principles embodied in

45 C Scorer, S Spencer and P Hewitt, *The New Prevention of Terrorism Act: The Case for Repression* (London: National Council for Civil Liberties, 1985), 15.

46 Reprinted in Committee on the Elimination of Racial Discrimination, *Positive Measures Designed to Eradicate All Incitement to, and Acts of, Racial Discrimination* (Geneva: United Nations, 1982), para. 126.

the Universal Declaration, its claim that discretion to determine what measures are necessary to fulfil Article 4 of the CERD Convention has been rejected by several members of the Committee.⁴⁷ Their interpretation must surely be correct. Otherwise Article 4 would be merely hortatory and would impose no binding obligations whatsoever, an interpretation which has been emphatically rejected by most experts in the field.⁴⁸

Article 4(a) demands that dissemination of ideas based on racial superiority and hatred, or incitement to discrimination be made criminal offences. Many members of CERD have expressed dissatisfaction with the UK's implementation of subparagraph (a) because the British legislation on incitement attaches conditions to the offences created: the language used must be threatening, abusive and insulting and must be likely to stir up racial hatred having regard to all the circumstances.⁴⁹ The British government's position is that the conditions imposed are essential if freedom of expression and the "with due regard" clause are to be respected. For the same reason, British law does not specifically penalize the expression of ideas based on racial superiority or incitement to racial discrimination, unless such expression is likely to stir up racial hatred.

Article 4(a) also requires the criminalization of assistance to racist activities. Members of CERD have indicated that the existence of laws on secondary offences is sufficient. Under British law a person can be prosecuted for aiding, abetting, conspiring to or inciting incitement to racial hatred. Assistance to at least certain types of racist activity is therefore illegal. Given the fact that the obligations imposed by Article 4 are ambiguous because of the "with due regard" clause, it is unclear whether the UK has gone far enough in the legislation which it has adopted.

Article 4 does not expressly require the type of legislation contained in the Malicious Communications Act 1988 and Section 5 of the Public Order Act 1986 which is directed more against racial harassment than the propagation of racist ideas. Indeed the British government did not mention these two new pieces of legislation in its last report to CERD. Even if they are not strictly required by Article 4(a), they may be regarded as an attempt by the government to meet its general obligations under Article 4.

The UK is also under a duty to ensure the proper enforcement of legislation against dissemination of racist ideas and incitement to discrimination. As noted above, much evidence exists that the provisions on incitement to racial hatred are not being properly enforced. While the British government retains discretion to prosecute, CERD's decision in the *Yilmaz-Dogan* case suggests that such discretion is not absolute, but must be exercised with due consideration to the CERD Convention's guarantees.⁵⁰ Given the large discrepancy between the number of complaints received by the Attorney-General and the number of directions by him to prosecute, one wonders if the duty to consider the CERD Convention is being taken seriously.

47 30 U.N. GAOR Supp. No. 18, U.N. Doc. A/30/18 (1975), para. 144.

48 It should be noted that several other states, most of them European, have made similar interpretative declarations. See the texts of declarations and reservations in Annex B.

49 33 U.N. GAOR Supp. No. 18, U.N. Doc. A/33/18 (1978), para. 339.

50 *Yilmaz-Dogan v. The Netherlands*, 43 U.N. GAOR Supp. No. 18, U.N. Doc. A/43/18 (1988), Annex IV.

As far as racial violence is concerned, Britain possesses the necessary general laws against violence and incitement to violence. CERD has indicated that, although not strictly required by the CERD Convention, legislation making racially motivated violence a specific offence would be desirable. Britain has instead adopted a policy that racially motivated violence should be treated as an aggravating factor, but not as a separate offence.

In assessing British compliance with Article 4 it must be born in mind that this article must be implemented with "due regard to the principles embodied in the Universal Declaration of Human Rights". Racism is alive and well in the UK. As mentioned above, an estimated 70,000 racist attacks take place every year. Increasing amounts of hate propaganda are becoming available. Given these factors, narrow limitations upon racist speech and the activities of racist organizations seem compatible with the Universal Declaration. Does British legislation go far enough in complying with Article 4 in the restrictions it places upon racist activities? Because the race hatred laws are so worded that convictions are difficult to obtain even in serious cases of racial vilification, there has never been the possibility of a committed attempt to enforce the laws properly. The fact that there have been only 18 prosecutions for incitement to racial hatred between 1986 and the end of 1991 surely indicates a failure to implement Article 4(a) properly. Any reform of hate speech laws must incorporate a change in emphasis in the legislation which currently ignores the need to protect the human dignity of members of ethnic minorities.

As far as Article 4(b)'s requirement that racist organizations be prohibited, it is arguable that the "with due regard" clause abrogates the British government's obligation to proscribe such organizations and otherwise restrict their activities since, in the UK, it is unlikely that proscription would substantially contribute to the elimination of racism.

Finding an appropriate balance between the right to freedom of speech and the right to freedom of association on the one hand and the public interest in eliminating racism and protecting human dignity on the other hand is not an easy task. Successive British governments have avoided serious consideration of the proper implementation of Article 4 when discussing reform of public order and other types of legislation which have implications for racist speech. This is reflected in the majority of government documents dealing with this area, few of which even refer to Article 4 or discuss how its obligations might be implemented. In contrast to Canada, Australia and many other European countries, the whole issue of racist speech has yet to be seriously debated in the UK.

CONCLUSION

Although this paper focuses on the issue of racist speech, it must not be forgotten that legal regulation of speech is only one weapon in the fight against racism and by no means the most important. The CERD Convention similarly makes clear that criminal penalties are only part of the package of obligations that states parties undertake; international law experts stress that criminal penalties without measures to promote non-discrimination in such fields as housing, education, employment and public service are both inadequate under the Convention and are almost certainly doomed to be ineffective. At the present time in the UK, racist violence and discrimination undoubtedly is a more serious threat to black people and most other minority groups than the propaganda activities of racists and fascists. Action against hate speech should not be abandoned but neither should it be overemphasized.

INCITEMENT TO RACIAL HATRED IN THE UNITED KINGDOM: HAVE WE GOT THE LAW WE NEED?¹

Geoffrey Bindman

The resurgence of neo-Nazi ideas and the efforts of extremist groups throughout Europe to foment racial hostility invite consideration of the legal means available to confront these dangerous developments. The European Commission is embarking on such an examination following a report by members of the European Parliament. The United Kingdom has one of the most sophisticated bodies of law among all European countries dealing with racial incitement. But how effective is it? Is it a model which other countries should adopt?

THE CONCEPT

Incitement to racial hatred was made a criminal offence for the first time in the Race Relations Act 1965. That Act also created the statutory tort of racial discrimination. Both wrongs imply hostile conduct aimed at members (or supposed members) of particular racial groups but they are otherwise distinct. The former, with which this paper is concerned, seeks to restrain in the public interest conduct tending to stimulate or increase hatred of such groups; the latter seeks to restrain unequal treatment of individuals on racial grounds, and to provide redress for those who suffer from such treatment.

CRIMINAL AND CIVIL PROCEEDINGS

The government at first proposed in the Bill which eventually became the 1965 Act that both racial incitement and racial discrimination should be criminal offences. However, it was persuaded to substitute a civil remedy for racial discrimination on the basis of experience in the United States. Criminal laws prohibiting racial discrimination had been introduced there as long ago as the 1860s, in the period of Reconstruction after the Civil War. They fell into disuse because it was believed, no doubt realistically, that juries would not convict. After the Second World War, the US government adopted new techniques, relying on a statutory commission with the power to investigate complaints and take civil proceedings where necessary. This approach seemed more appropriate and effective for discrimination cases, which usually involve individual victims seeking redress and/or to stop discriminatory practices.

The same is not true of racial incitement, which threatens public order, and for which criminal prosecution remains the obvious remedy. It is well-established in English law that a civil action may not be brought for incitement to racial hatred.²

¹ An abridged version of this chapter was published in *The Law Society's Gazette*, No. 14, of 8 April 1992.

² *Thorne v. BBC* [1967] 1 WLR 1104 (CA).

DEVELOPMENT OF THE LAW IN THE UNITED KINGDOM

The common law of seditious libel allowed prosecution for racial incitement only when violence was threatened.³ The statutory offence created in Section 6 of the Race Relations Act 1965 prohibited the use, with the *intent* to stir up racial hatred, of "threatening, abusive or insulting" words or matter. Prosecutions could be brought only by, or with the leave of, the Attorney-General.

The chief object of the law was to curb hostility to immigrants from the Caribbean and the Indian sub-continent. But there were few prosecutions and even some of those failed.⁴ Paradoxically, some of the successful prosecutions were of black people accused of inciting hatred of white people. Attorneys-General became increasingly reluctant to authorize prosecutions because they feared that trials would provide platforms for racists, who, if convicted, would claim martyrdom and, if acquitted, would claim vindication.

In his "Report on the Red Lion Square Disorders of 15th June 1974" (Cmd. 5919), Lord Scarman said:

The statute law does, however, call for scrutiny. Section 6 of the Race Relations Act is merely an embarrassment to the police. Hedged about with restrictions (proof of intent, requirement of the Attorney-General's consent) it is unclear to the policeman on the street. The section needs radical amendment to make it an effective sanction, particularly, I think, in relation to its formulation on the intent to be proved before an offence can be established.

In 1976, the requirement of intent was replaced by a requirement to prove merely the *likelihood* that racial hatred would be stirred up. The offence was transferred from the Race Relations Act to the Public Order Act. The need for the Attorney-General's consent was retained.

THE PUBLIC ORDER ACT 1986

Yet there were still very few prosecutions. In 1986, on the introduction of a new Public Order Act, the opportunity was taken to restore the option of proving intent as an *alternative* to proving likelihood (Section 18(1)).

The scope of the law was extended in other ways. The offence can now be committed in private as well as in public places (Section 18(2)), though not where words are used or displayed only in a dwelling and not audible or visible outside it (Section 18(4)). Suspects may be arrested without warrant merely on reasonable suspicion (Section 18(3)). Possession of racially inflammatory material with a view to publication or distribution is prohibited (Section 23), and there are powers of entry and search for such material (Section 24). But the requirement of the Attorney-General's consent has again been retained (Section 27(1)).

Since the 1986 Act came into force, the number of prosecutions has declined even further, notwithstanding an increase in Britain (as elsewhere in Europe) of

³ See *R v. Caunt*, and A Lester & G Bindman, *Race and Law* (Penguin, 1972) 347 *et seq.*

⁴ See *R v. Hancock* (discussed in Lester & Bindman, *supra* note 3, 370); see also *R v. Britton* [1967] 2 QB 51 (CA)).

neo-Nazi and extreme right-wing activity. There were only two prosecutions in 1988: one led to the conviction of a soapbox orator who received a suspended sentence for a racist speech and for distributing racist literature; the other led to a fine of £100 (US\$175) for posting Nazi stickers on lamp-posts. More recently prosecutions for such activities have been brought under the Town and Country Planning (Control of Advertisements) Regulations 1989 which prohibit the display of advertisements which are offensive and intimidating. However, an appeal against the conviction of members of the British National Party for breach of these regulations has recently succeeded.

When Black parliamentary prospective candidate, John Taylor, was chosen by the Conservatives in Cheltenham in 1990, a local party member, Major Galbraith, who opposed his selection, publicly described him as a "bloody nigger". Galbraith was expelled from the local Conservative association and charged with incitement to racial hatred. He died before the trial took place.

In 1991 four convictions under the racial incitement provisions of the Public Order Act have been reported. Lady Birdwood, the 80 year old widow of a Second World War Field Marshal, was convicted in October 1991 of distributing threatening, abusive or insulting material intended or likely to stir up racial hatred (Section 19). For many years the Jewish Board of Deputies and the Commission for Racial Equality had been submitting her anti-Semitic publications (including a "blood libel" leaflet) to successive Attorneys-General urging prosecution. Until this occasion no prosecution against her had been authorized. She was discharged conditionally on good behaviour for six months. In another, somewhat bizarre, case the Jewish manager of a shop selling Nazi memorabilia was convicted at Guildford Crown Court and sentenced to two months' imprisonment.

On 4 October 1991, the *Jewish Chronicle* reported that for the first time there had been a conviction under Section 23 of the Public Order Act for possession of racially inflammatory material. Francis Walsh, aged 66, was convicted of possessing two placards bearing anti-Semitic slogans. He had been standing at the junction of Bethnal Green Road and Brick Lane with about 10 others known to a police witness as members of the British National Party. He was trying to sell the placards. The Thames magistrates imposed no penalty for the first two offences but bound him over to keep the peace for one year in the sum of £100, and fined him £10 for obstructing the highway.

In August 1991 three supporters of the Ku Klux Klan were convicted in Edinburgh of possessing racially inflammatory recruiting material for their organization; and in June 1991 the home of a well-known leader of a neo-Nazi organization reportedly was raided and he was charged with possessing anti-Semitic material.

WHY SO FEW PROSECUTIONS?

The reluctance of past Attorneys-General to launch proceedings for racial incitement has doubtless been influenced by concern about their political or social consequences. But in October 1991, in his Sir George Bean Memorial Lecture to the Association of Jewish Ex-Servicemen, the then Attorney-General, Sir Patrick Mayhew QC, asserted that decisions whether or not to prosecute were always taken by him personally and only on evidential grounds. In the previous year's lecture, Sir Peter Imbert, Commissioner of Metropolitan Police, had expressed a different view: "It is not the law that is at fault. The law is adequate But on the

consideration of the law and the decision to prosecute we disagree [with the Attorney-General and the Director of Public Prosecutions]."

Sir Peter voiced a widely held opinion when he suggested that even now there is undue reluctance to prosecute. His satisfaction with the law, however, is optimistic: in spite of the attempt in the Public Order Act to strengthen provisions, the legal outcome must remain uncertain in many cases where the facts would seem to justify conviction.

There are several other weaknesses. First, the offence of incitement is restricted to cases where words or material are "threatening, abusive or insulting". Subtle or superficially moderate expressions which may be just as likely to promote racial hatred and therefore are arguably equally damaging are not caught by the statutory language.⁵

Second, the offence is concerned only with the "stirring up of hatred". Even if the mischief targeted by the law may be achieved without the arousal of so extreme an emotion, or indeed the hatred may already be felt by the audience. John Kingsley Read, leader of the British Movement, was charged with an offence under Section 6 of the 1965 Act when, following the stabbing to death of an Asian youth in 1971, he said at a public meeting "one down, a million to go". The judge directed that there was no evidence that Read intended to stir up hatred among an audience which largely consisted of his supporters. The Jewish Board of Deputies, in a recent report has suggested that the words "ill will, or hostility or prejudice or contempt" should be substituted for "hatred".

A third weakness is the requirement of the Attorney-General's consent before a prosecution may be mounted. Undoubtedly this has restricted the number of prosecutions, both by limiting the power of the prosecuting authorities and by excluding private prosecutions. However, it should not be left to private individuals or organizations of ethnic minorities to take responsibility for enforcement of the criminal law. In practice, few would be likely to do so. There is a case for allowing private prosecutions simply as a means of persuading the Attorney-General to carry out his duty with suitable vigour. Essentially, however, the responsibility is a public one.

Drafting changes could strengthen the law and might encourage its wider use and the imposition of more meaningful penalties. But, with due deference to Sir Patrick, the lack of enthusiasm for this law in the government and the prosecuting authorities is demonstrated by recent changes in policy. The current policy is plainly to confront racial incitement and racial violence wherever possible with laws not explicitly linked to race. The use of Planning Regulations has been noted. Before the Public Order Act 1986, the Attorney-General used to consider complaints of racial incitement within his own office. Since it came into force, complaints are referred to local police who report to the Crown Prosecution Service. Only if a prosecution under the racial incitement provisions is considered the only or best option is the matter referred to the Attorney-General for his consent.

The Public Order Act did indeed create a new option: an offence which may be prosecuted without the Attorney-General's consent. A person who uses threatening, abusive or insulting words or behaviour within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby may, if he or she does not cease such conduct following a police warning, be arrested without warrant and

⁵ *Cozens v. Brutus* [1973] AC 855.

convicted of the offence (Section 5). This charge is now used increasingly to deal with those who make racist speeches and distribute racist material, but the statistics do not distinguish such cases.

Furthermore, racially abusive letters or telephone calls may be prosecuted under the Malicious Communications Act 1988. Robert Relf (the only person ever to go to jail for contempt following his refusal to obey an injunction under the Race Relations Act 1968) was convicted in 1991 of sending racially offensive letters to John Taylor, the Cheltenham Conservative candidate. He was fined £75.

Both Section 5 of the Public Order Act and the Malicious Communications Act are summary offences, and the penalties are necessarily trivial. Incitement to racial hatred may be tried on indictment. That does not guarantee severe penalties, but at least there is the possibility of imprisonment for up to two years.

CONCLUSION

The series of attempts in the United Kingdom to create an effective legislative framework in the hope of curtailing the spread of racist propaganda and the activities of racist organizations has achieved little in practice. Enforcement doubtless has been inhibited by concerns about the right to freedom of speech. But it is beyond argument that freedom of speech is not an unqualified human right; it yields, for example, to the right not to be defamed. How much greater is the right of racial minorities to be protected from vilification which denies their equal humanity?

Such a right is firmly placed in international human rights law. The United Kingdom is bound by Article 4 of the International Convention on the Elimination of All Forms of Discrimination and by Article 20 of the International Covenant on Civil and Political Rights to legislate against racial incitement. Compliance with these obligations requires not merely that laws should be in place but that they should work. Indeed, it seems that compliance requires the scope as well as the efficacy of the law to be enhanced: for example, to prohibit incitement of religious hatred throughout the UK, which currently is prohibited only in Northern Ireland.

Plugging the law's loopholes would be a start, but would not suffice to make the law an effective instrument in the absence of the political will to make it so. If that will existed, it would be reflected not only in revised and strengthened legislation, but also in much more vigorous investigation of complaints, restored to the direct supervision of the Attorney-General, and in a greater readiness to prosecute on indictment. Until our law has been made to work, it cannot be held out as a useful model for the rest of Europe.

INCITEMENT TO HATRED: LESSONS FROM NORTHERN IRELAND

Therese Murphy

INTRODUCTION

In *The Observer* of 11 February 1990, Julie Flint, the paper's Beirut correspondent, commented as follows after a trip to Bradford:

'Rushdie' has joined the lexicon of classroom slang. White children shout it on the streets and scrawl it in the underpasses: 'Salman Rushdie is our hero ... Rushdie rules'. Asian youngsters are stopped on the street and asked: 'Have you seen Salman Rushdie? If you did, would you kill him?' 'Rushdie, Rushdie' is a popular chant when Bradford City play away from home.

Flint saw clearly how one man's name had become a taunt and a term of abuse or insult used by one community of Britons against another. "Rushdie" stung more deeply than any racial epithet. The abuse was not limited to verbal forms, nor was it evident only in Bradford: "Kill a Muslim for Christmas" was painted on a tube station wall in the latter half of 1989 while "Gas the Muslims" appeared elsewhere.

Rushdie's name was also invoked by others with a rather different motive - a worthy one of seeking to shift the generally blinkered terms of the debate. "Fight racism, not Rushdie" became their rallying cry. It was a well-intentioned but somewhat misdirected statement of concern. The bitter splintering which occurred in Britain as a result of the Rushdie affair did have roots in racism but, more importantly, it also had roots in religious discrimination and hatred.

In 1991, the Commission for Racial Equality (CRE) acknowledged the importance of religion in defining identity in a pluralistic Britain and placed it on the Commission's public agenda:

[F]or many members of the ethnic minorities, their faith and their personal identity through their faith, and the reaction of the rest of society to that faith and to them as belonging to it are of the utmost importance. Indeed, for many, identity through faith will be more important from day to day than identity through national origins.¹

Generally, however, Britain has failed to cope with religion as a defining feature of identity in a pluralistic society. Equally, it has generally failed to reflect on the appropriateness of a continued privileging of Christianity and, in particular, of the Church of England. The 1986 Public Order Act's anti-hatred provisions are concerned with *racial* hatred against persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins. Inciting religious hatred against persons who define themselves by reference to religious belief merits no condemnation in the Public Order Act. Instead, Britain has a discriminatory blasphemy law which protects only Christianity, and which has tended to displace sensible debate about the need for prohibitions on speech which *incites hatred* against religious groups.

1 CRE, *Second Review of the Race Relations Act 1976* (1991), 58.

Problems are compounded by the fact that Britain's race relations legislation, rather than acknowledging religious discrimination and endeavouring to tackle it head-on, has preferred to subsume religion into the category of ethnicity. This has had the unfair result that Rastafarians and Muslims have been found to have no legal protection against employment discrimination, while Jews and Sikhs have such protection, the latter two groups having made successful claims to be treated as racial groups defined by reference to ethnic origins for the purposes of the legislation.

A key message of the Rushdie affair is that religious tensions in Britain will continue to fester so long as the law on hate speech fails to facilitate progress toward a pluralistic society which is not only multi-racial and multi-ethnic, but also multi-faith. This is not to suggest that a law which prohibits incitement to religious hatred would have applied to Rushdie, but rather to pick up on Simon Lee's point that a law against incitement to religious hatred might have "contributed something positive" and "diminished conflict and dissatisfaction" created by the fact that "both the law and the *language* of the Rushdie debate" were "vitiated by the concept of blasphemy".²

The common law crime of blasphemy is a hindrance, not a help, in a multi-faith Britain. It is discriminatory in application and uncertain in its scope and imposes strict liability on the accused regardless of his or her intent.³ Its continued existence hampers the development of a consistent norm which would offer equal protection to members of religious and racial, national or ethnic groups and which would appropriately balance freedom of expression with respect for dignity and security.

Without repeal or reform of the blasphemy law and the introduction of religious hatred legislation, Britain will continue to be in breach of its international obligations under Article 20(2) of the International Covenant on Civil and Political Rights which provides that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." Furthermore, absence of a law prohibiting religious incitement detracts from the United Kingdom's commitment under Article 9 of the European Convention on Human Rights to ensure that persons have the right to practise the religion of their choice. As the CRE has noted, it cannot be "any more acceptable to stir up hatred against people because they are seen as Muslims than to do so because they are seen as Pakistanis."⁴

The current situation is exacerbated by the fact that Northern Ireland has a law against incitement to religious hatred. Similarly, Northern Ireland has unique fair employment legislation which concerns itself with discrimination on the grounds of religious belief or political opinion. Britain has neither of these but, as indicated earlier, does have the blasphemy law and all of its attendant problems. On the positive side, Britain has race discrimination legislation, the 1976 Race Relations Act, prohibiting discrimination in employment and the provision of services, legislation which is absent in Northern Ireland. The overall result, when the United Kingdom is considered as a whole, is a lamentable patchwork of

legislation showing little fidelity either to international law requirements or to fundamental principles of fairness, tolerance and non-discrimination.

NORTHERN IRELAND

As far back as 1969, Northern Ireland recognized the need to acknowledge religion in the hate speech debate. A joint communiqué of that year from the Westminster and Stormont governments accepted that "protection against the incitement of hatred against any citizen on the grounds of religious belief" was a field in which "effective action" was "fundamental ... to the creation of confidence". This political will found expression in the Prevention of Incitement to Racial Hatred Act (Northern Ireland) 1970 which imposed penalties for threatening, abusive or insulting matter or words, and for the circulation of false statements or reports, which were likely to stir up hatred against, or arouse fear of, any section of the public in Northern Ireland on grounds of religious belief, colour, race or ethnic or national origins. The Act contained a requirement of subjective intent and prosecutions could only be brought by or with the consent of the Attorney General.

The Northern Ireland Act's inclusion of religious belief is to be applauded. Unfortunately, the experience of the Northern Irish legislation in practice cannot equally be recommended. The law does not work and has not worked since its inception. Academic commentators have suggested that the 1970 Act was drafted in such a way "as to render highly unlikely a successful prosecution under it"⁵ and noted that "some cynics would claim that it was designed not to work".⁶ Their interpretation parallels concerns expressed by the Attorney-General for Northern Ireland in 1971, in the course of an adjournment debate at Stormont on his refusal to prosecute the writer of a scurrilous letter, that the terms of the Act made prosecutions extremely difficult. The letter, signed "Loyal Resident" in the *Mid Ulster Mail* of November 1970, complained of the influx of Roman Catholics into a village in Londonderry, referred to their employment as appeasement and called for a long overdue stand to be taken to prevent the character of a Protestant village from being changed such that "loved ones would turn over in their graves in the churchyard". In the course of the Stormont debate the Attorney-General was accused of "partisan antics" and "scandalous delaying tactics", and it was suggested that "the whole community had become somewhat disenchanting" to find that the Act had not been invoked once in the seven or eight months it had been on the statute book. The Attorney-General defended his refusal to prosecute and called for an appreciation of the Act's "precise scope", "that it has limitations" and "that difficulties of legal proof are inevitably created by the language it uses".⁸ According to the Attorney-General, there were "many difficult considerations in taking prosecutions": the words published or used had to be threatening, abusive or insulting; they had to be likely to stir up hatred or fear and not simply distaste, disgust, anger or odium; the hatred or fear had to be stirred up not against an

5 B Hadfield, "The Prevention of Incitement to Religious Hatred - An Article of Faith?" 35 *Northern Ireland Law Quarterly* 231, 241 (1984).

6 Lee, *supra* note 2, at 86.

7 *H C Debs (NI)*, col. 1277, 3 February 1971.

8 *Id.* at col. 1283.

2 S Lee, *The Cost of Free Speech* (Faber & Faber, 1990), 87.

3 Law Commission Report No. 145, *Offences Against Religion and Public Worship* (1985).

4 CRE, *supra* note 1, at 60.

individual or a number of persons but against a section of the public in Northern Ireland; the hatred or fear had to be directed against people, not against a religious denomination or a church or a society; and finally, "perhaps the most important element of all, and in many cases the most difficult of proof", the intent to stir up hatred or fear had to be proved.⁹

The force of these concerns became clear a number of months later when three people, one of whom was the chairman of the Shankill Defence Association, John McKeague, were prosecuted for the publication of a song in a songbook titled *The Orange Loyalist Songs 1971*. The prosecution failed even though the defence conceded that the words used were threatening and abusive. No further prosecutions were taken under the Act. This lack of prosecution cannot be attributed to the absence in Northern Ireland of words or matter which might stir up hatred. It must derive from another source. The Standing Advisory Commission on Human Rights (SACHR), in reviewing the operation of the Act in its 1974-75 Annual Report, queried whether "in the absence of prosecutions, the Act could be said to be fulfilling the purpose for which it was designed" given that there was "no absence of inflammatory words, either spoken or written, calculated to stimulate hatreds, fears and passions amongst the people of Northern Ireland". The Commission, which was of the view that the Act "should be amended to ensure that it will be an effective instrument", suggested that the requirement of subjective intention should be reviewed, given that "a prosecution should not be thwarted by the fear of being unable to discharge the evidential burden in cases where the contested words have clearly the effect of inciting hatred or arousing fear."

Northern Ireland's incitement legislation of 1970 has now evolved twice since its adoption, first, into the Public Order (Northern Ireland) Order 1981 and, second, into the Public Order (Northern Ireland) Order 1987. The 1981 amendment involved no change of substance; it merely incorporated and reordered the 1970 Act. It was not until the legislation's second amendment in 1987 that any attention was paid to SACHR's recommendation in its 1974-75 and 1976-77 annual reports that the requirement of subjective intent should be modified. The 1987 Order follows the racial hatred provisions of Britain's 1986 Public Order Act so that in Northern Ireland the offence now applies not only if there was proof of an intent to stir up hatred or arouse fear, but also if, having regard to all the circumstances, hatred was likely to be stirred up or fear aroused.

The scope of the Northern Irish law was extended in other ways paralleling the provisions of Britain's 1986 Public Order Act. The law now applies to publishing or distributing written material (Article 10); distributing, showing or playing a recording (Article 11); broadcasting (Article 12); and possessing matter intended or likely to stir up hatred or arouse fear (Article 13). The police are granted powers to enter and search for such material (Article 14). Prosecutions may still only be brought by or with the consent of the Attorney-General (Article 25). The groups against which hatred is prohibited have been expanded. While the 1970 Act and the 1981 Order protected "groups of persons in Northern Ireland defined by reference to religious belief, colour, race, or ethnic or national origins" the 1987 Order protects, in addition, groups defined by reference to nationality (including citizenship), a protection also included in Britain's 1986 Public Order Act.

9 Id. at cols. 1282-84.

The 1987 Order retains two aspects of the earlier Northern Irish legislation not found in the British law: first, the concern in the Northern Ireland Order is not only with acts intended or likely to stir up hatred but also with acts intended or likely to arouse fear; and, second, the Northern Ireland Order protects groups defined by reference to religious belief.

The 1987 Order can be said to have gone some distance towards meeting the concerns of critics of the earlier legislation. It would be wrong, however, to assume that it silenced such concerns. Civil liberties groups have recently voiced concerns about the Order's ability to protect the travelling community in Northern Ireland, in light of the English Court of Appeal's 1989 ruling in *Commission for Racial Equality v. Dutton*, that gypsies are protected under the Race Relations Act, but not travellers. In this regard, it is interesting to note that the Republic of Ireland, which introduced incitement legislation as recently as 1989, opted for express protection of the travelling community, defining prohibited hatred to be "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." Concerns have also been expressed about the absence in Northern Ireland of any race discrimination legislation. The greatest concern, however, is that, despite all of the legislative changes, there have been no prosecutions in Northern Ireland under the 1987 Order.

LESSONS FROM NORTHERN IRELAND

In the light of the overwhelming, and often singular, focus on prohibitions of *race* hatred in anti-hate laws throughout Europe, the inclusion of religious hatred undeniably is the most unusual feature of Northern Ireland's legislation. It is, in addition, a commendable feature; incitement to religious hatred not only avoids the problems we have come to associate with blasphemy, it also strikes an appropriate balance (one which is endorsed by international law) between freedom of expression and the stirring up of hatred in a pluralistic society. Furthermore, it helps to undercut the harmful assumption that race and gender are the only defining features of identity in a pluralistic society.

There are other features of the Northern Ireland hatred law which deserve highlighting as well. First, the reference to fear, in addition to the more common hatred reference, is noteworthy. This reference merits some consideration given the concerns which have been expressed about the term hatred, for instance, by the CRE which has suggested the addition of "ridicule and contempt" to Britain's Public Order Act. It might also be worth reflecting on the words used by Lord Scarman in the *Gay News* case, albeit in support of an extension of the blasphemy law:

[I]n an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also to protect them from *scurrility, vilification, ridicule and contempt*.¹⁰

A second feature of the Northern Ireland law is that its rather novel inclusion of incitement to hatred on religious grounds draws attention to whether there is a need for even further grounds of protection. For example, it might usefully be questioned

10 *R. v. Lemon* [1979] AC 617, 658 (emphasis added).

whether sexual orientation, gender and membership of the travelling community merit consideration as new grounds for protection against incitement to hatred in both Britain and Northern Ireland.

It would be foolish to assume that opting for an incitement to religious hatred law would be a panacea. The lesson of Northern Ireland indicates that it is not. Equally, opting for such a law would not be problem-free; indeed, there are a number of problems, in addition to effective enforcement, which require consideration. First, there is the issue of how to define religion. What would seem to be required is a definition which is sufficiently narrow to be meaningful yet sufficiently broad to avoid a bias against unpopular or untraditional religions. Arriving at such a definition would not be easy. Equally, however, using the difficulties of definition as a reason for inaction is a notoriously limp excuse. A second consideration is whether belief in general, rather than only religious belief, should be protected from incitement to hatred. Third, there is the issue of whether an incitement to religious hatred provision needs to be supplemented by a provision designed to cover outrage to religious feelings as recommended by the two Commissioners who dissented from the Law Commission's majority report on *Offences Against Religion and Public Worship* in 1985.¹¹ Finally, the need for effective complementary anti-discrimination legislation must be borne in mind. In this regard, progress resulting from the innovative powers of the Fair Employment Commission in Northern Ireland, including compulsory monitoring and affirmative action measures where necessary as well as use of the government's economic strength to support good employment equality practice, should be kept under close review by legislators contemplating the introduction of a religious hatred law.

All of this discussion about lessons from Northern Ireland cannot, of course, avoid the reality that the Northern Ireland model has not worked in practice. However, as the CRE has correctly noted: "there is a difference between the principle of having a law, and the effectiveness of its enforcement, which may depend basically on how judgement is exercised".¹² And, after all, in the end the responsibility for curbing religious hatred requires each individual citizen "in our society of different races and of peoples of different faiths and of no faith, not purposely to insult or outrage the religious feelings of others."¹³

11 See Law Commission Report, *supra* note 3, and also S Poulter, "Towards Legislative Reform of the Blasphemy and Racial Hatred Laws," *Public Law* 371, 378-9 (1991).

12 See CRE, *supra* note 1, at 60.

13 See Law Commission Report, *supra* note 3, at 41.

HATE SPEECH IN THE UNITED STATES: RECENT LEGAL DEVELOPMENTS

Ronna Greff Schneider

INTRODUCTION

The debate surrounding the propriety, legality and wisdom of regulating hate speech has been heard in the United States on college campuses, in legislatures and among policy makers and administrators in a variety of American institutions. The debate is often reduced to the question whether American constitutional guarantees of equality found primarily in the Fourteenth (and also in the Thirteenth) Amendment¹ and constitutional guarantees of freedom of expression found in the First Amendment² are allies or antagonists. Despite a shared goal in eradicating hatred and discrimination, civil rights advocates have found themselves on both sides of the debate - as proponents of anti-hate speech provisions in the interests of equality³ and as critics of such potentially speech restrictive provisions.

The First Amendment's guarantee of free speech has never been absolute. Although the United States Supreme Court has characterized this freedom as a "preferred right," it has always recognized that such a right can be overcome by a compelling state interest and that some forms of speech, such as defamation, fighting words, and obscenity, fall totally outside the protection of the First Amendment.

The hate speech problem can involve expressive conduct as well as pure speech. In *U.S. v. O'Brien*,⁴ the Supreme Court articulated the test to be applied by courts in determining the constitutionality of a governmental regulation which has the effect of suppressing some forms of expression. If the governmental interest lies in the suppression of free expression, then a heightened standard of scrutiny is applied. If, however, the governmental interest is not related to the suppression of free expression, a lower standard applies. This test entails a determination of whether the statute: (1) lies within the constitutional power of the government; (2) furthers an important or substantial governmental interest; and (3) imposes a restriction no greater than is essential to further the underlying governmental interest. Analysis involving the distinction between the expressive and non-expressive elements of certain conduct becomes particularly important with regard to statutes prohibiting the wearing of masks or the burning of crosses.

1 The Fourteenth Amendment provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See also Nadine Strossen's chapter, below.

2 The First Amendment provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

3 See Richard Delgado's chapter, below.

4 391 U.S. 367 (1968). See also *Texas v. Johnson*, 491 U.S. 397, 403 (1989); *U.S. v. Eichmann*, 496 U.S. 310 (1990). Both of these cases involved the politically charged issue of flag burning. The restrictions on such activity involved in both cases were held to be unconstitutional.

Questions have been raised in scholarly debate as to whether or not hate speech spoken by members of minority or otherwise protected groups and directed at persons who are members of majority or non-protected groups should be given the same treatment as hate speech spoken by members of the majority group or of non-protected groups directed at members of protected groups. Some have argued that members of majority or dominant groups who find themselves targets of hate speech do not suffer the harm, intimidation, fear, and discrimination that members of protected groups experience as targets of hate speech.⁵ Without the need for such protection, limitations on speech need not be imposed. Critics of this approach to the hate speech problem argue that it is itself a violation of equality principles, an impermissible content-based or viewpoint-based restriction, and raises enormous problems of definitions and enforcement. Neither the case law nor legislation has addressed this particular issue.

LEGAL RESPONSES TO HATE SPEECH

In 1990, the Hate Crime Statistics Act became law.⁶ As its name indicates, it requires the collection of certain data relating to the commission of hate crimes. While the Act does not punish or even proscribe hate speech, its existence reflects a national awareness of the growing problem of hate-related crimes. The Act is designed to provide the empirical data necessary to develop effective policies and responses to hate crime.

Although Congress has not responded with legislation which expressly addresses the phenomenon of hate speech itself, federal civil rights laws have been used to support criminal and civil actions for hate related acts. For example, Section 241 of Title 18 of the U.S. Code makes it a federal crime to conspire to deprive a person of constitutional or federal statutory rights.⁷ Section 1985(3) of Title 42 of the U.S. Code enables a person to sue any persons who conspire to deprive him or her of certain civil rights, including the equal protection of the laws or the equal privileges and immunities under the law. Some federal statutes, such as the Religious Vandalism Act and the Fair Housing Act, are designed to punish or provide compensation for specific forms of hate injuries.⁸ Others proscribe behaviour if committed under colour of official authority.⁹ These federal statutes, however, do not proscribe various kinds of private violence motivated by racial or ethnic animus.

Legal efforts by state governments to curtail hate speech have taken various forms: (1) statutes which generally prohibit harassment that is designed to intimidate, coerce, or humiliate the victim; (2) ethnic or racial intimidation statutes,

5 See, e.g., Lawrence, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," 1990 *Duke L.J.* 431, 450 n. 82.

6 Hate Crime Statistics Act Pub. L. 101-275, 104 Stat. 140, 23 April 1990.

7 This statute formed the basis of the prosecution in *United States v. Lee*, 935 F.2d 952 (8th Cir. 1991), discussed below in text accompanying notes 36-40.

8 Religious Vandalism Act, 18 U.S.C., §§ 245(b) and 247 (1988) (protection for those involved in certain federally protected activities); Title IX of the Fair Housing Act, 42 U.S.C. § 3631 (1982 and 1988 Supp.).

9 See, e.g., 18 U.S.C. §242 (1988) which makes it a federal crime for those acting under colour of law to willfully deprive a person of federal constitutional and statutory rights, privileges or immunities. A civil remedy for such violation is provided under 42 U.S.C. §1983 (1988).

including punishment enhancement statutes, that increase the penalty imposed for various independently criminal behaviour solely because the behaviour is motivated by a particular animus towards a protected group;¹⁰ (3) statutes which prohibit certain acts identified with such animus such as cross burning or the drawing of swastikas; (4) statutes which prohibit the intentional masking of one's identity; (5) statutory or common law prohibitions against disturbing the peace, which may or may not include characterizing hate speech as "fighting" words; (6) statutory or common law prohibitions against "fighting words" which encompass hate speech separate and apart from any breach of the peace; (7) civil action for defamation; (8) individual civil recovery in tort by characterizing the hate speech as some type of tortious injury other than defamation such as the intentional infliction of emotional distress or assault; (9) criminal action for group defamation; (10) statutes restricting hate speech in certain limited environments such as the workplace or the university; and (11) use of licensing or public permit requirements to deny public demonstrations or gatherings by persons using hate speech.

A majority of the states have passed some variation of one or more of the kinds of legislation noted in the categories above.¹¹ However, the constitutional validity of a number of these statutes has been challenged, primarily on the basis that they are violative of the First Amendment's free speech guarantees, that they constitute an invasion of privacy or associational rights, that they are either vague or overbroad in their prohibitions or both, or that they violate the equal protection clause of the Fourteenth Amendment in providing greater protection to victims of certain behaviour motivated by the racial or ethnic animus of the perpetrator than they do for victims of the same behaviour motivated by other reasons. The equal protection argument is used in this last context as a means of striking down restrictions on speech rather than using equality arguments as a basis for justifying infringements on free speech.

There have not been a large number of constitutional challenges and their success, as discussed below, has been mixed. The US Supreme Court may soon supply specific guidance in this area when it decides *R.A.V. v. St. Paul, Minnesota*, which is discussed below.¹² Arguments were heard last December and a decision is expected by July 1992.

10 Some jurisdictions have enacted a single statute which references other offences and provides for an increased penalty when the motivation involves ethnic or racial animus. See, e.g., Ohio Rev. Code Ann. §2927.12 (Baldwin 1991); 18 Pa. Cons. Stat. §2710 (1989); Wis. Stat. §939.645 (1988). Other jurisdictions make certain behaviour a crime or a civil action under one provision and that same behaviour a separate crime or cause of action when motivated by racial or ethnic animus. See, e.g., Ill. Rev. Stat. ch. 38 para. 12-71 (1989); Mass. Ann. Laws ch. 265 §239 (Law Co-op 1990); Okla. Stat. Tit. 21 §850 (1990).

11 See Anti-Defamation League of B'nai B'rith, "Hate Crimes Statutes: A Response to Anti-Semitism," *Anti-Defamation League of B'nai B'rith Law Report* (Spring/Summer 1988), which lists these provisions. Some jurisdictions have enacted legislation allowing civil as well as criminal causes of action. See, e.g., Idaho Code 18-7902 (defines malicious harassment); Idaho Code 18-7903 (lists criminal and civil penalties and actions).

12 No. 90-7675. The case was granted *certiorari* on 10 June 1991, 11 S. Ct. 2795. The case was decided by the Supreme Court of Minnesota under the name of *In the Matter of the Welfare of R.A.V.*, 464 N.W.2d 507.

In the US Supreme Court's only decision analyzing limits on hate speech in the context of group defamation, *Beauharnais v. Illinois*,¹³ decided in 1952, the Court upheld the constitutionality of an Illinois criminal statute which prohibited the libel of a class of citizens. The Court held that libellous, insulting, or fighting words are not protected speech. While that decision has never been expressly overruled, subsequent Supreme Court decisions extending greater protection to libellous speech may cast doubt on the current validity of this decision. Some lower courts have also subsequently rejected the group libel concept. Nevertheless, some scholars have emphasized that *Beauharnais* has never been overruled and continue to look to the decision and its reasoning as a basis for restricting racist speech.

Advocates of regulating hate speech also rely for support on the doctrine of "fighting words." This doctrine was first articulated by the United States Supreme Court in *Chaplinsky v. New Hampshire*.¹⁴ The Court defined fighting words as words which by their very utterance inflict injury or tend to incite an immediate breach of the peace. Some scholars have argued, however, that subsequent Court decisions have so limited the concept of fighting words as to render it ineffective as a justification for restricting racist speech.¹⁵ They maintain that it is only the second prong of the doctrine - inciting an immediate breach of the peace - that retains any kind of vitality.

Many years after *Chaplinsky*, in *Brandenburg v. Ohio*,¹⁶ the Supreme Court held that only speech which was "directed to inciting or producing imminent lawless action" and was "likely to incite or produce such action" could be proscribed. Some argue that when hate speech targets a particular individual it may be likely to give rise to such imminent lawless action.

Proponents of restricting hate speech argue that limitations on such speech do not interfere with the justifications advanced for free speech, including preservation of and participation in the democratic process, the achievement of a balance between social stability and change, the ascertainment and furtherance of truth, and self-expression and self-fulfilment. They also argue that hate speech is not an idea with cognitive content protectable by the First Amendment. Although the Supreme Court has held that the emotive content as well as the cognitive content of speech is protected under the First Amendment,¹⁷ it has addressed this issue only in the context of political speech and obscenity, and not in the context of the equality concerns presented by hate speech.

Additionally, at least some critics argue that speech restrictions may be used disproportionately against minority speakers rather than in an effort to protect them from hate speech and thus, as with all speech restrictions, "endanger principles of

13 343 U.S. 250 (1952).

14 315 U.S. 568 (1942).

15 Nadine Strossen notes in her chapter below that "the Court has overturned every single conviction it has reviewed since *Chaplinsky*." But see Delgado in the following chapter; and Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," 87 *Mich. L. Rev.* 2320 (1989).

16 395 U.S. 444 (1969). The defendant, a prominent member of the Ku Klux Klan, had been convicted under Ohio's Criminal Syndicalism statute of making racist remarks at a Klan rally. The Supreme Court reversed the conviction.

17 See, e.g., *Cohen v. California*, 493 U.S. 15 (1971). See Smolla, "Rethinking the First Amendment Assumptions about Racist and Sexist Speech," 47 *Wash. & Lee L. Rev.* 171 (1990).

equality as well as free speech."¹⁸ This concern is eliminated if minority speakers are not subject to the restrictions, a point vigorously debated by scholars, as noted above.

Criticism of anti-hate speech provisions argue that the most effective way to combat racist speech is to expose its evil by discussion and debate rather than by suppression. More speech is more effective than less speech. Censorship will only drive the racism underground where it will be harder to eradicate. Advocates of restrictions on hate speech respond that hate speech is intended to silence or intimidate the targets of such speech rather than to invite their response or to engage in debate. They point to social science theories about the origins of prejudice and the effective means of controlling it, arguing that desirable behaviour can be shaped by an understanding of what is or is not socially acceptable. Those proponents argue that controlling the acts will ultimately control the undesired attitudes underlying those acts.¹⁹

HATE SPEECH ON CAMPUS

The hate speech debate has probably been the most vocal in the United States in the university context. In addition to the approaches taken outside the walls of the academy, several arguments have been raised tailored to the uniqueness of the university environment. Both advocates and critics of anti-hate speech codes have relied on the argument that the university is a special environment with special responsibilities. Civil libertarians opposing regulation view the university as a "bastion of freedom" whose function is to foster the free flow of ideas, even those which are abhorrent, in the quest for truth and knowledge. On the other hand, proponents of anti-hate-speech codes argue that the university has an obligation to eradicate prejudice and discrimination and ensure that no member of its community is deprived of the right to equal educational opportunity. Hate speech, they contend, causes real harm and real discrimination, preventing the targets of this form of racism from availing themselves of the full value of the institution's education and educational opportunity. Moreover, some commentators argue that the academic institution itself has a responsibility towards potential victims of racial or ethnic harassment or intimidation.²⁰

Additionally, proponents of university anti-harassment, anti-hate speech codes argue that members of the university community, particularly in the classroom, are like a captive audience which thus gives the university greater latitude in regulating speech which is directed at them inside the university. With the realization that a university serves different functions depending upon which part of the campus is involved, the University of Michigan attempted to zone its campus for purposes of its anti-harassment code. Thus, certain speech was proscribed in the classroom, for example, but not in the public areas between classroom buildings.²¹ In *Doe v. University of Michigan*,²² one of only a handful of court decisions

18 See Nadine Strossen's chapter, below.

19 See Matsuda, *supra* note 15. See also Richard Delgado's chapter, below.

20 See Richard Delgado's chapter, below, citing Dartmouth President James O Freedman concerning his dispute with the *Dartmouth Review*.

21 The University policy zoned the school into three areas. The extent of regulation varied depending upon the location of the behaviour in question. The broadest amount of speech protection existed in

scrutinizing the constitutionality of hate speech restrictions on university campuses, the federal district court judge struck down the university's anti-harassment code. The court reasoned that the university's regulations and the manner in which they had been implemented made the limitations vague and overbroad in scope. However, the court's holding does not necessarily preclude constitutional application of such a zoning approach to the hate speech problem in some other factual context.

The extent of permissible regulation of speech might also depend upon whether there is some privacy expectation on the part of the targeted person or persons. Thus, restrictions may be permissible with regard to speech in residence halls, where, as in one's home, the expectation of privacy is high.²³ The proper degree to which speech may be restricted might also be affected by the amount of power the speaker has over the person to whom the speech is addressed. Thus, even many strong critics of limitations on hate speech argue that a professor may not make racist remarks to students in the classroom.²⁴

Some university codes have limited their hate speech restrictions to epithets directed at an individual target rather than words generally directed at a group, in an effort to fall within a more narrow definition of "fighting words" which would more closely align it with the concept of preserving the peace and preventing violent reaction.²⁵ Others, however, have argued that the injury of a bias-motivated insult is not just an individual one "but a collective one that the community may and should address."²⁶

In *UMW Post, Inc. Board of Regents of University of Wisconsin University*, a federal district court held that the University of Wisconsin's rule prohibiting students from directing discriminatory epithets at particular individuals with the intent to demean them and create a hostile educational environment was vague and overbroad.²⁷ It further held that the proscribed epithets did not constitute "fighting words". In rejecting the "fighting words" characterization, the court reasoned that the US Supreme Court had narrowed the meaning of that concept so as to include only speech that "tends to incite an immediate breach of peace" which must thus "naturally tend to provoke violent resentment" and must be "directed at the person of the hearer."²⁸

the public areas. Less speech protection was given in the academic centres, including classrooms. Speech was given the least protection in the residential dormitories.

22 721 F. Supp. 852 (E.D. Mich. 1989).

23 Although the issue was not presented to the court in *Doe*, other Supreme Court decisions lend some support to the argument that targets of hate speech may be entitled to more protection from such speech when it is directed at them in the privacy of their home than elsewhere. See *Frisby v. Schultz* 487 U.S. 474 (1988).

24 See Nadine Strossen's chapter, below. See also R. Schneider, "Sexual Harassment in Higher Education," 65 *Tex. L. Rev.* 525, 569 (1987).

25 See *Cohen v. California*, 403 U.S. 15, where the court stated that the wearing of a jacket bearing an offensive expletive in a courthouse was constitutionally protected speech since the offensive words were "not a direct personal insult" that was specifically directed at the particular hearer.

26 See Delgado, below.

27 774 F. Supp. 1162 (E.D. Wis. 1991). As already noted, the Supreme Court in *Chaplinsky v. New Hampshire* had established two parts of the fighting words concept - the infliction of injury or the tendency to incite an immediate breach of the peace. The Board of Regents apparently believed that the first half of the fighting words definition continues to constitute protected speech. *Id.* at 1170 n. 4.

28 *Id.* Subsequent to this decision, the University of Wisconsin redrafted its anti-discriminatory speech

While the Wisconsin rule was designed to proscribe speech targeted at a particular individual, the rule was not limited to epithets that incited the hearer. The court also refused to apply the limiting construction requested by the university. The rule had been challenged on the basis of the federal as well as the state constitution.

All the remaining reported decisions involving the hate speech issue on campus have similarly struck down limitations on expression. In *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason University*,²⁹ a fraternity and two of its members challenged the disciplinary action taken by the public university against the fraternity as a result of the fraternity's participation in an "ugly woman" contest which was held as part of a charity fund raiser. In the course of the contest, one of the participants "dressed in black face, used pillows to represent breasts and buttocks and wore a black wig with curlers." Upon receiving a letter of complaint from student leaders that the contest was offensive "because it perpetuated racial and sexual stereotypes", the university imposed sanctions on the fraternity. The fraternity and two of its members challenged the sanctions as a violation of the First Amendment.

The federal district court agreed. It held that the university had not tried to regulate the conduct of the fraternity, but the "expressive message conveyed by the skit which was perceived as offensive by several student groups." Citing the Supreme Court's decision in *Barnes v. Glen Theaters, Inc.*,³⁰ the court concluded that the skit at issue involved "more than a kernel of expression," thus entitling it to First Amendment protection. The court rejected the university's argument that even if the activity is protected, the university had a compelling interest in restricting it in order to further its mission "to promote learning through a cultural diverse student body ... , to eliminate racist and sexist behaviour on campus ... , accomplish maximal desegregation of its student body," and to prevent the "undermin[ing of] the education of minority and women students".

In *Levin v. Harleston*³¹, a tenured professor at the City College of City University of New York, brought a civil action against college officials arguing that his free speech and tenure rights had been violated when state college administrators, because of the professor's controversial views regarding affirmative action and the relative intelligence of blacks and whites had (1) created alternative parallel class sections of the professor's classes although there had not been any student complaints from students taking the professor's class or proof that the professor had acted unfairly or unprofessionally in the classroom; (2) created an *ad hoc* committee of faculty to investigate the professor's writings and public statements outside the classroom; and (3) had failed to adequately protect against disruptions in the professor's classroom and discipline the students involved in such

code in an effort to overcome the objections raised by the court. According to Pat Hodulnik, Senior Legal Counsel for the University of Wisconsin, as of going to press, the Board of Regents of the University has initiated the administrative rule making process necessary to legally implement the new rule.

29 C.A. No. 91-785-A (E.D. Va. Alexandria Div.) (27 August 1991).

30 111 S. Ct. 2456 (1991) (upholding an Indiana law which prevented certain establishments from offering performances of totally nude dancing). Stated the Court: "It is possible to find some kernel of expression in almost every activity a person undertakes ... but such a kernel is not sufficient to bring the activity within the protection of the First Amendment", quoting its previous decision *Dallas v. Stranglin*, 490 U.S. 19, 25 (1989).

31 770 F. Supp. 895 (S.D.N.Y. 1991).

disruption. The professor maintained that the College's actions had damaged his standing in the academic community and could foreclose professional opportunities. The federal district court agreed and enjoined the college from creating the "shadow sections", from commencing disciplinary action against the professor based on his protected expression of ideas and ordered the college to take reasonable steps to prevent the disruption of the professor's classes.

OTHER HATE SPEECH CASES

The case law dealing with hate speech outside the university setting has primarily involved constitutional challenges to statutes prohibiting cross-burning, mask-wearing, penalty enhancement provisions, general anti-harassment provisions and the denial of permits for demonstrations.

Permits

The denial of a permit is viewed as a prior restraint which is highly disfavoured in American law. A permit restriction based on the hate message of the demonstrators could be seen as violating a basic premise of First Amendment jurisprudence - content and viewpoint neutrality. The burden in upholding such a restraint is very heavy. Permit requirements must be based on content neutral standards which are not arbitrarily left to the discretionary implementation of government officials. Attempts to restrict marches by Nazis or the Ku Klux Klan have been struck down.

In *Collin v. Smith*,³² a group of Nazis sought a permit to march in the town of Skokie, Illinois, where a significant number of Jewish survivors of the Holocaust lived. The town had passed an ordinance which proscribed demonstrations by people wearing certain military-style clothing or uniforms. The federal Court of Appeals for the Seventh Circuit invalidated the ordinance on the ground that it was content based since "[a]ny shock effect...must be attributed to the content of the ideas expressed." The trauma caused to Holocaust survivors on seeing Nazis marching in their community could not justify the suppression of the symbolic expression.

In *Klu Klux Klan, etc. v. Martin Luther King Worshippers*,³³ the federal district court of Tennessee invalidated parts of an anti-parade ordinance. The court held that the city could not deny the Klan members who sought a parade permit their constitutional rights to assembly and free speech by denying their parade request outright. The court held, however, that the city could deny a permit on the date when a permit for another demonstration had been granted and that a high school did not have to allow the Klan the use of its facilities.³⁴ Both the *Collin* and *KKK* cases reasoned that in the context of parades and demonstrations certain masks

32 578 F.2d 1197 (7th Cir. 1978).

33 735 F. Supp. 745 (M.D. Tenn. 1990).

34 See also *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973) (school authorities must allow Party access to school facilities in off-school hours for meeting open to all members of the public). But see *NAACP v. Thompson*, 648 F. Supp. 195 (D. Md. 1986) (federal district court held that county zoning administrator may be enjoined from issuing permits for holding public Ku Klux Klan rallies on private property when such rallies were open to general public except members of particular racial and ethnic groups).

and disgraces may constitute strong symbolic political expression that is afforded protection by the First Amendment."³⁵

Cross Burning and Other Expressive Conduct

At least one lower federal court has upheld a statute which prohibits cross burning and the posting of swastikas under certain circumstances. The Supreme Court is expected to issue a decision in its first cross burning case by the end of 1992. The constitutionality of such laws may depend on whether their proscriptions apply to activity on one's own property, on someone else's property, or on public property. Cross-burning has been prosecuted under federal law as well as state and local law.

In *U.S. v. Lee*³⁶ a federal court of appeals rejected a constitutional challenge to a federal prosecution involving cross burning. The defendant built and burned a cross in a field adjacent to a racially mixed apartment complex. He was prosecuted under the federal statute which makes it a crime to conspire to injure or intimidate any citizen in the free exercise of federally guaranteed rights.³⁷ The federal court of appeals held that the statute as applied to the defendant did not violate the First Amendment.³⁸ The defendant had argued that the federal statute "punishes an expressive act of cross burning" and that it was overbroad because it "reach[ed] a substantial amount of constitutionally protected conduct." The defendant also argued that the statute was vague because it did not give notice that cross burning was a crime and used the vague term "intimidate".

The court rejected all of these arguments. The court held that the statute was content neutral. Applying the *O'Brien* test, the court found that the governmental interest in regulating the behaviour was unrelated to the suppression of free expression as it did not prohibit a person from conspiring to burn a cross to convey a message of hatred but prohibited such action only when there was the intent to threaten or intimidate the targeted individuals from exercising their federally guaranteed right to be free from racial discrimination in housing. The court also held that the incidental restriction on free speech was no greater than was essential to further the governmental interest in protecting the federally guaranteed right to rent and occupy a dwelling without racial discrimination.

The court reasoned that the statute was not overbroad because it proscribed conduct only when done with the specific intent to threaten or intimidate another in the enjoyment of a federally guaranteed right, and noted the importance of restricting such speech where it is impossible or impracticable for the listener or viewer to avoid exposure to the speech. The court also rejected the vagueness

35 *KKK*, 735 F. Supp. at 751, citing *Collin*, 578 F.2d at 1200.

36 935 F.2d 952 (8th Cir. 1991).

37 18 U.S.C. § 241.

38 Similarly, in *U.S. v. Hayward*, 772 F. Supp. 399 (D. Ill. 1991), a district court in Illinois held that prosecutions for cross burning near a dwelling under 18 U.S.C. § 844(h)(1) (which prohibits the use of fire in connection with any activity which constitutes a federal felony) as well as under 42 U.S.C. § 3631(b) (which prohibits the use of force or threat of force to interfere with the rights of any person to purchase or occupy a dwelling because of that person's race) did not violate the First Amendment. The court relied on the constitutional analysis used by the U.S. Supreme Court in its two recent decisions striking down limits on flag burning. The court in *Hayward* concluded that expressive conduct was involved, but that the statutes were content neutral and narrowly drawn and sufficiently important government interests were involved. See also *U.S. v. Long*, 935 F.2d 1212 (11th Cir. 1991).

challenge. The term "intimidate" used in the statute was not vague because the term, viewed in the context of the statute, should be understood to mean "to engage in conduct designed to interfere with a person's free exercise of federally guaranteed rights ... [As such, that term] neither requires ordinary people to guess at its meaning nor does it encourage arbitrary or discriminatory enforcement."³⁹

A vigorous dissent in *Lee*, concluding that the statute criminalized protected pure speech. It reasoned that the governmental interest involved was the right of individuals to be free from threats of physical force and that the terms "threaten" or "intimidate" did not necessarily include a threat of physical force. The dissent hypothesized that the defendant could have threatened and intimidated the black residents of the apartments by distributing pamphlets in the apartments which stated the presence of "the Ku Klux Klan in the neighborhood, [that they] disliked black people, and wanted them to move out." The dissent rejected the application of the captive audience concept, noting that the cross burning did not even occur on the apartment's own property. If the burning had occurred on apartment property, a different result may have been required, making the facts more analogous to the situation in *Frisby v. Schultz*.⁴⁰ In *Frisby*, the US Supreme Court had upheld a local ordinance which banned picketing in a residential area which was targeted at a single dwelling.

The opportunity to review the applicability of notions of privacy and the captive audience concept to cross burning may present itself this term when the US Supreme Court considers *R.A.V. v. St. Paul, Minnesota*. In *R.A.V.*, the white defendant, a boy of 17, had burned a cross on the property of an African American family. He was charged with violating a St. Paul, Minnesota ordinance which provides that

whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct ...

The defendant challenged the constitutionality of the provision arguing that it violated the First Amendment's guarantee of freedom of speech because the ordinance punished protected as well as unprotected behaviour and was therefore overbroad. The trial court dismissed the criminal charges on the ground that the ordinance proscribed expressive conduct in violation of the First Amendment. The city appealed and the Minnesota Supreme Court held that the ordinance was not substantially overbroad in its scope because it could be interpreted to proscribe expressive conduct which constituted "fighting words" or provocation to "imminent lawless action." The state court distinguished the US Supreme Court's decision in *Texas v. Johnson*⁴¹ which struck down a Texas statute prohibiting flag burning. The Minnesota court reasoned that the Supreme Court in *Johnson* had held that an individual could not be prosecuted for burning a flag under the Texas flag desecration statute on the mere assumption that every expression of a provocative idea would incite lawlessness. In contrast to the invalid Texas statute, the Minnesota

39 935 F.2d at 957.

40 487 U.S. 474 (1988).

41 491 U.S. 397, 403 (1989).

ordinance did "not on its face assume that any cross burning, irrespective of the particular context in which it occurs, is subject to prosecution." The Minnesota Supreme Court, therefore, upheld the ordinance.

Masks

There are a number of different statutes prohibiting mask-wearing. These prohibit mask-wearing in different contexts, including while on public property, while on private property, while participating in a demonstration, while committing a crime independent of any bias motivation or while wearing a mask with the intent to coerce, intimidate, or threaten. The purposes underlying these statutes include combating the commission of crime, assisting in identifying the perpetrator, and eradicating racial and ethnic intimidation. There are only a small number of decisions involving racial or ethnic animus in the wearing of a mask.

In *Hernandez v. Virginia*,⁴² a state intermediate court held that the wearing of a mask by a member of the Ku Klux Klan did not constitute expressive activity under the First Amendment because the wearing of the mask itself did not convey a "particularized message that would have been likely to have been understood by those who viewed it."⁴³ The court concluded that, even if the wearing of the Klan mask were expressive conduct, the statutory prohibition on wearing the mask in certain circumstances was constitutional as long as the statutory "purpose [was] unrelated to the suppression of free expression." While the court acknowledged that the motive behind the statute's passage may have been to "unmask the Klan," the court stated that the plain language of the statute "indicated no purpose to stifle the Klan's freedom of expression...[nor had there been] indiscriminate enforcement of the statute against members of the Klan." According to the court, the justification for the statute was to prevent

violence, crime and disorder by the unmasking of criminals. ... The incidental effect of preventing a Klansman ... from wearing his 'full costume' is minor when compared to the government's interest in keeping communities safe and free from violence.

The court also rejected the defendant's arguments that he had been punished because of his unpopular views.

In an earlier decision dealing with the constitutionality of a Georgia anti-mask statute, *State v. Miller*,⁴⁴ the Supreme Court of Georgia similarly held that the statute was not related to the suppression of constitutionally protected speech nor was it vague or overbroad. The court noted that the statute was content-neutral and its restriction was limited to threats and intimidation, neither of which were constitutionally protected.⁴⁵ The state had a compelling interest, indeed an "affirmative constitutional duty", to safeguard "the right of the people to exercise their civil

42 406 S.E.2d 398 (18 June 1991).

43 The court reasoned that "[t]he record does not establish ... that the mask is so identified with the Ku Klux Klan that it is a symbol of its identity. The robe and the hood may be such symbols, but the mask is not. ... The mask adds nothing, save fear and intimidation, to the symbolic message expressed by the wearing of the robe and the hood."

44 398 S.E.2d 547 (Ga. 1990).

45 *Id.* at 551. The dissenting justice argued that while this may be a compelling state interest, "there is no close nexus between the means chosen and the permissible objectives of the statute ... [and thus] the statute is not narrowly aimed at the permissible objectives." *Id.* at 555.

rights and to be free from violence and intimidation". The court construed the language of the statute to "apply only to mask-wearing conduct when the mask-wearer knows or reasonably should know that the conduct provokes a reasonable apprehension of intimidation, threats or violence".⁴⁶ The statute did not prevent mask-wearing on private property. Recognizing that, "under certain circumstances, anonymity may be essential to the exercise of constitutional rights"⁴⁷, the court distinguished the defendant's action from non-threatening political mask-wearing which was not proscribed under this statute. Previous decisions have established the right of political protesters to wear masks.⁴⁸

At least one state supreme court, however, has struck down a mask-wearing statute. In *Robinson v. State*,⁴⁹ the Florida Supreme Court ruled that a state statute which prohibited a person from wearing an identity-concealing mask while on public property was overbroad as it could be applied to innocent activities. The court refused to give a limiting construction to the statute. However, an intermediate appellate court in Florida subsequently upheld the constitutionality of a different statute which provided for penalty enhancement if the offender wore a mask concealing his identity while committing a crime.⁵⁰

Penalty Enhancement Statutes

Although state courts have scrutinized various penalty enhancement statutes, they have reached conflicting results and thus have provided no clear guidance as to the kinds of provisions which are likely to be found constitutional. In *State v. Beebe*,⁵¹ an Oregon state intermediate appellate court upheld the constitutionality of a state criminal racial intimidation statute which provided for a greater penalty for certain unlawful conduct if racially motivated. The defendant had challenged the enhanced penalty for assault. The court, noting several other examples of penalty enhancement factors other than racial animus, held that there was a rational basis for the distinction. The court reasoned that the legislature could legitimately determine that there is a greater danger to society from assaultive conduct directed at a person because of his race, religion or national origin than there is from such conduct under other circumstances. This is because "[s]uch confrontations ... readily - and commonly do - escalate from individual conflicts to mass disturbances" which thus have more serious consequences than those which are associated with assaults motivated by other reasons. The court also rejected a First Amendment challenge to the statute by concluding that the statute applied in this case to conduct and not speech.⁵²

46 *Id.* at 552.

47 *Id.*

48 See *Ghafari v. Municipal Court*, 87 Cal. App.3d 255, 150 Cal. Rptr. 813 (1979); *Aryan v. Mackey*, 462 F. Supp. 90 (N.D. Tex. 1978). Both involved political protests by Iranians.

49 393 So.2d 1076 (Fla. 1980). The statute was amended after the *Robinson* decision. There are other earlier decisions in other jurisdictions involving the validity of anti-mask wearing statutes where the issue of racial or ethnic animus was not involved. Some of these decisions uphold the statutes and some invalidate them.

50 *Fletcher v. State*, 472 So.2d 537 (Fla. App. 5 Dist. 1985).

51 680 P.2d 11 (Or.App. 1984).

52 In 1989, the Oregon statute was amended. In *State v. Hendrix*, 813 P.2d 115, 107 Or.App.734 (19 June 1991), a state intermediate appellate court rejected free speech as well as vagueness challenges

to the amended Intimidation Law. *Accord, State v. Martin* 818 P.2d 1301, 109 Or. App. 48 (October 1991).

53 *State v. Harrington*,⁵³ decided only days before the *Be* decision, a different intermediate state court in Oregon struck down the state's general harassment statute. The court examined both the state's general harassment statute and another subsection of the state racial intimidation statute involving *Beebe*, which imposed an enhanced penalty for harassment motivated by racial animus. The court held that it was unnecessary to assess the constitutionality of the enhanced penalty statute because it concluded that the general harassment statute upon which it was based was itself a violation of the state constitutional guarantee of freedom of expression. The court held that the general harassment provision was unconstitutional because it did not solely proscribe words which were intended likely to provoke physical violence.

In *State v. Bellamy*,⁵⁴ the Connecticut state intermediate appellate court held that the trial court erred in dismissing an information which charged the defendant under a general harassment statute. The defendant had drawn swastikas on a sign used to record pump readings during his shift at a pump plant after an Orthodox Jew transferred to that shift. The court reasoned that a more fully developed factual record was necessary in order to determine whether the swastikas were "fighting words" or whether they invaded the Jewish complainant's privacy interests because he could be viewed as a captive audience.⁵⁵

The Supreme Court of Washington upheld its state's general harassment statute in *State v. Smith*.⁵⁶ The case did not involve a racially or ethnically motivated crime. The statute was challenged on vagueness grounds. The court held, citing *Chaplinsky v. New Hampshire*, that threats of harm to others are not protected speech.⁵⁷

In *People v. Dietze*,⁵⁸ New York's highest state court invalidated New York's general harassment statute which prohibits the use of "abusive" language with the intent to "harass" or "annoy" another person. The court held that the statute prohibited more than "fighting words" and did not limit its application to an imminent breach of the peace. The court refused to provide a limiting construction of the statute. Neither racial nor ethnic animus was involved in *Dietze*; rather, the speaker verbally abused the victims with knowledge that they were mentally disabled.

Prior to *Dietze*, a New York trial court had upheld a state statute prohibiting harassment motivated by ethnic or racial animus. In *People v. Grupe*,⁵⁹ a court refused to dismiss the charges against a defendant who had been charged with

to the amended Intimidation Law. *Accord, State v. Martin* 818 P.2d 1301, 109 Or. App. 48 (October 1991).

53 680 P.2d 666 (Or. App. 1984).

54 495 A.2d 724 (Conn.App. 1985).

55 For procedural reasons, the court refused to consider the defendant's claim that the statute was unconstitutional, vague or overbroad in its scope.

56 *State v. Smith*, 759 P.2d 372 (1988).

57 See, e.g., *State v. Brown*, 748 P.2d 276 (Wash. App. 1988), citing among other cases, *Chaplinsky v. New Hampshire* 315 U.S. 568. In *Commonwealth v. Duncan*, the Pennsylvania Supreme Court rejected a First Amendment challenge and upheld a defendant's conviction for criminal solicitation for lewd and non-political remarks made to a female university student in a university dormitory. 363 P.2d 803, 239 P. Sup. Ct. 539 (1976).

58 75 N.Y.2d 47, 550 N.Y.S.2d 595 (Ct. App. 1989).

59 141 Misc.2d 6 (1988).

striking a person while shouting an anti-Semitic comment. The court held that since the statute regulated violent conduct and not speech, the court did not need to reach the First Amendment issue. The court reasoned that even if the defendant's behaviour were expressive, it would not be entitled to First Amendment protection. At best such a statement under the circumstances would constitute "fighting words" since an ethnic or racial insult shouted while striking the person who is the object of that insult is likely to increase the chances of provoking a violent response. Moreover, the court took judicial notice of the government's compelling interest in penalizing bias-related violence, and concluded that that interest is unrelated to the suppression of free expression. The court also rejected the defendant's argument that his equal protection rights were violated because the penalty established for bias-motivated harassment was greater than that established for harassment motivated by other reasons. The court concluded that the state legislature had a rational basis in drawing that distinction. *Dietze* leaves the validity of *Grupe* in some doubt. However, it may be argued that an imminent breach of the peace is more likely if the motivation is racial or ethnic bigotry than other reasons, thus distinguishing the statutory provision involved in *Grupe* from that in *Dietze*.

Conflicting opinions have also been rendered by three Ohio state intermediate appellate courts which reviewed the Ohio ethnic intimidation statute. One court upheld the statute and found that it was neither vague nor overbroad⁶⁰ because the defendant's racially motivated threats which were directed at specific individuals "would likely cause a breach of the peace". Two other courts held that the statute was vague and overbroad.⁶¹ One of these held the statute did not make clear whose race, religion or ethnicity - "the victim, a passerby, a group of people from the accused's past, the police, or anyone else" - was to be considered in determining whether a violation had occurred. The Ohio Supreme Court has just heard argument in these cases, although it has not yet issued an opinion resolving the conflict.

Tort Law

Tort law may provide another mechanism for responding to hate speech, although many of the same constitutional issues that are posed above also pose problems in this area. While defamation is the tort action most commonly used to seek redress for racial or ethnic epithets, several scholars and a few courts have suggested that hate speech may, in addition, constitute the intentional infliction of emotional distress.⁶²

Hate speech may also be viewed as an assault, at least when it creates a reasonable apprehension that a battery, or offensive bodily contact, will occur. Other tortious actions have been suggested by commentators for hate speech in the university context, such as the tortious interference with advantageous relationships

⁶⁰ *State v. Wyant*, No. 90-CA-2, Court of Appeals, Delaware County (Dec. 6, 1990).

⁶¹ *State v. May*, Nos. 12239, 12259, and 12260, Court of Appeals, Montgomery County (June 27, 1991); *State v. Van Gundy*, Franklin App. No. 90AP-473 (Apr. 16, 1991) (unreported). See also *City of Cincinnati v. Black*, 8 Ohio App.2d 143, 146-147 (1966) (invalidating a city ordinance prohibiting the distribution of pamphlets communicating religious and racial hatred and bigotry).

⁶² See, e.g., Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," 17 *Harv. C.R.-C.L. Rev.* 133 (1982). See also *Wiggs v. Courshon*, 355 F. Supp. 206 (S.D. Fla. 1973). The US Supreme Court has held that the tort of intentional infliction of emotional distress cannot be used to circumvent the constitutional obstacles imposed in an action for defamation brought by a public figure. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

(between the university and the targeted victim of the hate speech) and tortious interference of contract (between the victim and the university).⁶³

Limitations on bias-motivated harassment, including verbal harassment, have also been imposed by common law and state and federal statutes in the workplace and in other specific contexts like housing.⁶⁴ Thus, verbal harassment creates a hostile environment which constitutes discrimination under various statutes and regulations.⁶⁵

CONCLUSION

Whatever the outcome of the US Supreme Court's decision in *R.A.V. v. St. Paul, Minnesota*, the increasing number of incidents motivated by racial and ethnic animus demand a response. While eradicating such hatred and discrimination is a goal shared by all civil rights advocates, the issue whether the free speech guarantees of the First Amendment help or hinder such solutions awaits further exploration by the US Supreme Court.

⁶³ See Love, "Discriminatory Speech," 47 *Wash. & Lee L. Rev.* 123 (1990).

⁶⁴ E.g., 42 U.S.C. § 363 (1987 and 1988 Supp.).

⁶⁵ See Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-2000e-17 (1982), which is the federal statute prohibiting discrimination on the basis of sex, race, religion, and national origin in the workplace; *Meritor Savings v. Vinson*, 477 U.S. 57 (1986) (recognizing a cause of action under Title VII for sexual harassment, including environmental sexual harassment); *Robinson v. Jacksonville Shipyard, Inc.*, 760 F. Supp. 1486. See also Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1982). First Amendment limitations are only applicable where state action is involved. These limitations may not, therefore, apply to the conduct of a private person, institution or employer.

CAMPUS ANTIRACISM RULES: CONSTITUTIONAL NARRATIVES IN COLLISION¹

Richard Delgado

INTRODUCTION

Over the past few years, nearly two hundred university and college campuses have experienced racial unrest serious or graphic enough to be reported in the press. Most observers believe the increase in racial tension on the nation's campuses is real, and not just the product of better reporting or record keeping.

In response, a number of campuses have enacted student conduct rules prohibiting slurs and disparaging remarks against persons on account of their ethnicity, religion or sexual orientation. The University of Wisconsin rule, for example, prohibits remarks that (i) are directed to an individual; (ii) demean based on membership in a racial, religious, or sexual group; (iii) are intended to demean; and (iv) interfere with the victim's ability to take part in education or instruction. . . .

This article deals with some of the thorny issues such rules raise. . . . The problem may be framed in two ways - as a First or Fourteenth Amendment problem - that are equally valid but lead to drastically different consequences. Yet, no *a priori* reason exists for declaring the problem "essentially" one of free speech or protection of equality. . . .

I. THE CURRENT CONTROVERSY

Incidents of racism and other forms of bigotry have been proliferating on the nation's campuses. Some universities have done as little as possible or have focused on specific episodes or perpetrators. Others have instituted broad-based reforms, ranging from curricular changes to adoption of student conduct rules penalizing racist speech and acts.

A. Major Incidents and Institutional Responses

1. *The Citadel* - In October 1986, a black cadet was asleep in his room when he was awakened by five intruders chanting his name. The invaders, clad in white sheets and cone-shaped pillowcase masks, shouted obscenities and fled, leaving behind a charred cross made of newspaper. Five white cadets confessed. The Citadel's president condemned the action but denied it reflected the racial climate on campus. Shortly thereafter, the black cadet resigned from the academy because of harassment for having reported the incident, and filed an \$800,000 civil rights action against the school. College officials then issued a report absolving the school of responsibility and recommending only increased ethnic awareness classes for

¹ Ed. note: This essay is an abridged version of an article of the same title which appeared in *Northwestern University Law Review*, Volume 85, Issue 2 (1991), 343-387 and is reprinted by special permission of the Law School.

illegally wearing masks in violation of a state anti-Klan law. The Citadel promulgated no new rule governing racial insult or hazing.

2. *Dartmouth College* - In February 1988, four members of *The Dartmouth Review*, a conservative weekly newspaper, confronted William S. Cole, a black professor at the conclusion of his music history class. The newspaper had recently published a highly critical review of Cole's course. The confrontation turned into a shouting and pushing match between the professor and *Review* members. Black students charged that the article and classroom incident were racially motivated; the *Review* insisted that they were simply fair criticism of a professor's teaching abilities. A university panel found three staff members guilty of disorderly conduct, harassment, and invasion of privacy for initiating and secretly recording the "vexatious exchange" with Cole. The event caused a heated exchange between the *Review* and Dartmouth President James O. Freedman, who criticized the newspaper for "poisoning ... the intellectual environment." For its part, the *Review* charged Freedman with censorship and reverse discrimination.

Racial tensions continued to mount. In two later issues, the *Review* commented on President Freedman, a Jew, with Adolf Hitler. The college trustees condemned the newspaper, but declared themselves powerless to impose punishment. Since then, thereafter, a superior court judge ordered Dartmouth to reinstate two of the students on the ground that a member of the disciplinary panel had been biased against them. Two months later, a federal district judge dismissed the students' suit against the university. Like the Citadel, Dartmouth took no action to prohibit racial insult or invective. . . .

4. *University of California-Berkeley* - An intoxicated fraternity member shouted obscenities and racial slurs at a group of black students as they passed by a fraternity house; later, a campus radio disc jockey told black students to "go to Oakland" when they asked the station to play rap music. Members of a gay and lesbian group reported that an anonymous caller had left a message on its telephone recorder declaring "You should be taken out and gassed, like Hitler did with the Jews." Berkeley responded to these and other events by instituting a campus Diversity Awareness program, and the statewide system enacted a policy prohibiting "those personally abusive epithets which, when directly addressed to an ordinary person, are likely to provoke a violent reaction whether or not they actually do so." The rule applies to words spoken on university property, at university functions and events. Penalties range from reprimands to dismissal.

5. *Stanford University* - In fall 1988, a group of black and white students at Stanford debated the racial ancestry of composer Ludwig von Beethoven. The black students correctly maintained that he was a mulatto; some of the white students denied this. Later, two of the white students defaced a poster of Beethoven by scribbling on his face and adding stereotypically black facial features. The incident sparked a confrontation between black and white students. Later, Stanford released a revised student conduct code prohibiting words intended to harm or harass, "directly addressed" to a specific person, and containing "words, pictures or symbols which are commonly understood to convey in a direct and visceral way, hatred or contempt" for a particular race or sex. The Stanford law faculty were divided on whether the new measure met First Amendment standards. . . .

7. *University of Michigan* - In January 1987, a group of black women meeting in a lounge on the Ann Arbor campus found a stack of handbills declaring "open hunting season" on all blacks. A nineteen-year-old white underclassman admitted to distributing them and was disciplined, a result many white students thought too severe. A short time later, a disc jockey for the campus radio station encouraged listeners to call the station and tell racist jokes on the air. Other students established a computerized file which contained racist jokes, accessible through a password.

After these and other incidents, the Regents approved a new student conduct code covering several categories of harassment. The policy, which purported to balance free speech with the university's need to deter racist conduct, set varying standards for different locations around the campus. With respect to conduct in classrooms and other academic settings, the policy prohibited any verbal or physical behavior which (1) "stigmatizes or victimizes" any individual on the basis of thirteen different cultural characteristics (including race, sex, ethnicity, and religion), and (2) threatens or interferes with the individual's university activities or "creates an intimidating, hostile or demeaning environment." Sanctions ranged from formal reprimands to expulsion.

A short time later, a graduate student represented by the American Civil Liberties Union (ACLU) sued Michigan on the ground that its policy violated the First Amendment. A United States District Court struck down the policy in August 1989, finding its provisions unconstitutionally vague. The university replaced the policy with one that bars slurs directed at specific individuals but exempts statements made during classroom discussion. . . .

9. *Summary* - Racial incidents have taken place at many campuses. A review of the more celebrated incidents indicates that in several cases - Michigan, Wisconsin, Massachusetts, Berkeley and Stanford - the incidents led to enactment of antiracism rules. In others - Dartmouth, The Citadel, and Columbia - no rules were enacted. There seems to be little correlation between the seriousness or number of incidents and the enactment of rules. Some universities have responded quickly to a small number of incidents; others have ignored serious unrest or declared themselves unable to act. Whether a campus ultimately adopts an antiracism rule or not, the mere suggestion of such rules generates controversy. The next subpart reviews that controversy, focusing particularly on arguments against rules limiting racial speech.

B. The Current Debate

In response to the rising number of racial incidents, nearly a dozen colleges and universities have adopted student conduct codes or revised old ones to cope with the new wave of unrest.² These rules and policies have drawn fire from commentators ranging from political conservatives to First Amendment absolutists.

1. *The University as "Bastion of Freedom."* - A frequent argument against campus antiracism rules is that they run counter to the ideal of the university as a bastion

2 Institutions that have already adopted policies include Emory University, the Universities of Texas, Wisconsin, California, Connecticut, Michigan, North Carolina at Chapel Hill and Pennsylvania, Brown University, Pennsylvania State University, Trinity College, Mt. Holyoke and Tufts University.

of free thought. Describing the campus as "the locus of the freest expression found anywhere," where the unpopular truth may be "pursued - and imparted with impunity," Chester Finn [professor of education and public policy at Van University] decries any effort to limit that freedom. Many contend that anti-harassment policies, even those aimed only at face-to-face insults, might chill academic exchange or teaching. Further, they argue that "chill" of expression operates in one direction: Charles Kors [professor of history at the University of Pennsylvania] charges that at most campuses a white male can be insulted and disciplined with relative impunity. Minority protectors often respond by transferring the blame outside the realm of speech. Professor Martha Minow, for example, focuses on the way racist insults stigmatize the victim, and draws a line between speech and harassment. Dartmouth President James O. Freedman responded to criticism of an attack on the *Dartmouth Review* by describing the conflict not as a matter of "expression," but as one of protecting academic diversity.

2. *In Loco Parentis.* - Opponents of campus antiracism rules also charge that such rules represent a throwback to the days when colleges and universities functioned *in loco parentis*.³ Professor Finn points out that although campuses have rules to regulate student sexuality and alcohol and drug consumption, they are nevertheless less anxious to prohibit offensive speech. Professor Minow, on the other hand, points out that "neutrality does not mean no state regulation. The state is not neutral when it permits some private groups to wield power over others."⁴

3. *Protecting the Vulnerable.* - In his long-running battle with the *Dartmouth Review*, President Freedman emphasized that an academic institution has a responsibility toward the potential victim of racial harassment and insult. Conservatives reject this idea, arguing that speech cannot be bad merely because it hurts individuals to say bad things. Contrary views are an inherent part of an intellectual community; persons who are "hurt by strong expressions of disagreement are not in a university, but in a Trappist monastery."⁵ Other writers, however, argue that the injury of a racist insult is not just an individual one, but a collective one that the community may, and should, address.

4. *The Politics of Tolerance.* - Many writers who question campus antiracism rules maintain that the new restrictions are motivated more by politics than the desire to protect racial minorities. Robert M O'Neil [former president and professor at University of Virginia] views the question as whether "special interests" can override free speech protections. Others see the new policies as thinly veiled attempts to privilege a liberal agenda, pointing out that higher education's tolerance of scathing speech seems to vary with the ideology of the speaker. George Will [conservative columnist], for example, questions whether rules banning speech offensive to the right - "unpatriotic, irreligious or sexually explicit expressions" - would be graciously accepted by leftist endorsers of antiracism rules. T

3 The *in loco parentis* doctrine held that colleges and universities operated as surrogate parents responsible for the health and moral well-being of students.

4 Minow, "Looking Ahead to the 1990s," Keynote Address to the National Association of University and Universities Attorneys Meeting (28 June 1989).

5 Washburn, "Liberalism Versus Free Speech", 40 *National Review* 39 (1988).

Sowell labels antiracism rules as desperate attempts by liberals to cover up the failures of affirmative action. Minority protectors respond that protecting people of color from disparaging treatment is a matter not of politics but human decency, and is deeply rooted in our tradition of constitutional equality.

5. *A Better Way?* - Some opponents of antiracism rules urge that "[m]ore speech, not less, is the proper cure for offensive speech."⁶ Jon Weiner [professor of history at University of California at Irvine], for example, calls on universities to speak out forcefully and frequently on why racist speech is objectionable. Others urge that universities focus on underlying racist attitudes, rather than on their outward manifestations, or address racism through teaching and example. The soundness of these and related arguments is detailed later in this article.

II. INTERNATIONAL PERSPECTIVES

[Ed. note: This part, which discusses the international standards on racist speech and the laws and practice of several countries, has been deleted given that these matters are discussed elsewhere in this volume.]

III. CONSTITUTIONAL PARADIGMS

As mentioned earlier, campus antiracism rules can be analyzed from two directions. One perspective puts speech at the center, and demands that proponents of antiracism rules justify the abridgement of that liberty. Another perspective puts equal dignity at the center, and regards the speech-act as a violation. Proponents of the latter view argue that the university has the power (perhaps the duty) to protect vulnerable populations from racial abuse, and demand that the advocates of free speech show why the interest in hurling invective should nevertheless prevail. Typically, they cite some of the harms associated with racist speech detailed in the preceding section. This Part analyzes both views: subpart A evaluates the free-speech claim, subpart B the equality arguments.

A. A First Amendment View

The First Amendment appears to stand as a formidable barrier to campus rules prohibiting group-disparaging speech. Designed to assure that debate on public issues is "uninhibited, robust and wide open," the First Amendment protects speech which we hate as much as that which we hold dear. Yet, racial insults implicate powerful social interests in equality and equal personhood. When uttered on university campuses, racial insults bring into play additional concerns. Few would question that the university has strong, legitimate interests in (i) teaching students and teachers to treat each other respectfully; (ii) protecting minority-group students from harassment; and (iii) protecting diversity, which could be impaired if students of color become demoralized and leave the university, or if parents of minority race decide to send their children elsewhere.

⁶ Barringer, "Campus Battle Pits Freedom of Speech Against Racial Slurs," *New York Times*, 1 (25 Apr. 1989).

The United States Supreme Court has only on one occasion weighed speech against the equal-protection values endangered by race-hate speech. *Beauharnais v. Illinois*,⁷ the defendant was convicted under a statute prohibiting dissemination of materials promoting racial or religious hatred. Justice Frankfurter cited the "fighting words" doctrine of *Chaplinsky v. New Hampshire*, ruling that libellous statements aimed at groups, like those aimed at individuals, fall outside First Amendment protection. Later decisions, notably *New York Times v. Sullivan*, have increased protection for libellous speech, with the result that some commentators and courts have questioned whether *Beauharnais* today would be decided differently. Yet, *Beauharnais* has never been overruled, and in the meantime courts have afforded redress in tort for racially or sexually insulting language without finding any constitutional problem in doing so.⁹

Moreover, over the past century the courts have carved out or tolerated a host of "exceptions" to free speech. These exceptions include: speech used to commit a criminal conspiracy¹⁰ or an ordinary contract;¹¹ speech that disseminates a trade secret;¹² speech that defames or libels someone;¹³ speech that is obscene,¹⁴ pornographic,¹⁵ speech that creates a hostile workplace;¹⁶ speech that violates trademark or plagiarizes another's words;¹⁷ speech that creates an immediate harmful impact or is tantamount to shouting fire in a crowded theatre;¹⁸ "provocative" speech directed at captive audiences or broadcast on the airwaves;¹⁹ speech that constitutes "fighting words";²⁰ speech that disrespects a judge, a military officer, or other authority figure;²¹ speech used to defraud a consumer; words used to fix prices;²² words ("stick 'em up - hand over the money")

7 343 U.S. 250 (1952).

8 376 U.S. 254 (1964).

9 See Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling," 17 *Harv. Civil Rights & Civil Liberties Review* 133 (1982).

10 See *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

11 Contract law penalizes, by attaching various penalties and consequences to them, words of contract acceptance (such as, "You've got a deal").

12 *Snepp v. United States*, 444 U.S. 507 (1988) (*per curiam*); *United States v. Progressive, Inc.*, 467 F.2d 990 (W.D. Wis. 1979).

13 *Beauharnais v. Illinois*, 343 U.S. 250 (1952); see *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 340 (1974).

14 *Roth v. United States*, 354 U.S. 476 (1957); see *Miller v. California*, 413 U.S. 15 (1973).

15 *New York v. Ferber*, 458 U.S. 747 (1982).

16 *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399 (1988); *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971).

17 *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985); *Zacarias v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

18 *Schenk v. United States*, 249 U.S. 47, 52 (1919).

19 *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *FCC v. Pacifica Foundation*, 438 U.S. 176 (1978).

20 *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

21 *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918); see *Bethel School Dist. v. Fraser*, 467 U.S. 430 (1984). For federal protection of inanimate objects and symbols, see 18 U.S.C. § 877 (4-H club symbol); 18 U.S.C. § 711 (Smokey the Bear); 36 U.S.C. §§ 170 *et seq.* (U.S. flag).

22 On fraud, see R Perkins & R Boyce, *Criminal Law* (3rd ed. 1982), 304-08, 1048.

communicate a criminal threat;²⁴ and untruthful or irrelevant speech given under oath or during a trial.²⁵

At other times, the Supreme Court has applied a two-tiered approach, according to which "well-defined and narrowly limited classes of speech" are held to fall outside First Amendment protection. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1948). Examples of such exceptions are obscenity, defamation and child pornography. In either case, the Court weighs the societal interest sought to be protected against the value of the speech within our system of free expression. ... See *Cohen v. California*, 403 U.S. 15 (1971) (swear words printed on jacket protected as form of expression); see also *Gooding v. Wilson*, 405 U.S. 518 (1972) (conviction of antiwar protester who shouted, "White son of a bitch, I'll kill you," to police officer at Army induction station under breach of peace statute reversed as over-broad).

Much speech, then, is unprotected. The issues are whether the social interest in reining in racially offensive speech is as great as that which gives rise to these "exceptional" categories, and whether the use of racially offensive language has speech value. Because no recent Supreme Court decision directly addresses these issues, one might look to the underlying policies of our system of free expression to understand how the Supreme Court may rule if an appropriate case comes before it.

Our system of free expression serves a number of societal and individual goals. Included are the personal fulfilment of the speaker; ascertainment of the truth; participation in democratic decision-making; and achieving a balance between social stability and change. Applying these policies to the controversy surrounding campus antiracism rules yields no clear result. Uttering racial slurs may afford the racially troubled speaker some immediate relief, but hardly seems essential to self-fulfilment in any ideal sense. Indeed, social science writers hold that making racist remarks impairs, rather than promotes, the growth of the person who makes them, by encouraging rigid, dichotomous thinking and impeding moral development. Moreover, such remarks serve little dialogic purpose; they do not seek to connect the speaker and addressee in a community of shared ideals. They divide, rather than unite.

Additionally, slurs contribute little to the discovery of truth. Classroom discussion of racial matters and even the speech of a bigot aimed at proving the superiority of the white race might move us closer to the truth. But one-on-one insults do not. They neither state nor attack a proposition; they are like a slap in the face. By the same token, racial insults do little to help reach broad social consensus. Indeed, by demoralizing their victim they may actually reduce speech, dialogue, and participation in political life. "More speech" is rarely a solution. Epithets often strike suddenly, immobilizing their victim and rendering her speech-

23 On punishment of price-fixing, see L. Sullivan, *Antitrust* (1977), 29-30, 132-34.

24 On the various crimes of threat, see Perkins & Boyce, *supra* note 21, at 177-82, 448-52, 1113-15.

25 See, e.g., *McCormick on Evidence* (1984), 544-48. The Supreme Court has followed a number of analytical routes to arrive at the conclusion that certain types of speech should be considered exceptions to first amendment protection. Some correspond to Justice Holmes's "clear and present danger" test, according to which words may be prohibited if "used in such circumstances and ... of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck v. United States*, 249 U.S. 47, 52 (1919); see also *Dennis v. United States*, 341 U.S. 494 (1951) (modifying test to take account of gravity of evil and degree of probability).

less. Often they are delivered in cowardly, anonymous fashion - for example, in form of a defaced poster or leaflet slipped under a student's door, or hurled by a group against a single victim, rendering response foolhardy. Nor do they help strike a healthy balance between stability and social change. Racial epithets could be argued to relieve racial tension harmlessly and thus contribute to racial stability, but this strained argument has been called into question by social science.

Yet racial epithets *are* speech, and as such we ought to protect them unless there is a very good reason for not doing so.²⁶ A recent book by Kent Greenawalt suggests a framework for assessing laws against insults.²⁷ Drawing on first amendment principles and case law, Greenawalt writes that the setting, the speaker's intention, the forum's interest, and the relationship between the speaker and the victim must be considered. Moreover, abusive words (like kike, nigger, wop, faggot) are punishable if spoken with intent, cause a harm subject to formulaic expression in clear legal language, and form a message essentially devoid of ideas. Greenawalt offers as an example of words that could be criminally punishable, "You Sp... whore," uttered by four men to a woman of color at a bus stop, intended to humiliate her. He notes that such words can have long-term damaging effects on the victim and have little if any cognitive content; that which the words have may be expressed in other ways.

Under Greenawalt's test, narrowly drawn university guidelines penalizing racial slurs might withstand scrutiny. The university forum has a strong interest in establishing a nonracist atmosphere. Moreover, most university rules are aimed at face-to-face remarks that are intentionally abusive. Most exclude classroom speech, speeches to a crowd, and satire published in a campus newspaper. Under Greenawalt's nonabsolutist approach, such rules might well be held constitutional.

B. An Equal Protection View

The First Amendment perspective yields no clear-cut result. Society has a strong interest in seeing that expression is as unfettered as possible, yet the kind of expression under consideration has no great social worth and can cause serious harm. Unfortunately, looking at the problem of racist speech from the perspective of the equality-protecting amendments yields no clearer result.

Equality and equal respect are highly valued principles in our system of jurisprudence. Three constitutional provisions and a myriad of federal and state statutes are aimed at protecting the rights of racial, religious, and sexual minorities to be free from discrimination in housing, education, jobs, and many other areas of life. Moreover, universities have considerable power to enact regulations protecting minority interests. Yet the equality principle is not without limits. State agencies may not redress breaches by means that too broadly encroach on the rights of whites, or on other constitutional principles. Rigorous rules of intent, causation, standing, and limiting relief circumscribe what may be done. New causes of action are not lightly recognized; for example, the legal system has resisted efforts by feminists to have pornography deemed a civil rights offense against women.

26 In general, the Court has rejected efforts to restrict speech based on "sensibility" harms. See *Rosen v. New York*, 408 U.S. 901 (1972) (speaker repeatedly said "motherfucking" in speech before school board meeting). Yet, recent commentary and the approach suggested in this subpart urge that injury of racially disparaging speech goes beyond sensibility harms.

27 K. Greenawalt, *Speech, Crime and the Uses of Language* (1989).

campus policies, presumably including equality, is also limited. Cases stemming from efforts to regulate the wearing of armbands, what students may publish in the school newspaper, or their freedom to gather in open areas for worship or speech have shown that individual liberty will sometimes subordinate an institution's interest in achieving its educational objectives - students do not abandon all their constitutional rights at the schoolhouse door.

According to the author of a leading treatise on higher education law, rules bridling racist speech will be found constitutional if there is a local history of racial disruption; if the rules are narrowly tailored to punish only face-to-face insults and avoid encroaching on classroom and other protected speech; if they are consistently and even-handedly applied; and if due protections such as the right to representation and a fair hearing are present.²⁸ The author's guidelines seem plausible, but have yet to be tested. One set of rules was promulgated, then withdrawn; another was declared over-broad and subsequently redrafted. In several jurisdictions, the ACLU has announced that it is monitoring developments and may file suit.

In the meantime, analogous authority continues to develop. In *Bob Jones University v. United States*,²⁹ the Supreme Court held that universities may not discriminate in the name of religion. In *University of Pennsylvania v. EEOC*,³⁰ the Supreme Court held that a university's desire to protect confidential tenure files did not insulate the university from review in connection with discrimination investigations. Both cases imply that the anti-discrimination imperative will at times prevail over other strong interests, such as freedom of religion or academic freedom - and possibly speech.³¹

IV. RECONCILING THE FIRST AND FOURTEENTH AMENDMENTS: STIGMA PICTURES AND THE SOCIAL CONSTRUCTION OF REALITY

A. Class Subordination and the Problem of Concerted Speech

As the analysis to this point has shown, neither the constitutional narrative of the First, nor of the Thirteenth and Fourteenth, Amendments clearly prevails in connection with campus antiracism rules. Judges must choose. The dilemma is embedded in the nature of our system of law and politics: we want and fear both equality and liberty. This part offers a solution to the problem of campus antiracism rules based on a post-modern insight: the speech by which society "constructs" a stigma picture of minorities may be regulated consistently with the first amendment. Indeed, regulation may be necessary for full effectuation of the values of equal personhood we hold equally dear.

28 Interview with Michael Olivas on 4 Feb. 1990. Olivas is professor of law at the University of Houston, Director of the Institute of Higher Education, Law & Governance, and author of a leading casebook, *Higher Education Law* (1989).

29 461 U.S. 574 (1983).

30 110 S. Ct. 577 (1990).

31 See also *Marzette v. McPhee*, 294 F. Supp. 562, 563, 569 (E.D. Wis. 1968) (students invaded university president's office and made "insulting, degrading and humiliating" remarks; court held such conduct subject to sanction).

The first step is recognizing that racism is in almost all its aspects a class harm - the essence of which is subordination of one people by another. The mechanism of this subordination is a complex, interlocking series of acts, some physical, some symbolic. Although the physical acts (like lynchings and cross burnings) are often the most striking, the symbolic acts are the most insidious. By communicating and "constructing" a shared cultural image of the victim group as inferior, we enable ourselves to feel comfortable about the disparity in power and resources between ourselves and the stigmatized group. Most civil rights law, of necessity, contributes to this stigmatization: the group is so vulnerable that it requires social help. The shared picture also demobilizes the victims of discrimination, particularly the young. Indeed, social scientists have seen evidence of self-hatred and rejection of their own identity in children of color as early as age three.

The ubiquity and inescapability of harmful racial depiction are thus the source of its virulence. Like water dripping on sandstone, it is a pervasive harm which only the most hardy can resist. Yet the prevailing First Amendment paradigm predisposes us to treat racist speech as an individual harm, as though we only had to evaluate the effect of a single drop of water. This approach - corresponding to liberal, individualistic theories of self and society - systematically misperceives the experience of racism for both victim and perpetrator. This mistake is natural, and corresponds to one aspect of our natures - our individualistic selves. In this capacity we want and need liberty. But we also exist in a social capacity; we need others to fulfill ourselves as beings. In this group aspect, we require inclusion, equality, and equal respect. Constitutional narratives of equal protection and prohibition of slavery - narratives that encourage us to form and embrace collectivity and equal citizenship for all - reflect this second aspect of our existence.

When the tacit consent of a group begins to coordinate the exercise of individual rights so as seriously to jeopardize participation by a smaller group, the "rights" nature of the first group's actions acquires a different character and dimension. The exercise of an individual's right now poses a group harm and must be weighed against this qualitatively different type of threat.

Kent Greenawalt's recent book (mentioned above) has made a cautious move in this direction. Although generally a defense of free speech in its individual aspect, his book also notes that speech is a primary means by which we construct reality. Thus, a wealthy and well-regarded citizen who is victimized by a vicious defamation is able to recover in tort. His social "picture," in which he has a property interest, has been damaged, and will require laborious reconstruction. It would require only slight extension of Greenawalt's observation to provide protection from racial slurs and hate-speech. Indeed, the rich man has the dominant "story" on his side; repairing the defamation's damage will be relatively easy.

Racist speech, by contrast, is not so readily repaired - it separates the victim from the storytellers who alone have credibility. Not only does racist speech, by placing all the credibility with the dominant group, strengthen the dominant story, it also works to disempower minority groups by crippling the effectiveness of their speech in rebuttal. This situation makes free speech a powerful asset to the dominant group, but a much less helpful one to subordinate groups - a result at odds, certainly, with market- theories of the First Amendment. Unless society is able to deal with this incongruity, the Thirteenth and Fourteenth Amendments and our complex system of civil rights statutes will be of little avail. At best, they will be able to obtain redress for episodic, blatant acts of individual prejudice and bigotry. That redress will do little to address the source of the problem: the speech that creates

The stigma-picture that makes the acts hurtful in the first place, and that renders almost any other form of aid - social or legal - useless.

B. Implementing the Insight

Could judges and legislators effectuate this article's suggestion that speech which constructs a stigma-picture of a subordinate group stands on a different footing from sporadic speech aimed at persons who are not disempowered? It might be argued that *all* speech constructs the world to some extent, and that every speech act could prove offensive to someone. Traditionalists find modern art troublesome, Republicans detest left-wing speech, and some men hate speech that constructs a sex-neutral world. Yet race - like gender and a few other characteristics - is different; our entire history and culture bespeak this difference. Thus, judges easily could differentiate speech which subordinates blacks, for example, from that which disparages factory owners. Will they choose to do so? There is cause for doubt: low-grade racism benefits the status quo. Moreover, our system's winners have a stake in liberal, market- interpretations of law and politics - the seeming neutrality and meritocratic nature of such interpretations reassure the decisionmakers that their social position is deserved.

Still, resurgent racism on our nation's campuses is rapidly becoming a national embarrassment. Almost daily, we are faced with headlines featuring some of the ugliest forms of ethnic conflict and the spectre of virtually all-white universities. The need to avoid these consequences may have the beneficial effect of causing courts to reflect on, and tailor, constitutional doctrine. As Harry Kalven pointed out twenty five years ago, it would not be the first time that insights born of the cauldron of racial justice yielded reforms that ultimately redounded to the benefit of all society.³²

CONCLUSION

This article began by pointing out a little-noticed indeterminacy in the way campus antiracism rules are analyzed. Such rules may be seen either as posing a First Amendment problem or falling within the ambit of the equality-protecting amendments. The survey of the experience of other nations in regulating hate speech and the writings of social scientists on race and racism do not dispel this indeterminacy. Each view is plausible; each corresponds to a deeply held narrative; each proceeds from one's life experiences; each is backed by constitutional case law and principle. Each lays claim to the higher education imperative that our campuses reflect a market-place of ideas.

The gap between the two approaches can be addressed by means of a post-modern insight: racist speech is different because it is the means by which society constructs a stigma-picture of disfavored groups. It is tacitly coordinated by its speakers in a broad design, each act of which seems harmless, but which, in combination with others, crushes the spirits of its victims while creating culture at odds with our national values. Only by taking account of this group dimension can we capture the full power of racially scathing speech - and make good our promises of equal citizenship to those who have so long been denied its reality.

³² H Kalven, *The Negro and the First Amendment* (1965).

BALANCING THE RIGHTS TO FREEDOM OF EXPRESSION AND EQUALITY: A CIVIL LIBERTIES APPROACH TO HATE SPEECH ON CAMPUS¹

Nadine Strossen

INTRODUCTION

Civil libertarians are committed to the eradication of racial discrimination and promotion of free speech throughout society and have worked especially hard to combat both discrimination and free speech restrictions in educational institutions. Educational institutions should be bastions of equal opportunity and unrestricted exchange. Therefore, we find the upsurge of both campus racism and regulation of campus speech particularly disturbing, and we have undertaken efforts to combat both.

Because civil libertarians have learned that free speech is an indispensable instrument for the promotion of other rights and freedoms - including racial equality - we fear that regulating campus expression will undermine equality, as well as free speech. Combating racial discrimination and protecting free speech should be viewed as mutually reinforcing, rather than antagonistic, goals. A diminution of society's commitment to racial equality is neither a necessary nor an appropriate price for protecting free speech. Those who frame the debate in terms of this false dichotomy simply drive artificial wedges between would-be allies in what should be a common effort to promote civil rights and civil liberties.

SOME LIMITED FORMS OF CAMPUS HATE SPEECH MAY BE SUBJECT TO REGULATION UNDER CURRENT CONSTITUTIONAL DOCTRINE

General Constitutional Principles Applicable to Regulating Campus Hate Speech

Professor Lawrence sets up a "straw civil libertarian" who purportedly would afford *absolute* protection to *all* racist speech - or at least "all racist speech that stops short of physical violence." In fact, as evidenced by American Civil Liberties Union (ACLU) policies, traditional civil libertarians do not take such an extreme position. Indeed, there is much overlap between Professor Lawrence's position and that of traditional civil libertarians. We all agree that some racist speech should be protected, and that some should not, although we draw the line between protected and unprotected racist speech at somewhat different points along the constitutional continuum.

¹ Ed. note: This chapter is an abridged version of an article titled "Regulating Racist Speech on Campus: A Modest Proposal" published in 1990 *Duke Law Journal* 484-568. The essay addresses the various issues raised by hate speech in general, and responds to specific points made by Charles Lawrence, professor of law at Stanford University in "If He Hollers Let Him Go: Regulating Racist Speech on Campus," 1990 *Duke Law Journal* 431, most of which points have also been made by Richard Delgado in the preceding chapter.

At the end of the spectrum where speech is constitutionally protected, Professor Lawrence agrees with courts and traditional civil libertarians that the First Amendment should protect racist speech in a *Skokie*-type context.² The essentials of a *Skokie*-type setting are that the offensive speech occurs in a public place and the event is announced in advance. Hence, the offensive speech can be either avoided or countered by opposing speech. Traditional civil libertarians recognize that this speech causes psychic pain. We nonetheless agree with the judicial rulings in *Skokie* that this pain is a necessary price for a system of free expression, which ultimately redounds to the benefit of racial and other minorities.

At the other end of the spectrum, where expression may be prohibited, traditional civil libertarians agree with Professor Lawrence that the First Amendment should not necessarily protect targeted individual harassment just because it happens to use the vehicle of speech. The ACLU maintains this non-absolutist position, for example, with regard to sexually harassing speech on campus or in the workplace. The ACLU recently adopted a policy that specifically addresses racist harassment on campus, and it previously had adopted analogous policies concerning sexual harassment on campus and in the workplace. These earlier policies recognize that unlawful sex discrimination can consist of words specifically directed to a particular individual - words that undermine the individual's continued ability to function as a student or employee. For example, with regard to sexual harassment on campus, ACLU policy provides:

College[s] and universities should take those steps necessary to prevent the abuse of power which occurs ... where a pattern and practice of sexual conduct or sexually demeaning or derogatory comments is directed at a specific student or gender and has definable consequences for the student that demonstrably hinders her or his learning experience as a student. This policy does not extend to verbal harassment that has no other effect on its recipient than to create an unpleasant learning environment.³

These ACLU policies recognize that conduct that infringes on the right to equal educational (or employment) opportunities, regardless of gender (or other invidious classifications) should not be condoned simply because it includes expressive elements.

To be sure, there is no clear boundary between speech that "demonstrably hinders" a learning (or working) experience and speech that "creates an unpleasant learning" (or working) environment. Accordingly, even civil libertarians who agree that this is the appropriate line to draw between unprotected and protected speech in the harassment context still would be expected to disagree about whether particular speech fell on one side of this boundary or the other.

Specifically in the context of racist speech, the ACLU has recognized that otherwise punishable conduct should not be shielded simply because it relies in part

2 The reference is to an American neo-Nazi group's efforts, in 1977-78, to gain permission to demonstrate in Skokie, Illinois, a community with a large Jewish population, including many Holocaust survivors. For the judicial opinions rejecting arguments that Skokie residents should be protected from such personally odious expressions, see, *Collin v. Smith*, 578 F.2d 1197, 1205-07 (7th Cir.), cert. denied, 439 U.S. 916 (1978); *Village of Skokie v. National Socialist Party*, 69 Ill.2d 605, 612-18, 373 N.E.2d 21, 23-25 (1978). For an excellent account by the ACLU's then Executive Director of both the specific Skokie controversy and the general issues it raised, see A Neier, *Defending My Enemy: American Nazis, The Skokie Case, and the Risks of Freedom* (1979).

3 *ACLU Policy Guide* (rev. ed. 1990), at Policy No. 72.

on words. Some examples were provided by former ACLU President Norman Dorsen:

During the Skokie episode, the ACLU refused to defend a Nazi who was prosecuted for offering a cash bounty for killing a Jew. The reward linked the speech to action in an impermissible way. Nor would we defend a Nazi (or anyone else) whose speech interfered with a Jewish religious service, or who said, "There's a Jew; let's get him."⁴

The foregoing ACLU positions are informed by established principles that govern the protectibility of speech. Under these principles, speech may be regulated if it is an essential element of violent or unlawful conduct,⁵ if it is likely to cause immediate injury by its very utterance,⁶ and if it is addressed to a "captive audience" unable to avoid assaultive messages.⁷ It should be stressed that each of these criteria is ambiguous and difficult to apply in particular situations. Accordingly, the ACLU would insist that these exceptions to free speech be strictly construed and would probably find them to be satisfied only in rare factual circumstances. Nevertheless, the ACLU policies expressly recognize that if speech fits within these narrow parameters, then it could be regulable.⁸

The captive audience concept in particular is an elusive and challenging one to apply. Noting that we are "often 'captives' outside the sanctuary of the home and subject to objectionable speech," the Court has ruled that, in public places, we bear the burden of averting our attention from expression we find offensive. Otherwise, the Court explained, "a majority [could] silence dissidents simply as a matter of personal predilections."¹⁰ The Court has been less reluctant to apply the captive audience concept to private homes. However, the Court has held that even in the home, free speech values may outweigh privacy concerns, requiring individuals to receive certain unwanted communications.

The Court's application of the captive audience doctrine illustrates a general notion that an important factor in determining the protection granted to speech is the place where it occurs. At one extreme, certain public places - such as public parks - have been deemed "public forums," where freedom of expression

4 N Dorsen, "Is There a Right to Stop Offensive Speech? The Case of Nazis in Skokie," in L. Gross, ed., *Civil Liberties In Conflict* (London and New York: Routledge, 1988), 133-134.

5 Crimes and torts that may consist primarily of words include bribery, fraud and libel. Sex-designated advertisements for jobs or housing are also unprotected, as integral elements of proscribed discriminatory conduct.

6 This category is illustrated by Oliver Wendell Holmes' proverbial example of "falsely shouting fire in a theater and causing a panic", *Schenck v. United States*, 249 U.S. 47, 52 (1919). This theory is invoked to justify regulating "fighting words" and group defamation. Although the ACLU has a policy expressly addressing the fighting words doctrine, it explicitly rejects group defamation law as inconsistent with the First Amendment. See *ACLU Policy Guide*, at Policy No 6(c).

7 See below, at text accompanying notes 9-10.

8 Regarding speech that is an essential element of unlawful conduct, the *ACLU Policy Guide*, at Policy No. 16, states that, "[T]here is ... [a] need for the regulation of selling practices to minimize fraud, deception, and misrepresentations ... If the sale or transaction is one that can be validly regulated and prohibited, then communications that are an integral part of such a sale or transaction can be regulated." Regarding speech that can cause an immediate injury by its very utterance, see *ACLU Policy Guide*, at Policy No. 6 (accepts limitations on expression that creates "clear and present danger" of immediate unlawful action); *id.* at Policy No. 37 (recognizing that, under strictly limited circumstances, certain lawsuits may be brought for libel and invasion of privacy through speech without violating First Amendment).

9 *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970).

10 *Cohen v. California*, 403 U.S. 15, 21 (1971).

should be especially protected. At the other extreme, some private domains - such as residential buildings - have been deemed places where freedom of expression should be subject to restriction in order to guard the occupants' privacy and tranquility. In between these two poles, certain public areas might be held not to be public forums because the people who occupy them might be viewed as "captive".

The Supreme Court has declared that within the academic environment freedom of expression should receive heightened protection, and that "a university campus possesses many of the characteristics of a traditional public forum."¹¹ These conditions would suggest that hate speech should receive special protection within the university community. Conversely, Professor Mari Matsuda argues that equality guarantees and other principles that might weigh in favor of prohibiting racist speech also are particularly important in the academic context.¹²

The appropriate analysis is more complex than either set of generalizations assumes. In weighing the constitutional concerns of free speech, equality, and privacy that hate speech regulations implicate, decisionmakers must take into account the particular context within the university in which the speech occurs. For example, the Court's generalizations about the heightened protection due free speech in the academic world certainly are applicable to some campus areas, such as parks, malls, or other traditional gathering places. The generalizations, however, may not be applicable to other areas, such as students' dormitory rooms. These rooms constitute the students' homes. Accordingly, under established free speech tenets, students should have the right to avoid being exposed to others' expression by seeking refuge in their rooms.

Some areas on campus present difficult problems concerning the appropriate level of speech protection because they share characteristics of both private homes and public forums. For example, one could argue that hallways, common rooms, and other common areas in dormitory buildings constitute extensions of the individual students' rooms. On the other hand, one could argue that these common areas constitute traditional gathering places and should be regarded as public forums, open to expressive activities at least by all dormitory residents if not by the broader community. Such an argument would derive general support from Supreme Court decisions that uphold the free speech rights of demonstrators in residential neighborhoods on the theory that an individual resident's right of stopping "the flow of information into [his or her] household" does not allow him to impede the flow of this same information to his neighbors.¹³ The Supreme Court, however, recently declined to resolve the specific issue of whether university dormitories constitute public forums for free speech purposes.¹⁴

Even in the areas of the university reserved for academic activities, such as classrooms, the calculus to determine the level of speech protection is complex. On the one hand, the classroom is the quintessential "marketplace of ideas,"¹⁵ which

11 *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 803 (1985); see also *Sweeney v. New Hampshire*, 354 U.S. 234, 250 (1957).

12 Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," 87 *Michigan Law Review* 2320, 2370 (1989).

13 *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971).

14 See *Board of Trustees v. Fox*, 492 U.S. 469, 473 n. 2 (1989).

15 *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

should be open to the vigorous and robust exchange of even insulting or offensive words, on the theory that such an exchange ultimately will benefit not only the academic community, but also the larger community, in its pursuit of knowledge and understanding.

On the other hand, some minority students contend that in the long run, the academic dialogue might be stultified rather than stimulated by the inclusion of racist speech. They maintain that such speech not only interferes with equal educational opportunities, but also deters the exercise of other freedoms, including those secured by the First Amendment. Professor Lawrence argues that, as a consequence of hate speech, minority students are deprived of the opportunity to participate in the academic interchange, and that the exchange is impoverished by their exclusion. It must be emphasized, though, that expression subject to regulation on this rationale would have to be narrowly defined in order to protect the flow of ideas that is vital to the academic community. Thus, much expression would remain unregulated - expression which could be sufficiently upsetting to interfere with students' educational opportunities.

Another factor that might weigh in favor of imposing some regulations on racist speech in class is that students arguably constitute a captive audience. This characterization is especially apt when the course is required and class attendance is mandatory. Likewise, the case for regulation becomes more compelling the more power the racist speaker wields over the audience. For example, the law should afford students special protection from racist insults directed at them by their professors.

Even if various areas of a university are not classified as public forums, and even if occupants of such areas are designated captive audiences, any speech regulations in these areas still would be invalid if they discriminated on the basis of a speaker's viewpoint. Viewpoint-based discrimination constitutes the most egregious form of censorship and almost always violates the First Amendment. Accordingly, viewpoint discrimination is proscribed even in regulations that govern non-public forum property and regulations that protect captive audiences.¹⁶

Many proposed or adopted campus hate speech regulations constitute unconstitutional discrimination against particular views, either as they are written or as they are applied. Professor Lawrence, for example, endorsed a variation on the Stanford regulation that expressly would have excluded speech directed at "dominant majority groups".

As the foregoing discussion illustrates, the question whether any particular racist speech should be subject to regulation is a fact-specific inquiry. We cannot define particular words as inherently off limits, but rather we must examine every word in the overall context in which it is uttered.

Particular Speech-Limiting Doctrines Potentially Applicable to Campus Hate Speech

In addition to the foregoing general principles, Professor Lawrence and other proponents of campus hate speech regulation invoke three specific doctrines in an attempt to justify such rules: the fighting words doctrine; the tort of intention

16 See, e.g., *U.S. v. Kokinda*, 497 U.S. 110 S. Ct. 3115, 3121 (1990); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 305 (1974).

infliction of emotional distress; and the tort of group defamation. The Supreme Court has recognized that each of these doctrines may well be inconsistent with free speech principles. Therefore, these doctrines may not support any campus hate speech restrictions whatsoever. In any event, they at most would support only restrictions that are both narrowly drawn and narrowly applied.

Fighting Words

The fighting words doctrine is the principal model for the Stanford University code, which Professor Lawrence supports. However, this doctrine provides a constitutionally shaky foundation for several reasons: it has been substantially limited in scope and may no longer be good law; even if the Supreme Court were to apply a narrowed version of the doctrine, such an application would threaten free speech principles; and, as actually implemented, the fighting words doctrine suppresses protectible speech and entails the inherent danger of discriminatory application to speech by members of minority groups and dissidents.

Although the Court originally defined constitutionally regulable fighting words in fairly broad terms in *Chaplinsky v New Hampshire*,¹⁷ subsequent decisions have narrowed the definition to such a point that the doctrine probably would not apply to the campus racist speech that Professor Lawrence and others seek to regulate. As originally formulated in *Chaplinsky*, the fighting words doctrine excluded from First Amendment protection "insulting or 'fighting' words, those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."¹⁸

In accordance with its narrow construction of constitutionally permissible prohibitions upon "fighting words," the Court has overturned every single fighting words conviction that it has reviewed since *Chaplinsky*. Accordingly, Supreme Court Justices and constitutional scholars persuasively maintain that *Chaplinsky's* fighting words doctrine is no longer good law.

More importantly, constitutional scholars have argued that this doctrine should no longer be good law, for reasons that are particularly weighty in the context of racial slurs. First, the asserted governmental interest in preventing a breach of the peace is not logically furthered by this doctrine:

[I]t is fallacious to believe that personally abusive epithets, even if addressed face-to-face to the object of the speaker's criticism, are likely to arouse the ordinary law abiding person beyond mere anger to uncontrollable reflexive violence. ...¹⁹

Second, just as the alleged peace-preserving purpose does not rationally justify the fighting words doctrine in general, that rationale also fails to justify the fighting words doctrine when applied to racial slurs in particular. Rather, the serious evil of racial slurs consists of the ugliness of the ideas they express and the psychic injury they cause to their addressees. Therefore, the fighting words doctrine does not address and will not prevent the injuries caused by campus racist speech.

17 315 U.S. 568 (1942).

18 *Id.* at 572.

19 Gard, "Fighting Words as Free Speech," 58 *Washington U. Law Quarterly* 531, 580 (1980).

Third, this doctrine "makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence."²⁰ In other contexts, the Court appropriately has refused to allow the addresses of speech to exercise such a "heckler's veto."²¹

The fighting words doctrine is constitutionally flawed for the additional reasons that it suppresses much protectible speech and that the protectible speech of minority group members is particularly vulnerable. Professor Gard concludes, based on a comprehensive survey of relevant court decisions, that, in the lower courts, the fighting words doctrine "is almost uniformly invoked in a selective and discriminatory manner by law enforcement officials to punish trivial violations of a constitutionally impermissible interest in preventing criticism of official conduct."²² Even more disturbing is that the reported cases indicate that blacks are often prosecuted and convicted for the use of fighting words.²³ Thus, the record of the actual implementation of the fighting words doctrine demonstrates that - as in the case with all speech restrictions - it endangers principles of equality as well as free speech.

Intentional Infliction of Emotional Distress

A committee report submitted to the President of the University of Texas recommends the common law tort of intentional infliction of emotional distress as a basis for regulating campus hate speech.²⁴ This doctrinal approach has a logical appeal because it focuses on the type of harm potentially caused by racist speech that universities are most concerned with alleviating - namely, emotional or psychological harm that interferes with studies. In contrast, the harm at which the fighting words doctrine aims - potential violence by the addressee against the speaker - is of less concern to most universities.

Traditional civil libertarians caution that the intentional infliction of emotional distress theory should almost never apply to verbal harassment. A major problem with this approach is that

the innate vagueness of the interest in preventing emotional injury to listeners suggests that any attempt at judicial enforcement will inevitably result in the imposition of judges' subjective linguistic preferences on society, *discrimination against ethnic and racial minorities*, and ultimately the misuse of the rationale to justify the censorship of the ideological content of the speaker's message.²⁵

20 Z. Chafee, *Free Speech in the United States* (1941), 151.

21 *See, e.g., Gregory v. City of Chicago*, 394 U.S. 111 (1969).

22 Gard, *supra* note 19, at 580.

23 *See, e.g., Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Street v. New York*, 394 U.S. 575 (1969); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

24 *See* Report of President's Ad Hoc Committee on Racial Harassment, University of Texas (Nov. 27, 1989) (defining prohibited "racial harassment" as "extreme or outrageous acts or communications that are intended to harass, intimidate, or humiliate a student or students on account of race, color, or national origin and that reasonably cause them to suffer severe emotional distress").

25 Gard, *supra* note 19, at 578.

Again, as was true for the fighting words doctrine, there is a particular danger that this speech restrictive doctrine will also be enforced to the detriment of the very minority groups whom it is designed to protect.

The position that the intentional infliction of emotional distress tort should virtually never apply to words recently received the Supreme Court's support in *Hustler Magazine v. Falwell*.²⁶ Chief Justice Rehnquist, writing for a unanimous Court, reversed a jury verdict which had awarded damages to the nationally known minister, Jerry Falwell, for the intentional infliction of emotional distress. The Court held that a public figure may not "recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most." The Court further ruled that public figures and public officials may not recover for this tort unless they could show that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was false. In other words, the Court required public officials or public figures who claim intentional infliction of emotional distress to satisfy the same heavy burden of proof it imposes upon such individuals who bring defamation claims.²⁷

Although the specific *Falwell* holding focused on public figure plaintiffs, much of the Court's language indicated that, because of First Amendment concerns, it would strictly construe the intentional infliction of emotional distress tort in general, even when pursued by non-public plaintiffs. For example, the Court said that requiring a statement to be "outrageous" as a prerequisite for imposing liability did not sufficiently protect First Amendment values. Because the "outrageousness" of the challenged statement is a typical element of the tort the Court's indication that it is constitutionally suspect has ramifications beyond the sphere of public figure actions:

'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An 'outrageousness' standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.²⁸

For the reasons signalled by the unanimous Supreme Court in *Falwell*, any cause of action for intentional infliction of emotional distress that arises from words must be narrowly framed and strictly applied in order to satisfy First Amendment dictates.

Group Defamation

The group defamation concept has been thoroughly discredited.

First, group defamation regulations are unconstitutional in terms of both Supreme Court doctrine and free speech principles. To be sure, the Supreme Court's

²⁶ 485 U.S. 46 (1988).

²⁷ See *New York Times v. Sullivan*, 376 U.S. 254 (1964).

²⁸ *Falwell* 485 U.S. at 55.

only decision that expressly reviewed the issue, *Beauharnais v. Illinois*,²⁹ under a group libel statute against a First Amendment challenge. However, that decision was issued almost forty years ago, at a relatively early point in the developing free speech jurisprudence. *Beauharnais* is widely assumed not to be good law in light of the Court's subsequent speech-protective decision related issues, notably its holdings that strictly limit individual defamation actions so as not to chill free speech.

Statements that defame groups convey opinions or ideas on matters of public concern, and therefore should be protected even if those statements also harm reputations or feelings. The Supreme Court recently reaffirmed this principle in the context of an individual defamation action, in *Milkovich v. Lorain Journal Co.*

In addition to flouting constitutional doctrine and free speech principles, group sanctioning group defamation are ineffective in curbing the specific class of speech that Professor Lawrence advocates restraining. Even Justice Frankfurter's opinion for the narrow *Beauharnais* majority repeatedly expressed doubt about the wisdom or efficacy of group libel laws. Justice Frankfurter stressed that the Court upheld the Illinois law in question only because of judicial deference to the legislature's judgment about the law's effectiveness.

The concept of defamation encompasses only false statements of fact made without a good faith belief in their truth. Therefore, any disparaging or insulting statement would be immune from this doctrine, unless it were factually false in nature, demonstrably false in content, and made in bad faith. Members of minority groups that are disparaged by an allegedly libelous statement would hardly be harmed if their reputations or psyches enhanced by a process in which the maker of the statement sought to prove his good faith belief in its truth, and they were required to demonstrate the absence thereof.

One additional problem with group defamation statutes as a model for regulating and sanctioning campus hate speech should be noted. As with the other speech-restrictive doctrines asserted to justify such rules, group defamation laws introduce the risk that rules will be enforced at the expense of the very minority groups that are to be protected. The Illinois statute upheld in *Beauharnais* is illustrative. According to a leading article on group libel laws, during the 1940s, the Illinois statute was used as a weapon for harassment of the Jehovah's Witnesses,³¹ who were then "a minority group very much more in need of protection than most."³¹

Even a Narrow Regulation Could Have a Negative Symbolic Impact on Constitutional Values

Taking into account the constraints imposed by free speech principles and constitutional doctrines potentially applicable to the regulation of campus hate speech, it may be possible - although difficult - to frame a rule that is sufficiently narrow to withstand a facial First Amendment challenge.

Even assuming that a regulation could be crafted with sufficient precision to survive a facial constitutional challenge, several further problems would remain.

²⁹ 343 U.S. 250 (1952).

³⁰ 497 U.S., 110 S. Ct. 2695 (1990).

³¹ J. Tannenhaus, "Group Libel," 35 *Cornell Law Quarterly* 261, 279-80 (1950).

which should give any university pause in evaluating whether to adopt such a rule. First, because of the discretion entailed in enforcing any such rule, there is an inevitable danger of arbitrary or discriminatory enforcement. Therefore, the rule's implementation would have to be monitored to ensure that it did not exceed the bounds of the regulations' terms or threaten content- and viewpoint-neutrality principles.

Second, there is an inescapable risk that any hate speech regulation, no matter how narrowly drawn, will chill speech beyond its literal scope. Members of the university community may well err on the side of caution to avoid being charged with a violation.

A third problem inherent in any campus hate speech policy is that such rules constitute a precedent that can be used to restrict other types of speech. As the Supreme Court has recognized, the long-range precedential impact of any challenged governmental action should be a factor in evaluating its lawfulness.

Further, in light of constitutional restraints, any campus hate speech policy inevitably would apply to only a tiny fraction of all racist expression, and accordingly it would have only a symbolic impact. Therefore, in deciding whether to adopt such a rule, universities must ask whether that symbolic impact is, on balance, positive or negative in terms of constitutional values. On the one hand, some advocates of hate speech regulations maintain that the regulations might play a valuable symbolic role in reaffirming our societal commitment to racial equality (although this is debatable). On the other hand, we must beware of even a symbolic or perceived diminution of our impartial commitment to free speech. Even a limitation that has a direct impact upon only a discrete category of speech may have a much more pervasive indirect impact - by undermining the First Amendment's moral legitimacy.

Recently, the Supreme Court ringingly affirmed the core principle that a neutral commitment to free speech should trump competing symbolic concerns. In *United States v. Eichman*, which invalidated the Flag Protection Act of 1989, the Court declared:

Government may create national symbols, promote them and encourage their respectful treatment. But the Flag Protection Act goes well beyond this by criminally proscribing expressive conduct because of its likely communicative impact.

We are aware that desecration of the flag is deeply offensive to many. But the same might be said, for example, of virulent ethnic and religious epithets, vulgar repudiations of the draft, and scurrilous caricatures. 'If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.' Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering.³²

32 *United States v. Eichman*, 496 U.S. 310, 110 S. Ct. 2404, 2409-10 (1990).

PROHIBITING RACIST SPEECH WOULD NOT EFFECTIVELY COUNTER, AND COULD EVEN AGGRAVATE, THE UNDERLYING PROBLEM OF RACISM³³

Civil Libertarians Should Continue to Make Combating Racism a Priority

I do not think it is worth spending a great deal of time debating the fine point specific rules or their particular applications to achieve what necessarily will only marginal differences in the amount of racist insults that can be sanctioned. Larger problems of racist attitudes and conduct - of which all these words are symptoms - would remain. Those who share the dual goals of promoting racial equality and protecting free speech must concentrate on countering racial discrimination, rather than on defining the particular narrow subset of racist slurs that constitutionally might be regulable.

Although ACLU cases involving the Ku Klux Klan and other racist speakers often generate a disproportionate amount of publicity, they constitute only a small fraction of the ACLU's caseload. In the recent past, the ACLU has handled about six cases a year advocating the free speech rights of white supremacists, out of a total of more than six thousand cases annually, and these white supremacist cases rarely consume significant resources. Moreover, the resources the ACLU must expend to protect hatemongers' First Amendment rights are well-invested. They ultimately preserve not only civil liberties, but also our democratic system, for the benefit of all.³⁴

The ACLU has devoted substantial resources to the struggle against racism. The ACLU backed the civil rights movement in its early years, working with lawyers from the National Association for the Advancement of Coloured People (NAACP) to plan the attack on segregation. In 1931, the ACLU published *Brave New Justice*, a comprehensive report on legalized racism. Although the ACLU initially was not involved in the infamous Scottsboro cases - in which seven young black men were convicted of raping two white women after sham trials before an all-white jury - an ACLU attorney argued and won the first of these cases to reach the Supreme Court.

During World War II, the ACLU sponsored a challenge to the segregation draft and organized the Committee Against Racial Discrimination. In the 1950s, the ACLU successfully challenged state laws that made it a crime for a white woman to bear a child she had conceived with a black father. In the 1960s

33 Some specific points made in this section and the following one were previously included in my article with Strossen, "The Real ACLU," 2 *Yale J. L. and Feminism* 161 (1990).

34 Aryeh Neier persuasively drew this conclusion with respect to the ACLU's defense of the American Nazi Party's right to demonstrate in Skokie: [W]hen it was all over no one had been persuaded to join [the Nazis]. They had disseminated their message and it had been rejected. Why did the Nazi message fall on such deaf ears? Revolutionaries and advocates of destruction attract followers readily when the society they wish to overturn is illegitimate. Understanding this process, revolutionaries try to provoke the government into repressive measures. They rejoice, as the American Nazis did, when their rights are denied to them because they count on repression to win them sympathizers. In confronting the Nazis, however, American democracy did not lose, but preserved its legitimacy. ... The judges who devoted so much attention to the Nazis, the police departments that paid so much attention to them, the courts that tried them, the government that tried to overturn them, and the American Civil Liberties Union, which lost half a million dollars in membership income as a consequence of this defense, used their time and money well. They defeated the Nazis by preserving the legitimacy of American democracy.

ACLU provided funds and lawyers to defend civil rights activists, and since then it has lobbied extensively for civil rights legislation.

The ACLU's Voting Rights Project has helped to empower black voters throughout the southern United States, facilitating the election of hundreds of black officials. The ACLU also maintains several other special "Projects" whose constituents or clients are predominantly black - for example, the National Prison Project, the Capital Punishment Project, and the Children's Rights Project. For the past several years, the ACLU's national legal department has focused on civil liberties issues related to race and poverty. In addition, state and local-level branches of the ACLU consistently allocate substantial resources to civil rights cases.

As indicated by both policy and action, the ACLU is committed to the eradication of racial discrimination on campus as well as in society at large. For example, ACLU leaders have corresponded and met with university officials to recommend measures that universities could implement to combat campus racism, consistent with both equality and free speech values. In the same vein, ACLU officials have worked for the implementation of educational programs designed to counter racist attitudes among college students, as well as younger students. Additionally, ACLU representatives have participated in universities' deliberations about whether to adopt anti-hate-speech rules, and if so, how to frame them. Representatives of the ACLU also have organized investigations of racist incidents at specific campuses, for purposes of advising university officials how to counter those problems. Furthermore, ACLU officials have organized and participated in protests of racist incidents, both on campus and more generally.

Punishing Racist Hate Speech Would Not Effectively Counter Racism

This Article has emphasized the principled reasons, arising from First Amendment theory, for concluding that racist speech should receive the same protection as other offensive speech. This conclusion also is supported by pragmatic or strategic considerations concerning the efficacious pursuit of equality goals. Not only would rules censoring racist speech fail to reduce racial bias, but they might even undermine that goal.

First, there is no persuasive psychological evidence that punishment for name-calling changes deeply held attitudes. To the contrary, psychological studies show that censored speech becomes more appealing and persuasive to many listeners merely by virtue of the censorship.³⁵

Nor is there any empirical evidence, from the countries that do outlaw racist speech, that censorship is an effective means to counter racism. For example, Great Britain began to prohibit racist defamation in 1965. A quarter century later, this law has had no discernible adverse impact on the National Front and other neo-Nazi groups active in Britain. As discussed above, it is impossible to draw narrow regulations that precisely specify the particular words and contexts that should lead to sanctions. Fact-bound determinations are required. For this reason, authorities have great discretion in determining precisely which speakers and which words to

³⁵ See Brock, "Erotic Materials: A Commodity Theory Analysis of Availability and Desirability," in *Technical Report of the U.S. Comm'n on Obscenity and Pornography* 131, 132 (1971); Worchel & Arnold, "The Effects of Censorship and Attractiveness of the Censor on Attitudinal Change," *Journal of Experimental Social Psychology* 365 (1973).

punish, even vicious racist epithets have gone unpunished under the British law. Moreover, even if actual or threatened enforcement of the law had deterred some overt racist insults, that enforcement has had no effect on more subtle, but nevertheless clear, signals of racism. Some observers believe that racism is even more pervasive in Britain than in the United States.³⁶

Banning Racist Speech Could Aggravate Racism

For several reasons banning the symptom of racist speech may compound the underlying problem of racism. Professor Lawrence sets up a false dichotomy when he urges us to balance equality goals against free speech goals. Just as he observes that free speech concerns should be weighed on the pro-regulation, as well as the anti-regulation, side of the balance, he should recognize that equality concerns weigh on the anti-regulation, as well as the pro-regulation, side.

The first reason that laws censoring racist speech may undermine the goal of combating racism flows from the discretion such laws inevitably vest in prosecutors, judges and the other individuals who implement them. One ironic, even tragic result of this discretion is that members of minority groups themselves - the very people whom the law is intended to protect - are likely targets of punishment. For example, among the first individuals prosecuted under the British Race Relations Act of 1965 were black power leaders.³⁷ Their overtly racist messages undoubtedly expressed legitimate anger at real discrimination, yet the statute drew no such fine lines, nor could any similar statute possibly do so. Rather than curbing speech offensive to minorities, this British law instead has been regularly used to curb the speech of blacks, trade unionists, and anti-nuclear activists. In perhaps the ultimate irony, this statute, which was intended to restrain the neo-Nazi National Front, instead has barred expression by the Anti-Nazi League.

The general lesson that rules banning hate speech will be used to punish minority group members has proven true in the specific context of campus hate speech regulations. In 1974, in a move aimed at the National Front, the British National Union of Students (NUS) adopted a resolution that representatives of "openly racist and fascist organizations" were to be prevented from speaking on college campuses "by whatever means necessary (including disruption of the meeting)."³⁸ A substantial motivation for the rule had been to stem an increase in campus anti-Semitism. Ironically, however, following the United Nations' cue, some British students deemed Zionism a form of racism beyond the bounds of permitted discussion. Accordingly, in 1975, British students invoked the NUS resolution to disrupt speeches by Israelis and Zionists, including the Israeli ambassador to England. The intended target of the NUS resolution, the National Front

³⁶ For example, speaking in 1988 about incidents of violence against blacks and Asians in London, Paul Boateng, one of the four minority members then in the 650-member House of Commons, stated "[This] violence is linked to the deeper patterns of prejudice in a society in which racist behavior is more socially acceptable than in the United States. ... The basic difference between the United States and Britain is that no one in America questions the concept of the black American. In Britain, we still have not won the argument of whether it is possible to be black and British." Raines, "London Police Faulted as Racial Attacks Soar," *New York Times*, 24 March 1988, at A1, col. 1.

³⁷ See the discussions of British law by Joanna Oyediran and Geoffrey Bindman elsewhere in this volume.

³⁸ A Neier, *supra* note 1, at 155-56.

applauded this result. However, the NUS itself became disenchanting by this and other unintended consequences of its resolution and repealed it in 1977.

The British experience under its campus anti-hate speech rule parallels the experience in the United States under the one such rule that has led to a judicial decision. During the approximately one year that the University of Michigan rule was in effect, there were more than twenty cases of whites charging blacks with racist speech. More importantly, the only two instances in which the rule was invoked to sanction racist speech (as opposed to sexist and other forms of hate speech) involved the punishment of speech by or on behalf of black students. Additionally, the only student who was subjected to a full-fledged disciplinary hearing under the Michigan rule was a black student accused of homophobic and sexist expression. In seeking clemency from the sanctions imposed following this hearing, the student asserted he had been singled out because of his race and his political views. Others who were punished for hate speech under the Michigan rule included several Jewish students accused of engaging in anti-Semitic expression and an Asian-American student accused of making an anti-black comment. Likewise, the student who recently brought a lawsuit challenging the University of Connecticut's hate speech policy, under which she had been penalized for an allegedly homophobic remark, was Asian-American. She claimed that, among the other students who had engaged in similar expression, she had been singled out for punishment because of her ethnic background.

A second reason why censorship of racist speech actually may subvert, rather than promote, the goal of eradicating racism is that such censorship measures often have the effect of glorifying racist speakers. Efforts at suppression result in racist speakers receiving attention and publicity which they otherwise would not have garnered. As previously noted, psychological studies reveal that whenever the government attempts to censor speech, the censored speech - for that very reason - becomes more appealing to many people. Still worse, when pitted against the government, racist speakers may appear as martyrs or even heroes.

Advocates of hate speech regulations do not seem to realize that their own attempts to suppress speech increase public interest in the ideas they are trying to stamp out. Thus, Professor Lawrence wrongly suggests that the ACLU's defense of hatemongers' free speech rights "makes heroes out of bigots"; in actuality, experience demonstrates that it is the attempt to *suppress* racist speech that has this effect, not the attempt to *protect* such speech.³⁹

There is a third reason why laws that proscribe racist speech could well undermine goals of reducing bigotry. As Professor Lawrence recognizes, given the overriding importance of free speech in our society, any speech regulation must be narrowly drafted. Therefore, it can affect only the most blatant, crudest forms of racism. The more subtle, and hence potentially more invidious, racist expressions will survive. Virtually all would agree that no law could possibly eliminate all racist speech, let alone racism itself. If the marketplace of ideas cannot be trusted to winnow out the hateful, then there is no reason to believe that censorship will do so. The most it could possibly achieve would be to drive some racist thought and

³⁹ For example, when the American Nazi Party finally was allowed to march in Illinois in 1978, following the government's and Anti-Defamation League's attempts to prevent this demonstration, 2000 onlookers watched the 20 Nazis demonstrate. Throughout the protracted litigation that the Nazis predictably won, the case received extensive media attention all over the country. The event probably would have received little if any attention had the Village of Skokie simply allowed the Nazis to demonstrate in the first place.

expression underground, where it would be more difficult to respond to such speech and the underlying attitudes it expresses. The British experience confirms this prediction.

The positive effect of racist speech - in terms of making society aware of and mobilizing its opposition to the evils of racism - is illustrated by the wave of campus racist incidents now under discussion. Ugly and abominable as these expressions are, they undoubtedly have had the beneficial result of raising public consciousness about the underlying societal problem of racism. If these expressions had been chilled by virtue of university sanctions, then it is doubtful that there would be such widespread discussion on campuses, let alone more generally, about the real problem of racism. Consequently, society would be less mobilized to attack the problem. Past experience confirms that the public airing of racist and other forms of hate speech catalyzes communal efforts to redress the bigotry that underlies such expression and to stave off any discriminatory conduct that might follow from it.

Banning racist speech could undermine the goal of combating racism for additional reasons. Some black scholars and activists maintain that an anti-racist speech policy may perpetuate a paternalistic view of minority groups, suggesting that they are incapable of defending themselves against biased expressions. Additionally, an anti-hate speech policy stultifies the candid intergroup dialogue concerning racism and other forms of bias that constitutes an essential precondition for reducing discrimination. In a related vein, education, free discussion, and the airing of misunderstandings and failures of sensitivity are more likely to promote positive intergroup relations than are legal battles. The rules barring hate speech will continue to generate litigation and other forms of controversy that will exacerbate intergroup tensions. Finally, the censorship approach is diversionary. It makes it easier for communities to avoid coming to grips with less convenient and more expensive, but ultimately more meaningful, approaches for combating racial discrimination.

MEANS CONSISTENT WITH THE FIRST AMENDMENT CAN PROMOTE RACIAL EQUALITY MORE EFFECTIVELY THAN CAN CENSORSHIP

The Supreme Court recently reaffirmed the time-honored principle that the appropriate response to speech conveying ideas that we reject or find offensive is not to censor such speech, but rather to exercise our own speech rights. In *Texas v. Johnson*,⁴⁰ the Court urged this counter-speech strategy upon the many Americans who are deeply offended by the burning of their country's flag: "The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong."⁴¹ In addition to persuasion, the types of private expressive conduct that could be invoked in response to racist speech include censure and boycotts.

In the context of countering racism on campus, the strategy of increasing speech, rather than decreasing it, not only would be consistent with First Amendment principles, but also would be more effective in advancing equality goals. A

⁴⁰ 491 U.S. 397 (1989).

⁴¹ *Id.* at 419.

government agencies and officers, including state university officials, should condemn slavery, *de jure* segregation, and other racist institutions that the government formerly supported. State university and other government officials also should affirmatively endorse equality principles. Furthermore, these government representatives should condemn racist ideas expressed by private speakers. In the same vein, private individuals and groups should exercise their First Amendment rights by speaking out against racism. Traditional civil libertarians have exercised their own free speech rights in this fashion and also have defended the First Amendment freedoms of others who have done so.

In addition to the preceding measures, which could be implemented on a society-wide basis, other measures would be especially suited to the academic setting. First, regardless of the legal limitations on rules barring hate speech, universities should encourage members of their communities voluntarily to restrain the form of their expression in light of the feelings and concerns of various minority groups. Universities could facilitate voluntary self-restraint by providing training in communications, information about diverse cultural perspectives, and other education designed to promote intergroup understanding. Members of both minority and majority groups should be encouraged to be mutually respectful. Individuals who violate these norms of civility should not be subject to any disciplinary action, but instead should be counselled. These educational efforts should be extended to members of the faculty and administration, as well as students. Of course, universities must vigilantly ensure that even voluntary limits on the *manner* of academic discourse do not chill its *content*.

In addition to the foregoing measures, universities also should create forums in which controversial race-related issues and ideas could be discussed in a candid but constructive way. Another possibility would be for universities to encourage students to receive education in the history of racism and the civil rights movement in the United States and an exposure to the culture and traditions of racial and ethnic groups other than their own. Consistent with free speech tenets, these courses must allow all faculty and students to express their own views and must not degenerate into "reeducation camps."

The proposed measures for eliminating racism on campus are consistent not only with American constitutional norms of free speech and equality, but also with internationally recognized human rights. For example, article 26(2) of the Universal Declaration of Human Rights provides that individuals have a right to receive, and states have an obligation to provide, education which "promote[s] understanding, tolerance and friendship among all nations, racial or religious groups."

If universities adopt narrowly framed rules that regulate racist expression, then these rules should constitute one element of a broader program that includes the more positive, direct strategies outlined above. Many universities appear to be responding constructively to the recent upsurge in campus hate speech incidents by adopting some of the measures suggested here. This development demonstrates the positive impact of racist speech, in terms of galvanizing community efforts to counter the underlying attitudes it expresses.

It is particularly important to devise anti-racism strategies consistent with the First Amendment because racial and other minority groups ultimately have far more to lose than to gain through a weakened free speech guarantee. History has demonstrated that minorities have been among the chief beneficiaries of a vigorous free speech safeguard.

Professor Lawrence offers two rebuttals to the proposition that blacks are (on balance) benefited rather than hurt by a strong free speech guarantee. First, he notes

that "[t]he First Amendment coexisted with slavery". It is undeniable that, until Union won the Civil War, not only the First Amendment, but also *all* of Constitution's provisions guaranteeing liberty, coexisted with the total negation of liberty through the institution of slavery. It also is true, however, that the free speech guarantees of the federal Constitution and some state constitutions allowed abolitionists to advocate the end of slavery. Further, although the First Amendment from its adoption provided theoretical protection against actions by the national government, it did not provide any protection whatsoever against speech restrictions enacted by state or local governments until the 1930s, and in practice it was not enforced judicially until the latter half of the 20th century. Not until 1965 did the Supreme Court initially exercise its power to invalidate unconstitutional congressional statutes in the First Amendment context.⁴²

In short, although slavery coexisted with the theoretical guarantees enumerated in the First Amendment, slavery did not coexist with the judicially enforceable version of those guarantees that emerged fully only in the mid-1960s. We need not know how much more quickly and peacefully the anti-slavery forces might have prevailed if free speech and press, as well as other rights, had been judicially protected against violations by all levels of government earlier in our history. The robust freedoms of speech and press ultimately might have threatened slavery, as suggested by southern states' passage of laws limiting these freedoms, in an effort to undermine the abolitionist cause.

The second basis for Professor Lawrence's lack of "faith in free speech as the most important vehicle for liberation" is the notion that "equality [is] a precondition to free speech." Professor Lawrence maintains that racism devalues the ideas of non-whites and of anti-racism in the marketplace of ideas. Like the economic market, the ideological market sometimes works to improve society, but not always. Odious ideas, such as the idea of black inferiority, will not necessarily be driven from the marketplace. Therefore, the marketplace rationale alone might not justify free speech for racist thoughts. But that rationale does not stand alone.

The civil libertarian and judicial defense of racist speech also is based on the knowledge that censors have stifled the voices of oppressed persons and groups more often than those of their oppressors. Censorship traditionally has been the tool of people who seek to subordinate minorities, not those who seek to liberate them. [T]he civil rights movement of the 1960s depended upon free speech principles. These principles allowed protestors to carry their messages to audiences who found such messages highly offensive and threatening to their most deeply cherished views of themselves and their way of life. Equating civil rights activists with Communists, subversives, and criminals, government officials mounted inquiries against the NAACP, seeking compulsory disclosure of its membership lists and endangering the members' jobs and lives. Only strong principles of free speech and association could - and did - protect the drive for desegregation. Martin Luther King, Jr. wrote his historic letter from a Birmingham jail, but the Birmingham parade ordinance that King and other demonstrators had violated eventually was declared an unconstitutional invasion of their free speech rights. Moreover, the Civil Rights Act of 1964, which these demonstrators championed, did become law.

The more disruptive forms of protest, which Professor Lawrence credits with having been more effective - such as marches, sit-ins, and kneel-ins - w

42 See *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

especially dependent on generous judicial constructions of the free speech guarantee. Notably, many of these protective interpretations initially had been formulated in cases brought on behalf of anti-civil rights demonstrators. Similarly, the insulting and often racist language that more militant black activists hurled at police officers and other government officials also was protected under the same principles and precedents.⁴³

The foregoing history does not prove conclusively that free speech is an essential precondition for equality, as some respected political philosophers have argued. But it does belie Professor Lawrence's theory that equality is an essential precondition for free speech. Moreover, this history demonstrates the symbiotic interrelationship between free speech and equality, which parallels the relationship between civil liberties and civil rights more generally. Both sets of aims must be pursued simultaneously because the pursuit of each aids the realization of the other.

CONCLUSION

Some traditional civil libertarians may agree with Professor Lawrence that a university rule banning a narrowly defined class of assaultive, harassing racist expression might comport with First Amendment principles and make a symbolic contribution to the racial equality mandated by the Fourteenth Amendment. However, Professor Lawrence and other members of the academic community who advocate such steps must recognize that educators have a special responsibility to avoid the danger posed by focusing on symbols that obscure the real underlying issues. The recent exploitation of the American flag as a symbol of patriotism, to distort the true nature of that concept, serves as a sobering reminder of this risk.

An exaggerated concern with racist speech creates a risk of elevating symbols over substance in two problematic respects. First, it may divert our attention from the causes of racism to its symptoms. Second, a focus on the hateful message conveyed by particular speech may distort our view of fundamental neutral principles applicable to our system of free expression generally. We should not let the racist veneer in which expression is cloaked obscure our recognition of how important free expression is and of how effectively it has advanced racial equality.

PART IV: Policy Statements from Human Rights Organizations

⁴³ See, e.g., *Brown v. Oklahoma*, 408 U.S. 914 (1972) (the Supreme Court reversed the conviction of a Black Panther who had referred, during a political meeting, to specific policemen as "mother-fucking fascist pig cops").

ARTICLE 19

POLICY ON LAWS WHICH PROHIBIT INCITEMENT TO
HATRED OR DISCRIMINATION

ARTICLE 19, The International Centre Against Censorship, works to promote freedom of expression and to defend the victims of censorship around the world. ARTICLE 19 takes its name and purpose from Article 19 of the Universal Declaration of Human Rights (UDHR) which states:

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.

ARTICLE 19 takes the international standards as its starting point and aims to promote the interpretation and application of those standards in a manner which is consistent with their spirit and as protective of the right to freedom of expression as possible.

POLICY STATEMENT ON INCITEMENT TO HATRED OR
DISCRIMINATION

1. The right to freedom of opinion and expression is a fundamental right, which safeguards the exercise of all other rights, including the rights to equal treatment, security of the person and respect for the "inherent dignity of the human person"². Because of the fundamental importance of this right, ARTICLE 19 opposes restrictions on expression based only on the offensiveness of the content.³
2. In some circumstances - namely, when a person intends, or is likely by his or her words, to incite hatred or discrimination - the interest of that person in expressing him- or herself may conflict with the rights of others, including their rights to equal treatment and freedom from intimidation and violence.
3. ARTICLE 19 does not advocate or endorse restrictions on freedom of expression in any circumstances. Nonetheless, it does not oppose reasonable restrictions which are necessary to prevent incitement to an act of imminent violence, hatred or discrimination on grounds, among others, of race, religion, colour, descent, or ethnic or national origin.

¹ The right is recognized by Art. 19 of the UDHR, Art. 19 of the ICCPR, Art. 10 of the ECHR, Art. 13 of the ACHR and Art. 9 of the ACHPR, the texts of which are reproduced in Annexes A and B.

² See, e.g., first and second preambular paragraphs of the ICCPR ("recognizing that these [inalienable] rights derive from the inherent dignity of the human person"); see also, first preambular paragraph and Art. 1 of the UDHR.

³ ARTICLE 19 recognizes that expression may be subject to reasonable time, place and manner regulations in order, *inter alia*, to ensure that people may avoid material which they would find offensive. Any such restrictions, however, should not interfere with the ability of willing recipients or viewers to receive the material and should not hamper the impact of the message.

⁴ We recognize that the word "race", to the extent that it suggests biological distinctions, is

and are not disproportionate to the need to prevent the particular incitement in question.⁵

4. In this context, "incitement" is understood to mean instigation or encouragement which could reasonably lead directly to imminent, unlawful action. Incitement is to be distinguished from mere advocacy which may support or even call for the taking of unlawful action but in a context where, or in such a manner that, unlawful action is unlikely to be a direct result.

Incitement is also to be distinguished from expression which provokes a violent reaction by a hostile crowd (which ARTICLE 19 considers to be protected expression as long as the expression is not so provocative that a violent reaction would be justifiable under widely-accepted principles of self-defence).⁶

Where expression which is protected is likely to provoke a hostile reaction directly, and the authorities claim reasonably and in good faith that they could not prevent injury if the expression were to occur, ARTICLE 19 may not protest the government's decision to stop the expression, having regard to all the relevant circumstances. ARTICLE 19 would, however, protest any efforts to penalize the speaker.

5. In this context, "violence" is understood to mean an actual or threatened physical attack on a person or piece of property.
6. "Hatred" is understood to mean hostility, intimidation or harassment which aims at the destruction or limitation of any fundamental right or freedom.⁷
7. "Discrimination" is understood to mean "any distinction, exclusion, restriction or preference ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".⁸
8. "Necessary" is understood to mean that there is compelling evidence that no measures to prevent such conduct that are reasonably available

inapt and at worst offensive. We use it, however, because of its acceptance in both common usage and international law. ARTICLE 19 takes guidance from the CERD Convention's definition of "racial discrimination" to mean discrimination based on "race, colour, descent, or national or ethnic origin". To that list we have expressly added religion. However, our list of distinctions is illustrative and not exhaustive; thus we recognize that protection against discrimination on other grounds, such as gender and sexual preference, may also, in the limited circumstances specified in this policy statement, justify regulation of incitement.

- 5 Thus, even where ARTICLE 19 believes that a statement constitutes an incitement to violence, hatred or discrimination it nonetheless may protest if it believes that the restriction imposed is disproportionate.
- 6 For instance, a speaker who says that, when he leaves the platform, he plans to incite his followers to violence against the crowd, may provoke violence against himself. Such a violent reaction would be excusable under traditional notions of anticipated self-defence; the speaker's provocation thus would not be protected speech.
- 7 This language is modelled on Art. 5 of the ICCPR which provides that none of the rights or freedoms recognized in the Covenant "may be interpreted as implying for any ... person any right to engage in any activity ... aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant." Similar conflict-of-rights provisions are set forth in Art. 29 of the UDHR, Art. 17 of the ECHR, Art. 29(a) of the ACHR and Arts. 27 and 28 of the ACHPR.
- 8 Art. 1 of the CERD Convention.

and less intrusive on freedom of expression would be likely to be effective.

9. Governments are obliged to undertake effective measures to protect those within their borders, including immigrants and asylum-seekers, from violence, threats of violence and incitements to violence. Governments are obliged to prosecute with equal determination all those who commit crimes of violence, intimidation and property destruction regardless of the national or ethnic origin, colour or religion of the victim.

Governments are also obliged to take firm steps to eliminate discrimination (including on grounds of colour, religion and national and ethnic origin) in all its forms (including in the fields of economic, social, cultural, civil and political rights) and to promote understanding among all groups by, among other means:

- not engaging in discrimination or hatred, or in incitement to discrimination or hatred, and punishing any government officials or employees who do so;
 - not supporting discrimination by any groups or persons;
 - prohibiting discrimination in the private and public sectors, including in particular, in the fields of civil and criminal justice, housing, education, employment and public affairs;
 - undertaking programmes to promote true equality of opportunity of access to housing, education, employment and public affairs;
 - protecting and promoting linguistic, ethnic, cultural and religious rights.
10. ARTICLE 19 believes that an effective response to vilifying expression requires a sustained commitment on the part of governments to support programmes which promote equality of opportunity in education, employment, housing and public affairs, and public education about tolerance and pluralism.

THE INTERNATIONAL STANDARDS

International law recognizes that the right to freedom of expression is a fundamental right.⁹ It also recognizes that this right may legitimately be subject to restrictions in certain narrowly defined circumstances. These include when necessary to protect the rights and reputations of others (in a democratic society) to ensure respect for "the rights and reputations of others to protect public order."¹⁰ In addition, Article 20 of the International Covenant on Civil and Political Rights imposes on states the additional duty to prohibit

- 9 For instance, the UDHR, in its preamble, declares that "the advent of a world in which human rights shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people". The UN General Assembly, at its first session, declared that "Freedom of information is a fundamental human right and ... the touchstone of freedoms to which the United Nations is consecrated." GA resolution 59(1), 14 Dec. 1953. The European Court of Human Rights has stated that "Freedom of expression constitutes one of the essential foundations of such a [democratic] society, one of the basic conditions for its progress and the development of every man." *The Sunday Times v. UK*, Judgement of 26 Apr. 1979.
- 10 These permissible restrictions are set forth in Art. 19(3) of the ICCPR, Art. 10(2) of the ECHR, Art. 13(2) of the ACHR. While only Art. 10 expressly requires that any restrictions be necessary in a democratic society, the other standards are generally interpreted to incorporate such a requirement implicitly.

advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".

The International Convention on the Elimination of All Forms of Racial Discrimination (the "CERD Convention"), of all the international instruments, is the one that poses the most serious challenges to freedom of expression. Article 4 of the CERD Convention obliges states parties to make criminal "all dissemination of ideas based on racial superiority or hatred [and] incitement to racial discrimination, ... and also any assistance to racist activities, including the financing thereof". This obligation is modified by the instruction that states parties are to take action "with due regard to the principles embodied in the Universal Declaration of Human Rights", understood to refer, in particular, to the rights to freedom of expression and association. Despite the "with due regard clause", Article 4 remains controversial, and several states entered reservations or declarations concerning it when they became party to the CERD Convention.¹¹

AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union (ACLU) is a nationwide organization with more than 300,000 members. Founded in 1920 by Roger Baldwin, the ACLU today has 51 affiliates around the country. The ACLU's mission is to protect and extend constitutional rights and civil liberties to all people within the borders of the United States. It accomplishes its mission through litigation, legislative lobbying and public education. The ACLU handles in excess of 6,000 lawsuits every year across the country, mostly through the efforts of its volunteer attorneys. It is the pre-eminent defender of individual rights in the US today.

Following are the ACLU's Policy Statement on Free Speech and Bias on College Campuses adopted in 1989 and excerpts from a draft ACLU Briefing Paper on Hate Speech written by Franklyn Haiman, a Professor Emeritus in the Communications Department of Northwestern University and a member of the ACLU National Board. ACLU policy is also discussed by Nadine Strossen, current President of the ACLU, throughout her chapter and especially in the text accompanying footnotes 2, 7 and 31.

POLICY STATEMENT ON FREE SPEECH AND BIAS ON COLLEGE CAMPUSES

Preamble

The significant increase in reported incidents of racism and other forms of bias on colleges and universities is a matter of profound concern to the American Civil Liberties Union (ACLU). Some have proposed that racism, sexism, homophobia and other such biases on campus must be addressed in whole or in part by restrictions on speech. The alternative to such restrictions, it is said, is to permit such bias to go unremedied and to subject the targets of such bias to a loss of educational opportunity. The ACLU rejects both these alternatives and reaffirms its traditional and unequivocal commitment both to free speech and to equal educational opportunity.

Policy

1. Freedom of thought and expression are indispensable to the pursuit of knowledge and the dialogue and dispute that characterize meaningful education. All members of the academic community have the right to hold and to express views that others may find repugnant, offensive, or emotionally distressing. The ACLU opposes campus regulations which interfere with the freedom of professors, students and administrators to teach, learn, discuss and debate or to express ideas, opinions and feelings in classroom, public or private discourse.¹

¹¹ The texts of the reservations and declarations are reproduced in Annexe B.

¹ See, generally, ACLU Policies 60, 63, 65 and 71.

2. The ACLU has opposed and will continue to oppose and challenge disciplinary codes that reach beyond permissible boundaries into the realm of protected speech, even when those codes are directed at the problem of bias on campus.²

3. This policy does not prohibit colleges and universities from enacting disciplinary codes aimed at restricting acts of harassment, intimidation and invasion of privacy.³ The fact that words may be used in connection with otherwise actionable conduct does not immunize such conduct from appropriate regulation.⁴ As always, however, great care must be taken to avoid applying such provisions over-broadly to protected expression. The ACLU will continue to review such college codes and their application in specific situations on a case-by-case basis under the principles set forth in this policy and in Policy 72.⁵

4. All students have the right to participate fully in the educational process on a non-discriminatory basis. Colleges and universities have an affirmative obligation to combat racism, sexism, homophobia, and other forms of bias, and a responsibility to provide equal opportunities through education. To address these responsibilities and obligations, the ACLU advocates the following actions by colleges and universities:

- (a) to utilize every opportunity to communicate through its administrators, faculty and students its commitment to the elimination of all forms of bigotry on campus;
- (b) to develop comprehensive plans aimed at reducing prejudice, responding promptly to incidents of bigotry and discriminatory harassment, and protecting students from any further such incidents;
- (c) to pursue vigorously efforts to attract enough minorities, women and members of other historically disadvantaged groups as students, faculty members and administrators to alleviate isolation and to ensure real integration and diversity in academic life;
- (d) to offer and consider whether to require all students to take courses in the history and meaning of prejudice, including racism, sexism and other forms of invidious discrimination;⁶

2 The ACLU to date has opposed over-broad student speech codes adopted by the University of Connecticut, University of Michigan, University of Wisconsin and the University of California.

3 Although "harassment", "intimidation", and "invasion of privacy" are imprecise terms susceptible of impermissibly over-broad application, each term defines a type of conduct which is legally proscribed in many jurisdictions when directed at a specific individual or individuals and when intended to frighten, coerce, or unreasonably harry or intrude upon its target. Threatening telephone calls to a minority student's dormitory room, for example, would be proscribable conduct under the terms of this policy. Expressive behaviour which has no other effect than to create an unpleasant learning environment, however, would not be the proper subject of regulation. (See ACLU Policy No. 72 on sexual and other forms of discriminatory harassment on campus. See also Policy No. 316.)

4 For example, intimidating telephone calls, threats of attack, extortion and blackmail are unprotected forms of conduct which include an element of verbal or written expression.

5 In determining whether a university disciplinary code impermissibly restricts protected speech, there must be a searching analysis both of the language of the code and the manner in which it is applied. Many factors, which are heavily fact-oriented, must be considered, including time, place, pattern of conduct and, where relevant, the existence of an authority relationship between speaker and target.

6 All courses and programmes must be taught consistent with the principles prescribed in ACLU Policy No. 60.

- (e) to establish new student orientation programmes and continuing counselling programmes that enable students of different races, sexes, religions, and sexual orientation to learn to live with each other outside the classroom;
- (f) to review and, where appropriate, revise course offerings as well as extracurricular programmes in order to recognize the contributions of those whose art, music, literature and learning have been insufficiently reflected in the curriculum of many American colleges and universities;
- (g) to address the question of *de facto* segregation in dormitories and other university facilities; and
- (h) to take such other steps as are consistent with the goal of ensuring that all students have an equal opportunity to do their best work and to participate fully in campus life.

EXCERPTS FROM A DRAFT ACLU BRIEFING PAPER ON HATE SPEECH

Franklyn Haiman

If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

- Former US Supreme Court Justice Louis Brandeis

In recent years the United States has been experiencing a disturbing upsurge of incidents in which racist, sexist and anti-gay sentiments are being expressed by words and symbols of hatred and by acts of violence against people and property. Even on our college and university campuses, supposedly enclaves of greater enlightenment, instances of speech and action motivated by group hatred have erupted with alarming frequency.

Physical attacks on people, direct threats of violence, invasions of private space, and destruction or defacement of the property of others are, of course, and should be, punishable by the law. But the utterance of hate speech or the display of hate symbols unaccompanied by violent actions or face-to-face intimidation raise freedom of speech issues that First Amendment experts have debated for decades and that many institutions of higher education are now struggling with as well. Many of those who advocate that our colleges and universities should have disciplinary codes prohibiting such communicative behaviour, or even that this conduct should be made illegal by our legislatures and declared outside the bounds of First Amendment protection by the US Supreme Court, believe that they are advancing a new and more sensitive point of view that is required by new understandings of the harmful effects of such expression on its victims and of the need to include and extend equality of opportunity to those who have been subordinated and effectively excluded from our society by group hatred.

But their position and their arguments are not really new. There were predominant legal scholars in the United States who urged, during the 1930s, that we should outlaw Nazi rhetoric. Most Western European democracies, in the era followed by World War II, did in fact make it illegal to incite racial, religious or ethnic hatred by words or symbols, and those prohibitions are still in effect. Even the US Supreme Court, in a 1952 decision (*Beauharnais v. Illinois*), upheld a

Illinois law to the same effect, which was later removed from the books by the state legislature. On the other hand, as long ago as 1927, in a famous Supreme Court opinion quoted above (*Whitney v. California*), Justice Louis Brandeis laid the groundwork for what is now the prevailing legal view in this country - that, in the absence of emergency circumstances where there is a likelihood of immediate lawless action being incited by an act of communication (*Brandenburg v. Ohio*), the remedy in a democratic society for "evil" speech is more and better speech.

The ACLU supports the Brandeis view of the First Amendment. The way for a democratic and self-confident society to deal with bad ideas is to respond with better ideas - exposing the darkness of lies and intolerance to the cleansing light of day. Whether or not those who indulge in hate speech are intending to invite a dialogue, that is what they should get.

There are several reasons why the suppression of hate speech is self-defeating:

The first was well articulated long ago by John Stuart Mill in his famous essay "On Liberty". Mill pointed out that commonly accepted beliefs, such as our nation's commitment to racial and sexual equality, become mere prejudices if they never have to be defended against challenges. We forget, and our children may never know, the reasons for our beliefs. If, from time to time, we have to protect those beliefs from attack, they will become refreshed and reinvigorated, and younger generations who may not have been through the struggles to attain them will gain a stronger understanding of their value. Just as unused muscles grow flabby, so unchallenged minds become atrophied.

The second reason is that suppressing the overt expression of group hatreds does not eliminate the attitudes that underlie it. Those who are clever enough to do so will simply express their bigotry in more socially acceptable ways, avoiding the letter of the law while violating its spirit. This is what happened with a racist journal in England after passage of their 1965 Race Relations Act. The journal cleaned up its act and increased its circulation. The David Dukes of our world will not be stopped by banning only crude expressions of group hatred.

For those who are not clever enough to mask their hatred in more refined terms, suppressing the expression of their attitudes will only drive them underground. There they will fester, perhaps to explode in violence at a later time. Meanwhile, we may think we have solved a dangerous problem that remains. An unseen enemy is always more dangerous than one that is visible.

Suppression may also make martyrs of those who are suppressed, winning them more publicity and sympathy than they deserve or would otherwise achieve. The shoddy merchandise they peddle gains the attractiveness of forbidden fruit, and people who would otherwise ignore it may seek it out because of curiosity or a suspicion that speakers who so distress the powers that be must be saying something terribly important.

Finally, the energy we devote to crafting and attempting to enforce prohibitions against hate speech distract us from the more important work of dealing with the problems that give rise to the hatred that is expressed. That energy can be directed much more fruitfully at attempting to eliminate, or at least reduce, the inequalities, inequities, powerlessness, and ignorance which are the genesis of feelings of hatred toward other groups of people.

Chapter 35

AMERICAN-ARAB RELATIONS COMMITTEE

STATEMENT ON ANTI-ARAB AND ANTI-MUSLIM ATTITUDES IN THE UNITED STATES

The American-Arab Relations Committee (AARC), established in 1960, is the oldest American-Arab organization in North America. Its aim has been to improve understanding between American and Arab peoples. The organization primarily represents Arab intellectuals who have no ties to any government, Arab or otherwise. It presently reaches some 20,000 concerned members and supporters. The National Council on Islamic Affairs is a sister organization which reaches the American Muslims and deals with the same educational and political issues as AARC.

The following statement reflects the viewpoint of the Board of Directors and Advisors of AARC.

HISTORIC BACKGROUND OF RACISM IN AMERICA

Racism is a part of American tradition. The first group which landed on these shores considered the second group as intruders and the second group of immigrants considered the third group as foreigners and so on. Hence, prejudice against others (new arrivals, strangers and people of different races, religions, nationalities, etc.) went hand in hand with American expansion and progress.

Today, the Arabs and Muslims are the last group to appear on the American scene. Accordingly, they are the subject of the traditional general prejudice. In addition, there are two special reasons for anti-Arab and anti-Muslim racism. First, there is a general Christian misunderstanding of Islam and prejudice against "heathens" (Muslims), lingering from the days of the Crusades. And second, there is the strong Zionist anti-Arab and anti-Muslim position arising from the struggle for Palestine.

Today, Islam is the second largest religion in America, following Christianity, with some 10 million adherents. Judaism has six million adherents in America.

ARAB-AMERICAN POSITION ON FREEDOM OF SPEECH AND RACISM

AARC is a civil liberties organization which is committed to freedom of speech, including anti-Arab and anti-Muslim speech if based on "ignorance". But such anti-Arab and anti-Muslim speech is for "political" reasons in order to appeal to fear, especially among fundamentalist Christian or Zionist groups, where speech becomes an instrument of racism which AARC has strongly denounced.

Of course, freedom of speech should be used for political purposes, not to discuss poetry or the weather conditions. Yet, AARC "tolerates" anti-Muslim speeches based on ignorance and finds anti-Arab speech used for political purposes unacceptable. This apparent paradox is based on the fact that the appeal to group prejudices at the expense of the Arabs is a racist act and therefore obnoxious and unacceptable.

ARAB AND MUSLIM VICTIMS OF RACISM

During and after the war on Iraq, Arab and Muslim Americans were subjected to a great deal of racism and a greater deal of political torture, as the result of "civilized" hate speech. There were several physical attacks on Arab and Muslim establishments, including shops and mosques. Also, there were hundreds of abusive telephone calls, some of them threatening to do this or that to the Arabs or calling on the Arabs and Muslims "to go home to Araabi!"

Those were attacks and calls from uneducated, uncouth and ignorant Americans. But by far more hurtful was the "torture" poured on the Arabs and Muslims by radio and television programmes 10 to 15 hours a day. The newspapers promoted their share of misrepresentation, insulting the common sense of Arabs, Muslims and other knowledgeable persons.

The use of "hate speech" is a sophisticated art in America. Hate speech may be delivered in a highly "civilized" language, but urges hatred, incitement, hostility, death and destruction to be inflicted on such peoples as those in Panama, Grenada, Libya, Iraq and elsewhere. This subtle form of racism inflicts "psychological torture" upon defenceless people because of their "race", "culture", "nationality", "religion", or "political" beliefs.

During the Gulf war, many Arab, Muslim and Third World scholars viewed the crusade against Iraq as akin to the Fifth Crusades by the Christian West against Islam. On 29 January 1992, President Bush told the National Religious Broadcasters that war on Iraq was based on the moral force of the teachings of Jesus Christ. Muslim and Christian Americans objected to this abuse of Christianity by Bush for his political goals.

CONCLUSION

It should be noted, however, that bad as the condition of the Arabs and Muslims has been during and after the war on Iraq, there has been "progress" in America. Looking back at America's history, its racist society has become a bit more tolerant and open. Gradually and painfully, it is being admitted that America is no longer an Anglo-Saxon or Judeo-Christian fiefdom but a multi-racial society. More and more Americans are recognizing that America is a Judeo-Christian-Islamic country.

As a part of this process of change and with regard to American attitudes towards the Arabs and Muslims, it is important to recall that during the Middle East crises of 1956, 1967, 1973 and 1983 the anti-Arab and anti-Muslim prejudices were estimated to be 10 to 90 times greater than in 1991.

For example, in October 1973, AARC received on average 130 phone calls a day related to the Middle East war. Some 90 per cent of those calls were anti-Arab and anti-Muslim, 6 or 7 per cent asked questions about Egypt, Suez Canal and Israel, and 3 to 4 per cent were sympathetic to the Arab position.

By contrast, during the 1991 war, some 60 per cent of the calls were inquiries about Iraq, Kuwait, Saddam Hussein, and whether George Bush was defending Israeli or American interests in the Gulf; 30 to 35 per cent expressed opposition to Hussein's invasion of Kuwait and the American intervention in Iraq; and only about 5 to 10 per cent expressed hostility against Arabs and Muslims. Thus, there is a change from 90 to 10 per cent of calls being hostile. Of course, even one nasty phone call is one too many

Recognizing the nature of America's racist society, one must view even an historical perspective. Americans will gradually accept the Arabs and Muslims as they have accepted other groups, reluctantly, before. As a result, Arabs, Muslims and other minorities and disadvantaged peoples will receive a better hearing. America will become a more open society.

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

Through its divisions on Civil Rights, Intergroup Relations, International Affairs and Community Service, and its network of regional offices across the United States and in Israel, the Anti-Defamation League (ADL) is a leader in the fight against anti-Semitism. A civil rights and human relations organization founded almost 80 years ago by B'nai B'rith, ADL works to build bridges of understanding and friendship among racial, religious and ethnic groups; employs research, fact-finding, education and legal advocacy to search out and counter the toxic roots of prejudice; confronts threats to the security of the Jewish community and to democracy generally; and speaks out in support of the legitimate interests of the State of Israel.

ADL STATEMENT: RESPONDING TO BIGOTRY AND HATE SPEECH

When the Anti-Defamation League was founded, its creators proclaimed that the organization's goal would be "to stop, by appeals to reason and conscience, and if necessary, by appeals to law, the defamation of the Jewish people. Its ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens."

In keeping with this mandate, ADL has spearheaded efforts in the United States to foster tolerance and mutual respect and to combat discrimination, prejudice and bigotry. ADL has created innovative "prejudice reduction" educational campaigns and curricula, and promoted model legislation responding to criminal conduct motivated by hate.

At the same time, the ADL does not support or promote laws seeking to prohibit hate speech. Such laws would violate the First Amendment of the United States Constitution, which protects speech unless it constitutes "fighting words" or "incitement to imminent lawless action." ADL has always believed that the best answer to "bad speech" is more speech, and that in the marketplace of ideas, the overwhelming majority of Americans will see hate speech for what it is and reject it. In this connection, ADL agrees with the views previously submitted to ARTICLE 19 by Human Rights Watch and the ACLU.

Of course, ADL is aware of the harm hate speech can cause. At an ADL-sponsored conference on anti-Semitism around the world held in 1991, ADL's National Director, Abraham H Foxman, declared:

Forty-five years ago, when Auschwitz, Treblinka, Buchenwald, and Sobibor were laid bare for the world to see, there was no longer any question or doubt about what hate and bigotry and prejudice can do... After the *Shoah*, I think most of us were convinced -- and with the birth of Israel, we were reassured -- that anti-Semitism would begin to pass into history. But ironically, the further removed from Auschwitz, the more virulent, the more active, the more threatening the virus of anti-Semitism becomes. ... [A]nti-Semitism is on the increase... Even more troubling is the intensity, the level of hate, of hurt, of damage, of vandalism, even reaching murder, death and assassination. ...

We in the Jewish tradition know the power of words. We know that words can be as hurtful as grenades or bullets or Molotov cocktails. But

we also know that silence can be just as deadly. ... Our concern is that decent people are no longer willing or able to stand up and say this is immoral, this is un-Christian, this is unacceptable. Because only then will we be able to keep the lid on anti-Semitism and bigotry.

ADL believes that the best answer to hate speech is not laws driving it underground but decent people speaking out, and society making such hatred unfashionable and unacceptable. ADL also believes in the power of education, of confronting prejudice by teaching children and adults that differences should be celebrated, and all will benefit.

In this spirit, ADL launched its award-winning *A World of Differences* campaign in Boston seven years ago. Since then, the programme has reached tens of thousands of teachers, students and workers in schools, college campuses, and workplaces across the United States, bearing the message that by working together and respecting each other, we can make the world a better place.

THE BOARD OF DEPUTIES OF BRITISH JEWS

STATEMENT ON LAWS AGAINST INCITEMENT TO RACIAL HATRED

The Board of Deputies of British Jews, founded in 1760, is the representative body of the Jewish Community in Britain. It is an independent organization, recognized as the body to make official representations on behalf of the Jewish Community to central and local government authorities and other appropriate bodies, and is consulted by the government on a range of issues of concern to the Community. The Board has, on many occasions over the centuries, intervened on behalf of distressed communities in other countries. Deputies are elected by democratic direct vote by their constituencies to serve a three-year term of office. The majority of deputies represent synagogues or synagogal bodies, but in addition most national, political, cultural and youth organizations are represented.

INTRODUCTION

Last December, the Board of Deputies voted overwhelmingly to support proposals to strengthen the laws against incitement to racial hatred in Britain. These laws seek to deter the making of racially inflammatory remarks and the distribution of racist literature, but they have not proved especially effective despite various improvements over the years. The Board's proposals are made in the face of a rising tide of racism, anti-Semitism and anti-Semitic literature in this country.

Our proposals show a proper concern for the right of free speech, and we look for a clear signal that society will not now tolerate the evils caused by those who engage in racist and anti-Semitic behaviour.

BACKGROUND

There has been an upsurge in recent years in the amount of hate propaganda disseminated in Britain. There has also been a significant increase in racial harassment and attacks, as well as anti-Semitic incidents, throughout the country. Anti-Semitic and other racist literature has been freely circulated, its publishers and distributors seemingly emboldened by the absence of prosecutions and the apparent impotence of the law to curb their activities. Of particular concern to the Jewish Community is the wide dissemination of literature, some of it of a pseudo-scientific character, which denies the Holocaust.

Increasing disquiet has also been felt at the distribution, often within other ethnic minority communities, of material which is virulently anti-Semitic but which masquerades as an attack on the State of Israel or Zionism.

Although this anti-Semitic material appears to be emanating from a relatively small group of individuals and organizations, it is sufficiently significant to cause serious concern. History teaches us all too plainly how easily a climate of hatred and intolerance can be created, and the appalling consequences which can ensue. Experience also teaches us that emotion can displace reason and that once the seeds of prejudice and intolerance are sown they can germinate in times of economic pressure or social stress with devastating effect. We must also be aware of the dangers that can be created by the skilful exploitation of racist propaganda. A

simple belief that truth and fairness will prevail has too often been disproved at least in the short term.

The increase in racist material cannot therefore be ignored as the work of fringe groups that can do no real damage. Both our collective historical experience and the repeatedly expressed view of the international community, that racial hatred and racist propaganda should be eradicated, impel us to confront the problem. Material of the kind being published and distributed has a serious potential to cause racial and social disharmony and to influence attitudes in a manner harmful to society and to its ethnic minority groups.

RECOMMENDATIONS

The Board has therefore proposed a number of recommendations designed to strengthen the operation of the statutory provisions of the Public Order Act (POA) and the Malicious Communications Act 1988 (MCA) and to add a new offence of group libel.

Public Order Act 1965

1. "Racial hatred" is defined as "hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins" (Section 17, POA).
"Hatred" is a very strong and extreme emotion. This may explain at least in part the reluctance to prosecute on occasions or the unwillingness of juries to convict. We propose that the Act should cover "hatred, hostility or contempt".
2. The Act refers to "stirring up" of racial hatred. The verb "stir up" connotes active instigation, fostering or fomenting of hatred. We propose that the law should not be confined to the active stimulation of hatred but should also cover activities which involve the encouragement or advocacy of racial hatred by means of speech, written material or conduct.
3. We recommend that the reference to material "which is threatening, abusive or insulting" should be deleted (Sections 18 and 19). In our view *all* racist material should be caught, not merely that which is crudely abusive or vulgarly insulting. Racist material should not escape that legislation merely because it is expressed in ostensibly moderate or rational terms.
4. We propose that the definition of "the publication or distribution to the public or a section of the public" (Section 19(3)) be extended by the addition of the words "or any member of the public" in order to overcome the restrictive effect of a court ruling that the distribution of a racist leaflet to a Member of Parliament, who was at home with his family, was not distribution to the public or a section of the public. Adoption of this proposal would remove an anomaly in the present law.
5. The Act requires that racial hatred is intended or that it "is likely to be stirred up" having regard to all the circumstances. We consider that the word "likely" poses a stringent test or standard and that if the distribu-

tion of racist material is to be curbed, a less exacting test should be imposed. We propose that it should be sufficient if it is reasonably foreseeable that racial hatred may be stirred up, whether immediately or at any time thereafter. The onus would be on the prosecution to prove foreseeability of a serious risk that racial hatred could be provoked.

6. The police have powers to arrest any person who is reasonably suspected of committing an offence in relation to the use of words or behaviour or the display of written material (Section 18(3)). There is no parallel power in relation to the publication or distribution of written material in Section 19. We recommend that a police officer should enjoy a similar power in the context of Section 19. We see no reason to require a police constable to watch whilst racist material is disseminated without any power to intervene unless the distribution is likely to lead to violence or a breach of the peace.
7. Section 18(2) provides that an offence may be committed in a "public or private place", except that no offence is committed where the words or behaviour are used, or the written material is displayed, "by a person inside a dwelling and not heard or seen except by other persons in that or another dwelling". "Dwelling" is defined by Section 29 as meaning "any structure or part of a structure occupied as a person's home or other living accommodation (whether the occupation is separate or shared with others) ...". This would mean that if a person invited members of the public to his or her house and then used racially inflammatory words or displayed racially inflammatory material with the avowed intention of fomenting racial hatred, he or she would not be committing an offence. We do not consider there to be any valid distinction in principle between a meeting in a private house to which the public is invited, where racially inflammatory words are used, and a discussion in a public place where such words are used in the presence or hearing of members of the public.

We consider that the total repeal of this exception would constitute an unacceptable invasion of privacy; rather, we recommend that this exception should be retained only to the extent that there is no invitation to the general public to attend a meeting on private premises.

8. Section 25 provides that where a person is convicted, *inter alia*, of an offence under Sections 18 or 19, the Court shall order the forfeiture of any written materials or recordings produced to the Court to which the offence relates. No forfeiture order is to take effect whilst appeals are pending. Whilst this is a salutary power in relation to racist literature, it does not go far enough to prevent the dissemination of that literature. It would not, for example, prevent the reprinting and redistribution of copies of the offending literature at a future date.

We recommend that, in addition to the power to order forfeiture, the Court should have a power to order that no future copies of offending materials or recordings be published or distributed by the convicted person. We also recommend that this should extend to any materials which are substantially similar to the forfeited materials. An order restraining publication or distribution should, in our view, take effect

pending an appeal. A prohibition against the reprinting and redistribution of the materials will have the same effect as an injunction in a civil case and breach should be punishable by imprisonment or a fine for contempt of court if the prohibition order is not obeyed.

9. We recommend the repeal of the requirement that the Attorney-General's consent be obtained before proceedings for an offence may be instituted in England and Wales. The justification for this requirement has been the need to ensure that prosecutions are not instituted which are either oppressive or counter-productive. While we thus advocate that local prosecutors should be able to initiate prosecutions on their own, we do not consider that private prosecutions should be allowed because they could be ill-advised and brought with insufficient appreciation of the threat to freedom of expression involved.

Malicious Communications Act 1988

1. Under the **Malicious Communications Act 1988** an offence is committed by the sender of material or any article which is, *inter alia*, indecent or grossly offensive.

In some cases it may be difficult to identify the sender of the material and we propose that the printer or publisher of the material should be liable in the same way as the sender unless the printer or publisher can show that he or she was not aware (a) of the contents of the material or (b) that it was to be sent to any person for the purpose of causing distress or anxiety to that person.

2. The MCA refers to material which is "indecent or grossly offensive". We recommend that the Act be amended to make it clear that these words are not intended to relate only to material which is pornographic and therefore indecent or grossly offensive in that sense only.
3. The MCA imposes only a fine. We consider that the alternative of imprisonment would strengthen the Act and help to prevent the kind of conduct which is prohibited. Whether or not the conduct warrants imprisonment would be at the discretion of the court. A court may wish to impose imprisonment when the sender has previously committed offences under the MCA or when a particular offence is regarded as very serious.
4. We consider that the improper purpose of the sender should not be limited to causing distress or anxiety, but should also include causing outrage to the feelings of the recipient or to any other person to whom he or she intended that it or its contents be communicated.

In our view, it is particularly offensive to force on persons in the privacy of their own homes unwanted and unsolicited material of an indecent, grossly offensive or threatening nature, or material which is known or believed to be false in order to achieve some unworthy purpose. In our view, the law should protect the public against the gratuitous and unsolicited sending of highly offensive material with the deliberate purpose of outraging the recipient's feelings.

POLICY STATEMENT ON RACIST SPEECH

1. We consider that the defamation of a racial group can be seriously damaging and can have socially harmful and divisive consequences both for the group maligned and for society as a whole. We accordingly recommend the enactment of new legislation to protect members of a racial group against vilification and denigration by reason of their membership in such a group. We believe that the criminal law is more likely to provide effective protection than the civil law, but we do not exclude the possibility of re-examining civil remedies if criminal sanctions prove ineffective.
2. We suggest that a law should be drafted providing that any person who:
 - (a) uses words or publishes or distributes written or pictorial material which vilifies members of a racial group to hatred, hostility or contempt by reason of their belonging to such group,
 - (b) with the deliberate intention of vilifying, threatening, abusing, insulting or exposing members of that racial group to hatred, hostility or contempt by reason of their belonging to such group, commits a criminal offence.
3. We are not committed to any particular wording so long as the formulation embodies the principle that the law should protect racial groups against defamation and against the publication or distribution of material, the deliberate purpose or intention of which is to denigrate, abuse or vilify.

The Commission for Racial Equality is a statutory body in the UK deriving authority from the 1976 Race Relations Act. It carries a responsibility to work to eliminate discrimination on the grounds of colour, race and nationality and to promote equality of opportunity and good relations between different racial groups. It has a further duty to keep the Act under review and must therefore be alert to the changing context of its work which may call for amendment to the law. The Commission is in the process of framing proposals for change and has therefore been considering whether the Act should be extended or parallel legislation introduced together with enforcement machinery to cover religious discrimination and incitement to hatred on religious grounds.

The *Satanic Verses* episode forced this matter on to the agenda. People of Muslim faith continue to feel aggrieved that what they experience as attacks on their faith, their religious identity, cannot be restrained by law. They envy the protection against discrimination afforded to Jews and Sikhs, for instance, who are recognized as discrete racial groups. The episode also highlighted the discriminatory nature of the present blasphemy law in a multi-faith society in that it protects the beliefs only of members of the established Church. The Commission considers that the present position is not sustainable. Blasphemy should either be removed from the statute book or else extended to take account of a much wider range of religious sensibilities. The task of framing legislation to protect all belief systems from insult and ridicule may appear daunting. It requires a very sensitive appreciation of diverse cultures and beliefs to set new boundaries to what can be tolerated. But a society which seeks to respect the position of all its members has to struggle with that. Tolerance of hate speech in the name of freedom of expression offers no protection to the victims of racial or religious hatred.

In recent years there has developed a readier appreciation that hurt caused by attacks because of one's membership of a particular ethnic group or assault on what one holds most sacred should be recognized by offering legal protection and redress. But where to draw the line between robust challenge and gratuitous insult? And should we distinguish between those organizations which are established and confident enough to withstand attack and those which need protection because of their minority position?

The present law against incitement to racial hatred is itself a recognition that freedom of speech cannot be absolute, although the law is justified on the grounds that it is needed to prevent threats to public order. Should our society be equally concerned about protecting people's religious feelings from the effect of unprovoked or strained abuse? Speech which expresses or advocates hatred of certain racial groups is clearly an abuse of freedom of expression. It has a destabilizing effect on society and encourages a climate of divisiveness and discrimination in which racial violence is more likely to occur. And, apart from possible racial consequences, virulent literature and speeches may themselves represent intimidation and assault from which vulnerable minorities in particular are entitled to be protected. Is the concept of group libel capable of being framed into practicable legislation? In a plural society we have to find some way of reconciling freedom of expression with a respect for beliefs and values which may differ from our own. Unless that

**COMMITTEE ON THE ADMINISTRATION OF JUSTICE
(THE NORTHERN IRELAND CIVIL LIBERTIES COUNCIL)**

achieved, groups and individuals will feel under threat and the stresses within society, while not necessarily leading to public disorder, will be obvious. Finding the proper balance requires the courts to assess very carefully the circumstances in which alleged hate statements were made and whether their effect was to cause distress to the victims and stir up antagonism between different groupings within society. The requirement in Britain's present law to prove intent may over-restrict the law's application in this area.

The Commission believes that law must play some part in all this. Law can deal more easily with blatant expressions of hostility and discrimination, but it must be more precisely and sensitively framed in order to restrain covert, insidious attacks on people for what they are and for what they believe in. There is no evidence to suggest that, without legal constraints, goodwill and a natural tolerance will safeguard individual and group freedom. Laws against discrimination will not in themselves create enlightened attitudes but they can protect people from the consequences of others' discriminatory behaviour and have an important declaratory effect. They give a clear message about acceptable standards and, when supported by sensible and informed promotion, will eventually establish boundaries within which most people feel comfortable.

Discriminatory acts will be generated in a climate where people's prejudices are reinforced by propaganda of hate and ridicule. There is a powerful argument for preventing the public expression of such attitudes and with the increase of communication and movement across national boundaries it becomes important to establish some consistency between the laws and practices in different jurisdictions.

The Committee on the Administration of Justice (CAJ) is an independent civil liberties organization formed in 1981 to work for "the highest standards in the administration of justice in Northern Ireland by examining the operation of the current system and promoting the discussion of alternatives." The CAJ is non-political, non-partisan organization having open membership for individuals and groups.

STATEMENT ON LAWS AGAINST HATE SPEECH IN NORTHERN IRELAND

The legislation prohibiting hate speech in Northern Ireland is found in the Public Order (Northern Ireland) Order 1987 and is modelled largely on the Public Order Act 1986 which applies only in Great Britain.¹

The first comment we wish to make is that the Northern Ireland Order outlaws, *inter alia*, racial hate speech and thus appears to protect ethnic groups. It seems to be an admission that there are, in Northern Ireland, such groups whose identities require protection. However, the more comprehensive (though still significantly flawed) legislative protection for racial minorities, the Race Relations Act 1976, does not apply in Northern Ireland. If the explanation for this "lapse" is that there are insufficient numbers of ethnic persons in Northern Ireland to justify the enactment of anti-race discrimination legislation then this is simply at odds with anti-racist speech laws that have been enacted for Northern Ireland.

The Committee on the Administration of Justice (CAJ) supports hate speech laws and indeed its own proposed Bill of Rights for Northern Ireland appears to allow for the promulgation and utilization of hate speech law.² Article 9(1) of the proposed Bill protects the right to free expression.

Every person has the right (subject to Art. 12) to freedom of expression.

This right shall include freedom to hold opinions and to receive and impart information and ideas without interference.

Article 12 states:

The rights laid down in, *inter alia*, Art. 9 can be subject only to such limits as are shown to be (a) absolutely necessary, (b) prescribed by law and (c) manifestly justifiable in a free and democratic society.

The notes on the proposed Bill of Rights read:

Rather than include such a list (i.e.) of justifications for placing limits on rights (e.g.) national security, public safety, the economic well-being of the country, the prevention of disorder and crime, the prevention of disclosure of information received in confidence or the protection of health and morals, the CAJ prefers to focus attention on the requirement that all limitations must be 'absolutely necessary' and 'manifestly

¹ See chapter by Therese Murphy in Part III of this book.

² "Making Rights Count", CAJ Pamphlet No. 17 (Belfast: Oct. 1990).

justifiable. We are prepared to leave it to the courts, or to supplementary legislation, to lay down the precise limitations required for each of the rights in question.

Hate speech is not defined for the purposes of the proposed Bill. The CAJ is particularly concerned with racist and sectarian hate speech at the present time, though consideration of the topic should not be confined to those examples. Homophobic or gender-based hate speech, for example, requires further consideration, and we feel that there should not in principle be any objection to the extension of the public order legislation to outlaw those types of hate speech or hate speech directed against persons by virtue of disability or sexual orientation.

There are certain legislative issues with regard to hate speech legislation in Northern Ireland that we would like to see addressed.

At present the consent of the Attorney-General is required before a prosecution can commence. Traditionally Attorneys-General have expressed reluctance to initiate such prosecutions. It is believed that the Attorney-General requires 80 per cent probability of conviction before proceeding with a prosecution.³ The CAJ advocates the repeal of this requirement. As one author has suggested, "it is undesirable to make the enforcement of the criminal law depend on the wishes of a Government minister."⁴

However, it may be that some measure of blame for the under-utilization of the legislation lies with the Crown Prosecution Service or the local police involved, in that ultimately the Attorney-General will be relying on reports from these sources.

In addition, the CAJ would wish to see an express inclusion of Travellers as a group within the protective ambit of the legislation. While Travellers are an ethnic group - they are Ireland's indigenous nomadic population and thus should qualify under the legislation - the legal position is by no means clear. The inclusion of Travellers as a particular ethnic group to be protected would clear up any confusion and would have the advantage of indicating to the public that Travellers are indeed an ethnic group in their own right and not merely a sub-group of poverty, social deviants or some element of the Irish nation displaced from the land as a result of British rule in Ireland.⁵

However, as an active civil liberties group, the Committee is aware that there are several serious problems with laws which prohibit certain kinds of hate speech.

While the Committee is in favour of hate speech legislation, it has to be pointed out that much of the discussion with regard to hate speech in Northern Ireland, and indeed in the United Kingdom in general, is academic in that the legislation is woefully under-utilized. There are, to the best knowledge of the CAJ, no cases in which persons have been prosecuted under the Public Order legislation for inciting racial hatred in Northern Ireland. There are examples, though few and

3 See chapter by Joanna Oyediran in Part III of this book. This may account for the fact that so few of the complaints referred to the Attorney-General resulted in prosecutions. For example, in Great Britain from 1976-81 there were 21 prosecutions under Section 5A of the Public Order Act 1936 although the Commission for Racial Equality referred 43 cases to the Attorney-General in 1978, 31 in 1979 and similar numbers in the following years.

4 R Card, *Public Order Law*, (Butterworths 1987), 116.

5 It is a popularly held notion in Ireland - both North and South - that Travellers are those persons displaced from their holdings by either the Great Famine of the 1840s or the Cromwellian Campaign in Ireland of the 17th century.

an offence, or prosecutions for inciting religious hatred. This is not to suggest that there have been no instances when persons have fallen foul of the legislation. The difficulty with the legislation seems to lie with the prosecuting authorities as was pointed out above.

While academically one might have no great problem with the use of the legislation, practically it is a very crude tool with which to combat discrimination and achieve equality for minorities.

First, it only catches a small proportion of hate speech and even then only the more extreme opinions fall foul of the legislation. As such it seems to perpetuate the notion that racist or sectarian ideas are the preserve of the extremists. In addition it focuses attention away from institutional racism, a far greater day-to-day problem in the lives of ethnic minorities.

Second, hate speech legislation is a negative affirmation of ethnicity in that it merely recognizes the existence of groups and their need for protection. The Committee wishes to see identity acknowledged in a more positive way through legislation which responds to the needs of groups. The existence or implementation of hate speech legislation will not of itself reduce the racial disadvantages faced by ethnic groups in Northern Ireland for example.

Third, while it is often stated that one of the drawbacks of implementing such legislation is that prominence may be given to a handful of individuals, the CAJ does not see that potentiality as a difficulty because the moral opprobrium of a prosecution would counteract this. At any rate such an argument would even be prohibited reports in newspapers or academic journals of the activities and ideas of the purveyors of hate speech.

There is, however, a greater and more real danger with instituting prosecutions in that the group in question would bear the brunt of any backlash and the white, sedentary, civil libertarians campaigning on its behalf would not suffer. While utilization of a properly-amended hate speech law (by incorporating the suggestions above) would be a way of enforcing in the public mind the importance of race and religion to the group in question, this must be weighed against the potential danger posed to members of that group.

The Committee feels then that the existence, re-enactment, amendment or implementation of legislation outlawing hate speech would not be a sole or indeed even a major plank in any CAJ anti-racist or anti-sectarian campaign. The existence and implementation of such legislation is only peripheral to the needs and interests of possible target groups here in Northern Ireland. This is even more evident with regard to ethnic groups when one considers the absence of anti-race discrimination legislation here, and that the enactment of such legislation would not necessarily eradicate all aspects of racism, particularly institutional racism, towards the ethnic minorities.

In sum, the CAJ's policy on hate speech is that we would like to see legislative changes to render the law more useful but even with those changes the narrow focus of hate speech legislation prohibits it from being a useful anti-discrimination tool. While an amended Public Order (NI) Order would be declaratory of the State's intentions towards ethnic groups and a recognition of the importance of their identity and their vulnerability in society, any such legislation should not be viewed as a vital legislative device for ensuring equality for the groups concerned.

6 See Therese Murphy, *supra* note 1.

HUMAN RIGHTS WATCH

POLICY ON PROTECTION OF "HATE SPEECH"

Human Rights Watch, a US-based international human rights monitoring group composed of Africa Watch, Americas Watch, Helsinki Watch, Middle East Watch, and the Fund for Free Expression, monitors restrictions on expression, racial and ethnic discrimination, and other violations of human rights around the world.

The following policy, adopted in 1991, is based on four key principles: (1) a distinction between advocacy and action; (2) expression should never be punished for its subject matter alone; (3) to punish speech, there must be a direct and immediate connection to illegal action; and (4) any limitations on expression should be the least restrictive available.

Human Rights Watch condemns all forms of discrimination on such arbitrary grounds as nationality, race, gender or religion. In many countries, anti-discrimination efforts take the form of laws penalizing the communication of group hatred on these or other grounds.

Such laws are often justified on the grounds that they curb racial and ethnic violence. But there is little evidence that they achieve their stated purpose and they have often been subject to abuse. Many governments and other actors that encourage or exploit group tensions use "hate speech" laws as a pretext to advance a separate political agenda or to enhance their own political power. In a number of countries, the chief targets of "hate speech" laws have been minority rights activists fighting discrimination by the same majority that administers the laws - or, as in the case of South Africa, by the dominant minority.

Human Rights Watch believes that such laws raise serious freedom of expression issues. We are mindful of the fact that international human rights law provides different and conflicting standards in this area, and base our policy on a strong commitment to freedom of expression as a core principle of human rights. We believe that freedom of speech and equal protection of the laws are not incompatible, but are, rather, mutually reinforcing rights.

We therefore view as suspect any action by governments to criminalize any expression short of incitement to illegal action (as defined below) and consider any law or prosecution that is not based on a strict interpretation of incitement to be presumptively a violation of the right of free expression.

In evaluating "hate speech" laws and prosecutions to ensure that they do not infringe on rights of freedom of expression, Human Rights Watch will take the following factors into account:

1. Expression should never be punished for its subject matter or content alone, no matter how offensive it may be to others.
2. Any restriction on the content of expression must be based on direct and immediate incitement of acts of violence, discrimination or hostility¹ against an individual or clearly defined group of persons in circumstances in which such violence, discrimination or hostility is imminent

¹ These are the terms used in Article 20 of the International Covenant on Civil and Political Rights, which requires the participating states to prohibit "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."

and alternative measures to prevent such conduct are not reasonably available. For this purpose, "violence" refers to physical attack; "discrimination" refers to the actual deprivation of a benefit to which similarly situated people are entitled or the imposition of a penalty or sanction not imposed on other similarly situated people; and "hostility" refers to criminal harassment and criminal intimidation.

3. Reasonable limitations on the time, place and manner of expression shall not be enforced so as to prevent the effective communication of any information or point of view. The means chosen to implement such limitations should be the least restrictive available to accomplish a legitimate end unrelated to the content of the expression.
4. Abusive conduct may not be insulated from punishment simply because it may be accompanied by expression, nor may it be singled out for punishment or punished more heavily because of the expression.

In some countries, government agencies and officials engage in verbal attack racial and ethnic minorities. We strongly condemn such behaviour by government. To the extent that expression is controlled by the government as means of implementing discriminatory official policy, we do not view it as protected by the speech principles set forth above.

JUSTICE, THE UK AFFILIATE OF THE INTERNATIONAL
COMMISSION OF JURISTS

STATEMENT ON FREEDOM OF SPEECH AND INCITEMENT TO
RACIAL HATRED

"Justice" is the British Section of the International Commission of Jurists, the aim of which on a world-wide level is to foster respect for human rights through the rule of law. Drawn from all branches of the legal profession and including members of the main political parties, it pursues the same objective within the United Kingdom by a programme of research and publications, by drawing public attention to current legislation bearing on the rule of law and, where necessary, to the need for its amendment, by continuous review of the working of judicial proceedings and administrative machinery and by demands for the correction of miscarriages of justice.

1. As the present law of the United Kingdom has been discussed elsewhere in this volume, this statement is confined to summarizing the issues of principle and considerations of practice which are involved in reconciling the upholding of freedom of discussion with the avoidance of incitement to racial hostility.
2. Justice, in its regard for human rights, attaches especial importance to freedom of discussion. This is because it is not only a fundamental right of the individual but also an essential requirement for the working of a democratic society.
3. However, just as the freedom of expression of one individual is legitimately restricted by the law of defamation to protect the personality of others in respect of their reputation, so too may freedom of expression be curtailed where its effect is not to facilitate but rather to destroy the harmony of that society.
4. Notwithstanding the foregoing qualifications, Justice attaches such importance to the principle of freedom of expression in a democratic society that it would insist that:
 - (a) the burden of proof must remain on those who wish to impose a restriction on freedom of expression to show that in the particular circumstances there is on balance a greater danger to society from the unfettered exercise of freedom of expression than from its restriction; and
 - (b) bearing in mind the sensitive character of race relations, which may long remain on a seemingly harmonious footing until unpredictably inflamed by a minor and seemingly innocuous incident, prohibitions

* Drafted by Norman S Marsh, Council and Executive Member of Justice.

on expressions of racial hatred should be actively enforced with a certain degree of restraint, as the enforcement may give the incitement an actual effect through publicity which would otherwise have been lacking.

5. The reconciliation of freedom of expression with measures designed to prevent the incitement of racial hatred depends on the decisions made by officials on whom the responsibility rests for initiating proceedings for incitement of racial hostility, and on judges who ultimately have to decide whether, on balance, the restriction on freedom of expression is justified. Although to some extent the decisions made can be controlled by the ordinary process of judicial appeal or by judicial review, it must be recognized that there will remain an area of discretion which has to be left to the appreciation of the decision-maker. It is therefore extremely important that all such decision-makers should have the training and experience to understand the respective importance of freedom of expression and racial harmony in a democratic society.

LIBERTY (THE NATIONAL COUNCIL FOR CIVIL LIBERTIES)

STATEMENT ON FREEDOM OF EXPRESSION AND INCITEMENT
TO RACIAL HATRED

Liberty is committed to the defence and extension of civil liberties in the United Kingdom and to the rights and freedoms recognized in international law. Founded in 1934 as the National Council for Civil Liberties, the group is a non-party political, membership organization.

The following is an edited excerpt from *A People's Charter, Liberty's Bill of Rights*, published in October 1991. This draft Bill of Rights is produced as a consultation document, complete with questionnaire, and will be published in its final form in 1993. It must therefore be read as an interim statement on the organization's policy on freedom of expression, subject to revision following the consultation period. Furthermore, as with all Bills of Rights, it is a statement of general principles, rather than detailed policy, which seeks to set out the right to freedom of expression and the legitimate grounds on which it could - but not necessarily should - be limited. The explanatory footnotes have been added especially for the purposes of clarifying this excerpt for publication in this book.

THE RIGHT TO FREEDOM OF EXPRESSION

1. 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 media of their choice subject only to such limits as are prescribed by law, strictly necessary and demonstrably justified in a democratic society for the protection of individuals from imminent physical harm or to prevent incitement to racial hatred, and for the protection of the rights and freedoms of others as laid down in this Bill. . . .

SOURCES

Clause 1 is drawn from Article 19(2) of the International Covenant on Civil and Political Rights which is similar to ... Article 10(1) of the European Convention on Human Rights, but adds the right to "seek" information.¹ The limitations attached to this Article are ... much narrower than in Article 19(3) of the Covenant or 10(2) of the Convention. The inclusion of incitement to racial hatred is in line with Britain's 1986 Public Order Act and is similar to Article 20(2) of the Covenant. The inclusion of "protection against imminent physical harm" is similar to, although tighter than, the "clear and present danger" test which has been used by the American courts to limit the First Amendment's right to freedom of speech.² . . .

1 The full texts of Article 19 of the Covenant and Article 10 of the Convention are set forth in Annex A.

2 It is tighter only in the sense that the "clear and present danger" test has been held to cover "imminent

COMMENTARY - WHO WILL BENEFIT?

This Article ... would introduce a legally enforceable right to freedom of expression for the first time in the UK. Currently freedom of speech only exists as enforceable right for MPs as laid down in the 1689 Bill of Rights. . . .

CONSULTATION POINT

... It is our intention to limit censorship to the minimum degree necessary to uphold other fundamental civil rights In contrast to the Convention and Covenant materials which offend personal or public morality but which do not fall under our limiting criteria could not be banned under this formulation as there is no right in this Bill to be protected from offence on the grounds of taste or morals. The Local Government Act 1988, which forbids the promotion of "teaching in any maintained schools of the acceptability of homosexuality as a pretended family relationship" (Section 28), would, in all likelihood, fall foul of this Clause (and would probably also be in breach of Article 14 concerning discrimination). Likewise, the power of customs officers to intercept "obscene or indecent" articles - often used to ban the import of literature directed at the lesbian or gay community - would almost certainly be curtailed by this Clause.

We have included only three grounds for restricting freedom of expression under this Bill. The reference to incitement to racial hatred ... as a limitation on freedom of expression reflects a widely accepted boundary to this right in human rights discourse. Under current law, the incitement legislation covers hatred on the basis of national origin as well as race and colour (to include Jews, Sikhs and Gypsies for example), but not religion. The Commission for Racial Equality has proposed that the legislation be extended to cover religious groups.³ Britain's blasphemy laws, which prohibit freedom of expression in relation to the Christian religion (to be distinguished from Christians as a religious group), could be challenged under Clause 1 (as well as Article 14, which prohibits discrimination) as no other religion is protected by this law).

Protection of the rights and freedoms of others would provide grounds for arguing that confidential information relating to an individual's private life or reputation ... could be exempt from freedom of expression. This would allow some kind of libel law to remain in force (although the current one is in need of major reform).

Sexually explicit or violent material harmful to and aimed at children could likewise be curtailed under the obligation to protect children contained in Article 13 of this Bill. Similar products aimed at adults would only be prohibited where the courts could be persuaded that this was strictly necessary to protect individuals from imminent physical harm. This could provide some protection for minorities not covered by the incitement laws, for example, Catholics or lesbians and gays

lawless action", while our limitation on the right to freedom of expression covers "imminent physical harm", which is only one category of lawless action.

3 We are assuming that the term "incitement to racial hatred" covers only those groups affected by the current law. However, the Bill's limitation on the right to freedom of expression is phrased in such a way as not to rule out an extension of the scope of incitement to racial hatred in the future, for instance, to cover religious groups (an issue on which Liberty has no policy at present).

whilst being much tighter than the offence of "disorderly conduct" under the 1986 Public Order Act.

Considerable controversy surrounds whether what is called "hard core pornography" can lead to violence against women. Under our formulation the courts would have to be convinced - presumably on the basis of relevant research - that this was the case before limiting freedom of expression on these grounds. Likewise, the Government's ban on television interviews with members of Sinn Fein or the Ulster Defence Association could not be justified under our limitation clause unless a direct correlation between these and impending physical harm against individuals could be shown (it would also have to be introduced by parliamentary legislation, unlike the current ban).⁴ . . .

⁴ The broadcasting ban was introduced by an Order of the Home Secretary. We have some doubt as to whether the ban would meet the international interpretation of the term "prescribed by law" which covers statutes and common law only.

THE ISLAMIC SOCIETY FOR THE PROMOTION OF RELIGIOUS TOLERANCE

POLICY STATEMENT ON ISLAM AND HATE SPEECH

The Islamic Society for the Promotion of Religious Tolerance was established in 1982 as a specialist society, with membership limited to scholars of any faith (none) who are committed to tolerance. Although representing British Muslims, it is not among its aims, the Society, through its work, has come to be regarded as the voice of the silent British Muslim majority.

Contrary to some impressions of Islam, it is a religion of tolerance, freedom of worship, freedom of expression and, importantly, a religion of responsibility.

Islam recognizes only one race: the human race. The Qur'an tells us that all humans are the descendants of one man: Adam. That makes us all members of the same family, the same race. The differences in colour and culture which we see are meant to be grounds for one-upmanship or discrimination, but rather to be a miracle of creation, that a great variety could arise from a single source. If we are using, or rather misusing, the very great blessing of variation as a basis for discrimination. This situation could have arisen only through ignorance.

On the question of hate speech on the basis of religious differences, the Qur'anic position is that man is free to believe; unbelievers have a "divine right" not to believe; believers should treat unbelievers justly and compassionately and should not raise their sword against them; believers are not to coerce unbelievers into belief but must accept that each is entitled to pursue his own religion; believers are not to mock or insult whatever unbelievers worship or believe. Rather, the Qur'an requires of believers is that, if unbelievers insult or mock them or their beliefs, they should not sit with the mockers until the mockers talk about something else.

It is hate speech that gives freedom of expression a bad name. Freedom of expression is a high ideal that can only be harmed by espousing or protecting hate speech, for it would make this ideal less respectable. Freedom can only occur on a moral high ground if it is not used oppressively or unjustly, and if it incorporates responsibility.

So, what do we do about hate speech in a multicultural, secular, democratic society such as this one of ours? What do we do about hate speech when practised by the majority against a minority community, be it a racial, religious or any other identity-conscious group?

It is important to note that it is not only members of the majority community who indulge in hate speech. Members of minority communities do so as well, and only to answer back or reassert their right to personal integrity and respect.

We believe that the Islamic model is the most suitable one to deal with the problem. Hate speech is not a prominent feature of life in a Muslim society because hate speech is characterized as abhorrent by the religion itself and the culture that is derived from it. In a Muslim country like Egypt, hate speech against any minority race or religion is unlawful, yet it is not the power of the law which is the most potent but rather the power of the culture itself.

When we in the West finally reach a situation where hate speech is deemed to be a problem enough, and seen for the injustice that it is, when abhorrence of hate speech reaches the innermost sectors of our culture and when speakers of hate stop being charged

istic, nationalistic or racist, only men who we are able to say that have been defeated. Until then, we must do our best to combat it. But, what is our best? In this context, I believe that our salvation lies in education. A second option, less effective in the long term, is legal redress.

Criminal prosecution which can only be initiated by the state constitutes no more than lip service to the cause, a sanitization of the problem without having to do anything about it.

We believe that hate speech must be decriminalized. We believe that a person, or a group, that has been aggrieved or injured by hate speech must be given the opportunity to seek redress in a civil suit through the legal system, in much the same way as libel laws operate. Is not libel a form of hate speech? The prohibitive costs of such a course of action, however, may act as an impediment to justice. I wonder if there is room, somehow, for redress to be obtained without such an impediment.

In the Islamic model, one is urged to respond to hate speech at different levels. Not all Muslims are full-fledged Muslims who can function at the highest spiritual level and, being a practical religion, Islam is operative at lower spiritual levels too. It is within the rights of a Muslim to answer back, but he does not have the right to say anything that is not true. It is also within his rights to ask for, and be granted, compensation for injured feelings, to which Islam attaches a great deal of importance.

It is within the rights of the society at large to punish hate speech on account of its being a breach of the peace. But on the highest spiritual level a Muslim is urged to *ignore the ignorant*, for that is how the practitioner of hate speech is described in the Qur'an. For his patience, a Muslim believes that he will gain his reward from his Lord. The prize for the believer is held to be far superior to any recompense he may obtain in this life. The prize for the society is also great. The Muslim is even urged, on the same spiritual level, to return good for evil, and is told that, by doing so, he may well change enmity into friendship.

Which way to choose must be judged according to every particular situation, and what is chosen in the end must fulfil the fundamental Islamic requirements of justice and compassion.

PART V: Evaluating Laws Against Insult and Incitement

THE DECLARATORY VALUE OF LAWS AGAINST RACIAL INCITEMENT

Michael Banton

Early in 1991 the Cheltenham Conservative Association adopted a black man as their candidate for the next parliamentary election. Some members of the Association protested, and the dispute attracted attention in the mass media. At the time the letters sent to the Association was one from Robert Relf of Kent, a 66-year-old man with a record for racial agitation who, fifteen years earlier, had been imprisoned for contempt of court when he refused to take down a sign advertising a house for sale to whites only. Relf wrote to the Chairman of the Association that black bastard Taylor is married to a white slut and has got a half-caste daughter; perhaps you approve of England becoming a nation of half-breeds? ... If I had my way all those that voted for Taylor would be hung by their bollocks outside the Conservative Party headquarters and left there to rot. ... You too would be hung up alongside the nigger-loving bastards.

Relf was warned that he might be prosecuted under either Section 18 or 19 of the Public Order Act 1986, or under the Malicious Communications Act 1988. He had been prosecuted under the 1986 Act, to secure a conviction the Crown would have had to have proved that Relf used words (Section 18) or distributed material (Section 19) which were threatening, abusive or insulting, and that either he intended to stir up racial hatred or, having regard to all the circumstances, racial hatred was likely to be stirred up. The local Crown Prosecutor decided to prosecute Relf under the 1988 Act, alleging that Relf sent "a letter which conveyed a message which was indecent and grossly offensive, with intent to cause distress or anxiety to the recipient". There was therefore no reference to racial hatred.

Relf pleaded not guilty. He was quoted in the press (*The Guardian*, 16 March 1991) as having said in court that after sending the letter "I did realize that it was a bit strong". The magistrates convicted him, and, after hearing about his previous record and his record of previous offences, imposed a fine of £75. A prosecution application for costs was refused. As the maximum penalty for the offence was a fine of £1,000 or imprisonment for three months, Relf left the court maintaining that the outcome showed that the magistrates sympathized with his point of view.

Words which are threatening, abusive or insulting to members of a racial group may form part of a civil action for racial discrimination (as when, for example, they are evidence that an employee has been unfairly dismissed). Where such words form part of a charge under the Public Order Act, it may be necessary to establish which persons might be stirred up to racial hatred. If the person to whom the words are directed is often addressed in such terms, then, it might be argued that they are unlikely to have any such effect. Apprehensions about the difficulties following this course may explain why Relf was prosecuted on the lesser charge.

This essay will discuss ways in which different kinds of racially insulting speech may be interrelated with patterns of social interaction between members of racial groups. Before starting this discussion, however, I will explain why I consider it advisable to place restrictions on the freedom of expression, especially since some commentators maintain that it is better in the long run if persons such as Robert Relf are left free to express their opinions.

SANCTIONING DEVIANCE

Member states of the United Nations have pledged themselves to promote respect for human rights and fundamental freedoms without discrimination on the ground of race. These rights are said to be inalienable, meaning that they may not be abridged even by a democratic vote. According to one widely held view, these rights precede the formation of governments. States legislate in different ways and to different extents in order to protect such rights.

Those states, including the UK, which have adhered to the International Convention on the Elimination of All Forms of Racial Discrimination must guarantee to everyone within their jurisdiction equality before the law, without distinction as to race, in the enjoyment of those human rights which are safeguarded by the state's legal order. Acting with due regard to the principles embodied in the Universal Declaration of Human Rights (that is to say, bearing in mind the need to achieve a balance between conflicting rights, in particular, between non-discrimination on the one hand and freedom of expression and association on the other) they must make any dissemination of ideas based on racial superiority or hatred, or incitement to racial discrimination, an offence punishable by law.¹ Exercise of the right to freedom of expression must not infringe people's enjoyment of other rights.

The dissemination of ideas based on racial superiority can cause members of racial majorities to withhold from members of racial minorities services to which they are entitled, and it can inhibit members of minorities from demanding their rights. Ideas can have this effect by influencing the attitudes and personalities of people, and thereby influencing their behaviour, but the relationship between ideas and behaviour is one of interaction. While ideas can influence behaviour, behaviour can influence ideas just as strongly. The prohibition, by law or custom, of certain forms of behaviour can influence the way people think about possible behaviour, as is exemplified in sayings like "out of sight, out of mind", and "when in Rome, do as the Romans".

A model of all the variables relevant to the explanation of behaviour would have to be extraordinarily complex. One of the main difficulties would be the need to allow adequately for variations in the social contexts in which people express opinions about members of ethnic groups other than their own. For example, hostile speech about another ethnic group may be motivated by a speaker's desire to identify him or herself with his or her own group, rather than be a predictor of his or her actual behaviour in an encounter with someone who belongs to the group being disparaged.

Some hostile speech is rooted in individual pathology. By expressing hatred of a scapegoat group an individual may be able to alleviate some of his or her own psychological problems. In *Portrait of the Anti-Semite*², Jean-Paul Sartre portrayed Cousin Jules' diatribes against the English as a means whereby the speaker gained attention so that he could feel for a while as if he were someone who really counted for something. In some circumstances, as in Nazi Germany, the scapegoating of a minority can become a pathological characteristic of a significant section of an entire society.

1 See Dr Partsch's discussion of the obligations imposed by the Race Convention in Part II of this collection.

2 Jean-Paul Sartre, *Portrait of the Anti-Semite* (London: Secker and Warburg, 1948).

Racial discrimination sometimes shows pathological features or serological functions for disordered personalities. This is often evident in speech. But most discrimination is socially normal in the same sense that normal, a characteristic of all kinds of society. Everyone is capable of discrimination of some sort, just as everyone who drives a motor car is capable of committing a motoring offence. A collection of individuals becomes a society which recognizes rules or norms for regulating their collective life. Whenever these rules there must be occasions on which individuals fail to observe them, the result is deviant behaviour. Such behaviour is criminalized when it threatens public interest. For example, for a long time there was no law to limit the drinking of motor car drivers to drink alcohol before driving and, when a law was introduced, many drivers for some years did not regard driving with excess alcohol as wrong so long as no injury resulted. Now there is a better understanding of the danger and standards have changed accordingly.

It has been said that over the centuries there has been less change in the conception of a person's duty to his or her neighbour than in the conception of what is his or her neighbour. This draws attention to the way in which, because of changes in ways of life, the boundary between the public and private realms has been moving. More and more kinds of activity that used to be considered private have become regulated by public laws and standards. Laws governing the relations between employers and employees, and between landlords and tenants, provide examples. So do the obligations placed on parents regarding their children's education. Just fifteen years ago, many people accustomed to smoking cigarettes thought that they were free to light up in any place in which it was not explicitly prohibited. Now they are more conscious that their smoking may impair the health of non-smokers; a boundary has moved. Something similar has happened with respect to racial discrimination, both in behaviour and in speech.

CHANGING RELATIONSHIPS

In the 1950s non-white people in Britain were seen as temporary visitors who would be returning in due course to other countries within the Commonwealth. By the mid-1960s official opinion accepted that black and Asian minorities had become established and must be integrated into the life of the nation. Public opinion moved more slowly to perceive first blacks and then Asians as potential neighbours. Because most of the newcomers were of low socio-economic status, native opinion reflected considerations of class as well as colour, but the rising generation of whites were quicker to accept new social patterns than were their elders.

Gallup Poll data show that the expression of social distance by whites towards people of colour declined substantially over the period 1964 to 1974. The percentage of respondents saying that they would accept coloured people as neighbours went up from 49 to 59 per cent; as friends from 49 to 78 per cent; as schoolmates of their children, from 54 to 78 per cent; as co-workers from 54 to 78 per cent; as a principal or employer from 35 to 63 per cent; as son-in-law, from 35 per cent; as daughter-in-law, from 16 to 37 per cent.³ It is important to note that social distance towards minority residents was declining at the same

3 M Banton, "Pluralistic Ignorance as a Factor in Racial Attitudes," 13 *New Community* 18 (1963) and "Correction to Professor Banton's Article," 14 *New Community* 313 (1967).

hostility towards further non-white immigration was rising to the high plateau on which it has remained.

The law has played a part in this. When the Home Secretary, James Callaghan, introduced the 1968 Race Relations Act he said that he attached great importance to the declaratory nature of the provisions against discrimination. The bill was to protect society; it was for the whole nation and not just for minority groups.⁴ Experience suggests that it has had the effect he envisaged, but this was not appreciated at the time even by Lord Radcliffe, a much-respected Lord of Appeal in Ordinary. In a lecture delivered in the following year, he described the 1968 Act as mistaken because "its substance is to try to outlaw certain types of motive or intention if associated with certain types of action." It was not limited to "situations in which the moral issue is generally regarded as beyond debate I try to distinguish in my mind between an act of discrimination and an act of preference, and each time my attempt breaks down".⁵

Most of that part of the Act which he criticized was concerned with employment, housing, advertisements, provision of services and trade unions. It did not touch preferences in the private realm of the family. It recognized exceptions in housing in "small premises", employment in establishments employing not more than twenty-five persons or "for the purposes of a private household", and for the making of "charitable instruments". Preferences in these more private settings were not rendered unlawful, but the extension of such preferences to the public realm could properly trigger complaints and set in motion the arrangements for conciliation established by the Act. These continued until a revised Act was passed in 1976.

It should be remembered that what made the 1968 Act politically acceptable were the findings of a research project that demonstrated a significant incidence of racial discrimination in employment, housing and other public services. Since then there has been a great change in the public's conception of its own behaviour. In 1991 an opinion poll posed the following question:

Some people say Britain is a racist society in which black and Asian people have fewer opportunities than white people. Others say Britain is a non-racist society in which people have equal opportunities regardless of race or ethnic background. Do you think Britain as a society is very racist, fairly racist, fairly non-racist or completely non-racist?

Sixty-seven per cent of whites considered Britain to be racist to some extent. The proportion saying they would happily have people of a different race living next door had risen to 62 percent.

The successive Race Relations Acts have prohibited the granting of preferences in employment, housing and other fields because such preferences conflict with the societal policy of equalizing opportunity and can create dangerous social divisions by transmitting inequalities to future generations. These acts have influenced public opinion in a manner comparable to the restrictions upon drinking and driving. Many more people now accept that appointing others to jobs or admitting them to housing are not matters of private preference and that in making such decisions it is wrong to act on racial grounds. The duty that a person owes to his or her neighbour is now accepted to a much greater extent than in 1968 as a duty owing irrespective of the other person's race or colour.

4 Hansard, H of C, 763, col 55, 23 April 1968.

5 Lord Radcliffe, "Immigration and Settlement: Some General Considerations," 11 *Race* 35-51 (1969).

NORMS AND ATTITUDES

Rules are better observed when they are observed voluntarily. Courts do not punish offenders so severely when the public has had little time to appreciate that a type of behaviour has become unlawful. In this way the law is used to encourage the growth of a social norm. Other factors can also come into play and, in the present case, cause people to believe that the norms they acknowledge in dealings with members of their own group should also apply in dealings with members of other groups. In Britain, whites have come to appreciate that members of minority communities are not very different from themselves. Personal contact has become important, but so too has been what they have learned through the mass media, especially television.

The influence of the mass media is at least two-fold: it influences the views of the reader's own attitudes, and it conveys signals about opinions in the peer group. Law observance is one kind of norm observance and most people are concerned to keep in line with the expectations of those who are important to them. This points to the importance of another variable: people's perceptions of others' attitudes and expectations.

Pluralistic Ignorance: People's Perceptions of Others' Attitudes

In 1983 Social and Community Planning Research asked a sample of respondents "Would most white people mind or not mind if a suitably qualified person of (black or West Indian) origin were appointed as their boss? and you personally? Similar questions were asked about having an Asian or West Indian as a relative by marriage. For the four categories (Asian boss, black boss, Asian in-law, black in-law) the percentages who thought other people would mind more than they would were 41, 40, 16 and 15 respectively. The percentages who thought that others would mind less than they would were 4, 3, 9 and 8 respectively. The contrast between these two sets of figures is remarkable. Since similar findings have been reported from research in the United States, Germany and Sweden, there is a phenomenon that demands analysis. It is also of practical significance. A political party, like the Conservatives in Cheltenham, may wish to estimate how many voters they will lose if they adopt a black candidate. The extent of any such loss (or gain) may vary from one constituency (and party) to another. Estimates of others' attitudes and behaviour can be important.

The tendency for people to overestimate the extent to which members of their own group want to keep strangers at a distance is an example of what has been called pluralistic ignorance: an erroneous belief shared by two or more people regarding the ideas, sentiments and actions of others. Two sources of this kind of error are recognized by those who research into public opinion: there are people who do not like the strangers but do not wish to say so, and project their own feelings when estimating the views of their peers; and there are people with a more liberal disposition who fear that others are less well-disposed and project their fears when estimating the views of their peers.⁶

Research in Germany has shown that in the 1950s and '60s the second source of pluralistic ignorance was the more important. After World War II there

6 J M Fields and H Schuman, "Public Beliefs About the Beliefs of the Public," 40 *Public Opinion Quarterly* 427-48 (1976).

taboo on the expression of Nazi ideas which caused anti-Semites to underestimate the extent to which others shared their opinions. In the winter of 1959-60 there was a series of attacks on Jewish cemeteries and synagogues. The Chancellor, Konrad Adenauer, played down the significance of these acts, attributing them to the foolishness of adolescents. The research showed that those respondents who were themselves against Jews also belittled the acts, whereas those who were critical of anti-Semitism were more likely than others to assume that there was a lot of popular support for such attacks.

Since then the taboo has been lifted. In a 1987 survey, 5.8 per cent of respondents said they disliked Jews but 20 per cent believed that "many people stand opposed to Jews". Those who were themselves anti-Semitic were more than twice as likely as the unprejudiced to make this mistake.⁷ This suggests that they were projecting their own hostility when estimating the views of others. The press report of a study of attitudes towards foreign workers was headlined "Germans do not consider themselves hostile towards foreigners - it's just their fellow-countrymen".⁸ Whether surveys in France have found the same contrast is not known, but it is interesting to note that a recent report that 42 per cent of French people consider themselves "a little" racist should have been regarded as marking "the end of a taboo".⁹

Mention of attitudes towards foreign residents in Germany and France should serve as a reminder of an important feature of the constitutional dimension to group relations. The non-white settlers in Britain have nearly all come from Commonwealth countries and therefore enjoyed British citizenship from the outset. This led the British government to adopt policies of integration earlier than other European governments. Common citizenship has been important to the relative speed with which the native population has accepted the newcomers as potential neighbours, slow as that has been when seen either from the standpoint of the minorities or when measured against the standards of the Convention on the Elimination of Racial Discrimination.

Surveys conducted for the Commission for Racial Equality in 1975 and 1981 found that the proportion of whites believing that racial relations were getting worse increased by 65 per cent; among West Indians and Asians three times as many thought that they were getting worse in 1981 as had given this reply six years earlier. In surveys conducted in 1974 and 1982 the Policy Studies Institute asked a similar question. The percentages of West Indians and Asians saying that life was now worse for them rose from 16 and 18 respectively in 1974 to 53 and 51 eight years later but there was no blanket condemnation of white people or white institutions as racially biased; the main reasons given for the deterioration were economic. In the 1982 survey respondents were asked whether they thought there was more or less discrimination than five years earlier. The percentages replying that there was more were among whites, 39; among West Indians, 43; among Asians, 45. It is interesting to note that all groups, but particularly whites, were more optimistic in judgements about the locality of which they had personal experience than about the national scene for which they relied upon media images.

7 W Bergmann, "Anti-Jewish Attitudes in West Germany," 22 *Patterns of Prejudice* 15-21 (1988).

8 *Frankfurter Allgemeine Zeitung*, 7 December 1985.

9 Commission nationale des droits de l'homme, as reported in *Le Monde*, 22 March 1991.

Impact of the Mass Media

The tendency of survey respondents to believe that members of the majority to maintain greater social distance towards minority members than they do themselves, and that racial relations have become worse is not necessarily a projection of either feelings or fears. It could be an interpretation of social trends as presented to them by the mass media.

Television producers and at least some newspaper journalists may be more inclined than some others to see white prejudice as a problem which, if unchecked, is likely to cause increasing social conflict and economic cost in the future. They therefore try to persuade their audience that the matter is serious: to do so they focus their spotlights onto instances of conflict, prejudice and discrimination; they draw a portrait of racial relations which looks worse than do the statistics on the same subject. This may be one reason why so many people believe that racial relations have become worse. If, as the Gallup Poll answers suggest, people's sentiments have become more positive, it would not be surprising for them to conclude that the decline must be the fault of other people, that others' prejudices must be greater than their own.¹⁰

It should also be remembered that the reporting of events overseas can influence people's ideas about events and possible trends in their own country. Television reports of the black riots in United States cities in 1967 were thought to have influenced white British ideas about possible dangers in Britain. What is called "race relations" are perceived to have international as well as domestic implications.

Perceptions of Racial Conflicts

The British urban disorders of 1981 and 1985 are sometimes thought to have represented heightened racial conflict, but the comparison of historical periods is problematic. The second generation of New Commonwealth settlers, especially those of West Indian origin, expected a greater degree of equality than the first generation. Conflict may show that from a minority standpoint progress towards equality has been too slow, rather than that there has been no progress at all. Some of the history of revolutions have often concluded that they are most likely to occur in periods of rising expectations when something happens to disappoint those expectations.

The apparent increase in racial violence in Britain has also to be set against the appreciable increase in reported violent crime that started in the mid-1970s while any reference to forms of speech must take account of the weakening of taboos on the use of obscene words that became perceptible shortly afterwards (on television, and the ending of censorship of dramatic performances by the House of Chamberlain). Conflicts such as riots have both negative and positive functions. On the one hand there is injury and damage to property, persons and reputations; on the other, there may be changes for the better in social policies. Similar to the conflict over Rushdie's *Satanic Verses* has had both negative and positive consequences. For instance, it has made non-Muslims more conscious of the significance of Muslim citizens attach to their faith, and of the need for dialogue.

10 Note that the Commission for Racial Equality interviews were completed before the first of the riots. The survey findings are discussed in greater detail in M Barton, "Optimism and Pessimism about Racial Relations," 22 *Patterns of Prejudice* 3-13 (1988).

Social Desirability

Answers to survey questions may also be influenced by the social desirability effect. A research worker planning a survey in Sweden thought that respondents might feel shamefaced about reporting their prejudices because of a taboo on the expression of hostility towards immigrants. So when certain propositions were put to the sample (for instance, "The most important thing is to see that the country's own people have jobs"), half were required to indicate orally the degree of their assent or dissent, while half answered in writing. Contrary to expectation, written answers displayed more tolerance than oral answers. Comparing this finding with other evidence, the research worker concluded that at the time of his study there was in Sweden a norm that people should express themselves in a "tough" manner and conceal any generous, tolerant or understanding sentiments.¹¹

Part of the social desirability effect may be an inclination on the part of the respondents to establish a bond with the interviewer by signalling something they have in common as opposed to members of a stranger group. The statements may express in-group solidarity rather than likely behaviour towards out-group members. In many circumstances political, religious and racial issues are recognized as sensitive topics for conversation, and people are careful lest an incautious remark upsets relations. They allow for the possibility that just one person among a much larger number may take offence, so that extreme opinions have a greater effect than their actual frequency would predict. If the law prohibits racial abuse and incitement to racial hatred, many people are less likely to speak in an abusive manner. The law channels the social desirability effect so that others have to worry less about the possible reactions of bigots.

THE FUNCTIONS OF LAWS AGAINST RACIAL INCITEMENT

Changes in norms may be less important than changes in ideas about their applicability. In Robert Relf's letter there was a suggestion that at all costs England must not become a nation of "half-breeds" and that therefore different norms applied. The anti-discrimination statutes invalidate any claim that race and sex are grounds for holding that general norms do not apply when there are differences of race and sex. Opinion surveys show that attitudes towards intergroup contact are often very fluid and context-dependent. This means that leaders of opinion can be influential in fixing ideas about which are the right norms to follow in particular situations.

Zerbanoo Gifford, a British citizen born in India but educated in Britain, has recently described the threats made to her when she stood for Parliament as Alliance candidate in Hertsmere in 1983 and in Harrow East in 1987:

Telephone threats were followed by more direct approaches; our house was broken into and a death threat, classically composed from newspaper, left on my desk. On another occasion I was driving home from a public meeting one night when a car tried to force me off the road. Throughout these periods there was a stream of anonymous phone calls with threats against my family and home. ... I was telephoned by an articulate member of the National Front who calmly informed me that my house would be fire-bombed if I persisted in standing for Parliament.

I had no business seeking to represent the voters of Britain, since I was foreign and unwanted here.

The minority of persons responsible for such threats seem to keep informed what like-minded people are doing. They learn what they can get away with and can be influenced by the prosecution and conviction of those who send letters as that sent by Robert Relf. The ordinary citizen, either victim or neighbour, can do little if the authorities do not use their much greater powers. The power to prosecute needs to be used with care since a failed prosecution - like that brought in 1987 against four members of the Racial Preservation Society - can be counterproductive. The value of laws cannot be judged independently of the manner of their enforcement. Nevertheless, it would seem that in recent years those responsible for prosecutions have erred too much on the side of caution with the result that members of the public do not report incidents that could well justify prosecution.

CONCLUSION

This essay has attempted to show that the value of laws against racial incitement cannot be assessed in isolation from other measures against racial discrimination, because the causes of racial hostility are highly interactive. Laws against racial incitement have been thought necessary in order to prevent breaches of the peace and to protect possible victims. They can also serve a third function, as identified by the Home Secretary in 1968: that of declaring standards to be observed by everyone living in the country. If those standards were followed there would be no breaches of the peace and no victims.

¹¹ C. Westin, *Majoritet om Minoritet: En Studie i Etnisk Tolerans i 80-Talets Sverige* (Stockholm: Liberforlag, 1984), pp. 72-75.

GROUP LIBEL AND FREEDOM OF EXPRESSION: THOUGHTS ON THE RUSHDIE AFFAIR

Bhikhu Parekh

Among the different mechanisms upon which a civilization relies to preserve and perpetuate itself, telling its complex history in the form of a story is one of the most common. Since civilizations vary greatly in their systems of values, conceptions of man and society and social structures, they are amenable and grant cultural legitimacy to different patterns of story-telling. In some, the community constitutes the hero of the story, and its collective deeds form its content; in others, the pride of place is assigned to privileged groups or individuals.

Although the history of European civilization has been told in different stories, the most popular and influential stresses the heroic deeds of remarkable individuals and centres around the themes of blasphemy, martyrdom, resurrection and the triumph of good over evil after an initial setback. The story begins with Socrates, widely accepted as the first uncompromising champion of critical reason and independent thought. When accused, among other things, of impiety and undermining the Athenian gods, he preferred death to the loss of intellectual independence. He triumphed in his death and became the founder of the tradition of free inquiry in general and philosophy in particular. Jesus of Nazareth, accused of blasphemy by his own people and killed by the Romans at their instigation, became the founder of a great religion. His small band of largely illiterate followers, persecuted for refusing to honour Roman gods, eventually converted the mighty Roman Empire. The story goes on in this vein weaving its narrative around such defiant dissenters as Copernicus, Galileo, Martin Luther and Spinoza, all in one form or another accused of, and in varying degrees persecuted for, alleged acts of blasphemy. In each of these increasingly successful revolts against God or His earthly representatives, the central figure incarnates and realizes one or another of the cherished values of European civilization and supposedly takes mankind a step further towards its ultimate goal. The community suppressing this is rarely if ever judged right. Indeed it is almost always presented as reactionary, backward looking, an enemy of truth. All progress in history is seen as a result of battles between individual sources of light and communal sources of darkness.

Salman Rushdie's case beautifully fits into this story and apparently confirms its central message. He too has been condemned to death for revolting against the God of his people and has had to go into presumably permanent hiding. His case also has several other features that add to its fascination. Rushdie's revolt was inspired by the European tradition of independent thought and scepticism, a tradition with a long record of hostility to his ancestral way of life. The people placed in charge of executing the death sentence on him are those for whose dignity and material interests he has a long record of fighting and whose current anger deeply puzzles and pains him. If his ungrateful co-religionists were ever to succeed in assuaging their murderous wrath, he would be the first western martyr in the cause of literature. Rushdie thus stands at the centre of such large battles as those between Christianity and Islam, secularism and fundamentalism, Europe and its ex-colonies, the host society and its immigrants, the post and pre-modernists, art and religion, and between scepticism and faith.

Not surprisingly, the Rushdie affair has given rise to several important questions of considerable theoretical interest. I propose to comment on two of

COMMUNAL LIBEL

The first important issue raised by the Rushdie affair relates to the concept of communal libel or defamation. In most societies, libel is an offence broadly speaking it consists in making public, untruthful and damaging remarks about an individual that go beyond fair comment. Libel is an offence not so much because it causes pain to, or offends the feelings of, the individual concerned, but because the damaging and untruthful remarks made in private do not constitute libel because they lower him in the eyes of *others*, damage his *social* standing and his *reputation*.

An individual is not a free-floating atom but a member of a specific community, and his identity is at once both personal and social. His self-respect is therefore necessarily tied up with, and partly grounded in, the general respect accorded to his community. To say that "all Jews are mean, unreliable, rapacious and stupid" is to implicate and demean every one of them. Or to say that "all blacks are stupid and sexy", or that "all Indians are effeminate, devious and liars" is to demean every black man and every Indian. Such untrue and damaging remarks, which nurture and perpetuate perverse stereotypes, lower the social standing of the communities involved, demean them in their own and others' eyes, and treat them less equally than the rest. In so far as they go beyond fair comment they amount to communal libel or defamation. Communal libel can cause deep moral injury and lead to such things as self-alienation, self-hatred and compensatory aggression. It movingly described by black, Jewish and Asian writers. Human beings are ontologically insecure and fail to develop the vital qualities of self-respect, confidence and a sense of their own worth if they are constantly insulted, ridiculed, subjected to snide innuendos, and made objects of crude jokes on the basis of their race, colour, gender nationality or social and economic background. To accuse someone of protesting victims of being prickly, oversensitive or unable to share a good joke is to betray a lack of elementary moral sensitivity. Ugly actions occur within the framework of, and draw their legitimacy from, an ugly moral climate. The law is built up and sustained by, among other things, gratuitously offensive remarks which in itself perhaps good-humoured and tolerable but collectively devastating and corrupting. A humane and sensitive society based on mutual respect ought to find ways of discouraging them.

In several countries the concept of ethnic libel is incorporated in their legal systems. In 1989 the government of New South Wales in Australia passed legislation declaring unlawful acts which "incite hatred towards, serious contempt or serious ridicule of" persons and groups on the ground of their race. In so far as it punishes incitement to "racial hatred" and not just racially discriminatory acts, even the British Race Relations Act of 1976 is informed by a diluted version of ethnic libel.

The law has its obvious limits and becomes counter-productive if enacted and applied with excessive zeal. Its role is largely symbolic and educationary in affirming the community's collective disapproval of certain forms of utterance which both reassures the minorities and lays down norms of public debate made effective by selective enforcements. Since the law can play only a limited part in creating a humane and gentle society, we need to explore other ways. A powerful public council along the lines recently proposed in Britain, non-punitive and declaratory

laws laying down what may or may not be said publicly but attaching no penalties, and vigilant citizens' forums bringing to bear the organized pressure of enlightened public opinion on those responsible for corrupting and lowering the level of public discourse, indicate the direction in which we need to move.

The concept of communal libel does, of course, raise difficult questions, but these are not unanswerable. The British Race Relations Act of 1976 and the subsequent court cases show that ethnic groups can be defined without much difficulty. Libel laws the world over have found reasonably satisfactory ways of distinguishing between libel and legitimate and fair comment, and the distinction can be applied with suitable modification to groups as well. We do, of course, need to decide whether the protection against libel should be confined to racial and ethnic groups or extended to religious and even perhaps to other groups. If the Jews and blacks are to be protected against vilifactory, degrading and provocative remarks, what about the Muslims and even the capitalists? Although we cannot even begin to answer these questions here, they are not as insuperable as they seem. The law is concerned not to eliminate all injustices and inequalities, but only those that are currently recognized to be unfair or oppressive, and is rightly selective. Again, it could be argued that groups based on natural, unalterable, visible and easily identifiable characteristics are qualitatively different from, and more vulnerable than, those based on beliefs, interests, preferences, sentiments and social relations, and therefore merit different treatment.

GROUPS OF FREE SPEECH

The second important question raised by the Rushdie affair relates to the nature, grounds and limits of free speech. Not only Rushdie and his supporters but also almost the entire white community thought that Muslim demands involved unacceptable restraints on free speech and could not be conceded. Rushdie spoke for them all when he said:¹

How is freedom gained? It is taken: never given. To be free, you must first assume your right to freedom. In writing *The Satanic Verses*, I wrote from the assumption that I was, and am, a free man.

What is freedom of expression? Without the freedom to offend, it ceases to exist. Without the freedom to challenge, even to satirise all orthodoxies, including religious orthodoxies, it ceases to exist. Language and the imagination cannot be imprisoned, or art dies, and with it, a little of what makes us human.

These and other remarks, which are typical of much present and past liberal writing on the subject, make strange reading and highlight some of the limitations of the liberal discourse on free speech. Rushdie reduces speech, a publicly orientated and interpersonal act, to expression, a subjectivist and personal act, and shifts the focus from a shared public realm to the individual's right or need to express himself. He says, further, that *he* is free to offend others and satirize their deeply held beliefs but does not explain why *they* should put up with the offence. His right to free expression entails, and is made possible by, a corresponding obligation on them to

¹ "In Good Faith," *The Independent* (11 Feb 1990). In this long article Rushdie offers a spirited defence of *The Satanic Verses* against its Muslim critics. See also the two replies by Michael Dummett and myself in *The Independent* (18 Feb 1990).

refrain from interfering with it and to suffer patiently whatever hurt his ut might cause them. Rushdie does not explain why they should accept obligation and how it serves their "human" interests. Again, he looks at the of free speech almost entirely from the standpoint of a writer. He assumes writer's interests are morally paramount and what is good for him or her is *be* good for society as a whole. He is not alone in taking this view. V universalizes the concerns and interests of a novelist, such earlier advocate speech as Milton, Locke, J.S. Mill, Kant and Schelling universalized those poet, the philosopher, the scientist or the artist. They are all united in the be intellectuals or men of ideas are the moral leaders or vanguard of society, th is good for them is *eo ipso* good for all, and that only a society conducive pursuits is truly human. All this may or may not be true, but it needs to be rather than uncritically assumed or asserted. In this area as in others, lib displays a deep and rarely acknowledged paternalist, even authoritarian i It assumes that all "civilized" and "sensible" men want minimum restraints i speech, and that those who do not are ignorant, barbarians, benighted and be ignored, suppressed, morally blackmailed or politically manipulated. more, hardly any of the illustrious defenders of free speech appreciated the fact that since they earned their living by, and had a vested interest in, free they lacked the necessary measure of objectivity and impartiality in this ma could be guilty of exaggeration and bias.

That Rushdie's assertion of a writer's more or less unrestrained i express himself as he pleases runs into difficulties can be illustrated by a h tical example. Imagine a novelist writing about the tragic victims of Aus Suppose he mocks and ridicules them, trivializes their suffering, and presen as a despicable lot thoroughly deserving the mindless brutality inflicted on He creates scenes of collective debauchery, wife-swapping, incest and cannib and presents Jewish women as offering themselves and their young childre Nazi guards in return for a few more days of life. Not only the Jews but all men and women would feel deeply outraged by such a "literary" work, complaining that it takes unacceptable liberties with Jewish collective me and insults the honour and integrity of the pathetically helpless victims. Si law is a blunt instrument and since we are rightly uneasy about giving gove the power to censor creative writing, we may not ask for such a work to be b But we would be right to express our sense of outrage against it and our disap of, and even contempt for, the author in the strongest possible terms. We feel that he had misused his freedom, taken undue advantage of society's tol and violated the unspoken conventions regulating the exercise of his l freedom. In other words, his freedom of expression *has* to be balanced aga rights of others to their individual and collective self-respect. The law's rel to restrain him does not mean that he is at liberty to ignore the moral constr good taste and respect for his fellow human beings.

Suppose the deeply hurt Jews mounted a strong protest against the h tical book and demanded that it be banned, in the same way that Muslims hav against *The Satanic Verses*. On what grounds would we feel justified in tellin that although understandable, their demand is wrong and that they should pa suffer the deep hurt and anguish caused by the book? Many of the trad arguments are of little avail. The author cannot claim that he was pursuing *tr* furthering the cause of human *progress*. He cannot invoke the writer's r *self-expression* because the very basis and rationale of the right is in dispute or his defenders were to say that his act was an isolated aberration which sho

put up with in the larger interest of human freedom, they would have a case but not a very strong one. Those affected, in this case the Jews, might ask why *they* should be asked to bear the moral and emotional cost of preserving freedom and how they can be sure that the book will not set a precedent and their acquiescence not be used against them in future. They might rejoin too that if society agreed that the book was offensive, it should at least express its collective disapproval of it, even if it is not prepared to ban it.

All this is not to deny that free speech is one of the highest values, and that it can be adequately defended, merely that the traditional liberal defence is not wholly satisfactory. It considers the question largely from the standpoint of intellectuals and uncritically assumes that what is good for them is necessarily good for society as a whole. This is not only philosophically suspect but also too elitist and paternalist to carry conviction in a democratic society, especially one in which not just sizeable minorities but evidently the "moral" majority also feels intensely protective about its deeply held beliefs, values and practices, and demands to know why it should put up with iconoclastic attacks on these by "irresponsible" intellectuals taking "perverse pride" in knocking established values, as a Catholic bishop put it at the height of the Rushdie controversy. The rise of the morally authoritarian New Right, and some of the recent restrictions on free speech imposed by the Thatcher government evidently with popular support, indicate the increasing dissatisfaction with the traditional celebration of free speech. We can ill afford to ignore these ominous signs.

CONCLUSION

In justifying free speech, as well as the right to liberty and property, liberal writers have tended to concentrate on the beneficiaries, ignoring those who stand little chance of enjoying these rights, and who for the most part only bear their corresponding burdens. We need to look at the question of free speech from the standpoint of the community rather than the intellectual and show if, how and why it is in *its* interest to allow maximum possible freedom not only to the press but also to its iconoclastic intellectuals. Many a liberal writer, including J.S. Mill, Constant and de Tocqueville, saw the need for this, but despaired of finding an answer. Free speech, they argued, was and will always remain an elite value constantly threatened by and in need of vigorous political defence against the masses. In an age far more democratic than theirs, such an authoritarian despairing answer will not do. Free speech in all its forms needs to be defended in democratic terms, that is, in terms of the vital moral and cultural interests of the community as a whole, or else it will remain dangerously precarious.

HATE SPEECH LAWS: DO THEY WORK?

Sandra Coliver

This chapter brings together information from the preceding chapters on experiences, examines patterns of laws and their enforcement and suggests some of the lessons which may be drawn from those experiences.

An underlying premise of this analysis is that words are powerful: they can cause injury, often as hurtful as physical attack; they are a potent weapon for bringing about change in society; they may for a time make fascism and intolerance acceptable. But, equally, words, and other forms of expression - such as boycotts, demonstrations and public debate - form the best defence, at least over time, against intolerance, bigotry and ignorance. Where there is no time, and violence or an unlawful action appears likely and unavoidable by other means, restraints on speech may well be necessary.

A conclusion of this analysis, illustrated throughout, is that equal rights, dignity rights, as well as free speech rights, are best advanced by the narrowest possible restrictions on hate speech.¹ In most countries, hate speech laws either have been used to a substantial degree to suppress the rights of government critics and minorities or else have been used arbitrarily or not at all. To the extent that they have served a beneficial purpose it has been to improve the tone of civility in liberal democracies. In those countries the laws do not seem to have improved underlying conditions of discrimination and hatred and, in some of the countries, may have justified inattention to those conditions. The possible benefits to be gained by hate speech laws simply do not seem to be justified by their high potential for abuse.

CANADA, DENMARK, FRANCE, GERMANY, THE NETHERLANDS

Laws which Aim to Protect Dignity and Promote Civility

The experience of the use of hate speech laws in Canada, Denmark, France, Germany and the Netherlands is roughly similar in that they all have hate speech laws which are actively enforced and which are premised on the need to protect human dignity quite apart from any interest in safeguarding public order (in addition to having laws which are premised on public order concerns). All provisions are for both criminal and civil remedies.

As stated by Roger Errera, these laws provide "a vehicle by which society can express its values and the limits of what it will tolerate." They are needed to defend the basic civility of our society." The injury of hate speech is seen as twofold. "It is directed first against certain individuals or groups, causing psychological and moral harm ... Second, [it] is directed against the whole body politic and its social and moral fabric."² The same two-fold injury was noted by the Canadian Supreme Court as justifying Canada's hate propaganda law.³

¹ I use the term "hate speech" as defined in the Editorial Note to include laws which prohibit speech that is deeply offensive to or advocates hatred of a group or a person based on that person's identification with a group on such grounds as "race" (also as defined in the Note), ethnicity, national origin or religion.

While the criminal incitement laws of Canada require either intent to incite hatred or else the likelihood of causing a breach of the peace, France, Denmark, Germany and the Netherlands each have at least one law which permits criminal conviction for hate speech regardless of intent or likelihood of breaching the peace. Concerning the Netherlands law, the Supreme Court stated, "whether an expression was insulting to a group of people on account of their race and/or religion depends on the nature of the expression and not as well on the intention of the one who makes this public."⁴ An editor's conviction under France's incitement and group libel laws for a virulently anti-Semitic article which he claimed to have published without reading illustrates the lack of a rigorous intent requirement. The Danish law also does not require intent but recently was amended to provide that journalists, at least, are not liable for statements they publish of others unless it is proved that they intended to cause insult.⁵ In 1990, a law was added to the French Criminal Code which makes it an offence, regardless of intent, to deny or even contest the Nazi genocide of the Jews.⁶

Article 130 of the German Penal Code provides that anyone who incites hatred against or maliciously ridicules "a certain part of the population" may be subjected to up to five years' imprisonment if his or her acts are likely to breach the peace. The concept of breaching the peace is much broader, however, than under the UK or Canadian laws. The German law requires only that either the sense of security of the target group is threatened or that the existing predisposition of others to attack the target group is increased.

Members of Religious Groups Protected

The laws of Canada, Denmark, France and the Netherlands all protect members of groups defined by reference to their religion as well as to the more common grounds of race, ethnicity and national origin. The French incitement law extends its protection to a person or a group because of belonging or not belonging to a given ethnic group, nationality, race or religion. In practice, about half of the prosecutions under the French laws have concerned anti-Semitic speech and half have concerned hate speech against migrant workers from Turkey, the Maghreb, and the rest of Africa, but there has been at least one widely publicized case which resulted in a conviction for hate speech against Muslims.

2 See Errera, Chapter 17, 156.

3 *R. v. Keegstra* [1991] 2 W.W.R. 1, 43 (S.C.C.), quoted by Irwin Cotler in Chapter 13.

4 Judgement of 18 Oct 1988, NJ 1989, 476, interpreting Art. 137e of the Criminal Code, quoted in Boerefijn, Chapter 22.

5 Denmark's law (Art. 266b of the Penal Code) makes it a crime punishable by up to two years' imprisonment to make a public statement by which "a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin or religion". See Johannessen, Chapter 15.

6 Errera suggests that he thinks the law is both unwise and unnecessary. See Chapter 17, 155.

7 Although anti-Semitic speech does not account for half of the most abusive incidents of hate speech, the percentage of prosecutions overrepresents the occurrence because the cases involving anti-Semitic hate speech are generally easier to prove.

The German law which protects "a certain part of the population" from on "human dignity" has been interpreted to apply to German citizens belonging to ethnic, linguistic, racial, religious or social minorities (such as black students) also to non-nationals residing in Germany (such as migrant workers). The serious offence of racial incitement has been construed to prohibit anti-hate speech. Germany's criminal libel law (art. 185), which does not admit truth as a defence but rather turns on the offensiveness of the manner in which an insult is delivered, has been used almost exclusively on behalf of Jews since 1945 and before then, the German Supreme Court consistently refused to apply it to libel suits against them.

Lessons to be Learned

One of the more interesting aspects of the laws in these countries is that, although they are quite broadly worded, by and large they do not appear to have been seriously abused, that is, they do not appear to have been used against government critics (at least not because of their criticism) or against members of disadvantaged minority groups. (I leave aside the question of whether free speech advocates should endorse the prosecutions.) Denmark's conviction of a journalist and editor for broadcasting on television, without intent to cause insult, an interview with a woman who does appear to constitute an abuse but the media law recently was amended in order to prevent such cases in the future. While hate speech laws are a subject of considerable controversy in Canada (where three of seven justices of the Supreme Court opined that the laws were unconstitutional), there seems to be wide support for the hate speech laws in Denmark, France, Germany and the Netherlands.

Having said that, and however obvious it may be, the importance of protecting the right of free will to prosecute fairly must not be taken for granted. Germany's criminal libel law, on the books since the late 19th century, was used to protect Germans living in the Prussian provinces, large landowners, Christian clerics, German officers and Prussian troops, but not once, before 1945, did it provide protection for Jews.

A significant feature of the French system is that non-governmental organizations dedicated to opposing racism may initiate criminal, as well as civil, actions for hate speech. Mr Errera credits this unusually permissive standing provision as being a major reason for the laws' success. Most local prosecutors are ill-equipped to initiate hate speech prosecutions and thus there is scant concern about overzealous or even selective prosecutions. In the event, the national prosecution authorities may intercede to prevent an improper prosecution and do intercede on occasion to direct local prosecutors to initiate actions. Most prosecutions, however, are initiated by anti-racist organizations. They are entitled to participate jointly with the public prosecutor's office in any criminal action they initiate and, if successful, the court is likely to award civil damages to them to cover their costs (in addition to ordering criminal fines). If there is an acquittal, they of course do not recover their costs, a procedure which appears to limit prosecutions to ones that are not frivolous. Canada, Germany and the Netherlands offer more limited opportunities for the involvement of private associations in criminal prosecutions.

Another interesting feature of the French system is that substantial criminal fines and civil damage awards may be, and frequently are, ordered. Imprisonment appears to be reserved for repeat offenders; since entry into force of the 1975 law there does not appear to have been any cases of people who have been sentenced to jail, although some French experts speculate that if M. Le Pen (convicted of terrorism and currently on probation) commits another offence he could well be the first

speech, may be ordered to pay for the cost of publishing the victim's reply in leading newspapers.

Advocates of the French system note that it combines various commendable features. It includes criminal laws which make an emphatic statement of societal condemnation of certain highly offensive language, yet the laws do not appear to be seriously misapplied and the threat of imprisonment is minimal except perhaps for repeat offenders. The system also offers the option of civil actions which are easier to prove and faster to complete. Remedies of high fines or damages act to deter future similar conduct, compensate the victims and reinforce society's opprobrium. Standing for private anti-racism associations has resulted in responsible enforcement of the laws. The Canadian, Danish, Dutch and German systems share some of these features.

The ultimate question - Are these laws effective? - is of course difficult, and on one level virtually impossible, to answer. Although racism, xenophobia and the appeal of political parties that pander to those emotions are increasing, who can say what the situation would be in the absence of the hate speech laws? A comprehensive compilation of civil and criminal actions and their outcomes, coupled with a sophisticated public opinion survey would undoubtedly yield interesting information. At the anecdotal level, it can be remarked that, since his conviction, M Le Pen's language has become more restrained and there seems to be less acceptance of the espousal by academics of revisionist theories. Nonetheless, the free expression advocate cannot help but wonder what legitimate speech might be subjected to suppression and whether the growth in support for extreme right-wing parties might not be due in some small part to the notoriety they have received from cases against them.

GREAT BRITAIN, NORTHERN IRELAND, ISRAEL AND AUSTRALIA

Laws Which Are Little Used

The criminal laws of Great Britain, Northern Ireland, Israel and Australia are premised on the interest in safeguarding public order and the recognition that hate speech which vilifies a group, or a person because of identification with a group, poses a greater threat to public order than insults directed against an individual for his personal characteristics. All require the consent of the Attorney-General to prosecute.

None have been used effectively. Despite the high level of sectarian hatred and violence in Northern Ireland, there has been only one prosecution for incitement to religious hatred - which resulted in acquittal - during the 21 years of the law's operation. In the six years since the enactment of Israel's law, there has been only one conviction, and that was as a result of a plea bargain from sedition charges. There have been only 18 prosecutions in the UK since enactment of the 1986 racial incitement law, of which 16 resulted in convictions. There have been no prosecutions under the New South Wales racial incitement law, adopted in 1989.

The laws of Israel, Britain and New South Wales apply only to groups distinguished by race, ethnicity or national origin. Jews, Sikhs and Roma (gypsies) have been included within the protection of the UK law, but Muslims, Zionists and travellers have not. The Northern Ireland law protects, in addition, groups identified by religion.

The UK racial incitement law, similar in its language to the Canadian law, makes it an offence to use threatening, abusive or insulting words or behavior *either* with the intent of stirring up racial hatred *or* in circumstances where racial hatred is likely to be stirred up (Sections 18 and 19 of the Public Order Act 1986). The Northern Ireland law makes it an offence to use threatening, abusive or insulting words or matter which are likely to stir up hatred against, or arouse fear of, a section of the population. The Israeli law (Section 144B of the Penal Law) provides for imprisonment of up to five years for publishing anything with the purpose of stirring up racism, regardless of whether it is true and regardless of whether it leads to racism in fact, and provides for up to one year's imprisonment for possession for distribution of a prohibited publication with intent to stir up racism.

The UK also has two relevant summary offences (punishable by minor fines) which are aimed at general harassment, rather than at protecting racial groups in particular. The verbal harassment law prohibits the use or display of threatening, abusive or insulting words within the hearing or sight of a person "likely to be caused harassment, alarm or distress thereby" (Section 5, Public Order Act 1986). The Malicious Communications Act prohibits the sending of a letter or article which is threatening or grossly offensive with intent to cause distress or anxiety.

The UK laws suffer from a number of defects. Of particular concern is that the laws lend themselves to abuse. The 1965 racial incitement law, actually *narrower* than the 1986 law (in that it required both intent and likelihood of stirring up hatred), was used during its first decade more effectively against Black Power leaders than against white racists. Within the past four years, the general harassment law of 1986 has been used to prosecute students who tried to put up a poster of the Prime Minister Margaret Thatcher, demonstrators who ran onto a cricket pitch to protest against cricketers playing in South Africa, and a demonstrator outside the Prime Minister's office.

While protesting abusive enforcement, several human rights groups urge that the incitement law be strengthened on the ground that its demanding requirements have resulted in inadequate prosecution and acquittals in outrageous cases (including under the earlier 1965 law). Although the Commission for Racial Equality examined and recommended for prosecution 55 cases between 1986 and 1990, the Crown prosecuted only 14 cases during that period. Prosecutors seem more inclined to use non-race linked statutes where possible.

Penalties are problematic: on the one hand, in stark contrast to the French precedent, fines have been low (up to £400); on the other hand, of 16 prosecutions three have resulted in jail sentences (from two months to one year). The light fines have allowed some racists to claim virtual vindication; jail sentences have allowed others to protest loudly about scapegoating. Moreover, civil actions for racial incitement may not be brought.

Lessons to be Learned

One lesson of the British and Israeli experiences is that hate speech laws aimed at protecting public order fail in two respects. On the one hand, they are poor tools for deterring the types of speech that civil rights groups would most like to see proscribed, and on the other hand they are open to risk of abuse (and, at least in Britain's case, have been abused). Race neutral laws expressly linked to the likelihood of causing imminent lawless action would address both concerns. Freedom of expression as well as core equality and dignity rights would be

promoted by adoption of such a law, especially if coupled with greater protection for free speech rights generally and repeal of the blasphemy, incitement and general harassment laws.

A second lesson illustrated by the experience of both countries is that the existence of incitement laws has distracted attention away from the need to enact legislation which addresses root causes of discrimination. In Israel a bill to extend the law which prohibits discrimination in employment and public services on the basis of sex to discrimination on national, ethnic and religious grounds has languished in the Knesset for years. In Britain, members of minority groups remain woefully underrepresented in government, the judiciary, the professions and in crucial government departments such as the police. This situation prompted one of the four minority members of the 650-member House of Commons in 1988 to comment that racist behaviour is more socially acceptable in the UK than in the US.⁸

A third lesson is dramatically presented by Israel's law which prohibits racist organizations from participating in elections for the Knesset. So long as Meir Kahane, who espoused racist positions in the crudest terms, represented the extreme right wing in the Knesset, he was shunned by his colleagues and marginalized politically. A new racist party which uses more civil language is now gaining greater acceptance. Similarly, there is opinion in Britain that the couching of racist ideas in language which is immune from the racial incitement law has garnered increased support for some of the racist groups.

The law of New South Wales provides an interesting precedent in conciliation procedures especially suitable for complaints against the mass media and less serious incidents of racial incitement. A tribunal, whose orders are subject to judicial enforcement, is authorized to order such remedies as publication of apologies and retractions, payment of damages, and implementation of steps to eliminate unlawful discrimination.

SOUTH AFRICA AND SRI LANKA

Hate Speech Laws Used to Oppress Groups

South Africa and Sri Lanka offer the most powerful examples in this book of the abuse of hate speech laws to suppress the free speech and equality rights of minorities or oppressed majorities.

The words of the two contributors from Sri Lanka, owing to the violence and hatred which continues to tear apart that country and the urgency of the hate speech dilemma, constitute a particularly compelling, even haunting, endorsement of non-regulation of hate speech in situations of high inter-communal tensions. They lament that in Sri Lanka hate speech poses a substantial risk of inciting very real and very bloody violence. They accept in theory that in such a volatile society in which vulnerable minorities have been brutalized, vigilant regulation of hate speech may have merit. Nonetheless, they embrace a strong freedom of expression position on strategic grounds. They conclude:

Regulation of speech, in the unfettered hands of the 'competent authority,' particularly when empowered by sweeping Emergency Regula-

⁸ Paul Boateng, quoted in Strossen, *supra* Chapter 32, 307 note 36.

tions and motivated by a majority bias, ultimately defeats the stated regulatory purpose of protecting public order. In these circumstances therefore we believe that only hate speech which clearly incites to imminent illegal action can justifiably be restricted. Dissent and indeed hate will eventually be expressed; sadly, in Sri Lanka, we have witnessed far too much evidence that censoring hate from public discourse only banishes it to more deadly fora.

South Africa presents a graphic study of a country which has come through one of the most dehumanizing periods of repressive government policies premised on racism that the world has witnessed in recent decades. It was a period marked initially, in the 1920s, by pervasive censorship justified by the interest in promoting inter-racial harmony, moderating to merely extensive censorship by the 1970s and '80s.

The history of racism has left deep scars. As Albie Sachs, member of the African National Congress Executive Committee, stated: "So much insult and indignity have been involved that ... the issues go well beyond speech. They touch souls. The defamation of the black population has been associated with conquest and repression, murder, torture, tear-gassing and so on."⁹ For that reason, the fact that the ANC's proposed Bill of Rights permits penalties for hate speech is not surprising. Nonetheless, in a country whose history has been so disfigured by censorship it seems that rejection of such forms of regulation of speech based on the alleged offensiveness of its content would mark a strong break with the past.

INDIA

High Level of Inter-Communal Hatred and Violence

India offers a remarkable example of a country with a strong commitment to democratic principles and with a functioning, independent judiciary, faced with massive problems (many exacerbated by the central and state governments) including inter-communal tensions, poverty and illiteracy.

India's laws prohibit hate expression against "any class of persons" by virtue of their being "members of any religious, racial, language or regional group or caste or community".

India has five criminal laws which provide sentences of up to five years imprisonment for inciting inter-communal hatred with malicious intent. In addition various other laws prohibit hate speech in particular contexts. For instance, the government has authority to ban certain organizations in the interest of preventing public disorder or preserving national unity (used primarily against organizations which promote extremist religious views), and can subject films to prior censorship. It is an offence for any candidate or party official to make a "systematic appeal to vote or refrain from voting on grounds of caste, race, community or religion". The Customs Act 1962 authorizes the government to prohibit the import or export of goods, including books and other publications.

All of the above provisions are subject to the constitutional protection of free speech which requires that any restrictions must be "in the interest of", among other things, public order, preventing breaches of the peace. While "in the interest of" undenial-

⁹ See G J Marcus, Chapter 24, note 7, quoting A Sachs.

broader than "as necessary to", human rights campaigners by and large do not take great issue with the implementation of these provisions by the central government. However, abuses by some of the state governments occur all too often, and the central government abuses the laws on occasion. For instance, Salman Rushdie's novel, *The Satanic Verses*, was excluded from India by the Customs Act, without a full judicial hearing, and the state government of Jammu and Kashmir was able to ban summarily a women's social organization and a public welfare trust engaged in running schools in Kashmir. In Maharashtra, the Bombay police pursued a complaint in 1989 under Section 502(2) of the Penal Code (rather than using the civil or even criminal libel law) against a newspaper for an article which suggested links between the police and Sikh terrorists. The same state government banned several books which could not reasonably be considered threats to public order.

In contrast to this array of laws which are subject to a measure of judicial constraint, various emergency and special measures are wide open to abuse. Thus, if the central or a state government wishes to move quickly against hate speech, it may easily resort to preventative detention, curfew laws and excessive use of force to silence speakers and quell dissent, and other emergency laws to suppress publications.

Lessons to be Learned

The fact that India's judiciary is independent (particularly at the higher levels) has meant that certain of its hate speech laws which provide for adequate judicial review have played an ameliorative role in limiting speech which might otherwise erupt into violence while being mindful of the constitutional protection of freedom of expression. The laws would be far more effective and less subject to abuse if they authorized restrictions on hate speech (or were construed to do so in light of the constitution's free speech guarantee) only where *necessary* to prevent an imminent breach of the peace.

Clearly, the emergency measures are indefensibly overbroad. However, since they are not subject to adequate judicial review (and their repeal is impractical to contemplate), amendments would be of little value, as Venkat Eswaran points out, in the absence of fundamental institutional, social and economic reforms. He recommends major structural changes in the police and security forces and, even more fundamentally, the adoption of programmes aimed at addressing widespread problems of mass illiteracy, ignorance and poverty. Education and economic development, he suggests, are the only strategies which have any chance of reducing hatred, discrimination and violence among India's diverse communities.

THE FORMER SOVIET UNION

High Level of Inter-Communal Tension; Inadequately Developed Legal System

The states of the former Soviet Union, like India, are racked by inter-communal tensions which can and do flare up into violent confrontations. Also like India, Russia's central government seeks to play a role in moderating disputes and limiting violence. The comparison should not be advanced too far, however, because of substantial dissimilarities, including in the degree to which India's and Russia's central governments favour one side in a dispute.

The other major difference of relevance is the Soviet Union's lack of a functioning legal system, let alone an independent judiciary. As noted by Schmidt and Tanya Smith, "Soviet courts have traditionally been dependent on government and Communist Party apparatus to such an extent that it has been virtually impossible to receive an impartial, fair determination by a Soviet court in any case involving parties of different nationalities." Moreover, the status of law itself is in disarray: various declarations of independence, new constitutions, intra-Commonwealth treaties and acceptances of international treaty obligations have left courts and lawyers to struggle with unanswered questions concerning the powers of the courts and the laws which apply.

An All-Union law of the former Soviet Union made it a crime punishable by up to three years' imprisonment to deliberately incite national or racial hatred or discord or "any direct or indirect limitation of the rights of, or the establishment of direct or indirect privileges for citizens on grounds of their race or nationality." This law, however, is known to have been applied only once other than in conjunction with violent offences.

In light of the high level of intolerance, discrimination and violence which currently pervade the societies of the Commonwealth, Yuri Schmidt proposes a much more narrowly drawn criminal law which would prohibit only the republication of statements maliciously intended to incite hatred between communities. Because of the pervasiveness of racism, chauvinism and hate speech, he suggests a narrowly drawn statute in order to minimize the potential for arbitrary or selective enforcement.

Another risk of criminal prosecutions is their potential for making heroes of those who are prosecuted. Some observers claim that this occurred in the prosecution of Toretz Kolumbegov, the elected leader of the recently proclaimed Southern Ossetian Soviet Democratic Republic. They suggest that an administrative procedure might be preferable, which could result in such remedies as requiring the respondent to publish an apology and/or pay damages and, if the respondent held a position of civic responsibility, removing him from his post. An administrative procedure would also be faster, an important consideration where part of the interest in prosecuting is to demonstrate the ability of democratic institutions to take effective action. Moreover, especially in light of the underdeveloped condition of law throughout the Commonwealth and the tradition of bias in cases involving parties of different nationalities, an administrative process would lessen the risk of serious abuse. Cases in which violence actually was incited could, and should, be prosecuted.

States of the Commonwealth might also consider adopting some version of the French procedure of authorizing certain organizations committed to combating racism to participate in administrative and/or criminal prosecutions. Such innovation would convey a strong message that people injured by incitement to hatred had an effective mechanism by which their views would be taken into consideration.

THE UNITED STATES

Prohibition of Imminent Lawless Action

The great contribution of the United States to the hate speech debate is not merely the First Amendment but, more importantly, the extensive jurisprudence which the Supreme Court has developed. Kevin Boyle, in his Overview Chapter,

suggested at least two reasons for the United States' dramatically different approach from that of Europe and the rest of the world: first, the US was born of dissent and has a tradition of suspicion of central government; second, the Anglo-American tradition of negative liberty, premised on the assumption that liberty is best protected by the least regulation, is fundamentally different than the Roman Law traditions of codification which have shaped European law. Regardless of these differences, a number of lessons may be drawn from the US experiences which may be applicable to other legal systems.

US law permits restrictions on hate speech only in such situations where the speech is likely to lead directly to imminent lawless action and there are no other available measures less intrusive on free speech rights which would be effective. However, the law permits reasonable regulation of the time, place and manner of expression so long as the regulation does not undermine the effectiveness of the message. In particular, US jurisprudence includes the concept of the "captive audience" which permits some regulation to prevent offensive speech from being thrust upon people in their homes and other private areas. In public places, people have the burden of averting their attention from expression they may find offensive.

US law prohibits insults directed at an individual which are intimidating or threatening, and permits civil actions for insults directed at an individual in the workplace which demonstrably hinder that person's ability to function as an employee, such as in the context of race discrimination or sexual harassment. Civil libertarians suggest that a similar approach is appropriate for campus hate speech: face-to-face insults which demonstrably hinder a student's learning experience should be actionable.

US jurisprudence is also unusual in its insistence that any regulation of expression must be content neutral. The principled defence of content neutrality is that freedom of expression is protected primarily to guarantee the right of political dissent; that core freedom would be threatened if the government could penalize speech which insults groups the government has decided deserve protection. The strategic defence of content neutrality is that there is no way to ensure that the government, once granted the power, will only limit speech which has no legitimate value.

Various episodes in US history underscore the important contribution of the commitment to freedom of expression in promoting equality and dignity rights as well as the rights of political protest and dissent. The civil rights movement of the 1950s and '60s was kept alive by court rulings (especially by the higher courts) upholding the rights of protesters to march in the streets, sit-in at public buildings and make speeches that were highly offensive to the white majority. Similarly, offensive and often racist language used by some Black Power militants against the police and other government officials was protected (in contrast, for instance, to Britain, where Black Power militants were among the first to be prosecuted for race hatred).

The campus hate speech debate has shown that bad speech can, over time, be countered by good speech. Although the debate may appear to be a tempest in a teapot, the fact that so much attention was devoted to the issue has borne results. Now, three to four years after the first of the recent wave of these hate speech incidents, their numbers are declining. Universities, realizing that restrictive disciplinary codes would probably not pass constitutional muster, instead turned their attention to making more fundamental changes, such as requiring students who engaged in hate speech to receive counselling about tolerance or to engage in

community service, adding elective courses to the curriculum on the histories and cultures of minority groups, and holding public debates on campus.

The notorious *Skokie* case, which upheld the right of Nazis to march in uniform through the streets of a neighbourhood inhabited by Jewish survivors of the Holocaust, is regarded by some as an illustration of the excesses of the First Amendment. And yet, as pointed out by Aryeh Neier, "when it was all over they had been persuaded to join [the Nazis]. They had disseminated their message and it had been rejected."¹⁰ Moreover, they had not been made into heroes. The residents of Skokie undeniably suffered injury, but an important fact of the case was that the residents had notice and thus were able to leave their homes and avoid the most direct onslaught of insult. It was the same principle that protected the right of the Nazis to march in Skokie which enabled Martin Luther King, Jr. to march in the white neighbourhoods of Birmingham, and countless other demonstrators to carry their message to the American public. What *Skokie* represents is the victory of tolerance over intolerance.

Undeniably, the US commitment to free speech has resulted in a real commitment to laws which serve a primarily symbolic or educative function which may improve the civility of discourse. The US has made the decision, however, to place a higher value on free expression than on its symbols. As the Supreme Court stated in striking down a statute which prohibited the desecration of the US flag:

If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. Punishing the desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering.¹¹

Certainly, the First Amendment neither inhibited slavery nor prevented McCarthyism. But, as Nadine Strossen explains, the Amendment was only given the strong constructions with which it is now associated in the mid-1960s. Just as it is impossible to assess whether the hate speech laws in France have played a role in slowing the growing appeal of virulent xenophobia and racism, it is equally impossible to know whether a different set of laws in the US would have had a greater or lesser protection for equal rights and political dissent. But, it is clear that intolerance and discrimination are no worse than in many parts of Europe and that dissent is afforded greater protection in the US than anywhere else in the world.

CONCLUSION

The 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. Thus, the laws in Sri Lanka and South Africa have been used almost exclusively against the oppressed and politically weak communities. In India, the hate speech laws have not come under widespread criticism in part because the government may resort to emergency measures whenever it wishes to take actions which the courts would likely find inconsistent with the constitution's free speech guarantee.

¹⁰ Quoted by Nadine Strossen in Chapter 30, note 34.

¹¹ *US v. Eichman*, 496 U.S. 310.

Selective or lax enforcement by the authorities, including in the UK, Israel and the former Soviet Union, allows governments to compromise the right of dissent and inevitably leads to disaffection and feelings of alienation among minority groups. Such laws may also distract from the need for effective legislation to promote non-discrimination; Israel is perhaps the most obvious example of a country which has adopted a symbolic hate speech law, while it continues to neglect enactment of a law to prohibit discrimination in employment and public services on grounds of race, religion or national or ethnic origin.

The rise of racism and xenophobia throughout Europe, despite a variety of laws restricting racist speech, calls into question the effectiveness of such laws in the promotion of tolerance and non-discrimination. One worrying phenomenon is the sanitized language now adopted to avoid prosecution by prominent racists in Britain, France, Israel and other countries, which may have the effect of making their messages of hate more acceptable to a broader audience.

To the extent that a society is committed to having hate speech laws, civil and administrative remedies accomplish most of the aims of criminal legislation without the seriousness of attendant risks. Remedies such as publication of rights of reply and retractions, as well as damages to cover the cost of suit, are far more effective in granting relief to injured parties and in promoting education than jail sentences.

The US experience may be the most instructive for free speech advocates grappling with the problem. While the campus context cannot be taken as representative of the wider society, education on campuses about tolerance combined with robust debate and clear condemnation of hate speech have reduced the number of hate speech incidents and are certainly more likely than mere hate speech restrictions to have an impact as well on the underlying prejudices.

As summed up by Denise Meyerson, a South African writer:

[A] final consideration is that, to the extent that racial animosities will continue to plague us, it is better to let them be played out at the level of words rather than to bottle them up, thereby not only increasing their virulence, but also making more likely a more dangerous kind of discharge. Forced, as we are, to weigh up evils here, we should therefore conclude that tolerance is more beneficial than costly.¹²

When dealing with racism and hate speech on the one hand, and restrictions on freedom of expression on the other, we undeniably are weighing evils. Finding a balance in each context is a delicate process to which there is no ideal solution that satisfies all concerns. Nonetheless, the process of searching will undoubtedly bring us closer to realizing the mutually reinforcing values of free speech and equality.

ANNEXES

¹² Quoted by L. Johannessen, Chapter 25, note 62.

INTERNATIONAL STANDARDS

Following are some of the most important provisions of international treaties and declarations concerning freedom of expression, religion, thought and opinion, non-discrimination, advocacy of hatred and balancing of rights, reproduced according to the organization under whose auspices they were drafted (United Nations, Organization of African Unity, Organization of American States, Council of Europe, European Community, Conference on Security and Cooperation in Europe) and by date of their adoption or entry into force. Owing to considerations of space we have not reproduced all of the relevant provisions, especially concerning the right to non-discrimination, the rights of minorities and rights relating to freedom of expression (such as the rights to freedom of assembly and association and to participate in elections and public affairs). A greater number of provisions are reproduced from the Conference on Security and Cooperation in Europe than from the other organizations primarily because the CSCE documents are more widely available.

UNITED NATIONS

UNIVERSAL DECLARATION OF HUMAN RIGHTS

Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas ... the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law, ...

Now, therefore, the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and nations ...

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

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.

Article 29

- ...
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
 3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

Approved and opened for signature, ratification or accession by General Assembly resolution 260 A (III) of December 1948. Entered into force 12 January 1951.

Article 1

The Contracting Parties confirm that genocide, whether committed in time of peace or time of war, is a crime under international law which they undertake to prevent and to punish.

Article 3

The following acts shall be punishable: ... (c) direct and public incitement to commit genocide ...

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

Adopted and opened for signature, ratification and accession by General Assembly resolution 2106 A (XX) of 21 December 1965. Entered into force 4 January 1969.

The States Parties to this Convention,

Considering that the Charter of the United Nations is based on the principle of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves ... to promote and encourage universal respect and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion ...

Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination.

Article 1

1. In this Convention the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and noncitizens.
3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among races, and, to this end:
 - c. Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
 - d. Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization ...

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 ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures d

eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

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

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups ...

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966. Entered into force 23 March 1976.

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Agree upon the following articles:

Article 5

1. Nothing in the present Covenant 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 recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Article 19

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

Article 20

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

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES

Adopted and opened for signature, ratification and accession in February 1991. Not in force as of May 1992.

Article 13

1. Migrant workers and members of their families shall have the right to hold opinions without interference.
2. Migrant workers and members of their families 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 right provided for in paragraph 2 of the present 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 reputation of others;
- (b) For the protection of the national security of the States concerned or of public order (*ordre public*) or of public health or morals;
- (c) For the purpose of preventing any propaganda for war;
- (d) For the purpose of preventing any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

ORGANIZATION OF AFRICAN UNITY

AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

Adopted by the OAU on 27 June 1981. Entered into force 21 October 1986.

Article 8

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Article 9

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

ORGANIZATION OF AMERICAN STATES

AMERICAN CONVENTION ON HUMAN RIGHTS

Adopted by the OAS on 22 November 1969. Entered into force 18 July 1978.

Article 1: Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language,

religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. ...

Article 12: Freedom of Conscience and Religion

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs; and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private
-
3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others. ...

Article 13: Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary in order to ensure:
 - (a) respect for the rights or reputations of others; or
 - (b) the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offences punishable by law.

Article 14: Right of Reply

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.
2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.
3. For the effective protection of honor and reputation, every publisher and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.

Article 24: Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

COUNCIL OF EUROPE

EUROPEAN CONVENTION ON HUMAN RIGHTS

(Convention for the Protection of Human Rights and Fundamental Freedoms)

Signed by Contracting States of the Council of Europe on 4 November 1950. Entered into force 3 September 1953.

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 9

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 14

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.

Article 17

Nothing in this Convention may be interpreted as implying for any 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.

COUNCIL OF EUROPE CONSULTATIVE ASSEMBLY: DRAFT MODEL LAW (1966)

Article 1

A person shall be guilty of an offence:

- (a) if he publicly calls for or incites to hatred, intolerance, discrimination or violence against persons or groups of persons distinguished by colour, race, ethnic or national origin, or religion;
- (b) if he insults persons or groups of persons, holds them up to contempt or slanders them on account of the distinguishing particulars mentioned in paragraph (a).

Article 2

- (a) A person shall be guilty of an offence if he publishes or distributes written matter which is aimed at achieving the effects referred to in Article 1.
- (b) "Written matter" includes any writing, sign or visible representation

...

Article 4

Organizations whose aims or activities fall within the scope of Articles 1 and 2 shall be prosecuted and/or prohibited.

Article 5

- (a) A person shall be guilty of an offence if he publicly uses insignia of organizations prohibited under Article 4.
- (b) "Insignia" are, in particular, flags, badges, uniforms, slogans and forms of salutes.

DECLARATION REGARDING INTOLERANCE - A THREAT TO DEMOCRACY

Adopted by the Committee of Ministers of the Council of Europe on 14 May 1980 Session.

The Committee of Ministers of the Council of Europe,

1. *Convinced* that tolerance and respect for the dignity and intrinsic equality of all human beings are the very basis of a democratic pluralistic society;
2. *Profoundly disturbed* by the resurgence of various forms of intolerance;
3. *Reaffirming* its determination to safeguard the effective political democracy referred to in the Preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms;

4. *Recalling* that human rights and fundamental freedoms are the very foundation of justice and peace throughout the world;
 5. *Bearing in mind* that the Convention for the Protection of Human Rights and Fundamental Freedoms has successfully afforded effective international protection, without discrimination, to everyone within the jurisdiction of the Contracting States;
 6. *Recalling* that, in accordance with the United Nations International Convention on the Elimination of All Forms of Racial Discrimination and following the Committee of Ministers Resolution (68)30 of 31 October 1968, on measures to be taken against incitement to racial, national and religious hatred, several member states have either adopted new legislation or reinforced existing legislation against acts inspired by racism;
 7. *Welcoming* the adoption by the Consultative Assembly of Resolution 743 (1980) on "the need to combat resurgent fascist propaganda and its racist aspects";
 8. *Considering* that the best way of countering all forms of intolerance is to preserve and consolidate democratic institutions, to foster citizens' confidence in those institutions and to encourage them to take an active part in their operation;
 9. *Convinced* of the vital part played by education and information in any action against intolerance, whose origin frequently lies in ignorance, source of incomprehension, hatred and even violence,
- I. Vigorously condemns all forms of intolerance, regardless of their origin, inspiration or aims, and the acts of violence to which they give rise, especially when human lives are at stake;
 - II. Rejects all ideologies entailing contempt for the individual or a denial of the intrinsic equality of all human beings;
 - III. Solemnly recalls its unswerving attachment to the principles of pluralistic democracy and respect for human rights, the cornerstone of membership of the Council of Europe, as well as to the Convention for the Protection of Human Rights and Fundamental Freedoms, the essential instrument in the effective exercise of these rights;
- IV. Decides:
- i. to reinforce efforts, at national and international levels, and particularly in the framework of the Council of Europe, to prevent the spread of totalitarian and racist ideologies and to act effectively against all forms of intolerance;
 - ii. to take, with this objective in mind, all appropriate measures and to implement a programme of activities including, in particular, the study of legal instruments applicable in the matter with a view to their reinforcement where appropriate;
 - iii. to promote an awareness of the requirements of human rights and the ensuing responsibilities in a democratic society, and to this end, in addition to human rights education, to encourage the creation in schools, from the primary level upwards, of a climate of active understanding of and respect for the qualities and culture of others;

V. Agrees that member states will make every effort so that the principles enounced above prevail within other international organizations;

VI. Appeals to all institutions, movements and associations and to all political and social forces to contribute towards a sustained effort against the threat to democracy represented by intolerance.

EUROPEAN COMMUNITY

DECLARATION ON RACISM AND XENOPHOBIA

European Council of the European Community, Maastricht, 11 December 1991

The European Council notes with concern that manifestations of racism xenophobia are steadily growing in Europe, both in the member States of Community and elsewhere.

The European Council stresses the undiminished validity of international obligations with regard to combating discrimination and racism to which member States have committed themselves within the framework of the United Nations, the Council of Europe and the CSCE.

The European Council recalls the Declaration against racism and xenophobia issued by the European Parliament, Council and Commission on 11 June 1986 reaffirming its Declaration issued in Dublin on 26 June 1990, expresses its revulsion against racist sentiments and manifestations. These manifestations, including expressions of prejudice and violence against foreign immigrants and exploitation of them, are unacceptable.

The European Council expresses its conviction that respect for human dignity is essential to the Europe of the Community and that combating discrimination in all its forms is therefore vital to the European Community, as a community of States governed by the rule of law. The European Council therefore considers it necessary that the Governments and Parliaments of the member States should act clearly and unambiguously to counter the growth of sentiments and manifestations of racism and xenophobia.

The European Council asks Ministers and the Commission to increase their efforts to combat discrimination and xenophobia, and to strengthen the international protection for third country nationals in the territories of the member States.

Lastly, the European Council notes that, in connection with the upheavals in Eastern Europe, similar sentiments of intolerance and xenophobia are manifesting themselves in extreme forms of nationalism and ethnocentrism. The policies of the European Community and its member States towards the countries concerned will aim to discourage strongly such manifestations.

DOCUMENT OF THE COPENHAGEN MEETING OF THE
CONFERENCE ON THE HUMAN DIMENSION

5 to 29 June 1990

The representatives of the participating States of the Conference on Security and Co-operation in Europe (CSCE), Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Union of Soviet Socialist Republics, the United Kingdom, the United States of America and Yugoslavia, met in Copenhagen from 5 to 29 June 1990, in accordance with the provisions relating to the Conference on the Human Dimension of the CSCE contained in the Concluding Document of the Vienna Follow-up Meeting of the CSCE. ...

The participating States express their conviction that full respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law are prerequisites for progress in setting up the lasting order of peace, security, justice and co-operation that they seek to establish in Europe. ...

In order to strengthen respect for, and enjoyment of, human rights and fundamental freedoms, to develop human contacts and to resolve issues of a related humanitarian character, the participating States agree on the following. ...

(9) The participating States reaffirm that

(9.1) - everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards. In particular, no limitation will be imposed on access to, and use of, means of reproducing documents of any kind, while respecting, however, rights relating to intellectual property, including copyright. ...

(24) The participating States will ensure that the exercise of all the human rights and fundamental freedoms set out above will not be subject to any restrictions except those which are provided by law and are consistent with their obligations under international law, in particular the International Covenant on Civil and Political Rights, and with their international commitments, in particular the Universal Declaration of Human Rights. These restrictions have the character of exceptions. The participating States will ensure that these restrictions are not abused and are not applied in an arbitrary manner, but in such a way that the effective exercise of these rights is ensured.

Any restriction on rights and freedoms must, in a democratic society, relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law.

(30) The participating States recognize that the questions relating to national minorities can only be satisfactorily resolved in a democratic political framework based on the rule of law, with a functioning independent judiciary. This framework guarantees full respect for human rights and fundamental freedoms, equal rights and status for all citizens, the free expression of all their legitimate interests and aspirations, political pluralism, social tolerance and the implementation of legal rules that place effective restraints on the abuse of governmental power.

They also recognize the important role of non-governmental organizations, including political parties, trade unions, human rights organizations and religious groups, in the promotion of tolerance, cultural diversity and the resolution of questions relating to national minorities.

They further reaffirm that respect for the rights of persons belonging to national minorities as part of universally recognized human rights is an essential factor for peace, justice, stability and democracy in the participating States.

(31) Persons belonging to national minorities have the right to exercise fully and effectively their human rights and fundamental freedoms without any discrimination and in full equality before the law. ...

(32) To belong to a national minority is a matter of a person's individual choice and no disadvantage may arise from the exercise of such choice.

Persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects free of any attempts at assimilation against their will. ...

(33) The participating States will protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and create conditions for the promotion of that identity. ...

(35) The participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities. ...

(36) The participating States recognize the particular importance of increasing constructive co-operation among themselves on questions relating to national minorities. Such co-operation seeks to promote mutual understanding and confidence, friendly and good-neighbourly relations, international peace, security and justice. ...

(37) None of these commitments may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes and principles of the Charter of the United Nations, other obligations under international law or the provisions of the Final Act, including the principle of territorial integrity of States.

(38) The participating States, in their efforts to protect and promote the rights of persons belonging to national minorities, will fully respect the:

undertakings under existing human rights conventions and other relevant international instruments and consider adhering to the relevant conventions, if they have not yet done so, including those providing for a right of complaint by individuals. ...

- (40) The participating States clearly and unequivocally condemn totalitarianism, racial and ethnic hatred, anti-semitism, xenophobia and discrimination against anyone as well as persecution on religious and ideological grounds. In this context, they also recognize the particular problems of Roma (gypsies).

They declare their firm intention to intensify the efforts to combat these phenomena in all their forms and therefore will

- (40.1) - take effective measures, including the adoption, in conformity with their constitutional systems and their international obligations, of such laws as may be necessary, to provide protection against any acts that constitute incitement to violence against persons or groups based on national, racial, ethnic or religious discrimination, hostility or hatred, including anti-semitism;
- (40.2) - commit themselves to take appropriate and proportionate measures to protect persons or groups who may be subject to threats or acts of discrimination, hostility or violence as a result of their racial, ethnic, cultural, linguistic or religious identity, and to protect their property;
- (40.3) - take effective measures, in conformity with their constitutional systems, at the national, regional and local levels to promote understanding and tolerance, particularly in the fields of education, culture and information;
- (40.4) - endeavour to ensure that the objectives of education include special attention to the problem of racial prejudice and hatred and to the development of respect for different civilizations and cultures;
- (40.5) - recognize the right of the individual to effective remedies and endeavour to recognize, in conformity with national legislation, the right of interested persons and groups to initiate and support complaints against acts of discrimination, including racist and xenophobic acts;
- (40.6) - consider adhering, if they have not yet done so, to the international instruments which address the problem of discrimination and ensure full compliance with the obligations therein, including those relating to the submission of periodic reports;
- (40.7) - consider, also, accepting those international mechanisms which allow States and individuals to bring communications relating to discrimination before international bodies.

CHARTER OF PARIS FOR A NEW EUROPE

Paris, 21 November 1990

We affirm that the ethnic, cultural, linguistic and religious identity of national minorities will be protected and that persons belonging to national minorities have the right freely to express, preserve and develop that identity without any discrimination and in full equality before the law. ...

We express our determination to combat all forms of racial and ethnic anti-semitism, xenophobia and discrimination against anyone as well as persecution on religious and ideological grounds.

We recognize that the issues of migrant workers and their families residing in host countries have economic, cultural and social aspects as well as a human dimension. We reaffirm that the protection and promotion of their rights as well as the implementation of relevant international obligations, is our common concern.

REPORT OF THE CSCE MEETING OF EXPERTS ON NATIONAL MINORITIES

Geneva, 19 July 1991

The representatives of Albania, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech and Slovak Federal Republic, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands-European Community, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Union of Soviet Socialist Republics, the United Kingdom, the United States of America and Yugoslavia met in Geneva from 1 to 19 July 1991 in accordance with the relevant provisions of the Charter of Paris for a New Europe. ...

VI.

The participating States, concerned by the proliferation of acts of racial, ethnic, religious hatred, anti-semitism, xenophobia and discrimination, stress their determination to condemn, on a continuing basis, such acts against anyone.

In this context, they reaffirm their recognition of the particular problems of Roma (gypsies). They are ready to undertake effective measures in order to ensure full equality of opportunity between persons belonging to Roma ordinarily residing in their State and the rest of the resident population. They will also encourage research and studies regarding Roma and the particular problems they face.

They will take effective measures to promote tolerance, understanding and equality of opportunity and good relations between individuals of different ethnicities within their country.

Further, the participating States will take effective measures, including the adoption, in conformity with their constitutional law and their international obligations, if they have not already done so, of laws that would prohibit and constitute incitement to violence based on national, racial, ethnic or religious discrimination, hostility or hatred, including anti-semitism, and policies to enforce such laws.

Moreover, in order to heighten public awareness of prejudice and hatred and to improve enforcement of laws against hate-related crime and otherwise to make efforts to address hatred and prejudice in society, they will make efforts to publish on a regular basis, and make available to the public, data about conditions in their respective territories that are based on prejudice as to race, ethnic identity, religion, including the guidelines used for the collection of such data. This data should not contain any personal information.

They will consult and exchange views and information at the international level, including at future meetings of the CSCE, on crimes that manifest evidence of prejudice and hate.

DOCUMENT OF THE MOSCOW MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION

10 September to 4 October 1991

The representatives of the participating States of the Conference on Security and Co-operation in Europe (CSCE), Albania, Austria, Belgium, Bulgaria, Canada, Cyprus, the Czech and Slovak Federal Republic, Denmark, Estonia, Finland, France, Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands-European Community, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the USSR, the United Kingdom, the United States of America and Yugoslavia met in Moscow from 10 September to 4 October 1991, in accordance with the provisions relating to the Conference on the Human Dimension of the CSCE contained in the Concluding Document of the Vienna Follow-up Meeting of the CSCE. ...

- (26) The participating States reaffirm the right to freedom of expression, including the right to communication and the right of the media to collect, report and disseminate information, news and opinion. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards. ...
- (37) The participating States confirm the provisions and commitments of all CSCE documents, in particular the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, concerning questions relating to national minorities and the rights of persons belonging to them, and the Report of the Geneva CSCE Meeting of Experts on National Minorities, and call for their full and early implementation. They believe that, in particular, the use of the new and expanded CSCE mechanisms and procedures will contribute to further protection and promotion of the rights of persons belonging to national minorities.
- (38) The participating States recognize the need to ensure that the rights of migrant workers and their families lawfully residing in the participating States are respected and underline their right to express freely their ethnic, cultural, religious and linguistic characteristics. The exercise of such rights may be subject to such restrictions as are prescribed by law and are consistent with international standards.
- (38.1) - They condemn all acts of discrimination on the ground of race, colour and ethnic origin, intolerance and xenophobia against migrant workers. They will, in conformity with domestic law and international obligations, take effective measures to promote tolerance, understanding, equality of opportunity and respect for the fundamental human rights of migrant workers and adopt, if they have not already done so, measures that would prohibit acts that constitute

incitement to violence based on national racial, ethnic or religious discrimination, hostility or hatred. ...

(42) The participating States:

- (42.1) - affirm that human rights education is fundamental and that it therefore essential that their citizens are educated on human rights and fundamental freedoms and the commitment to respect such rights and freedoms in domestic legislation and international instruments to which they may be parties.
- (42.2) - recognize that effective human rights education contributes to combating intolerance, religious, racial and ethnic prejudice and hatred, including against Roma, xenophobia and anti-semitism. ...

**RESERVATIONS AND DECLARATIONS CONCERNING
RACIST SPEECH AND ADVOCACY OF
RACIAL AND RELIGIOUS HATRED**

When ratifying, acceding to or signing the CERD Convention and the ICCPR, several countries entered statements concerning the obligations to prohibit racist speech set forth in Article 4 of the CERD Convention and advocacy of hatred on national, racial or religious grounds set forth in Article 20(2) of the ICCPR.

Some countries entered reservations by which they expressly reserved the right not to enact legislation to implement the articles. Others entered declarations by which they set forth their understanding of the articles' obligations. Some countries entered a reservation or declaration at the time of signing the treaty which they confirmed upon ratification; others entered a reservation or declaration at the time they ratified or acceded to the treaty. Of the countries which entered declarations or reservations at the time of signing, only the US has yet to ratify.

As of May 1992, 129 countries were parties to the CERD Convention. Twelve of those have entered a reservation or declaration expressly concerning Article 4. Others, such as Guyana and Jamaica, have made sweeping declarations stating that they do not consider the Convention to impose any obligations beyond the limits set by their own constitutions. The US, upon signing the Convention, similarly stated that it did not consider the Convention to require any action incompatible with the US Constitution, in particular, its protection of free speech. Of the 12 which expressly mentioned Article 4, five (Bahamas, Nepal, Papua New Guinea, Tonga, UK) have stated that they consider Article 4 to require the adoption of further legislation only in so far as they may consider "with due regard to the principles embodied in the UDHR and the rights set forth in Article 5 of the Convention" that further legislation is required for the achievement of the purpose set forth in the first paragraph of Article 4, namely to "eradicate all incitement to, or acts of, such discrimination". Malta made a similar statement that it would enact legislation only where necessary to "bring to an end any act of racial discrimination". France went so far as to declare that the principles of the UDHR and Article 5 of the Convention *release* states parties from the obligation to enact legislation "incompatible with the freedoms of opinion and expression and of peaceful assembly and association". Three other countries mentioned the "with due regard" clause.

As of May 1992, 105 countries were parties to the ICCPR. Of those, 14 have entered a reservation or declaration concerning Article 20, and of those, eight limited their objections to paragraph 1 which requires states parties to prohibit "propaganda for war". The six which made statements concerning paragraph 2 as well are Australia, Belgium, Luxembourg, Malta, New Zealand and the United Kingdom. The US, which is not yet a party to the ICCPR, has proposed a reservation to the whole of Article 20. The US is expected to ratify in 1992.

**DECLARATIONS AND RESERVATIONS TO THE INTERNATIONAL
CONVENTION ON THE ELIMINATION OF
ALL FORMS OF RACIAL DISCRIMINATION**

As set forth in Status of International Instruments (New York: UN, 1987) confirmed in May 1992.

Australia

The Government of Australia ... declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4(a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and sedition. It is the intention of the Australian Government, at the first suitable opportunity, to seek from Parliament legislation specifically implementing the terms of article 4(a).

Austria

Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the measures specifically described in subparagraphs (a), (b) and (c) shall be undertaken with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention. The Republic of Austria therefore considers that the measures through such measures the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association may not be jeopardized. The rights are laid down in articles 19 and 20 of the Universal Declaration of Human Rights; they were re-affirmed by the General Assembly of the United Nations in 1948. It adopted articles 19 and 21 of the International Covenant on Civil and Political Rights and are referred to in article 5(d) (viii) and (ix) of the present Convention.

Bahamas

First, the Government of the Commonwealth of the Bahamas wishes to state its understanding of article 4 It interprets article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by subparagraphs (a), (b) and (c) of that article only in so far as it may consider with due regard to the principles embodied in the Universal Declaration set out in article 5 of the Convention (in particular the right to freedom of opinion and expression and the right of freedom of peaceful assembly and association) that some legislative measures in addition to, or variation of existing law and practice in these fields is necessary for the attainment of the ends specified in article 4. ... Acceptance of this Convention by the Commonwealth of the Bahamas does not imply the acceptance of obligations going beyond the constitutional limits nor the acceptance of any obligation to introduce judicial process beyond those prescribed under the Constitution.

Barbados

The Constitution prescribes judicial processes to be observed in the event of a violation of any of these rights whether by the State or by a private individual.

Accession to the Convention does not imply the acceptance of obligations going beyond the constitutional limits nor the acceptance of any obligations to introduce judicial processes beyond those provided in the Constitution.

The Government of Barbados interprets article 4 of the said Convention as requiring a party to the Convention to enact measures in the fields covered by subparagraph (a), (b) and (c) of that article only where it is considered that the need arises to enact such legislation.

Belgium

In order to meet the requirements of article 4 of the International Convention of the Elimination of All Forms of Racial Discrimination, the Kingdom of Belgium will take care to adapt its legislation to the obligations it has assumed in becoming a party to the said Convention.

The Kingdom of Belgium nevertheless wishes to emphasize the importance which it attaches to the fact that article 4 of the Convention provides that the measures laid down in subparagraphs (a), (b) and (c) should be adopted with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention. The Kingdom of Belgium therefore considers that the obligations imposed by article 4 must be reconciled with the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association. Those rights are proclaimed in articles 19 and 20 of the Universal Declaration of Human Rights and have been reaffirmed in articles 19 and 21 of the International Covenant on Civil and Political Rights. They have also been stated in article 5, subparagraph (d)(viii) and (ix) of the said Convention.

The Kingdom of Belgium also wishes to emphasize the importance which it attaches to respect for the rights set forth in the Convention for the Protection of Human Rights and Fundamental Freedoms, especially in articles 10 and 11 dealing respectively with freedom of opinion and expression and freedom of peaceful assembly and association.

Fiji

The government of Fiji ... interprets article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by subparagraphs (a), (b) and (c) of that article only in so far as it may consider with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention (in particular the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association) that some legislative addition to or variation of existing law and practice in those fields is necessary for the attainment of the end specified in the earlier part of article 4.

France

With regard to article 4, France wishes to make it clear that it interprets the reference made therein to the principles of the Universal Declaration of Human Rights and to the rights set forth in article 5 of the Convention as releasing the States parties from the obligation to enact anti-discrimination legislation which is incompatible

with the freedoms of opinion and expression and of peaceful assembly and association guaranteed by those texts.

Italy

(a) The positive measures, provided for in article 4 of the Convention and especially described in subparagraphs (a) and (b) of that article, designed to eradicate incitements to, or acts of, discrimination, are to be interpreted, as that article provides, "with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5" of the Convention. Consequently, the obligations deriving from the aforementioned article 4 are not to jeopardize the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association, which are laid down in articles 19 and 20 of the Universal Declaration of Human Rights, were reaffirmed by the General Assembly of the United Nations when it adopted articles 19 and 21 of the International Covenant on Civil and Political Rights, and are referred to in articles 5(d)(viii) and (ix) of the Convention. In fact, the Italian Government, in conformity with the obligations resulting from Articles 55(c) and 56 of the Charter of the United Nations, remains faithful to the principle laid down in article 29(2) of the Universal Declaration, which provides that "in the exercise of his rights and freedoms everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

Jamaica

The Constitution of Jamaica entrenches and guarantees to every person in Jamaica the fundamental rights and freedoms of the individual irrespective of his race, place of origin. The Constitution prescribes judicial processes to be observed in the event of the violation of any of these rights whether by the State or by a private individual. Ratification of the Convention by Jamaica does not imply the acceptance of obligations going beyond the constitutional limits nor the acceptance of any obligation to introduce judicial processes beyond those prescribed under the Constitution."

Malta

The Government of Malta wishes to state its understanding of certain articles of the Convention. ... It interprets article 4 as requiring a party to the Convention to adopt further measures in the fields covered by subparagraphs (a), (b) and (c) of that article should it consider, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights set forth in article 5 of the Convention, that the need arises to enact 'ad hoc' legislation, in addition to the variation of existing law and practice to bring to an end any act of racial discrimination.

Nepal

The Constitution of Nepal contains provisions for the protection of individual rights, including the right to freedom of speech and expression, the right to form unions and associations not motivated by party politics and the right to freedom of professing his/her own religion; and nothing in the Convention shall be deemed to require or to authorize legislation or other action by Nepal incompatible with the provisions of the Constitution of Nepal.

His Majesty's Government interprets article 4 of the said Convention as requiring a party to the Convention to adopt further legislative measures in the fields covered by subparagraphs (a), (b) and (c) of that article only in so far as His Majesty's Government may consider, with due regard to the principles embodied in the Universal Declaration of Human Rights, that some legislative addition to, or variation of, existing law and practice in those fields is necessary for the attainment of the end specified in the earlier part of article 4. His Majesty's Government interprets the requirement in article 6 concerning 'reparation or satisfaction' as being fulfilled if one or other of these forms of redress is made available; and further interprets 'satisfaction' as including any form of redress effective to bring the discriminatory conduct to an end.

Papua New Guinea

The Government of Papua New Guinea interprets article 4 of the Convention as requiring a party to the Convention to adopt further legislative measures in the areas covered by subparagraphs (a), (b) and (c) of that article only in so far as it may consider with due regard to the principles contained in the Universal Declaration set out in article 5 of the Convention that some legislative addition to, or variation of existing law and practice, is necessary to give effect to the provisions of article 4. In addition, the Constitution of Papua New Guinea guarantees certain fundamental rights and freedoms to all persons irrespective of their race and place of origin. The Constitution also provides for judicial protection of these rights and freedoms. Acceptance of this Convention does not therefore indicate the acceptance of obligations by the Government of Papua New Guinea which go beyond those provided by the Constitution, nor does it indicate the acceptance of any obligation to introduce judicial process beyond that provided by the Constitution.

Tonga

Secondly, the Kingdom of Tonga wishes to state its understanding of certain articles in the Convention. It interprets article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by subparagraphs (a), (b) and (c) of that article only in so far as it may consider with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention (in particular the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association) that some legislative addition to or variation of existing law and practice in those fields is necessary for the attainment of the end specified in the earlier part of article 4.

United Kingdom of Great Britain and Northern Ireland

Secondly, the United Kingdom wishes to state its understanding of certain articles in the Convention. It interprets article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by subparagraphs (a) and (c) of that article only in so far as it may consider with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention (in particular the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association) that some legislative addition to or variation of existing law and practice in those fields is necessary for the attainment of the end specified in the earlier part of article 4.

United States of America

Upon signature:

The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America.

RESERVATIONS AND DECLARATIONS TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

As set forth in UN Doc. CCPR/C/2/Rev. 2, 12 May 1989, and confirmed in May 1990

Australia

Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject-matter of the article in matters of practical concern in the interest of public order (*ordre public*), the right is reserved and no further legislative provision on these matters.

Belgium

6. The Belgian Government declares that it does not consider itself obliged to enact legislation in the field covered by article 20, paragraph 1, and that article 20 as a whole shall be applied taking into account the rights to freedom of thought, religion, freedom of opinion and freedom of assembly and association proclaimed in articles 18, 19 and 20 of the Universal Declaration of Human Rights and reaffirmed in articles 18, 19, 21 and 22 of the Covenant.

Denmark

3. Reservation is further made to article 20, paragraph 1. This reservation is in accordance with the vote cast by Denmark in the sixteenth session of the General Assembly of the United Nations in 1961 when the Danish delegation, referring

the preceding article concerning freedom of expression, voted against the prohibition against propaganda for war."

Finland

7. With respect to article 20, paragraph 1, of the Covenant, Finland declares that it will not apply the provisions of this paragraph, this being compatible with the standpoint Finland already expressed at the sixteenth session of the United Nations General Assembly by voting against the prohibition of propaganda for war, on the grounds that this might endanger the freedom of expression referred in article 19 of the Covenant.

France

7. The Government of the Republic declares that the term "war", appearing in article 20, paragraph 1, is to be understood to mean war in contravention of international law and considers, in any case, that French legislation in this matter is adequate.

Iceland

5. Article 20, paragraph 1, with reference to the fact that a prohibition against propaganda for war could limit the freedom of expression. This reservation is consistent with the position of Iceland at the General Assembly at its sixteenth session.

Ireland

Ireland accepts the principle in paragraph 1 of article 20 and implements it as far as is practicable. Having regard to the difficulties in formulating a specific offence capable of adjudication at national level in such a form as to reflect the general principles of law recognized by the community of nations as well as the right of freedom of expression, Ireland reserves the right to postpone consideration of the possibility of introducing some legislative addition to, or variation of, existing law until such time as it may consider that such is necessary for the attainment of the objective of paragraph 1 of article 20.

Luxembourg

(d) The Government of Luxembourg declares that it does not consider itself obligated to adopt legislation in the field covered by article 20, paragraph 1, and that article 20 as a whole will be implemented taking into account the rights to freedom of thought, religion, opinion, assembly and association laid down in articles 18, 19 and 20 of the Universal Declaration of Human Rights and reaffirmed in articles 18, 19, 21 and 22 of the Covenant.

Malta

The Government of Malta interprets article 20 consistently with the rights conferred by articles 19 and 21 of the Covenant, but reserves the right not to introduce any legislation for the purpose of implementing article 20.

Netherlands

The Kingdom of the Netherlands does not accept the obligation set out in provision [article 20, paragraph 1] in the case of the Netherlands.

New Zealand

The Government of New Zealand, having legislated in the areas of the advancement of national and racial hatred and the exciting of hostility or ill will against any class of persons, and having regard to the right of freedom of speech, reserves the right not to introduce further legislation with regard to article 20.

Norway

Subject to reservations ... to article 20, paragraph 1.

Sweden

Sweden reserves the right not to apply ... the provisions of article 20, paragraph 1 of the Covenant.

United Kingdom of Great Britain and Northern Ireland

The Government of the United Kingdom interprets article 20 consistently with the rights conferred by articles 19 and 21 of the Covenant and having legislative regard to matters of practical concern in the interests of public order (*ordre public*) reserves the right not to introduce any further legislation. The United Kingdom also reserves a similar right in regard to each of its dependent territories.

United States

Reservation proposed by the Bush Administration in 1991:

Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

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