

## Human Rights in the Age of Ambiguity

Conference 13-15 June 2016, New York, NY

### Panel WA07- Understanding the Dynamics of Compliance with and Resistance to Human Rights

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“Forces Shaping Controversies Over the Human Right of Free Expression”

Abstract: How political frameworks shape the realization of human rights raises important theoretical and practical issues. How may constraints on human rights be justified? What political, judicial and institutional instruments may be used to regulate them? Although speech rights are thought of as among the most basic rights, their expression has often been contested by pointing to cultural factors, overriding societal needs and possible harm to societal groups. Demands for constraints on free speech have increased in recent years.

In the foundational documents of the modern human rights system, rights of free access to and expression of opinion is firmly anchored. The Universal Declaration of Human Rights (UDHR 1948) declares in 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.

Similarly, the International Covenant on Civil and Political Rights of 1976 declares in Article 19, 1 & 2 *inter alia*, that everyone shall have broad rights of holding opinions, and receiving and disseminating “ideas of all kinds.” Controversies as to exercise of these rights have arisen in part through these very texts (of the ICCPR). (ICCPR: 1976, 2016) The rights set forth in article 19 may be restricted, by law, in order to respect the rights and reputations of others and to protect national security public order, public health or morals. Moreover, article 20 asserts positive restraints in “propaganda for war or advocacy of “national, racial or religious hatred” that would incite discrimination, hostility or violence. As will be noted below, some contemporary speech controversies stem from the unclear language of these documents.

While the first operative paragraph of the Vienna Declaration and Programme of Action, adopted at the 1993 World Human Rights Conference, holds that "the universal nature of these rights and freedoms is beyond question," and the universality of human rights is a central theme in diplomatic, popular, and academic discussions alike, the scholarly as well as political implementation of such universal ideals have neither been easily achieved in practice, nor always accepted in scholarly analysis. (Vienna Declaration:1993)

My purpose in this paper is to stake out main “areas of contestation”, such as formal commitment vs. public attitudes, ‘cultural’ differences, including such subjects as blasphemy, political opposition, including by government leaders, to exercise of speech rights. I will also note some especially freighted topics, such as genocides and contested actions, and lastly, and more broadly, questions of the possible harmful effects of exercising speech rights. My examples are not systematic in mapping the current terrain of disputation but rather examples that hopefully both illuminate current problems and suggest further research as well as possible political action.

## I

A good example of some of the issues raised by speech is the study of Australian speech policies by Katharine Gelber. (Gelber 2011) Pointing to ambiguities in Australian views of democratic rights, she remarks that “Free speech is a vital democratic freedom. It is also a freedom that most Australians take for granted.” Her research suggests that the Australian public doesn’t understand why free speech is important. Lacking explicit constitutional guarantees of speech rights, Australians must grapple with changing and often ill-defined parameters of speech restraints. Much depends on the behavior of people in the legal system, the police, and other groups. An example is provided by the issue of flag burning. This is an action of protected (by Supreme Court decisions) speech in the United States, but an indictable offense in Germany under section 90a of the

criminal code regarding “defamation of the state and its symbols.” In Australia there are vague legal restraints; reaction to flag burning depends on political views of the moment and in the community.

Symbolic speech, actual speech and the issue of public defamation have been emerged as a bundled controversy in spring 2016, thanks to an unusual action by the Turkish President, Recep Tayyip Erdogan. Offended by a satirical skit broadcast on a public German television broadcaster (ZDF), he brought suit for defamation under a nineteenth century law against “defamation of organs and representatives of foreign states” (§103). Perhaps influenced in part by the EU-Turkey agreement on migrants, Chancellor Merkel granted the necessary government approval for the suit to go forward. (Giacomo 2016) In the following parliamentary debate, the government defended its stance, but pledged to work for repeal of the article by 2018 (Stützele 2016). The Hamburg court rejected some of Erdogan’s complaints, accepted others, but left final adjudication to a further process. Thus a German court worked to decide whether a satirical skit (one poem of it in particular) was protected by free speech law. Furthermore, some observers raised the issue of whether free speech protections should necessarily outweigh important foreign policy interests. One observer

(deSouza, 2016) noted that this was a purely secular defamation case, unlike many others, which raised the issue in an ethnic-religious setting.

## II

There has recently been a rising tide of complaints of religiously based defamation, often under the general heading of blasphemy. One common—and not unjustified response—is to reject the notion that criticism of particular Islamic practices or Muslim deeds amount to general disparagement or even blasphemy. A vehement defense of the right of speech to be critical on either score is that offered by the (late) Stéphane Charbonnier (“Charb”) the then editor-in-chief of *Charlie Hebdo*, in an *Open Letter* published not long before his death. As Adam Gopnik says in his “Foreword,” Charbonnier maintained “that criticizing a ideology, including an religious ideology, however vociferously, is different from inducing hatred of a people or persons.” (Charb 2016: xi.) In considering “...when does protected expression venture into the realm of hate speech, and who should determine when a particular expression qualifies as such,” S. Mark Edwards (Edwards 2015) sheds welcome light on a vital and practical question. Leave these decisions in the hands of the powerful and nothing that hurts their interests will be classified as hate speech; leave the decision to minority groups, and “censorship could run rampant.”

Inasmuch as much of the discussion has centered both on majority-Muslim states or Muslim minorities in European countries, it is helpful to begin with other examples of these problems. These may be largely divided between countries (many in Western Europe, but including our Commonwealth of Massachusetts) where such statutory provisions or court rulings date from a long ago era and those countries where such rejection of universal free speech arrangement reflect a broader reaction against human rights norms.

In the aftermath of the "Pussy Riot" controversy, the Russian Orthodox Church lobbied in 2012-2013 for a law (Art 148, Russian criminal code) against "publicly offending the feelings" of [Orthodox] believers. In 2014, the Russian blogger Viktor Krasnov was the first person to be charged under this law; he maintained innocence, claiming that while as he had expressed atheist views and disparaged the Bible, he had not attacked the Church.

(Haft 2016)

In some countries, dusty old laws defending the status and reputation of state churches have been revived to apply to cases of communal strife. Jacob Mchangama (Mchangama 2016) has pointed to recent Danish court rulings and governmental prosecutorial decisions that have expanded old blasphemy laws, under which there had been no convictions since 1946, to cover hate speech. Under section 266b of the Danish criminal code, charges have been

brought to stretch ban on insulting individual adherents to criticizing a faith as such. Mchangama sees this as part of trend to use “defamation of religion” as a means of stifling critical speech regarding religious communities. Mchangama sees this as an international effort, especially by some members of the Organization of the Islamic conference (in resolutions proposed to the UN Human Rights Council but not adopted) to broaden the ban in the ICCPR on inciting racism to include criticism of a particular religion.

A somewhat different development has taken place in Norway (Bangstad 2012; Bangstad 2014) The “racism paragraph” (§135a of the Norwegian General Penal Code was added in 1970 after ratification of the ICERD (elimination of ethnic and racial discrimination.) . Restrictions on speech calculated to grossly neglectful public hateful expression have been added. Bangstad points out however that social and political developments in Norway have not lead to an increase in prosecutions under this law. In his view, Norwegian social and political forces have been responsible for this. In anticipation of a discussion below on “hate speech,” it may be noted here that Bangstad, following Waldron, approves of limited application of hate speech restrictions as an aid to emotional and civic health for victims of verbal abuse. Like other critics of Waldron’s views (and Waldron himself), Bangstad acknowledges that the new legal barriers have not lead to significant increases in punishing “hate speakers.”

Turning to cases of laws punishing blasphemy or apostasy, a recent (2012) survey (Theodorou 2014), there are laws punishing blasphemy (variously

defined) in 22 percent of a world sample. (There are no such laws in the United States at the Federal level; there are still some state laws.) A recent study (Munshey 2015) highlighted the concentration of such laws in the Middle East-North Africa region. A ‘leader’ in this regard has been Pakistan, where there have been 702 cases registered against members of minority religious communities, which is 52% of all cases brought against 4% population. Pakistani blasphemy laws date from British colonial rule; although the Pakistani Supreme Court in 2014 held that this law applies to all religions, it is in practice used to ‘defend’ Islam. Blasphemy charges have often been brought as a tool in economic or social disputes. A recent case involved Aasia Bibi, a Christian farm worker charged with blasphemy after a dispute with Muslim fellow workers. (Bibi was sentenced to death but is still in jail.)

### III

I will now take up two examples of possible connections between hate speech restrictions and controversial political issues. The first is the long-standing prohibition in Germany of publishing a new edition of Hitler’s *Mein Kampf*. That this ban has now been lifted with the expiration of any copyright claims, and the publication of a new, carefully annotated edition, does not detract from the interesting aspects of this case. (Krisch 2016) What is involved here is the German effort to deal with the dangerous political legacy of the Hitler period. Thus German criminal law and constitutional texts both restrict expressive speech in ways that would seem to be inconsistent with Germany’s commitment to universal human rights standards.

Successive German governments have pressed for EU-wide restrictions on what is deemed “hate speech,” especially including various forms of Holocaust denial, but thus far without success. The European Court of Human Rights considered Holocaust denial ineligible for speech protection, but left implementation to states; strong objections to this line of argument from such countries as the UK and Scandinavian members have blocked moves in this direction. (Hennebel, Hochmann 2011: xvii-li, 223-226.)

This German preoccupation is further reflected in provisions of the penal code, particularly §86. (*Strafgesetzbuch* 2002) In the language of this article, whose title “Crimes Against Peace, High Treason and *Endangerment of the Democratic Rule of Law* [my ital],” shows the thinking behind these prohibitions, is stated that (§86, 1, 4) “Whoever domestically disseminates or produces, stocks, imports or exports or makes publicly accessible through electronic data files for dissemination domestically or abroad ... propaganda, the contents of which are intended to further the aims of a former National Socialist organization...”

These and other restraints are mostly still in place, although their implementation (such as the provision for banning certain political parties) have fallen into disuse. The failure to renew the ban in publishing *Mein Kampf* is due largely to a congruence of exogenous factors: generational change, the availability of the book on line (particularly from a source in Canada), and its existence in other languages (including modern Hebrew.) Still, there were (and are) voices in affected communities, including some in the Jewish community in Germany, that regret the publication of this book because of the feared emotional impact of seeing it openly displayed in book stores and news stands.

I will discuss the issue of holocaust/genocide assertion/denial only briefly—but certainly not because the subject is not worthy examining at length. It is rather because the topic, and the empirical and theoretical literature on it is so large, that it would require a separate paper to begin adequately to deal with it. (I am working on a larger project dealing with the substance, political frameworks and speech-theoretical implications of public decisions to express opinion on these topics. A thoughtful study is Altman 2012.) It may be noted here that in the case of the Armenian genocide (1915) controversies, the Turkish government has taken various positions. Thus on the one hand, it has reacted with disfavor on foreign (especially official) assertions of genocide (Casdorff 2016), it did not block publication of a path breaking account by a Turkish writer acknowledging the genocide. (Çemal 2012.)

Turning finally to the academic controversies as to the effectiveness and advisability of legal hate speech restrictions, I would begin with recognition of the difficulty in separating the closely related forms of speech, seeing that in Sindre Bangstad's phrase, hate speech is the dark twin of free speech. In the background of this discussion is the long-asserted difference between the United States as the home of free speech absolutism (thanks to the First Amendment) and the greater European and others willingness to consider the need for defenses against the harms of hate speech. A leading proponent of the view that we need defenses against the harms of hate speech is Jeremy Waldron (Waldron 2012.) In this view, hate speech weakens important, if not essential bastions of a free, democratic society. It undermines the ability to participate fully in civic life, by "...not only by intimating discrimination and violence but by reawakening living nightmares..." of what harms any given society may be capable of inflicting on a social group that has "living

nightmares” of what may happen. Moreover, public recognition of hate speech harms validates a potentially threatened group in its sense that the larger society welcomes its inclusion. (Waldron 2012: 4-5.)

Many scholars of this topic have come to take a semi-Waldron view that hate speech should be regulated, even if they do not agree on exactly how. For Katharine Gelber, for example, “Hate speech is clearly a type of speech that injures and harms discourse.” Thus regulation of such speech is needed to allow people who are objects of hate speech to participate fully in public discourse.” (Gelber 2011: 84) Gelber does not argue that free speech ought to be absolute. She regards anti-vilification laws (what are called anti-defamation elsewhere) as legitimate speech regulation; under such laws, the Holocaust denier Frederick Toben was convicted and sentenced to jail for “vilification.”

A contrasting view is that of Eric Heinze. In the US-Europe disagreement mentioned above, Heinze, while skeptical regarding hate speech laws, takes a different stance, first by stressing both the social-political environment in a particular country and time, and secondly by searching for empirical evidence of the effect of hate speech laws. (Heinze 2013) Thus Heinze distinguishes between the societal needs of a country with shaky cultural and institutional foundations for its democratic politics. He would focus the hate speech debate on what he calls LSPD (long standing, prosperous and democratic) countries. Thus I understand him to argue that while Germany may have needed the restraints discussed above, it does not necessarily need them now.

Moreover, Heinze challenges proponents of hate speech restrictions to provide empirical evidence that these laws have led to a reduction of hate *acts*. Adding to the difficulty of tracing the causal links here, he provides

evidence (from several German studies of right wing extremist groups) that restrictive laws may well act to school extremists in clever ways to obey the letters of these laws while violating their spirit and intentions.

A further example of how difficult it is to demonstrate the actual harm done by hate speech is shown by a very interesting account of a possible relationship between the use of hostile anti-Judaism expressions in medieval Europe and outbursts of savage persecution of the Jewish communities.

(Lipton 2015) That Lipton sees parallels with current events is made clear by her opening with a citation of the Attorney General, Loretta Lynch, and pointing to what “[s]ome claim” and “similar debates” related to other hate crimes.

Dealing with hate speech is further complicated by the difficulty in demonstrating a causal link between hostile speech (or other forms of expression) by person A and acts against members of the target group by person B. To paraphrase the current political cliché: when A blows a dog whistle, why are there potentially responsive dogs nearby? Why do they respond, and in what way?

I would not rule out the possibility of some connection between hate speech and hate acts— only that we need much more targeted social-psychological research into this issue. I have not sought to provide an exhaustive list of all the topics on which hate speech harm may be alleged, such as pornography. But the basic principles of seeking to maximize freedoms, acknowledging possible harms, seeking evidence for what might be best practice— these are in every case the goals champions of human rights should strive for.

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