IN DEFENSE OF CIVILITY: REFLEXIONS ON HATE-SPEECH AND GROUP-LIBEL

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Freedom of speech is a fundamental human right. It is not, however, an absolute one under international human rights law, as shown by Article 10-2 of the European Convention on Human Rights (hereafter ECHR), Art.19-3 and 20-2 of the International Covenant on Civil and Political Rights (hereafter ICCPR) and Art.4 of the International Convention on the elimination of all forms of racial discrimination (hereafter CERD), as well as under domestic constitutional law[1]. One of the limitations, stated in both the ECHR and the ICCPR, relates to the protection or respect of the rights or reputation of others. To be lawful, such limitations must rest on on a clear legal basis containing the appropriate procedural and substantial guarantees and be proportionate. Judicial review is essential.

The aim of this paper is to contribute to the reflexion on the legal status of hate-speech and group-libel in our societies and on the ultimate meaning of legislating on them. To comment in depth on the comparative case law of the countries mentioned here would necessitate another study. I will first explore the origins of group-libel and hate-speech statutes and discuss their legitimacy. A second part will comment on the main wording and implementation issues.

The origins and legitimacy of group-libel and hate-speech statutes

For a long time the main legal limitations to freedom of speech related mostly to the rights of the individual (libel), the protection of public morals (pornography, obscenity), the preservation of public order and the protection of State secrets (defense).

[1] Under Art.4-a CERD : "The States Parties… shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof". On its legislative history see W. McKean, *Equality and Discrimination under International Law*, Clarendon Press, Oxford, 160. On the international law dimension of hate-speech and group-libel, see D. Mc Goldrick and T. O'Donnell, "Hate speech laws: Consistency with national and international human rights law", *Legal Studies*, 1998.453; J. Cooper and A.M. Williams, "Hate speech, Holocaust Denial and International Law", (1999) EHRLR.594; Thomas David Jones, *Human Rights, Group Defamation, Freedom of Expression and the Law of Nations*", Martinus Nijhoff, The Hague and Boston, 1998; on Art. 20 ICCPR see I. Boerefijn and J. Oyediran, "Article 20 of the International Covenant on Civil and Political Rights", in *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination,* S. Coliver, Ed., Article 19 and Human Rights Center, University of Essex, 1992, 29.

Group-libel and hate-speech statutes are generally posterior to 1945[2]. One explanation of the adoption of such statutes would consist in affirming that it was caused by the existence of a new form of political discourse, composed of anti-foreign and xenophobic opinions, antisemitism and of other writings and public expressions directed against specific minorities. However, this form of political discourse is neither new nor recent in Europe or in the USA. Literature directed against Jews, aliens, immigrants and Blacks has existed at least since the end of the XIXth century. The first three currents reached unprecedented heights during the 1930's in Europe. What followed is known. From the 1960's on group-libel and hate-speech made a remarkable come back in Europe, due to the fact that immigration and integration policies have become political issues and to a reapparition of antisemitism. What is new and finally led to the adoption of such statutes in a number of countries is thus not such a discourse *per se* but a new awareness, by Governments and public opinion, of its meaning and its consequences in our societies.

Stated briefly the contents of group-libel and hate-speech is clear enough: it consists in denigrating certain groups, or persons belonging to them, in making them responsible for all sorts of social problems or evils, from unemployment to insecurity, alteration of the traditional way of life or national identity. After the accusation comes the "remedy": exclusion, i.e. the denial of certain basic rights and outright discrimination in such areas as public housing, welfare, access to certain professions and employment.

Two reasons led Governments and public opinion, in Europe and in Canada, to think that new legislation was necessary: a legal one and a more general one. The legal reason derived from the new place, in domestic and international human rights law, of such notions as non-discrimination, equal protection of the law, human dignity[3] and, generally, the

[2] The first French one was adopted in 1939: *décret-loi* (delegated legislation) of April 21, 1939.

[3] On the concept of human dignity, see D. Feldman, "Human Dignity as a Legal Value", (1999) *Public Law,* 682; *The Concept of Dignity in Human Rights Discourse*, D. Kretzmer and E. Klein Eds, The Hague and New York, 2002; B.Mathieu, « La dignité de la personne humaine: quel droit ? Quel titulaire?», *D.*1996.282; B. Edelman, « La dignité de la personne humaine, un concept nouveau », *id* 1997.185 ; V.Saint-James, « Réflexions sur la dignité de l'être humain en tant que concept juridique du droit français », *Revue du droit public*.1999.159 ; B.Jorion, « La dignité de la personne humaine, ou la difficile insertion d'une règle morale dans le droit positif », *id*, 1999.197. On the French Conseil constitutionnel case law on this notion see the decision of July 27, 1994, n °94343/344 DC, Rec., p 100. For an application in administrative law see Conseil d'Etat, October 27, 1995, *Commune de Morsang sur Orge and Ville d'Aix en Provence*, (the "dwarf's case") commented in (1996) *Public Law*. 166, and the UN Human Rights Committee decision, *Wackenheim v. France*, in *Revue trimestrielle des droits de l'homme,* n° 55, 2003.1017, commented by M. Levinet, at 1024. On the notion of human dignity in German constitutional law, see Art. 1 (1) of the German Constitution ("The dignity of man shall be inviolable"). This Article is part of the Ewigkeit clause of Art. 79-3; K. Sontheimer, "Prnciples of Human Dignity in he Federal Republic", in *Germany and its Basic Law. Past, Present and Future. A German-American-Symposium*,

protection of the rights of personality[4]. The more general reason can be summed up as follows: legislative intervention is deemed to be necessary not only - and perhaps not mainly - to protect certain targeted groups and their members but also for the well-being of society as a whole. Such a discourse is an attack on its very fabric, on the form of *civility* which forbids to vilify an individual or a group of persons on the ground of their *identity*. We live in times and in societies where the use of legal instruments against what is, and is meant to be an aggression[5] is fully legitimate[6].

The response of the US case law relating to the 1st Amendment is based on different premises. It rests on a principled opposition to the idea of restricting speech on the sole base of its content, however offensive and outrageous the expressed opinions may be and whatever the offense, insult or social discomfort they contain or create, unless in cases or clear and present danger, i.e. of imminent lawless action, and when alternative measures are not available. Statutes such as those mentioned supra and restrictions based on them are held to be a form of Government censorship[7]. Such a case law has led to a lively and meaningful debate questioning it and analysing in depth the central issues. I regret to lack here the space to do full justice to this remarkable body of legal literature[8]. Some American commentators have

P. Kirchhof and Donald. P.Kommers, Eds., Nomos, Baden-Baden,1993.213 ; Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press, Durham and London, 2nd ed., 1997, chap. 7:"Human dignity and personhood".

[4] H. Nerson, « La protection des droits de la personne en droit privé français », *Travaux de l'association H. Capitant*, XIII, 1963,60 ; B. Beignier, *Le droit de la personnalité*, Presses universitaires de France, 1992 ; P.Kayser, « Les droits de la personnalité Aspects théoriques et pratiques », *Revue trimestrielle de droit comparé*.1971.445.

[5] K .Greenawalt, *Speech, Crime and the Uses of Language*, Oxford University Press, New York, 1989.299.

[6] In *The Morality of Consent,* Yale University Press, New Haven and London, 1975, A. Bickel, discussing Justice Brandeis's premise in Whitney v California, that "discussion affords ordinarily adequate protection against the dissemination of noxious doctrines" (274 US 357,at 375,1927) writes: "…we have lived through to much to believe it", at 71.

[7] See J.F. Gaudreault-DesBiens, "From Sisyphus's Dilemma to Sisyphus's Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide", 46 *McGill Law Journal/ Revue de droit de McGill*, 1117 (2001); R. Errera, "Freedom of speech in Europe and in the USA" in *European and US constitutionalism*, G. Nolte, Ed., Council of Europe Publishing, Strasbourg, 2005.25; Cambridge University Press, 2005.23.

[8] Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado and Kimberlé Williams Crenshaw, *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment*, Westview Press, 1993, reviewed by Henry L. Gates Jr, "Why civil liberties pose no threat to civil rights: let them talk", *The New Republic*, September 20-27, 1993.37. On the aftermath of the Skokie case see Donald A. Downs," Skokie revisited: Hate-group Speech and the First Amendment", 60 *Notre Dame Law Review*.629 (1985);Lee C. Bollinger, "The Skokie Legacy: Reflections on an "Easy case" and Free Speech Theory", 80 *Michigan Law Review*. 617 (1982); *The Tolerant Society*, Clarendon Press, Oxford, 1986, reviewed by M. Rosenfeld , "Extremist Speech and the Paradox of Tolerance", 100 *Harvard Law Review*.1457 (1987); D. Kretzmer, "Freedom of Speech and Racism", 8 *Cardozo Law Journal*.445 (1987); Robert C. Post, "Racist Speech, Democracy and the First Amendment", 32 *William and Mary Review*.267 (1991); Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story", 87 *Michigan Law Review*.2320 (1989); Richard D. Bernstein," First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress", 85 *Columbia Law Review*. 1749 (1985);

recognized that "group vilification… poses … (harms) both to targeted groups and the political community as a whole"[9]. Gates[10] quotes Matsuda: "A legal response to racist speech is a statement that victims of racism are valued members of our polity… In a society that expresses its moral judgment through the law, the "absence of law against racial speech is telling". No less remarkable has beeen the use of such central concepts as those of individual autonomy and identity, human dignity[11], equality and civility, i. e. personality rights[12].

On the wording and implementation of group-libel and hate - speech statutes: key legal concepts and issues.

Once the decision to legislate is taken and the choice of criminal law made, a number of key legal issues must be addressed. The drafting and wording of such legal instruments must be very careful. In implementing them, courts must keep in mind their ultimate justification as well as the importance of freedom of expression.

a) Procedural issues:

Who may initiate a prosecution? Shall the State prosecutor have a monopoly? This is not enough. Political considerations may influence its decision, be it a positive or a negative one. Hence the interest of allowing other bodies to bring a perosecution. Here is one example: under French law any association which had existed during five years at the date of the facts and the aim of which is to combat racism and discrimination has standing to bring criminal proceedings. Such a power has been frequently used. In French law criminal courts are empowered to award in the same judgment civil damages to the victim of an offense and to sentence the accused person. In Canada the Human Rights Act (1977) allows the Human Rights Commission to act if certain conditions are met, e.g. the use of telecommunications to spread hate-messages[13].

Note, "A communitarian defense of group libel laws", 101 *Harvard Law* Review.682 (1988; Greenawalt, *op. cit.,* 292, ff.

[9] Note, *loc. cit.,*684.

[10] *Loc. cit.*, 43.

[11] Note, *loc.cit.* 689.

[12] Greenawalt, *op. cit.*

[13] See J. Manwaring, "Legal regulation of hate propaganda in Canada", in *Striking a Balance, op. cit.* 106. In the Taylor and Keegstra cases the Canadian Supreme Court held that the Canadian statute (Art. 319 of the Criminal Code) was consistent with the Canadian Charter of Rights and Freedoms. In the Zundel case it held that Art. 181, punishing the wilful publication of statements or news known as false, causing or likely to cause injury or

What follows is an examination of the answers of several legal systems to a number of central issues[14].

b) The definition of the offense.

The two notions most used are those of libel and of incitement.

- Libel is a familiar legal notion as applied to persons, physical or legal. Certain legislations use the notion of group- libel, i.e to libel a person or a group of persons on the ground of certain characteristics (see infra). This is the case under French law[15]. As to the definition of libel, it consists in "Any allegation or attribution of a fact which undermines the honour or the esteem (« consideration ») of the person to whom the fact is attributed"[16]. Under German law, it is an offense to attack the human dignity of others "by insulting, maliciously ridiculing or defaming parts of the population" or a group on the grounds of certain characteristics[17].

- The notion of incitement is used by most countries. French law mentions "provocation"[18]. In Britain, the 1986 Public Order Act uses the verb to "stir up". The Swiss penal code (Art. 261 bis) uses the word "to incite".

Some legislations add another element to the definition of the offense, relating to the nature of the language used. In Britain; Art.18 (1) of the Public Order Act 1986 mentions "threatening, abusive or insulting words or behaviour". Art.29 B (1) of the same Act, adopted recently and relating to religious hatred, mentions "threatening words or behaviour" and "threatening" material.

Some countries go further: in addition to inciting to hatred or discrimination, it is an offense under Swiss law to propagate "an ideology aiming to disparage or denigrate systematically

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mischief to a public interest was unconstitutional. On the Keegstra case (Regina v.Keegstra, 1880, CCC (3rd),I (SCC) see Bruce P. Elman, "*Her Majesty The Queen v. James Keegstra:* The Control of Racism in Canada", in *Under the Shadow of Weimar. Democracy ,Law and Racia Incitement in Six Countries*, L. Greenspan and C. Levitt, Eds., Prager, Westport (Conn.) and London, 1993. 149.

[14] For a comparative study see *Striking a Balance, op. cit.; Under the Shadow of Weimar, op. cit.; Revue trimestrielle des droits de l'homme*, special issue, March 31, 2001, « Le droit face à la montée du racisme et de la xénophobie ».

[15] Art. 32 , para 2, of the law on the press.

[16] *Id.,* Art. 29.

[17] German Criminal Code, Art. 130-2-d).

[18] Law on the press, Art.24, para. 8.

members of certain groups", or "to lower members of certain groups in a manner which is an attack against human dignity" (Penal Code, Art. 261 bis). The notion of human dignity is also to be found in Austrian and German legislation.

c) To incite to what?

Hatred is mentioned in French, English, Canadian (Criminal Code; section 319), Swiss (Penal Code, Art. 261 bis) and German (Penal Code, Art. 130) criminal law. It is sometimes accompanied by other notions such as violence or discrimination (French law) or discrimination (Swiss law), violence and attack on the human dignity of others (German Penal Code, Art. 130).

d) On which grounds?

English law seems to be the only one to mention colour. The word is used by Art.4-a CERD. Race is mentioned in English, French, German and Swiss law. Nationality is mentioned in English and German law; ethnic or national origin in English, French, German and Swiss law. Most countries mention religion (France, Germany, Canada, Switzerland). A lengthy debate took place recently in Britain on the inclusion of incitement to religious hatred, unknown before 2005 except in Northern Ireland. The Religious Hatred Act inserts into the 1986 Act the following clause: 29B(1) "A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred". The statute contains also the following provision:

> 29: "Nothing in this part can be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or proselytizing or urging adherents of a different religion or belief system to cease practising their religion or belief system"[19].

Canadian law is particular in that the offence consists in inciting hatred "any identifiable group".

[19] S.Poulter, "Towards, *id.,* Legislative Reform of the Blasphemy and Racial Hatred Laws", (1991) *Public Law*. 371; I. Hare, "Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred", (2006) *Public Law*.521; Lord Lester, "Free Speech, Religious Freedom and the Offence of Blasphemy", n.d.,n.pl.

A French statute of December 30, 2004, has added sex, sexual orientation and handicap to the grounds mentioned supra. Discrimination based on sexual orientation or handicap is mentioned in Art. 13 of the European Community Treaty, derived from Art. 6 A of the Amsterdam Treaty. Sexual orientation applies to homosexuals and bisexuals and probably to transsexuals[20].

e) Public order or public peace.

The possibility or the likelyhood of a disturbance of public order or peace is part of the definition of the offence in Canadian (Section 319 -1 of the Criminal Code) and German law (Art. 130- 1 of the Penal Code).

f) Defences.

Defences are sometimes mentioned in hate-speech and group-libel statutes. One example is Canada, where Section 319 of the Criminal Code lists four kinds of defences: truth; good faith in expressing an opinion; statements relevant to a subject of public interest, the discussion of which was for the public benefit and reasonably believed (by the author) to be true on a religious subject; intention, in good faith, to point out, for the purpose of removal, matters producing feelings of hatred toward an identifiable group in Canada.

Section 29 of the Public Order Act 1986 in Britain, mentioned supra, is intended to be a defence. French, German and Swiss law do not mention defences.

Domestic courts decisions relating to the implementation of such statutes may be reviewed either by the European Court of Human Rights or by such bodies as the UN Human Rights Committee (see below) or the Committee on the elimination of racial discrimination,

[20] According to a judgment of the ECJ of April 30,1996,P.v.S and Cornwall City Council, Case C-13/94 (1996), ECR I. 2143, the right not to be discriminated against in one's work on grounds of sex, based on Directive 76/207 EEC of February 9, 1976, cannot be reduced to the sole discrimination resulting from belonging to one sex or the other one. It is bound to apply to discrimination based on sexual conversion, since the latter rests mainly, if not exclusively, on the individual's sex. However two years later, in Grant v. SW Trains, Case C-249/96 (1998) ECR I 621, the Court refused to include homosexuals. In a judgment of October 9, 1998, The National Coalition for Gay and Bisexual equality v. the Minister of Justice, the South African Constitutional Court has held that the prohibition of sex-based discrimination (Art. 9-3 of the Constitution) must be construed broadly and be applicable tio transsexuals. This judgment is mentioned in S.Garneri, « Le droit constitutionnel et les discriminations fondées sur l'orientation sexuelle », *Revue française de droit constitutionnel*, 40.1999.725 and 41. 2000.67.

set up under CERD. In a remarkable decision, the latter recently held that the acquittal, by the Norvegian Supreme Court, of the author of pro-Nazi and antisemitic statements was a violation of Art.4 and 6 CERD[21].

Denial of the Nazi genocide of the Jews and of other crimes against humanity

In a number of countries such a denial or minimization, accompanied by the allegation that the genocide has been invented by the Jews for their own purposes, has been the subject of books, essays and articles[22]. As the European Court of human rights rightly held in the Garaudy case, the real purpose of G.'s book was to rehabilitate the National-Socialist regime and, as a consequence, to accuse the victims of the genocide of falsifying history. Disputing the existence of crimes against humanity, the Court added, is therefore one of the most severe forms of racial defamation and of incitement to hatred of Jews.The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism is based and constitutes a serious threat to public order. It is incompatible with democracy and human rights and its proponents indisputably had designs that fell into the category of prohibited aims under Art.17 ECHR. Consequently the Court found that G., who had been sentenced by a French court to a fine and a suspended prison sentence, could not rely on Art.10. His application was declared ill-founded[23]. This is consistent with the case law of the European Human Rights Commission[24], a dictum of the court in a 1998 judgment[25] and a decision of the UN Human Rights Committee[26].

[21] Committee on the elimination of racial discrimination, Communication n° 30/2003, 15-22 August 2005, Jewish Community of Oslo and others v. Norway, 20.BHRC. 323.

[22] See P. Vidal-Naquet, « Un Eichmann de papier. Anatomie d'un mensonge », in *Les Juifs, la mémoire et le présent,* La Découverte, 1981.193 ; *Les assassins de la mémoire*, *id.,* 1987 ; D. Lipstadt, *Denying the Holocaust. The Growing Assault on Truth and Memory* , The Free Press, New York, 1993 ; N. Fresco « Nouveaux visages du vieil antisémitisme », in *La lutte contre le négationnisme,* La Documentation française, 2003.17.

[23] Garaudy v. France, July 7, 2003 ; M. Levinet, « La fermeté bienvenue de la Cour européenne des droits de l'homme face au négationnisme », *Revue trimestrielle des droits de l'homme* ,2004.653.

[24] European Commission on Human Rights, P. Marais v. France, June 24, 1996, D.R.86-A.M. had published an article in a journal called *Révision.* His application was held inadmissible under Art. 10. Art. 17 was mentioned.

[25] Isorni v. France, September 23, 1998. The Court remarked that negationism or revisionism relating to historically duly established facts, such as the Nazi genocide of the Jews, were deprived by Art.17 of the protection of Art.10.

[26] Human Rights Committee, Faurisson v. France, November 8, 1996; *Revue universelle des droits de l'homme*, 1997.46 ; G.Cohen-Jonathan, « Négationnisme et droits de l'homme », *Revue trimestrielle des droits de l'homme,*1997.571.

There is nothing to add to the European Court of Human Rights judgment except this: Such writings are also an aggression against the dead, the survivors and society at large, aiming at the desecration of the only grave of the former, that is, our memory. This is why certain European countries (Austria, Belgium, France, Germany, Spain and Switzerland) have adopted statutes making it an offense to deny the existence or grossly minimize the existence of this genocide or of crimes againts humanity in general. The wording varies and often refers to international law. There are also differences on who may initiatiate a prosecution. The Belgian statute of March 23, 1995 makes it an offence to publicly deny, grossly minimise, approve or tend to justify "the genocide committed by the German National-Socialist régime during the second word war". As to the meaning of genocide, the statute contains a reference to Art.2 of the 1948 UN Convention on genocide. The Center for the promotion of equal opportunity and any association which has existed for five years and the aim of which is to defend the interests of resistants and of camp inmates may initiate a prosecution. The Belgian Cour d'arbitrage held that the statute was consistent both with the Belgian Constitution, Art.10 ECHR and Art.19 ICCPR[27]. In Germany Art.130 (3) of the Penal Code makes it an offense to contest or minimize acts of genocide committeed under the Nazi regime if this may lead to a breach of public order[28]. Under Swiss law (Art. 261 bis of the Penal Code), it is an offense to deny, grossly minimise or seek to justify, for racist purposes, "a genocide or other crimes against humanity". French law (Art. 24 bis of the Law on the press, as revised in 1990) makes it an offense to challenge the existence of one or several crimes against humanity as defined by Art. 6 of the 1945 London Agreement creating the International Military Tribunal and committed either by members of organizations declared criminal in application of Art. 9 of the Tribunal's Status, or by a person declared guilty of such crimes by an international or French court. Associations may bring prosecutions. Under Austrian law it is an offence to deny, make banal or glorify national-socialist crimes.

Like all statutes restricting freedom of speech group-libel and hate-speech ones deserve a permanent and close scrutiny. The same applies to the case law relating to their implementation and the reasoning of the courts' decisions. Both have important consequences on the public domain and must be taken seriously. The warning of Professor Alexander

[27] Cour d'arbitrage, judgment 45/96 of July 12, 1996, *Revue universelle des droits de l'homme*.1997.106 ; note F. Ringelheim, « Le négationnisme et la loi »,111 ; *Journal des tribunaux*, 1997.95 .

[28] See, for a case relating to meeting during which D. Irving planned to deny the Nazi genocide of the Jews and the condition set by the local authorities, the judgement of the German Federal Constitutional Court, Holocaust Denial case (1994) 90 Bverf GE 241, commented in Kommers, *op. cit.* 382.

Bickel, who argued in 1971 with Floyd Abrams the Pentagon Papers case before the US Supreme Court[29], remains as valid to-day as it was 30 years ago:

"There is such a thing as verbal violence, a kind of cursing, assaultive speech that amounts to almost physical aggression, bullying that is no less punishing because it is simulated… This sort of speech constitutes an assault. More, and equally important, it may create a climate, an environment in which conduct and actions that were not possible before become possible… Where nothing is unspeakable, nothing is undoable"[30].

[29] F.Abrams, Speaking Freely. Trials of the First Amendment, Viking, New York, 2005, 1 ff.
[30] Bickel, *op. cit.*,72-73.