

# Hate Speech and Freedom of Expression: Balancing Social Good and Individual Liberty

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The relationship between speech and action is one of the most complex in the law of communications. Speech plays a pivotal role in the communication of ideas, beliefs, doctrines, and schemes of action.<sup>1</sup> Verbal and symbolic messages are instrumental in the transmission of social mores and dogmas.<sup>2</sup> Those tenets then influence persons to act on the expressed views.

Free speech is quintessential for maintaining democracy because it facilitates the exchange of diverse opinions. In a representative democracy, dialogue facilitates the testing of competing claims and obtaining of diverse input into political decision making. Free speech is also essential to the enjoyment of personal autonomy.

Embodied in the Universal Declaration of Human Rights is the evocative proposition that “everyone has the right to freedom of opinion and expression”<sup>3</sup>. But beneath that level of abstraction there is anything but universal agreement. Modern democratic societies disagree on the text, content, theory, and practice of this liberty.

Hate speech that has now become a fashion and a short cut to get publicity, poses vexing and complex problems for contemporary constitutional rights to freedom of expression.

This article is proposed to discuss the notion of hate speech and the challenge posed by that for law and society. It further discusses the legal and judicial attempts that have been made at the international and national level to restrict hate speech and further to protect individual freedom of expression and speech.

**Notion of hate speech** Hate speech is speech perceived to disparage a person or group of people based on their social or ethnic group<sup>4</sup> such as race, gender, age, ethnicity, nationality, religion, sexual orientation, gender identity, disability, language ability, ideology, social class, occupation, appearance (height, weight, skin colour, etc.), mental capacity, and any other distinction that might be considered by some as a liability. The term covers written as well as oral communication and some forms of behaviour in a public setting.

The regulation of hate speech is largely a post-World War II phenomenon<sup>5</sup>. Prompted by the obvious links between racist propaganda and the Holocaust, various international covenants<sup>6</sup> as well as individual countries such as Germany<sup>7</sup> and even, in the decade immediately following the War, the United States<sup>8</sup> excluded hate speech from the scope of constitutionally protected expression.

Tsien equates “hate speech” with three other phrases: “hate propaganda”, “destructive messages”, and “antisocial oratory”<sup>9</sup>. He defines “hate speech” as “antisocial oratory that is intended to incite persecution against people because of their race, color, religion, ethnic group, or nationality, and has a substantial likelihood of causing such harm”<sup>9</sup>. He then goes on to say that “this definition does not include verbal attacks against individuals who incidentally happen to be members of an out-group”<sup>10</sup>.

Hate speech commonly relies on stereotypes about insular groups in order to influence hostile behavior towards them.<sup>11</sup> Supremacist and outright menacing statements deny that targeted groups have a legitimate right to equal civil treatment and advocate against their equal participation in a democracy.<sup>12</sup> Destructive messages are particularly dangerous when they rely on historically established symbolism, such as burning crosses or swastikas, in order to kindle widely shared prejudices. Messages that are meant to hurt individuals because of their race, ethnicity, national origin, or sexual orientation have a greater social impact than those that attempt to draw out individuals into pugilistic conflicts.<sup>13</sup> Establishing a broad consensus for large-scale harmful actions, such as those carried out by supremacist movements, relies on a form of self-expression that seeks the diminished deliberative participation of groups of the population.<sup>14</sup> Hate speech extols injustices, devalues human worth, glamorises crimes, and seeks out recruits for anti-democratic organisations.<sup>15</sup>

**Hate speech: Issues** Hate speech raises very complex questions that test the limits of free speech. There are vast differences between the regulation practised among the nations and the much more extensive regulation typical of other countries and of international covenants.

Hate speech is against the mandate of a fundamental right which is freedom of expression. Freedom of expression has five broad special purposes to serve:

It helps an individual to attain self-fulfilment.

It assists in the discovery of truth.

It strengthens the capacity of an individual in participating in decision making.

It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social

change.

All members of the society would be able to form their own beliefs and communicate them freely to others.

Hate speech obstructs these purposes. Not all contemporary instances of hate speech are alike. Any assessment of whether, how, or how much, hate speech ought to be prohibited must, therefore, account for certain key variables, namely, who and what are involved and where and under what circumstances these cases arise.

The who is always plural, for it encompasses not only the speaker who utters a statement that constitutes hate speech, but the target of that statement and the audience to whom the statement in question is addressed<sup>16</sup> which may be limited to the target, may include both the target and others, or may be limited to an audience that does not include any member of the target group.<sup>16</sup> Moreover, not all speakers are alike. This is not only because of group affiliation, but also because of other factors.

Thus, in the context of dominant majority group hate speech against a vulnerable and discriminated against minority, the impact of the hate speech in question is likely to differ significantly depending on whether it is uttered by a high government official or an important opposition leader or whether it is propaganda by a marginalised outsider group with no credibility.<sup>17</sup> Furthermore, even the same speaker may have to be treated differently, or at least may have a different impact which ought to be considered legally relevant, depending on who is the target of his or her hate message.

The what or message uttered in the context of hate speech also matters, and may or may not, depending on its form and content, call for sanction or suppression. Obvious hate speech such as that involving crude racist insults or invectives can be characterised as ‘hate speech in form’<sup>18</sup>. In contrast, utterances such as holocaust denials or other coded messages that do not explicitly convey insults, but are nonetheless designed to convey hatred or contempt, may be referred to as ‘hate speech in substance’<sup>18</sup>. At first glance, it may seem easy to justify banning hate speech in form but not hate speech in substance. Indeed, in the context of the latter, there appears to be potentially daunting line-drawing problems, as the boundary between genuine scholarly, scientific or political debate and the veiled promotion of racial hatred may not always be easy to draw. Moreover, even hate speech in form may exceptionally not be used in a demeaning way warranting suppression.<sup>18</sup>

Finally, where and under what circumstances hate speech is uttered also makes a difference in terms of whether or not it should be prohibited. As already mentioned, ‘where’<sup>19</sup> may make a difference depending on the country, society or culture involved, which may justify flatly prohibiting all Nazi propaganda in Germany but not in the United States. ‘Where’<sup>19</sup> may also matter within the same country or society. Thus, hate speech in an intracommunal setting may in some cases be less dangerous than if uttered in an intercommunal setting. Without minimising the dangers of hate speech, it seems plausible to argue that circumstances also make a difference.

**International Human Rights Obligations** Freedom of speech and expression is universally accepted as one of the most important freedoms in almost all modern progressive nations. Several international conventions and declarations guarantee these rights.<sup>19</sup>

Freedom of speech is protected as a fundamental right under all the major international covenants on human rights adopted since the end of World War II. A particularly strong stand against hate speech, which includes a command to States to criminalise it, is promoted by Article 4 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>20</sup>

International bodies charged with judicial review of hate speech cases have, by and large, embraced positions that come much closer to those prevalent in Germany than to their United States counterpart. For example, in *Faurisson v. France*,<sup>21</sup> the UN Human Rights Committee upheld the conviction of Faurisson under France’s ‘Gayssot Act’<sup>21</sup> which made it an offence to contest the existence of proven crimes against humanity. Faurisson, a French university professor had promoted the view that the gas chambers at Auschwitz and other Nazi camps had not been used for purposes of extermination, and claimed that all the people in France knew that ‘the myth of the gas chambers is a dishonest fabrication’<sup>21</sup>. The Human Rights Committee decided that Faurisson’s conviction for having violated the rights and reputation of others was consistent with the free speech protection afforded by Article 19 of CCPR. Since Faurisson’s statements were prone to foster anti-Semitism, their restriction served the legitimate purpose of furthering the Jewish community’s right to live free ‘from fear of an atmosphere of anti-Semitism’<sup>21</sup>.

The European Court of Human Rights has also upheld convictions for hate speech as consistent with the free speech guarantees provided by Article 10 of the ECHR. An interesting case in point is *Jersild v. Denmark*.<sup>22</sup> The Danish courts had upheld the convictions of members of a racist youth group who had made derogatory and degrading remarks against immigrants, calling them among other things, ‘niggers’<sup>22</sup> and ‘animals’<sup>22</sup>, and that of a television journalist who had interviewed the youths in question and broadcast their views in the course of a television documentary which he had edited. The journalist appealed his conviction to the European Court, which unanimously stated that the convictions of the youths had been consistent with ECHR standards, but which by a 12 to 7 vote held that the journalist’s conviction violated the standards in question. The convictions of the youths for having treated a segment of the population as being less than human were consistent with the limitations on free speech for ‘the protection of the reputation or rights of others’<sup>22</sup> imposed

by Article 10 of the ECHR.<sup>23</sup>

Some international law advocates believe that “hate speech” violates customary international law. ICCPR in fact forbids “any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence.”<sup>24</sup> Louise Arbour, the former UN Commissioner for Human Rights, opened an investigation of whether Denmark’s willingness to permit cartoons of Prophet Mohammed violated international law against hate speech.<sup>25</sup> She also argued that international law bans “xenophobic arguments in political discourse.”<sup>26</sup>

**Hate speech and Indian laws** Hate speech and hate writing are two mechanisms that have been systematically used in recent times, during and after elections, to whip up anti-minority hatreds and in many cases, actual violence. “Hate speech” is generally an accompaniment of the politics in the name of religion and language, and also many times it precedes the violence in India.

India has witnessed some burning cases<sup>27</sup> of hate speech from last some years and recently controversy has arisen due to some hate remarks by Mr Varun Gandhi<sup>28</sup>. Though Indian laws have ample provisions to combat such practices which are enumerated as follows.

**Constitution of India** The Constitution of India and its hate speech laws aim to prevent discord among its many ethnic and religious communities. The laws allow a citizen to seek the punishment of anyone who shows the citizen disrespect “on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever.” The laws specifically forbid anyone from outraging someone’s “religious feelings”. The laws allow authorities to prohibit means of expression which someone finds insulting.

Article 19<sup>29</sup> gives all citizens the right to freedom of speech and expression but subject to reasonable restrictions for preserving inter alia “public order, decency or morality”. The Constitution of India does not provide for a State religion. Article 25(1) states:

25. Freedom of conscience and free profession, practice and propagation of religion. “(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

Article 51<sup>ÓA(h)</sup> imposes on every citizen the duty to develop the scientific temper, humanism and the spirit of inquiry and reform.

**Criminal laws** India prohibits hate speech by several sections of the Penal Code, the Code of Criminal Procedure, and by other laws which put limitations on the freedom of expression. Section 95<sup>30</sup> of the Code of Criminal Procedure gives the Government the right to declare certain publications “forfeited” if the “publication” appears to the State Government contain any matter the publication of which is punishable under Section 142-A or Section 153-A<sup>31</sup> or Section 153-B<sup>32</sup> or Section 292 or Section 293 or Section 295-A<sup>33</sup> of the Penal Code.

**Case laws on hate speech** The Indian judiciary has come up with some landmark judgments to fight the danger posed by hate speech. In *Virendra v. State of Punjab*.<sup>34</sup> The law impugned was the Punjab Special Powers (Press) Act, 1956<sup>35</sup>. The Supreme Court struck the order about ban on entry and held that it was unreasonable because there was no time-limit for the operation of an order made against a paper and also because there was no provision made for any representation being made to the State Government. Das, C.J. observed:

If a newspaper is prevented from publishing its own view or the views of its correspondents it is certainly a serious encroachment on the valuable and cherished right of freedom of speech and expression.<sup>36</sup>

Pre-publication ban even under a court injunction can be justified in the interest of justice only when there is a clear and imminent danger to the administration of fair justice and not otherwise.<sup>37</sup>

Section 153-A IPC is invoked most often in cases related to hate speech. One of the earliest cases to discuss in detail the scope of this section was *Shib Sharma v. Emperor*<sup>38</sup> where the Oudh High Court examined whether a book entitled *Chaman Islam ki Sair* was violative of the section. The Court noted that what the author had done on quoting Islamic texts and scriptures was to,

“have collected a number of passages which may be perfectly right and harmless in their proper setting, but when disconnected or detached may seem scurrilous, indecent and highly objectionable. Any Mohamedan who reads the passages must feel them highly painful and excite his anger and disgust.

In *Babu Rao Patel v. State (Delhi Admn.)*<sup>39</sup> the Supreme Court was faced with the task of distinguishing speech violative of Section 153-A from political thesis and historical truths, which are what the author of the two articles under scrutiny, claimed they were. The Supreme Court examining the two articles held that the first entitled, “A Tale of Two Communalisms”, was

3. “an undisguised attempt to promote feelings of enmity, hatred and ill-will between the Hindu and the Muslim communities. The reference to the alleged Muslim tradition of rape, loot, violence and murder and the alleged terror struck into the hearts of Hindu minority in a neighbouring country by periodical killings, in the context of his thesis that

communalism is the instrument of a militant minority can lead to no other inference.<sup>40</sup>

Similarly on an examination of the second article entitled, "Lingering Disgrace of History", purported as a protest against naming of Delhi Roads after Moghul emperors, the Supreme Court held that it was convinced that both the articles do promote feelings of enmity, hatred and ill-will between the Hindus and Muslims on grounds of community.

In *Joseph Bain D'Souza v. State of Maharashtra*<sup>41</sup> the Bombay High Court considered a public interest litigation praying for a writ of mandamus to direct the Commissioner of Police, Bombay to register crimes under Sections 153-A and 153-B IPC against the editor and executive editor of Saamna for editorials published during the 1993 Bombay riots and for the State of Maharashtra to grant sanction under Section 196(1) for the prosecution of these cases. After examining various judgments on the section, the Bombay High Court determined that while the motive in writing the articles and editorials was irrelevant, the articles would have to be read as a whole to determine their effect.

After examining and quoting various passages from all the articles and editorials, the Court in *Joseph D'Souza*<sup>41</sup> concluded as follows:

27. "It appears that criticism is levelled against anti-national Muslims, who at the behest of Pakistani agents, poured poison in the minds of local Muslims and developed hatred in their minds against Hindus in Bombay which ultimately resulted in unprecedented riots. The main thrust of these articles is against anti-national Muslims and attitude of police and the Government. In these articles reference is also made to respect holy Koran which, according to the editor, not only belongs to the Muslims but to the whole humanity. In the said editorials appeal was also made to the Muslims to forget the past and to join mainstream of public life in India. It is true that in some of these articles due to the emotional outburst high flown and caustic language is used but this per se will not fall within the mischief of Sections 153-A and 153-B of the Code."<sup>42</sup>

In *Das Rao Deshmukh (Dr.) v. Kamal Kishore Nanasaheb Kadam*<sup>43</sup> the Supreme Court considered a poster where the appellant appealed for votes to "teach a lesson to Muslims". The Supreme Court held that:

16. "Such appeal, to say the least, was potentially offensive and was likely to rouse passion in the minds of the voters on communal basis. Such appeal to teach a lesson was also likely to bring disharmony between the two communities, namely, the Hindus and the Muslims and offended the secular structure of the country."<sup>44</sup>

The Supreme Court noted that speeches delivered in elections had to be appreciated dispassionately keeping in mind their context as the atmosphere is often surcharged with partisan feelings and emotions. Keeping these factors in mind, the Supreme Court found that the poster "cannot be justified in any manner even by giving reasonable latitudes in election speeches".

In *Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra*<sup>45</sup> the Supreme Court noted:

11. Our Constitution makers certainly intended to set up a secular democratic republic the binding spirit of which is summed up by the objectives set forth in the Preamble to the Constitution. No democratic political and social order, in which the conditions of freedom and their progressive expansion for all make some regulation of all activities imperative, could endure without an agreement on the basic essentials which could unite and hold citizens together despite all the differences of religion, race, caste, community, culture, creed and language. Our political history made it particularly necessary that these differences, which can generate powerful emotions, depriving people of their powers of rational thought and action, should not be permitted to be exploited lest the imperative conditions for the preservation of democratic freedoms are disturbed.

It is clear that Indian laws or rather their interpretation by courts tend to prove the case against hate speech restrictions.

**Comparative study** Many democracies throughout the world consider free speech to be a fundamental human right.<sup>46</sup> The common trend is, nevertheless, to enforce criminal laws prohibiting the public dissemination of discriminatory messages.<sup>47</sup> These policies are driven by the conviction that hate speech tends to incite conduct that is violent and otherwise harmful to human dignity.<sup>48</sup> A non-exhaustive list of countries that have restricted hate speech includes: Australia, Austria, Belgium, Brazil, Canada, Cyprus, Denmark, England, France, Germany, India, Ireland, Israel, Italy, Sweden, and Switzerland.<sup>49</sup> Nations that punish the use of hate propaganda weigh orators' interests to the right of free expression against both the dignitary harm to individuals and the collective harm to pluralism.<sup>50</sup> In this area of law, countries that bar the use of racially and ethnically incitable rhetoric tend to follow international norms on civility to a greater extent than the United States. The prevalent international trend to regulate hate speech is grounded in what, to borrow Martha Nussbaum's description of constitutional governance, is meant to "secure for all citizens the prerequisites of a life worthy of human dignity".<sup>51</sup>

There is a big divide between the democracies. In the United States, hate speech is given wide constitutional protection while under international human rights covenants and in other Western democracies, such as Canada, Germany, and the United Kingdom it is largely prohibited and subjected to criminal sanctions.

**USA** Freedom of speech is not only the most cherished American constitutional right, but also one of its foremost

cultural symbols.<sup>52</sup> Free speech rights in the United States are conceived as belonging to the individual against the State, and they are enshrined in the First Amendment to the Constitution as a prohibition against Government interference rather than as the imposition of a positive duty on Government to guarantee the receipt and transmission of ideas among its citizens.<sup>53</sup>

Even beyond hate speech, freedom of speech is a much more pervasive constitutional right in the United States than in most other constitutional democracies.<sup>54</sup> American theory and practice relating to free speech is ultimately complex and not always consistent.

Current judicial treatment of hate speech in the United States is of relatively recent vintage. Indeed, less than fifty years ago, in *Beauharnais v. People State of Illinois*<sup>55</sup>, the Supreme Court upheld a conviction for hate speech emphasising that such speech amounted to group defamation, and reasoning that such defamation was in all relevant respects analogous to individual defamation, which had traditionally been excluded from free speech protection.

The current constitutional standard, which draws the line at incitement to violence, was established in the 1969 *Brandenburg v. Ohio*<sup>56</sup> decision. *Brandenburg*<sup>57</sup> involved a leader and several members of the Ku Klux Klan who in a rally staged for television (in front of only a few reporters) made several derogatory remarks mainly against Blacks, but also some against Jews. The Supreme Court in a unanimous decision set aside *Brandenburg*'s criminal conviction concluding that the Klan may have advocated violence, but that it had not incited it. Significantly, in drawing the line between incitement and advocacy, the Court applied to hate speech a standard it had recently established to deal with communist speech involving advocacy of forcible overthrow of the Government.<sup>58</sup>

In *Schenck v. United States*<sup>59</sup> *Schenck* was accused of printing and circulating a pamphlet declaring that forced conscription violated the Thirteenth Amendment's prohibition against involuntary servitude.<sup>60</sup> The Court found *Schenck*'s intent was to influence men not to participate in the draft.<sup>61</sup> Therefore, the Court upheld *Schenck*'s conviction.<sup>62</sup>

In *Chaplinsky v. State of New Hampshire*<sup>63</sup> the Supreme Court upheld *Chaplinsky*'s conviction for violating a statute that forbade persons from using "offensive, derisive, and annoying" words and "derisive" names against persons in places.<sup>64</sup> Writing for the majority, Murphy, J. concluded that certain types of speech, such as "fighting words", are not, and have never been, protected by the Constitution.<sup>65</sup> Fighting words are epithets reasonably expected to provoke a violent reaction if addressed toward an "ordinary citizen".<sup>66</sup> "Such utterances are no essential part of any exposition of ideas of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>67</sup>

The most recent Supreme Court decision regarding limitations on "pure bias" laws is *R.A.V. v. City of St. Paul Minnesota*.<sup>68</sup> The majority opinion in *R.A.V.*<sup>69</sup> differed substantially from the views of the three concurring opinions. The case arose when several teenagers placed a burning cross on a Black family's front yard.<sup>70</sup> The juveniles were charged under a St. Paul Ordinance that outlawed placing symbols "such as Nazi swastikas or burning crosses" which were known to "arouse anger, alarm or resentment on the basis of race, color, creed, religion or gender", in public or private places.<sup>71</sup> Justice Scalia, writing for the majority, found that the St. Paul Ordinance violated the First Amendment because it was a form of "content discrimination".<sup>72</sup> The ordinance prohibited only those "fighting words" enumerated in the law, which forms of potentially inflammatory utterances, such as those about persons' political affiliations, were not proscribed.<sup>73</sup> While Scalia recognised the city's compelling interest in protecting the human rights of the "members of groups that have historically been subjected to discrimination",<sup>74</sup> he nevertheless held that such legislative intent could only be constitutionally exercised by a total ban of all fighting words, rather than focusing on hate speech.<sup>75</sup> Scalia's view proclaims laws specifically intended to prohibit inflammatory racist and anti-Semitic utterances unconstitutional.

The United States Federal Government and State Governments are broadly forbidden by the First Amendment of the Constitution from restricting speech<sup>76</sup>. Generally speaking, the First Amendment prohibits Governments from regulating the content of speech, subject to a few recognised exceptions such as defamation<sup>77</sup> and incitement to riot.<sup>78</sup> Even in cases where speech encourages illegal violence, instances of incitement qualify as criminal only if the threat of violence is imminent.<sup>79</sup> This strict standard prevents prosecution of many cases of incitement, including prosecution of those advocating violent opposition to the Government, and those exhorting violence against racial, ethnic, or gender minorities<sup>80</sup>. Under Title VII of the Civil Rights Act of 1964, employers may sometimes be prosecuted for tolerating "hate speech" by their employees, if that speech contributes to a broader pattern of harassment resulting in a "hostile or offensive working environment" for other employees.<sup>81</sup> In the 1980s and 1990s, more than 350 public universities adopted "speech codes" regulating discriminatory speech by faculty and students.<sup>82</sup> These codes have not fared well in the courts, where they are frequently overturned as violations of the First Amendment.<sup>83</sup> Debate over restriction of "hate speech" in public universities has resurfaced with the adoption of anti-harassment codes covering discriminatory speech.<sup>84</sup>

The US Supreme Court has recently declared that individuals who publicly burn a cross to express racial hatred are engaged in a form of "lawful political speech at the core of what the First Amendment is designed to protect".<sup>85</sup>

**UK** The United Kingdom does not have a written constitution. Nevertheless, it recognises a right to freedom of

expression through its adherence to international covenants, such as the European Convention on Human Rights, and through commitment to constitutional values inherent in its rule of law tradition.<sup>86</sup> Moreover, the United Kingdom has criminalised hate speech going back as far as the seventeenth century.

In 1936, Parliament adopted Section 5 of the Public Order Act.<sup>87</sup> This legislation, which proved useful in combating the rise of British fascism prior to and during World War II, relaxed the seditious libel standards in two critical respects: first it allowed for punishment of speech “likely” to lead to violence even if it did not actually result in violence; and, second it allowed for punishment of mere intent to provoke violence.<sup>88</sup>

After World War II, the United Kingdom enacted further laws against hate propaganda, consistent with its obligations under international covenants.<sup>89</sup> Thus, in 1965, the British Parliament enacted Section 6 of the Race Relations Act (RRA, 1965) which made it a crime to utter in public or to publish words “which are threatening, abusive or insulting” and which are intended to incite hatred on the basis of race, colour or national origin.<sup>90</sup>

The RRA, 1965 focuses on incitement to hatred rather than on incitement to violence, but it reintroduces proof of intent as a prerequisite to conviction. This makes prosecution more difficult, as evinced by the acquittal in the 1968 Southern News case.<sup>91</sup> The newspaper involved a publication of the Racial Preservation Society, which advocated the “return of people of other races from this overcrowded island to their own countries”. At trial the publishers asserted that their paper addressed important social issues and that it did not attempt to incite hatred. Because of the prosecution’s failure to establish the requisite intent, the net result of Southern News<sup>92</sup> was the dissemination of its racist views in the mainstream press, and a judicial determination that its message was legally protected expression of a political position rather than illegal promotion of hate speech.

In the United Kingdom, the Public Order Act, 1986 prohibits, by its Part 3, expressions of racial hatred, which is defined as hatred against a group of persons by reason of the group’s colour, race, nationality (including citizenship) or ethnic or national origins. Section 18 of the Act says:

A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if

- (a) he intends thereby to stir up racial hatred, or
- (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

Offences under Part 3 carry a maximum sentence of seven years imprisonment or a fine or both.

In 1986, however, Parliament added Section 5 of the Public Order Act, which made hate speech punishable if it amounted to harassment of a target group or individual, and in 1997 it enacted the Protection from Harassment Act.<sup>93</sup> These provide more tools in the British legal arsenal against hate speech, but have not thus far led to any clearer or more definitive indication of the ultimate boundaries of punishable hate speech in the United Kingdom.

A British law criminalises hateful propaganda referring “to colour, race, nationality (including citizenship) or ethnic or national origins”.<sup>94</sup> It requires prosecutors to prove either that a defendant intended the abusive, threatening, or insulting words “to stir up racial hatred” or that “having regard to all the circumstances racial hatred is likely to be stirred up thereby”.<sup>95</sup> Violations can occur in either public or private places but not where the statements are made in a dwelling to others within the same dwelling.<sup>96</sup> A 2006 Amendment to the law prohibits the public or private assertion of threats to stir up religious hatred;<sup>97</sup> however, religious criticism “even the expression of “antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents” remains a protected form of expression.<sup>98</sup>

The Racial and Religious Hatred Act, 2006 amended the Public Order Act, 1986 by adding Part 3-A. That Part says, “A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred”. The Part protects freedom of expression by stating in Section 29-J.<sup>99</sup>

**Canada** Canada is one of the democratic States that have adopted international hate speech standards in its domestic laws. That nation guarantees the freedom of expression through the Canadian Charter of Rights and Freedoms, which is its Bill of Rights.<sup>100</sup> The Supreme Court of Canada has recognised that the three values associated with the Charter’s guarantee of expression are: (1) seeking truth; (2) participating in “social and political decision making” and (3) achieving “self-fulfilment and human flourishing” in a pluralistic society.<sup>101</sup> The latter is very close to the concept of self-determination that Robert Post regards as being at the heart of free speech guarantees.<sup>102</sup> Unlike Post, however, the Supreme Court of Canada has determined that statutes punishing the spread of hate speech are in accordance with those interests.<sup>103</sup> Canada has found that safeguarding fundamental liberties is compatible with “reasonable limits prescribed by law” that are necessary to maintain “a free and democratic society”.<sup>104</sup>

The Canadian Court upheld the criminal conviction of a high school teacher who had communicated anti-Semitic propaganda to his pupils in the leading case of *R. v. Keegstra*.<sup>105</sup> Keegstra told his pupils that Jews were “treacherous”, “subversive”, “sadistic”, “money loving”, “power hungry” and “child killers”. He went on to say t

to gain sympathy.<sup>106</sup> He concluded that Jews were inherently evil and expected his students to reproduce his teachings on their exams in order to avoid bad grades.<sup>106</sup> The criminal statute under which Keegstra had been convicted prohibited the wilful promotion of hatred against a group identifiable on the basis of colour, race, religion or ethnic origin.<sup>107</sup> The statute in question made no reference to incitement to violence, nor was there any evidence that Keegstra had any intent to lead his pupils to violence.

In examining the constitutionality of Keegstra's conviction, the Supreme Court in Keegstra referred to the following concerns as providing support for freedom of expression under the Canadian Charter:

(1) seeing 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-fulfillment 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 meaning is conveyed.<sup>108</sup>

Stressing the Canadian Constitution's commitment to multicultural diversity, group identity, human dignity and equality,<sup>109</sup> the Court adopted a nuanced approach designed to harmonise these values with those embedded in freedom of expression.

Thus, the Canadian protection of freedom of expression like the American relies on the justification from democracy, on that from the pursuit of truth and on that from autonomy.

In Canada dissemination of hate propaganda seems more dangerous than its suppression as it is seen as likely to produce enduring injuries to self-worth and to undermine social cohesion in the long run.

**Germany** The contemporary German approach to hate speech is the product of two principal influences: the German Constitution's conception of freedom of expression as properly circumscribed by fundamental values such as human dignity, and by constitutional interests such as honour and personality; and the Third Reich's historical record against the Jews, and especially its virulent hate propaganda and discrimination which culminated in the Holocaust.

Germany casts freedom of expression as one constitutional right among many rather than as paramount or even as first among equals. Under the German Basic law freedom of expression must be balanced against the pursuit of dignity and group-regarding concerns.<sup>110</sup>

The German Constitutional Court's treatment of free speech claims:

First, the value of personal honour always trumps the right to utter untrue statements of fact made with knowledge of their falsity. If, on the other hand, untrue statements are made about a person after an effort was made for accuracy, the court will balance the conflicting rights and decide accordingly. Second, if true statements of fact invade the intimate personal sphere of an individual, the right to personal honour trumps freedom of speech.

But if such truths implicate the social sphere, the court once again resorts to balancing. Finally, if the expression of an opinion as opposed to fact constitutes a serious affront to the dignity of a person, the value of personal honour triumphs over speech. But if the damage to reputation is slight, then again the outcome of the case will depend on careful judicial balancing.<sup>111</sup>

In broad terms, freedom of speech like other constitutional rights in Germany is in part a negative right i.e. a right against Government<sup>112</sup> and, in part a positive right i.e. a right to government sponsorship and encouragement of free speech<sup>112</sup>. The contemporary German constitutional system is grounded in an order of objective values, including respect for human dignity and perpetual commitment to militant democracy<sup>113</sup>.

The Constitutional Court's landmark decision in the 1958 Lüth case<sup>114</sup> involved an appeal to boycott a post-war movie by a director who had been popular during the Nazi period as the producer of a notoriously anti-Semitic film. Lüth, who had advocated the boycott and who was an active member of a group seeking to heal the wounds between Christians and Jews, was enjoined by a Hamburg Court from continuing his advocacy of a boycott. He filed a complaint with the Constitutional Court claiming a denial of his free speech rights. The Constitutional Court upheld Lüth's claim and voided the injunction against him, noting that he was motivated by apprehension that the re-emergence of a film director who had been identified with Nazi anti-Semitic propaganda might be interpreted, especially abroad, to mean that nothing had changed in German cultural life since the National Socialist period.<sup>115</sup>

Germany has sought to curb hate speech with a broad array of legal tools. These include criminal and civil laws that protect against insult, defamation and other forms of verbal assault, such as attacks against a person's honour or integrity, damage to reputation, and disparaging the memory of the dead.<sup>116</sup> Although the precise legal standards applicable to the regulation of hate speech have evolved over the years,<sup>117</sup> hate speech against groups, and anti-Semitic propaganda in particular have been routinely curbed by the German courts. For example, spreading pamphlets charging 'the Jews' with numerous crimes and conspiracies, and even putting a sticker only saying 'Jew' on the posters of a candidate running for office were deemed properly punishable by the courts.<sup>118</sup>

Under current law, criminal liability can be imposed for incitement to hatred, or attacks on human dignity against individuals or groups determined by nationality, race, religion, or ethnic origin.<sup>119</sup> Some of these provisions require showing a threat to public peace, while others do not.<sup>120</sup> But even when such a showing is necessary, it imposes a standard that is easily met<sup>121</sup> in sharp contrast to the American requirement of proof of an incitement to violence.

A German criminal provision prohibits the distribution or supply of any "written materials" which describe cruel or otherwise inhuman acts of violence against human beings in a manner expressing glorification or which downplays such acts of violence or which represents the cruel or inhuman aspects of the event in a manner which violates human dignity.<sup>122</sup> Moreover, individual and group violators are subject to imprisonment for attacking the human dignity of others by: (1) inciting people to hate particular segments of the population; (2) advocating "violent or arbitrary measures against them";<sup>123</sup> and (3) "insulting them, maliciously exposing them to contempt or slandering them".<sup>124</sup> With the increasing popularity of the internet, Germany has added a new criminal provision penalising the use of computer technology to disseminate antidemocratic group propaganda.<sup>125</sup>

**Australia** Australia, which is a member of the British Commonwealth, likewise prohibits the public assertion of hatred based on a group's race, colour, or national or ethnic origin<sup>126</sup>. While the Australian Constitution does not expressly mention the freedom of speech, it is well established as an implied constitutional right<sup>127</sup>. Nevertheless, in 2004 an Australian appellate court found that as a democratic society the country may safeguard political pluralism and tolerance by prohibiting the use of insulting, humiliating, or intimidating statements that have a real chance of causing harm<sup>128</sup>. This model goes beyond the United States Supreme Court's ruling that statutes against intimidating hate speech do not violate the right to free expression,<sup>129</sup> but the Australian model is instructive because its support for hate speech regulations are more highly attuned to democratic issues than the more libertarian-oriented American jurisprudence<sup>130</sup>.

**Conclusion** Democracy, social peace and harmony through the social contract, and pursuit of the truth, are collective goods designed to benefit society as a whole. In contrast, individual autonomy and well being through self-expression are presumably always of benefit to the individual concerned without in many cases necessarily producing any further societal good.

In the present age of faster mode of communications and social networking hate speech can now almost instantaneously spread throughout the world, and as nations become increasingly socially, ethnically, religiously and culturally diverse, the need for regulation becomes ever more urgent. In view of these important changes the State can no longer justify commitment to neutrality, but must embrace pluralism, guarantee autonomy and dignity, and strive for maintenance of a minimum of mutual respect.

Commitment to these values requires States to conduct an active struggle against hate speech, while at the same time paving the way to avoiding most of the pitfalls likely to be encountered in the course of that struggle. It would of course be preferable if hate could be defeated by reason. But since unfortunately that has failed all too often, there seems no alternative but to combat hate speech through regulation in order to secure a minimum of civility.

In a democratic society, while tolerance for dissenting and contradictory expression of opinion need protection on the pretext of individual right of self-expression, but aggressive mode of expression likely to cause social disruption, spread hatred and violence in the community, cannot be allowed to be propagated. For larger social good, a little curtailment on individual freedom is permissible.

In order to maintain the integrity of its constitutional system along with harmony in society, the Government must protect both equality and free expression.

"If Nature have made men equal; that equalities is to be acknowledged: or if Nature have made men unequal; yet because men that think themselves equal, will not enter into conditions of Peace, but upon Equal terms, such equalities must be admitted. And therefore [it is a law of Nature,] that every man acknowledge other for his Equal by Nature."<sup>TM131</sup>

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â€ . Simultaneously published in the SCC Journal Section at (2011) 8 SCC J-23.

- See, David Kretzmer, "Freedom of Speech and Racism" (1987) 8 Cardozo L Rev 445, 462.

- Ibid.

- Article 19.

- Dictionary.com: Hate speech.

- See, Friedrich Klüber, "How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of Human Rights" (1998) 27 Hofstra L Rev 335, 336.

- See, e.g., Article 20 of the United Nations Covenant on Civil and Political Rights (CCPR) (1966) which provides in relevant part: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."



- See, Friedrich KÃ¼bler, *supra*, n. 5, 340-47 for a discussion of the extensive German regulation against hate speech.
- See, *Beauharnais v. Illinois*, 96 L Ed 919 : 343 US 250 (1952) (upholding constitutionality of a statute criminalising group defamation based on race or religion). Although *Beauharnais* has never been formally repudiated by the Supreme Court, it is fundamentally inconsistent with more recent decisions on the subject.
- Alexander Tsesis, "Destructive Messages: How Hate Speech Paves the Way For Harmful Social Movements" (2002) 211. Alexander Tsesis, "The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech" (2000) 40 SANTA CLARA L REV 729.
- *Ibid*.
- See, Howard J. Ehrlich, "The Social Psychology of Prejudice: A Systematic Theoretical Review and Propositional Inventory of the American Social Psychological Study of Prejudice" (1973) 21.
- See, Rory McVeigh, "Structured Ignorance and Organized Racism in the United States" (2004) 82 Social Forces 895, 902-03 (discussing how supremacist protest can harness collective action against minorities during favourable political circumstances).
- See, *RAV v. City of St. Paul Minnesota*, 120 L Ed 2d 305 : 505 US 377, 382-83 (1992) [explaining the restriction on fighting words because of their "slight social value", citing *Chaplinsky v. State of New Hampshire*, 86 L Ed 1031 : 315 US 568, 572 (1942)].
- See, Christopher J. Peters, "Adjudicative Speech and the First Amendment" (2004) 51 UCLA L REV 705, 795-96.
- Chris Demaske, "Modern Power and First Amendment: Reassessing Hate Speech" (2004) 9 COMM L & POL'Y 273, 291 (linking hate speech and hate crimes); SÃ¡vane Garibian, "Taking Denial Seriously: Genocide Denial and Freedom of Speech in the French Law" (2008) 9 Cardozo J Conflict Resol 479 (concerning the harm to democracies resulting from hate speech and genocide denial); Tsesis, *supra*, n. 9, 148 (discussing the empirical correlation between hate crimes and hate speech); Alexander Tsesis, "The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech" (2000) 40 SANTA CLARA L REV 729, 779-80.
- See generally, Gordon Allport, *The Nature of Prejudice* (1954), See also, F. Haiman, "Speech and Law in a Free Society" (1981) 87, See the Atlanta Constitution, 1-11-1998, 6A (reporting crippling effect on Ku Klux Klan of a \$37.8 million verdict over a church fire).
- For example, Neo-Nazis in the United States are so marginalised and discredited that virtually no one believes that they pose any realistic danger. In contrast, a statement (that is better qualified as anti-Semitic rather than as an instance of hate speech) to the effect that the Jews have too much influence in the United States because they control the media "which is in part true" and the banks "which is patently false" uttered by the country's highest military official at back caused quite an uproar and led to his resignation. See, *The Nation*, Vol. 247, No. 8, p. 257, 3-10-1988.
- For example, in the United States the word "nigger" is an insulting and demeaning word that is used to refer to a person that is Black. When uttered by a white person to refer to a black person, it undoubtedly fits the label "hate speech in form". However, as used among Blacks, it often serves as an endearing term connoting at once intra-communal solidarity and implicit condemnation of white racism.
- Universal Declaration of Human Rights, 1948, Article 19:  
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.
- International Covenant on Civil and Political Rights, 1966, 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 print, in the form of art, or through any other media of his choice.
- American Declaration of the Rights and Duties of Man, 1948, Article 4:  
4. Right to freedom of investigation, opinion, expression and dissemination. "Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.
- American Convention on Human Rights, 1969, Article 13:  
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 rights shall not be subject to prior censorship.  
(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 by any other means tending to impede the communication and circulation of ideas and opinions.
- African Charter on Human and Peoples' Rights, 1981, 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.
- Rome Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, 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.
- Framework Convention for the Protection of National Minorities, 1951, Article 7:  
The parties shall ensure respect for the right of every person belonging to national minorities to freedom of peaceful assembly, freedom of association, freedom of expression and freedom of thought, conscience and religion.
- European Convention on Human Rights, Article 10:  
Everyone has the right to freedom of expression.

- Article 4 provides in relevant part, that State parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form.

[State parties] shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination and also the provision of any assistance to racist activities, including the financing thereof. Shall declare illegal and prohibit organizations and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offense punishable by law.

- UN Doc CCPR/C/58/D550 of 1993 (1996).

- (1994) 19 EHRR 1.

- See, ECHR, Article 10(2).

- International Covenant on Civil and Political Rights, Article 6(5), adopted 19-12-1966, 999 UNTS 171, Article 20(2).

- See, Paul Belien, "UN to Investigate Racism of Danish Cartoonists" Brussels, J., 7-12-2005,

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- Louise Arbour, UN Commr. for Human Rights, Remarks at International Day for the Elimination of Racial Discrimination Panel Discussion (21-3-2005).

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Varma, Amit (23-12-2006) "Ravi Shastri and Section 295(a)" India Uncut <http://indiauncut.blogspot.com/2006/12/ravi-shastri-and-section-295.html> Retrieved 8-9-2009.

"Sacred text on clothes: fashion designer booked" www.nerve.in. last accessed on 10-6-2010. <http://www.nerve.in/news:25350010632> last accessed 8-12-2009.

- Rajeev Dhavan, "India Needs a Law to Check Hate Speech", Sunday, 29-3-2009 <http://www.sacw.net/article799.html> last accessed 10-6-2010.

- Article 19(1)(a) of the Indian Constitution guarantees to all its citizens the right to freedom of speech and expression. Clause (2) of Article 19, at the same time provides:

19. (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, 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.

- Section 95 CrPC provides, "95. Power to declare certain publications forfeited, and to issue search warrants for the same."

- Section 153-A. Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.

- Section 153-B. Imputations, assertions prejudicial to national integration.

- Section 295-A. Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs.

- AIR 1957 SC 896.

- It provides for: Prohibition of printing or publication of any article, report, news item, letter or any other material relating to or connected with "Save Hindi" agitation; the imposition of ban against the entry and circulation of the said papers published from New Delhi in the State of Punjab; authorising the State Government or its delegate to impose pre-censorship.

- Supra, n. 34, 900, para 10.

- Reliance Petrochemicals Ltd. v. Indian Express Newspapers, Bombay (P) Ltd., (1988) 4 SCC 592.

- AIR 1941 Oudh 310, 313.

- (1980) 2 SCC 402 : 1980 SCC (Cri) 500.

- Ibid, 404, para 3.

- 1995 Cri LJ 1316 (Bom).

- Ibid, 1328, para 27.

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- Ibid, 16.

- See e.g., Thomas D. Jones, "Human Rights: Group Defamation, Freedom of Expression and the Law of Nations" (1998) 189-224, 259-313; Kenneth Lasson, "Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society" (1997) 6 GEO MASON L REV 35, 72, 286; Kathleen E. Mahoney, "Hate Speech: Affirmation or Contradiction of Freedom

- of Expressionâ€• (1996) U ILL L REV 789, 803; Alexander Tsesis, â€œRegulating Intimidating Speechâ€• (2004) 41 HARV J O LEGIS 389, 396; Abigail Jones Southerland, Note, â€œThe Tug of War Between First Amendment Freedoms of Antidiscrimination: A Look at the Rising Conflict of Homosexual Legislationâ€• (2007) 5 REGENT J INTâ€™L L 183, 192.
- Martha C. Nussbaum, â€œConstitutions and Capabilities: â€˜Perceptionâ€™ Against Lofty Formalismâ€•, (2007) 121 HARV J.
  - Ibid.
  - See, Lee Bollinger, â€œThe Tolerant Society: Freedom of Speech and Extremist Speech in Americaâ€• (1986) 7.
  - The First Amendment provides, in relevant part, that â€œCongress shall make no law ... abridging the freedom of speech or of the press â€˜.â€•
  - For example, flag burning see Texas v. Johnson, 105 L Ed 2d 342 : 491 US 397 (1989) a crude parody of a church leader, Hustler Magazine v. Falwell, 99 L Ed 2d 41 : 485 US 46 (1988), and publication of sensitive classified diplomatic information susceptible of adversely affecting sensitive peace negotiations, New York Times Co. v. United States, 29 L Ed 2d 822 : 403 US 713 (1971), were all held to amount to protected speech.
  - 96 L Ed 919 : 343 US 250 (1952).
  - 23 L Ed 2d 430 : 395 US 444 (1969).
  - Ibid.
  - See, Yates v. United States, 1 L Ed 2d 1356 : 354 US 298 (1957) (conviction for mere advocacy held unconstitutional).
  - Schenck v. United States, 63 L Ed 470 : 249 US 47 (1919).
  - Ibid, 48-49.
  - Ibid, 51.
  - Ibid, 53.
  - 86 L Ed 1031 : 315 US 568 (1942).
  - Ibid, 569 (reciting the relevant ordinance).
  - See, ibid, 571-72.
  - See, Cohen v. California, 29 L Ed 2d 284 : 403 US 15, 20 (1971).
  - Supra, n. 63, 572.
  - 120 L Ed 2d 305 : 505 US 377 (1992).
  - Ibid.
  - See, ibid, 379.
  - St. Paul, Minn., Legis Code Â§ 292.02 (1990), cited in supra, n. 68, 380.
  - Supra, n. 68, 387.
  - Ibid, 391.
  - Ibid, 395.
  - See, ibid, 394-95.
  - See, e.g., Gitlow v. People of the State of New York, 69 L Ed 1138 : 268 USA 652 (1925), incorporating the free speech clause.
  - Unfettered Press: Libel Law in the United States.
  - US CODE: Title 18,2101. Riots.
  - â€œHate Speech or Free Speech? What much of West Bans is Protected in USâ€•, The New York Times.
  - See, e.g., Supra, n. 58, Supra, n. 56.
  - See, e.g., Meritor Savings Bank Fsb v. Vinson, 91 L Ed 2d 49 : 477 US 57 (1986), Patterson v. McLean Credit Union, 99 L Ed 2d 879 : 485 US 617 (1989).
  - Free speech on public college campuses â€˜ Topic available at firstamendmentcenter.org.
  - See, e.g., Doe v. University of Michigan, 721 F Supp 852 (1989), UWM Post v. Board of Regents of University of Wisconsin, 774 F Supp 1163 (1991), Dambrot v. Central Michigan University, 55 F 3d 1177 (1995), Corry v. Stanford, (1995).
  - [http://en.wikipedia.org/wiki/Hate\\_speech](http://en.wikipedia.org/wiki/Hate_speech) last accessed on 12-6-2010.
  - Virginia v. Black, 538 US 343, 365 (2003).
  - 72 See, ECHR, Article 10, and the decision by the House of Lords (sitting as a court of law) in R. v. Secy. of State for the Home Dept., ex p Brind, (1991) 1 AC 696 : (1991) 2 WLR 588 : (1991) 1 All ER 720 (HL) (freedom of expression considered a basic right under both written constitutions). Furthermore, through adoption of the Human Rights Act of 1998, which became effective in October 2000, the United Kingdom has incorporated ECHR, Article 10 into domestic law, thus making it directly applicable before British courts. See, Thomas Morton, Free Speech v. Racial Aggravation, (1999) 149 New LJ 1198.
  - POA, 1936, Ch. 6, Â§ 5.
  - See, Nathan Courtney, â€œBritish and United States Hate Speech Legislation: A Comparisonâ€• (1993) 19 Brook J Intâ€™L L 731.
  - Ibid, 733.
  - RRA, 1965, Ch. 73 Â§ 6 (1).
  - This is an unreported case discussed in The London Times, 28-3-1968 Edn., 2.
  - Ibid.
  - See, Public Order Act, 1986, Ch. 64 Â§ 5-6; Protection From Harassment Act, 1997, Ch. 40 Â§ 7.
  - Public Order Act, 1986, Ch. 64, Â§ 17 (UK) [http://www.opsi.gov.uk/acts/acts1986/pdf/ukpga\\_19860064\\_en.pdf](http://www.opsi.gov.uk/acts/acts1986/pdf/ukpga_19860064_en.pdf) last accessed 10-6-2010.

- Ibid, Â§ 18(1).
  - Ibid, Â§ 18(2).
  - Racial and Religious Hatred Act, 2006, Ch. 1, Â§ 29B (UK)
- [http://www.opsi.gov.uk/acts/acts2006/ukpga\\_20060001\\_en\\_1](http://www.opsi.gov.uk/acts/acts2006/ukpga_20060001_en_1) last accessed 10-6-2010.
- Ibid, Â§ 29J.
  - Nothing in this part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.
  - Switzman v. Elbling, 1957 SCR 285, 326 (Can) (The right of free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy such as ours.)
  - R. v. Keegstra, (1990) 3 SCR 697, 728 (Can).
  - Robert C. Post, "Racist Speech, Democracy, and the First Amendment" (1991) 32 WM & MARY L REV 267, 325-26, 281.
  - Supra, n. 101, 728.
  - Can Charter of Rights and Freedoms, Constitution Act, 1982, Pt. I, Â§ 1.
  - Supra, n. 101.
  - Ibid, 714.
  - Ibid, 713.
  - Ibid, 728.
  - Ibid, 736.
  - The values underlying the Basic Law's approach of freedom of expression were discussed by the German Constitutional Court in the landmark 1<sup>st</sup> case, (1958) 7 BVerfGE 198. (the Basic Law "establishes an objective order of values ... which centers upon dignity of the human personality developing freely within the social community....") (translation by Donald Kommers, in his The Constitutional Jurisprudence of the Federal Republic of Germany).
  - Donald Kommers, 107, 424.
  - Ibid, 386.
  - Neither Article 1 of the Basic Law which enshrines human dignity nor Article 21 which establishes militant democracy are subject to amendment and are thus made permanent fixtures of the German constitutional order.
  - (1958) 7 BVerfGE 198.
  - Translation by Donald Kommers, in op cit, 367.
  - See, Friedrich KÃ¼bler, supra, n. 5, 340.
  - See, ibid, 340-47 for an account of the most important changes.
  - See, ibid, 343-44.
  - See, ibid, 344-34.
  - Ibid, 345.
  - See, ibid, 344, 32.
  - Strafgesetzbuch [StGB] [Penal Code] Dec 2007, Â§ 131(1) (F.R.G.), translated in The German Criminal Code: A Modern English Translation 116 (Michael Bohlander trans, 2008).
  - StGB Â§ 130(1).
  - StGB Â§ 130.
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  - Bropho v. Human Rights & Equal Opportunity Commission, (2004) 204 ALR 761, para 62 (Aust).
  - See Lange v. Australian Broadcasting Corp., (1997) 189 CLR 520, 523-24 (Aust); Australian Communist Party v. Commonwealth, (1951) 83 CLR 1, 262-63 (Aust); Kathleen E. Foley, "Australian Judicial Review" (2007) 6 WASH U GLOBAL STUD L REV 281, 313.
  - Supra, n. 126, para 65.
  - Supra, n. 85, 362 (holding that a Virginia statute banning cross burning with intent to intimidate did not violate the free speech clause of the First Amendment).
  - See, William Buss, "Constitutional Words About Words: Protected Speech and 'Fighting Words' Under the Australian and American Constitutions" (2006) 15 TRANSNAT'L & CONTEMP PROBS 489, 494; GE Carmi, "Dignity-The Enemy Within" (2007) 9 Journal of Constitutional Law 958, 965-966; Carni, supra, n. 217, 965-66; Ambika Kumar, Note, "Using Courts to Enforce the Free Speech Provisions of the International Covenant on Civil and Political Rights" (2006) 7 CHI J INT'L L 351, 357, 43.
  - Richard Tuck (Ed.), Thomas Hobbes: Leviathan (1651) Ch XIV, 91-92; Ch XV, 107 (Cambridge University Press 1991).