



Oxford Pro Bono Publico
<http://www.law.ox.ac.uk/opbp>

COMPARATIVE HATE SPEECH LAW: ANNEXURE

Research prepared for the Legal Resources Centre, South Africa

March 2012

CONTRIBUTORS

Faculty:

Professor Sandra Fredman, FBA
OPBP Executive Committee

Dr Liora Lazarus
OPBP Executive Committee

Research co-ordinator:

Chris McConnachie
Deputy-Chairperson, OPBP
MPhil Candidate

Compilation:

Emma Webber
BCL Candidate

Ingrid Cloete
BCL Candidate

Jonathan Swanepoel
BCL Candidate

Researchers:

Chintan Chandrachud
BCL Candidate

Tamas Szigeti
MJur Candidate

Natasha Simonsen
DPhil Candidate

Maximilian Alter
MJur Candidate

Petra Weingerl
MJur Candidate

Laura Hilly
DPhil Candidate

Emma McKarron
BCL Candidate

Marija Jovanovic
MPhil Candidate

Reader:

Miles Jackson
DPhil Candidate

We would like to thank:

- **Professor Timothy Endicott**, Dean of the Oxford Law Faculty, for his support of this project;
- The Members of the Oxford Pro Bono Publico Executive Committee, **Dr Tarunabh Khaitan**, **Dr Jane Donoghue**, **Ms Dhvani Mehta**, **Ms Emma Dunlop**, **Ms Alecia Johns**, **Ms Meghan Campbell** and **Mr Paolo Ronchi**, for their support and assistance with the project.

Indemnity

Oxford Pro Bono Publico is a programme run by the Law Faculty of the University of Oxford, an exempt charity (and a public authority for the purpose of the Freedom of Information Act). The programme does not itself provide legal advice, represent clients or litigate in courts or tribunals. The University accepts no responsibility or liability for the work which its members carry out in this context. The onus is on those in receipt of the programme's assistance or submissions to establish the accuracy and relevance of whatever they receive from the programme; and they will indemnify the University against all losses, costs, claims, demands and liabilities which may arise out of or in consequence of the work done by the University and its members.

TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	2
I International Law.....	2
II Australia.....	3
III United Kingdom.....	5
IV Republic of Ireland.....	6
V India	6
VI Canada.....	8
VII United States.....	8
VIII European Court of Human Rights	10
IX Germany	11
X Slovenia.....	12
QUESTION 1: CONTEXTUALISING THE BALANCING EXERCISE.....	14
I International Law.....	14
II Australia.....	16
III United Kingdom.....	18
IV Republic of Ireland.....	19
V India	19
VI Canada.....	21
VII United States.....	24
VIII European Court of Human Rights	25
IX Germany	26
X Slovenia.....	28
QUESTION 2: HATE SPEECH AND CONTEXT	30
I International Law.....	30

II Australia.....	33
III United Kingdom.....	35
IV Republic of Ireland.....	36
V India	37
VI Canada.....	38
VII United States.....	39
VIII European Court of Human Rights	39
IX Germany	42
X Slovenia.....	45
QUESTION 3: HATE SPEECH AND POPULAR CULTURE.....	46
I International Law.....	46
II Australia.....	47
III United Kingdom.....	50
IV Republic of Ireland.....	51
V India	52
VI Canada.....	52
VII United States.....	52
VIII European Court of Human Rights	54
IX Germany	55
X Slovenia.....	56

INTRODUCTION

1. This annexure provides supplementary research to the memorandum. We hope that this will be a useful resource should the Legal Resources Centre wish to explore the issues covered in the memorandum in more detail.
2. This document is organised into four sections. The first section provides background information on the hate speech laws in the ten jurisdictions covered in this study. The remaining sections address the three questions posed by the LRC, providing a country-by-country overview of the relevant law and cases:
 - a. *Contextualising the balancing exercise:* The prohibition on hate speech must be interpreted in a way that strikes a balance between the values of free expression, equality and human dignity. How have other jurisdictions sought to achieve this balance? Most importantly, what role does the historical and socio-political context play in striking this balance?
 - b. *Hate speech and context:* What role does context play in determining whether speech amounts to hate speech?
 - c. *Hate speech and popular culture:* How have courts in other jurisdictions dealt with alleged hate speech in songs or other forms of cultural or artistic expression?

BACKGROUND

I INTERNATIONAL LAW

a) International human rights instruments

3. Hate speech is addressed in two primary international instruments:¹ the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), adopted in 1965,² and the International Covenant on Civil and Political Rights (ICCPR), adopted in 1966.³
4. Art 20(b) of the ICCPR requires states parties to prohibit hate speech in the following terms:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.
5. Article 4(a) of CERD, goes further, requiring states parties to-

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.
6. In General Recommendation XV,⁴ the CERD Committee explained that art 4(a) requires the prohibition of four primary acts:
 - (i) dissemination of ideas based upon racial superiority or hatred;
 - (ii) incitement to racial hatred;
 - (iii) acts of violence against any race or group of persons of another colour or ethnic origin and
 - (iv) incitement to such acts.

¹ See further Toby Mendel, 'Hate Speech Rules under International Law', available at <http://www.law-democracy.org/?page_id=61> (last accessed 16 February 2012).

² International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969), 660 UNTS 195.

³ International Covenant on Civil and Political Rights adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171.

⁴ Committee on the Elimination of Racial Discrimination, General Recommendation XV, Report of the Committee on the Elimination of Racial Discrimination, 2, UN Doc A/48/18 (Mar. 17, 1993).

b) International criminal law

7. Hate speech has been analysed in the context of crimes of incitement to commit genocide and persecution by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), bodies established by the United Nations Security Council Resolution 955 and 827 respectively to prosecute serious crimes committed during the wars in Rwanda and the former Yugoslavia. While these courts have analysed speech acts from the perspective of the crimes proscribed by their statutes, it is useful to consider how those tribunals have interpreted the elements of intent and incitement. In the *Media* case⁵ the ICTR Trial Chamber I extensively analysed the jurisprudence of the international human rights bodies dealing with discrimination and hate speech thus indicating the proximity and interconnectedness of the questions analysed. The Trial Chamber held that:

A review of international law and jurisprudence on incitement to discrimination and violence is helpful as a guide to the assessment of criminal accountability for direct and public incitement to genocide, in light of the fundamental right of freedom of expression.⁶

8. However, this position has been heavily criticized⁷ and in the subsequent Appeals decision, the ICTR clarified that ‘to the extent that not all hate speech constitutes direct incitement to commit genocide, the jurisprudence on incitement to hatred, discrimination and violence is not directly applicable in determining what constitutes direct incitement to commit genocide.’⁸

II AUSTRALIA

9. Australian federal and state-level legislation imposes criminal and civil restrictions on hate speech. At the Federal level, racial hatred provisions were introduced into the Race Discrimination Act 1975 (Cth) (‘RDA’) in 1995 by the Racial Hatred Act (1995) (Cth). The Act prohibits public acts which are done, in whole or in part, because of the race, colour, or national or ethnic origin of a person or group *and it*

⁵ *Nahimana et al*, Case No ICTR 99-52-T, Judgment and Sentence (3 December 2003).

⁶ *ibid* [980].

⁷ Diane F Orentlicher, ‘Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana’, 21 *Am. U. Int’l L. Rev.* 557 2005-2006; *Nahimana et al*, ICTR Appeals judgement, Case No. ICTR-99-52-A (28 November 2007), partly dissenting opinion of Judge Meron.

⁸ *Nahimana* *ibid* [693].

is reasonably likely in all the circumstances to offend, insult, humiliate or intimidate that person or group.⁹ Section 18D of the RDA provides for ‘anything said or done reasonably and in good faith’ if it is done:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in the making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest; or
 - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

10. In 2010, a new federal criminal offence was inserted into the Criminal Code 1995 (*Cth*) that prohibits urging violence against a ‘targeted group’ or a member of a ‘targeted group’, with the intention that force or violence will occur.¹⁰ A ‘targeted group’ is a group ‘distinguished by race, religion, nationality, national or ethnic origin or political opinion’. The penalty for such an offence is five years imprisonment.¹¹ These provisions only cover ‘urging’ that incites violence, not advocacy that incites discrimination or hostility. To date, there have been no prosecutions under these provisions.

⁹ Section 18C of the RDA provides:

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
 - (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
 - (b) the act is done because of the race, colour or national or ethnic origin of the person or of some or all of the people in the group.
- (2) For the purposes of subsection (1), an act is taken not to be done in private if it:
 - (a) causes words, sounds, images or writing to be communicated to the public; or
 - (b) is done in a public place; or
 - (c) is done in the sight or hearing of people who are in a public place.
- (3) In this section:

Public place includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

¹⁰ National Security Legislation Amendment Act 2010 (*Cth*).

¹¹ Criminal Code 1995 (*Cth*), ss 80.2A and 80.2B.

11. A range of racial hatred or ‘anti-vilification’ laws prohibit vilification on the ground of race in each of the Australian states and territories.¹² State and territory legislation in both the civil and criminal law cover racially motivated acts and offences. Legislation in the ACT and most states provides that it is unlawful to incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground of race.¹³
12. As is discussed [below](#), Australia’s federal Constitution does not contain an express freedom of expression provision. However, a number of state-level constitutions contain free expression guarantees.

III UNITED KINGDOM

13. Racial hatred is dealt with by Part III of the Public Order Act 1986.¹⁴ Section 18(1) states that

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

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

Section 18(5) provides that it is a defence if a person ‘did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.’ The act also specifies a number of offences related to broadcasting and production of offensive materials.

14. This offence was extended to cover religious hatred by the Racial and Religious Hatred Act 2006. The Criminal Justice and Immigration Act of 2008 includes the offence of inciting hatred on the basis of sexual orientation.

¹² Three jurisdictions, Queensland, Tasmania and Victoria also explicitly include ‘religion’ or ‘religious belief as a protected category under anti-vilification laws, and in NSW vilification on the basis of ‘ethno-religious’ grounds is prohibited. Other grounds on which vilification is prohibited include gender in Queensland and Tasmania; HIV/AIDS and transgenderism in NSW and the ACT, sexuality in Queensland, Tasmania and the ACT; homosexuality in NSW and a range of categories including age and disability in Tasmania.

¹³ Discrimination Act 1991 (ACT), s 66; Anti-Discrimination Act 1977 (NSW), ss 20C, 20D; Anti-Discrimination Act 1991 (Qld), s 124A; Racial Vilification Act 1996 (SA), s 4; Anti-Discrimination Act 1998 (Tas), s 19(a); Racial and Religious Tolerance Act 2001 (Vic), ss 7, 24.

¹⁴ Incitement to racial hatred was first proscribed by the Race Relations Act 1965, which required both subjective intent and objective likelihood that racial hatred would be stirred up. Due to the difficulty in obtaining prosecutions, the intent requirement was removed by s 70 of the Race Relations Act 1976. These provisions were replaced by the Public Order Act 1986.

IV REPUBLIC OF IRELAND

15. Section 2 of the Prohibition of Incitement to Hatred Act 1989 prohibits statements or actions which are threatening, abusive, or insulting and are intended to are likely to 'to stir up hatred'.
16. The Act is rarely used. Very few prosecutions have arisen and there have been fewer convictions. This legislative framework has been heavily criticized and has been under review for over a decade.¹⁵ Criticism of the Act includes the imprecision of the terms used, the complexity of prosecutions and its limited scope.¹⁶

V INDIA

17. Broadly speaking, hate speech law in India has been influenced by two concerns. The first is caste-based discrimination, which is most acute in the case of the 'dalits' or 'untouchables' who suffer systemic marginalisation. The second is religious conflict, which has its roots in communal disharmony between Hindus and Muslims and the partition of India at the time of independence in 1947.
18. The statutory framework on laws governing hate speech in India is quite subject- and context-specific. The Indian Penal Code 1860 (IPC) contains several provisions restricting freedom of expression (whether through written or spoken words) where it incites violence, promotes enmity between religious groups, etc. Section 153A of the IPC prohibits promoting or attempting to promote (by words, signs or visible representations) disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities. Section 153B penalizes imputations that a class of persons, by virtue of being members of a religious, racial, linguistic or regional group or caste or community (a) cannot bear true faith to the Constitution of India (b) should be deprived of their status as Indian citizens (c) would cause disharmony with another class of persons. Section 295A penalizes deliberate and malicious acts intended to

¹⁵ Tom Daly, 'Reform of the Prohibition of Incitement to Hatred Act 1989 – Part I' (2007) 17 (3) ICLJ 16.

¹⁶ Jennifer Scheppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal law* (2008) 165 available at <[http://www.integration.ie/website/omi/omiwebv6.nsf/page/AXBN-7UPE6D1121207-en/\\$File/Combating%20Racism%20with%20the%20Criminal%20Law.pdf](http://www.integration.ie/website/omi/omiwebv6.nsf/page/AXBN-7UPE6D1121207-en/$File/Combating%20Racism%20with%20the%20Criminal%20Law.pdf)> accessed 16 February 2012.

outrage the religious feelings of any class by insulting its religion or religious beliefs. Similarly, s 505(2) renders any statement that is made with a view to create or promote enmity, hatred or ill will between classes of society punishable. State governments may confiscate copies of newspapers, documents or books found to violate these provisions.¹⁷ It must be noted that most hate speech cases relevant to this memorandum have arisen under these provisions of the IPC.

19. The Protection of Civil Rights Act 1955, which was enacted to supplement the constitutional mandate of abolishing ‘untouchability’ in India,¹⁸ contains provisions penalizing hate speech against the historically marginalised ‘dalit’ communities. Section 7(1)(c) of the Act prohibits the incitement or encouragement (by words, either spoken or written, or by signs or by visible representations or otherwise) of any person or class of persons or the public generally to practice ‘untouchability’ in any form whatsoever. Similarly, intentional public humiliation of members of the ‘Scheduled Castes’ and ‘Scheduled Tribes’ is penalized under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989.
20. There are also separate electoral laws governing hate speech, although the Election Commission of India has faced widespread criticism for failing to meaningfully implement them.¹⁹ The Information Technology Act 2000 (as amended by the Information Technology (Amendment) Act 2008) empowers the government to censor material that endangers public order or national security. The Cinematograph Act 1952 and the rules thereunder govern the certification and censorship of films.
21. These restrictions on free expression must be viewed in the light of art 19(1)(a) right to free expression in the Constitution of India. Article 19(2) of the Constitution permits the state to make laws imposing ‘reasonable restrictions’ on the exercise of this right, in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, or decency or morality. Reasonable restrictions may also be imposed in relation to contempt of court, defamation or incitement to an offence.

¹⁷ Code of Criminal Procedure 1973, s 95.

¹⁸ Constitution of India, art 17.

¹⁹ See Ritika Patni and Kasturika Kaumudi, ‘Regulation of Hate Speech’ 2 NUJS L. Rev. 749 (2009).

VI CANADA

22. At the federal level, hate speech is prohibited both in criminal and civil legislation. The Canadian Criminal Code 1985²⁰ prohibits incitement to violence, the communication of statements in a public place that ‘incites hatred against an identifiable group’ which is ‘likely to lead to a breach of the peace’,²¹ and the wilful promotion of hatred against any identifiable group.²²
23. The Human Rights Act 1985 deals with hate speech on the Internet, prohibiting communication that ‘is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.’²³
24. Hate speech laws are assessed in the light of the s 2(b) right to free expression under the Canadian Charter of Rights and Fundamental Freedoms. Limitations of this right must satisfy the s 1 limitations analysis, requiring the limitation to be prescribed by law and to be ‘demonstrably justified in a free and democratic society.’

VII UNITED STATES

25. The First Amendment of the US Bill of Rights provides that ‘Congress shall make no law ... abridging the freedom of speech.’ Consequently, any law which restricts speech will be subjected to ‘strict scrutiny’, requiring it to be narrowly tailored to serve a compelling state interest, and it must not be overbroad. The only form of hate speech which survives ‘strict scrutiny’ under the First Amendment is incitement to violence, known as ‘fighting words’.²⁴ ‘Fighting words’ are those which ‘by their very utterance inflict injury or tend to incite an immediate breach of the peace.’²⁵ To satisfy this standard, the words in question must be ‘directed to

²⁰ (RSC, 1985, c. C-46).

²¹ Section 319(1).

²² Section 319(2).

²³ Section 13(1).

²⁴ Note that there are other exceptions such as obscenity and defamation, but the US Supreme Court held in *US v Stevens*, 559 US __; 130 S. Ct. 1577 (2010) that the list of categories of unprotected speech is now closed.

²⁵ *Chaplinsky v New Hampshire* (1942) 315 US 568, 571-2; 62 S Ct. 766; 86 L.Ed. 1031 (1942).

inciting or producing imminent lawless action and [be] likely to incite or produce such action.’²⁶

26. The Court’s assessment of the likelihood of producing imminent lawless action is strict. The leading case is *Brandenburg v Ohio*,²⁷ where a Klu Klux Klan leader was convicted under Ohio’s criminal syndicalism statute for ‘advocating ... the duty, necessity, or propriety of crime, sabotage, violence or unlawful methods of terrorism’ and for ‘voluntarily assemb(ling) ... to teach or advocate the doctrines of criminal syndaclism.’ The conviction was based on video evidence of the petitioner wearing full Klan regalia addressing a crowd of Klansmen, some of whom carried firearms, delivering a speech including words such as

‘This is what we are going to do to the niggers.’

‘A dirty nigger.’

‘Send the Jews back to Israel.’

‘Bury the niggers.’

‘Freedom for the whites.’

‘Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel.’²⁸

The statute was struck down by the Supreme Court for failing to distinguish between ‘advocacy’ and ‘incitement.’ The statute, by its terms and as applied by the Ohio courts, purported to punish ‘mere advocacy not distinguished from incitement to imminent lawless action,’²⁹ and therefore violated the First Amendment.

27. There is a hierarchy within speech under the First Amendment. ‘Fighting words’, where they amount to an ‘incitement to imminent lawless action’ are entitled to less protection than other forms of expression. However, that does not mean that they are entitled to no protection at all. Even ‘fighting words’ will be closely inspected for content or viewpoint discrimination. Race-based ‘fighting words’ were expressly considered in the two cases of *R.A.V. v City of St Paul, Minnesota*³⁰ and *Virginia v Black*.³¹ In *R.A.V.*, a statute prohibiting the burning of crosses (a notorious Klu Klux Klan message of intimidation) was construed by the Court as applying only to ‘fighting words.’ Nevertheless, the statute was struck down,

²⁶ *Brandenburg v Ohio*, 395 US 444, 447; 89 S. Ct. 1827 (1969).

²⁷ *ibid.*

²⁸ *ibid* 446-7.

²⁹ *Brandenburg v Ohio* *ibid* 448-9.

³⁰ 505 US 377; 112 S. Ct. 2538 (1992).

³¹ 538 US 343; 123 S. Ct. 1536 (2003).

because it only prohibited cross-burning when done with intent to provoke alarm or anger on the basis of one of several enumerated grounds: ‘race, color, creed, religion or gender’. This was held to be impermissible content discrimination because it only applied to ‘specified disfavoured topics.’³² St Paul must prohibit all fighting words with intent to provoke alarm or anger, or none. As Scalia J said, ‘St Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules.’³³

28. A ban on cross-burning with intent to intimidate, without reference to the offending list of ‘disfavoured topics’ was upheld in the later case of *Virginia v Black*.³⁴ The significance of this for hate speech prohibitions is twofold: first, hate speech may only be prohibited where it amounts to incitement; and second, discrimination based on the point of view expressed or the content of the message is strictly prohibited.
29. In contrast, laws which enhance the penalty available to particular crimes committed on the basis of hatred, bias or ill-will towards the victim based on actual or perceived race, ethnicity, religion, gender, sexual orientation or disability do not violate the First Amendment because they penalise conduct rather than speech. This is because the perpetrator is free to *express* his views, it is only the *commission* of harassing or other criminal conduct on the basis of those views that is prohibited.³⁵

VIII EUROPEAN COURT OF HUMAN RIGHTS

30. The European Court of Human Rights (ECtHR) serves as the regional human rights enforcement mechanism for the 47 signatories to the European Convention on Human Rights (ECHR). Article 10 of the ECHR protects freedom of expression, subject to permissible restrictions,³⁶ and the ECHR does not expressly require

³² *R.A.V. v St Paul*, above, per Scalia J, at 391.

³³ *R.A.V. v St Paul*, above, per Scalia J, at 392.

³⁴ *Virginia v Black*, (n 31). Note that the part of the statute which said that the fact of cross burning created a presumption of intent to intimidate was facially unconstitutional. O’Connor J, delivering the Opinion of the Court, held that the presumption created an unacceptable risk of the suppression of ideas (365; 1551).

³⁵ *Wisconsin v Mitchell* 508 US 476, 113 S. Ct. 2194 (1993). Note that where the available penalty is enhanced because of the alleged bias-motivation of the perpetrator, that fact must be charged in the indictment and proved to a jury beyond a reasonable doubt: *Apprendi v New Jersey* 530 US 466, 120 S. Ct. 2348 (2000).

³⁶ Article 10 provides:

member states to adopt hate speech laws. The ECtHR primarily deals with hate speech issues in the form of challenges to domestic hate speech restrictions as violations of art 10. The Court addresses these challenges in one of two ways. First, the Court may invoke art 17 - the abuse of rights provision – in finding that the expression in question is inconsistent with the rights and values under the Convention, and is therefore not protected under art 10.³⁷ Secondly, if the expression does merit protection, the Court will consider whether the restriction is legitimate in terms of the criteria outlined in art 10(2). Restrictions are permissible where they are ‘prescribed by law’; serve a ‘legitimate aim’, including the ‘protection ... of rights of others’; and where the ‘the restriction is necessary in a democratic society’.³⁸

IX GERMANY

31. The German Criminal Code (StGB) includes two major provisions relevant to hate speech: the general provision on defamation (s 185) and the more specific provision on seditious speech (s 130). The latter was introduced into the German Criminal Code in 1960 after several anti-Semitic incidents were reported.³⁹ Despite the contextual connection to the National Socialist regime it was set up broadly in order to cover all types of hate speech. The provision was complemented in 1994 and 2005 with special provisions concerning the glorification or trivialisation of National Socialism and its crimes against humanity.
32. Section 130 of the German Criminal Code contains a general prohibition on hate speech. Subsection 1 prohibits three types of acts ‘capable of disturbing the public peace’: a) ‘[incitement] of hatred against a national, racial, religious, or ethnic

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.

³⁷ See *Communist Party of Germany v the Federal Republic of Germany* App no. 250/57 (ECtHR 20 July 1957).

³⁸ See Anne Weber *Manual on Hate Speech* (Council of Europe 2009) 19.

³⁹ Lenckner and Sternberg-Lieben, in: Schönke and Schröder, *Strafgesetzbuch* (28th ed. Munich 2010), § 130 [1].

group, against segments of the population or against an individual because of his belonging to such group or segment of the population’; b) ‘calls for violent or arbitrary measures against them’ and ‘assaults the human dignity of others by insulting, maliciously maligning, or defaming such group, segments of the population or an individual because of his belonging to such group’. Subsection 2 prohibits these forms of hate speech in the media. Subsections 3 and 4 make the glorification or trivialisation acts of the National Socialist regime a special form of hate speech. Hence, s 130 deals with hate speech capable of having a particularly severe effect on the public, whereas the general defamation provision primarily captures matters of personal honour.

33. These provisions must be seen in the light of the rights contained in the German Basic Law. Article 5 provides for the right to free expression, but this right is subject to significant limitations based on dignity.⁴⁰ Human dignity is afforded primary importance in German constitutional law and cannot be outweighed by other competing rights or values.⁴¹

X SLOVENIA

34. Slovenia’s prohibition on hate speech must be understood in the context of Slovenia’s history, especially its occupation by the Nazi regime during the Second World War, the break-up of the Former Yugoslavia (of which Slovenia was a part before independence) and its ethnic diversity, including a small Roma community.

35. Hate speech is forbidden under art 63 of the Slovenian Constitution:⁴²

Any incitement to national, racial, religious or other discrimination and the inflaming of national, racial, religious or other hatred and intolerance are unconstitutional.

36. This constitutional prohibition is concretised in art 297 of the Slovenian Criminal Code,⁴³ which prohibits ‘stirring up’ religious, racial ethnic or other hatred or

⁴⁰ The Basic Law, Art. 5(2) reads: ‘These rights shall find their limits in the (...) right to personal honour’; also: BVerfG App no 1 BvR 2150/08.

⁴¹ See the German Constitutional Court’s landmark decision in *Lith*, BverfGE 7, 198 (1958) where the Court stated that the Basic Law ‘establishes an objective order of values ... which centres upon dignity of the human personality developing freely within the social community’. See further Michael Rosenfeld, ‘Hate Speech in Constitutional Jurisprudence: A Comparative Analysis’ (2003) 24 *Cardozo L R* 1523, 1548ff.

⁴² Constitution of the Republic of Slovenia 1991.

⁴³ Criminal Code (KZ-1) 2008.

intolerance; promoting the supremacy of one race of another; or the denial of genocide or other crimes against humanity.

37. Moreover, hate speech is prohibited under Article 5 of the Implementation of the Principle of Equal Treatment Act.⁴⁴ Victims of hate speech thus have a civil claim against alleged perpetrators.⁴⁵

⁴⁴ Implementation of the Principle of Equal Treatment Act 2004.

⁴⁵ Code of Obligations 2001.

QUESTION 1: CONTEXTUALISING THE BALANCING EXERCISE

38. Most of the jurisdictions considered in this study have produced case law on the balancing of free expression against dignity, equality or other competing rights in the context of hate speech. This balancing exercise does not take place in a vacuum, but is considered in light of the social and historical context. Furthermore, the value attached to free expression is generally made dependent on the nature of the speech in issue.

I INTERNATIONAL LAW

a) ICCPR Jurisprudence

39. Under art 19(3) of the ICCPR, restrictions on free speech must satisfy three criteria: they must be provided by law; they must be based on permissible grounds (including the protection of rights or reputation of others and the protection of public order); and must be necessary to achieve a legitimate aim (which involves a proportionality analysis).
40. The Human Rights Committee (HRC) has heard a number of challenges to hate speech laws under art 19(3). The social and historical context and the interests of vulnerable groups play an important role in this jurisprudence. For example, in *Faurisson v France*,⁴⁶ dealing with the compatibility of the applicant's conviction for crime of Holocaust denial under French legislation with the art 19 right to free expression, the HRC emphasised the importance of promoting 'respect for the rights and interests of the Jewish community to live in society with full human dignity and free from an atmosphere of anti-Semitism'.⁴⁷ Furthermore, the HRC noted that France's social and historical context was relevant in determining whether the prohibition of Holocaust denial pursued a legitimate aim:

Holocaust denial is a contemporary expression of racism and anti-Semitism ... The notion that *in the conditions of present-day France*, Holocaust denial may constitute a form of incitement to anti-semitism cannot be dismissed.⁴⁸

⁴⁶ HRC, *Faurisson v France*, Communication No. 550/93, views adopted on 8 November 1996.

⁴⁷ *ibid* [9.6].

⁴⁸ *ibid*, individual opinion of Elizabeth Evatt and David Kretzmer, [5]-[6].

41. The Committee further emphasized that that not every type of speech that segments of society find offensive may be legitimately prohibited under Article 19(3). Thus, the mere fact that the Jewish community took offence to this speech was not sufficient to prohibit it:

The power given to States parties under article 19, paragraph 3, to place restrictions on freedom of expression, must not be interpreted as license to prohibit unpopular speech, or speech which some sections of the population find offensive.⁴⁹

42. However, the Committee found that the applicant's Holocaust denial amounted to incitement to hatred and thus his conviction was a valid restriction of his right to free expression:

While there is every reason to maintain protection of bona fide historical research against restriction, even when it challenges accepted historical truths and by so doing offends people, anti-Semitic allegations of the sort made by the author, which violate the rights of others in the way described, do not have the same claim to protection against restriction.⁵⁰

b) CERD Jurisprudence

43. Article 4 of CERD provides that measures designed to suppress hate speech need to be implemented with 'due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention'. In its decision in *Jewish Community of Oslo et al v Norway*,⁵¹ the CERD Committee considered the 'due regard' standard and emphasised that:

[T]he principle of freedom of speech has been afforded a lower level of protection in cases of racist and hate speech dealt with by other international bodies, and . . . general recommendation XV clearly states that the *prohibition of all ideas based on racial superiority or hatred* is compatible with the right of freedom of opinion and expression.⁵²

This suggests that the weight given to the right to free expression is dependent on the nature of the expression under consideration, as a lower level of protection is afforded to racist or hate speech.

44. On the other hand, in the case of *Kamal Queresbi v. Denmark*, the CERD drew 'the attention of the State party to the need to balance freedom of expression with the requirements of the Convention to prevent and eliminate all acts of racial

⁴⁹ Ibid [8].

⁵⁰ ibid [10].

⁵¹ CERD, *Jewish Community of Oslo et al. v Norway*, Communication No. 30/2003, 15 August 2005.

⁵² ibid [10.5] (emphasis added).

discrimination, particularly in the context of statements made by members of political parties.’⁵³ Unfortunately, the Committee did not elaborate on how membership of a political party matters in this context.

II AUSTRALIA

a) Freedom of expression

45. Freedom of expression is not explicitly protected by the Australian Constitution. Instead there is an implied constitutional protection of political communication⁵⁴ (i.e. communication relating to matters that have a bearing on federal politics). Attempts to rely upon this implied constitutional right to invalidate anti-vilification legislation in Australia have so far failed. For example, in *Catch the Fire Ministries Inc v Islamic Council of Victoria*⁵⁵ the Victorian Court of Appeal rejected the argument that s 8 of the *Racial and Religious Tolerance Act*⁵⁶ was invalid because it allegedly breached the freedom to communicate about political and governmental matters.⁵⁷
46. At the State and Territory level, s 16 of the ACT Human Rights Act 2004, s 16 and s 15 of the Victorian Charter of Human Rights and Responsibilities Act 2006, s 15 provide for a qualified protection of freedom of expression. Section 15 of the Victorian Charter was recently considered by the High Court of Australia in relation to a breach of a court-imposed suppression order by an infamous Australian ‘shock-jock’. In this case the court was striking a balance between freedom of expression and right to privacy. The High Court acknowledged that it was undertaking a ‘proportionality’ based test when performing this balancing exercise, but unfortunately it did not give extensive reasons highlighting the manner in which the balance was to be struck in this case.⁵⁸

⁵³ CERD, *Kamal Quereshi v. Denmark*, Communication No. 27/2002, 19 August 2003, [9].

⁵⁴ For a clear statement of the content of this implied freedom see: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561.

⁵⁵ [2006] VSCA 284; (2006) 206 FLR 56.

⁵⁶ Section 8: (1) A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons

(2) For the purposes of sub-section (1) conduct — (a) may be constituted by a single occasion or by a number of occasions over a period of time; and (b) may occur in or outside Victoria.

⁵⁷ *Catch the Fire Ministries Inc v Islamic Council of Victoria* [2006] VSCA 284; (2006) 206 FLR 56, [208]. Also, In *Toben v Jones* [2003] FCAFC 137; (2003) 129 FCR 515, the respondent was held to have breached federal racial anti-vilification laws by publishing Holocaust denial material on the internet. The applicants failed to establish that the anti-vilification laws were made in a manner beyond the power delegated to the Federal Government under the external affairs power in the Australian constitution.

⁵⁸ *Hogan v Hinch* [2011] HCA 4, [70]-[79].

b) The interests of marginalised or historically oppressed groups

47. Most of the recent cases on hate speech have only dealt with marginalised or historically oppressed groups as the *target* of hate speech,⁵⁹ rather than as the group having their speech curtailed.
48. In *Davis v Commonwealth*⁶⁰ the High Court of Australia recognised the importance of free expression for minority groups, albeit not within the context of hate speech legislation. *Davis* involved a challenge to legislation which prevented an Aboriginal group from producing a T-shirt using the words ‘200 years [of suppression and depression]’, ‘1988’ and ‘1788’ without the licence of the Australian Bicentennial Authority. While the legislation was struck down for reasons relating to the scope of the constitutional powers given to the Federal Government, one of the reasons supporting this finding was that the legislation had a ‘grossly disproportionate’ effect on freedom of speech. Justice Brennan paid particular attention to the rights of minority groups to protest and the particular historical context surrounding the 1988 Bicentennial celebrations (200 years since the arrival of European settlers to Australia):

The limits on the legislative power to enact penal laws under s. 51(xxxix) is of especial importance when the relevant activity undertaken in execution of an executive power is the commemoration of an historical event. Such a commemoration may take many forms, according to the significance placed upon it. The form of national commemorations of historical events usually reflects the significance which the majority of people place upon the event. But there may well be minority views which place a different significance on the same event, as the present case illustrates. It is of the essence of a free and mature nation that minorities are entitled to equality in the enjoyment of human rights. Minorities are thus entitled to freedom in the peaceful expression of dissident views. In this case, the plaintiffs wish to raise a voice of protest against the celebratory commemoration of the Bicentenary, and the defendants contend that ss. 22 and 23 are effective to muffle the intended protest. As a matter of construction, ss. 22 and 23 do muffle the intended protest. But it cannot be incidental to the organization of the commemoration of the Bicentenary to prohibit, under criminal sanctions, the peaceful expression of opinions about the significance of the events of 1788. By prohibiting the use of the symbols and expressions apt to express such opinions, ss. 22 and 23 forfeit any support which s. 51(xxxix) might otherwise afford.⁶¹

⁵⁹ For example, *Eatoock v Bolt* [2011] FCA 1130; *Hogan v Hinch* [2011] HCA 4, [70]-[79].

⁶⁰ (1988) 166 CLR 79.

⁶¹ *ibid* 116-7. See also (1998) 116 CLR, 79, 100; 114.

49. In terms of racial anti-vilification laws, the Courts have taken into account the particular historical experience and characteristics of the targeted racialised group when considering whether an infringement occurred. For example, in *McLeod v Power*,⁶² the applicant was a Caucasian prisoner officer. He complained that the respondent, an Aboriginal woman, had abused him in terms including ‘you fucking white piece of shit’ and ‘fuck you whites, you’re all fucking shit.’ The Federal Magistrate held that the primary purpose of the Race Discrimination Act was to protect vulnerable minority groups, and that the applicant’s situation fell outside of this purpose, given that white people are historically and culturally dominant within Australia.⁶³ The Magistrate proceeded to conclude that the term ‘white’ did not itself encompass a specific race or national or ethnic group, being too wide a term when used in the context of Australia. Furthermore, he found that the term ‘white’ as a form of abuse was not reasonably likely to cause offence when viewed from the perspective of a reasonable white prison official, who is in a position of authority and is likely to encounter abuse during his or her daily activities.⁶⁴ As a result, the application was dismissed.

III UNITED KINGDOM

50. The UK courts have not yet considered the prohibition on hate speech in light of the rights to freedom of expression, equality or dignity. This prohibition is typically framed as a public order issue rather than a means to protect the dignity or equality of vulnerable groups.⁶⁵ This is because the prohibition evolved from offences of sedition and breach of the peace. Amendments over the years have considerably broadened its scope and have been highly controversial,⁶⁶ but have not been challenged under the UK Human Rights Act.
51. Nevertheless, the history of hate speech laws in the UK highlights the danger that oppressed or marginalised groups may be silenced or further marginalised by hate

⁶² *McLeod v Power* (2003) 173 FLR 31. Example taken from *Discrimination Law Review*, Ch 3 ‘Race Discrimination’, 51.

⁶³ *ibid* [54]. See, however, *Carr v Boree Aboriginal Corporation* [2003] FMCA 408, in which Raphael FM found that the first respondent had unlawfully discriminated against the applicant in her employment and had dismissed her for reasons ‘which were to do with her race or non- Aboriginality’, [9]. Raphael FM stated that ‘the provisions of the RDA apply to all Australians’, [14]. See also *Bryant v Queensland Newspaper Pty Ltd* [1997] HREOCA 23.

⁶⁴ *McLeod* *ibid* [69].

⁶⁵ Nicholas Bamforth, Maleiha Malik, Colm O’Cinneide, *Discrimination Law; Theory and Context; Text and Materials* (1st ed. Thomson, Sweet & Maxwell 2008) 513.

⁶⁶ See Anne Twomey ‘*Laws Against Incitement to Racial Hatred in the United Kingdom*’ (1994) 1 AJHR 5; Bamforth *ibid*.

speech laws. The first person to be prosecuted for hate speech under the Race Relations Act of 1965 (the predecessor to the Public Order Act 1986) was a black man.⁶⁷ Throughout the 1960s and 1970s members of the Black Liberation Movement in the UK were prosecuted under the hate speech legislation for ‘stirring up’ racial hatred. For example, in *R v. Malik*,⁶⁸ a black defendant was convicted and sentenced to a year in prison for stating that whites are ‘vicious and nasty people’. He admitted that his speech was offensive but argued that this was a response to the intolerance and discrimination that he had experienced at the hands of white people.⁶⁹

52. There have also been a number of cases of alleged hate speech by Muslim men,⁷⁰ although few have produced reported judgments.

IV REPUBLIC OF IRELAND

53. As noted [above](#), there have been very few prosecutions under the 1989 Incitement of Hatred Act and only a handful of convictions. This is due in part to the weaknesses of the Act. In addition, those cases that have arisen have been at district court level and as a result have not generally been reported. This has made it extremely difficult to ascertain what has guided judges in their interpretation and application of the Act.⁷¹

V INDIA

54. As discussed [above](#), article 19(2) of the Indian Constitution permits the state to make laws imposing ‘reasonable restrictions’ on the right to free expression in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, or decency or morality. Reasonable restrictions may also be imposed in relation to contempt of court, defamation or incitement to an offence.

⁶⁷ Discussed in Michael Rosenfeld, ‘Hate Speech in Constitutional Jurisprudence: A Comparative Analysis’ (2003) 24 *Cardozo L R* 1523, 1525.

⁶⁸ [1968] 1 All ER 582, 58.

⁶⁹ Rosenfeld (n 67) 1546-7.

⁷⁰ See for example, *R v Rahman* [2008] EWCA Crim 2290; see also ITN ‘Muslim Men Guilty over Homophobic Leaflets’ available at <<http://www.itn.co.uk/uk/37441/Three+men+guilty+over+homophobic+leaflets>> accessed 16 February 2012.

⁷¹ Tom Daly *Reform of the Prohibition of Incitement to Hatred Act 1989 – Part II* (2007) 17(4) *ICLJ* 16, 17

55. The case law demonstrates an emerging trend where Indian courts have shown a greater sensitivity to the cultural and historical context underlying the exercise of freedom of expression in hate speech cases. In particular, the courts have recognised the importance of representations of India's history of sectarian violence and have struck down many attempts to suppress depictions of this history.
56. The Supreme Court, adopting a liberal approach to freedom of expression, has permitted the screening of a television serial which depicted Hindu-Muslim tension before the partition of India.⁷² The serial portrayed how extremist sections of both communities generated pre-partition tension and hatred. One of the key factors employed by the Court in arriving at its decision was that the serial was based on historical truths, which though unpleasant on occasion, could be revealing and instructive. Those who overlooked history would be 'condemned to repeat it'.⁷³ Therefore, the nature of the expression under consideration was a key focus of the judgment. The Supreme Court seemed to suggest that the beneficial aspects of the serial counterbalanced its inflammatory potential.
57. In *Anand Patwardhan v Union of India*,⁷⁴ the Bombay High Court held that the refusal to telecast a documentary film on the ground that it could spur communal tensions violated the constitutional freedom of speech. The historical theme underlying the film was the massacre of Sikhs in 1984, which was triggered by the assassination of the Former Prime Minister, Indira Gandhi, by her Sikh bodyguards.⁷⁵ The Court conducted a similar counterbalancing exercise, observing that the documentary could create a 'lasting impression of the message of peace and co-existence'.⁷⁶
58. In *F.A. Picture International v Central Board of Film Certification*⁷⁷ the principal question was whether the refusal to certify a film, which depicted the travails of a couple who were separated during communal riots between Hindus and Muslims, was an infringement of the right to free expression. The Bombay High Court held that it

⁷² *Ramesh v Union of India* (1988) 1 SCC 668.

⁷³ *ibid* [20].

⁷⁴ AIR 1997 Bom 25.

⁷⁵ The bodyguards assassinated the Prime Minister to avenge a military operation which was conducted at the Golden Temple, Amritsar on her orders (Operation 'Blue Star').

⁷⁶ *Anand Patwardhan* (n 74) [17].

⁷⁷ *F.A. Picture International v Central Board of Film Certification* AIR 2005 Bom 145.

was, emphasising that stability in a society can only be promoted by reflection on social reality, however grim it may be.⁷⁸

59. The observations of the Delhi High Court in a case involving the certification of a documentary film in which concerns were expressed that the film would spread religious tensions, capture the reasoning behind these conclusions:

The scenes and visuals...are in one sense a recalling of the memory of an historical event. The recall may be imperfect. It may contradict the collective memory of that historical event. It may revive tensions over the events being recalled. Yet, that by itself does not invite censorial intervention to obliterate the scenes of recall.⁷⁹

60. Moreover, the Bombay High Court has held that the State cannot contend that ‘the narration of history would promote violence, enmity or hatred’ and attempt to extinguish history on this ground.⁸⁰

61. There is no clear judicial pronouncement on whether courts will afford a wider margin of appreciation or give greater weight to the freedom of expression of members of historically oppressed or marginalized groups. However, courts could consider such factors as forming a relevant part of the context in which the expression would be judged.

VI CANADA

62. The constitutionality of Canadian hate speech law has been considered in three important cases: *R v Keegstra*⁸¹ and *R v Zundel*,⁸² in which the prohibition on hate speech in the Criminal Code was scrutinised; and *Taylor v Canada (Canadian Human Rights Commission)*⁸³ concerning a challenge to the hate speech provision in the Human Rights Act. Nevertheless, it should be noted that Canadian hate speech case law is relatively underdeveloped. One commentator has pointed out that:

Canadian courts resisted a criminal speech jurisprudence that would enlist suppression of speech directly in the service of politically partisan battles over social policies. Publicly saying such things as there is too much non-Whites immigration;

⁷⁸ *ibid* [13].

⁷⁹ *Shrishti School v Chaiperson, Central Board of Film Certification* WP (C) 6806 of 2010, [23].

⁸⁰ *Varsba Publications v State of Maharashtra* 1983 Cr LJ 1446. This case was in the context of the banning of an issue of a weekly magazine on the ground that it would promote disharmony between Hindus and Muslims.

⁸¹ [1990] 3 SCR 697 (Canadian Supreme Court).

⁸² [1992] 2 SCR 731 (Canadian Supreme Court).

⁸³ [1990] 3 SCR 892 (Canadian Supreme Court).

affirmative action is reverse discrimination against Whites; same-sex marriages undermine the family; or women in combat weaken the military' man well invite social disapprobation, even blacklisting (...) But no one has yet been prosecuted for saying them.⁸⁴

63. In *R. v Keegstra*⁸⁵ the Canadian Supreme Court (CSC) examined the constitutionality of s 319 of the Canadian Criminal Code, prohibiting the incitement or wilful promotion of hatred. The CSC held that a narrow legal construction of hate speech law is constitutional. The Court used the *Oakes-test* to assess whether the restriction on free expression was justified. The test consists of two steps. Firstly, it asks whether the provision has a 'pressing and substantial objective'; secondly, whether the limitation is proportional (the subcategories of this step are: rational connection with the objective; minimal impairment of the right; and that the restriction and its objective should be proportional). The CSC accepted as a baseline that non-violent hate speech is a form of expression that conveys a message. Hence, it is covered by the Charter's right to the freedom of expression. The Court further accepted that the fight against hate propaganda, and hence the promotion of equality and multiculturalism ('social and racial harmony') are important constitutional goals that warrant restriction on freedom of speech.
64. In the proportionality phase the Court stressed the narrow construction of the provision, especially the meaning of 'hatred'. It held that: 'the sense in which "hatred" is used in s. 319(2) does not denote a wide range of diverse emotions, but is circumscribed so as to cover only the most intense form of dislike.'⁸⁶
65. At the proportionality stage, the Court adopted what it referred to as the 'the contextual approach',⁸⁷ which adopts a context-oriented approach to the determination of restrictions on free expressions. This requires courts to consider the 'nature of the expressive activity that the state seeks to restrict' in each case arguing that it is 'destructive of free expression values ... to treat all expression as equally crucial to those principles at the core of s 2(b) [the free expression

⁸⁴ Stefan Braun, *Democracy Off Balance: freedom of expression and hate propaganda law in Canada* (University of Toronto Press, 2004) 22-3.

⁸⁵ Above n 81.

⁸⁶ *ibid* [122].

⁸⁷ *ibid* [50].

guarantee in the Canadian Charter]’.⁸⁸ This also precludes the Court from reaching conclusions to the constitutional question that are too abstract.⁸⁹

66. The Court proceeded to consider the three main purposes that underpin the right to freedom of expression – the search for truth; self-fulfilment; and an unhindered political process. The Court held that the restricted speech under consideration had little value in light of these purposes.⁹⁰
67. The next step of the balancing exercise was to evaluate the level of impairment imposed on freedom of expression (‘minimal impairment requirement’). The CSC held in *Keegstra* that the legislation only criminalised those utterances that undermine democratic values. *R v. Zundel* seems to underline this point. *Zundel* struck down s 181 of the Canadian Criminal Code which prohibited spreading 'false news/tales' that are likely to injure the public on balance. The legislation was overboard and vague because it lacked a legitimate aim for restriction. The avoidance of public mischief is insufficient to warrant speech restriction. *Keegstra* held that restrictions must specifically aim to protect equality and multiculturalism in a narrow sense.
68. In *Taylor v. Canada (Canadian Human Rights Commission)*, the CSC upheld the Human Rights Act (HRA) ban on hate speech among private citizens. The CSC used the same rationale applied in *Keegstra*. Section 13 of the HRA forbids private communication by telephone or other technology that is likely to expose private individuals to hatred or contempt. According to the CSC, the importance of tackling discriminatory practices and maintaining a racially and socially harmonious society that is based on its multicultural heritage warrants such a restriction. The Court did not find it problematic that there was no truth-defence in the private

⁸⁸ *ibid* [87]. Here it adopted the approach used in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232 (Canadian Supreme Court):

While the Canadian approach does not apply special tests to restrictions on commercial expression, our method of analysis does permit a sensitive, case-oriented approach to the determination of their constitutionality. Placing the conflicting values in their factual and social context when performing the s. 1 analysis permits the courts to have regard to special features of the expression in question. As Wilson J. notes in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, not all expression is equally worthy of protection. Nor are all infringements of free expression equally serious.

⁸⁹ *ibid*.

⁹⁰ *ibid* [99].

context. Hence, even a true statement that is liable to cause contempt runs afoul of the Act (*Keegstra*, by contrast, required a truth defence to the criminal offence).

VII UNITED STATES

69. The US Supreme Court has explicitly disavowed the balancing exercise in the context of the First Amendment. Statutes which regulate expression based on content will be presumptively invalid and the state bears the burden of proving that they do *not* violate the First Amendment.⁹¹ In the 2010 case of *US v Stevens* the Government submitted that there should be a balancing test where the value of the restricted speech is weighed up against the societal costs to determine whether the First Amendment applies. The Supreme Court rejected that contention out of hand, declaring that: ‘[t]he Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.’⁹² Indeed, they described the Government’s contention that a balancing test should be used as ‘startling and dangerous.’⁹³
70. The Supreme Court’s First Amendment jurisprudence makes it clear that the freedom of expression interest of historically marginalised groups cannot be given greater weight than that of any other group. As Scalia J said in *R.A.V.*, ‘St Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules.’⁹⁴ This is because ‘the government may not regulate expression based on hostility — or favouritism — towards the underlying message expressed.’⁹⁵ Such differentiation would ‘[raise] the spectre that the Government may effectively drive certain ideas or viewpoints from the marketplace.’⁹⁶ This reflects the wholesale adoption of Justice Oliver Wendall Holmes’ concept of the ‘marketplace of ideas’ in First Amendment jurisprudence:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test

⁹¹ *US v Playboy Entertainment Group, Inc.*, 529 US 803, 817; 120 S. Ct 1878 (2000).

⁹² See *US v Stevens*, 559 US ___; 130 S. Ct. 1577 (2010), striking down a statute which prohibited the creation, sale or possession of depictions of animal cruelty for commercial gain. This result was reached notwithstanding that the statute contained an exception clause for depictions with ‘serious religious, political, scientific, educational, journalistic, historical or artistic value.’

⁹³ *US v Stevens*, *ibid*, at 1585.

⁹⁴ *R.A.V. v St Paul*, above, per Scalia J, at 392.

⁹⁵ *R.A.V. v St Paul*, above, per Scalia J, at 386.

⁹⁶ *Simon & Shuster, Inc. v Members of the New York State Victims Board et al*, 502 US 105, 116 (1991).

of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be safely carried out.⁹⁷

VIII EUROPEAN COURT OF HUMAN RIGHTS

71. Art 10 of the ECHR provides broad protection for freedom of expression, including speech that may ‘offend, shock and disturb’.⁹⁸ As discussed [above](#), hate speech prohibitions are permissible in terms of art 10(2) where they are ‘prescribed by law’; serve a ‘legitimate aim’, including the protection of the rights of others; and where the ‘the restriction is necessary in a democratic society’. Hate speech cases are generally decided in the third step, involving an assessment of whether the restriction corresponds with a ‘pressing social need’ and whether there is proportionality between the means and the ends. This pressing social need could correspond to the protection of other rights, such as the right to private and family life (art 8) or the right to freedom of religion (art 9),⁹⁹ or to uphold broader values, such as democratic principles, the importance of ‘combating racial discrimination in all its forms and manifestations’,¹⁰⁰ and the promotion of ‘tolerance and respect for the equal dignity of all human beings’.¹⁰¹
72. The social and historical context appears to play an important role in the ECtHR’s approach to this balancing exercise. First, the ECtHR has shown great deference in cases involving prohibitions on anti-Semitic speech or Holocaust denial.¹⁰² Some commentators argue that the Court is reluctant to intervene in these cases because the memory of the atrocities committed during World War II was the primary motivation for the adoption of the Convention.¹⁰³ The Court has also shown a

⁹⁷ *Abrams v United States* (1919) 250 US 616, 628 (Holmes J, dissenting). Although that was a dissenting opinion it has now been widely accepted and approved: see, e.g., *Virginia v Black* above, at 358.

⁹⁸ *Jersild v Denmark* App no. 15890/89 (ECtHR 23 September 1989).

⁹⁹ See Anne Weber *Manual on Hate Speech* (Council of Europe 2009) 49ff for a discussion of hate speech cases relating to religious freedom.

¹⁰⁰ *Jersild v Denmark*. App. no 15890/89 (ECtHR 23 September 1989) [30].

¹⁰¹ *Féret v Belgium* App no. 15615/07 (ECtHR 16 July 2009) [64].

¹⁰² See for example, *Lehideux and Isorni v France* App no. 55/1997/839/1045 (ECtHR 23 September 1998) [47] and *Garaudy v France* App no. 65831/01 (ECtHR 3 July 2003) where the ECtHR held that Holocaust denial is removed from the protection of art 10 by virtue of art 17 as it is in conflict with the values underpinning the Convention.

¹⁰³ Harris, O’Boyle, Warbrick, *Law of the European Convention on Human Rights* (OUP 2009) 449.

greater willingness to accept prohibitions on anti-immigrant¹⁰⁴ and homophobic hate speech.¹⁰⁵

73. However, the Court has been reluctant to uphold hate speech prohibitions that have been used to target oppressed or marginalised groups, as is evident in the string of hate speech cases involving Kurdish dissidents in Turkey.¹⁰⁶ In these cases the Court has generally granted more protection for expression that bordered on being hate speech. The ECtHR has never explicitly acknowledged that these cases are treated differently. However it is well-known that the Kurdish people have been historically disadvantaged and face on-going hostility and marginalisation. Emphasis is often laid on the disproportionate penalties and on the violence that tears apart Kurds and the Turkish people. The Court tends to side with the applicants where the expression did not reach the level of effective incitement to violence. This contrasts with cases involving anti-Semitic or anti-immigrant propaganda¹⁰⁷ where the absence of incitement to violence does not work to the applicants' advantage.

IX GERMANY

74. As outlined [above](#), the right to free expression is subject to restrictions based on human dignity.¹⁰⁸ The German Constitutional Court has held that human dignity cannot be balanced.¹⁰⁹ This means, on the one hand, that whenever human dignity is concerned, it will trump freedom of expression.¹¹⁰ On the other hand, the court will carefully consider whether to classify an expression as interfering with human dignity.¹¹¹

¹⁰⁴ *Féret* (n 101); *Le Pen v France*, App no. 18788/09 (ECtHR 20 April 2010).

¹⁰⁵ *Vejdeland and Others v Sweden*, App no. 1813/07 (ECtHR 9 February 2012).

¹⁰⁶ See for example *Süreke and Özdemir v Turkey* App no. 23927/94 (ECtHR 8 July 1999); *Ceylan v Turkey*, App no. 23556/94 (ECtHR 8 July 1999); *Karatas v Turkey*, App no. 23168/94 (8 July 1999); *Incal v Turkey*, App no 22678/93 (ECtHR 9 June 1999). However counter-examples exist where the applicant did not prevail. See *Süreke v Turkey* (No 1), App no. 24122/94 (ECtHR 7 July 1999).

¹⁰⁷ Above n 104.

¹⁰⁸ The Basic Law, Art. 5(2) reads: 'These rights shall find their limits in the (...) right to personal honour'; see also: BVerfG App no 1 BvR 2150/08.

¹⁰⁹ 75 BVerfGE 369, 380 for the freedom of art: 'As far as the right of personality is a deduction of human dignity, this limitation is absolute and without possibility of a balance.' Regarding hate speech: BVerfG [2009] NJW 3503.

¹¹⁰ *ibid.*

¹¹¹ For example, in the case of satirical cartoons: 75 BVerfGE 369, 377, 378.

75. In its landmark decision on free expression, *Lüth*,¹¹² the Constitutional Court set the standard for balancing the right to free expression with other rights. This case involved a movie director who had produced propaganda movies for the Nazi regime and had been granted injunctive relief against a prominent civil servant who had appealed to the public to boycott the director's new movie. The Constitutional Court held that-

the right to free expression must step back if legitimate interests of others of a higher rank would be violated by exercising free expression. Whether such outweighing interests of others are given must be examined in light of the circumstances of the case.¹¹³

The Court examined whether the appeal to boycott was made for economic reasons by competing film businesses or in a public context debating matters of politics and the public interest.¹¹⁴ Finding that the civil servant had acted to discuss the involvement of successful artists in the Nazi regime, the civil servant had legitimately exercised his right to free expression. In case of a debate of public interest there was an assumption that free speech was permissible.¹¹⁵ The Court examined the context of the case in detail, assessing factors such as the applicant's relation to Jews after the war, the public perception of the director and his movies.¹¹⁶

76. As mentioned above, the art 5 right to free expression is subject to the protection of personal honour, which is broader than human dignity, covering many aspects of the right to personality.¹¹⁷ In the recent *Wunsiedel*-decision the Constitutional Court indicated there is an additional, implicit, limit on free expression in the Basic Law.¹¹⁸ In German constitutional law, a fundamental right is not only subject to those limitations that are expressly admitted by the constitution, but also to those limitations that are necessary to solve a conflict of colliding constitutional principles. However, limitations to free speech can only be imposed by 'general laws', i.e. laws which apply to any opinion and not just to a particular one.¹¹⁹ In the case of the special provision of s 130 of the Criminal Code prohibiting the

¹¹² *Lüth*, BVerfGE 7, 198 (1958).

¹¹³ *ibid* 198, 210, 211.

¹¹⁴ *ibid* 212; 216

¹¹⁵ *ibid* 212.

¹¹⁶ *ibid* esp. 218.

¹¹⁷ 75 BVerfGE 369, 380.

¹¹⁸ BVerfG App no 1 BvR 2150/08.

¹¹⁹ 7 BVerfGE 198, 209, 210.

glorification of National Socialism or the denial of the Holocaust this is clearly not the case. However, the court found that the context of the development of the Basic Law in 1949 showed that it was a counter draft opposed to National Socialism, allowing special legislation to counteract it.¹²⁰

77. Regarding differences in freedom of speech of particular groups of the population, s 185 as well as s 130(1) and (2) of the Criminal Code (the general prohibition on hate speech and the specific prohibition on hate speech by the media) not only provide protection for historical minorities in Germany, such as Jews, Sorbs (a Slavonic minority in east Germany and western Poland), or Poles, but any groups in society, including immigrants,¹²¹ professions,¹²² or soldiers of the (post-war) German army.¹²³
78. In terms of the general defamation provision, the courts do not consider the group to which the perpetrator or the victim belongs, but focus only on whether defamation has been proved. In contrast, regarding s 130, these issues do matter in determining whether the expression is a danger to the public peace. This is more likely if a member of the majority attacks a member of a minority than the other way around.

X SLOVENIA

79. In considering hate speech cases, the Slovenian Constitutional Court balances the right to freedom of expression and dignity on a case-by-case basis.¹²⁴ As a result the balancing exercise is contextualised in light of the facts and merits of each case.¹²⁵
80. The Court has also demonstrated its sensitivity to the vulnerable position of the Roma community. The Roma receive special protection under art 65 of the Slovenian Constitution which provides that the status and special rights of the Romany community living in Slovenia shall be regulated by law. On the basis of

¹²⁰ BVerfG App no 1 BvR 2150/08.

¹²¹ OLG Hamm [1995] NSzZ 136.

¹²² LG Göttingen [1979] NJW 173.

¹²³ 36 BGHSt 90, 91.

¹²⁴ [1996] Up-44/96.

¹²⁵ [2001] Up-249/01.

this Article the Roma Community Act¹²⁶ was adopted. In a recent case, a member of parliament was charged with hate speech after he referred to Roma people as ‘gypsies’ and used other offensive words and expressions on a television show where he appeared with representatives of the Roma community.¹²⁷ While the Court ultimately held that his speech did not amount to hate speech, it took into account the special status of Roma people and emphasized their oppression in the society. It also made note of their problematic status in particular villages where there had been a history of discord.

81. Academics dealing with hate speech and freedom of expression argue that if alleged hate speech is not directed against a group of people with status of vulnerable groups, the scope of freedom of speech should be extended.¹²⁸

¹²⁶ The Roma Community Act 2007.

¹²⁷ IV K 58798/2010. This is judgement of the lower court.

¹²⁸ Andraž Teršek, *Svoboda izražanja- nepreprečljivo varovana in zlorabljena?! (Information Commissioner’s website 2006)* 2.

QUESTION 2: HATE SPEECH AND CONTEXT

82. All of the jurisdictions in this study recognise that context determines whether speech amounts to hate speech. However, the courts in this study have not developed clear and consistent approaches to assessing meaning in context.

I INTERNATIONAL LAW

a) ICCPR and CERD Jurisprudence

83. The HRC decision in *Faurisson*¹²⁹ demonstrates that context is vital in determining whether speech amounts to hate speech. While Holocaust denial is not included in the list of prohibited forms of hate speech in art 20(2) of the ICCPR, the HRC noted that it could amount to a form of incitement to hatred given the particular social and historical context:

This is the case where, in a particular social and historical context, statements that do not meet the strict legal criteria of incitement can be shown to constitute part of a pattern of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so.¹³⁰

And further,

Holocaust denial may constitute a form of incitement to anti-Semitism ... This is a consequence not of the mere challenge to well-documented historical facts, established both by historians of different persuasions and backgrounds as well as by international and domestic tribunals, but of the context, in which it is implied, under the guise of impartial academic research, that the victims of Nazism were guilty of dishonest fabrication, that the story of their victimization is a myth and that the gas chambers in which so many people were murdered are “magic”.¹³¹

84. This second quote indicates that the identity of the author of the statement is important when deciding whether a particular act constitutes hate speech. In its decision on *Malcolm Ross v Canada*,¹³² concerning a teacher that was removed from his teaching position because of his publication of anti-Semitic books and statements, the HRC took into account the importance of the teacher’s role. It

¹²⁹ HRC, *Faurisson v France*, Communication No. 550/93, views adopted on 8 November 1996.

¹³⁰ *ibid*, individual opinion of Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein (concurring), [4].

¹³¹ *ibid* [6].

¹³² HRC, Communication No. 736/97, *Ross v Canada*, Views adopted on 18 October 2000.

stressed that the special duties and responsibilities that the exercise of the right to freedom of expression entails are of particular relevance within the school system, especially with regard to the teaching of young students.¹³³

b) ICTR Jurisprudence

85. In the widely discussed *Media Case*,¹³⁴ the ICTR's Trial Chamber I convicted three defendants (Ferdinand Nahimana and Jean-Bosco Barayagwiza, founders of the infamous Radio Television Libre des Mille Collines (RTL), often called 'Radio Machete' and Hassan Ngeze, editor-in-chief of the equally infamous newspaper Kangura) of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and crimes against humanity (extermination and persecution). The RTL, through the airwaves, and Kangura, through print, exhorted Rwanda's Hutu majority population to exterminate the country's Tutsi minority.
86. Within a discussion about the relationship between hate speech and the crime of incitement to commit genocide, the ICTR has addressed the issue of speech couched in ambiguous terms that are open to a variety of interpretations. The Trial Chamber I considered that it was necessary to take account of Rwanda's culture and language in determining whether speech constituted direct incitement to commit genocide.¹³⁵ The Appeals Chamber agreed that:

[T]he culture, including the nuances of the Kinyarwanda language, should be considered in determining what constitutes direct and public incitement to commit genocide in Rwanda. For this reason, it may be helpful to examine how speech was understood by its intended audience in order to determine its true message.¹³⁶

Importantly, it stated that 'the principal consideration is thus the meaning of the words used in the specific context: it does not matter that the message may appear ambiguous to another audience or in another context.'¹³⁷ Therefore, the Appeals Chamber concluded 'it was appropriate to consider the potential impact in context' – notably, how the message would be understood by its intended audience – in determining whether it constituted direct and public incitement to commit genocide.¹³⁸ Furthermore, it emphasised that:

¹³³ *ibid* [11.6].

¹³³ General Comment No. 34 (see note 3 above), [21]. *Ross v Canada* *ibid*.

¹³⁴ *Nahimana et al*, Case No ICTR 99-52-T, Trial Chamber Judgment and Sentence (3 December 2003).

¹³⁵ *ibid* [1011].

¹³⁶ *Nahimana et al*, Case No. ICTR-99-52-A, Appeals Chamber Judgment, (28 November 2007) [700].

¹³⁷ *ibid* [701].

¹³⁸ *ibid* [711].

‘[I]t is irrelevant whether the author of the speech is from the majority ethnic group or supports the government’s agenda (and by implication, whether it is necessary to apply a stricter standard), but rather whether the speech in question constitutes direct incitement to commit genocide. On the other hand, it recognises that the political or community affiliation of the author of a speech may be regarded as a contextual element which can assist in its interpretation.’¹³⁹

87. The ICTR had another opportunity to address the relationship between hate speech and incitement to commit genocide in *Bikindi*,¹⁴⁰ decided on December 2, 2008.
88. Simon Bikindi was a famous composer and singer from Rwanda whose songs, such as ‘Twasezereye’ (‘We Said Goodbye to the Feudal Regime’), ‘Nanga Abahutu’ (‘I Hate the Hutu’), and ‘Bene Sebahinzi’ (‘The Sons and Fathers of the Cultivators’)¹⁴¹ were filled with inflammatory anti-Tutsi hate speech and pro-Hutu solidarity messages. Prosecutors at the ICTR believed Bikindi’s songs constituted incitement to genocide (along with other charges).
89. The ICTR reiterated its findings in the *Media Case Appeals Judgement* that there is a difference between ‘mere hate speech’ and incitement to commit genocide that requires a direct and public incitement to commit an act referred to in Article 2(2) of the Statute.¹⁴² Furthermore, the Court held that:

“To determine whether a speech rises to the level of direct and public incitement to commit genocide, context is the principal consideration specifically: *the cultural and linguistic content; the political and community affiliation of the author; its audience; and how the message was understood by its intended audience*, i.e. whether the members of the audience to whom the message was directed understood its implication.”¹⁴³

90. The Trial Chamber made an important distinction between the role Bikindi’s music played in heightening tensions between groups and acts for which he was legally culpable. However, in assessing whether his songs reached the threshold to be considered as acts of incitement to genocide, the Trial Chamber stated that ‘one cannot properly interpret Bikindi’s songs without considering the cultural, historical and political context in which they were composed and disseminated’:

¹³⁹ibid [713]

¹⁴⁰ *The Prosecutor v. Simon Bikindi*, Case no. ICTR-01-72-T. Trial Chamber Judgment and Sentence, (2 December 2008); upheld by the Appeals Chamber in *The Prosecutor v. Simon Bikindi*, Case no. ICTR-01-72-A, Appeal Chamber Judgment (18 March 2010).

¹⁴¹ *Bikindi* Trial Chamber ibid [15].

¹⁴² ibid [387]; *Nahimana et al.*, Appeal Chamber, Case no. ICTR-99-52-A [692].

¹⁴³ *Bikindi* ibid [387]; See also *Nahimana* ibid [700], [711] and [713].

Although the historical references in the songs were accurate, the Chamber notes the context in which Bikindi referred to them. Reminding people what happened during the monarchy, referring to events before 1959 against a backdrop of highly politicised propaganda and inter-ethnic relationships already fragile and precarious due to those historical realities, is not neutral in the Chamber's opinion.¹⁴⁴

91. The judges held that 'Bikindi's three songs were indisputably used to fan the flames of ethnic hatred, resentment and fear of the Tutsi', and that broadcasts of the songs 'had an amplifying effect on the genocide given Rwanda's oral tradition and the popularity of RTLM at the time'.¹⁴⁵ However, the ICTR concluded that none of them constitutes direct and public incitement to genocide *per se*.¹⁴⁶ Nevertheless, they did find Bikindi guilty of direct and public incitement to genocide for hate speech he broadcasted while driving through the countryside *during* the genocide.¹⁴⁷

II AUSTRALIA

92. As outlined [above](#), section 18C of Race Discrimination Act 1975 (Cth) ('RDA') prohibits acts which are done, in whole or in part, because of the race, colour, or national or ethnic origin of a person or a group and it is reasonably likely in all the circumstances to offend, insult, humiliate or intimidate that person or group. Context plays an important role in determining whether an act is 'reasonably likely' to have this effect.
93. This was evident in the Federal Court of Appeal decision in *Eatock v Bolt*.¹⁴⁸ This case involved a series of publications by right-wing journalist, Andrew Bolt. The articles questioned the aboriginality of several people whom he described as 'fair-skinned' and alleged that these people had procured commercial and professional gain through their 'choice' of racial identity. The applicants claimed that the publications amounted to racial hatred under the RDA. Bromberg J noted the acute need for the articles to be read in light of the historical experience of Aboriginal Australians:

It is necessary to make some observations about aboriginal identity. The manner in which aboriginal people have identified, and have been identified, by others since the

¹⁴⁴ *ibid* [248].

¹⁴⁵ *ibid* [264].

¹⁴⁶ *ibid* [421].

¹⁴⁷ *ibid* [423].

¹⁴⁸ *Eatock v Bolt* [2011] FCA 1130; *Hogan v Hinch* [2011] HCA 4.

British settlement of Australia is a background matter of some significance to a number of issues in the case, including whether the articles were reasonably likely to offend and the extent to which Mr Bolt should have realized that to be so. In the context of a challenge made to the legitimacy of a person's racial identification, the extent to which that identification is generally accepted, and thus, the extent to which the person challenged has a legitimate expectation that their identity will be respected, has a rational bearing upon the nature and extent of any offence that may be generated by the challenge. The extent to which racial categorisation has been a matter of historical sensitivity for a particular race of people is also relevant to the likelihood of offence.¹⁴⁹

And:

It is a notorious and regrettable fact of Australian history that the flawed biological characterisations of many aboriginal people was the basis for mistreatment, including for policies of assimilation involving the removal of many aboriginal children from their families until the 1970s. It will be of no surprise that a race of people subjected to oppression by reason of oppressive racial categorisation will be sensitive to being racially categorised by others.¹⁵⁰

94. In *Bropho v Human Rights & Equal Opportunity Commissioner*,¹⁵¹ French J similarly noted that the context in which an act is performed will be relevant in determining its reasonableness, offering the following example:

The publication of a genuine scientific paper on the topic of genetic differences between particular human populations might, for one reason or another, be insulting or offensive to a group of people. Its discussion at a scientific conference would no doubt be reasonable. Its presentation to a meeting convened by a racist organisation and its use to support a view that a particular group of persons is morally or otherwise 'inferior' to another by reason of their race or ethnicity, may not be a thing reasonably done in relation to par (b) of s 18D.¹⁵²

95. The Victorian Court of Appeal in *Catch the Fire Ministries Inc v Islamic Council of Victoria*,¹⁵³ in applying the Racial and Religious Tolerance Act 2001 (Vic), placed considerable emphasis on historical and social context when determining whether anti-Islamic publications produced by a Christian group amounted to hate speech. It considered that the relevant circumstances of the case to include:

[B]oth the characteristics of the audience to which the words or conduct is directed and the historical and social context in which the words are spoken or the conduct occurs. It is trite to remark that the social and historical context in which words are spoken or behaviour occurs, alters from time to time. Changes in social context

¹⁴⁹ *ibid* [167].

¹⁵⁰ *ibid* [171].

¹⁵¹ 2004) 135 FCR 105.

¹⁵² *ibid* 128.

¹⁵³ *Catch the Fire Ministries Inc v Islamic Council of Victoria* [2006] VSCA 284; (2006) 206 FLR 56.

mean that words directed against members of a particular racial or religious group could be found to have the relevant inciting effect at one time, which they would not have at another time. For example words attacking a racial or religious group at a time when Australia was at war with a country from which members of that group originally came might be likely to incite hatred or other relevant emotion against members of that group, whilst the same words said in peace-time would not be likely to incite this response. Whether particular words have this effect is a question of fact. Social context is also relevant in considering the effect of s 11 [exceptions] of the *Racial and Religious Tolerance Act*.¹⁵⁴

96. Although brought under s 9(1) of the RDA as a complaint of racial discrimination, *Hagan v Trustees of the Toowoomba Sports Ground Trust*¹⁵⁵ provides an interesting example of the role of context in considering whether something is racially noxious. In this case a complaint was brought about a sign with the words ‘The ES Nigger Brown Stand’ at an athletic oval. ‘Nigger’ was the nickname given to ES Brown, one of the teams celebrated players who was being honoured by the stand. The judge noted:

There can be no doubt that the use of the word ‘nigger’ is, in modern Australia, well capable of being an extremely offensive racist act. If someone were, for example, to call a person of indigenous descent a ‘nigger’, that would almost certainly involve unlawfully racially-based conduct prohibited by the [RDA]. I say almost certainly because it will, I think, always be necessary to take into account the context in which the word is used, even when it is used to refer to an indigenous person.¹⁵⁶

Drummond J suggested that the use of the word ‘nigger’ *between* Australian Indigenous people would be *unlikely* to breach the RDA. His Honour cited the views of Clarence Major, to the effect that the use of the word ‘nigger’ between black people in the USA could be considered ‘a racial term with undertones of warmth and goodwill – reflecting, aside from the irony, a tragicomic sensibility that is aware of black history’.¹⁵⁷ In this case, his Honour held that the word ‘nigger’ was devoid of any racist connotations.

III UNITED KINGDOM

97. There have been very few convictions for incitement to hatred under the Public Order Act 1986 or its predecessor, the Race Relations Act 1965. This is due in part

¹⁵⁴ *ibid* [159].

¹⁵⁵ *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615. See further *Discrimination Law Review* (n 62) 59.

¹⁵⁶ *ibid*, [7].

¹⁵⁷ *Ibid*.

to the lack of precision in the Act. Hatred is left undefined and it seems that judges and juries have understood ‘hatred’ as covering only extreme forms of racial abuse.¹⁵⁸

98. Whether or not particular conduct violates the Act may depend on the audience. In *R v Britton* a 17 year-old boy was charged under the Race Relations Act after having left pamphlets stating ‘Blacks not wanted here’ on the porch of his MP. It was held that as he had left the pamphlets with the MP with a view to persuading him to oppose immigration, this could not amount to distribution intended to stir up hatred:¹⁵⁹

[I]t seems difficult to believe that Parliament ever intended that there should be any distribution within the meaning of section 6 by leaving a pamphlet of this sort with a Member of Parliament with the object of persuading him to change his policy, and fight against allowing immigrants to come into the country. It is difficult to think that, even if technically there was a distribution or a publication to him, it could be said that in those circumstances it was a distribution or publication intended to stir up hatred. It is the distribution which must be intended to stir up hatred, not the words used.¹⁶⁰

99. Fenwick and Phillipson have noted that the offence is objective and can be committed in the absence of likelihood that distress would be caused.¹⁶¹ It has been argued that since the offence refers to incitement of hatred and not merely insult of a racial group it may be necessary for the offensive material to be heard by someone outside of the targeted racial group.¹⁶² If the accused knew or ought to have known that the words were threatening, abusive or insulting, it is not a defence that they did not intend to stir up racial hatred.¹⁶³

IV REPUBLIC OF IRELAND

100. There are no notable pronouncements on the role of context in determining whether acts or speech amount to hate speech. An interesting feature of the cases is that because the Irish Incitement to Hatred Act only covers incitement, face-to-

¹⁵⁸ Jennifer Schweppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal law*. Available at [http://www.integration.ie/website/omi/omiwebv6.nsf/page/AXBN-7UPE6D1121207-en/\\$File/Combating%20Racism%20with%20the%20Criminal%20Law.pdf](http://www.integration.ie/website/omi/omiwebv6.nsf/page/AXBN-7UPE6D1121207-en/$File/Combating%20Racism%20with%20the%20Criminal%20Law.pdf) Accessed on 10/02/2012. 32.

¹⁵⁹ *R v Britton* [1967] 2 QB 51.

¹⁶⁰ *ibid* [56].

¹⁶¹ Helen Fenwick and Gavin Philipson, *Media Freedom under the Human Rights Act* (Oxford University Press 2006) 515.

¹⁶² Schweppe and Walsh (n 158).

¹⁶³ *ibid* 35.

face vulgar abuse and hate mail fall outside the ambit of the act.¹⁶⁴ Keogh has written that ‘[i]t is anomalous that a neo-Nazi can be prosecuted if he harangues fellow fascists but not an audience of Asians’.¹⁶⁵ As a result, the audience of the speech or action is all important. In *Director of Public Prosecutions v O’Grady* a bus driver was prosecuted under the Act after calling a Gambian man attempting to board his bus a ‘nignog’ and suggesting he ‘return to his own country’. He appealed to the circuit criminal court and was acquitted. Buckley J, who heard the appeal, considered that the conviction could not be upheld given the narrow definition of incitement in the act. The act was only heard by two witnesses, both of whom supported the Gambian man and thus could not have been considered to have been incited to hatred.¹⁶⁶

V INDIA

101. The Indian courts have not laid down any clear standard to ascertain the relevance of context. However, context-specific observations have been made in some instances.
102. In *Gopal Vinayak Godse v Union of India*,¹⁶⁷ the Bombay High Court invalidated a decision to confiscate all copies of a book, ‘Gandhi-hatya Ani Mee’ (‘Gandhi-assassination And I’), authored by one of the conspirators in the assassination of Mahatma Gandhi. The Court indicated that rather than scrutinizing specific lines or passages from a book, it is the overall impact of a book on the reaction of a common reader that is relevant. The Court also recognized the importance of historical context, as the book dealt with a theme which was ‘a matter of past history’ – the assassination of Gandhi in 1948. It did not grapple with any contemporary issues and it was open to the author to consider the justifications for Gandhi’s assassination (which the author primarily based on Gandhi’s putative policy of appeasing Muslims, which he claimed led to the partition of India). The Court took note of the author’s argument that, as a convict who had served his sentence for the assassination, providing the justifications for his actions would make it easier for him and his family to be rehabilitated into society.

¹⁶⁴ Ibid.

¹⁶⁵ Quoted in David Cowhey *Racist Hate Speech Laws in Ireland; the Need for Reform* (2006) COLR 4, 43.

¹⁶⁶ Discussed in Schweppe and Walsh (n 158) 112.

¹⁶⁷ *Gopal Vinayak Godse v Union of India* AIR 1971 Bom 56.

103. In *Sujato Bhadra v State of West Bengal*,¹⁶⁸ the Calcutta High Court held that the context in which a book is written forms a key consideration in determining whether s 295A of the Indian Penal Code has been breached. The author, a Bangladeshi national, expressed her anguish at the deplorable state of women in the political climate in her country, which in her opinion emanated from the adoption of Islam as a state religion. Her book also highlighted inconsistencies in the Islamic holy scriptures. The Government of West Bengal passed an order forfeiting the book on the ground that it would outrage the religious feelings and insult the beliefs of Muslims in India. The Court observed that ‘a reader should not be oblivious of the larger context’ in which a book was written. The fact that the author sought to ‘administer a shock’ in order to sensitise the public to women’s ‘clamoring for equality’ and to revive the tradition of secularism played an important role in the Court’s decision.¹⁶⁹

VI CANADA

104. As discussed above, the Canadian Supreme Court adopts a contextual-approach in balancing free expression against other competing rights. In *Edmonton Journal v. Alberta*¹⁷⁰ the Court developed the core of this ‘context approach’:

A contextual approach recognizes that a particular right or freedom may have a different value depending on the context and brings into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. This approach is more sensitive to the reality of the dilemma posed by the particular facts of a case and is more conducive to finding a fair and just compromise between two competing values under s. 1. The importance of a Charter's right or freedom, therefore, must be assessed in context rather than in the abstract and its purpose must also be ascertained in context.¹⁷¹

105. Nonetheless, in the seminal hate speech cases, *Keegstra*¹⁷² and *Zundel*¹⁷³ the Supreme Court did not analyse the context in much detail. Both cases dealt with anti-Semitic speech: in the former the accused was a teacher who taught his racist theories to his students while in the latter the accused published a piece of

¹⁶⁸ (2005) 3 CALLT 436 HC.

¹⁶⁹ *ibid* [15.1].

¹⁷⁰ *Edmonton Journal v. Alberta* (1989) 2 SCR 1326.

¹⁷¹ *ibid* 4.

¹⁷² [1990] 3 SCR 697 (Canadian Supreme Court).

¹⁷³ [1992] 2 SCR 731 (Canadian Supreme Court).

revisionist history, denying the Holocaust. These different contexts were hardly mentioned in the cases. This can be attributed to the fact that in both cases the Supreme Court was concerned with the constitutionality of the offences, rather than interpreting the meaning of the speech.

VII UNITED STATES

106. Bearing in mind the entirely different way in which the United States addresses questions of free expression to the other jurisdictions analysed here, ‘context’ normally arises in relation to whether a state’s attempts to regulate the ‘time, place, and manner’¹⁷⁴ of communications are constitutional. This is because US courts hold that neither the content of the message, nor the viewpoint expressed, may be prohibited. But ‘[e]ven protected speech is not equally permissible in all places and at all times.’¹⁷⁵ Restrictions on the time, place and manner of free expression will be assessed to determine whether they are: justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.
107. An example is the case of *Ward v Rock Against Racism*,¹⁷⁶ where the Court assessed a regulation limiting the volume to be used at a community rock concert in Central Park. The petitioners challenged the local council restrictions on amplification under the First Amendment, but the Supreme Court evaluated both the *statutory* context (finding that the regulations were directed at the volume of the speech in a residential area, and not the content of the speech), as well as the context of the speech itself, determining that there were ample channels for communication of the messages without the need for high volumes late at night in residential areas.

VIII EUROPEAN COURT OF HUMAN RIGHTS

108. Context has great significance in all freedom of expression cases heard by the ECtHR. A number of contextual factors reappear in the case law, though the Court accords different weight to these factors in each case.

¹⁷⁴ *Clark v Community for Creative Non-Violence*, 468 US 288, 293; 104 S. Ct. 3065 (1984).

¹⁷⁵ *Frisby v Schultz*, 487 US 474, 479; 108 S. Ct. 2495 (1988).

¹⁷⁶ *Ward v Rock Against Racism*, 491 US 781, 791; 109 S. Ct. 2746 (1989).

109. The most important factor is the intention of the speaker. *Jersild*¹⁷⁷ is the leading case on this point. The case concerned a TV journalist who made a documentary containing extracts from the television interview with members of an extreme right group ('the Greenjackets') during which the interviewees uttered abusive and racist remarks. Jersild, the reporter, was convicted for aiding the dissemination of racist remarks. In this case the Court emphasised that 'taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas'. Instead Jersild aimed to inform the public about an important social issue, that involved reporting on racist opinions in order to expose, analyse and explain. Therefore the use of other people's hate speech could not amount to hate speech.
110. In *Gündüz*, the leader of an Islamist group debated democracy and sharia law on television during which he repeated the desire to destroy democracy and establish *sharia* law as well as uttering derogatory slurs against children born of civil marriages.¹⁷⁸ He was convicted in Turkey for expressing his distaste of secular democracy, and his desire to set up a regime based on sharia law. In *Refah Partisi (the Welfare Party) and Others v. Turkey*¹⁷⁹ the Court held that the promotion of *sharia* was inconsistent with the values under the Convention, and did not amount to protected speech. The Court differentiated that case from *Gündüz* on the ground that he had only argued for *sharia*, and did not call for violence.¹⁸⁰ Interestingly, the Court also emphasised the nature of the television program, which involved a lively debate between panellists in which his views were interrogated and subjected to criticism.
111. The applicant's status and role should also be taken into account. For example, if the speaker is a journalist reporting events or transmitting the hate speech, then his

¹⁷⁷ *Jersild v Denmark*. App. no 15890/89 (ECtHR 23 September 1989).

¹⁷⁸ *Gündüz v Turkey*, App. no. 59745/00 (ECtHR 13 November 2003).

¹⁷⁹ *Refah Partisi (the Welfare Party) and Others v. Turkey*. App. no. 41340/98 (ECtHR 13 February 2003).

¹⁸⁰ Here the Court observed, at [51]:

Admittedly, there is no doubt that, like any other remark directed against the Convention's underlying values, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention. However, the Court considers that the mere fact of defending sharia, without calling for violence to establish it, cannot be regarded as "hate speech."

status gives him increased protection against hate speech prosecution.¹⁸¹ This factor is especially relevant in cases concerning politicians, as the Court affords greater protection to political speech. In *Incal v Turkey*¹⁸² the Court held that an incitement to violence charge against the leader of a Kurdish opposition party amounted to a violation of art 10. The applicant was convicted of hate speech for having described the State as terrorist and for calling on Kurds to defend themselves against state aggression. The Court laid emphasis on the importance of political speech; the fact that the target of the admittedly harsh criticism was the government, which was ‘in dominant position’;¹⁸³ and the disproportionate nature of the penalty.

112. However, *Féret*¹⁸⁴ and *Le Pen*¹⁸⁵ stand for the increased responsibility of politicians not to propagate hate. Both cases involved right-wing politicians uttering anti-immigrant views in public. Le Pen made his comments in an interview given to a national newspaper, whereas Féret published anti-immigrant literature during his campaign. The Court held that their speech stigmatized a vulnerable minority, and that their position as politicians was not a mitigating factor. Moreover, the court stressed their increased responsibility by virtue of their position.¹⁸⁶
113. *Vajnai v Hungary*¹⁸⁷ and *Fratanolo v Hungary*¹⁸⁸ concerned a national criminal ban on the public display of communist (and other totalitarian regimes') symbols. The applicants, left-wing politicians, wore red stars during public demonstration and were convicted for displaying totalitarian symbols under Hungarian hate speech law. The ECtHR, while acknowledging that the red star represents historical trauma for some people, held that it has also acquired multiple historical meanings for others.

The ban can encompass activities and ideas which clearly belong to those protected by Article 10, and there is no satisfactory way to sever the different meanings of the incriminated symbol.¹⁸⁹

¹⁸¹ See *Jersild* (n 177).

¹⁸² *Incal v Turkey*, App no 22678/93 (ECtHR 9 June 1999).

¹⁸³ *ibid* [54].

¹⁸⁴ *Féret v Belgium* App no. 15615/07 (ECtHR 16 July 2009).

¹⁸⁵ *Le Pen v France*, App no. 18788/09 (ECtHR 20 April 2010).

¹⁸⁶ *Féret* (n 184) [75]-[76].

¹⁸⁷ *Vajnai v. Hungary*, App. no. 33629/06 (ECtHR 8 July 2008).

¹⁸⁸ *Fratanolo v. Hungary*, App no. 29459/10 (ECtHR 3 November 2011).

¹⁸⁹ *Vajnai* (n 187) [54].

The Court found the ban problematic because it infused chilling effect in political speech. If no present or remote danger of this expression is shown, then a mere ‘speculative danger’ cannot justify the curtailment of Article 10. Finally it is worth emphasising that the Court expressly acknowledged the hurt feelings of some, but declared that nonetheless these ‘feelings, however understandable, cannot alone set the limits of freedom of expression.’¹⁹⁰

IX GERMANY

114. As outlined [above](#), sections 130(1) and (2) of the German Criminal Code are framed in broad terms. There are several crucial points in the statutory tests of the various subsections which are connected to context.
115. First, the Federal Court of Justice (BGH) has held that hate speech under s 130(1) requires more than a mere insult against a person, but an ‘assault on his equal right to life in the public community, which treats him as an inferior being’¹⁹¹
116. The Oberlandesgericht Frankfurt am Main¹⁹² held that there was no violation of dignity where a publican installed a sign at the entrance door with the words: ‘Turks may not enter this pub.’¹⁹³ The Court held that while the sign clearly discriminated against Turks in Germany, it could not be assumed that the applicant had intended to deny Turks an equal right to life in society.¹⁹⁴ Therefore, there was no proven assault to the very humanity of Turks.¹⁹⁵
117. However, the Oberlandesgericht Hamburg found a violation of human dignity in a case in which the defendant sent a letter to the editor of a popular mainstream news magazine about a recent article on cross-racial marriages, saying: ‘your cover picture joyfully shows how unaesthetic such a perverted marriage is: those coveting black claws on white skin, this repugnant brutality, primitiveness and lack of culture in the facial expression of those underdeveloped.’¹⁹⁶ The court held that

¹⁹⁰ *ibid* [57].

¹⁹¹ BGH [1994] NJW 1421.

¹⁹² Which was the court of last instance in the case.

¹⁹³ OLG Frankfurt [1985] NJW 1720.

¹⁹⁴ *ibid* 1721.

¹⁹⁵ *ibid* 1721.

¹⁹⁶ OLG Hamburg [1975] NJW 1088.

this statement negated the personhood of ‘the Negroes living in the Federal Republic of Germany’¹⁹⁷ as it far exceeded ordinary defamation.¹⁹⁸

118. Second, a key element of the statutory test is whether the statement is ‘capable of disturbing the public peace’. This is dependent on the circumstances of the particular statement. The criteria that are considered in determining whether a statement is capable of disturbing the public peace are: the content and the intensity of the statement, the receptivity of the population and especially of the youth,¹⁹⁹ the potential for violence and the sensitivity of the affected group.²⁰⁰
119. The BGH has held that the capability must be determined according to a generalised assessment.²⁰¹ In this case, the defendant had published several ‘revisionist’ letters, denying the Holocaust and suggesting an international conspiracy against Germany.²⁰² The BGH held that those statements were capable of undermining Jewish Germans’ trust in their legal security.²⁰³
120. Another case decided by the BGH concerned a demonstration of the far-right NPD party against public subsidies for the construction of Synagogues.²⁰⁴ The defendant cited a Talmud passage which could be interpreted as allowing sexual intercourse with children. The court held though the passage was correctly cited, the circumstances were of major importance. It drew on the fact that the speaker was a member of a far right party and was aware that his audience at the demonstration was far right and could not be expected to engage in a serious discourse on Jewish rules of faith.²⁰⁵ Moreover, it was clear that the audience had expected him to make anti-Semitic remarks in his speech and was ready to interpret it in this light.²⁰⁶ The court took other parts of the speech into account, which referred to National Socialist prejudices against Jews, Roma, homeless people, homosexuals etc. and thus showed that the speaker based his speech on National Socialist ideology.²⁰⁷ The Court held that such identification of the speaker with National Socialist

¹⁹⁷ Ibid.

¹⁹⁸ *ibid.*

¹⁹⁹ OLG Zweibrücken [1994] NStZ 490.

²⁰⁰ Lenckner and Sternberg-Lieben, in: Schönke and Schröder, Strafgesetzbuch (28th ed. Munich 2010), § 130 [11].

²⁰¹ 48 BGHSt 212, 218.

²⁰² *ibid.*

²⁰³ *ibid.*, 220.

²⁰⁴ BGH [2006] NStZ 305.

²⁰⁵ *ibid.* 306.

²⁰⁶ *ibid.*

²⁰⁷ *ibid.*

ideology always involves an assault on human dignity of the target group.²⁰⁸ Hence, the speech was not protected.

121. In its first *Soldiers are Murderers* decision the Constitutional Court dealt with the display of a bumper sticker during the 1991 Gulf War, stating ‘soldiers are murderers’, a quote from the left wing author Kurt Tucholsky.²⁰⁹ The court assessed the contextual meaning of the statement at great length. It could not be reduced to the assumption that the applicant had wanted to express that all soldiers of the German army had committed a murder in terms of the Criminal Code.²¹⁰ An average reader moreover was aware of the fact that the modern German army had (by the time of the decision) never been engaged in actual combat.²¹¹ The lower courts also had failed to assess the other stickers displayed on the car, one of which was showing a soldier throwing his gun to the ground with the inscription: ‘Why?’. The Constitutional Court held that this could be interpreted in several ways, one of which was that the soldier was shot and the inscription expressed that he was a senseless victim of a war.²¹² The ‘soldiers are murderers’ sticker had to be interpreted in the light of this.²¹³
122. The second *Soldiers are Murderers*-decision was brought under the general defamation provision, dealing with similar slogans.²¹⁴ The Court reiterated that once human dignity was concerned there would be no balancing.²¹⁵ It also repeated its findings in the *Lüth*-case, saying that in a public debate there was the assumption that free speech was permissible.²¹⁶ It further recognised that public institutions had to be protected from defamation to a certain degree in order to ensure their functioning.²¹⁷ However, this had to be balanced with the right of the speaker in the light of the circumstances of the expression, taking into account the perception of the addressees.²¹⁸ Regarding the dignitarian aspect, the court found that the larger the insulted group was, the less affected was a particular member of it in his

²⁰⁸ *ibid.*

²⁰⁹ App no 1 BvR 1423/92.

²¹⁰ *ibid.*

²¹¹ *ibid.*

²¹² *ibid.*

²¹³ *ibid.*

²¹⁴ 93 BVerfGE 266.

²¹⁵ *ibid.* 293.

²¹⁶ *ibid.*

²¹⁷ *ibid.*

²¹⁸ *ibid.* 295, 296.

personal honour.²¹⁹ It therefore drew a distinction between ‘soldiers’ referring to all soldiers in all countries of the world and those soldiers of the German army in particular, the latter being a small enough group to be possibly defamed.²²⁰ However, in the particular case there was no evidence that only the soldiers of the German army were targeted.²²¹

X SLOVENIA

123. In determining whether speech amounts to hate speech, the Slovenian courts emphasise that context plays a very important role.²²²
124. In the case of a politician accused of hate speech against the Roma,²²³ discussed [above](#), the Court took into account a wide range of contextual factors. It acknowledged that the alleged hate speech took place in the popular TV show based on confrontational arguments with a loud audience supporting their favoured candidate. As a result, the Court held that while the defendant could have used other words, or at least explained his use of the terms while on the show, his speech had not shown to be dangerous as it was not likely to cause a possible escalation of the strained relations in the specific Roma community. It found that the motive of the television show was entertainment. If the purpose of the show was seriously to debate the Romany situation, the context of defendant’s words could have been understood differently. Therefore, taking all the relevant factors in the account, the Court decided that this specific speech did not amount to hate speech.

²¹⁹ *ibid* 301, 302.

²²⁰ *ibid* 302.

²²¹ *ibid*.

²²² Andraž Teršek, *Svoboda izražanja- nepreprečljivo varovana in zlorabljena?!* <https://www.ip-rs.si/fileadmin/user_upload/Pdf/clanki/Tersek_Svoboda_izrazanja.pdf> accessed 16 February 2012.

²²³ IV K 58798/2010.

QUESTION 3: HATE SPEECH AND POPULAR CULTURE

125. The fact that alleged hate speech is in the form of a song or other forms of artistic or cultural expression can be relevant in at least two ways: first, some jurisdictions make an exception for artistic expression in their hate speech laws, and, second, these forms of expression introduce additional factors that are relevant in determining the meaning, intentions and likely effects of the speech.

I INTERNATIONAL LAW

126. In *Bikindi*,²²⁴ the accused was alleged to have participated in the genocide by composing songs extolling Hutu solidarity, encouraging ethnic hatred, and inciting Hutus to attack and kill Tutsis.²²⁵

127. The Court first noted that hate speech was not criminalized per se under the Statute of the Tribunal:²²⁶

Although the Statute does not criminalise acts of expression per se, the inclusion of expressive acts within the underlying elements of the crimes under the jurisdiction of the Tribunal comes close to having such an effect.²²⁷

128. Hence, the Court stated that:

Depending on the nature of the message conveyed and the circumstances, the Chamber does not exclude the possibility that songs may constitute direct and public incitement to commit genocide.²²⁸

129. Similarly:

[D]epending on the message conveyed and the context, the Chamber does not exclude the possibility that songs may constitute persecution as a crime against humanity.²²⁹

²²⁴ *The Prosecutor v. Simon Bikindi*, Case no. ICTR-01-72-T. Judgment and Sentence, (2 December 2008); upheld by the Appeals Chamber in *The Prosecutor v. Simon Bikindi*, Case no. ICTR-01-72-A, Appeal Chamber Judgment (18 March 2010).

²²⁵ *Bikindi* Trial Chamber *ibid* [186] and [187].

²²⁶ *ibid* [382].

²²⁷ *ibid* [396].

²²⁸ *ibid* [389].

²²⁹ *ibid* [395].

130. However, it went on to state that ‘the Chamber will not address this issue here, as this section is concerned with whether hate speech can constitute the actus reus of a crime in itself.’²³⁰
131. The Trial Chamber stated that both the meaning of the songs and their factual deployment were relevant when assessing those matters. Furthermore, the cultural, historical and political context in which they were composed and disseminated had bearing on the interpretation of the songs.²³¹ As to the meaning, the Court confirmed the central role played by euphemisms and metaphors: ‘[a]lthough Bikindi’s songs were filled with metaphors and imagery, their message was clearly understood’.²³² Moreover, the Tribunal found the manner of the songs’ dissemination was important. While recordings of the songs might have been played as a prelude to and during the massacres, those electronic reproductions were not within Bikindi’s control.
132. The Court concluded that two of Bikindi’s songs were composed with the specific intention to disseminate pro-Hutu ideology and anti-Tutsi propaganda, and thus to encourage ethnic hatred. However, the Chamber did not find sufficient evidence to conclude that Bikindi composed these songs with the specific intention to incite attacks and killings, even if they were used to that effect in 1994.²³³ Hence, none of the three songs have been found to constitute direct and public incitement to commit genocide *per se* (because of a lack of genocidal intent) nor had Bikindi played any role in the dissemination or deployment of these songs in 1994.²³⁴ Nevertheless, they did find Bikindi guilty of direct and public incitement to genocide for the songs and speech he broadcasted himself while driving through the countryside during the genocide.

II AUSTRALIA

133. As discussed [above](#), Section 18D of the Race Discrimination Act (RDA) provides an exception for ‘anything said or done reasonably and in good faith’ if it is done:

²³⁰ *ibid* [386].

²³¹ *ibid* [247] – [255].

²³² *ibid* [197]-[199] and [240].

²³³ *ibid* [245]-[255].

²³⁴ *ibid* [421].

‘in the performance, exhibition or distribution of an artistic work... or any other genuine purpose in the public interest’.

134. In *Bryl v Nowra*,²³⁵ Commissioner Johnston stated that in drawing a line between what is reasonable, and what is not, when publishing and performing a play, a judge ‘should exercise a margin of tolerance and not find the threshold of what is unreasonable conduct too readily crossed.’ The conflict between artistic license, as a form of freedom of expression, and political censorship requires that a judge take-

a fairly tolerant view in determining what is reasonable or not. Topics like the Holocaust can be the subject of comedy, as in the film ‘Life is Beautiful’, even if offensive to some Jewish survivors of concentration camps who see it as trivialising the horror of that situation. In many instances marked differences of opinion may be engendered, as in the case of the painting by Andres Serrano ‘Piss Christ’ (as to which see *Pell v Council of Trustees of the National Gallery of Victoria* [1997] 2 VR 391).²³⁶

135. *Kelly-Country v Beers*²³⁷ considered a performance by a non-Aboriginal comedian who portrays an Aboriginal character ‘King Billy Cokebottle’ for the duration of his routine, much of which involves jokes with no specific racial element. In doing so, the respondent applied black stage make-up, has an unkempt white beard and moustache as well as ‘what appears to be a white or ceremonial ochre stripe across his nose and cheek bones... [and] a battered, wide brimmed hat, of a kind often associated with Australian, particularly Aboriginal people, who live in a rural or outback setting’.²³⁸

136. The respondent successfully relied upon the exemption provided for in s 18D. The judge held:

In the particular context of this case, I bear in mind that Mr Beers was appearing as the character of King Billy Cokebottle, who in many ways is a grotesque caricature. As such, the character has more license than a politician or social commentator to express views. In the context of a stand-up comedy performance, the offence implicit in much of Mr Beers’ material does not appear to me to be out of proportion. I do not believe that there is a high degree of gratuitous insult, given that the comedic convention of stand-up is to give offence or make jokes at the expense of some member or members of the community. In this regard, the character does not use slang terms, which are likely to give particular offence to any particular

²³⁵ *Bryl v Nowra* [1999] HREOCA 11 (extract at (1999) EOC 93-022).

²³⁶ *ibid.*

²³⁷ (2004) 207 ALR 421.

²³⁸ *ibid* 426.

ethnic or racial group. In my view, Mr Beers keeps his performance within the constraints and conventions of stand-up comedy and when viewed objectively, it is reasonable.²³⁹

137. In *Mulball v Barker*,²⁴⁰ Mr Barker produced and published on YouTube a music video of a song entitled 'My Name is Flabba, Babba, Wabba, Jabba, Nyoongah'. The lyrics were set to 50 Cent's 'In Da Club' and the video depicted two men wearing dark face paint and black wigs engaging in various unlawful activities and being pursued by other men dressed as police officers.
138. Mr Barker was charged under s 80B of the *Criminal Code 1913* (WA) making it an offence to engage in any conduct, otherwise than in private, that is likely to harass a racial group, or a person as a member of that racial group. Section 80G of the *Criminal Code 1913* (WA) provided a defence to s 80B if the accused's conduct was 'engaged in reasonably and in good faith: (a) in the performance, exhibition or distribution of an artistic work'.²⁴¹ The matter went on appeal on technical grounds, but on the substance of the case the first instance judge held that Mr Barker was entitled to rely upon this defence, as there was not a want of reasonableness or lack of good faith in making the video:

In this case, and as I've said, an objective observer sitting down and watching that video for the first time, and in particular a member of a racial group, namely, people of Aboriginal descent, in my view would be offended. However, that fact alone does not constitute a want of reasonableness or a lack of good faith. I emphasise that Mr Barker did not produce the video for racist purposes, or in a way that associated with racist purposes. Had he done so he would have been seen to be not to be acting reasonably and not in good faith.

So one of the matters to take into account in considering those two matters of reasonableness and good faith, is the purpose for which the video was produced. I accept, as I have said, that Mr Barker produced it for a number of reasons. To use his words, "A parody of the words of a song." To parody the content of the song and, at the same time, raise those issues of the difficulties faced by Aboriginal people.

²³⁹ *ibid.*

²⁴⁰ [2010] WASC 359.

²⁴¹ Section 80G(1)(a).

III UNITED KINGDOM

139. The UK has a long history of sectarianism and xenophobia which, like the Republic of Ireland discussed below, is often reflected in songs or poetry. Verse two of ‘God Save the Queen’ is a clear example of this:

O Lord, our God, arise / Scatter her enemies / And make them fall / Confound
their politics / Frustrate their knavish tricks / On Thee our hopes we fix / God save
us all.

As is the unofficial Scottish anthem, ‘Flower of Scotland’ which recounts Scottish military victories over the English army, ending with a call for nationalism based on that memory:

But we can still rise now/ And be the nation again/ That stood against him / Proud
Edward's army/ And sent him homeward/ Tae think again

140. In 1971 John McKeague, chairman of the Skankill Defence Force in Northern Ireland was charged along with two others under the Prevention of Incitement to Hatred (Northern Ireland) Act 1970 for inciting religious hatred by publishing a book entitled ‘Orange Loyalist Songs 1971’. The songs contained lyrics which were extremely offensive to the Catholic community of Northern Ireland including the line ‘Taigs are made to kill’ (taig is a derogatory term for Catholics). McKeague denied intention to stir up racial hatred. Though defence council accepted that the words were threatening and abusive, they asked the jury to consider them in context and in particular, whether they were meant to be taken seriously. The jury found the accused not guilty of the offence.²⁴² It appears that there have been no successful prosecutions under the 1970 Act.²⁴³ It has been suggested that the Act was deliberately drafted in such a way as to make prosecution difficult.²⁴⁴
141. Hate speech in songs has also been a major concern in football, particularly in Scotland. The Scottish Parliament recently enacted the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 which prohibits the expression of hatred against racial, religious or other groups at football matches

²⁴² Bridget Hadfield, *Prevention of Incitement to Religious Hatred – An Article of Faith* 35 N. Ir. Legal Q. 231 (1984) at 242.

²⁴³ Part III of the 1986 Act was introduced in substance into Northern Ireland by the Public Order (Northern Ireland) Order 1987. Very few prosecutions were taken under this act. In reponse the Criminal Justice (no.2) (Northern Ireland) Order 2004 was enacted.

²⁴⁴ Theresa Murphy, ‘Incitement to Hatred; Lessons from Northern Ireland’ in ‘*Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination*’ Sandra Coliver (ed), 1992 (Article 19, London and Human Rights Centre).

where this is likely to incite public disorder.²⁴⁵ It has been noted that sectarianism in Scottish football is often expressed implicitly through symbolism and songs which, on their face, seem inoffensive but have acquired strong sectarian overtones:

For an outsider, this symbolism is bewildering. Rangers fans [associated with British Protestantism] have thrown potatoes onto the pitch to annoy the Catholic/Irish identified Celtic fans, while their opponents have worn German flags as a provocative celebration of the new Pope. Both sides have adapted apparently harmless songs such as the traditional 'Fields of Athenry' and Tina Turner's 'Simply The Best'. Now, singing even the harmless lyrics is inflammatory.²⁴⁶

142. This demonstrates the power of context and history to turn even the most innocuous of objects, words or actions - such as potatoes or Tina Turner's 'Simply the Best' - into inflammatory hate speech.
143. In their submissions the Justice Committee noted the role played by 'football as theatre'.²⁴⁷ They considered the argument that behaviour at a football match cannot be viewed through the same lens as behaviour in real life, and that the lively atmosphere of football provided a means for individuals to let off steam; '... it was a rowdy and rough-edged species of theatre, and that was its unique appeal. Behaviour that might be considered offensive in another context is normalised precisely because it happens during a football match.'²⁴⁸

IV REPUBLIC OF IRELAND

144. A number of traditional Irish rebel songs feature a calls to arms against the English. Notably the Irish national anthem, Amhran na bhFiann ('The Soldier's Song') is a call to arms against the English 'despots'.²⁴⁹ An alternative song 'Ireland's Call' is sung by the All-Ireland sports teams (the combined teams of the Republic of Ireland and Northern Ireland) to avoid controversy with the Unionist community of Northern Ireland who favour the continued union between Great Britain and Northern Ireland.

²⁴⁵ Section 1(1).

²⁴⁶ Kay Goodall, *Incitement to Religious Hatred; All talk and No Substance?* (2007) 70(1) *Modern Law Review* 70: 189-113

²⁴⁷ Justice Committee Report, Justice Committee, 1st Report, 2011 (Session 4) para 33 available at <http://www.scottish.parliament.uk/S4_JusticeCommittee/Reports/OFBTC_Bill_FINAL.pdf> accessed 16 February 2012, [92].

²⁴⁸ *ibid.*

²⁴⁹ See full lyrics at <http://en.wikipedia.org/wiki/The_Soldier's_Song> accessed 16 February 2012.

V INDIA

145. The majority of hate speech cases in India have concerned books and films. The most notable have already been discussed [above](#). Alleged hate speech has been dealt with under obscenity laws, therefore not addressing the broader question *per se*. An example of this approach can be found in the case of *Maqbool Fida Husain v Raj Kumar Pandey*²⁵⁰. In this case, it was alleged that a painting produced by a leading Indian artist was likely to cause religious violence due to its depiction of a religious figure. However, the criminal charge was based on obscenity laws – as he had depicted the religious figure naked – rather than the prohibition on hate speech.

VI CANADA

146. No cases were found that placed emphasis on this issue. The Canadian Supreme Court in *Keegstra* hinted that due to the narrow legal conception of ‘hatred’ in the Criminal Code it does not expect any spill-over effect on protected area such as arts or politics:

That s. 319(2) may in the past have led authorities to restrict expression offering valuable contributions to the arts, education or politics in Canada is surely worrying. I hope, however, that my comments as to the scope of the provision make it obvious that only the most intentionally extreme forms of expression will find a place within s. 319(2). In this light, one can safely say that the incidents mentioned above illustrate not over-expansive breadth and vagueness in the law, but rather actions by the state which cannot be lawfully taken pursuant to s. 319(2). The possibility of illegal police harassment clearly has minimal bearing on the proportionality of hate propaganda legislation to legitimate Parliamentary objectives, and hence the argument based on such harassment can be rejected.²⁵¹

VII UNITED STATES

147. As discussed [above](#), the United States adopts extremely broad protection for free expression, however distasteful or injurious to others the speech might be. There is nevertheless a hierarchy of protection under the First Amendment, at the apex of which sits speech on matters of public concern.

²⁵⁰ 2008 Cri LJ 4107.

²⁵¹ *R v Keegstra* [1990] 3 SCR 697 (Canadian Supreme Court) [132].

148. The importance of cultural activities such as performance to the expression of ideas was noted by the Supreme Court in *Virginia v Black*,²⁵² where the Court struck down part of a statute which said that burning of a cross created a presumption of intent to intimidate. O'Connor J, delivering the opinion of the Court, noted that

Indeed, occasionally a person who burns a cross does not intend to express either a statement of ideology or intimidation. Cross burnings have appeared in movies such as *Mississippi Burning*, and in plays such as the stage adaptation of Sir Walter Scott's *The Lady of the Lake*.²⁵³

Although it is difficult to find examples outside art or popular culture where crosses could be burned without an intention to intimidate, the possibility was sufficiently important to render that part of the statute unconstitutional. The statutory presumption that cross burning was itself sufficient evidence of an intent to intimidate therefore created an 'unacceptable risk of the suppression of ideas.'

149. Countless other forms of cultural expression have been upheld as deserving of the full protection of the First Amendment, including: wearing a jacket printed with the words 'Fuck the Draft' in a county courthouse;²⁵⁴ holding a rock concert to publicise efforts to combat racism;²⁵⁵ covering over the state motto 'Live Free or Die' on a vehicle license plate²⁵⁶; violent video games²⁵⁷; and many other areas. This is hardly surprising given the 'marketplace of ideas' rationale which is embraced by the US Supreme Court.

150. Obscenity, like 'fighting words', is classed as 'low value' speech and thus entitled to less protection than other forms of protected speech. However, the Supreme Court has held that states wishing to restrict or prohibit obscenity must nevertheless contain exceptions for publications of serious literary or artistic value. In the 1973 case of *Miller v California*, the Court held that

At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political or scientific value to merit First Amendment protection.²⁵⁸

²⁵² 538 US 343; 123 S. Ct. 1536 (2003).

²⁵³ *ibid* 366; 1551.

²⁵⁴ *Cohen v California*, 403 US 15; 91 S. Ct. 1780 (1971).

²⁵⁵ *Ward v Rock Against Racism*, 491 US 781, 791; 109 S. Ct. 2746 (1989).

²⁵⁶ *Wooley v Maynard*, 430 US 705; 97 S. Ct. 1428 (1977).

²⁵⁷ *Brown v Entertainment Merchants Association*, 131 S. Ct. 2729 (2011).

²⁵⁸ 413 US 15; 93 S. Ct. 2697 (per Burger CJ, delivering the Opinion of the Court).

That position was affirmed in 1997 in *Attorney-General v American Civil Liberties Union*.²⁵⁹ The significance of this is that, even where ‘low value’, proscribable speech is concerned, works carrying serious literary or artistic value are still entitled to protection.

VIII EUROPEAN COURT OF HUMAN RIGHTS

151. Two decisions demonstrate the ECtHR’s approach to alleged hate speech in a context outside of pure political speech. In one, the Fifth Chamber of the ECHR upheld a conviction of a French cartoonist for a cartoon which, in a satirical manner, suggested his support for the attacks on the World Trade Centre in New York on 11 September 2001.²⁶⁰ Although not strictly a hate speech conviction,²⁶¹ the ECtHR’s approach is instructive. The Chamber held that the satirical nature of the cartoon and the subjective intention of the cartoonist was essentially irrelevant. More important to the Fifth Chamber, was the likelihood that the cartoon could incite violence in France’s Basque communities. Another factor which seems to have weighed heavily in their decision to uphold the conviction was the limited nature of the sanction imposed upon the cartoonist.²⁶²
152. Artistic expression was addressed more directly by the Grand Chamber in *Karatas v Turkey*.²⁶³ Karatas, a Kurdish poet, published an anthology of poetry which contained poems that called for the establishment of the state of Kurdistan and ‘through the frequent use of pathos and metaphors, called for self-sacrifice for ‘Kurdistan’ and included some particularly aggressive passages directed at the Turkish authorities’.²⁶⁴ The Court held that ‘even though some of the passages from the poems seem very aggressive in tone and to call for the use of violence’ the fact that they were ‘artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political

²⁵⁹ *Janet Reno, Attorney-General of the United States, et al. v American Civil Liberties Union et al.*, 521 US 844; 117 S. Ct. 2329 (1997).

²⁶⁰ *Leroy v France*. App no. 36109/03 (ECtHR 2 October 2008).

²⁶¹ The applicant had been charged with complicity in condoning terrorism under French law for publication of a cartoon on 13 September 2001. The caption of the cartoon, ‘We have all dreamed of it ... Hamas did it’, led to charges being brought by French authorities against the cartoonist and the editor of the newspaper which carried the cartoon.

²⁶² The initial conviction was for a fine of €1 500 for the cartoonist and the editor of the newspaper, and a requirement that they publish the judgment convicting them at their own cost in three newspapers.

²⁶³ App no. 23168/94 (ECtHR 8 July 1999).

²⁶⁴ *ibid.*

situation.’²⁶⁵ However, the Court provided little explanation for why the poem’s ‘artistic nature’ transformed its meaning. Ultimately, the Chamber found that the domestic conviction violated Karatas’ expression rights under the ECHR.

IX GERMANY

153. Artistic or cultural expression is not afforded any greater protection in hate speech cases as far as human dignity is concerned.²⁶⁶ The assessment of artist expression in extremist songs was examined by the Constitutional Court in the *Germany must die*-case²⁶⁷ and was further considered under youth protection law in the *Spreegeschwader*-case.²⁶⁸ Spreegeschwader was a far-right wing rock band, which recorded a CD containing lyrics such as the call for ‘solid boots on (Berlin’s) streets’ and displayed the number 1488 on its booklet. In neo-Nazi terminology, 88 stands for HH (the 8th letter of the alphabet), meaning ‘Heil Hitler’.²⁶⁹ 14 is the neo-Nazi link to the ‘14 words’: ‘We must secure the existence of our people and a future for white children’. The German youth protection authorities banned the record from being sold to minors. The group challenged this decision, arguing that the lyrics about marching boots could equally refer to soldiers of the GDR or the German Empire before 1918, as well as 1488 could also refer to the year of birth of Ulrich von Hutten (a German Scholar). The Constitutional Court however held that the crucial point was how the addressees of the band would likely understand the message. Because this was a rock band which was engaged in the extremist Skinhead movement, the court held that the audience would certainly interpret those symbols as neo-Nazi propaganda.²⁷⁰

²⁶⁵ *ibid* [52].

²⁶⁶ It is interesting to note that artistic expression is provided with separate constitutional protection under the German Constitution and is textually separate from the usual ‘opinion’ speech protection. This is particularly important as, under section 5(2) of the German Constitution, general expression is subject to a limitation by general law and for the protection of the youth and personal honour. Artistic expression is seemingly not subject to this limitation. However, because human dignity cannot be balanced, the result in artistic expression cases is no different from other restrictions on free expression whenever human dignity is concerned.

²⁶⁷ 81 BVerfGE 298.

²⁶⁸ App no 1 BvR 1584/07.

²⁶⁹ *ibid*.

²⁷⁰ *ibid*.

X SLOVENIA

154. Section 153(3) of the Slovenian Criminal Code provides a special exception for certain forms of speech, including artistic and political expression, providing that:

Whoever expresses words offensive to another person in a scientific, literary or artistic work, in a serious piece of criticism or in the exercise of official duty, in a piece of journalism, in the course of political or other social activity, or in the defence of a right or protection of justified benefits shall not be punished, provided that the manner of expressing such words or that the other circumstances of the case indicate that his expression was not meant to be derogatory.²⁷¹

155. The phrasing of section 153(3) suggests that in these cases the absence of intention is a defence. Slovenian courts are generally reluctant to find that artistic or cultural expression amounts to hate speech, requiring that the expression be aimed at specific persons and not at a larger group.²⁷²

²⁷¹ Slovenian Criminal Code 2008, s 153(3).

²⁷² See for example the decision in *Višje sodišče v Celju* VSC sklep Kp 49/2003. In this case, the Court held that the broad allegation that Catholics were defamed by manipulating the image of a Catholic religious symbol was not sufficient to establish liability; greater specificity of the victim was required.