

Group Libel, Hate Speech, and  
other Fighting Words: Civility and the  
Uses of Law

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Freedom of expression is a paramount constitutional right in our societies. Nowhere, however, is it an absolute one. Among its limitations we find group-libel or hate-speech laws. By their very nature, contents, and scope such laws are bound to generate among legislators, governments, and judges soul-searching and much debate. The aim of this paper is to explore some of their legal and social dimensions. In this paper, I shall focus mainly on three areas: (I) the general context; (II) the question why we need group-libel and hate-speech laws and (III) Racial incitement and the uses of the law.

I THE CONTEXT

For a long time, the main legal limitations to freedom of expression related either to the rights of the individual (for example, libel), or to the protection of morality (for example, obscenity or pornography laws), or to the preservation of public order and the vital interests of the State (for example, incitement to serious crimes or protection of defense secrets).

In the course of the twentieth century, a series of new political and social factors has led to the appearance of a new form of political discourse.

**A) The new social and political factors**

- 1) The rise of political anti-semitism;
- 2) The expression of anti-foreign, overtly xenophobic opinions and attitudes; and
- 3) Writings and public expressions directed against specific minorities.

**B) Hate-speech and group libel as a new form of political discourse**

The content is clear enough: to denigrate certain groups, or persons belonging to them; to make these groups responsible for all kinds of social problems, evils, and dangers such as unemployment, insecurity, excessive public spending, corruption of morals, decline of the national culture, threats to national identity. After the accusation comes the 'remedy': *exclusion*, that is, the denial of certain basic rights or outright discrimination in education, housing, social services, access to certain professions, employment and the like.

## II WHY WE NEED GROUP-LIBEL AND HATE-SPEECH LAWS

**A) The case against and for them**

Against specific legislation there exist two kinds of arguments.

*i) Consequential, or utilitarian arguments:*

Group-libel and hate-speech, bad as they are, express deep social and psychological currents that cannot be silenced by legislation. New legislation will give to the proponents of such doctrines the very publicity they are looking for. Such laws are a danger for freedom of expression. They may lend themselves to abuse or have a 'chilling effect' on all forms of expression. Where will the line be drawn? Such laws thus amount to a new form of censorship. Such laws might in fact damage the situation and status of the very groups we wish to protect. The best way to fight hate-speech and group-libel is a public and open discussion in what is sometimes called the 'market place of ideas'.<sup>1</sup>

<sup>1</sup> On the 'market place of ideas' see J. R. Pole's pungent remarks in 'A bad case of agoraphobia. Is there a marketplace of ideas?', *Times Literary Supplement*, 4 February, 1994.

*ii) Arguments derived from an intrinsic and principled opposition to the idea of restricting free expression*

Such restrictions are seen as deeply offensive in themselves. They represent a denial of that freedom for *all*. There is simply no right to use public power in that way, however offensive and outrageous these opinions might be, and whatever the offense, insult, or social discomfort they contain or create.<sup>2</sup>

**B) The case for specific legislation relating to group-libel and hate-speech**

I belong to those who believe that such legislation is necessary in our societies. However, I also believe that it has to be based on clear legal foundations. I shall discuss briefly these two points.

*i) Why do we need such legislation?*

We need it not only, and not even mainly, in order to protect or to defend certain groups or certain individuals, but for the well-being of *society as a whole*. This is a *political* issue, in the broadest sense of the word; one on which Governments and Parliaments must decide, and courts adjudicate.

The ultimate purpose for such laws is to maintain a minimum of *civility* in public discourse. Which form of civility? That which forbids us to attack an individual or a group of persons on the grounds of what they are, that is, for their identity.<sup>3</sup> Permitting vilification harms society as a whole. Greenawalt mentions rightly 'the long-term effects of reinforcement of feelings of prejudice and inferiority and of social patterns of domination'.<sup>4</sup> We live in a century and in societies where the use of legal instruments against what is, and is meant to be an aggression,<sup>5</sup> is fully legitimate.

<sup>2</sup> See T. Nagel, 'Personal Rights and Public Space', *Philosophy and Public Affairs*, 1995.

<sup>3</sup> See Note, 'A communitarian defense of group-libel laws', 101 *Harvard Law Review*, 682 (1988).

<sup>4</sup> K. Greenawalt, *Speech, Crime and the Uses of Language*, Oxford University Press (New York, 1989), 299.

<sup>5</sup> See A. Bickel, *The Morality of Consent*, Yale University Press, (New Haven and London, 1975), 71-3. Discussing Justice Brandeis's premise in *Whitney v. California*, that 'discussion affords ordinarily adequate protection against the dissemination of noxious doctrine' (274 U.S. 357, 375 (1927)), he writes: '... we have lived through too much to believe it.'

ii) *The legal basis for such laws may be two-fold:*

First, it may be seen as a constitutional one since the central principles at stake are those of equality, dignity<sup>6</sup> and non-discrimination. Secondly, it may be seen as resting on international law. For instance, Article 10-2 of the European Human Rights Convention allows, if certain conditions are fulfilled, restrictions of freedom of expression 'for the protection of reputation and *rights* of others'. Likewise, Article 4-a of the International Convention on the Elimination of all Forms of Racial Discrimination provides that States 'shall declare an offense 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.'<sup>7</sup>

### III RACIAL INCITEMENT AND THE USES OF THE LAW

An exploration of key legal concepts and issues will be followed by an attempt to assess group-libel and hate-speech laws.

<sup>6</sup> On the dignity of the individual in French constitutional law, see the Conseil constitutionnel's decision of 27 July, 1994, no. 94. 343/344. DC, 100; for an application in administrative law, see the two decisions of the Conseil d'Etat of 27 October, 1995, *Commune de Morsang sur Orge*, and *Ville d'Aix en Provence*, commented by the author in *Public Law* 1996, 166. On the same notion in German constitutional law, see Art. 1 (1) of the German Constitution ('The dignity of man shall be inviolable'), and K. Sontheimer, 'Principles of Human Dignity in the Federal Republic' in, *Germany and its Basic Laws. Past, Present and Future—A German-American Symposium*, P. Kirchhof and D. P. Kommers (eds.) (Nomos, Baden-Baden, 1993), 213. The dignity of man is part of the *Ewigkeit* clause in the German Constitution.

<sup>7</sup> On the legislative history of Art. 4 of the Convention, see W. McKean, *Equality and Discrimination under International Law*, Clarendon Press, (Oxford, 1983), 160. The French statute on hate-speech and group-libel was revised in 1972 after France ratified the Convention. See R. Errera, 'French Law and Racial Incitement: on the Necessity and Limits of the Legal Responses', in *Under the Shadow of Weimar. Democracy, Law and Racial Incitement in six countries*, L. Greenspan and C. Levitt (eds.) (Praeger, Westport, CT and London, 1993), 39. On the model law on incitement to racial, national or religious hatred adopted by the Consultative Assembly of the Council of Europe, see W. Mc Kean, *op. cit.*, 223.

### A. Key legal concepts and issues for legislators, governments and judges.

They include the following points:

i) Whether one thinks of racial incitement or of group-libel, criminal law has to be used. In certain countries, for example, France, criminal courts are empowered to award in the same judgment civil damages to the victims of such violations.

ii) The two main categories of offenses are group-libel and racial incitement. The latter may include incitement to violence, discrimination (unlawful acts in themselves) or hatred.

iii) On which grounds? What may be the scope of the offense? The key notions here are belonging (or not belonging) to a given ethnic group, nation, race, or religion.<sup>8</sup> Some enactments punish incitement to hatred 'against any identifiable group',<sup>9</sup> or 'against a certain part of the population'.<sup>10</sup>

iv) Should public order or public peace be taken into consideration? This is certainly the case in a number of countries.<sup>11</sup>

v) Should the relevant statutes mention intention? This is so in England<sup>12</sup> and Canada.<sup>13</sup>

vi) Should certain defenses be available, such as truth or the public interest? This is so in Canada.<sup>14</sup>

vii) Should the negation of the existence or the gross minimization of crimes against humanity or genocide be a separate offense? This is so in Switzerland,<sup>15</sup> France,<sup>16</sup> Austria,<sup>17</sup> and Israel.<sup>18</sup> In Germany the case-law relating to the implementation of art. 130 and 185 of the

<sup>8</sup> French Law on the Press (1881, as revised in 1972), art. 24, § 5, and 32, § 2; see also art. 261 *bis* of the Swiss Penal Code. In England, the Public Order Act (1986) mentions colour, race, nationality or ethnic or national origins, but not religion. The Public Order (Northern Ireland) Order (1987) includes religious belief.

<sup>9</sup> Canada, Criminal Code, Section 319 (1).

<sup>10</sup> Germany, Criminal Code, Art. 130 (1).

<sup>11</sup> Germany, Criminal Code, Art. 130; Canada, Criminal Code, Section 319 (1).

<sup>12</sup> Public Order Act, 1986, Section III, Section 18 (1) a.

<sup>13</sup> Canada, Criminal Code, Section 319 (2).

<sup>14</sup> Canada, Criminal Code, Section 319 (3).

<sup>15</sup> Swiss Penal Code, Art. 261 *bis*.

<sup>16</sup> France, Art. 24 *bis* of the Law on the Press (since 1990)

<sup>17</sup> Austrian Law no. 148, 1992.

<sup>18</sup> Israel, Denial of Holocaust (Prohibition Law) 5746-1986.

Criminal Code has led to the conviction of 'negationist' authors. The new wording of Article 194 (1) allows a prosecution for insult to be instituted without a petition 'if the insulted person was persecuted as a member of a group under the National-Socialist regime or another violent and arbitrary dominance, if the group is part of the population and if the insult is connected with a such persecution'.<sup>19</sup>

viii) Who, in addition to the State Prosecutor, may sue? This is a key issue. To rely exclusively on State Prosecutors or on individuals is not enough. Hence the interest of allowing other bodies to sue. Thus, under French law any association whose legal existence has been recognized for five years at the date of the facts and whose aim is to combat racism has *locus standi* to bring criminal proceedings (the individual's permission is needed if that person has been attacked). In Canada the Human Rights Act (1977) allows the Human Rights Commission to act if certain conditions are met.<sup>20</sup>

### B. An interim evaluation of group-libel and hate-speech legislation

It is by no means easy to assess the real impact of a given legislation. This applies to the laws mentioned above. However, a number of valuable studies offer some guidance.<sup>21</sup>

i) From a legal point of view the main challenge for hate-speech and group-libel laws (and case-law) is a constitutional one. Such a challenge has been successfully met in Germany,<sup>22</sup> in Canada,<sup>23</sup> and

<sup>19</sup> On the case-law and the history of the reform, see E. Stein, 'History against free speech. The new German law against the "Auschwitz" — and other — "lies"', 85 *Michigan Law Review*, 277 (1986).

<sup>20</sup> e.g. the use of telecommunications to spread hate-messages. On Canada, see J. Manwaring, 'Legal regulation of hate propaganda in Canada', in *Striking a Balance: Hate-Speech, Freedom of Expression and non Discrimination*, S. Coliver (ed.), Article XIX, International Centre against Censorship, Human Rights Centre, University of Essex, 1992, 106.

<sup>21</sup> *Striking a Balance*, op. cit., studies the law and practice in Australia, Canada, the Commonwealth of Independent States, Denmark, France, Germany, India, Israel, Uruguay, Netherlands, South Africa, Sri Lanka, the United Kingdom and the U.S.A. and offers a general evaluation; Under the Shadow of *Weimar*, op. cit., studies six countries (France, England, Germany, U.S.A, Israel and Canada). The late Stephen J. Roth has written a relevant analytical comparison.

<sup>22</sup> See note 17, supra and R. Hofmann, 'Incitement to national and racial hatred: the legal situation in Germany', in *Striking a Balance*, op. cit., 159.

<sup>23</sup> As shown by the *Taylor* and *Keegstra* cases. The *Zundel* case related to Section 181 of the Canadian Criminal Code punishing the wilful publication of

in Hungary,<sup>24</sup> thus leading to a reaffirmation of the central constitutional notions of equality, dignity, and non-discrimination.

However, there are countries which share the same constitutional values, but in which group-libel and hate-speech laws as we know them in Europe, would be unconstitutional. The U.S.A is a relevant example. We have to recognize here, a difference of legal and social attitudes and cultures.

Seen from the point of view of international law, the case is even stronger. As D. Kretzmer writes: '[Racism] has become the one ideology outlawed by international law'.<sup>25</sup> The case-law of the European Human Rights Commission<sup>26</sup> and that of the UN Human Rights Committee<sup>27</sup> provides an apt illustration.

It is true that group-libel and hate-speech laws have often been seen as a 'new' body of law, entirely different from other regulations, if not somewhat alien from the classical *corpus juris*. If that is so, so be it. For such laws are a creation of legislators and governments in the same way that, in many countries, the rights of privacy and personality are the products of court activity. This comparison could be pursued further.

ii) This being said, it is true that there is a tension between freedom of expression and group-libel and hate-speech laws. This has to be

statements or news known as false causing or likely to cause injury or mischief to a public interest. The Canadian Supreme Court found that section unconstitutional. On the Keegstra case (*Regina v. Keegstra*, (1990), C.C.C. (3rd) 1 (S.C.C.), see Bruce P. Elman, 'Her Majesty the Queen v. James Keegstra: the control of racism in Canada. A case-study', in *Under the Shadow of Weimar*, op. cit., 149. For a prior review of Canadian law, see Law Reform Commission in Canada, *Hate Propaganda*, Working Paper 50, Ottawa, 1986.

<sup>24</sup> See the Hungarian Constitutional Court's decision no. 30/1992 (V. 18) AB, in East European case reporter of Constitutional Law, 1995, 9, and A. Sajo's commentary, 'Hate-speech for hostile Hungarians', *East European Constitutional Review*, Spring 1994, 82. The Court holds unconstitutional art. 269 (2) of the Penal Code punishing the public use of 'offensive or denigrating expression', while holding constitutional Section 1 of the same article punishing incitement to hatred.

<sup>25</sup> D. Kretzmer, 'Freedom of Speech and Racism', 8 *Cardozo Law Review*, 445, at 458 (1987).

<sup>26</sup> See cases 8348/78 and 8406/78, *X v. Netherlands*, 21 May 1978; 9235/81, *X v. Germany*, 16 July 1982, D.R., no. 29, 1982, 194; 7777/82, *T v. Belgium*, 14 July 1983 (Spreading of 'negationist' theses); *Glimmerveen and Hagenbeck v. Netherlands*, 10 October 1979, D.R., no. 18, 1980, 187; (1979) 4 EHRR, 260. See R. Genn, 'Beyond the Pale: Council of Europe Measures against Incitement to Hatred' (1983), 13 *Israel Yearbook on Human Rights*, 189.

<sup>27</sup> See Communication 104/181, *J. R. Taylor and the WG Party v. Canada*, 6 April, 1983.

recognized by governments, legislators, and judges. The former must be careful in the drafting and wording of legal instruments; and they must take care not to change them too often. More than legal certainly is at stake here. The judges have a clear duty to implement such laws, keeping in mind their ultimate justification, through the use of appropriate reasoning.

As we all know, there is an interplay between public attitudes of governments, what Parliaments vote for, and judicial pronouncements and policy. No one here is on the side of the angels.

iii) Such laws, and the legitimate debate they give rise to, lead us beyond the classical distinctions usually employed here. We need such laws to protect certain groups and their members *and* to maintain public order (in the broader sense of the word) *and* as an affirmation of what society will not accept.

iv) One brief word about 'revisionism', outright negation or minimization of the Nazi genocide of the Jews. In a number of countries (the U.S.A, Canada, France, Britain, etc), such a negation has been the subject of books, essays, and articles.<sup>28</sup> There is no doubt at all that such writings are not only a perverse expression of anti-semitism, but also an *aggression* against the dead, the survivors, and society at large, aiming at the desecration or the destruction of the only grave of the former, that is, our memory, and the erosion of the very conscience and knowledge of the crime. Such an aggression is not to be tolerated.<sup>29</sup> However, civil law and not criminal law should be used here.

v) It is obvious that in countries which have group-libel and hate-speech laws, racial incitement will not disappear. Social attitudes and behaviour do change—for the better or for the worse—but not overnight.

The existence of these laws, their very wording and their implementation have many consequences on the public domain. In our societies as they are today, these laws express a pressing social need,

<sup>28</sup> See P. Vidal-Naquet, 'Un Eichmann de papier. Anatomie d'un mensonge', in *Les Juifs, la mémoire et le présent*, Paris, La Découverte, 1981, 193; *Les assassins de la mémoire. 'Un Eichmann de papier' et autres essais sur le révisionnisme*, id, 1987; Deborah Lipstadt, *Denying the Holocaust. The Growing Assault on Truth and Memory*, (New York, The Free Press, 1993).

<sup>29</sup> For a study of the law and practice in France, see R. Errera, 'French law and racial incitement', *Under the Shadow of Weimar*, op. cit., at 52, and 'Sur les justes limites de la liberté d'expression', *Esprit*, 1990, 81, at 91.

'because the values of equality and dignity are so central and so *vulnerable*, and the support for these constitutional values of the community here overrides a claim to freedom of expression'.<sup>30</sup>

As we approach a new century, no one is in a position to overlook what Bickel wrote more than a quarter of century ago in *The Morality of Consent*: 'There is such a thing as verbal violence, a kind of cursing, assaultive 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 undoable'.<sup>31</sup>

<sup>30</sup> K. Greenawalt, *Speech, Crime, and the Uses of Language*, op. cit., at 300.

<sup>31</sup> A. Bickel, *The Morality of Consent*, Yale University Press, (New Haven and London, 1975) at 72-3.