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**The Law of Holocaust Denial in Europe:  
Towards a (qualified) EU-wide Criminal Prohibition**

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**The Law of Holocaust Denial in Europe:  
Towards a (qualified) EU-wide Criminal Prohibition**

By

*Laurent Pech*\*

**Abstract:** A majority of EU countries have long considered that the right to freedom of expression precludes the criminalization of Holocaust denial per se. The full implementation of the 2008 EU *Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law* (hereinafter: the EU FD on racism) will, however, considerably harmonizes the law of Holocaust denial in Europe. While several provisions of the EU FD on racism offer a series of legal options enabling any EU country to limit the scope of national provisions criminalizing “genocide denial,” it remains that all EU Member States are now under the legal obligation to criminalize genocide denial when it is carried out either in a manner likely to incite to violence or hatred or in a manner likely to disturb public order or which is threatening, abusive or insulting. Before offering a critical review of the EU FD on racism and arguing that the political necessity of laws punishing genocide denial and the legal need for an EU-wide prohibition may be seriously questioned, this paper will contend that the legal reasoning developed by national courts in “militant democracies” is far from convincing and that the European Court of Human Rights should have refrained from labeling the Holocaust a clearly established historical fact whose denial constitutes ipso facto an “abuse of right”.

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When the European Commission issued its Proposal for a Council Framework Decision on combating racism and xenophobia in November 2001,<sup>1</sup> only a minority of EU Member States (ten out of twenty seven<sup>2</sup>) had national laws explicitly aimed at punishing the denial of the Holocaust and/or other genocides and crimes against humanity. Some European countries, while not possessing legal provisions specifically addressing Holocaust denial, were nonetheless willing to punish such utterance on the basis of general provisions dealing with what may broadly be described as “hate speech”.<sup>3</sup> As a result, and contrary to a prevalent belief in countries where Holocaust denial is subject to specific criminal sanctions, while all EU Member States have legislation outlawing hate speech, a majority of EU countries have long considered that the fundamental right to freedom of expression *inter alia* precludes the criminalization of Holocaust denial per se. By contrast to this “liberal” practice, public authorities in countries still haunted by their “dark past” or faced with the resurgence of extreme-right forces have shown less reluctance to enact legislation aimed at Holocaust deniers.

As this paper will demonstrate, the full implementation of the recently adopted EU *Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law* (hereinafter: the EU FD on racism) will radically alter the legal landscape in Europe.<sup>4</sup> The militant democracies’ camp, however, did not completely triumph. While the EU FD on racism considerably harmonizes the law of Holocaust denial in Europe by compelling all EU Member States to punish it along with other genocides – another striking change – several provisions of the FD offer a series of

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<sup>1</sup> Proposal for a Council Framework Decision on combating racism and xenophobia, COM(2001)664, OJ C 75 E, 26 March 2002, p. 269.

<sup>2</sup> In 2001, those ten countries were Austria, Belgium, the Czech Republic, France, Germany, Lithuania, Poland, Romania, Slovakia and Spain. For an outline of all national legal provisions dealing with Holocaust denial in Europe, see M. Whine, “Expanding Holocaust Denial and Legislation Against It”, in I. Hare and J. Weinstein (eds), *Extreme Speech and Democracy* (OUP, 2009), p. 540 et seq.

<sup>3</sup> As noted by T. McGonagle, the term hate speech, although it enjoys widespread and largely uncontested currency nowadays, does not lend itself easily to legal definition. The European Court of Human Rights has referred to it for the first time in 1999 but is yet to precisely define it. T. McGonagle, “International and European Legal Standards for Combating Racist Expression: Selected Current Conundrums,” in The European Commission against Racism and Intolerance (ECRI), *Expert Seminar: Combating Racism While Respecting Freedom of Expression*, Strasbourg, 16-17 November 2006, 2007, pp. 42-44. In this paper, “hate speech” is used as a shorthand to refer to all legal provisions, such as criminal provisions on insult or defamation, incitement to hatred, etc., that may be relied on to punish racist utterances.

<sup>4</sup> OJ L 328/55 [2008]. Member States shall take the necessary measures to comply with the provisions of the EU FD on racism by 28 November 2010.

legal options enabling any Member State to limit the scope of national provisions criminalizing “genocide denial”.<sup>5</sup> Yet it remains that all EU Member States are now under the legal obligation to criminalize genocide denial when it is carried out either “in a manner likely to incite to violence or hatred” or “in a manner likely to disturb public order or which is threatening, abusive or insulting”.

Before offering a critical review of the EU FD on racism and arguing that the political necessity of laws punishing genocide denial and the legal need for an EU-wide prohibition may be seriously questioned, it is essential to first review why and to what extent national approaches on the question of Holocaust denial have diverged. This review will help determine the national model(s) the drafters of EU FD on racism sought to emulate. It will also prove, on the one hand, that scholars were not entirely right to oppose an American approach to a European model as regards hate speech – if one agrees to include Holocaust denial in this category<sup>6</sup> – and, on the other hand, that even among EU countries with criminal provisions aimed at punishing Holocaust denial, these provisions have been diversely drafted and interpreted. What is striking, however, is that national courts, in militant democracies, with the exception of the Constitutional Court of Spain in a 2007 judgment, have invariably upheld the compatibility of Holocaust denial

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<sup>5</sup> “Holocaust denial” or “genocide denial” will be used as shorthand to describe any utterance that denies, downplays or trivializes crimes of genocide or crimes against humanity.

<sup>6</sup> The existence of a clear “philosophical” divide between the US and most European democracies cannot, however, be denied when one compares the modern case law of the US Supreme Court to the case law of the European Court of Human Rights and national constitutional courts. To put it concisely and at the risk of oversimplification, the case law in Europe generally reflects, when it comes to reviewing restrictions on “extremist speech,” the rejection of the presuppositions inherent to what may be labeled the Holmesian approach, which is dominant in the US and according to which (i) “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market,” 250 US 616 (1919), p. 630 (Holmes, J., dissenting) and (ii) “[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence,” 274 US 357 (1927), p. 377 (Brandeis and Holmes, JJ., concurring). For further analysis, see e.g. L. Pech, *La liberté d’expression et sa limitation* (LGDJ, 2003); E. Barendt, “The First Amendment and the Media”, in I. Loveland (ed.), *Importing the First Amendment: Freedom of Speech and Expression in American, English and European Law* (Northwestern University Press, 1999), p. 29; S. Douglas-Scott, “The Hatefulness of Protected Speech: A Comparison of the American and European Approaches”, 7 *William & Mary Bill of Rights Journal* 305 (1999); M. Rosenfeld, “Hate Speech in Constitutional Jurisprudence: A Comparative Analysis”, 24 *Cardozo Law Review* 1523 (2003); R. Krotoszynski, *The First Amendment in Cross-Cultural Perspective: A Comparative Legal Analysis of the Freedom of Speech* (New York University Press, 2006).

laws with the right to freedom of expression. This paper will argue that the legal reasoning developed by German and French courts is far from being entirely convincing and that the European Court of Human Rights should have refrained from labeling the Holocaust a clearly established historical fact whose denial constitutes ipso facto an “abuse of right”. To that extent, one may welcome the fact that the EU FD on racism preserves the right of each Member State not to apply this jurisprudence and punish genocide denial “only” where genocide deniers directly incite to violence or hatred. One cannot completely exclude, however, that EU legislative intervention might either result in the eventual criminalization of denial of crimes committed by communist regimes at EU level and/or tempt national legislatures to use the force of the law to ban alternative interpretations of particular historical events in order to gain the favor of some vocal minorities.

### **1. The Situation before 9/11:<sup>7</sup> United in Diversity**

Most EU Member States have long lacked *specific* criminal provisions aimed at Holocaust deniers. This obviously shows that there is “no unanimity among Member States on the issue of the incrimination of the conduct of publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes.”<sup>8</sup> In fact, only in those countries one may describe as militant democracies was the denial of the Holocaust expressly criminalized.

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<sup>7</sup> It may seem curious at first to link the 9/11 terrorist attacks in the United States (US) to EU legislative development. Yet this tragic event quickly convinced most, if not all, national governments of EU Member States to push for the adoption of numerous laws and regulations in the area commonly known as Justice and Home Affairs. With respect to this paper’s topic, it may be sufficient to cite the Commission’s proposal to give an idea how tragic external events sometimes influence or motivate the adoption of legislation for which there was little consensus beforehand: “Furthermore, the conclusions and the plan of action adopted by the Extraordinary European Council meeting held on 21 September 2001 to analyse the international situation following the terrorist attacks in the United States, expresses the European Union’s commitment with the international community to pursue the dialogue and negotiation with a view to building at home and elsewhere a world of peace, the rule of law and tolerance. In this respect, the EU emphasises the need to combat any nationalist, racist and xenophobic drift,” Proposal for a Council Framework Decision on combating racism and xenophobia, COM(2001)664, OJ C 75 E, 26 March 2002, p. 269.

<sup>8</sup> EU Network of Independent Experts on Fundamental Rights, *Combating Racism and Xenophobia Through Criminal Legislation: The Situation in the EU Member States*, Opinion no. 5-2005, 28 November 2005, p. 79.

### *1.1 The Principle: The Lack of Criminal Provisions Prohibiting the Denial of the Holocaust*

In an exhaustive report on *Combating Racism and Xenophobia through Criminal Legislation*, the EU Network of Independent Experts on Fundamental Rights distinguishes between countries with *specific* criminal provisions incriminating Holocaust denial and countries where *general* criminal provisions can be used to sanction this conduct.<sup>9</sup> The report refers to Finland, Hungary, Italy, Ireland, Latvia, Greece, Malta, Poland the Netherlands, Sweden and the United Kingdom as examples of countries where “revisionist ideologies” could be punished under general criminal provisions dealing with the maintenance of public peace or those dealing with statements and behaviors motivated by racist intent. For instance, in the United Kingdom, denying the Holocaust, while not an offence under British law, might nonetheless be prosecuted if – and only if – it is done in a manner that also constitutes incitement to racial hatred as defined under British law,<sup>10</sup> while in the Netherlands, the Supreme Court has authorized the sanction of Holocaust denial when it amounts to insult or defamation of Jews.<sup>11</sup>

There are also countries where the right to freedom of expression, as interpreted by the national constitutional court, appears to exclude any criminalization of Holocaust denial per se. While the report previously mentioned refers to Italy or Greece as examples of countries where general criminal provisions could be used to sanction Holocaust deniers, other studies suggest that this would not be constitutionally conceivable unless their conduct pose a “clear and present danger” of violence.<sup>12</sup> It would also appear evident that in countries such as Denmark and Hungary, where the case law clearly reflects the

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid., p. 66. To the best of our knowledge, no Holocaust denier has ever been successfully prosecuted in the UK on the basis that his speech constituted racist propaganda likely to stir up racial hatred. This seems to explain why a member of the House of Commons thought useful to introduce a Bill to make it a criminal offence to claim, whether in writing or orally, that the policy of genocide against the Jewish people committed by Nazi Germany did not occur on the basis that such utterance is always animated by the intent to stir up racial hatred. See *HC Deb.*, 29 January 1997, vol. 289 cc. 370-372.

<sup>11</sup> Ibid., p. 81. The Report refers to a judgment of the *Hoge Raad* issued on November 25, 1997.

<sup>12</sup> See the Greek and Italian national reports in Table Ronde “Constitution et Liberté d’Expression,” *Annuaire International de Justice Constitutionnelle*, vol. XXIII-2007, Economic-PUAM, 2008, p. 265 and p. 327 respectively. The Italian Report further indicates (p. 332) that, in 2007, a Bill aimed at criminalizing Holocaust denial was introduced by the Ministry of Justice but was later withdrawn following strong opposition from historians who feared for their academic freedom.

strong influence of First Amendment jurisprudence, that freedom of expression excludes the sanction of revisionist views as such. Yet, as will be shown in this paper's final section, EU legislative intervention means that all EU Member States will eventually have to criminalize genocide denial. Notwithstanding the EU FD on racism, some countries already had to amend their criminal codes following their decision to ratify the Council of Europe's *Additional Protocol to the Convention on cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems*. This explains, for instance, why Slovenia and Cyprus recently passed legislation criminalizing the distribution, through a computer system, of material which denies, grossly minimizes, approves or justifies acts constituting genocide or crimes against humanity.<sup>13</sup>

### *1.2 The Exception: The Express Criminalization of Holocaust Denial in "Militant Democracies"*

The long and difficult gestation of the EU FD on racism was essentially a reflection of the fact that only a minority of European countries had clearly opted for a "militant" stance on the issue of Holocaust denial. What one may call the weight of the past explains, if not justifies, why, in countries such as Germany, Austria or the Czech Republic, the dissemination of such views is expressly subject to criminal sanctions. Following the contemporary resurgence of extreme-right parties and groups in a context of growing immigration, countries such as France, Belgium or Spain also felt the need to legislate in the 1990s. In both cases, however, public authorities appear to have been clearly inspired by the ancient philosophy famously espoused by the French revolutionary Saint-Just, "*pas de liberté pour les ennemis de la liberté*" (no freedom to the enemies of freedom). The fear is that, as past historical episodes would allegedly demonstrate, any tolerance for antidemocratic speech may endanger the very existence of democratic regimes. This, in itself, reveals how the denial of the Holocaust is generally understood: as a type of speech or conduct motivated by a racist *as well as* antidemocratic intent. As a result, it may be prohibited without violating the deniers' fundamental rights and, in particular, their right to freedom of expression. This reasoning

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<sup>13</sup> See Report on *Combating Racism and Xenophobia Through Criminal Legislation*, *op. cit.*, pp. 81-82.

has naturally been subject to recurrent judicial challenges. These challenges have invariably failed with the exception of a recent judgment of the Spanish Constitutional Court. Before examining this controversial case, the German and French laws and relevant case law will first be considered in order to emphasize the relative diversity of the criminal provisions in force at the national level before recent international and European interventions.

### 1.2.1 Punishing the “Auschwitz Lie” in Countries Haunted by their Dark Past: The Example of Germany

Germany is often described as the archetype of the “militant democracy,” in other words, a country whose constitution is based on the principle of a “democracy capable of defending itself” (*streitbare Demokratie*).<sup>14</sup> This essentially refers to the fact that the framers of the 1949 Basic Law, mindful of what happened under the Weimar Republic, decided to include provisions that allow public authorities to prevent individuals or groups wishing to abolish Germany’s “free democratic constitutional order” from abusing the rights and freedoms guaranteed by the Constitution.<sup>15</sup> More generally, two key ideas largely explain why the German Federal Constitutional Court has constantly ruled that criminal convictions for denying the Holocaust are fully compatible with the fundamental right to freedom of expression:<sup>16</sup> On the one hand, German democracy must be ready to

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<sup>14</sup> See e.g. D. Oberndörfer, “Germany’s militant democracy: An attempt to fight incitement against democracy and freedom of expression through constitutional provisions. Historical and overall record”, in D. Kretzmer and F. Kershman Hazan (eds.), *Freedom of Speech and Incitement Against Democracy* (Kluwer, 2000), p. 237. Germany, however, is far from being the only example of a democracy where the long-term survival of democratic institutions has been used as a rationale to justify short-term deprivation of political rights to anti-democratic actors. See e.g. G. Fox and G. Nolte, “Intolerant Democracies”, 36 *Harvard International Law Journal* 1 (1995).

<sup>15</sup> To give a single example, Article 21 of the Basic Law hence authorizes the banning of political parties who pursue “anti-constitutional” aims. It follows from the Constitutional Court’s judgment on the banning of the former Communist Party (KPD), that political parties must not, for instance, advocate the dictatorship of the proletariat or approve recourse to force in order to overthrow the constitutional system. See e.g. BVerfGE 5, 85; BVerfGE 39, 334.

<sup>16</sup> See Article 5 of the Basic Law: “(1) Everyone shall have the right freely to express and disseminate his or her opinions in speech, writing and pictures and freely to obtain information from generally accessible sources. Freedom of the press and freedom of reporting on the radio and in films shall be guaranteed. There shall be no censorship.

(2) These rights shall be subject to the limitations laid down by the provisions of the general laws and by statutory provisions aimed at protecting young people and to the obligation to respect personal honour.

(3) There shall be freedom of art, science, research and teaching. Freedom of teaching shall not release citizens from their duty of loyalty to the Constitution.”

defend itself against those who wish to subvert its free and democratic constitutional system, and, on the other hand, freedom of expression must be interpreted in light of the cardinal value on which the constitutional system is based, i.e. the principle of respect for human dignity.

Before dealing with the Court's case law, it may be useful to briefly look at the criminal provisions on the basis of which Holocaust deniers have been prosecuted and, in most cases, sanctioned. In what may come as a surprise, the German Criminal Code lacked any specific provision aimed at punishing the so-called Auschwitz lie (*Auschwitzlüge*) until 1994. A previous attempt in 1985 failed to expressly criminalize this act. It was agreed, however, and to simplify, to insert a new provision (Section 130) aimed at punishing incitement to hatred against segments of the population.<sup>17</sup> This does not obviously imply that Holocaust deniers, before 1985, could not be prosecuted and sanctioned. Numerous successful prosecutions were conducted, not only on the basis of general criminal provisions dealing with breaches of public order,<sup>18</sup> insult or defamation,<sup>19</sup> or the disparagement of the memory of deceased persons,<sup>20</sup> but also on the basis of provisions of the Civil code.<sup>21</sup> This proved satisfactory until a controversy erupted about a decision of the Federal Supreme Court – not to be confused with the Federal Constitutional Court – holding that publication of another person's denial of the Holocaust could not constitute incitement to racial hatred. As a result and as previously mentioned, a new Section 130 was inserted into the German Criminal Code in 1985 to more effectively punish incitement to hatred. For symbolic more than legal reasons, Holocaust denial was finally clearly outlawed in 1994 although the Holocaust is yet not explicitly mentioned and singled out: Section 130(3) now states that “whoever, publicly or at a meeting, approves

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<sup>17</sup> For further analysis and references, see E. Stein, “History Against Free Speech: The New German Law Against the “Auschwitz”-and Other-“Lies”,” 85 *Michigan Law Review* 277 (1986).

<sup>18</sup> See in particular Section 130(1): “Whosoever, in a manner capable of disturbing the public peace incites hatred against segments of the population or calls for violent or arbitrary measures against them; or assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population, shall be liable to imprisonment from three months to five years.”

<sup>19</sup> See Sections 185 and 186 of the Criminal Code.

<sup>20</sup> See Section 189 of the Criminal Code: “Whosoever defames the memory of a deceased person shall be liable to imprisonment of not more than two years or a fine.”

<sup>21</sup> For a good example, see the European Commission of Human Rights' decision in the case of *X v. Germany*, no. 9235/81, Commission decision of 16 July 1982, DR 29, p. 194 (the applicant was subject to civil and criminal proceedings following the display of pamphlets denying the Holocaust).

of, *denies or trivializes an act committed under the regime of National Socialism ... in a manner likely to disturb the public peace*, shall be liable to imprisonment up to five years or a fine” (our emphasis). The criminal law arsenal was further strengthened in 2005. According to the new Section 130(4), “whoever, publicly or at a meeting, disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment of not more than three years or a fine.”

These provisions call for several remarks. Firstly, the *denial* as well as the *trivialization* of the Holocaust or any of the crimes against humanity committed by the Nazis may be punished. The notion of trivialization (or of downplaying), being far from self-evident, has naturally required further judicial clarification. In practice, courts have interpreted it in a broad fashion in order to guarantee the sanction of those who seek, for instance, to play down the number of victims of Nazi gas chambers or to qualify the responsibility of Nazi officials. This raises difficult questions as far as freedom of expression is concerned. By contrast, the fact that Section 130(4) also punishes speech approving, glorifying or justifying Nazi crimes or rule is both conventional and uncontroversial. Secondly, the sole crimes committed by the Nazis are expressly mentioned.<sup>22</sup> Accordingly, it would seem that one can publicly deny, say, the existence of the Armenian genocide as this horrendous episode did not take place under the rule of the National Socialist regime. It goes without saying that statements of this nature could nonetheless be prosecuted were the speaker to violate provisions on incitement to hatred, defamation, etc. Finally, it is worth emphasizing that the sanction of Holocaust denial, formally speaking, is subject to one restrictive condition: statements denying or trivializing Nazi crimes must be made in a manner capable of disturbing public peace. One can, however, easily deduce from the case law that German courts operate on the presumption that any utterance denying or

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<sup>22</sup> Similarly, in Austria, the 1945 National Socialist Prohibition Act, as amended in 1992, specifically and exclusively targets the crimes committed by the Nazis. Anyone who publicly denies, grossly trivializes, approves or seeks to justify the National-Socialist genocide or other National-Socialist crimes against humanity, may be punished by a prison sentence of between one and ten years. A different historical experience explains why the Czech Republic possesses a criminal provision (Section 261A of the Criminal Code) that punishes not only those who publicly deny, dispute, approve or attempt to justify Nazi genocide or other crimes against humanity committed by Nazis but also those who publicly deny, dispute, approve or attempt to justify Communist genocide or other crimes committed by Communists.

downplaying Nazi crimes invariably poses, in itself, a threat to public peace. In dramatic contrast with the American standard of “clear and present danger”, the mere existence of a potential and abstract threat is sufficient.<sup>23</sup> As for the position adopted by the Federal Constitutional Court on the question of whether the criminalization of Holocaust denial is compatible with freedom of expression, one may also describe it as quite “absolutist”.

While space constraints preclude any comprehensive overview of the Constitutional Court’s case law on freedom of expression,<sup>24</sup> it is sufficient to stress here that the Court has referred to freedom of expression in eloquent terms:

The fundamental right to free expression of opinion is, as the most direct expression of human personality in society, one of the foremost human rights of all (one of the most precious of the rights of man according to Article 11 of the Declaration of the Rights of Man and of the Citizen). For a free democratic State system, it is nothing other than constitutive, for it is only through it that the constant intellectual debate, the clash of opinions, that is its vital element is made possible. It is in a certain sense the basis of every freedom whatsoever, “the matrix, the indispensable condition of nearly every other form of freedom” (Cardozo).<sup>25</sup>

This is not to say that freedom of expression, as a constitutional right, is an absolute one. In all legal systems, the non-absolute character of freedom of expression is an understandable and unavoidable consequence of the existence of other fundamental rights

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<sup>23</sup> In the US, following the decision *Brandenburg v. Ohio*, 395 U.S. 444 (1968), it is commonly held that hate speech can only be constitutionally proscribed if likely to lead to imminent disturbance of public peace. In this particular case, the Supreme Court ruled that the right to free speech does not allow “a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action,” *ibid.*, p. 447. The so-called “fighting words” doctrine, expressions which by their very utterance are said to inflict injury or to incite an immediate breach of the peace, follows a similar logic but its scope of application has also been severely restricted by the Supreme Court. See *RAV v. St. Paul*, 505 US 377 (1992).

<sup>24</sup> For a stimulating overview and the argument that the Constitutional Court’s case law since the early 1990s demonstrates that freedom of expression is a “preferred freedom” in the German constitutional order, see E. Eberle, “Public Discourse in Contemporary Germany,” 47 *Case Western Reserve Law Review* 797 (1997). While it is undeniably accurate to contend that the Court’s contemporary case law on Article 5 of the Basic Law has moved German law in the direction of its American counterpart, some striking exceptions remain and in particular, as regards Holocaust denial.

<sup>25</sup> *Lith*, BVerfGE 7, 198, p. 208. The quote from Justice Cardozo is taken from the case of *Palko v. Connecticut*, 302 US 319 (1937), p. 327. The Court’s leading decisions with respect to Article 5 of the Basis Law are available in English. See Decisions of the Bundesverfassungsgericht (Federal Constitutional Court) of the Federal Republic of Germany, *Volume 2: Freedom of Speech (1958-1995)*, (Nomos Publishers, 1998).

and competing public interests. In Germany, this is made clear, for instance, by Article 5(2) of the Basic Law, which states that freedom of expression and the right to information “are subject to limitations in the provisions of general statutes, in statutory provisions for the protection of the youth, and in the right to personal honour.” As a result, public authorities can and do regularly restrict freedom of expression. While a case-by-case analysis is almost always required to precisely assess the constitutionality of these public interferences, the Court has articulated some general principles of interpretation that greatly clarify how public authorities should balance freedom of expression with other rights and/or interests when they enter into conflict with each other.

With respect to the denial of the Holocaust, the basic legal distinction is the one made between opinions and factual utterances.<sup>26</sup> A well-settled principle is that opinions, being at the heart of the individual right to express oneself, cannot be interfered with because public authorities view them as unfounded, emotional, worthless or dangerous. Demonstration of their truth or untruth is simply impossible and there is no need for anyone, as a matter of principle, to provide verifiable arguments in order to be able to freely speak one’s mind. Furthermore, the Court has repeatedly held that freedom of expression also extends to the form of the statement, which means that opinions can be formulated in a sharp or hurtful manner. Another important and protective principle is that where a value judgment contributes to the intellectual battle between opinions on a question of public interest, German courts must operate under a presumption favorable to free speech. By contrast, and this is the most decisive point as far as Holocaust denial is concerned, Article 5 of the Basic Law does not protect the dissemination of a factual statement that the speaker knows to be false or when the speaker relies on a fact that has been proven to be false. In other words, incorrect or untruthful statements of facts do *not* fall within the area of protection guaranteed by Article 5. The Constitutional Court’s main argument is that statements of this nature do not contribute anything to the formation of public opinion, with the important caveats that ordinary courts may nonetheless interpret what appears to be a factual utterance as a statement of opinion, or

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<sup>26</sup> See case law referred to in the *Auschwitzlüge* (Holocaust Lie) Case, Decision of 13 April 1994, BVerfGE 90, 241, p. 247.

may hold that the factual utterance serves as a prerequisite for the formation of opinions or is irremediably linked to a statement of opinion.

It follows from these general principles that it would not be constitutionally permissible to sanction Holocaust denial on the basis of its false nature were the Court to agree to view it as an opinion. A statement of opinion may nevertheless be sanctioned if, for instance, it takes the form of an insult. However, for the Court, those denying the Holocaust do not express opinions, even abusive ones, but rather offer factual assertions whose notoriously untrue nature has been established beyond any doubt thanks to countless testimonies of eye-witnesses and documents, the evidence collected in numerous previous criminal proceedings and the findings of historical scholarship.<sup>27</sup> As a result, a statement denying or trivializing the Holocaust cannot enjoy constitutional protection.<sup>28</sup>

The Constitutional Court's reasoning in the so-called Holocaust Lie case, while clear and sophisticated, is not always entirely convincing. First and foremost, the Court draws a rather subjective distinction between statement of opinions on historical events, which cannot be entirely reduced to statements of facts,<sup>29</sup> and "pure" statements of facts. Statements denying the Holocaust are said to fall within this last category. The difficulty is that this distinction goes against a long-established, and extremely generous, interpretation of the concept of opinion and the principle, regularly recalled by the Constitutional Court, that ordinary courts must do their utmost to interpret litigious statements in a non-punishable manner.<sup>30</sup> Accordingly, some scholars, convincingly in

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<sup>27</sup> *Ibid.*, p. 249.

<sup>28</sup> In practice, this meant that municipal (preventive) orders instructing an association to be ready to interrupt or terminate the conference it was planning to organize if any statement denying or putting into question the persecution of the Jews in the Third Reich was expressed, are compatible with the applicant's right to freedom of expression. This plainly demonstrates that German courts do not demand that public authorities demonstrate the likelihood of a disturbance to public peace on a case-by-basis. The association subsequently lodged a complaint with the European Commission of Human Rights. See *Nationaldemokratische Partei Deutschlands v. Germany*, no. 25992/94, Commission decision of 29 November 1995, DR 84, p. 149. This decision is examined *infra*.

<sup>29</sup> See "Historical Fabrication" Case, Decision of 11 January 1994, 90 BVerfGE 1 (1994). For the Court, the denial of German guilt and responsibility at the outbreak of the Second World War is not only an "opinion" but one that is protected by Article 5 of the Basic Law.

<sup>30</sup> See in particular the "Soldiers are murderers" controversy (or Tucholsky Case), Decision of 10 October

my view, have made the case that even the “simple denial of the Holocaust” – when the denial is not accompanied by a normative judgment or call for action – should be recognized as an “opinion.”<sup>31</sup> That being said, it is obvious that an “opinion” expressing the view, for instance, that Jews profit from distorting the historical record on the Holocaust, could always be punished on the basis of provisions dealing with incitement to hatred or insult.

Secondly, the Court felt required to stress that even if the statement that “the Nazis did not persecute Jews” is considered a prerequisite for the formation of opinions and may therefore fall within the area *covered* by Article 5 of the Basic Law, this provision does not *protect* a right to deny the Holocaust as such a statement violates the criminal provisions that protect the Jews living in Germany from insult.<sup>32</sup> This point may seem superfluous as the Court previously, and authoritatively, held that the Auschwitz lie is not an opinion but a statement of fact whose untrue nature has been indisputably established. Yet as the distinction between fact and opinion is not an easy one to work out in theory and in practice,<sup>33</sup> the Court might have felt obliged to strongly underline that the denial of the Holocaust, regardless of the opinion-fact distinction, is never acceptable.<sup>34</sup> Indeed, for

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1995, BVerfGE 93, 266.

<sup>31</sup> W. Brugger, “The Treatment of Hate Speech in German Constitutional Law” (Part II) (2003) 4 *German Law Journal* 1, para. 65: “The rationale used to refuse simple Holocaust denial the character of “opinion” under Art. 5 (1) BL is not convincing.”

<sup>32</sup> BVerfGE 90, 241, p. 254. The Constitutional Court here refers to a well-known judgment of the Federal Court of Justice. Reversing a judgment of a lower court, the Federal Court of Justice held on the one hand, that the Jews living in Germany, on the basis of the fate to which the Jewish population was exposed under the Nazis, form a specific group and, on the other hand, that the denial of the Holocaust can be construed as an insult inflicted on this group. See Judgment of 18 September 1979, BGHZ 75, 160. This judgment has been criticized on the ground that it overstretches the standard definition of what may constitute an insult within the meaning of the Criminal Code. Furthermore, it justified the legal standing of the plaintiff, a German of Jewish origin whose grandfather had died in the Auschwitz concentration camp and who initiated defamation proceedings against the person who displayed pamphlets denying the Holocaust, on the basis of a particular historical context. This meant that each person belonging to the Jewish community may feel defamed by any statement denying the Holocaust, irrespective of whether he has personally suffered from persecution during the period of the Third Reich, or whether he has lived during that time.

<sup>33</sup> An eminent free speech scholar described the distinction opinion-fact as “deeply obscure” and one which “has proved resistant to most analytic attempts at clarification”, R. Post, “The Constitutional concept of public discourse,” 103 *Harvard Law Review* 601 (1990), pp. 649-650.

<sup>34</sup> According to D. Grimm, the judge rapporteur of the 1994 judgment, the Court’s finding that Holocaust denial constituted a false statement of fact, whose falsehood was undoubtedly established at the time when the NPD wanted to hold its assembly, should have ended the case. He offers the interesting suggestion that “the Court continued its examination, perhaps to avoid the impression that it had chosen an easy way to circumvent the crucial question, or maybe because it was aware of the difficulty of clearly distinguishing

the Constitutional Court, relying heavily on a previous judgment of the Federal Court of Justice,<sup>35</sup> Holocaust denial constitutes an intolerable affront to the dignity of German Jews in a society whose “dark past” justifies a special moral responsibility on the part of their fellow German citizens when it comes to guaranteeing the collective self-perception, dignity and security of Jews living in contemporary Germany. Above all, it would seem that for the Constitutional Court, it is this special *moral* responsibility that explains, regardless of the sometimes Byzantine *legal* justifications put forward in its judgment, why the criminalization of the Auschwitz lie is compatible with the German Constitution.<sup>36</sup> Viewed in this light, one may wonder why countries lacking the kind of special moral responsibility, as they did not engage in crimes comparable to those committed by the Nazis, have decided in the past two decades to criminalize Holocaust denial. The rationale advanced by public authorities, in countries such as France, slightly differs from the reasons put forward by German authorities. Rather than focusing on the notoriously untruthful nature of the Auschwitz lie, French authorities have mostly relied on the argument that Holocaust denial must be proscribed because Holocaust deniers pursue racist as well as antidemocratic aims.

### 1.2.2 Punishing Holocaust Denial in a Context of Extreme-Right Resurgence: The Example of France

As in most European democracies, the ratification of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination was swiftly followed, in France by the adoption, in 1972, of the first significant piece of legislation dealing with “hate speech”.<sup>37</sup> The ancient and venerable French 1881 Law on Freedom of the Press was hence amended to explicitly outlaw all racist, anti-Semitic or xenophobic acts but no provision explicitly outlawed the denial of the Holocaust. It would be wrong, however, to believe that Holocaust deniers could not be subject to criminal sanctions. Indeed, and

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between opinions and statements of fact.” D. Grimm, “The Holocaust Denial Decision of the Federal Constitutional Court of Germany”, I. Hare and J. Weinstein (eds), *Extreme Speech and Democracy* (OUP, 2009), p. 558.

<sup>35</sup> See BGHZ 75, 160, p. 162.

<sup>36</sup> It is therefore far from certain that the German Constitutional Court, in the absence of a special moral responsibility, would find compatible with the Constitution a law proscribing, for instance, the denial or downplaying of the Armenian genocide.

<sup>37</sup> See Act no. 72-546 of 1 July 1972.

similarly to the situation in Germany until the 1994 revision of the German Criminal Code, “negationist”<sup>38</sup> statements could be criminally punished only when they infringed provisions on racial insult or defamation, incitement to hatred or condoning of crimes against humanity. Civil proceedings were also an option.<sup>39</sup> The analogy with Germany does not cease here. The decision to criminalize Holocaust denial as such is directly linked to the intense media coverage of a sinister incident.<sup>40</sup> This event, in the context of increasing popularity of the National Front,<sup>41</sup> convinced the French government of the need to explicitly proscribe the denial of the Holocaust. Soon afterwards, the so-called “*Loi Gayssot*” (from the name of the MP who sponsored the Bill) inserted a new provision (Section 24 *bis*) into the 1881 Freedom of the Press Act, which reads as follows:

Anyone who disputes<sup>42</sup> the existence of one or more crimes against humanity as defined in Article 6 of the Statute of the International Military Tribunal annexed to the London agreement of 8 August 1945 which have been committed either by the members of an organisation declared criminal under Article 9 of the Statute or by a person found guilty of such crimes by a French or international court shall be liable to [one year’s imprisonment and a fine of €45,000, or one of those penalties only].<sup>43</sup>

If one compares Section 24 *bis* with Section 130(3) of the German Criminal Code, one common element and two essential differences can be noted. In both countries, and to simplify, the law solely refers to crimes committed by persons associated with the Nazi

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<sup>38</sup> Those who deny the Holocaust are often referred to in France as “negationists” rather than “deniers” or “revisionists”.

<sup>39</sup> The leading civil case is the case of *Ligue internationale contre le racisme et l’antisémitisme et autres c/ Faurisson*, TGI Paris, 8 July 1981, *Recueil Dalloz*, Jurisprudence, 1982, p. 61 (holding that the defendant, a notorious Holocaust denier, failed to observe, in his work on the Holocaust and the existence of gas chambers, the obligations of prudence, objective circumspection and intellectual neutrality which must be observed by all academics).

<sup>40</sup> In May 1990, in the southern city of Carpentras near Avignon, a Jewish cemetery was desecrated. Six years later, four individuals, known for their neo-Nazis sympathies, were finally convicted.

<sup>41</sup> The National Front’s leader, Jean-Marie Le Pen, was also known for regularly expressing offensive views on the Holocaust. For instance, in 1987, he argued that the mode of extermination used in Nazi concentration camps was “a minor point” in the history of World War II. He was subsequently successfully prosecuted on the basis of Article 1382 of the Civil Code.

<sup>42</sup> Most English translations use the verb “to deny” to translate the French verb “*contester*”. Yet rather than the denial of the Holocaust, Section 24 *bis* prohibits anyone from “disputing” the existence of the Holocaust. The restriction on freedom of expression is therefore, theoretically speaking, greater.

<sup>43</sup> Section 24 *bis* of the Freedom of the Press Act added by Law no. 90-615 of 13 July 1990.

regime, with the additional temporal restriction in France that the crimes must have been committed between 1939 and 1945. This means, for instance, that the denial of the Armenian genocide cannot, under current laws, be criminally sanctioned, and explains why some proposals to extend the temporal and material scope of the Gayssot Act have been made by both scholars and MPs.<sup>44</sup>

By contrast with the German provision, the Gayssot Act does not formally punish the act of downplaying the crimes committed against the Jews, unlike subsequently passed and better worded legislation in countries such as Belgium<sup>45</sup> or Switzerland.<sup>46</sup> French courts, however, have interpreted the notion of “denial” in a very broad manner. For instance, one may be punished if the denial of the Holocaust is disguised, presented in terms expressing doubts or by insinuation. The offence is also made out where, on the pretext of attempting to ascertain an alleged historical truth, one expresses doubts on the number of victims or grossly minimizes, in bad faith, the number of victims.<sup>47</sup> This judicial extension of the scope of the prohibition, while having the merits of closing any potential loophole, is nonetheless difficult to reconcile with the cherished and ancient principle that criminal provisions must be strictly construed. Another difference between the French and German provisions, which remains a rather theoretical difference considering German case law, is that the French Section 24 *bis* does not require any demonstration that the denial is done in a manner capable of disturbing the public peace (or in a manner capable of inciting to hatred for that matter). In other words, Section 24 *bis* takes the form of a pure “content-based” restriction on freedom of expression.<sup>48</sup> Indeed, a particular

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<sup>44</sup> For further discussion, see *La lutte contre le négationnisme, bilan et perspectives de la loi du 13 juillet 1990* (Documentation française, 2003), p. 89 et seq.

<sup>45</sup> In Belgium, Article 1 of the Law of 23 March 1995 on the denial, minimization, justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War, punishes whoever, in the circumstances described in Article 444 of the Penal Code denies, grossly minimizes, attempts to justify, or approves the genocide committed by the German National Socialist Regime during the Second World War.

<sup>46</sup> In Switzerland, Article 261 *bis* punishes, since 1 January 1995, whoever publicly grossly minimizes or attempts to justify any genocide or other crimes against humanity when the intent is to attack the human dignity of a person or group of persons because of their race, ethnic affiliation or religion.

<sup>47</sup> See Cour de Cassation, chambre criminelle, 17 June 1997 in *Recueil Dalloz*, 1998, jurisprudence, p. 50, casenote J.-Ph. Feldman.

<sup>48</sup> In US First Amendment doctrine, a key distinction is made between content-based and content-neutral restrictions on free speech. Content-based restrictions, i.e. public regulations which interfere with particular viewpoints because of their sole content, are viewed with suspicion by the Supreme Court as it “raises the

viewpoint is prohibited in all circumstances because of its content. The rather exceptional nature of this legislative limitation explains that the Gayssot Act, unlike the criminal provisions that sanction the *apology* of crimes against humanity, has been extremely controversial from the outset. To give a single example, the French Senate rejected the Bill not once but three times on the grounds that it instituted an official historical truth in violation of freedom of expression and that current legal provisions on “hate speech” were adequate to effectively deal with revisionist utterances. For the Government, however, the Bill pursued legitimate aims such as the fight against anti-Semitism and the need to punish behavior that seriously threatens public order and/or damage the reputation and honor of individuals. The government further claimed that the Gayssot Act was compatible with the Constitution and in particular, Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen (“Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by law”) as the denial of the Holocaust constitutes an abusive use of freedom of expression.

Regrettably, the French Constitutional Council did not get the opportunity to rule on the constitutionality of the Gayssot Act as all major political parties agreed not to submit the Bill to its attention.<sup>49</sup> Ordinary courts had nonetheless jurisdiction to rule on the compatibility of the Gayssot Act with the right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights (ECHR). On several occasions, the *Cour de cassation* as well as the *Conseil d’Etat* held that convictions or sanctions adopted on the basis of the Gayssot Act were fully compatible with Article 10 ECHR.<sup>50</sup>

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specter that the Government may effectively drive certain ideas or viewpoints from the marketplace,” *Simon and Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 US 105 (1991), p. 116. Accordingly, content-based regulations are subject to a strict degree of judicial scrutiny, which essentially means that they must be justified by a compelling public interest, be narrowly tailored and the public authorities must prove that there are no least restrictive alternatives. In practice, it is extremely difficult for a public regulation, once classified as a content-based restriction, to survive judicial scrutiny. See e.g. *RAV v. St. Paul*, 505 US 377 (1992) (a city cannot prohibit hate speech on the sole basis of its content).

<sup>49</sup> Until a series of amendments made to the French Constitution in July 2008, constitutional review of statutes exclusively operated on an *a priori* basis. As private parties have gained the right to challenge the constitutionality of any statute, the Constitutional Council may eventually have the opportunity to rule on the Gayssot Act.

<sup>50</sup> For further references, see B. de Lamy, “Révisionnisme,” *Juris-Classeur Communication* (LexisNexis), Fascicule 3160.

The legal reasoning put forward by French courts is invariably the same: Article 10 ECHR, which guarantees freedom of expression, nevertheless provides in its second paragraph for certain restrictions or penalties, as are prescribed by law, which constitute necessary measures in a democratic society for the prevention of disorder and the protection of the rights of others. As these aims are said to be precisely those pursued by Section 24 *bis*, this provision, it is argued, protects the rights of the Nazis' victims in terms of ensuring and safeguarding the respect due to their memory and safeguards the peaceful coexistence of persons in the French State, any conviction pronounced on that basis is invariably held to constitute a measure necessary in a democratic society. To further justify this conclusion, courts sometimes additionally refer to Article 17 ECHR, according to which none of the provisions of the ECHR may be interpreted as implying any right to engage in any activity or perform any act aimed at the destruction of the rights and freedoms set forth in the ECHR, to hold that freedom of expression does not protect the public denial of facts that have been the subject of a final ruling by the Nuremberg International Military Tribunal. Indeed, statements of this nature are said to relate to events that are totally incompatible with the values of the Convention. In other words, Holocaust denial constitutes an abuse of right within the meaning of Article 17 ECHR because the revisionist ideology represents a threat to any democratic society as it seeks to rehabilitate or justify the Nazi regime.<sup>51</sup>

While French courts have wisely avoided to defend the criminalization of the Holocaust denial on the basis that freedom of expression does not protect a right to utter untruthful statements on clearly established historical facts, the legal reasoning they have developed may nevertheless be found wanting. In particular, French courts continue to apply the requirement of “necessity” in a very superficial manner. This, however, reflects a more widespread failure to carefully scrutinize public interferences with freedom of expression in light of the methodology patiently elaborated by the European Court of Human Rights over the years.<sup>52</sup> Yet, as will be shown *infra*, the European Court of Human Rights has

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<sup>51</sup> This rationale has also influenced the Belgian Supreme Court. See Cour d'arbitrage de Belgique, 12 July 1996, in *Revue trimestrielle des droits de l'homme*, 1997, p. 111, casenote F. Ringelheim.

<sup>52</sup> For historical and cultural reasons, French courts have been extremely reluctant to strike down legislative limitations to freedom of expression on the basis of Article 10 ECHR. As a result, France has been found to

exercised its supervisory jurisdiction in a highly deferent manner with respect to national convictions for Holocaust denial.

Regardless of the European Court's case law, the Gayssot Act may be questioned on political and legal grounds. For instance, some irreproachable individuals such as Simone Veil, an eminent politician and former member of the *Conseil constitutionnel* whose family, including herself, was tragically deported to Auschwitz, have voiced their unease with the Gayssot Act as it appears to transform an historical truth into an unchallengeable state-sponsored truth. As for the (legal) arguments put forward by the French courts to justify the punishment of Holocaust deniers, they do not appear entirely convincing when it comes to justifying a pure and overbroad content-based restriction on freedom of expression.<sup>53</sup> If one may certainly agree that Holocaust deniers are generally animated by anti-Semitism intent and that Holocaust denial harms the reputation and honor of the Jews as a group, it seems wiser to rely on "standard" provisions dealing with racial insult and defamation to prosecute them. Furthermore, it may not be prudent to rely on the principle of human dignity and/or the principle of respect due to the memory of victims of Nazi crimes as these principles subject legal analysis to eminently vague notions and have naturally led other groups, whose ancestors have been victims of what we would now describe as genocides or crimes against humanity, to lobby for the inclusion of these crimes into the category of historical events that cannot be disputed. Public order considerations are hardly more persuasive. French courts do not indeed demand that public authorities prove that Holocaust deniers' utterances are likely to incite to anti-Semitism or produce anti-Semitic acts because, in most cases, it would be extremely

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have violated this provision on numerous occasions. For further analysis, see L. Pech, "Fondement du droit de la presse et des médias" in B. Beignier et al., *Traité du droit de la presse et des médias* (LexisNexis, 2009), para. 96 et seq.

<sup>53</sup> See *contra* S. Garibian, "Taking Genocide Seriously: Genocide Denial and Freedom of Speech in the French Law," 9 *Cardozo Journal of Conflict Resolution* 479 (2008). In this interesting study, the author argues that the Gayssot Act merely punishes those who, under the cover of academic legitimacy, spread, in bad faith, an ideology grounded on racist or anti-Semitic propaganda with the likely effect of producing dangerous or harmful effects in a democracy. Yet Garibian fails to mention that the Gayssot Act does not require any proof of the speaker's racist intent or the likelihood of any *concrete* disturbance to the public peace. Besides, the case law requires that bad faith be established only where one seeks to grossly minimize the number of victims of the Holocaust. It is also difficult to agree with the author's point that the criminalization of Holocaust denial is only one limitation of free speech among many others like defamation or insult.

difficult to do so. Furthermore, in practice, and to mention a controversial example, pro-Palestinian speech has proved more likely to lead to civil unrest and anti-Semitic attacks yet it is not subject to a specific and preventive prohibition. It is also difficult to be convinced by the argument that Holocaust deniers pose a real and present danger to the French constitutional order. No evidence of an actual and imminent danger to the democratic system is ever required by courts. In reality, the Gayssot Act punishes a particular viewpoint because of the exceptional nature of the Holocaust. To put it differently, the Holocaust, being an incomparable event from so many points of view,<sup>54</sup> it may at least be reasonably argued that a legal regime *d'exception* is justified even though this regime cannot be easily reconciled with what it is normally constitutionally permissible. Rather than the harm suffered by descendants of Nazis crimes' victims, which may be relatively diffuse and indirect when Holocaust deniers do not specifically target them, or the *potential* dangers mentioned by public authorities, it is the quasi-unanimous public abhorrence for these horrendous crimes that fundamentally explains legislative action and why any attempt to deny or downplay the Nazi crimes continues to be viewed as morally intolerable. This also appears to explain why most recent legislative initiatives, aimed at punishing the denial of "other" genocides, have been met with fierce resistance.

In addition to the 2001 law which formally acknowledged the existence of the Armenian genocide,<sup>55</sup> another controversial law passed in 2001 describes the slave trade as "a crime against humanity".<sup>56</sup> More controversial, as the view defended is less "politically correct", a provision of a 2005 law (later repealed) also required school history teachers to stress the "positive aspects" of French colonialism.<sup>57</sup> Last but not least, a 2006 Bill sought to punish by a prison sentence of up to one year and/or a fine of up to €45,000,

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<sup>54</sup> For further discussion, see A. Margalit and G. Motzkin, "The Uniqueness of the Holocaust", *Philosophy and Public Affairs*, Vol. 25(1), (Winter 1996), p. 65.

<sup>55</sup> See Act no. 2001-70 of 29 January 2001.

<sup>56</sup> See Act no. 2001-434 of 21 May 2001.

<sup>57</sup> See Act no. 2005-158 of 23 February 2005. Its Article 4 paragraph 2 reads: "School courses should recognize in particular the positive role of the French presence overseas, notably in North Africa." A vast controversy ensued. It ended thanks to an opportunistic decision of the Constitutional Council (decision no. 2006-203 L), which allowed for this provision to be repealed by mere administrative decree (see Decree no. 2006-160 of 15 February 2006).

anyone who denies that the mass-murder of Armenians committed in Turkey between 1915 and 1917 constitutes a genocide,<sup>58</sup> i.e. the enforcement of a concerted plan aimed at the partial or total destruction of a national, ethnic, racial or religious group, or of a group determined by any other arbitrary criterion.<sup>59</sup> The Armenian genocide Bill has so far failed to become law following the continuous opposition of the Government and the mobilization of academic historians and lawyers against what became known as the *lois mémorielles* or memory laws,<sup>60</sup> i.e. laws who promote and at times forbid people from challenging state-sponsored historical interpretations of past events. Space constraints preclude any exposition of the pragmatic arguments one may raise against the Armenian genocide Bill.<sup>61</sup> The most significant aspect of the academic mobilization is that numerous critics went as far as to advocate the repeal of the Gayssot Act while others argued, convincingly in my view, that the denial of the Holocaust cannot be (legally) compared with the denial of the Armenian genocide as the sole Holocaust deniers are clearly animated by racial hatred.<sup>62</sup> The intensity of the public controversy finally led the French Parliament to clearly spell out that it did not intend to enact any additional “*loi mémorielle*” in the foreseeable future.<sup>63</sup> At last, the controversy over the Armenian

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<sup>58</sup> See Parliamentary Bill no. 610 (*Proposition de loi tendant à réprimer la contestation de l'existence du génocide arménien*), adopted on first reading, 12 October 2006.

<sup>59</sup> See Article 211-1 of the French Penal Code.

<sup>60</sup> See e.g. M. Frangi, “Les lois mémorielles : de l’expression de la volonté générale au législateur historien” (2005) *Revue de droit public* 241 ; P. Fraisseix, “Le Droit mémoriel” (2006) 67 *Revue française de droit constitutionnel* 483. For the argument that these laws violate the principles of equality, legal certainty and freedom of expression, see B. Mathieu, “Les « lois mémorielles » ou la violation de la Constitution par consensus,” *Recueil Dalloz* 2006, p. 3001. On his initiative, sixty Law Professors signed a petition arguing against these laws. See *JurisClasseur Périodique* 2006, Actualité, p. 2201.

<sup>61</sup> See L. Pech, “Genocide-denial laws: A misguided attempt to criminalize history”, NUI Galway Faculty of Law Conference Papers, 7 LAW CPS 2006, translated into Turkish and published in *Ifade Özgürlüğü* (Istanbul: İletisim, 2007), p. 159.

<sup>62</sup> See however the ruling by the Tribunal fédéral Suisse, ruling of 12 December 2007, *X. v. Y.*, 6B.398/2007. In this ruling, the Court found the defendant (a politician with a doctorate in law) guilty of racial discrimination for having denied that the massacres and deportations of Armenian people in Turkey in 1915 constituted genocide and argued that these actions were, in any event, justified by the necessities of war and national security. For the Court, as the defendant’s public statements were motivated by racist intent – a conclusion drawn up from the fact that the defendant described the Armenian people as the aggressor in 1915 – he violated the Swiss criminal provision that punishes anyone who denies or downplays any genocide or other crimes against humanity.

<sup>63</sup> See in particular Assemblée Nationale, *Rapport de la mission d’information sur les questions mémorielles*, Rapport d’information no. 1262, 18 November 2008, p. 181. While the report accepts that the Parliament plays its role when enacting laws aimed at fighting racism and xenophobia, it concedes that laws are not the most appropriate instruments when the Parliament seeks to qualify historical facts or to express views on particular historical events, especially when these laws are accompanied by criminal sanctions. The report suggests that legislative resolutions should instead be used. In doing so, the French

genocide Bill had the merit of illustrating how delicate it is to reconcile criminal provisions on genocide denial with the right to free speech. In a striking contrast to the reasoning developed by German or French courts, the Spanish Constitutional Court actually found it impossible to satisfactorily reconcile them.

### 1.2.3 Decriminalizing the Denial of the Holocaust in a “Non-Militant” Democracy: The “Surprising” Judgment of the Spanish Constitutional Court

In 1995, the Spanish Parliament, not insensitive to legislative developments taking place outside the country’s borders, decided to amend the Criminal Code in order to explicitly punish Holocaust denial as well as incitement to discrimination, hatred or violence against groups or entities when motivated, in particular, by racist or anti-Semitic intent. With respect to genocide denial, Section 607(2) of the Criminal Code punishes by imprisonment for one to two years the dissemination of ideas and doctrines that *deny or justify* genocide or that purport to rehabilitate regimes or institutions responsible for these crimes. This provision was first applied in the context of legal proceedings initiated against the owner of a bookshop where Holocaust denial literature was sold. Convicted in first instance,<sup>64</sup> the defendant appealed the ruling before the Provincial Court of Appeal of Barcelona. Uncertain of whether Section 607(2) was compatible with Article 20(1) of the Spanish Constitution, which guarantees freedom of expression, the Appeal Court submitted a “question of unconstitutionality” to the Constitutional Court. In the ruling 235/2007, a majority of the Court (eight judges out of twelve) answered this question negatively and ruled that the criminalization of the “mere” denial of any genocide is not compatible with the constitutional right to free speech.<sup>65</sup>

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Parliament would emulate US practice. See e.g. House Resolution no. 106, “Affirmation of the United States Record on the Armenian Genocide Resolution”, 110<sup>th</sup> Congress, 30 January 2007. The resolution calls upon the President “to accurately characterize the systematic and deliberate annihilation of 1,500,000 Armenians as genocide.”

<sup>64</sup> In first instance, the bookshop owner was sentenced to two years in prison for genocide denial and another term of three years in prison for incitement to discrimination, racial hate and violence against groups or entities by racist and anti-Semitic motives (Section 510.1 of the Criminal Code).

<sup>65</sup> On this ruling, see P. Salvador and A. Rubi, “Genocide Denial and Freedom of Speech. Comments on the Spanish Constitutional Court’s Judgment 235/2007, November 7<sup>th</sup>” (2008) 4 *Review of the Analysis of the Law* (available at: [www.indret.com](http://www.indret.com)). The judgment is available in English on the Court’s website ([www.tribunalconstitucional.es](http://www.tribunalconstitucional.es)).

In light of the German and French case law previously analyzed, this outcome may seem particularly surprising. The key legal explanation is that a majority of the Spanish Constitutional Court refused to accept the classic argument according to which the dissemination of Holocaust deniers' views poses, in all instances, a general threat not only to the security of some minority groups (public order argument), but also to the constitutional and democratic order as a whole (abuse of right argument). In Germany and France, courts have easily accepted this rationale without ever requiring from public authorities any concrete evidence that Holocaust deniers' speech actually poses a tangible and present danger. However, for the Constitutional Court of Spain, a content-based restriction on freedom of expression cannot be justified on the basis of a mere abstract or potential danger.

Interestingly, the Court justifies this interpretation by reference to Spanish history and also refers to US-inspired philosophical presuppositions when it comes to protecting freedom of expression in a democratic society. With respect to the Court's historical views,<sup>66</sup> the most interesting point raised by the Court is that Spain, unlike Germany or France, is not a "militant democracy," which means that the exercise of fundamental rights cannot be restricted on the grounds that they may be used for anti-constitutional purposes. The Court actually notes that there is no equivalent to Article 17 ECHR in the Spanish constitutional system.<sup>67</sup> Another general and decisive point developed by a majority of the Court, is that public authorities cannot, in a democratic regime whose cornerstones are the value of pluralism and the free exchange of ideas, control, select or seriously undermine the public circulation of ideas or doctrines even if these ideas or doctrines are repulsive to the majority or incompatible with the principle of respect of human dignity.<sup>68</sup> This is clearly reminiscent of the American "marketplace of ideas" paradigm from which is derived the principle that public authorities cannot prohibit "the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>69</sup> The Court nonetheless carefully explains that freedom of expression is

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<sup>66</sup> See Judgment 235/2007, para. 4.

<sup>67</sup> *Ibid.*, para. 5.

<sup>68</sup> *Ibid.*, para. 6.

<sup>69</sup> *Texas v. Johnson*, 491 US 397 (1989), p. 414. Interestingly, in his dissenting opinion, Jorge Rodríguez-

not, of course, an absolute right. This means, for instance, that hate speech can be punished because, in this instance, there is generally a clear connection between racist utterances and effective harms on the rights of others.

These general principles of interpretation enunciated, the Court then proceeds to assess the constitutionality of Section 607(2). At this stage, however, the reader can be forgiven for thinking that these general principles will make it extremely difficult, if not impossible, to reconcile freedom of expression and the criminalization of the “mere” denial of past genocides. And indeed, after recalling the “international origin” of Section 607(2) and explaining that Germany, among other countries, decided to punish Holocaust denial as a result of tragic historical circumstances, the Court ruled that the right to freedom of expression, in Spain, cannot tolerate that “the mere transmission of ideas to be classified as a crime, not even in cases where those ideas are truly execrable, being contrary to human dignity,” even though human dignity is “a precept which forms the basis of all the rights included in the Constitution.”<sup>70</sup>

In other words, as Section 607(2) neither requires proof of *mens rea* – no specific malicious intent is required contrary to what is required for the crime of inciting to commit a genocide – nor “positive” actions of racist or xenophobic proselytizing, or even indirect incitement to commit genocide, the criminalization of the mere denial of a genocide is not compatible with freedom of expression. By contrast, and unsurprisingly, the Court does not raise any objection to the criminalization of the act of publicly justifying a genocide – which includes the act of condoning, glorifying or inciting to the crime of genocide – or those responsible for this type of crime. The essential difference between denying and justifying the crime of genocide is that the latter conduct does create a clear and present danger.<sup>71</sup>

In light of previous case law, this ruling, while controversial, is not utterly startling.

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Zapata explicitly deplores the influence of US doctrine on the Court before arguing in favor of the European free speech model as it gives primacy to the principle of human dignity.

<sup>70</sup> Judgment 235/2007, para. 6.

<sup>71</sup> In March 2008, the Appeal Court of Barcelona found Mr. Varela guilty of the crime of justifying genocide. He was sentenced to seven months in prison.

Indeed, the Court had previously and clearly indicated that the right to free speech includes the right to express subjective and biased opinions on historical facts, even when clearly mistaken or lacking in substance, unless these opinions are expressed with the *intentional* objective of inciting to racial discrimination or hatred, pose a real risk to the pacific coexistence among citizenry or violate the dignity of persons, which, similar to Germany, is one of the key values on which the Spanish constitutional order is said to be based.<sup>72</sup> Yet, ruling 235/2007 does seem to plainly go against the spirit – but not the letter as will be shown in the last section of this paper – of the EU FD on Racism (not yet adopted at the time of the judgment), a point emphasized by all the dissenting judges.<sup>73</sup> In my view, the majority also relied on a challengeable understanding of the case law of the European Court of Human Rights and in particular, the European Court’s interpretation of Article 17 ECHR.<sup>74</sup> This is not to say that the ruling is not convincing – the Spanish Court’s insistence that public authorities can punish the denial of a genocide only where there is a clear and present danger to public peace or when it is directly linked to “hate speech,” seems to me perfectly reasonable in principle – but that it fails to properly appreciate the Strasbourg Court’s case law on Holocaust denial.

## **2. Holocaust denial laws before the European Court of Human Rights: From a Low Standard of Scrutiny to the Absence of any Scrutiny**

In the well-known case of *Handyside*, the European Court eloquently stressed that freedom of expression “constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual’s self-

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<sup>72</sup> See judgments 214/1991 (León Degrelle case) and 176/1995 (Hitler-SS comic case).

<sup>73</sup> All dissenting judges defended the “legitimacy” and “necessity” of Article 607(2) on the basis of three main arguments: This provision complies with the letter and spirit of the EU FD on racism; past tragic historical experiences in Europe demonstrate that genocide deniers are motivated by antidemocratic as well as racist intent; finally, there is a clear casual link between the denial of past genocides and the present commission of racist acts of violence. These last two points have been largely accepted by German and French courts.

<sup>74</sup> For the Spanish Constitutional Court, quoting *Refah Partisi v. Turkey* (nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II) and *Ždanoka v. Latvia* (no. 58278/00, 17 June 2004), Article 17 ECHR may only be used where there is evidence of damage and further requires from public authorities that they prove the defendant’s intention to rely on freedom of expression to destroy freedoms and pluralism, or to attack the freedoms recognized in the Convention. The Spanish Court is nonetheless right to point out that there is no legal obligation for Spanish authorities to apply Article 17 ECHR-type of analysis to genocide deniers residing in Spain. See Judgment 235/2007, para. 6.

fulfilment.”<sup>75</sup> With respect to Holocaust denial, however, the Court has come to adopt a very restrictive stance: freedom of expression does not protect a freedom to deny “clearly established historical facts”. As a result, Holocaust deniers have been unable to rely on Article 10 ECHR to challenge national criminal convictions.<sup>76</sup>

### *2.1 The Principle: The Freedom to Express Offensive, Shocking or Disturbing Information or Ideas*

In line with national constitutional provisions in Europe, Article 10 ECHR first provides an extensive definition of the right to freedom of expression before describing the circumstances in which (national) public authorities may legitimately interfere with the exercise of this right:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 10 therefore makes clear that the multiple freedoms covered by the label “freedom of expression” are protected insofar as their exercise do not conflict with other fundamental rights or objectives of general interest. In more technical terms, Article 10 is not violated as long as the national public interference is “prescribed by law” (is the relevant legal rule accessible and foreseeable?), pursues a legitimate public objective (one of the aims provided for in Article 10(2)) and is “necessary in a democratic society”. In practice, the European Court of Human Rights almost always exclusively focuses on the

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<sup>75</sup> 7 December 1976, Series A no. 24, para. 49.

<sup>76</sup> Holocaust deniers have also sought to rely on Article 6 ECHR (right to a fair trial) but to no avail.

“necessary” nature of the public interference. The adjective “necessary” essentially means that in order to survive judicial scrutiny under Article 10, national authorities (including national courts) must demonstrate that a fair balance was struck between the applicant’s freedom of expression and the relevant competing individual rights or public interests.<sup>77</sup> To put it differently, national authorities must convince the European Court that the litigious interference is proportionate to the legitimate aims pursued and that the reasons advanced to justify it are relevant and sufficient. To complicate things further, in exercising its supervisory jurisdiction, the Court also takes into account the so-called “national margin of appreciation” when it comes to assessing whether a “pressing social need” exists or whether the litigious interference is proportional to the aim(s) pursued. Indeed, as a matter of principle, the Court’s task in exercising its supervisory function is not to take the place of the national authorities but rather to review the decisions they have adopted pursuant to their power of appreciation. The notion of margin of appreciation, being rather open-ended, has been diversely and not always clearly applied by the Court. From its case law, one can nonetheless conclude that the Court “modulates” the intensity of its scrutiny depending on the nature of the speech involved. For instance, national interferences, when political speech is at issue or when the press is involved, will be strictly scrutinized. This results in the *de facto* annihilation of the margin of appreciation. However, when “sensitive” speech is at issue, for example, racist or blasphemous speech, the Court normally assumes that national authorities are better placed to precisely determine the appropriate limits on freedom of expression and that these limits do not have to be identical from country to country.

It would be an exaggeration, however, to argue that the Court’s case law is unpredictable. While it is true that the circumstances of each case ultimately determine whether freedom of expression shall prevail, one can easily deduce a general framework of guiding principles or “philosophical” presuppositions from a “transversal” analysis of the case

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<sup>77</sup> Strictly speaking, in the context of Article 10 ECHR, the Court never faces a direct conflict between fundamental rights, as paragraph 2, through a sequence of “interests”, exhausts all hypothesis of conflict. If a conflict occurs, the Court would have to reconcile freedom of expression with a public interest protected by law that may, in turn, protect an individual fundamental right such as reputation or privacy. It is also important to note that applicants can only claim a violation of Article 10 ECHR in relation to an action or omission of the “State”.

law. To put it concisely, the Court's invariable starting point is that freedom of expression, as previously quoted, "constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual's self-fulfilment."<sup>78</sup> The Court has also repeatedly emphasized that freedom of expression includes the right to disseminate information or idea that some may regard as offensive, shocking or disturbing, because such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society. And if freedom of expression, as enshrined in Article 10, is subject to exceptions, these exceptions must be narrowly interpreted, which essentially means that the necessity for any public interference must be convincingly established.

Unsurprisingly, these guiding principles have led the European Court to develop a very protective case law so much so that it is not unusual to see the Court being sharply criticized for "importing" the First Amendment into Europe, in contradiction, allegedly, with more "balanced" national constitutional traditions.<sup>79</sup> While it would be interesting to address this point, it is sufficient to say here that not all the Court's guiding principles are favorable to freedom of expression. In particular, the Court regularly stresses that the exercise of this right involves "duties and responsibilities". This means, for instance, that the scope of one's freedom of expression may be diversely interpreted depending on one's profession. It is on this basis that civil servants do not benefit from an ample freedom of expression or that historians may have to demonstrate compliance with the "ethics" of scholarly research in order to be protected by Article 10. As for those who seek to promote "revisionist" theories in the name of historical research, they face another hurdle as the European Court has ruled that freedom of expression does not include a right to deny "clearly established historical facts".

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<sup>78</sup> *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24, para. 49.

<sup>79</sup> See recently e.g. F. Lyn, "La protection de la réputation ou des droits d'autrui et la liberté d'expression. Etude de la jurisprudence de la Cour européenne des droits de l'homme," *Légipresse* avril 2006, n° 230, II-41, p. 45 ; E. Derieux et A. Granchet, *Droit des médias* (LGDJ, 2008), note 15, p. 12.

## *2.2 The Holocaust Denial Exception: No Freedom to Deny “Clearly Established Historical Facts”*

In ways reminiscent of the German case law, the European Court of Human Rights has “neutralized” any protection the right to freedom of expression may have conferred on “revisionist historians” by labeling the Holocaust a clearly established historical fact whose denial constitutes an abuse of right. This approach, however, is rather recent and does not entirely reflect the previous and, dare I say, more reasonable approach adopted by the European Commission of Human Rights.

### *2.2.1 The Initial Approach: A Minimalist Degree of Scrutiny under Article 10 ECHR Interpreted in Light of Article 17 ECHR*

For procedural reasons, the (now-defunct) European Commission of Human Rights had long been the sole institution reviewing applications from those convicted at the national level for Holocaust denial. The Commission constantly found the applications inadmissible on the basis of the following reasoning: While the relevant national judgments were found to constitute an interference with the applicants’ freedom of expression, the interference was always held to be “necessary in a democratic society” within the meaning of Article 10.

Two essential points can be made. Firstly, the Commission’s decisions reflect a readiness to grant national authorities an extremely ample “margin of appreciation” even though the Commission never failed to mention that national restrictions must always be justifiable in principle as well as proportionate. In the absence of any real explanation and justification from the Commission as to why it chose not to double-guess the reasons put forward by national authorities to justify the conviction of Holocaust deniers, one may understand this policy of self-restraint as essentially motivated by a desire to pay due respect to the specific historical past of each country. As an external human rights body, the Commission might have had no other choice but to exercise its subsidiary supervision in a conciliatory manner. In practice, this meant that public authorities from a country with a “dark past” could expect to be given a free rein whenever they sought to limit the diffusion of ideas inspired by National Socialist ideology. A previous experience with

Nazism was enough to justify any content-based restriction as an objective, reasonable and proportionate one.<sup>80</sup>

Secondly, and contrary to German practice, the right to freedom of expression was not, however, entirely “neutralized”. Applications were dealt with under Article 10(2) rather than under Article 17, which deals with “abuse of rights” and reads as follows:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

This provision prevents anyone from taking advantage of the provisions of the Convention to engage in any *activity* or perform *acts* aimed at destroying the rights and freedoms the Convention guarantees.<sup>81</sup> When found applicable, Article 17 has a dramatic impact as the applicant is then precluded from relying on any of the rights and freedoms guaranteed by the ECHR, to challenge national measures. Yet, and contrary to the prevalent view,<sup>82</sup> the Commission never *directly* applied Article 17 to deal with

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<sup>80</sup> See e.g. *B.H., M.W., H.P. and G.K. v. Austria*, no. 12774/87, Commission decision of 12 October 1989, DR 62, p. 216: “Insofar as National Socialist activities are treated differently in Section 3g from those of other political groups, this has an objective and reasonable justification in the historical experience of Austria during the National Socialist era, her treaty obligations, and the danger which activities based on National Socialist thinking may constitute for the Austrian society.” The European Court also plainly accepts to consider the historical circumstances specific to each country when assessing the “necessary” character of an interference with freedom of expression. See e.g. *Vogt v. Germany*, 26 September 1995, Series A no. 323, para. 59. Reviewing the dismissal of a civil servant for belonging to a political party pursuing anti-constitutional aims, the Court accepted the principle that it should take into account “Germany’s experience under the Weimar Republic and during the bitter period that followed the collapse of that regime up to the adoption of the Basic Law in 1949” and “Germany’s position in the political context of the time,” when reviewing how the duty of political loyalty imposed on civil servants is applied by German authorities. In the present case, but only by ten votes to nine, the decision to dismiss the civil servant from her post as secondary-school teacher was found disproportionate to the legitimate aim pursued, and therefore in violation of Article 10 ECHR. For the dissenting judges, Germany’s “special history” should have led the Court to consider the decision as falling within the national margin of appreciation.

<sup>81</sup> Similar provisions can be found, for instance, in the UDHR (Article 30) or in Article 18 of the German Constitution.

<sup>82</sup> See e.g. F. Tulkens, “Freedom of expression and racism in the case law of the European Court of Human Rights”, in The European Commission against Racism and Intolerance (ECRI), *Expert Seminar: Combating Racism While Respecting Freedom of Expression*, Strasbourg, 16-17 November 2006, 2007, p. 54.

applications from Holocaust deniers. While it is true that the Commission easily accepted that statements denying the Holocaust run counter one of the basic ideas of the Convention, namely justice and peace, and that Article 10 may not be invoked to protect activities which, if admitted, would contribute to the destruction of the Convention's rights and freedoms, the Commission essentially relied on Article 17 to guide its interpretation of the sphere that ought to be protected by Article 10. To put it differently, the Commission applied the "standard" Article 10 step by step analysis (is the restriction prescribed by law? does it pursue a legitimate goal? is it necessary in a democratic society?), before deciding on whether there was a breach of Article 10.

As previously noted, the question of whether a public interference is "necessary" is almost always the decisive question. It is also a delicate one as it involves balancing freedom of expression with competing rights or interests. However, in the case of statements denying the Holocaust, the Commission constantly referred to a series of public interests (i.e. the prevention of crime and disorder and in particular the need to secure "the peaceful coexistence" of the population; the protection of the Jews' reputation and rights) before promptly concluding that they outweigh the applicants' freedom to express their views as one can see from this brief synopsis of the Commission's most important decisions:

*X v. Germany*:<sup>83</sup> A civil conviction for defamation of all Jews following the public display of pamphlets denying the Holocaust is found "necessary in a democratic society", within the meaning of Article 10(2), as the pamphlets failed to observe the principles of tolerance and broadmindedness on which such a society rests;

*T. v. Belgium*:<sup>84</sup> Although this decision does not directly deal with Holocaust denial, it is worth noting as the applicant's conviction and confiscation of pro-Nazi material pamphlets is found proportionate and necessary for the prevention of disorder as well as for the maintenance of the authority of the judiciary;

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<sup>83</sup> No. 9235/81, Commission decision of 16 July 1982, DR 29, p. 194.

<sup>84</sup> No. 9777/82, Commission decision of 14 July 1983, DR 34, p.158.

*H., W., P. and K. v. Austria:*<sup>85</sup> The promotion of pamphlets suggesting that the killing of six million Jews by the Nazis was a lie can be described as an activity inspired by National Socialist ideas and the ensuing criminal convictions of the applicants' can be justified as being necessary in a democratic society in the interests of national security and territorial integrity as well as for the prevention of crime;

*Honsik v. Austria:*<sup>86</sup> A criminal conviction for having denied in several publications the systematic mass extermination of certain groups of the population in gas chambers of Nazi concentration camps can be considered as "necessary in a democratic society";

*Nationaldemokratische Partei Deutschlands v. Germany:*<sup>87</sup> A city's decision obliging the applicant organisation to ensure that, in the context of a conference, Nazi persecution of Jews is not denied constitutes a "necessary" interference. The Commission further stresses that the public interests in the prevention of crime and disorder in the German population due to incriminating statements denying the persecution of Jews under the Nazi regime, and the requirements of protecting the reputation and rights of Jews, outweigh the freedom of the applicant organization to hold a meeting without being obliged to take steps in order to prevent such statements;

*Irving v. Germany:*<sup>88</sup> The criminal conviction of the applicant, a British national and notorious "revisionist," for insulting and blackening the memory of the deceased following a speech in which he denied *inter alia* that gas chambers had ever existed in Auschwitz, can be considered as "necessary in a democratic society";

*Marais v. France:*<sup>89</sup> The criminal conviction of the applicant, another notorious Holocaust denier, for complicity in the denial of crimes against humanity following the publication of an article in which he denied that gas chambers had existed or has been used to commit genocide can be considered "necessary in a democratic society".

Overall, the Commission's approach seems both reasonable and persuasive. Rather than adopting an "absolutist" position whereby any statement denying the Holocaust is dealt with as an abuse of right, the Commission distinguished between the sphere covered by Article 10 and the sphere protected by the same provision. In other words, while the

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<sup>85</sup> No. 12774/87, Commission decision of 12 October 1989, DR 62, p. 216.

<sup>86</sup> No. 25062/94, Commission decision of 18 October 1995, DR 83-A, p. 77.

<sup>87</sup> No. 25992/94, Commission decision of 29 November 1995, DR 84, p. 149

<sup>88</sup> No. 26551/95, Commission decision of 29 June 1996.

<sup>89</sup> No. 31159/96, Commission decision of 24 June 1996, DR 86, p. 184.

Commission found Article 10 applicable, it also held that freedom of expression does not protect the dissemination of views that go against the basic ideals on which the Convention is based. Faced with a continuing wave of applications from Holocaust deniers, the European Court of Human Rights has, unfortunately in my view, decided to adopt a more radical approach.

### 2.2.2 A More Radical Approach: Holocaust Denial as an Abuse of Right

The Court's more radical approach was consolidated on two occasions. In the 1998 case of *Lehideux and Isorni*, the Court, on the basis of the German-inspired notion of established historical fact, held that the negation or revision of clearly established historical facts such as the Holocaust is *entirely* removed from the protection of Article 10 by Article 17. In other words, those found guilty of Holocaust denial by national courts cannot even merely invoke Article 10 before the Court as this type of "speech" is said to constitute an abuse of rights. As if concerned by its own audacity, the Court did not seek to immediately apply this new jurisprudence.<sup>90</sup> In 2003, in the case of *Garaudy*, the Court crossed the Rubicon and held that the applicant, a former politician and the author of a book entitled *The Founding Myths of Modern Israel*, in accordance with Article 17, cannot rely on the provisions of Article 10 regarding his conviction for denying crimes against humanity.<sup>91</sup>

While the Commission did also previously equate "revisionism" with ideas running counter to the fundamental values of the Convention and also emphasized that "revisionists" are regularly attempting to rely on Article 10 for ends which are contrary to the text and spirit of the Convention, the Court took a more absolute stance in *Garaudy*: (i) It first denied the quality of historians to those denying the reality of clearly established historical facts, such as the Holocaust, as their goal is not a quest for

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<sup>90</sup> See e.g. *Witzch v. Germany* (dec.), no. 41448/98, 20 April 1999: For having denied the existence of gas chambers and the mass killing therein, the applicant was convicted of disparaging the dignity of the deceased pursuant to section 189 of the German Penal Code. Having regard to Article 17, the Court held that the applicant's conviction can be regarded as necessary and stressed that "the public interest in the prevention of crime and disorder due to disparaging statements regarding the Holocaust, and the requirements of protecting the interests of the victims of the Nazi regime, outweigh, in a democratic society the applicant's freedom to impart views denying the existence of gas chambers and mass murder therein."

<sup>91</sup> *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX.

historical truth but rather the rehabilitation of the National-Socialist regime; (ii) It equated “revisionism” with the “the most serious forms of racial defamation of Jews and of incitement to hatred of them” as well as “a serious threat to public order”; (iii) Finally, it logically concluded, on the basis of these premises, that the denial or rewriting of this type of historical fact are “acts” incompatible with democracy and human rights which fall into the category of aims prohibited by Article 17.

This reasoning is not entirely above reproach. Firstly, the European Court’s analysis in *Garaudy* can hardly be reconciled with the logic espoused by the Court in relation to all other historical events and according to which it is not the task of the Court to settle historical debates. And in a case where the French applicants were prosecuted for questioning who was responsible for the policy of collaboration with Nazi Germany, the Court went as far as to state that

[e]ven though remarks like those the applicants made are always likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously. That forms part of the efforts that every country must make to debate its own history openly and dispassionately.<sup>92</sup>

The *Chauvy* and *Monnat* judgments further made clear that Article 10 includes the right to seek historical truth and reemphasized the principle that it is not the Court’s role to arbitrate historical debates.<sup>93</sup> The Court also reiterated that the principle according to which freedom of expression covers offensive, shocking or disturbing ideas also applies to historical debate, “a sphere in which it is unlikely that any certainty exists and in which the dispute is still ongoing.”<sup>94</sup> It is true, however, that the Court is always careful to state

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<sup>92</sup> *Lehideux and Isorni v. France*, 23 September 1998, para. 55, *Reports of Judgments and Decisions* 1998-VII.

<sup>93</sup> *Chauvy and Others v. France*, no. 64915/01, para. 69, ECHR 2004-VI; *Monnat v. Switzerland*, no. 73604/01, para. 57, ECHR 2006-X.

<sup>94</sup> In light of these principles, the Court, in *Monnat*, unanimously held that sanctioning a journalist for denouncing in a TV program the “myth” of Switzerland’s courageous resistance to Nazism without suggesting that there were differing views among historians is not compatible with Article 10 ECHR because the journalist acted in good faith and his “report was indisputably based on historical research.” By contrast, in *Chauvy*, a conviction for defamation, following the publication of a book on two members of

that these principles apply to questions that are still part of a “continuing debate” between historians. Yet on the basis that the Holocaust belongs to the German-inspired category of clearly established historical facts, these liberal principles are sidelined.

This is the second problematic aspect of the Court’s jurisprudence. While the Court uses the plural, the sole Holocaust has been found to constitute a clearly established historical fact and the Court has yet to precisely explain when exactly does an historical fact become “clearly established”. In *Garaudy*, the Court notes that the applicant questions “the reality, extent and seriousness” of historical events “that are not the subject of debate between historians, but – on the contrary – are clearly established.”<sup>95</sup> This precision is of little help as the question then becomes how can a court determine when a debate between historians has ended? One option may be to defer to the national legislator’s “historical expertise” and hope that it has the ability to distinguish between undeniable historical facts which cannot be challenged and those still debated among well-intentioned historians. This was, for instance, the road followed in France with respect to the Armenian genocide and this is a road full of dangers. To put it concisely, genocide-denial laws raise *line-drawing problems* and increase the danger of a *slippery slope effect*. Indeed, once you accept that public authorities can legislate historical truths and ban alternative interpretations of particular historical events, multiple and diverse groups will inevitably attempt to use the force of the law to protect their own historical narratives from any challenge. This is, for example, what happened in France where legislative proposals to criminalize the denial of the Armenian genocide have rapidly led some MPs to put forward Bills aimed at criminalizing the denial of the alleged Vendean genocide of 1793-94<sup>96</sup> or of the Ukrainian genocide of 1932-33.<sup>97</sup>

An important point is that the European Court is nevertheless unlikely to agree to view the Armenian, Vendean or Ukrainian genocides as “clearly established historical facts”,

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the French anti-Nazi resistance in which it was argued that they betrayed their leader, was found compatible with Article 10 ECHR on the ground that more than half a century after the events, there was still a risk that the honor and reputation of these two persons would be seriously tarnished by a book that raised the possibility of their betrayal.

<sup>95</sup> *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX.

<sup>96</sup> Proposition de loi no. 3754, 21 February 2007.

<sup>97</sup> Proposition de loi no. 254, 9 October 2007.

whose negation or revision would be entirely removed from the protection of Article 10 by Article 17.<sup>98</sup> Indeed, the European Court has constantly linked Holocaust denial with the notions of racial defamation and of incitement to hatred. As it is highly doubtful that those questioning the Armenian genocide, for instance, are animated by a racist intent or hatred of the Armenian people, it would be ill-advised to apply the *Garaudy* jurisprudence. Furthermore, there is no objective of rehabilitating a regime comparable to the National-Socialist regime. The only justification left is the eventual theoretical threat to public order such “speech” could cause. Yet any legislation criminalizing the denial of the Armenian genocide on this sole ground would have to be assessed under Article 10 rather than Article 17. As a result, the “necessary” character of any public interference, in any country other than Turkey, may well be impossible to demonstrate convincingly.

Rather than relying on the notion of “clearly established historical facts”, a better and more traditional option may be to focus on the goal pursued by “revisionist historians”. In *Garaudy*, the European Court agrees with the assessment made by the national courts that the applicant’s goal is not a quest for historical truth but rather the rehabilitation of a criminal regime. This assessment is essentially motivated by the applicant’s non-respect for the research standards academics must comply with. But this judicial method used to distinguish between “legitimate” historians and biased ones is not infallible. For instance, a renowned American academic, who specializes in the history of the Middle East, was prosecuted for remarks he made in an interview to the newspaper *Le Monde* and in which he expressed doubts as to whether the term “genocide” could accurately describe the atrocities inflicted on the Armenians by Ottoman Turkey in 1915-17. While the criminal action was dismissed on the ground that French law incriminated the sole denial of the Holocaust,<sup>99</sup> the professor was nevertheless held liable for damages (for a symbolic amount) by a civil court on the ground that he failed to express his views with “objectivity and prudence” as elements counter to his thesis were not alluded to.<sup>100</sup> This

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<sup>98</sup> To the best of my knowledge, only in Switzerland did the Federal Court agree to interpret the criminal provision punishing the denial of any genocide as covering the Armenian genocide. The Court further held that the Armenian genocide, like the Holocaust, is an historical fact recognized as clearly established by the Swiss legislator. See Tribunal fédéral Suisse, ruling of 12 December 2007, *X. v. Y.*, 6B.398/2007.

<sup>99</sup> Tribunal correctionnel de Paris, 14 October 1994, unreported.

<sup>100</sup> Tribunal de grande instance de Paris, 21 June 1995: *Juris-Data* no. 044058.

last judgment is far from convincing if only for the reason that one cannot be expected to express oneself with objectivity and prudence in the context of a journalistic interview. A judicial assessment of the scientific character of the revisionists' writings on a case-by-case basis therefore seems preferable to overbroad legislative bans whose chilling effect is undeniable.

A third problematic aspect of the European Court's jurisprudence is that the Court too rapidly concludes that Holocaust denial is a type of speech that falls entirely – and one may add almost automatically – outside Article 10 ECHR. True, this is not without precedent at the national level. The German Constitutional Court also held that Holocaust denial does not fall within the scope of Article 5(1) of the Basic Law. The German Court nonetheless justified this conclusion by stressing that Holocaust denial does not reflect the expression of an opinion but must be categorized as untrue factual statements. By contrast, the European Court excludes Holocaust denial from the scope of Article 10 ECHR because it is said to constitute an abuse of right.<sup>101</sup> In doing so, the Court de facto allows national authorities to impose pure content-based restrictions on freedom of expression. It may have been preferable to carefully distinguish between “Article 10 coverage” and “Article 10 protection”. In other words, the sphere covered by the right to freedom of expression does not have to be identical to the sphere that this right protects. The European Commission of Human Rights' past jurisprudence whereby national authorities were given a large margin of appreciation and convictions for Holocaust denial were assessed under Article 10, itself interpreted in light of Article 17, may be found more reasonable.

Finally, the Court's reliance on Article 17 is also problematic as the Court too easily assimilates the mere public dissemination or promotion of “opinions” with “acts” falling within the scope of this provision. Yet a strict reading of Article 17 excludes its application to “pure speech” – even when the views expressed can be described as seditious – as it is expressly aimed at *activity* or *act* undertaken with the objective of

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<sup>101</sup> As a result, it may be said that the *Garaudy* jurisprudence “goes even farther than the German Constitutional Court's jurisprudence,” D. Grimm, *op. cit.*, p. 559.

destroying the Convention's rights and freedoms or limiting them to a greater extent than is provided for in the Convention. It does not seem therefore correct to interpret Article 17 as allowing public authorities to subject to criminal sanctions those who merely *express ideas* contrary to the text and the spirit of the Convention.<sup>102</sup> Even assuming that Article 17 does cover "acts" such as the publication of a book, even when it does not include calls for illegal actions but merely disseminates ideas incompatible with democracy and human rights or ideas likely to destroy the rights and freedoms of others, the Court should nonetheless offer, on a case-by-case basis, some reasoning as to *how* such a book may contribute to the destruction or limitations of the rights guaranteed by the Convention. And while the principle of a "democracy capable of defending itself" definitely justifies the existence of provisions such as Article 17 as long as they are implemented under strict conditions, it does not seem wise to enable public authorities to prohibit certain ideas on the sole grounds that they undermine some cherished values (rather than the rights and freedoms of others) and/or represent in all situations a serious threat to public order even if this threat is purely theoretical. In any case, it seems hardly logical to apply Article 17 to Holocaust denial views while refusing to sanction racist speech under the same provision.<sup>103</sup>

### **3. The Triumph of the Militant Democracies' Camp: The 2008 EU Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law**

While the European Court of Human Rights' case law on Holocaust denial may be criticized, it is important to realize that it never imposed any *obligation* to criminalize statements of this nature. Any attempt to do so would obviously have met with strong resistance. And indeed some countries were extremely concerned when the EU

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<sup>102</sup> See e.g. *Witzch v. Germany*, no. 7485/03, 13 December 2005: "The Court observes that the general purpose of Article 17 is to make it impossible for individuals to take advantage of a right with the aim of promoting ideas contrary to the text and the spirit of the Convention."

<sup>103</sup> See e.g. *Soulas and Others v. France*, no. 15948/03, 10 July 2008. This judgment shows that racist speech, even of the most offensive and dangerous nature as the applicants called in their book for a war of ethnic re-conquest, is still assessed by the Court under Article 10(2) ECHR on the basis that the disputed passages in the book are not sufficiently serious to justify the application of Article 17 ECHR in the present case. Yet no explanation is given as to when a particular utterance becomes sufficiently serious.

Commission proposed to harmonize national criminal provisions with a view to making genocide denial a criminal offence in all the Member States of the EU. This largely explains why seven years lapsed between the first Commission proposal and the adoption of the EU FD on racism and why this last text contains a certain number of options on the basis of which Member States may decide to limit the scope of the provision requiring each EU country to punish the act of publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes.

### *3.1 The Lack of a Universal Consensus*

The lack of consensus among European countries regarding the question of whether genocide-denial must be criminally prohibited reflects, more generally, a lack of universal consensus. While “hate speech” has long been outlawed on the basis of specific provisions contained in several international instruments,<sup>104</sup> there is less clarity on whether international law compels the criminalization of Holocaust denial. The 1948 Genocide Convention, for instance, requires State Parties to punish “direct and public incitement to genocide” but does not refer explicitly to genocide denial as a potential crime.<sup>105</sup> In fact, the unique treaty which specifically requires the criminalization of the act of denying the Holocaust or any other genocide or crimes against humanity is the 2003 *Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems*.

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<sup>104</sup> See e.g. Article 20(2) of the Covenant on Civil and Political Rights (Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”) and Article 4 of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (requiring *inter alia* that State Parties “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof”). The Convention has been ratified by all EU Member States but some Member States have entered reservations on Article 4. For an exhaustive overview, see S. Farrior, “Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech,” (1996) 14 *Berkeley Journal of International Law* 3.

<sup>105</sup> For further analysis, see W. Schabas, *Genocide in International Law. The Crime of Crimes* (Cambridge University Press, 2<sup>nd</sup> ed., 2009), p. 319 et seq. After reviewing how the concept of direct and public incitement to commit genocide has been interpreted, the author concludes (p. 334) that “Holocaust denial and other forms of revisionism are forms of hate propaganda, and should generally be addressed within that context rather than as incitement to genocide.”

According to its Article 6 dealing with denial, gross minimization, approval or justification of genocide or crimes against humanity, each Party to the Additional Protocol must adopt such legislative measures as may be necessary to criminalize genocide denial “when committed intentionally and without right.” Genocide denial is further defined as the act of

distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.<sup>106</sup>

According to T. McGonagle, this provision “introduces a novel focus into international human rights treaty law”<sup>107</sup> as the scope of the offence has been extended, for the first time, to apply to genocides other than the Holocaust. And indeed, the Explanatory Report annexed to the Additional Protocol makes clear that “the drafters considered it necessary not to limit the scope of this provision only to the crimes committed by the Nazi regime during the 2<sup>nd</sup> World War and established as such by the Nuremberg Tribunal, but also to genocides and crimes against humanity established by other international courts set up since 1945 by relevant international legal instruments (such as UN Security Council Resolutions, multilateral treaties, etc.).”<sup>108</sup>

The Explanatory Report further states three major reasons why genocide denial must be criminalized: “revisionists” inspire and even stimulate as well as encourage racist and xenophobic groups; the dissemination of revisionist views insults the memory of those persons who have been victims of such evil, as well as their relatives; finally, it also threatens the dignity of the human community.<sup>109</sup> To secure an agreement on the inclusion of this controversial provision into the Additional Protocol, it was decided that

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<sup>106</sup> Article 6(1).

<sup>107</sup> T. McGonagle, *op. cit.*, p. 49.

<sup>108</sup> Explanatory Report to the Additional Protocol, para. 40.

<sup>109</sup> *Ibid.*, para. 39.

Article 6 would contain provisions allowing any party to the Protocol either (i) to require, through a declaration, that the denial or the gross minimization is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion, or (ii) to make use of a reservation, by allowing a Party not to apply, *in whole or in part*, this provision.<sup>110</sup>

The last option strikingly illustrates the lack of universal consensus on the question of whether genocide denial should be criminalized. Furthermore, some countries remained unconvinced and took the view that making use of a reservation would not adequately answer their concerns.<sup>111</sup> For instance, and unsurprisingly, the US government refused to become a Party to the Additional Protocol on the ground that the final version of the protocol is not “consistent” with the First Amendment.<sup>112</sup> The US, however, is not the only major democracy to have shown some reluctance. An important number of EU Member States (Bulgaria, Czech Republic, Hungary, Ireland, Italy, Spain and the United Kingdom) have also refused to sign the Additional Protocol on the ground that it requires the criminalization of speech and conduct in a manner not compatible with the right to freedom of expression as protected by their respective constitution. This rather widespread opposition to the Additional Protocol, in addition to the possibility offered to State Parties not to apply, in whole or in part, Article 6, have evidently constituted serious obstacles to the effective harmonization of substantive criminal law in the fight against Holocaust denial on the Internet. This is one of the reasons why some European countries promptly sought to push for EU legislative intervention.

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<sup>110</sup> Article 6(2).

<sup>111</sup> Only a few countries made use of the options offered by Article 6(2). On the one hand, Lithuania and Ukraine declared that criminal liability for denial or gross minimization may only arise if it is committed with the intent to provoke hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors. On the other hand, Denmark and Norway declared that they reserve their right to fully or partially refrain from criminalizing acts covered by Article 6(1).

<sup>112</sup> “The United States does not believe that the final version of the protocol is consistent with its Constitutional guarantees. For that reason, the U.S. has informed the Council of Europe that it will not become a Party to the protocol. ... Thus, its authorities would not be required to assist other countries in investigating activity prohibited by the protocol”, US Department of Justice, Computer Crime and Intellectual Property Section, “Council of Europe Convention on Cybercrime – Frequently Asked Questions and Answers”, available at: <http://www.usdoj.gov/criminal/cybercrime/COEFAQs.htm#topicE>.

### 3.2 A Long Time in the Coming: The 2008 EU FD on racism

In November 2001, the Commission brought forward its proposal for a Council Framework Decision on combating racism and xenophobia,<sup>113</sup> with the objective of replacing the 1996 Joint Action concerning action to combat racism and xenophobia.<sup>114</sup> Several reasons were offered to justify the need for a new piece of legislation: (i) a new EU text would present a strong signal by political leaders which can influence public perceptions; (2) it would send out the message to minority communities that they are recognized and integral part of our societies; (3) Having an EU FD would also have a positive impact on the implementation of law addressing racism and xenophobia in European societies.<sup>115</sup> These are noble reasons but hardly pressing ones when it comes to justifying EU legislative intervention. The key argument was a legal one. The Commission and supporters of its proposal often contended that although all EU Member States possess legislation addressing to a large extent the issues dealt with by the proposed FD on racism, the diversity and variation in the relevant criminal provisions allegedly highlighted the need for an EU-wide approximation, i.e. harmonization, of national criminal law. Divergent views between national governments on the potential impact of this proposal on freedom of expression explain that no agreement was found in the EU Council of Ministers until April 2007. Following further consultation with the European Parliament,<sup>116</sup> the EU FD on racism was, at last, adopted in November 2008.<sup>117</sup>

By comparison to the 1996 Joint Action, the list of offences is expanded and there is also a change in the method of achieving approximation: while the Joint Action gave Member States the *option* either to incriminate certain conduct or to derogate from the principle of dual criminality, the Framework Decision *imposes*, for the first time, an express

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<sup>113</sup> COM(2001)664, OJ C 75 E, p 269.

<sup>114</sup> [1996] OJ L 185/5.

<sup>115</sup> B. Winkler, Director of the EUMC, "Racism and Xenophobia in the EU Member States: Trends and Developments", Seminar on Combating Racism and Xenophobia, Vienna, 20 June 2006. Speech available at: <http://eumc.europa.eu>.

<sup>116</sup> The compromise text agreed in April 2007 was submitted to the European Parliament for "re-consultation" given that the original text from 2001, for which the Parliament was previously consulted in 2002 (OJ C 271 E, 12.11.2003, p. 558), had since been subject to major amendments.

<sup>117</sup> Framework Decision of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L328/55 [2008].

obligation on Member States to treat forms of racist and xenophobic conduct as criminal offences, which can give rise to extradition or surrender. In another radical development, the EU Council of Ministers, at the insistence of countries such as Germany, France and Luxembourg,<sup>118</sup> also agreed to punish those who deny or trivialize crimes of genocide, crimes against humanity and war crimes on the basis of provisions which are “largely inspired by the German law, which incriminates not only the denial but also the trivialisation of the crimes mentioned, if that is liable to disturb the public peace.”<sup>119</sup>

According to Article 1(1) (“Offences concerning racism and xenophobia”), each EU Member State shall take the necessary measures to ensure that the following intentional conduct is punishable:

(c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;

(d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

These provisions have raised a certain number of concerns. Firstly, the notions of “public condoning”, “denial” and of “gross trivialization” are not defined. The last one, in particular, is especially vague. French courts, for instance, decided to liberally interpret the Gayssot Act to punish the gross minimizing of Nazi crimes but formally required the demonstration that those engaged in such conduct acted in bad faith. No such requirement

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<sup>118</sup> See also ECRI general policy recommendation N°7 on national legislation to combat racism and racial discrimination, 13 December 2002: “18. The law should penalise the following acts when committed intentionally: ... e) the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes.”

<sup>119</sup> Commission proposal, explanatory memorandum.

is explicitly mentioned in the EU FD.

Secondly, the EU FD is both more open-ended and broader than the 2003 Council of Europe's Additional Protocol on cybercrime. Indeed, Article 1(1)(c) of the EU FD remains silent as to *whom* can establish the factual existence of a genocide contrary to what Article 6 of the Additional Protocol does. In addition, there is no *temporal* limitation so it cannot be entirely excluded that countries may decide to describe as genocides historical events, such as the Armenian genocide, which took place before the concept of genocide was formalized.<sup>120</sup> The EU FD might also be interpreted as obliging countries, where the legislator has “merely” recognized the *existence* of a particular genocide, to logically introduce criminal provisions in order to punish the act of publicly condoning, denying or grossly trivializing this genocide.

The scope of the EU FD also appears broader than the Additional Protocol as it is aimed at crimes of genocide, crimes against humanity as well as *war crimes*. Furthermore, the notions of denial and gross trivialization are now to be applied to all genocides, crimes against humanity and war crimes (as defined by the Statute of the International Criminal Court). By contrast, in its 2001 version, the EU FD only expressly punished the act of denying or grossly trivializing the sole Holocaust.<sup>121</sup> The drafters of the Commission proposal must have initially thought that the Holocaust is such an unprecedented crime that it must be the unique historical event whose denial or gross trivialization must be punished because of the implicit yet obvious racist and antidemocratic intent of those

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<sup>120</sup> See R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace, 1944). As observed by D. Fraser, “one must ask if it is possible to apply this term retrospectively to events which pre-dated the concept of ‘genocide’ itself. ... In other words, in order to apply such general prohibitions to a denial of the Armenian genocide, a real issue in today's world, a court would first have to determine that events in Turkey in 1915 did in fact constitute genocide, a concept which by necessity would have to be applied retrospectively to the historical facts in order to impose criminal liability today?,” D. Fraser, “**On the Internet, Nobody Knows You're a Nazi': Some Comparative Legal Aspects of Holocaust Denial on the WWW**”, in I. Hare and J. Weinstein (eds), *Extreme Speech and Democracy* (OUP, 2009), p. 512.

<sup>121</sup> “Member States shall ensure that the following intentional conduct committed by any means is punishable as criminal offence: ... (c) public condoning for a racist or xenophobic purpose of crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court; (d) public denial or trivialisation of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 in a manner liable to disturb the public peace...”.

engaged in such “conduct”. But rather than distinguishing among genocides on case by case basis, the final version of the EU FD makes it also possible to criminally sanction those denying any genocide, crime against humanity or war crime while reserving a “special” provision regarding the Holocaust. In doing so, the EU FD allows for the continuing coexistence of the “genocide model” (see e.g. legislation in Spain or Switzerland) as opposed to the “Holocaust denial model” (see e.g. legislation in France or Germany) in Europe. Finally, it is important to stress that the scope of the EU FD may be further broadened. Indeed, recital 10 provides that a Member State may decide to *extend* the application of Article 1(1)(c) and (d) to crimes directed against a group of persons defined by other criteria than the ones previously mentioned, such as social status or political convictions.

The broader scope of Article 1(1)(c) and (d), by comparison to the 2001 draft proposal issued by the Commission, and more generally, the mere presence of provisions punishing the denial or the trivialization of all genocides and other international crimes proved to constitute real stumbling blocks to the adoption of the EU FD. To secure a unanimous vote from all national governments, several concessions were offered to the countries that expressed concerns regarding the potential impact of the FD on freedom of expression.

Firstly, the Council agreed in 2007 that EU Member States will only be compelled to punish genocide-denial “when the conduct is carried out in a manner likely to incite to violence or hatred”<sup>122</sup> against a particular group or a member of such a group. Yet some have expressed their disappointment with this new condition on the ground that trivialization of the crime of genocide is “a form of racism, and Member States should be able to punish it even where incitement to hatred or violence is not involved.”<sup>123</sup> This would, however, likely conflict with Article 10 ECHR, as interpreted by the European

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<sup>122</sup> Article 1(c) and (d).

<sup>123</sup> M. Roure MEP, *Report on the proposal the proposal for a Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law*, Committee on Civil Liberties, Justice and Home Affairs (A6-0444/2007), 14 November 2007

Court of Human Rights, especially if the trivialization is not aimed at the Holocaust.<sup>124</sup> Yet, and similar to the option offered in relation to “hate speech”, Member States can also opt to punish genocide denial “which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.”<sup>125</sup> It would seem that this provision does not offer an additional “escape route” to those countries unwilling to prosecute genocide deniers but should be understood, on the contrary, as enabling the “militant democracies” to continue to punish the denial of the Holocaust when collective interests, rather than individual interests, have been harmed. In other words, the threshold, in this last hypothesis, is less difficult to satisfy. And since the EU FD does not define either “likely” or the notion of “public order”, one can assume that national authorities, in countries such as France or Germany, remain free to decide when, for instance, a statement denying the Holocaust becomes likely to disturb public order.

The second major concession offered to the “liberal camp”, Article 1(4), offers the additional opportunity for each country “to make a statement that it will make punishable denying or grossly trivialising the crimes referred to in paragraph 1(c) and/or (d), only if the crimes referred to in these paragraphs have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only.” In doing so, the EU FD on racism emulates, but not strictly follows, Article 6 the Council of Europe’s Additional Protocol. This reservation may be welcome insofar as it enables any EU country to let national or international courts, rather than their own legislator, determine when a particular event can be legally described as genocide.

Despite these major concessions, and contrary to what the Council of Europe’s Additional Protocol offers, EU Member States are not granted the right not to apply, in whole or in part, paragraphs (c) and (d) of Article 1(1). Furthermore, the EU FD raises the distressing possibility of a person being extradited for having engaged in a conduct lawful in his/her country of residence but constitutive of a racist offence in another EU

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<sup>124</sup> See *supra* Section 2.2.2.

<sup>125</sup> Article 1(e).

Member State. To put it differently, one cannot exclude the issuance of a European Arrest Warrant for behavior that is constitutionally protected in a country but prohibited in another one. Assuming for instance that a country decides to criminalize the denial of the Armenian genocide, a person living in a Member State where such conduct is lawful could be subject to a European Arrest Warrant for posting materials denying or trivializing the Armenian genocide on the internet as these materials would then be accessible from the territory of other Member States. Some governments, however, have been keen to promise that they would not extradite anyone who has acted in a lawful manner under domestic law.<sup>126</sup>

As previously mentioned, concerns about freedom of expression largely explain why the EU FD on racism has not been unanimously welcomed, especially in countries where “simple” Holocaust denial (i.e. when the denial does not also constitute incitement to hatred) cannot be criminally sanctioned. As pointed out by *The Economist*, quoting Jacques Chirac, Holocaust denial may be “a perversion of the soul and a crime against truth. But that does not mean it should be a crime in law.”<sup>127</sup> Yet it is important to stress that the text of the FD on racism has been dramatically improved over time, so much so that some NGOs have criticized the efforts of those who attempted to limit the impact of the EU FD by putting “an overemphasis on the need to limit its scope in the context of freedom of speech.”<sup>128</sup> These efforts were indeed not entirely unsuccessful. In addition to the different limitations and options previously outlined, the EU FD contains a provision (Article 7) on “constitutional principles and fundamental principles” which reads as

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<sup>126</sup> For example, the UK Government gave the House of Lords Select Committee on the EU the assurance that “no one who has acted in a lawful manner in this country would be extradited under an EAW to another Member State for a racism and xenophobia offence where the whole or a part of the conduct occurred in the UK,” *The Proposed Framework Decision on Racism and Xenophobia – An Update*, Session 2002-03, 32<sup>nd</sup> Report, HL Paper 136, para. 14. This means, in practice, that “if a British citizen posted something on a website in the UK, for whatever reason, denying the Holocaust, and that was accessed by a German citizen and the German state wished to act on that and asked for extradition under the Extradition Bill to the United Kingdom, we would not do so because it is not an offence in Britain to deny the Holocaust and therefore we would not extradite in those circumstances,” Lord Filkin, Parliamentary Under Secretary of State, Home Office, quoted in House of Lords, *The Proposed Framework Decision on Racism and Xenophobia – An Update*, *op. cit.*, Appendix 2: Explanatory Memorandum, Correspondence and Oral Evidence, Appendix 2002-03, question 38.

<sup>127</sup> Charlemagne, “Slippery slope”, *The Economist*, 25 January 2007.

<sup>128</sup> Response of the European Network Against Racism, Framework Decision on Racism and Xenophobia: “Europe cannot fail a third time”, February 2007, p. 3.

follows:

1. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles, including freedom of expression and association, as enshrined in Article 6 of the Treaty establishing the European Union.
2. This Framework Decision shall not have the effect of requiring Member States to take measures in contradiction to fundamental principles relating to freedom of association and freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.

Article 7(1) may be described as a standard and rather “toothless” reference to fundamental rights. It merely states the obvious point that the EU law must always respect the fundamental rights recognized by Article 6 TEU, which includes the rights and freedoms protected by the European Convention on Human Rights. By contrast, Article 7(2) is both more original and unclear. It was devised by the Council of Ministers to meet ongoing concerns about media liability. One should also note that this provision was criticized by the Commission on the ground that it may be interpreted as authorizing certain Member States to set aside EU law were it to conflict with national procedural rules shielding the media from liability. Despite the potential threat to the primacy of EU law it poses, Article 7(2) was maintained as it was considered of utmost importance by some countries. Intriguingly, a recital, which initially stated that Article 7(2) could not result in the exemption of the press from criminal liability, also disappeared from the final version. It remains unclear whether this should be understood as implying that Article 5 on “liability of legal persons” contains an implicit exemption as far as the media are concerned? One may hope that the Court of Justice will soon be given the opportunity to clarify how the notion of “constitutional traditions or rules”, which may exempt media from criminal liability, should be interpreted.

Regardless of these multiple and rather confusing legal safeguards, one may legitimately remain unconvinced, both about the political necessity of laws punishing genocide denial

and the legal need for an EU-wide prohibition. To follow the arguments neatly summed in an article published in *The Economist*,<sup>129</sup> the EU FD on racism seriously limits freedom of speech, one of the basic freedoms on which other liberties depend, but more pragmatically, it is also rather unclear whether the proposed remedies aimed at stopping anti-Semitism would actually work. Furthermore, laws against genocide denial come up against the rule of unintended consequences. In practice, they tend to give more publicity to the views of genocide deniers. The slippery slope effect should also be taken into account. As the example of France shows, where multiple and diverse memorial laws have been voted or proposed, national authorities may find it difficult to resist the temptation to also criminalize expressions merely because they might cause ethnic or religious offence. Finally, it seems reasonable to argue that genocide denial laws are only understandable and *necessary* in countries where Nazism had indigenous roots. To these traditional arguments, one may want to add that the EU FD on racism also participates in this unfortunate trend which leads to an inflationary use of the term genocide and to the “normalization” of the Holocaust as merely one among many other genocides.

However, at present, the most worrying development has to do with the slippery slope effect of the EU FD on racism. Indeed, while the EU FD was being negotiated, Latvia and other Baltic countries pushed to include condemnation of crimes committed during the Soviet occupation of their countries in the legislation. In order to accommodate the concerns of those Member States that wanted the EU FD to cover Stalinist crimes, the Council agreed to annex a declaration that deplors all totalitarian crimes.<sup>130</sup> Furthermore, it was also agreed (the so-called “rendez-vous” clause) that the Commission will report to the Council within two years after the entry into force of the EU FD, with the view to determining whether an additional instrument was needed to cover public condoning, denying or grossly trivializing of crimes directed against a group of persons defined by criteria such as social status or political convictions. The underlying idea was to allow for the eventual criminalization of the denial of crimes committed by communist

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<sup>129</sup> Charlemagne, *op. cit.*

<sup>130</sup> “The Framework Decision is limited to crimes committed on the grounds of race, colour, religion, descent and national or ethnic origin. It does not cover crimes committed on other grounds for example by totalitarian regimes. However, the Council deplors all of these crimes,” Council of the European Union, Annex Statements to be entered in the minutes of the Council, 16351/1/08, 26 November 2008.

regimes. In the meantime, the European Parliament, in a manner reminiscent of the French Parliament's "historical activism", decided it was time to refer to the great Ukrainian famine of 1932-33 as a crime against humanity.<sup>131</sup>

While the objective to fight misinterpretations of history to lay the foundations for reconciliation based on truth and remembrance is a noble one, it cannot be excluded that the EU also decides, for reasons of political convenience, to punish *gulag* denial or those who refuse, for instance, to describe the Ukrainian or Irish great famines as crimes against humanity. For this author, public authorities should however resist the enticing temptation to use the force of criminal law to "sanctify" clearly established historical facts. This is not to say that nothing can and should be done to counter the genocide deniers' fallacies. The EU Member States should find inspiration in the Terezin Declaration. In other words, they would be well advised to focus their energy and resources on establishing and supporting research and education programs, not only about the Holocaust, but also other genocides and crimes against humanity, as well as encourage ceremonies of remembrance and support the preservation of memorials.<sup>132</sup>

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<sup>131</sup> European Parliament resolution of 23 October 2008 on the commemoration of the Holodomor, the Ukraine artificial famine (1932-1933) (P6 TA(2008)0523). In its resolution of 2 April 2009 on European conscience and totalitarianism (P6 TA(2009)0213), which calls for 23 August to become a Europe-wide day of remembrance for victims of 20<sup>th</sup>-century Nazi and communist crimes, the European Parliament is nonetheless careful enough to stress that "official political interpretations of historical facts should not be imposed by means of majority decisions of parliaments" and that "a parliament cannot legislate on the past."

<sup>132</sup> See the section on "Education, Remembrance, Research and Memorial Sites" in the *Terezin Declaration on Holocaust Era Assets and Related Issues* adopted by 46 countries on 30 June 2009, in Terezin (Czech Republic). The text is available at: <http://www.eu2009.cz/fr/news-and-documents/news/terezin-declaration-26319>.