In the case of Refah Partisi (the Welfare Party) and Others v. Turkey,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Mr GAUKUR JÖRUNDSSON,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mr C. BÎRSAN,
Mr P. LORENZEN,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mr M. PELLONPÄÄ,
Mrs M. TSATSA-NIKOLOVSKA,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mr A. KOVLER,
Mrs A. MULARONI,
and also of Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 19 June 2002 and 22 January 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in four applications (nos. 41340/98, 41342/98, 41343/98 and 41344/98) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish political party, Refah Partisi (the Welfare Party – "Refah") and three Turkish nationals, Mr Necmettin Erbakan, Mr Şevket Kazan and Mr Ahmet Tekdal ("the applicants") on 22 May 1998.

2. The applicants alleged in particular that the dissolution of Refah by the Turkish Constitutional Court and the suspension of certain political rights of the other applicants, who were leaders of Refah at the material time, had breached Articles 9, 10, 11, 14, 17 and 18 of the Convention and Articles 1 and 3 of Protocol No. 1.

3. The applications were transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

4. The applications were allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). They were joined (Rule 43 § 1) and on 3 October 2000 they were declared partly admissible by a Chamber of that Section, composed of Mr J.-P. Costa, President, Mr W. Fuhrmann, Mr L. Loucaides, Mr R. Türmen, Sir Nicolas Bratza, Mrs H.S. Greve, Mr K. Traja, judges, and Mrs S. Dollé, Section Registrar.

5. On 31 July 2001 the Chamber gave judgment, holding by four votes to three that there had been no violation of Article 11 of the Convention and unanimously that it was not necessary to examine separately the complaints under Articles 9, 10, 14, 17 and 18 of the Convention and Articles 1 and 3 of

Protocol No. 1. The joint dissenting opinion of Judges Fuhrmann, Loucaides and Sir Nicolas Bratza was annexed to the judgment.

6. On 30 October 2001 the applicants requested, under Article 43 of the Convention and Rule 73, that the case be referred to the Grand Chamber.

On 12 December 2001 a panel of the Grand Chamber decided to refer the case to the Grand Chamber.

7. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

8. The applicants and the Government each filed a memorial.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 19 June 2002 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*
Mr Ş. ALPASLAN, *Agent*,
Mrs D. AKÇAY,
Mr M. ÖZMEN, *Co-Agents*,
Mr Y. BELET, *Counsel*,
Mrs A. GÜNYAKTI,
Mrs G. ACAR,
Mrs V. SIRMEN, *Advisers*;

(b) *for the applicants*
Mr L. HINCKER,
Mrs M. LEMAÎTRE,
Mr G. NUSS, *Counsel*,
Mrs V. BILLAMBOZ,
Mr M. KAMALAK,
Mr Ş. MALKOÇ, *Advisers*.

One of the applicants, Mr Kazan, was also present.
The Court heard addresses by Mr Kazan, Mr Hincker and Mr Alpaslan.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicants

10. The first applicant, Refah Partisi (the Welfare Party – "Refah"), was a political party founded on 19 July 1983. It was represented by its chairman, Mr Necmettin Erbakan, who is also the second applicant. He was born in 1926 and lives in Ankara. An engineer by training, he is a politician. At the material time he was a member of Parliament and Refah's chairman.

The third applicant, Mr Şevket Kazan, who was born in 1933, lives in Ankara. He is a politician and a lawyer. At the material time he was a member of Parliament and a vice-chairman of Refah. The fourth applicant, Mr Ahmet Tekdal, who was born in 1931, lives in Ankara. He is a politician and a lawyer. At the material time he was a member of Parliament and a vice-chairman of Refah.

11. Refah took part in a number of general and local elections. In the local elections in March 1989 Refah obtained about 10% of the votes and its candidates were elected mayor in a number of towns, including five large cities. In the general election of 1991 it obtained 16.88% of the votes. The sixty-two

MPs elected as a result took part between 1991 and 1995 in the work of Parliament and its various committees, including the Committee on Constitutional Questions, which proposed amendments to Article 69 of the Constitution that became law on 23 July 1995. During the debate in Parliament on the new sixth paragraph of Article 69 of the Constitution (see paragraph 45 below) the chairman of the Committee on Constitutional Questions explained when he presented the draft it had prepared that the Constitutional Court would not restrict itself to noting the unconstitutional nature of the individual acts of the members of a party but would then be obliged to declare that the party concerned had become a centre of anti-constitutional activities on account of those acts. One MP, representing the parliamentary group of the Motherland Party, emphasised the need to change the relevant provisions of Law no. 2820 on the regulation of political parties to take account of the new sixth paragraph of Article 69 of the Constitution.

Ultimately, Refah obtained approximately 22% of the votes in the general election of 24 December 1995 and about 35% of the votes in the local elections of 3 November 1996.

The results of the 1995 general election made Refah the largest political party in Turkey with a total of 158 seats in the Grand National Assembly (which had 450 members at the material time). On 28 June 1996 Refah came to power by forming a coalition government with the centre-right True Path Party (Doğru Yol Partisi), led by Mrs Tansu Ciller. According to an opinion poll carried out in January 1997, if a general election had been held at that time, Refah would have obtained 38% of the votes. The same poll predicted that Refah might obtain 67% of the votes in the general election to be held roughly four years later.

B. Proceedings in the Constitutional Court

1. Principal State Counsel's submissions

12. On 21 May 1997 Principal State Counsel at the Court of Cassation applied to the Turkish Constitutional Court to have Refah dissolved on the grounds that it was a "centre" (*mihrak*) of activities contrary to the principles of secularism. In support of his application, he referred to the following acts and remarks by certain leaders and members of Refah.

– Whenever they spoke in public Refah's chairman and other leaders advocated the wearing of Islamic headscarves in State schools and buildings occupied by public administrative authorities, whereas the Constitutional Court had already ruled that this infringed the principle of secularism enshrined in the Constitution.

– At a meeting on constitutional reform Refah's chairman, Mr Necmettin Erbakan, had made proposals tending towards the abolition of secularism in Turkey. He had suggested that the adherents of each religious movement should obey their own rules rather than the rules of Turkish law.

– On 13 April 1994 Mr Necmettin Erbakan had asked Refah's representatives in the Grand National Assembly to consider whether the change in the social order which the party sought would be "peaceful or violent" and would be achieved "harmoniously or by bloodshed".

– At a seminar held in January 1991 in Sivas, Mr Necmettin Erbakan had called on Muslims to join Refah, saying that only his party could establish the supremacy of the Koran through a holy war (jihad) and that Muslims should therefore make donations to Refah rather than distributing alms to third parties.

– During Ramadan Mr Necmettin Erbakan had received the heads of the Islamist movements at the residence reserved for the Prime Minister, thus assuring them of his support.

– Several members of Refah, including some in high office, had made speeches calling for the secular political system to be replaced by a theocratic system. These persons had also advocated the elimination of the opponents of this policy, if necessary by force. Refah, by refusing to open disciplinary proceedings against the members concerned and even, in certain cases, facilitating the dissemination of their speeches, had tacitly approved the views expressed.

– On 8 May 1997 a Refah MP, Mr İbrahim Halil Çelik, had said in front of journalists in the corridors of the parliament building that blood would flow if an attempt was made to close the "*İmam-Hatip*" theological colleges, that the situation might become worse than in Algeria, that he personally

wanted blood to flow so that democracy could be installed in the country, that he would strike back against anyone who attacked him and that he would fight to the end for the introduction of Islamic law (sharia).

– The Minister of Justice, Mr Şevket Kazan (a Refah MP and vice-chairman of the party), had expressed his support for the mayor of Sincan by visiting him in the prison where he had been detained pending trial after being charged with publicly vindicating international Islamist terrorist groups.

Principal State Counsel further observed that Refah had not opened any disciplinary proceedings against those responsible for the above-mentioned acts and remarks.

13. On 7 July 1997 Principal State Counsel submitted new evidence against Refah to the Constitutional Court.

2. The applicants' defence

14. On 4 August 1997 Refah's representatives filed their defence submissions, in which they relied on international human-rights protection instruments, including the Convention, pointing out that these instruments formed part of Turkish written law. They further referred to the case-law of the Commission, which had expressed the opinion that Article 11 of the Convention had been breached in the cases concerning the United Communist Party of Turkey and the Socialist Party, and to the case-law of the Court and the Commission on the restrictions on freedom of expression and freedom of association authorised by the second paragraphs of Articles 10 and 11 of the Convention. They contended that the dissolution of Refah was not prompted by a pressing social need and was not necessary in a democratic society. Nor, according to Refah's representatives, was their party's dissolution justified by application of the "clear and present danger" test laid down by the Supreme Court of the United States of America.

15. Refah's representatives further rejected Principal State Counsel's argument that the party was a "centre" of activities which undermined the secular nature of the Republic. They submitted that Refah was not caught by the criteria laid down in the Law on the regulation of political parties for determining whether a political party constituted a "centre of anti-constitutional activities". They observed, *inter alia*, that the prosecuting authorities had not issued any warning to Refah (which had four million members) that might have enabled it to expel any of its members whose acts had contravened the provisions of the Criminal Code.

16. Refah's representatives also set out their point of view on the concept of secularism. They asserted that the principle of secularism implied respect for all beliefs and that Refah had shown such respect in its political activity.

17. The applicants' representatives alleged that in accusing Mr Necmettin Erbakan of supporting the use of force to achieve political ends and of infringing the principle of secularism the prosecuting authorities had merely cited extracts from his speeches which they had distorted and taken out of context. Moreover, these remarks were covered by Mr Necmettin Erbakan's parliamentary immunity. They further noted that the dinner he had given to senior officials of the Religious Affairs Department and former members of the theology faculty had been presented by Principal State Counsel as a reception organised for the leaders of Islamist fundamentalist movements, which had in any event been legally proscribed since 1925.

18. With regard to the remarks of the other Refah leaders and members criticised by Principal State Counsel's Office, Refah's representatives observed that these did not constitute any criminal offence.

They asserted that none of the MPs whose speeches had been referred to by Principal State Counsel was authorised to represent Refah or held office within the party and claimed that the prosecuting authorities had not set in motion the procedure laid down in the Law on the regulation of political parties so as to give Refah the opportunity, if the need arose, to decide whether or not the persons concerned should continue to be members of the party; the first time Refah's leadership had been informed of the remarks criticised in the case had been when they read Principal State Counsel's submissions. The three MPs under attack had been expelled from the party, which had thus done what was necessary to avoid becoming a "centre" of illegal activities within the meaning of the Law on the regulation of political

parties.

3. The parties' final submissions

19. On 5 August 1997 Principal State Counsel filed his observations on the merits of the case with the Constitutional Court. He submitted that according to the Convention and the case-law of the Turkish courts on constitutional-law issues nothing obliged States to tolerate the existence of political parties that sought the destruction of democracy and the rule of law. He contended that Refah, by describing itself as an army engaged in a jihad and by openly declaring its intention to replace the Republic's statute law by sharia, had demonstrated that its objectives were incompatible with the requirements of a democratic society. Refah's aim to establish a plurality of legal systems (in which each group would be governed by a legal system in conformity with its members' religious beliefs) constituted the first stage in the process designed to substitute a theocratic regime for the Republic.

20. In their observations on the merits of the case, Refah's representatives again argued that the dissolution of their party could not be grounded on any of the restrictions permitted by the second paragraph of Article 11 of the Convention. They went on to say that Article 17 was not applicable in the case, as Refah had nothing in common with political parties which sought to install a totalitarian regime. Furthermore, the plurality of legal systems which their party proposed was actually intended to promote the freedom to enter into contracts and the freedom to choose which court should have jurisdiction.

21. On 11 November 1997 Principal State Counsel submitted his observations orally. On 18 and 20 November 1997 Mr Necmettin Erbakan submitted his oral observations on behalf of Refah.

4. The Constitutional Court's judgments

22. In a judgment of 9 January 1998, which it delivered following proceedings on preliminary issues it had instituted of its own motion as the court dealing with the merits, the Constitutional Court ruled that, regard being had to Article 69 § 6 of the Constitution, the second paragraph of section 103 of the Law on the regulation of political parties was unconstitutional and declared it null and void. Article 69 § 6, taken together with section 101(d) of the same Law, provided that for a political party to be considered a "centre" of activities contrary to the fundamental principles of the Republic its members had to have been convicted of criminal offences. According to the Constitutional Court, that legal restriction did not cover all cases where the principles of the Republic had been flouted. It pointed out, among other observations, that after the repeal of Article 163 of the Criminal Code activities contrary to the principle of secularism no longer attracted criminal penalties.

23. On 16 January 1998 the Constitutional Court dissolved Refah on the ground that it had become a "centre of activities contrary to the principle of secularism". It based its decision on sections 101(b) and 103(1) of Law no. 2820 on the regulation of political parties. It also noted the transfer of Refah's assets to the Treasury as an automatic consequence of dissolution, in accordance with section 107 of Law no. 2820.

24. In its judgment the Constitutional Court first dismissed the preliminary objections raised by Refah. In that connection it held that the parliamentary immunity of the MPs whose remarks had been mentioned in Principal State Counsel's submissions of 21 May 1997 had nothing to do with consideration of an application for the dissolution of a political party and forfeiture of political rights by its members, but was a question of the criminal responsibility of the MPs concerned, which was not a matter of constitutional law.

25. With regard to the merits, the Constitutional Court held that while political parties were the main protagonists of democratic politics their activities were not exempt from certain restrictions. In particular, activities by them incompatible with the rule of law could not be tolerated. The Constitutional Court referred to the provisions of the Constitution which imposed respect for secularism on the various organs of political power. It also cited the numerous provisions of domestic legislation requiring political parties to apply the principle of secularism in a number of fields of political and social life. The Constitutional Court observed that secularism was one of the indispensable conditions of democracy. In

Turkey the principle of secularism was safeguarded by the Constitution, on account of the country's historical experience and the specific features of Islam. The rules of sharia were incompatible with the democratic regime. The principle of secularism prevented the State from manifesting a preference for a particular religion or belief and constituted the foundation of freedom of conscience and equality between citizens before the law. Intervention by the State to preserve the secular nature of the political regime had to be considered necessary in a democratic society.

26. The Constitutional Court held that the following evidence proved that Refah had become a centre of activities contrary to the principle of secularism (see paragraphs 27-39 below):

27. Refah's chairman, Mr Necmettin Erbakan, had encouraged the wearing of Islamic headscarves in public and educational establishments. On 10 October 1993, at the party's Fourth Ordinary General Meeting, he had said:

> "... when we were in government, for four years, the notorious Article 163 of the Persecution Code was never applied against any child in the country. In our time there was never any question of hostility to the wearing of headscarves ..."

In his speech of 14 December 1995 before the general election he had said:

> "... [university] chancellors are going to retreat before the headscarf when Refah comes to power."

But manifesting one's religion in such a manner amounted to exerting pressure on persons who did not follow that practice and created discrimination on the ground of religion or beliefs. That finding was supported by various rulings of the Constitutional Court and the Supreme Administrative Court and by the case-law of the European Commission of Human Rights on applications nos. 16278/90 and 18783/91 concerning the wearing of headscarves at universities.

28. The plurality of legal systems proposed by Mr Necmettin Erbakan was nothing to do with the freedom to enter into contracts as Refah claimed, but was an attempt to establish a distinction between citizens on the ground of their religion and beliefs and was aimed at the installation of a theocratic regime. On 23 March 1993 Mr Erbakan had made the following speech to the National Assembly:

> "... 'you shall live in a manner compatible with your beliefs'. We want despotism to be abolished. There must be several legal systems. The citizen must be able to choose for himself which legal system is most appropriate for him, within a framework of general principles. Moreover, that has always been the case throughout our history. In our history there have been various religious movements. Everyone lived according to the legal rules of his own organisation, and so everyone lived in peace. Why, then, should I be obliged to live according to another's rules? ... The right to choose one's own legal system is an integral part of the freedom of religion."

In addition, Mr Necmettin Erbakan had spoken as follows on 10 October 1993 at a Refah party conference:

> "... we shall guarantee all human rights. We shall guarantee to everyone the right to live as he sees fit and to choose the legal system he prefers. We shall free the administration from centralism. The State which you have installed is a repressive State, not a State at the people's service. You do not allow the freedom to choose one's code of law. When we are in power a Muslim will be able to get married before the mufti, if he wishes, and a Christian will be able to marry in church, if he prefers."

29. The plurality of legal systems advocated by Mr Necmettin Erbakan in his speeches had its origin in the practice introduced in the first years of Islam by the "Medina Agreement", which had given the Jewish and polytheist communities the right to live according to their own legal systems, not according to Islamic law. On the basis of the Medina Agreement some Islamist thinkers and politicians had proposed a model of peaceful social co-existence under which each religious group would be free to choose its own legal system. Since the foundation of the Nizam Party in 1970 (dissolved by a judgment of 2 May 1971) Mr Necmettin Erbakan had been seeking to replace the single legal system with a plurality of legal systems.

30. The Constitutional Court further observed that in a plurality of legal systems, as proposed by Refah, society would have to be divided into several religious movements; each individual would have to choose the movement to which he wished to belong and would thus be subjected to the rights and obligations prescribed by the religion of his community. The Constitutional Court pointed out that such a system, whose origins lay in the history of Islam as a political regime, was inimical to the

consciousness of allegiance to a nation having legislative and judicial unity. It would naturally impair judicial unity since each religious movement would set up its own courts and the ordinary courts would be obliged to apply the law according to the religion of those appearing before them, thus obliging the latter to reveal their beliefs. It would also undermine legislative and judicial unity, the preconditions for secularism and the consciousness of nationhood, given that each religious movement would be empowered to decree what legal rules should be applicable to its members.

31. In addition, Mr Necmettin Erbakan had made a speech on 13 April 1994 to the Refah group in Parliament in which he had advocated setting up a theocratic regime, if necessary through force:

> "The second important point is this: Refah will come to power and a just [social] order [*adil dozen*] will be established. The question we must ask ourselves is whether this change will be violent or peaceful; whether it will entail bloodshed. I would have preferred not to have to use those terms, but in the face of all that, in the face of terrorism, and so that everyone can see the true situation clearly, I feel obliged to do so. Today Turkey must take a decision. The Welfare Party will establish a just order, that is certain. [But] will the transition be peaceful or violent; will it be achieved harmoniously or by bloodshed? The sixty million [citizens] must make up their minds on that point."

32. The reception given by Mr Necmettin Erbakan at the Prime Minister's residence to the leaders of various religious movements, who had attended in vestments denoting their religious allegiance, unambiguously evidenced Refah's chairman's support for these religious groups *vis-à-vis* public opinion.

33. In a public speech in April 1994 Mr Şevki Yılmaz, MP for the province of Rize, had issued a clear call to wage a jihad and had argued for the introduction of Islamic law, making the following declaration:

> "We shall certainly call to account those who turn their backs on the precepts of the Koran and those who deprive Allah's Messenger of his jurisdiction in their country."

In another public speech, also in April 1994, Mr Şevki Yılmaz had said:

> "In the hereafter you will be summoned with the leaders you have chosen in this life. ... Have you considered to what extent the Koran is applied in this country? I have done the sums. Only 39% [of the rules] in the Koran are applied in this country. Six thousand five hundred verses have been quietly forgotten ... You found a Koranic school, you build a hostel, you pay for a child's education, you teach, you preach. ... None of that is part of the chapter on jihad but of that on the *amel-i salih* [peacetime activities]. Jihad is the name given to the quest for power for the advent of justice, for the propagation of justice and for glorification of Allah's Word. Allah did not see that task as an abstract political concept; he made it a requirement for warriors [*cahudi*]. What does that mean? That jihad must be waged by an army! The commander is identified ... The condition to be met before prayer [*namaz*] is the Islamisation of power. Allah says that, before mosques, it is the path of power which must be Muslim ... It is not erecting vaulted ceilings in the places of prayer which will lead you to Paradise. For Allah does not ask whether you have built up vaulted ceilings in this country. He will not ask that. He will ask you if you have reached a sufficient level ... today, if Muslims have a hundred liras, they must give thirty to the Koranic schools, to train our children, girls and boys, and sixty must be given to the political establishments which open the road to power. Allah asked all His prophets to fight for power. You cannot name a single member of a religious movement who does not fight for power. I tell you, if I had as many heads as I have hairs on my head, even if each of those heads were to be torn from my shoulders for following the way of the Koran, I would not abandon my cause ... The question Allah will ask you is this: 'Why, in the time of the blasphemous regime, did you not work for the construction of an Islamic State?' Erbakan and his friends want to bring Islam to this country in the form of a political party. The prosecutor understood that clearly. If we could understand that as he did, the problem would be solved. Even Abraham the Jew has realised that in this country the symbol of Islam is Refah. He who incites the Muslim community [*cemaat*] to take up arms before political power is in Muslim hands is a fool, or a traitor doing the bidding of others. For none of the prophets authorised war before the capture of State power. ... Muslims are intelligent. They do not reveal how they intend to beat their enemy. The general staff gives orders and the soldiers obey. If the general staff reveals its plan, it is up to the commanders of the Muslim community to make a new plan. Our mission is not to talk, but to apply the war plan, as soldiers in the army ..."

Criminal proceedings had been brought against Mr Şevki Yılmaz. Although his antipathy to secularism was well-known, Refah had adopted him as a candidate in local-government elections. After he had been elected mayor of Rize, Refah had made sure that he was elected as an MP in the Turkish Grand National Assembly.

34. In a public speech on 14 March 1993 and a television interview first recorded in 1992 and rebroadcast on 24 November 1996, Mr Hasan Hüseyin Ceylan, Refah MP for the province of Ankara,

had encouraged discrimination between believers and non-believers and had predicted that if the supporters of applying sharia came to power they would annihilate non-believers:

> "Our homeland belongs to us, but not the regime, dear brothers. The regime and Kemalism belong to others. ... Turkey will be destroyed, gentlemen. People say: Could Turkey become like Algeria? Just as, in Algeria, we got 81% [of the votes], here too we will reach 81%, we will not remain on 20%. Do not waste your energy on us – I am speaking here to you, to those ... of the imperialist West, the colonising West, the wild West, to those who, in order to unite with the rest of the world, become the enemies of honour and modesty, those who lower themselves to the level of dogs, of puppies, in order to imitate the West, to the extent of putting dogs between the legs of Muslim women – it is to you I speak when I say: 'Do not waste your energy on us, you will die at the hands of the people of Kırıkkale.' "
>
> "... the army says: 'We can accept it if you're a supporter of the PKK, but a supporter of sharia, never.' Well you won't solve the problem with that attitude. If you want the solution, it's sharia."

Refah had ensured that Mr Ceylan was elected as an MP and its local branches had played videotapes of this speech and the interview.

35. Refah's vice-chairman, Mr Ahmet Tekdal, in a speech he made in 1993 while on pilgrimage in Saudi Arabia which was shown by a Turkish television station, had said that he advocated installing a regime based on sharia:

> "In countries which have a parliamentary regime, if the people are not sufficiently aware, if they do not work hard enough to bring about the advent of '*hak nizami*' [a just order or God's order], two calamities lie ahead. The first calamity is the renegades they will have to face. They will be tyrannised by them and will eventually disappear. The second calamity is that they will not be able to give a satisfactory account of themselves to Allah, as they will not have worked to establish '*hak nizami*'. And so they will likewise perish. Venerable brothers, our duty is to do what is necessary to introduce the system of justice, taking these subtleties into consideration. The political apparatus which seeks to establish '*hak nizami*' in Turkey is the Welfare Party."

36. On 10 November 1996 the mayor of Kayseri, Mr Şükrü Karatepe, had urged the population to renounce secularism and asked his audience to "keep their hatred alive" until the regime was changed, in the following terms:

> "The dominant forces say 'either you live as we do or we will sow discord and corruption among you'. So even Welfare Party Ministers dare not reveal their world-outlook inside their Ministries. This morning I too attended a ceremony in my official capacity. When you see me dressed up like this in all this finery, don't think it's because I'm a supporter of secularism. In this period when our beliefs are not respected, and indeed are blasphemed against, I have had to attend these ceremonies in spite of myself. The Prime Minister, other Ministers and MPs have certain obligations. But you have no obligations. This system must change. We have waited, we will wait a little longer. Let us see what the future has in store for us. And let Muslims keep alive the resentment, rancour and hatred they feel in their hearts."

Mr Şükrü Karatepe had been convicted of inciting the people to hatred on the ground of religion.

37. On 8 May 1997 Mr İbrahim Halil Çelik, Refah MP for the province of Şanlıurfa, had spoken in Parliament in favour of the establishment of a regime based on sharia and approving acts of violence like those which were taking place in Algeria:

> "If you attempt to close down the '*İmam-Hatip*' theological colleges while the Welfare Party is in government, blood will flow. It would be worse than in Algeria. I too would like blood to flow. That's how democracy will be installed. And it will be a beautiful thing. The army has not been able to deal with 3,500 members of the PKK. How would it see off six million Islamists? If they piss into the wind they'll get their faces wet. If anyone attacks me I will strike back. I will fight to the end to introduce sharia."

Mr İbrahim Halil Çelik had been expelled from the party one month after the application for dissolution had been lodged. His exclusion had probably only been an attempt to evade the penalty in question.

38. Refah's vice-chairman, the Minister of Justice, Mr Şevket Kazan, had visited a person detained pending trial for activities contrary to the principle of secularism, thus publicly lending him his support as a Minister.

39. On the basis of the evidence adduced on 7 July 1997 by Principal State Counsel's Office, the Constitutional Court held that the following further evidence confirmed that Refah was a centre of activities contrary to the principle of secularism:

– In a public speech on 7 May 1996 Mr Necmettin Erbakan had emphasised the importance of

television as an instrument of propaganda in the holy war being waged in order to establish Islamic order:

> "... A State without television is not a State. If today, with your leadership, you wished to create a State, if you wanted to set up a television station, you would not even be able to broadcast for more than twenty-four hours. Do you believe it is as easy as that to create a State? That's what I told them ten years ago. I remember it now. Because today people who have beliefs, an audience and a certain vision of the world, have a television station of their own, thanks be to God. It is a great event.
>
> Conscience, the fact that the television [channel] has the same conscience in all its programmes, and that the whole is harmonious, is very important. A cause cannot be fought for without [the support of] television. Besides, today we can say that television plays the role of artillery or an air force in the jihad, that is the war for domination of the people ... it would be unthinkable to send a soldier to occupy a hill before those forces had shelled or bombed it. That is why the jihad of today cannot be waged without television. So, for something so vital, sacrifices must be made. What difference does it make if we sacrifice money? Death is close to all of us. When everything is dark, after death, if you want something to show you the way, that something is the money you give today, with conviction, for Kanal 7. It was to remind you of that that I shared my memories with you.
>
> ... That is why, from now on, with that conviction, we will truly make every sacrifice, until it hurts. May those who contribute, with conviction, to the supremacy of *Hakk* [Allah] be happy. May Allah bless you all, and may He grant Kanal 7 even more success. Greetings."

– By a decree of 13 January 1997 the cabinet (in which the Refah members formed a majority) had reorganised working hours in public establishments to make allowances for fasting during Ramadan. The Supreme Administrative Court had annulled this decree on the ground that it undermined the principle of secularism.

40. The Constitutional Court observed that it had taken into consideration international human-rights protection instruments, including the Convention. It also referred to the restrictions authorised by the second paragraph of Article 11 and Article 17 of the Convention. It pointed out in that context that Refah's leaders and members were using democratic rights and freedoms with a view to replacing the democratic order with a system based on sharia. The Constitutional Court observed:

> "Democracy is the antithesis of sharia. [The] principle [of secularism], which is a sign of civic responsibility, was the impetus which enabled the Turkish Republic to move on from Ummah [*ümmet* – the Muslim religious community] to the nation. With adherence to the principle of secularism, values based on reason and science replaced dogmatic values. ... Persons of different beliefs, desiring to live together, were encouraged to do so by the State's egalitarian attitude towards them. ... Secularism accelerated civilisation by preventing religion from replacing scientific thought in the State's activities. It creates a vast environment of civic responsibility and freedom. The philosophy of modernisation of Turkey is based on a humanist ideal, namely living in a more human way. Under a secular regime religion, which is a specific social institution, can have no authority over the constitution and governance of the State. ... Conferring on the State the right to supervise and oversee religious matters cannot be regarded as interference contrary to the requirements of democratic society. ... Secularism, which is also the instrument of the transition to democracy, is the philosophical essence of life in Turkey. Within a secular State religious feelings simply cannot be associated with politics, public affairs and legislative provisions. Those are not matters to which religious requirements and thought apply, only scientific data, with consideration for the needs of individuals and societies."

The Constitutional Court held that where a political party pursued activities aimed at bringing the democratic order to an end and used its freedom of expression to issue calls to action to achieve that aim, the Constitution and supranational human-rights protection rules authorised its dissolution.

41. The Constitutional Court observed that the public statements of Refah's leaders, namely those of Mr Necmettin Erbakan, Mr Şevket Kazan and Mr Ahmet Tekdal, had directly engaged Refah's responsibility with regard to the constitutionality of its activities. It further observed that the public statements made by MPs Mr Şevki Yılmaz, Mr Hasan Hüseyin Ceylan and Mr İbrahim Halil Çelik, and by the mayor of Kayseri, Mr Şükrü Karatepe, had likewise engaged the party's responsibility since it had not reacted to them in any way or sought to distance itself from them, or at least not before the commencement of the dissolution proceedings.

42. As an additional penalty, the Constitutional Court decided to strip Necmettin Erbakan, Şevket Kazan, Ahmet Tekdal, Şevki Yılmaz, Hasan Hüseyin Ceylan and İbrahim Halil Çelik of their MP status, in accordance with Article 84 of the Constitution. It found that these persons, by their words and deeds,

had caused Refah's dissolution. The Constitutional Court also banned them for five years from becoming founding members, ordinary members, leaders or auditors of any other political party, pursuant to Article 69 § 8 of the Constitution.

43. Judges Haşim Kılıç and Sacit Adalı expressed dissenting opinions stating, *inter alia*, that in their view the dissolution of Refah was not compatible either with the provisions of the Convention or with the case-law of the European Court of Human Rights on the dissolution of political parties. They observed that political parties which did not support the use of violence should be able to take part in political life and that in a pluralist system there should be room for debate about ideas thought to be disturbing or even shocking.

44. This judgment was published in the Official Gazette on 22 February 1998.

II. RELEVANT DOMESTIC LAW

A. The Constitution

45. The relevant provisions of the Constitution read as follows:

Article 2

"The Republic of Turkey is a democratic, secular and social State based on the rule of law, respectful of human rights in a spirit of social peace, national solidarity and justice, adhering to the nationalism of Atatürk and resting on the fundamental principles set out in the Preamble."

Article 4

"No amendment may be made or proposed to the provisions of Article 1 of the Constitution providing that the State shall be a republic, the provisions of Article 2 concerning the characteristics of the Republic or the provisions of Article 3."

Article 6

"Sovereignty resides unconditionally and unreservedly in the nation. ... Sovereign power shall not under any circumstances be delegated to an individual, a group or a social class. ..."

Article 10 § 1

"All individuals shall be equal before the law without any distinction based on language, race, colour, sex, political opinion, philosophical beliefs, religion, membership of a religious sect or other similar grounds."

Article 14 § 1

"None of the rights and freedoms referred to in the Constitution shall be exercised with a view to undermining the territorial integrity of the State and the unity of the nation, jeopardising the existence of the Turkish State or Republic, abolishing fundamental rights and freedoms, placing the control of the State in the hands of a single individual or group, ensuring the domination of one social class over other social classes, introducing discrimination on the grounds of language, race, religion or membership of a religious organisation, or establishing by any other means a State political system based on such concepts and opinions."

Article 24 § 4

"No one may exploit or abuse religion, religious feelings or things held sacred by religion in any manner whatsoever with a view to causing the social, economic, political or legal order of the State to be based on religious precepts, even if only in part, or for the purpose of securing political or personal interest or influence thereby."

Article 68 § 4

"The constitutions, rule books and activities of political parties shall not be incompatible with the independence of the State, the integrity of State territory and of the nation, human rights, the principles of equality and the rule of law, national sovereignty or the principles of a democratic, secular republic. No political party may be founded with the aim of advocating and establishing the domination of one social class or group, or a dictatorship in any form whatsoever. ..."

Article 69 § 4

"... The Constitutional Court shall give a final ruling on the dissolution of political parties on an application by Principal State Counsel at the Court of Cassation."

Article 69 § 6

"... A political party may not be dissolved on account of activities contrary to the provisions of Article 68 § 4 unless the Constitutional Court has held that the political party concerned constitutes a centre of such activities."

This provision of the Constitution was added on 23 July 1995.

Article 69 § 8

"... Members and leaders whose declarations and activities lead to the dissolution of a political party may not be founder members, leaders or auditors of another political party for a period of five years from the date on which the reasoned decision to dissolve the party is published in the Official Gazette ..."

Article 84

"Forfeiture of the status of member

Where the Council of the Presidency of the Grand National Assembly has validated the resignation of members of Parliament, the loss of their status as members shall be decided by the Grand National Assembly in plenary session.

A convicted member of Parliament shall not forfeit the status of member until the court which convicted him has notified the plenary Assembly of the final judgment.

A member of Parliament who continues to hold an office or carry on an activity incompatible with the status of member, within the meaning of Article 82, shall forfeit that status after a secret ballot of the plenary Assembly held in the light of the relevant committee's report showing that the member concerned holds or carries on the office or activity in question.

Where the Council of the Presidency of the Grand National Assembly notes that a member of Parliament, without valid authorisation or excuse, has failed, for a total of five days in one month, to take part in the work of the Assembly, that member shall forfeit the status of member where by majority vote the plenary Assembly so decides.

The term of office of a member of Parliament whose words and deeds have, according to the Constitutional Court's judgment, led to the dissolution of his party, shall end on the date when that judgment is published in the Official Gazette. The Presidency of the Grand National Assembly shall enforce that part of the judgment and inform the plenary Assembly accordingly."

B. Law no. 2820 on the regulation of political parties

46. The relevant provisions of Law no. 2820 read as follows:

Section 78

"Political parties

... shall not aim or strive to or incite third parties to

...

– jeopardise the existence of the Turkish State and Republic, abolish fundamental rights and freedoms, introduce discrimination on grounds of language, race, colour, religion or membership of a religious sect, or establish, by any means, a system of government based on any such notion or concept.

..."

Section 90(1)

"The constitution, programme and activities of political parties shall not contravene the Constitution or this Law."

Section 101

"The Constitutional Court shall dissolve a political party

...

(b) where its general meeting, central office or executive committee ... takes a decision, issues a circular or makes a statement ... contrary to the provisions of Chapter 4 of this Law [This chapter (from section 78 to section 97), which concerns restrictions on the activities of political parties, provides, *inter alia*, that such activities may not be conducted to the detriment of the democratic constitutional order (including the sovereignty of the people and free elections), the nature of the nation State (including national independence, national unity and the principle of equality), and the secular nature of the State (including observance of the reforms carried out by Atatürk, the prohibition on exploiting religious feelings and the prohibition on religious demonstrations organised by political parties)], or where the chairman, vice-chairman or general secretary makes any written or oral statement contrary to those provisions.

...

(d) Where acts contrary to the provisions of Chapter 4 of this Law have been committed by organs, authorities or councils other than those mentioned in sub-paragraph (b), State Counsel shall, within two years of the act concerned, require the party in writing to disband those organs and/or authorities and/or councils. State Counsel shall order the permanent exclusion from the party of those members who have been convicted for committing acts or making statements which contravene the provisions of Part 4.

State counsel shall institute proceedings for the dissolution of any political party which fails to comply with the instructions in his letter within thirty days of its service. If, within thirty days of service of State Counsel's application, the organs, authorities or councils concerned have been disbanded by the party, and the member or members in question have been permanently excluded, the dissolution proceedings shall lapse. If not, the Constitutional Court shall consider the case on the basis of the file and shall adjudicate after hearing, if necessary, the oral submissions of State Counsel, the representatives of the political party and all those capable of providing information about the case ..."

Section 103

"Where it is found that a political party has become a centre of activities contrary to the provisions of sections 78 to 88 ... of the present Law, the party shall be dissolved by the Constitutional Court."

Section 107(1)

"All the assets of political parties dissolved by order of the Constitutional Court shall be transferred to the Treasury."

47. Paragraph 2 of section 103, which the Constitutional Court declared unconstitutional on 9 January 1998, prescribed the use of the procedure laid down in section 101(d) for determination of the question whether a political party had become a centre of anti-constitutional activities.

C. Article 163 of the Criminal Code, repealed on 12 April 1991

48. This provision was worded as follows:

"It shall be an offence, punishable by eight to fifteen years' imprisonment, to establish, found, organise, regulate, direct or administer associations with the intention of adapting the fundamental legal, social, economic or political bases of the State, even in part, to religious beliefs.

It shall be an offence, punishable by five to twelve years' imprisonment, to be a member of an association of that type or to incite another to become a member.

It shall be an offence, punishable by five to ten years' imprisonment, to spread propaganda in any form or to attempt to acquire influence by exploiting religion, religious feelings or objects regarded as sacred by religion in a manner contrary to the principle of secularism and with the intention of adapting the fundamental legal, social, economic or political bases of the State, even in part, to religious beliefs or of serving political interests.

It shall be an offence, punishable by two to five years' imprisonment, to spread propaganda in any form or to attempt to acquire influence, with the aim of serving one's personal interests or obtaining advantages, by exploiting religion, religious feelings, objects regarded as sacred by religion or religious books.

Where the acts mentioned above are committed on the premises of the public administrative authorities, municipal councils, publicly owned undertakings whose capital, or part of whose capital, belongs to the State, trade unions, workers' organisations, schools, or institutions of higher education, or by civil servants, technicians, doorkeepers or members of such establishments, the penalty shall be increased by a third.

Where the acts mentioned in the third and fourth paragraphs above are committed by means of publications, the penalty shall be increased by a half."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

49. The applicants alleged that the dissolution of Refah Partisi (the Welfare Party) and the temporary prohibition barring its leaders – including Mr Necmettin Erbakan, Mr Şevket Kazan and Mr Ahmet Tekdal – from holding similar office in any other political party had infringed their right to freedom of association, guaranteed by Article 11 of the Convention, the relevant parts of which provide:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association ...

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. ..."

A. Whether there was an interference

50. The parties accepted that Refah's dissolution and the measures which accompanied it amounted to an interference with the applicants' exercise of their right to freedom of association. The Court takes

the same view.

B. Whether the interference was justified

51. Such an interference will constitute a breach of Article 11 unless it was "prescribed by law", pursued one or more of the legitimate aims set out in paragraph 2 of that provision and was "necessary in a democratic society" for the achievement of those aims.

1. "Prescribed by law"

(a) Arguments of the parties

(i) The applicants

52. The applicants submitted that the criteria applied by the Constitutional Court in establishing that Refah had become a centre of anti-constitutional activities were broader than those laid down by Law no. 2820 on the regulation of political parties. The provisions of Law no. 2820, which laid down stricter criteria in the matter, namely those concerning refusal to expel members who had been convicted of criminal offences, had been declared void by a decision of the Constitutional Court one week before its decision to dissolve Refah. Moreover, the former decision had been published in the Official Gazette after Refah's dissolution.

53. The applicants argued that all of the above had made it impossible to foresee what criteria the Constitutional Court would apply in deciding that Refah had become a centre of anti-constitutional activities. The new version of Law no. 2820 had not been accessible to the applicants before Refah's dissolution. They could not have been expected to organise their political activities in accordance with criteria that did not exist before the party's dissolution. The applicants submitted that the former version of Law no. 2820 should have been applied in their case and that, after Refah's exclusion of its members whose speeches had been cited by Principal State Counsel in his submissions, the Constitutional Court should have discontinued the dissolution proceedings.

(ii) The Government

54. The Government asked the Court to reject the applicants' arguments. They observed that the interference in question was clearly prescribed by Articles 68 and 69 of the Constitution, which required political parties constituting centres of anti-constitutional activities, contrary to the principles of equality and of a secular, democratic republic in particular, to be dissolved by the Constitutional Court. They emphasised that one of the conditions for the dissolution of a political party, namely failure on its part to expel those of its members who had been convicted of criminal offences – a condition which had been added by the Law on the regulation of political parties to the definition of a "centre of anti-constitutional activities" – was no longer applicable in the case on account of changes to the Criminal Code. In other words, following the repeal of Article 163 of the Turkish Criminal Code, which concerned the dissemination of anti-secular ideas and the creation of associations for that purpose, the procedure laid down in section 103(2) of the Law on the regulation of political parties had become devoid of purpose. The Government submitted that for that reason section 103(2) was manifestly unconstitutional in that its application would have made it impossible to give full effect to the Constitution, and in particular Article 69 § 6 thereof, which gave the Constitutional Court sole power to rule that a political party constituted a centre of anti-constitutional activities.

55. The Government further submitted that a judgment concerning a review of the constitutionality of the specific rule to be applied in a particular dispute did not need to be published in the Official Gazette before the commencement of that dispute in order to be operative. In such a situation the Constitutional Court adjourned the proceedings until it had settled the question of the constitutionality of a legislative provision it had to apply. That procedure was a well-established practice of the Turkish Constitutional Court and of the higher courts in a number of other European countries.

(b) The Court's assessment

56. The Court must first consider whether the applicants are estopped from submitting this argument, since they accepted in their additional observations to the Chamber and at the hearing before the Chamber that the measures complained of were in accordance with domestic law, and in particular with the Constitution. In its judgment the Chamber noted that the parties agreed "that the interference concerned was 'prescribed by law', the measures imposed by the Constitutional Court being based on Articles 68, 69 and 84 of the Constitution and sections 101 and 107 of Law no. 2820 on the regulation of political parties".

However, the Court points out that the "case" referred to the Grand Chamber embraces in principle all aspects of the application previously examined by the Chamber in its judgment, the scope of its jurisdiction in the "case" being limited only by the Chamber's decision on admissibility. It does not exclude the possibility of estoppel where one of the parties breaks good faith through a radical change of position. However, that has not occurred in the instant case, as the applicants presented in their initial applications the main lines of their argument on this point. They are therefore not estopped from raising the issue now (see, *mutatis mutandis*, *K. and T. v. Finland* [GC], no. 25702/94, §§ 139-41, ECHR 2001-VII; *Kingsley v. the United Kingdom* [GC], no. 35605/97, § 34, ECHR 2002-IV; and *Göç v. Turkey* [GC], no. 36590/97, §§ 35-37, ECHR 2002-V).

57. As regards the accessibility of the provisions in issue and the foreseeability of their effects, the Court reiterates that the expression "prescribed by law" requires firstly that the impugned measure should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Experience shows, however, that it is impossible to attain absolute precision in the framing of laws, particularly in fields in which the situation changes according to the evolving views of society. A law which confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (see *Müller and Others v. Switzerland*, judgment of 24 May 1988, Series A no. 133, p. 20, § 29; *Ezelin v. France*, judgment of 26 April 1991, Series A no. 202, pp. 21-22, § 45; and *Margareta and Roger Andersson v. Sweden*, judgment of 25 February 1992, Series A no. 226-A, p. 25, § 75). The Court also accepts that the level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the status of those to whom it is addressed. It is, moreover, primarily for the national authorities to interpret and apply domestic law (see *Vogt v. Germany*, 26 September 1995, Series A no. 323, p. 24, § 48).

58. In the instant case the Court observes that the dispute under domestic law concerned the constitutionality of the activities of a political party and fell within the jurisdiction of the Constitutional Court. The written law most relevant to the question whether the interference was "prescribed by law" is the Turkish Constitution.

59. The parties did not dispute that activities contrary to the principles of equality and respect for a democratic, secular republic were undoubtedly unconstitutional under Article 68 of the Constitution. Nor did they deny that the Constitutional Court had sole jurisdiction, on an application by Principal State Counsel, to dissolve a political party which had become a centre of activities contrary to Article 68 of the Constitution. Moreover, Article 69 of the Constitution (amended in 1995) explicitly confirms that the Constitutional Court alone is empowered to determine whether a political party constitutes a centre of anti-constitutional activities. The Court notes that Refah's MPs took part in the work of the parliamentary committee concerned and the debate in the Grand National Assembly on the 1995 amendments to the Constitution (see paragraph 11 above).

60. Furthermore, the fact that on 12 April 1991 anti-secular activities ceased to be punishable under the criminal law is not disputed by either party. The Court notes that, as the Turkish Constitutional Court

explained in its judgment of 9 January 1998, there thus resulted a divergence between the Law on the regulation of political parties and the Constitution, in that the requirement in section 103(2) of the Law on the regulation of political parties that in order for the political party concerned to constitute a "centre of anti-constitutional activities" it had to have refused to expel those of its members who had been convicted of criminal offences, taken together with the amendments to the Criminal Code of 12 April 1991, had rendered meaningless the Constitutional Court's power to dissolve political parties which constituted centres of anti-secular activities, even though that power was clearly conferred by Articles 68 § 4 and 69 §§ 4 and 6 of the Constitution.

61. It remains to be determined whether the applicants must have been aware of the possibility of a direct application of the Constitution in their case and could thus have foreseen the risks they ran through their party's anti-secular activities or through their refusal to distance themselves from that type of activity, without the procedure laid down by section 103(2) of the Law on the regulation of political parties being followed.

In order to be able to answer that question, the Court must first consider the relevant particularities of the legal background against which the facts of the case took place, as set out in the judgment of the Turkish Constitutional Court and not contested by the parties. The Turkish Constitution cannot be amended by ordinary legislation and takes precedence over statute law; a conflict between the Constitution's provisions and those of ordinary legislation is resolved in the Constitution's favour. In addition, the Constitutional Court has the power and the duty to review the constitutionality of legislation. Where in a particular case there is a discrepancy between the provisions of the applicable statute law and those of the Constitution, as happened in the instant case, the Constitutional Court is clearly required to give precedence to the provisions of the Constitution, disregarding the unconstitutional provisions of the relevant legislation.

62. The Court next takes into account the applicants' status as the persons to whom the relevant legal instruments were addressed. Refah was a large political party which had legal advisers conversant with constitutional law and the rules governing political parties. Mr Necmettin Erbakan, Mr Şevket Kazan and Mr Ahmet Tekdal were also experienced politicians. As members of the Turkish parliament they had taken part in parliamentary discussions and procedures concerning the amendments to the Constitution, during which the Constitutional Court's power to rule that a party had become a centre of anti-constitutional activities and the discrepancy between the new text of the Constitution and Law no. 2820 were mentioned. In addition, Mr Şevket Kazan and Mr Ahmet Tekdal were lawyers by profession (see paragraphs 10-11 above).

63. That being so, the Court considers that the applicants were reasonably able to foresee that they ran the risk of proceedings to dissolve Refah if the party's leaders and members engaged in anti-secular activities, and that the fact that the steps laid down in section 103(2) of Law no. 2820 were not taken, having become inapplicable as a result of the 1991 changes to the Criminal Code's provisions on anti-secular activities, could not prevent implementation of the dissolution procedure required by the Turkish Constitution.

64. Consequently, the interference was "prescribed by law".

2. Legitimate aim

65. The Government submitted that the interference complained of pursued several legitimate aims, namely protection of public safety, national security and the rights and freedoms of others and the prevention of crime.

66. The applicants accepted in principle that protection of public safety and the rights and freedoms of others and the prevention of crime might depend on safeguarding the principle of secularism. However, they submitted that in pleading those aims the Government sought to conceal the underlying reasons which had led to Refah's dissolution. In reality, they argued, this had been the aim of major business concerns and the military, whose interests were threatened by Refah's economic policy, involving a reduction of the national debt to zero.

67. The Court considers that the applicants have not adduced sufficient evidence to establish that

Refah was dissolved for reasons other than those cited by the Constitutional Court. Taking into account the importance of the principle of secularism for the democratic system in Turkey, it considers that Refah's dissolution pursued several of the legitimate aims listed in Article 11, namely protection of national security and public safety, prevention of disorder or crime and protection of the rights and freedoms of others.

3. "Necessary in a democratic society"

(a) Arguments of the parties

(i) The applicants

68. The applicants submitted in the first place that the criticisms that had been levelled at Refah on the basis of speeches made several years before were not nearly sufficient to prove that the party constituted a threat to secularism and democracy in Turkey at the time when the dissolution proceedings were instituted against it.

69. They further observed that Refah had found itself in power thirteen years after its foundation. With its millions of members it had had a long political existence and had taken on many responsibilities in local and central government. In order to determine whether the party's dissolution was necessary, the Court should assess all the factors that had led to the decision and all of the party's activities since it had come into existence.

70. The applicants further emphasised the fact that Refah had been in power for a year, from June 1996 to July 1997, during which time it could have tabled draft legislation to introduce a regime based on Islamic law. But it had done nothing of the sort. The applicants submitted that "rigorous" European supervision on the Court's part would have shown that Refah complied with democratic principles.

71. As regards the imputability to Refah of the statements and acts cited in the dissolution judgment, the applicants maintained that where these acts and speeches were attributable to members who had been expelled from the party for that very reason they could not engage Refah's responsibility. The remarks of Refah's chairman, Mr Necmettin Erbakan, had to be interpreted in context, in the light of the full text of the speeches from which they had been extracted. No apologia for violence could be discerned in those speeches.

72. With regard to the theory of a plurality of legal systems, the applicants pointed out that Mr Necmettin Erbakan's speeches on that point were isolated and had been made in 1993. It was not the policy of Refah, as a political party, to introduce a plurality of legal systems, but at all events what Mr Necmettin Erbakan had proposed was only the introduction of a "civil-law" system, based on the freedom to enter into contracts, which would not have affected the general sphere of public law. Frustrating such a policy in the name of the special role of secularism in Turkey amounted to discrimination against Muslims who wished to conduct their private lives in accordance with the precepts of their religion.

73. On the question whether Refah sought to introduce a regime based on sharia, the applicants observed in the first place that there was no reference in Refah's constitution or its programme to either sharia or Islam. Secondly, they submitted that analysis of the speeches made by Refah's leaders did not establish that it was the party's policy to introduce sharia in Turkey. The desire to see sharia introduced in Turkey, as expressed by certain MPs who had subsequently been expelled from Refah, could not be attributed to the party as a whole. In any case, the proposal to introduce sharia and the plan to establish a plurality of legal systems were incompatible, and the Constitutional Court had been mistaken in accusing Refah of supporting both proposals simultaneously.

74. Moreover, in the applicants' submission, the concept of a "just order", which had been mentioned in certain speeches by party members, was not a reference to divine order, contrary to what had been stated in the Chamber's judgment. Many theoreticians had used the same term in order to describe their ideal society without giving it any religious connotation.

75. The applicants further disputed the statement in paragraph 72 of the Chamber's judgment that "It

is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia ...". They submitted that such a statement could lead to a distinction between "Christian democrats" and "Muslim democrats" and constitute discrimination against the 150 million Muslims in a total European population of 800 million. In any event, they considered that the question did not fall within the Court's jurisdiction.

76. As regards recourse to force, the applicants maintained that even though some Refah members had mentioned such a possibility in their speeches, no member of Refah had ever attempted to use force. The inescapable conclusion was that the acts and speeches criticised on this account did not at the time of the party's dissolution represent a real danger for secularism in Turkey. Certain members who had made such speeches had been expelled from Refah. One of them had been convicted just before the dissolution, so that Refah had not had time to expel him before being dissolved. The other speeches for which Refah's leaders had been criticised had been made before the party came to power.

77. Lastly, the applicants submitted that the interference in issue was not proportionate to the aims pursued. They laid particular emphasis on the harshness of dissolving any political party on account of speeches made by some of its members, the scale of the political disabilities imposed on the three applicants, Mr Necmettin Erbakan, Mr Şevket Kazan and Mr Ahmet Tekdal, and the heavy financial losses suffered by Refah following its dissolution.

(ii) The Government

78. On the question whether Refah presented a danger at the time of its dissolution, the Government observed that the party had never exercised power alone and had therefore never had an opportunity to put its plan of setting up a theocratic State into practice. They submitted that if Refah had been the sole party in power it would have been quite capable of implementing its policy and thus putting an end to democracy.

79. The Government further submitted that the speeches criticised by the Constitutional Court were imputable to Refah. They pointed out that Article 4 of the party's constitution provided for the exclusion of members responsible for acts contrary to the decisions of its executive organs; under Article 5 of the constitution members who committed acts contrary to the party's constitution and programme were liable to the same penalty. The Government asserted that these provisions had never been applied to the Refah members guilty of the offending acts and statements.

80. Moreover, the plan to introduce a plurality of legal systems, which had never been abandoned by Refah, was clearly incompatible with the principle of non-discrimination, which was enshrined in the Convention and was one of the fundamental principles of democracy.

81. With regard to the question whether Refah supported the introduction of sharia in Turkey, the Government observed that it was not the party's official programme which caused a problem but the fact that certain aspects of the activities and speeches of Refah's leaders unambiguously indicated that the party would seek to introduce sharia if it held power alone. They pointed out that the concept of a "just order", mentioned by Refah, had formed the basis for its campaign in the 1995 general election. In explaining the concept of a "just order" in the context of that propaganda, Refah's leaders had clearly been referring to an order based on sharia.

82. The Government endorsed the opinion expressed by the Constitutional Court and in paragraph 72 of the Chamber's judgment that sharia is hard to reconcile with democracy and the Convention system. A theocratic State could not be a democratic State, as could be seen from Turkish history during the Ottoman period, among other examples. The Government mentioned a number of instances of incompatibility between the main rules of sharia and the rights and freedoms guaranteed by the Convention.

83. The Government did not believe that Refah was content to interpret the principle of secularism differently. In their submission, the party wished to do away with that principle altogether. This was evidenced by the submissions made on Refah's behalf during the latest debates on amendment of the Constitution, since Refah had quite simply proposed deleting the reference in the Constitution to the principle of secularism.

84. As to the possibility of using force as a method of political struggle, the Government cited the statements of Refah members who advocated the use of violence in order to resist certain government policies or to gain power and retain it. They submitted that a number of acts and speeches by Refah members constituted incitement to a popular uprising and the generalised violence characterising any "holy war".

85. The Government further observed that at the material time radical Islamist groups such as Hizbullah were carrying out numerous acts of terrorism in Turkey. It was also at that time that Refah members were advocating Islamic fundamentalism in their speeches, one example being a visit made by one of the applicants, Mr Şevket Kazan, the Minister of Justice at the time, to a mayor who had been arrested for organising a "Jerusalem evening" in a room decorated with posters showing the leaders of the terrorist organisations Hamas and Hizbullah.

(b) The Court's assessment

(i) General principles

(α) Democracy and political parties in the Convention system

86. On the question of the relationship between democracy and the Convention, the Court has already ruled, in *United Communist Party of Turkey and Others v. Turkey* (judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, pp. 21-22, § 45), as follows:

> "Democracy is without doubt a fundamental feature of the European public order ...
>
> That is apparent, firstly, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights ... The Preamble goes on to affirm that European countries have a common heritage of political tradition, ideals, freedom and the rule of law. The Court has observed that in that common heritage are to be found the underlying values of the Convention ...; it has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society ...
>
> In addition, Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is 'necessary in a democratic society'. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from 'democratic society'. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it."

87. The Court has also confirmed on a number of occasions the primordial role played in a democratic regime by political parties enjoying the freedoms and rights enshrined in Article 11 and also in Article 10 of the Convention.

In *United Communist Party of Turkey and Others*, cited above, it stated that it found even more persuasive than the wording of Article 11 the fact that political parties were a form of association essential to the proper functioning of democracy (p. 17, § 25). In view of the role played by political parties, any measure taken against them affected both freedom of association and, consequently, democracy in the State concerned (p. 18, § 31).

It is in the nature of the role they play that political parties, the only bodies which can come to power, also have the capacity to influence the whole of the regime in their countries. By the proposals for an overall societal model which they put before the electorate and by their capacity to implement those proposals once they come to power, political parties differ from other organisations which intervene in the political arena.

88. Moreover, the Court has previously noted that protection of opinions and the freedom to express them within the meaning of Article 10 of the Convention is one of the objectives of the freedoms of assembly and association enshrined in Article 11. That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy (ibid., pp. 20-21, §§ 42-43).

89. The Court considers that there can be no democracy without pluralism. It is for that reason that

freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb (see, among many other authorities, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49, and *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, p. 26, § 37). Inasmuch as their activities form part of a collective exercise of the freedom of expression, political parties are also entitled to seek the protection of Article 10 of the Convention (see *United Communist Party of Turkey and Others*, cited above, pp. 20-21, § 43).

(β) Democracy and religion in the Convention system

90. For the purposes of the present case, the Court also refers to its case-law concerning the place of religion in a democratic society and a democratic State. It reiterates that, as protected by Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion (see *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, p. 17, § 31, and *Buscarini and Others v. San Marino* [GC], no. 24645/94, § 34, ECHR 1999-I).

91. Moreover, in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected (see *Kokkinakis*, cited above, p. 18, § 33). The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs (see, *mutatis mutandis*, *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, § 84, ECHR 2000-VII) and that it requires the State to ensure mutual tolerance between opposing groups (see, *mutatis mutandis*, *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, § 123, ECHR 2001-XII).

92. The Court's established case-law confirms this function of the State. It has held that in a democratic society the State may limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety (see *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V).

While freedom of religion is in the first place a matter of individual conscience, it also implies freedom to manifest one's religion alone and in private or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists a number of forms which manifestation of a religion or belief may take, namely worship, teaching, practice and observance. Nevertheless, it does not protect every act motivated or influenced by a religion or belief (see *Kalaç v. Turkey*, judgment of 1 July 1997, *Reports* 1997-IV, p. 1209, § 27).

The obligation for a teacher to observe normal working hours which, he asserts, clash with his attendance at prayers, may be compatible with the freedom of religion (see *X v. the United Kingdom*, no. 8160/78, Commission decision of 12 March 1981, Decisions and Reports (DR) 22, p. 27), as may the obligation requiring a motorcyclist to wear a crash helmet, which in his view is incompatible with his religious duties (see *X v. the United Kingdom*, no. 7992/77, Commission decision of 12 July 1978, DR 14, p. 234).

93. In applying the above principles to Turkey the Convention institutions have expressed the view that the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to

respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention (see the opinion of the Commission, expressed in its report of 27 February 1996, in *Kalaç*, cited above, p. 1215, § 44, and, *mutatis mutandis*, p. 1209, §§ 27-31).

94. In order to perform its role as the neutral and impartial organiser of the exercise of religious beliefs, the State may decide to impose on its serving or future civil servants, who will be required to wield a portion of its sovereign power, the duty to refrain from taking part in the Islamic fundamentalist movement, whose goal and plan of action is to bring about the pre-eminence of religious rules (see, *mutatis mutandis*, *Yanasik v. Turkey*, no. 14524/89, Commission decision of 6 January 1993, DR 74, p. 14, and *Kalaç*, cited above, p. 1209, § 28).

95. In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practise that religion or on those who belong to another religion may be justified under Article 9 § 2 of the Convention. In that context, secular universities may regulate manifestation of the rites and symbols of the said religion by imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others (see *Karaduman v. Turkey*, no. 16278/90, Commission decision of 3 May 1993, DR 74, p. 93).

(γ) The possibility of imposing restrictions, and rigorous European supervision

96. The freedoms guaranteed by Article 11, and by Articles 9 and 10 of the Convention, cannot deprive the authorities of a State in which an association, through its activities, jeopardises that State's institutions, of the right to protect those institutions. In this connection, the Court points out that it has previously held that some compromise between the requirements of defending democratic society and individual rights is inherent in the Convention system. For there to be a compromise of that sort any intervention by the authorities must be in accordance with paragraph 2 of Article 11 – a matter which the Court considers below. Only when that review is complete will the Court be in a position to decide, in the light of all the circumstances of the case, whether Article 17 of the Convention should be applied (see *United Communist Party of Turkey and Others*, cited above, p. 18, § 32).

97. The Court has also defined as follows the limits within which political organisations can continue to enjoy the protection of the Convention while conducting their activities (ibid., p. 27, § 57):

> "... one of the principal characteristics of democracy [is] the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned."

98. On that point, the Court considers that a political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds (see *Yazar and Others v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, § 49, ECHR 2002-II, and, *mutatis mutandis*, the following judgments: *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, § 97, ECHR 2001-IX, and *Socialist Party and Others v. Turkey*, judgment of 25 May 1998, *Reports* 1998-III, pp. 1256-57, §§ 46-47).

99. The possibility cannot be excluded that a political party, in pleading the rights enshrined in Article 11 and also in Articles 9 and 10 of the Convention, might attempt to derive therefrom the right to conduct what amounts in practice to activities intended to destroy the rights or freedoms set forth in the Convention and thus bring about the destruction of democracy (see *Communist Party (KPD) v.*

Germany, no. 250/57, Commission decision of 20 July 1957, Yearbook 1, p. 222). In view of the very clear link between the Convention and democracy (see paragraphs 86-89 above), no one must be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society. Pluralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole (see, *mutatis mutandis*, *Petersen v. Germany* (dec.), no. 39793/98, ECHR 2001-XII).

In that context, the Court considers that it is not at all improbable that totalitarian movements, organised in the form of political parties, might do away with democracy, after prospering under the democratic regime, there being examples of this in modern European history.

100. The Court reiterates, however, that the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation. Although it is not for the Court to take the place of the national authorities, which are better placed than an international court to decide, for example, the appropriate timing for interference, it must exercise rigorous supervision embracing both the law and the decisions applying it, including those given by independent courts. Drastic measures, such as the dissolution of an entire political party and a disability barring its leaders from carrying on any similar activity for a specified period, may be taken only in the most serious cases (see the following judgments: *United Communist Party of Turkey and Others*, cited above, p. 22, § 46; *Socialist Party and Others*, cited above, p. 1258, § 50; and *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, § 45, ECHR 1999-VIII). Provided that it satisfies the conditions set out in paragraph 98 above, a political party animated by the moral values imposed by a religion cannot be regarded as intrinsically inimical to the fundamental principles of democracy, as set forth in the Convention.

(δ) Imputability to a political party of the acts and speeches of its members

101. The Court further considers that the constitution and programme of a political party cannot be taken into account as the sole criterion for determining its objectives and intentions. The political experience of the Contracting States has shown that in the past political parties with aims contrary to the fundamental principles of democracy have not revealed such aims in their official publications until after taking power. That is why the Court has always pointed out that a party's political programme may conceal objectives and intentions different from the ones it proclaims. To verify that it does not, the content of the programme must be compared with the actions of the party's leaders and the positions they defend. Taken together, these acts and stances may be relevant in proceedings for the dissolution of a political party, provided that as a whole they disclose its aims and intentions (see *United Communist Party of Turkey and Others*, cited above, p. 27, § 58, and *Socialist Party and Others*, cited above, pp. 1257-58, § 48).

(ε) The appropriate timing for dissolution

102. In addition, the Court considers that a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent. The Court accepts that where the presence of such a danger has been established by the national courts, after detailed scrutiny subjected to rigorous European supervision, a State may "reasonably forestall the execution of such a policy, which is incompatible with the Convention's provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country's democratic regime" (see the Chamber's judgment, § 81).

103. The Court takes the view that such a power of preventive intervention on the State's part is also consistent with Contracting Parties' positive obligations under Article 1 of the Convention to secure the rights and freedoms of persons within their jurisdiction. Those obligations relate not only to any

interference that may result from acts or omissions imputable to agents of the State or occurring in public establishments but also to interference imputable to private individuals within non-State entities (see, for example, with regard to the State's obligation to make private hospitals adopt appropriate measures to protect life, *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002-I). A Contracting State may be justified under its positive obligations in imposing on political parties, which are bodies whose *raison d'être* is to accede to power and direct the work of a considerable portion of the State apparatus, the duty to respect and safeguard the rights and freedoms guaranteed by the Convention and the obligation not to put forward a political programme in contradiction with the fundamental principles of democracy.

(ζ) Overall examination

104. In the light of the above considerations, the Court's overall examination of the question whether the dissolution of a political party on account of a risk of democratic principles being undermined met a "pressing social need" (see, for example, *Socialist Party and Others*, cited above, p. 1258, § 49) must concentrate on the following points: (i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent; (ii) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a "democratic society".

105. The overall examination of the above points that the Court must conduct also has to take account of the historical context in which the dissolution of the party concerned took place and the general interest in preserving the principle of secularism in that context in the country concerned to ensure the proper functioning of "democratic society" (see, *mutatis mutandis*, *Petersen*, cited above).

(ii) Application of the above principles to the present case

106. The Court will devote the first part of its examination to the question whether Refah's dissolution and the secondary penalties imposed on the other applicants met a "pressing social need". It will then determine, if the case arises, whether those penalties were "proportionate to the legitimate aims pursued".

(α) Pressing social need

The appropriate timing for dissolution

107. The Court will first determine whether Refah could have presented a threat to the democratic regime at the time when it was dissolved.

It observes in that connection that Refah was founded in 1983, took part in a number of general and local election campaigns and obtained approximately 22% of the votes in the 1995 general election, which gave it 158 seats in the Grand National Assembly (out of a total of 450 at the material time). After sharing power in a coalition government, Refah obtained about 35% of the votes in the local elections of November 1996. According to an opinion poll carried out in January 1997, if a general election had been held at that time Refah would have received 38% of the votes. According to the forecasts of the same opinion poll, Refah could have obtained 67% of the votes in the general election likely to be held about four years' later (see paragraph 11 above). Notwithstanding the uncertain nature of some opinion polls, those figures bear witness to a considerable rise in Refah's influence as a political party and its chances of coming to power alone.

108. The Court accordingly considers that at the time of its dissolution Refah had the real potential to seize political power without being restricted by the compromises inherent in a coalition. If Refah had proposed a programme contrary to democratic principles, its monopoly of political power would have enabled it to establish the model of society envisaged in that programme.

109. As regards the applicants' argument that Refah was punished for speeches by its members made

several years before its dissolution, the Court considers that the Turkish courts, when reviewing the constitutionality of Refah's acts, could legitimately take into consideration the progression over time of the real risk that the party's activities represented for the principles of democracy. The same applies to the review of Refah's compliance with the principles set forth in the Convention.

Firstly, the programme and policies of a political party may become clear through the accumulation of acts and speeches by its members over a relatively long period. Secondly, the party concerned may, over the years, increase its chances of gaining political power and implementing its policies.

110. While it can be considered, in the present case, that Refah's policies were dangerous for the rights and freedoms guaranteed by the Convention, the real chances that Refah would implement its programme after gaining power made that danger more tangible and more immediate. That being the case, the Court cannot criticise the national courts for not acting earlier, at the risk of intervening prematurely and before the danger concerned had taken shape and become real. Nor can it criticise them for not waiting, at the risk of putting the political regime and civil peace in jeopardy, for Refah to seize power and swing into action, for example by tabling bills in Parliament, in order to implement its plans.

In short, the Court considers that in electing to intervene at the time when they did in the present case the national authorities did not go beyond the margin of appreciation left to them under the Convention.

Imputability to Refah of the acts and speeches of its members

111. The parties before the Court agreed that neither in its constitution nor in the coalition programme it had negotiated with another political party, the True Path Party (Doğru Yol Partisi), had Refah proposed altering Turkey's constitutional settlement in a way that would be contrary to the fundamental principles of democracy. Refah was dissolved on the basis of the statements made and stances adopted by its chairman and some of its members.

112. Those statements and stances were made or adopted, according to the Constitutional Court, by seven of Refah's leading figures, namely its chairman, Mr Necmettin Erbakan, its two vice-chairmen, Mr Şevket Kazan and Mr Ahmet Tekdal, three Refah members of Turkey's Grand National Assembly, Mr Şevki Yılmaz, Mr Hasan Hüseyin Ceylan and Mr İbrahim Halil Çelik, and the mayor of the city of Konya, Mr Recai Karatepe, elected on a Refah ticket.

113. The Court considers that the statements and acts of Mr Necmettin Erbakan, in his capacity as chairman of Refah or as the Prime Minister elected on account of his position as the leader of his party, could incontestably be attributed to Refah. The role of a chairman, who is frequently a party's emblematic figure, is different in that respect from that of a simple member. Remarks on politically sensitive subjects or positions taken up by the chairman of a party are perceived by political institutions and by public opinion as acts reflecting the party's views, rather than his personal opinions, unless he declares that this is not the case. The Court observes on that point that Mr Erbakan never made it clear that his statements and stances did not reflect Refah's policy or that he was only expressing his personal opinion.

114. The Court considers that the speeches and stances of Refah's vice-chairmen could be treated in the same way as those of its chairman. Save where otherwise indicated, remarks by such persons on political questions are imputable to the party they represent. That applies in the present case to the remarks of Mr Şevket Kazan and Mr Ahmet Tekdal.

115. Moreover, the Court considers that, inasmuch as the acts and remarks of the other Refah members who were MPs or held local government posts formed a whole which disclosed the party's aims and intentions and projected an image, when viewed in the aggregate, of the model of society it wished to set up, these could also be imputed to Refah. These acts or remarks were likely to influence potential voters by arousing their hopes, expectations or fears, not because they were attributable to individuals but because they had been done or made on Refah's behalf by MPs and a mayor, all of whom had been elected on a Refah platform. Such acts and speeches were potentially more effective than abstract forms of words written in the party's constitution and programme in achieving any unlawful ends. The Court considers that such acts and speeches are imputable to a party unless it distances itself from them.

But a short time later Refah presented those responsible for these acts and speeches as candidates for important posts, such as member of Parliament or mayor of a large city, and distributed one of the offending speeches to its local branches to serve as material for the political training of its members. Before the proceedings to dissolve Refah were instituted no disciplinary action was taken within the party against those who had made the speeches concerned on account of their activities or public statements and Refah never criticised their remarks. The Court accepts the Turkish Constitutional Court's conclusion on this point to the effect that Refah had decided to expel those responsible for the acts and speeches concerned in the hope of avoiding dissolution and that the decision was not made freely, as the decisions of leaders of associations should be if they are to be recognised under Article 11 (see, *mutatis mutandis, Freedom and Democracy Party (ÖZDEP)*, cited above, § 26).

The Court accordingly concludes that the acts and speeches of Refah's members and leaders cited by the Constitutional Court in its dissolution judgment were imputable to the whole party.

The main grounds for dissolution cited by the Constitutional Court

116. The Court considers on this point that among the arguments for dissolution pleaded by Principal State Counsel at the Court of Cassation those cited by the Constitutional Court as grounds for its finding that Refah had become a centre of anti-constitutional activities can be classified into three main groups: (i) the arguments that Refah intended to set up a plurality of legal systems, leading to discrimination based on religious beliefs; (ii) the arguments that Refah intended to apply sharia to the internal or external relations of the Muslim community within the context of this plurality of legal systems; and (iii) the arguments based on the references made by Refah members to the possibility of recourse to force as a political method. The Court must therefore limit its examination to those three groups of arguments cited by the Constitutional Court.

(a) The plan to set up a plurality of legal systems

117. The Court notes that the Constitutional Court took account in this connection of two declarations by the applicant Mr Necmettin Erbakan, Refah's chairman, on 23 March 1993 in Parliament and on 10 October 1993 at a Refah party conference (see paragraph 28 above). In the light of its considerations on the question of the appropriate timing for dissolution of the party (see paragraphs 107-10 above) and on the imputability to Refah of Mr Necmettin Erbakan's speeches (see paragraph 113 above), it takes the view that these two speeches could be regarded as reflecting one of the policies which formed part of Refah's programme, even though the party's constitution said nothing on the subject.

118. With regard to the applicants' argument that when Refah was in power it had never taken any concrete steps to implement the idea behind this proposal, the Court considers that it would not have been realistic to wait until Refah was in a position to include such objectives in the coalition programme it had negotiated with a political party of the centre-right. It merely notes that a plurality of legal systems was a policy which formed part of Refah's programme.

119. The Court sees no reason to depart from the Chamber's conclusion that a plurality of legal systems, as proposed by Refah, cannot be considered to be compatible with the Convention system. In its judgment, the Chamber gave the following reasoning:

> "70. ... the Court considers that Refah's proposal that there should be a plurality of legal systems would introduce into all legal relationships a distinction between individuals grounded on religion, would categorise everyone according to his religious beliefs and would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement.
>
> The Court takes the view that such a societal model cannot be considered compatible with the Convention system, for two reasons.
>
> Firstly, it would do away with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State in the exercise of its above-mentioned functions, but static rules of law imposed by the religion concerned. But the State has a positive obligation to ensure that everyone within its jurisdiction enjoys in

full, and without being able to waive them, the rights and freedoms guaranteed by the Convention (see, *mutatis mutandis*, *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 14, § 25).

Secondly, such a system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy. A difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention, and more particularly Article 14 thereof, which prohibits discrimination. Such a difference in treatment cannot maintain a fair balance between, on the one hand, the claims of certain religious groups who wish to be governed by their own rules and on the other the interest of society as a whole, which must be based on peace and on tolerance between the various religions and beliefs (see, *mutatis mutandis*, the judgment of 23 July 1968 in the "Belgian linguistic" case, Series A no. 6, pp. 33-35, §§ 9 and 10, and *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, pp. 35-36, § 72).

(b) Sharia

120. The Court observes in the first place that the intention to set up a regime based on sharia was explicitly portended in the following remarks cited by the Constitutional Court, which had been made by certain members of Refah, all of whom were MPs:

– In a television interview broadcast on 24 November 1996 Mr Hasan Hüseyin Ceylan, Refah MP for the province of Ankara, said that sharia was the solution for the country (see paragraph 34 above);

– On 8 May 1997 Mr İbrahim Halil Çelik, Refah MP for the province of Şanlıurfa, said: "I will fight to the end to introduce sharia" (see paragraph 37 above);

– In April 1994 Mr Şevki Yılmaz, Refah MP for the province of Rize, urged believers to "call to account those who turn their backs on the precepts of the Koran and those who deprive Allah's Messenger of his jurisdiction in their country" and asserted: "Only 39% [of the rules] in the Koran are applied in this country. Six thousand five hundred verses have been quietly forgotten ..." He went on to say: "The condition to be met before prayer is the Islamisation of power. Allah says that, before mosques, it is the path of power which must be Muslim" and "The question Allah will ask you is this: 'Why, in the time of the blasphemous regime, did you not work for the construction of an Islamic State?' Erbakan and his friends want to bring Islam to this country in the form of a political party. The prosecutor understood that clearly. If we could understand that as he did, the problem would be solved" (see paragraph 33 above).

121. The Court further notes the following remarks by Refah's chairman and vice-chairman, on their desire to set up a "just order" or "order of justice" or "God's order", which the Constitutional Court took into consideration:

– On 13 April 1994 Mr Necmettin Erbakan said: "Refah will come to power and a just order [*adil dozen*] will be established" (see paragraph 31 above), and in a speech on 7 May 1996 he praised "those who contribute, with conviction, to the supremacy of Allah" (see paragraph 39 above);

– While on pilgrimage in 1993 Mr Ahmet Tekdal said: "If the people ... do not work hard enough to bring about the advent of '*hak nizami*' [a just order or God's order], ... they will be tyrannised by [renegades] and will eventually disappear ... they will not be able to give a satisfactory account of themselves to Allah, as they will not have worked to establish '*hak nizami*' " (see paragraph 35 above).

122. Even though these last two statements lend themselves to a number of different interpretations, their common denominator is that they both refer to religious or divine rules as the basis for the political regime which the speakers wished to bring into being. They betray ambiguity about those speakers' attachment to any order not based on religious rules. In the light of the context created by the various views attributed to Refah's leaders which the Constitutional Court cited in its judgment, for example on the question of the wearing of Islamic headscarves in the public sector or on the organisation of working hours in the civil service to fit in with the appointed times for prayers, the statements concerned could reasonably have been understood as confirming statements made by Refah MPs which revealed the party's intention of setting up a regime based on sharia. The Court can therefore accept the Constitutional Court's conclusion that these remarks and stances of Refah's leaders formed a whole and gave a clear picture of a model conceived and proposed by the party of a State and society organised according to religious rules.

123. The Court concurs in the Chamber's view that sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention:

> "72. Like the Constitutional Court, the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. ... In the Court's view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention."

124. The Court must not lose sight of the fact that in the past political movements based on religious fundamentalism have been able to seize political power in certain States and have had the opportunity to set up the model of society which they had in mind. It considers that, in accordance with the Convention's provisions, each Contracting State may oppose such political movements in the light of its historical experience.

125. The Court further observes that there was already an Islamic theocratic regime under Ottoman law. When the former theocratic regime was dismantled and the republican regime was being set up, Turkey opted for a form of secularism which confined Islam and other religions to the sphere of private religious practice. Mindful of the importance for survival of the democratic regime of ensuring respect for the principle of secularism in Turkey, the Court considers that the Constitutional Court was justified in holding that Refah's policy of establishing sharia was incompatible with democracy (see paragraph 40 above).

(c) Sharia and its relationship with the plurality of legal systems proposed by Refah

126. The Court will next examine the applicants' argument that the Chamber contradicted itself in holding that Refah supported introducing both a plurality of legal systems and sharia simultaneously.

It takes note of the Constitutional Court's considerations concerning the part played by a plurality of legal systems in the application of sharia in the history of Islamic law. These showed that sharia is a system of law applicable to relations between Muslims themselves and between Muslims and the adherents of other faiths. In order to enable the communities owing allegiance to other religions to live in a society dominated by sharia, a plurality of legal systems had also been introduced by the Islamic theocratic regime during the Ottoman Empire, before the Republic was founded.

127. The Court is not required to express an opinion in the abstract on the advantages and disadvantages of a plurality of legal systems. It notes, for the purposes of the present case, that – as the Constitutional Court observed – Refah's policy was to apply some of sharia's private-law rules to a large part of the population in Turkey (namely Muslims), within the framework of a plurality of legal systems. Such a policy goes beyond the freedom of individuals to observe the precepts of their religion, for example by organising religious wedding ceremonies before or after a civil marriage (a common practice in Turkey) and according religious marriage the effect of a civil marriage (see, *mutatis mutandis*, *Serif v. Greece*, no. 38178/97, § 50, ECHR 1999-IX). This Refah policy falls outside the private sphere to which Turkish law confines religion and suffers from the same contradictions with the Convention system as the introduction of sharia (see paragraph 125 above).

128. Pursuing that line of reasoning, the Court rejects the applicants' argument that prohibiting a plurality of private-law systems in the name of the special role of secularism in Turkey amounted to establishing discrimination against Muslims who wished to live their private lives in accordance with the precepts of their religion.

It reiterates that freedom of religion, including the freedom to manifest one's religion by worship and observance, is primarily a matter of individual conscience, and stresses that the sphere of individual conscience is quite different from the field of private law, which concerns the organisation and functioning of society as a whole.

It has not been disputed before the Court that in Turkey everyone can observe in his private life the requirements of his religion. On the other hand, Turkey, like any other Contracting Party, may legitimately prevent the application within its jurisdiction of private-law rules of religious inspiration prejudicial to public order and the values of democracy for Convention purposes (such as rules permitting discrimination based on the gender of the parties concerned, as in polygamy and privileges for the male sex in matters of divorce and succession). The freedom to enter into contracts cannot encroach upon the State's role as the neutral and impartial organiser of the exercise of religions, faiths and beliefs (see paragraphs 91-92 above).

(d) The possibility of recourse to force

129. The Court takes into consideration under this heading the following remarks cited by the Constitutional Court and made by:

– Mr Necmettin Erbakan, on 13 April 1994, on the question whether power would be gained by violence or by peaceful means (whether the change would involve bloodshed or not – see paragraph 31 above);

– Mr Şevki Yılmaz, in April 1994, concerning his interpretation of jihad and the possibility for Muslims of arming themselves after coming to power (see paragraph 33 above);

– Mr Hasan Hüseyin Ceylan, on 14 March 1993, who insulted and threatened the supporters of a regime on the Western model (see paragraph 34 above);

– Mr Şükrü Karatepe, who, in his speech on 10 December 1996, advised believers to keep alive the rancour and hatred they felt in their hearts (see paragraph 36 above); and

– Mr İbrahim Halil Çelik, on 8 May 1997, who said he wanted blood to flow to prevent the closure of the theological colleges (see paragraph 37 above).

The Court also takes into account the visit by Mr Şevket Kazan, who was then the Minister of Justice, to a member of his party charged with incitement to hatred based on religious discrimination (see paragraph 38 above).

130. The Court considers that, whatever meaning is ascribed to the term "jihad" used in most of the speeches mentioned above (whose primary meaning is holy war and the struggle to be waged until the total domination of Islam in society is achieved), there was ambiguity in the terminology used to refer to the method to be employed to gain political power. In all of these speeches the possibility was mentioned of resorting "legitimately" to force in order to overcome various obstacles Refah expected to meet in the political route by which it intended to gain and retain power.

131. Furthermore, the Court endorses the following finding of the Chamber:

> "74. ...
>
> While it is true that [Refah's] leaders did not, in government documents, call for the use of force and violence as a political weapon, they did not take prompt practical steps to distance themselves from those members of [Refah] who had publicly referred with approval to the possibility of using force against politicians who opposed them. Consequently, Refah's leaders did not dispel the ambiguity of these statements about the possibility of having recourse to violent methods in order to gain power and retain it (see, *mutatis mutandis*, *Zana v. Turkey*, judgment of 25 November 1997, *Reports* 1997-VII, p. 2549, § 58)."

Overall examination of "pressing social need"

132. In making an overall assessment of the points it has just listed above in connection with its examination of the question whether there was a pressing social need for the interference in issue in the present case, the Court finds that the acts and speeches of Refah's members and leaders cited by the Constitutional Court were imputable to the whole of the party, that those acts and speeches revealed Refah's long-term policy of setting up a regime based on sharia within the framework of a plurality of legal systems and that Refah did not exclude recourse to force in order to implement its policy and keep the system it envisaged in place. In view of the fact that these plans were incompatible with the concept of a "democratic society" and that the real opportunities Refah had to put them into practice made the danger to democracy more tangible and more immediate, the penalty imposed on the applicants by the

Constitutional Court, even in the context of the restricted margin of appreciation left to Contracting States, may reasonably be considered to have met a "pressing social need".

(β) Proportionality of the measure complained of

133. After considering the parties' arguments, the Court sees no good reason to depart from the following considerations in the Chamber's judgment:

> "82. ... The Court has previously held that the dissolution of a political party accompanied by a temporary ban prohibiting its leaders from exercising political responsibilities was a drastic measure and that measures of such severity might be applied only in the most serious cases (see the previously cited *Socialist Party and Others v. Turkey* judgment, p. 1258, § 51). In the present case it has just found that the interference in question met a 'pressing social need'. It should also be noted that after [Refah's] dissolution only five of its MPs (including the applicants) temporarily forfeited their parliamentary office and their role as leaders of a political party. The 152 remaining MPs continued to sit in Parliament and pursued their political careers normally. ... The Court considers in that connection that the nature and severity of the interference are also factors to be taken into account when assessing its proportionality (see, for example, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 64, ECHR 1999-IV)."

134. The Court also notes that the pecuniary damage alleged by the applicants was made up largely of a loss of earnings and is speculative in nature. In view of the low value of Refah's assets, their transfer to the Treasury can have no bearing on the proportionality of the interference in issue. Moreover, the Court observes that the prohibition barring three of the applicants, Mr Necmettin Erbakan, Mr Şevket Kazan and Mr Ahmet Tekdal, from engaging in certain types of political activity for a period of five years was temporary, and that, through their speeches and the stances they adopted in their capacity as the chairman and vice-chairmen of the party, they bear the main responsibility for Refah's dissolution.

It follows that the interference in issue in the present case cannot be regarded as disproportionate in relation to the aims pursued.

4. The Court's conclusion regarding Article 11 of the Convention

135. Consequently, following a rigorous review to verify that there were convincing and compelling reasons justifying Refah's dissolution and the temporary forfeiture of certain political rights imposed on the other applicants, the Court considers that those interferences met a "pressing social need" and were "proportionate to the aims pursued". It follows that Refah's dissolution may be regarded as "necessary in a democratic society" within the meaning of Article 11 § 2.

136. Accordingly, there has been no violation of Article 11 of the Convention.

II. ALLEGED VIOLATION OF ARTICLES 9, 10, 14, 17 AND 18 OF THE CONVENTION

137. The applicants further alleged the violation of Articles 9, 10, 14, 17 and 18 of the Convention. As their complaints concern the same facts as those examined under Article 11, the Court considers that it is not necessary to examine them separately.

III. ALLEGED VIOLATION OF ARTICLES 1 AND 3 OF PROTOCOL No. 1

138. The applicants further submitted that the consequences of Refah's dissolution, namely the confiscation of its assets and their transfer to the Treasury, and the ban preventing its leaders from participating in elections, had entailed breaches of Articles 1 and 3 of Protocol No. 1.

139. The Court notes that the measures complained of by the applicants were only secondary effects of Refah's dissolution, which, as the Court has found, did not breach Article 11. Accordingly, there is no cause to examine separately the complaints in question.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 11 of the Convention;

2. *Holds* that it is not necessary to examine separately the complaints under Articles 9, 10, 14, 17 and 18 of the Convention and Articles 1 and 3 of Protocol No. 1.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 13 February 2003.

Luzius WILDHABER
President
Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Ress joined by Mr Rozakis;
(b) concurring opinion of Mr Kovler.

L.W.
P.J.M.

CONCURRING OPINION OF JUDGE RESS JOINED BY JUDGE ROZAKIS

The only point on which I would like to clarify the reasoning of the judgment, as I interpret it, relates to paragraphs 97 and 98, where the Court refers to the limits under which political movements can continue to rely on the protection of the Convention while conducting their activities. In paragraph 97 of the judgment the Court refers to *United Communist Party of Turkey and Others v. Turkey* (judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, p. 27, § 57) where the Court reiterated the characteristics of democracy and the available possibilities to resolve a country's problems – even irksome ones – through dialogue and other means of expression without recourse to violence. The Court then in paragraph 98 of the judgment says that a political party may campaign for a change in the law or the legal and constitutional structures of a State on two conditions: firstly, the means used to that end must be legal and democratic and secondly, the change proposed must itself be compatible with fundamental democratic principles.

Since this case is related to the dissolution of a political party for its activities and far-reaching political aims, one has to be careful with very general statements. These two paragraphs should not be understood to mean that the protection of the Convention is limited to situations where the political party has acted in every respect in conformity with the law. There are situations in between. The reference to the legality of means, in my view, cannot be interpreted in the sense that a political party, which on one occasion or another does not act fully in conformity with domestic law thereby loses its capacity to lay claim to the Convention's protection against penalties imposed against it, and in particular against dissolution. Not all minor violations of the law which occur in the course of political assemblies, or the conduct of one or another of a party's members or illegal situations relating to its internal order can be deemed to justify such a measure. The formulation in paragraph 98 of the judgment should in my view not be understood to exclude for more or less minor illegalities the application of the principle of proportionality in relation to sanctions such as dissolution of a party. In respect of a possible dissolution of the party the following sentence relating to a situation where party leaders incite to violence or put forward a political programme which fails to respect basic rules of democracy or which is even aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy is a more reliable guide. But even there one should be prudent and not overstep the limits set out in other decisions and judgments of the Court. It is difficult to give an exhaustive list of the rules of democracy, apart from the basic ones. It is without doubt correct to say that parties that aim at the destruction of democracy cannot enjoy protection against even such drastic measures as

dissolution. But whether the failure to respect this or that rule of democracy justifies dissolution or whether a less drastic measure is the only appropriate and adequate one is again a question that has to be judged with regard to the principle of proportionality. Furthermore, the last part relating to the flouting of the rights and freedoms recognised in a democracy must be seen in the context of the very basic rights and freedoms. In my view it cannot be interpreted to the effect that any campaign to change rights and freedoms recognised in a democracy amount to a situation where a political party would lose protection. In this respect also all depends on the specific rights and freedoms which a political party aims to change and furthermore what kind of change or modification is envisaged. So the very general sentences of paragraph 98 of the judgment need some further clarification and limitation in the light of the principle of proportionality and in the light of the judgments which are quoted at the end of that paragraph.

I have no doubt that the aims for which the applicant party and its prominent leaders stood and which they advocated rather vigorously are not in conformity with basic rules of democracy and justify the dissolution. The only point I wanted to make is that the Court's observation in paragraph 98 of the judgment must be read in the light of the other quoted judgments and within the interpretation that was given in these judgments, in particular *United Communist Party of Turkey and Others*, and not be taken for a general dictum, as its wording might appear to suggest.

CONCURRING OPINION OF JUDGE KOVLER

(Translation)

I concur for the most part in the Court's ruling that there has been no violation of Article 11 of the Convention in this specific case for the simple reason that some of the applicants' activities and statements were in contradiction with the principle of secularism, a pillar of Turkish democracy as conceived by Mustafa Kemal Atatürk and enshrined in the Constitution of the Republic of Turkey (particularly Articles 2 and 24 § 4), to which contradiction the State, as the guarantor of constitutional order, was obliged to react, taking account in particular of Articles 9 § 2 and 11 § 2 of the Convention.

What bothers me about some of the Court's findings is that in places they are unmodulated, especially as regards the extremely sensitive issues raised by religion and its values. I would prefer an international court to avoid terms borrowed from politico-ideological discourse, such as "Islamic fundamentalism" (paragraph 94 of the judgment), "totalitarian movements" (paragraph 99 of the judgment), "threat to the democratic regime" (paragraph 107 of the judgment), etc., whose connotations, in the context of the present case, might be too forceful.

I also regret that the Court, in reproducing the Chamber's conclusions (paragraph 119 of the judgment), missed the opportunity to analyse in more detail the concept of a plurality of legal systems, which is linked to that of legal pluralism and is well-established in ancient and modern legal theory and practice (see, in particular, the proceedings of the international congresses on customary law and legal pluralism organised by the International Union of Anthropological and Ethnological Sciences, and J. Griffiths: "What is legal pluralism?", *Journal of Legal Pluralism and Unofficial Law*, 1986, no. 24). Not only legal anthropology but also modern constitutional law accepts that under certain conditions members of minorities of all kinds may have more than one type of personal status (see, for example, P. Gannagé, "*Le pluralisme des statuts personnels dans les Etats multicommunautaires – Droit libanais et droits proche-orientaux*", Brussels, Editions Bruylant, 2001). Admittedly, this pluralism, which impinges mainly on an individual's private and family life, is limited by the requirements of the general interest. But it is of course more difficult in practice to find a compromise between the interests of the communities concerned and civil society as a whole than to reject the very idea of such a compromise from the outset.

This general remark also applies to the assessment to be made of sharia, the legal expression of a religion whose traditions go back more than a thousand years, and which has its fixed points of reference and its excesses, like any other complex system. In any case legal analysis should not caricature polygamy (a form of family organisation which exists in societies other than Islamised peoples) by reducing it to ... "discrimination based on the gender of the parties concerned" (paragraph 128 of the judgment).

Lastly, I find the use of figures derived from opinion polls (paragraph 107 of the judgment), which would be natural in a political analysis, rather strange in a legal text which constitutes *res judicata*.

András Sajó (ed.), *Militant Democracy*. Eleven International Publishing, 2004. 262 pages

Reviewed by Stephen Holmes*

Roughly speaking, the concept of "militant democracy" refers to the capacity of modern constitutional democracies to defend themselves against domestic political challenges to their continued existence as democracies. Must a democratic system stand idly by and watch antidemocratic forces gather strength? Must liberal constitutions, because they support tolerance and openness, function as suicide pacts, preventing effective self-defense? Joseph Goebbels believed that the answer was "yes" to both questions: "It will always be one of the best jokes of democracy that it gives its deadly enemies the means to destroy it."

The correct answer is "no." Constitutional democracies can and do act preemptively; for instance, by banning extremist parties while they are still relatively weak. Endangered democracies can curtail freedom of speech,

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doi:10.1093/icon/mol015

freedom of association, and associated political rights to vote and compete for office and still remain recognizably liberal and democratic. To be sure, honest debate remains possible about the most effective and least restrictive ways of defending democracy against its most virulent enemies. And there is another important question that remains unanswered: What constitutional obstacles can be put in place to prevent political incumbents from opportunistically invoking the defense of democracy against antidemocratic forces as a justification for cracking down on perfectly legitimate political rivals?

This lively and readable collection of essays, while addressing these and related issues from a variety of viewpoints, focuses principally on the role played by constitutions and constitutional courts in regulating democratic self-defense. The examples discussed range from post–World War II attempts to ban the Communist parties in Germany (upheld) and Australia (overturned) to the 2002 Spanish decision to ban the Batasuna Party for its alleged association with ETA terrorism, even without judicially acceptable proof of the party's involvement in violent action (upheld). That politics often trumps constitutional law runs like a *fil conducteur* through the entire volume. After the European Court of Human Rights upheld Turkey's decision to ban the Islamic Refah (Welfare) Party, for example, Turkey itself reversed course and allowed Erdogan's AK Party, basically a successor to Refah, to run and even accede to power. Other chapters discuss Israel's disqualification of candidates who deny the legitimacy of Israel as a Jewish state, the use of antitreason law in Indonesia, Hungary's feeble measures against right-wing extremism, and American, British, and Canadian responses to 9/11. Although only one chapter is exclusively devoted to Carl Schmitt, his theory of emergency powers furnishes a shimmering backdrop for the volume as a whole.

With such a rich menu, it would be niggling to complain about gaps and omissions. But the reader is left wishing that more attention had been paid to the cancellation of the second round of Algerian elections in 1992, and the subsequent disbanding of the Islamic Front for Salvation, as well as to McCarthyism in the United States, a classic example, one would have thought, of militant democracy in a feverish war against largely imaginary enemies. If the book is ever reissued, one might also hope for the addition of an essay on Israel's policy toward Hamas, assuming that the latter refuses to foreswear violence while handily winning fair and free elections in the territories.

That the book makes us wish for more is a sign of its success at redirecting our attention to an exceptionally important and too often neglected topic in democratic and constitutional theory. Do political groups, no matter how virulently racist or antidemocratic, have an inalienable right to participate in elections and vie for votes? Behind this question, at least some of the time, lie philosophical doubts about liberalism itself. Perhaps a liberal can

best be defined, as poet Robert Frost is alleged to have said, as "a man who cannot take his own side in an argument." Schmitt, too, argued that the liberal state was incapable of defending itself against its enemies. Could it be that liberals naïvely absolutize civil liberties and are unwilling, therefore, to make practical adjustments even for the sake of democracy's survival?

To have demonstrated the implausibility of this common concern is one of the principal achievements of *Militant Democracy*. The authors amply document the willingness of democracies to meet intolerant groups with intolerance and to treat liberty as a relative not an absolute value. Article 21 (2) of the German *Grundgesetz*, to pick only the best-known example, declares that any party that aims to damage or endanger Germany's democratic order shall be considered *verfassungswidrig*, or contrary to the Constitution. Disagreements rage about where to draw the line, but courts in democratic countries have proved perfectly capable, say, of permitting advocacy and banning incitement. In a similarly practical spirit, they have sometimes banned and sometimes permitted parties whose commitment to democracy was doubtful. That Anglo-American liberalism is not a weak-kneed suicide pact should already have been obvious from both theory (John Locke's prerogative power to act for the national defense even against the law) and practice (from Abraham Lincoln's suspension of habeas corpus in the Civil War to Franklin D. Roosevelt's mass detention of Japanese Americans during World War II). True, civil libertarians object to such measures, often for very good reasons; but their objections have had only sporadic influence over the way democratic authorities actually behave in a crisis. Hence, the U.S. Constitution has never functioned as a suicide pact, despite the oddly widespread suspicion that it might. Nor has any other democratic constitution ever prevented a modern democracy from responding aggressively to serious domestic threats. Weak democracies such as those in Eastern Europe, illuminatingly discussed by András Sajó, may be relatively defenseless against a politics of emotionalism, but the vulnerability Sajó acutely describes is rooted in political culture and cannot be repaired by constitutional craftsmanship.

The suspicion that liberal constitutions might conceivably prevent democracies from defending themselves derives from a certain diagnosis of the collapse of the Weimar Republic. Indeed, the very phrase "militant democracy" (*streitbare Demokratie*) is borrowed from two essays first published by Karl Loewenstein, the German émigré scholar, in 1937 (and republished in the volume as an appendix), arguing that democratic regimes in post–World War I Europe lacked the legal instruments necessary to conduct a "militant" defense against antidemocratic movements. But as Shlomo Avineri argues in his brilliant introduction, Weimar society, reeling from national defeat and humiliation, was too violently polarized to permit a peaceable resolution of social conflicts. The republic itself was so widely unpopular in the army and bureaucracy, in churches and universities, that

no legal instrument or constitutional provision could have withstood the lashing maelstrom. The Weimar constitution did not prevent the Weimar Republic from committing suicide, it is true. But to blame the constitution itself for the catastrophe is the overestimate the capacity of even well-designed institutions to keep volcanic political and social processes under control.

What gives the volume its contemporary resonance, needless to say, is an implicit analogy between antiterrorism measures adopted by Western democracies after 9/11 and constitutional restrictions on antidemocratic political parties. The question, Can democracies fight antidemocratic parties democratically? invites comparison with the question, Can democracies fight terrorism within the bounds of the rule of law? What both questions seek to learn is if constitutional democracy is some kind of suicide pact. The analogy between the two struggles gains some degree of plausibility from the apparent capacity of transnational terrorist organizations to infiltrate lethally armed saboteurs inside enemy territory. The U.S. president has alleged that, in this "wartime" situation, his inherent commander-in-chief powers allow him to operate on U.S. soil as if it were a foreign battlefield, freed from any meddling or second-guessing by Congress and the courts. As protector of the nation, the nationally elected president apparently considers himself to be militant democracy incarnate. But the analogy is also strained, for the obvious reason that there is virtually no domestic support, inside the U.S., for terrorists sworn to commit mass murder against American civilians. There is no political wing of al-Qaeda fielding candidates in congressional or local elections and crying out to be banned by militant democracy. There may be sleeper cells inside the U.S., but there is no fifth column and, therefore, no McCarthy-style witch hunts and persecutions. In Europe, where terrorist plots have been incubated in immigrant neighborhoods, the situation is somewhat different and, perhaps, more worrying for democracy.

To be sure, America's war on terror has had an enormous impact around the world. Its principal effect, as Kent Roach explains in his chapter, has been the normalization of certain abusive policies that had previously been viewed as typical only of illiberal and undemocratic states. Before 9/11, the U.S. regularly accused China and other nondemocratic states of resorting to indefinite preventive detention without charges being lodged and without access to an attorney. Today, such serious charges evoke an immediate and irrefutable *tu quoque*. Thus, even though the U.S.'s war on terror has alienated many of America's democratic allies, it has at least brought some comfort and sense of belonging to America's undemocratic adversaries.

Chantal Mouffe, in her chapter, emphasizes both the Schmittian and non-Schmittian characteristics of the American war on terror. On the one hand, President George W. Bush, as protector of the nation, claims the power unilaterally to "name the enemy," that is to say, to classify anyone

in the world as an "enemy combatant" and either consign them to indefinite executive detention or try them before a military tribunal, where appointees of the executive branch will sit as judge, jury, and executioner. On the other hand, Mouffe attempts to draw a distinction between the Nazi theorist and the American president by pointing out that Bush "moralizes" the current conflict as a battle between good and evil, while Schmitt often wrote of conflict as existential but not Manichaean.

But the core weakness of Schmitt's political theory, unmentioned by Mouffe, is actually closely related to the original sin of the American war on terror. Schmitt distinguishes clearly between decisiveness and indecisiveness. However, what he glosses over is the distinction between intelligent and stupid decisions. This is a serious omission. It is wrong to identify liberal constitutionalism with rigid rules that deprive the executive branch of the flexibility it needs to respond to crises and solve pressing problems. Liberal constitutionalism permits the executive to deviate significantly from normal rules and procedures if it can give a good reason, explaining to an independent oversight body why ordinary rules need to be bent or broken. (It can provide this reason after the fact if the situation is urgent and brooks no delay.) According to the Schmittian theory that guides Bush's war on terror, the president never has to give reasons for his actions. Alternatively, the legislature and the courts can act as rubber stamps. This latter possibility is what concerns David Dyzenhaus in his excellent anti-Schmittian chapter.

The principal problem with this superpresidentialist approach, in any case, is easy to identify. If the executive never has to give plausible-sounding reasons for its actions, it will soon cease to have any reasons, or organizing rationale, for its actions. The self-declared protector of democracy may soon be deploying, from on high, the politics of emotionalism and mendacity that Sajó observes in the low-lying antidemocratic movements of eastern Europe. That is the situation into which its Bush-league Schmittianism has plunged the American administration. Having dismantled the constitutional system of checks and balances, it is unable to give any plausible account of its priorities in the war on terror. Normally, the executive branch is allowed to use lethal force only when it has tested the factual premises of its action in some kind of adversarial process. In the war on terror, the Bush administration has jettisoned this bedrock liberal principle, confirming Avineri's worst fear, that counterterrorism will turn democracies into the mirror image of those they are trying to defeat. It also suggests that constitutions, far from being suicide pacts, include checks and balances to protect democracy from the unpredictably suicidal impulses of elected leaders.

Two competing metaphors surface repeatedly in these and other discussions of militant democracy: the "toe in the door" versus the "safety valve." That both metaphors are plausible shows why the controversy over militant democracy will not soon end.

According to the toe-in-the-door metaphor, allowing an antidemocratic party to participate in elections is unacceptably dangerous because it legitimates illegitimate aims and opens the path to a seizure of power: one person, one vote, one time. Antidemocratic parties see elections as a ladder to be tossed away once the heights of power have been scaled. Since they will use the power of the state to destroy future electoral competitors, they cannot be allowed to compete in elections.

The safety valve metaphor has opposite connotations. It implies that serious grievances should be channeled inside political institutions, rather than being pushed outside, where they will fester and perhaps explode. Groups that cannot compete in elections will not abandon their aspirations but will become conspiratorial and violent. That is why banning a radical party may prove counterproductive. The best way to tame such groups is to invite them into the democratic process, to give them a political horizon. Participation in competitive elections will display to the world that they are only one group among others and that they do not deserve to rule alone. If they are actually elected to office, the responsibility of solving practical problems will reduce their militancy and teach them the value of cooperating across party lines. We find this second logic played out in a country such as Colombia. What we can plausibly call a militant democracy is trying to defend itself there not by banning radical parties but, on the contrary, by trying to entice former guerrilla movements to *join* the political process.

Each metaphor captures a part of the truth, in other words. Taken together, they help us understand the serious difficulties confronting militant democracy. Faced with an antidemocratic movement aspiring to participate in elections, a democratic government can choose either repression or concessions, can either ban the antidemocratic movement or let it participate. Each strategy has an upside and a downside, and for a very simple reason. Antidemocratic movements have various sorts of members. Some of them will be pacified by concessions and radicalized by repression, so that allowing them to field candidates will calm them down, while keeping them out of the race will rile them up. Others will be radicalized by concessions and pacified by repression, so allowing them to run will signal government weakness and will lead to a ratcheting up of demands, while barring the door, if combined with criminalization of membership in the group, may well incapacitate the extremists. This is at least one way to explain why the debate about militant democracy, as Sajó makes clear, is destined to go on.

Cardozo Law School
Jacob Burns Institute for Advanced Legal Studies

April 2001

Working Paper Series No. 41

HATE SPEECH IN CONSTITUTIONAL JURISPRUDENCE: A COMPARATIVE ANALYSIS

By Michel Rosenfeld

HATE SPEECH IN CONSTITUTIONAL JURISPRUDENCE: A COMPARATIVE ANALYSIS

by Michel Rosenfeld*

Introduction

Hate speech -- that is, speech designed to promote hatred on the basis of race, religion, ethnicity or national origin -- poses vexing and complex problems for contemporary constitutional rights to freedom of expression[1]. The constitutional treatment of these problems, moreover, has been far from uniform as the boundaries between impermissible propagation of hatred and protected speech vary from one setting to the next. There is, however, a big divide between the United States and other Western democracies. In the United States, hate speech is given wide constitutional protection while under international human rights covenants[2] and in other Western democracies, such as Canada[3] Germany[4], and the United

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[1]I use the term "constitutional rights" in a broad sense that encompasses both rights arising under national constitutions and those established by supra-national human rights covenants, notwithstanding that, strictly speaking, the latter may be treaty based rights rather than constitutional rights.

[2]*See infra*, Part III, D.

[3]*See infra*, Part III, A.

[4]*See infra*, Part III, C.

Kingdom[5] it is largely prohibited and subjected to criminal sanctions.

The contrasting approaches to hate speech adopted respectively by the United States and other Western democracies afford a special opportunity to embark on a comparative analysis of the difficult problems posed by hate speech and of the various possible solutions to them. As we shall see, in the United States hate speech and the best ways to cope with it are conceived differently than in other Western democracies. This is due, in part, to differences in social context, and, in part, to differences in approach. It may be tempting, therefore, to endorse a purely contextual approach to hate speech encompassing a broad array of diverse constitutional responses ranging from American *laissez faire* to German vigilance. Given the trend toward globalization and the instant transnational reach of the Internet, however, a purely contextual approach would seems insufficient if not downright inadequate. For example, much Neo-Nazi propaganda is now generated in California and transmitted through the Internet to countries like Canada or Germany where Neo-Nazi groups have established a much more significant foothold than in the United States[6]. In as much as such propaganda generally amounts to protected speech in the United States, there seems to be little that can be done to limit its spread beyond American soil. Does that justify calling for a change of constitutional jurisprudence in the United States? Or, more generally, do present circumstances warrant a systematic rethinking of constitutional approaches to hate speech?

In this article, I will concentrate on these questions through a comparison of different existing

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[5]*See infra*, Part III, B.

[6]See ADL Report, "The Skinhead International; A Worldwide survey of Neo-Nazi skinheads", U.S. Newswire, June 28, 1995; "Spreading Hatred", The Boston Globe, Nov. 26, 1988, at 25; "Noting Neo-Nazi Material Internet Block Site", The Chattanooga Times, Jan. 27 1996, at A8.

constitutional approaches to hate speech. Before embarking on such a comparison, however, I will provide in Part I a brief overview of some of the most salient issues surrounding the constitutional treatment of hate speech. In the next two parts, I will examine the two principal contrasting constitutional approaches to hate speech. Part II will focus on the United States and analyze hate speech within the broader free speech jurisprudence under the American Constitution. Part III will deal with the alternative approach developed in other Western democracies and largely endorsed in the relevant international covenants. Finally, Part IV will compare the two contrasting approaches and explore how best to deal with hate speech as a problem for contemporary constitutional jurisprudence.

I. Hate Speech and Freedom of Expression: Issues and Problems

The regulation of hate speech is largely a post World War II phenomenon[7]. Prompted by the obvious links between racist propaganda and the Holocaust, various international covenants[8] as well as individual countries such as Germany[9] and even, in the decade immediately following the war, the United

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

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

[9] *See* Friedrich Kübler, *supra* at 340-47 for a discussion of the extensive German regulation against hate speech.

States[10] excluded hate speech from the scope of constitutionally protected expression. Viewed from the particular perspective of a rejection of the Nazi experience and an attempt to prevent its resurgence, the suppression of hate speech seems both obvious and commendable.

Current encounters with hate speech, however, are for the most part far removed from the Nazi case. Whereas in Nazi Germany hate speech was perpetrated by the government as part of its official ideology and policy, in contemporary democracies it is by and large opponents of the government, and in a wide majority of cases members of marginalized groups with no realistic hopes of achieving political power, who engage in hate speech. Moreover, in some cases those punished for engaging in hate speech have been members of groups long victimized by racist policies and rhetoric prosecuted for their race based invectives against people whom they perceive as their racist oppressors. Thus, for example, it is ironic that the first person convicted under the United Kingdom's Race Relations Law criminalizing hate speech was a black man who uttered a racial epithet against a white policeman[11].

Nazi racist propaganda was by and large crude and unambiguous as is some of the straight forward racist invective heard today. Contemporary hate speech cannot be confined, however, to racist insults. Precisely because of the strong post-Holocaust constraints against raw public expressions of racial hatred, present day racists often feel compelled to couch their racist message in more subtle ways. For example,

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[10] *See Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding constitutionality of a statue criminalizing group defamation based on race or religion). Although *Beauharnais* has never been formally repudiated by the Supreme Court, it is fundamentally inconsistent with more recent decisions on the subject. *See infra*, Part II.

[11] *See* Anthony Skillen "Freedom of Speech", in *Contemporary Political Philosophy* 139, 142 (Keith Graham, ed. 1982).

anti-Semites may engage in Holocaust denial or minimizing under the guise of weighing in on an ongoing historians' debate. Or, they may attack Zionism in order to blur the boundaries between what might qualify as a genuine debate concerning political ideology and what is pure and simple anti-Semitism. Similarly, American racists have on occasion resorted to what appears to be a scientific debate or invoked certain statistics -- such as those indicating that proportionately blacks commit more crimes than whites -- to promote their prejudices under the disguise of formulating political positions informed by scientific fact or theory.

Even these few observations suffice to establish that not all contemporary instances of hate speech are alike. Any assessment of whether, how, or how much, hate speech ought to be prohibited must, therefore, account for certain key variables: namely *who* and *what* are involved and *where* and *under what circumstances* these cases arise.

The *who* is always plural, for it encompasses not only the speaker who utters a statement that constitutes hate speech, but the target of that statement and the audience to whom the statement in question is addressed -- which may be limited to the target, may include both the target and others, or may be limited to an audience that does not include any member of the target group[12]. Moreover, as already mentioned,

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[12]The identity of the audience involved may be relevant for a variety of reasons, including assessing the harm produced by hate speech, and devising effective legal means to combat hate speech. For example, demeaning racist propaganda aimed at a non-target audience may be a necessary step in the creation of a political environment wherein policies of genocide might plausibly be implemented. *See generally*, Gordon Allport, *The Nature of Prejudice* (1954). Thus, the German people would have never countenanced the Nazi policy of extermination of the Jews, had it not been desensitized through years of vicious anti-Semitic propaganda, *See* F. Haiman, *Speech and Law in a Free*

not all speakers are alike. This is not only because of group affiliation, but also because of other factors. Thus, in the context of dominant majority group hate speech against a vulnerable and discriminated against minority, the impact of the hate speech in question is likely to differ significantly depending on whether it is uttered by a high government official or an important opposition leader or whether it is propaganda by a marginalized outsider group with no credibility[13]. Furthermore, even the same speaker may have to be treated differently, or at least may have a different impact which ought to be considered legally relevant, depending on whom is the target of his or her hate message. Assuming, for the sake of argument, that black hate speech against whites in the United States is not the equivalent of white hate speech against blacks,

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Society, 87 (1981). Consistent with this, hate speech directed at a non-target audience might well be much more dangerous than if exclusively addressed to a target-group audience.

From the standpoint of devising workable legal responses, the differences between different speakers and different target group audiences may also be very important. For example, in the United States where hate groups like the Neo-Nazis and the Ku Klux Klan are relatively marginalized and lack major financial means, allowing private tort suits by affected members of the relevant target groups may lead to expensive verdicts with crippling effects on the ability to function of the hate group involved. *See* The Atlanta Constitution, Nov. 1, 1998, at 6A (reporting crippling effect on Ku Klux Klan of a $37.8 Million verdict over a church fire).

[13]For example, Neo-Nazis in the United States are so marginalized and discredited that virtually no one believes that they pose any realistic danger. In contrast, a statement (that is better qualified as anti-Semitic rather than as an instance of hate speech) to the effect that the Jews have too much influence in the United States because they control the media -- which is in part true -- and the banks -- which is patently false -- uttered by the country's highest military official a few years back caused quite an uproar and led to his resignation. *See* The Nation, vol. 247, no. 8, p. 257, Oct. 3, 1988.

what about black anti-Semitism? Ought it be considered as yet another instance of black (albeit inappropriate) response to white oppression[14]? Or as an assault against a vulnerable minority? In other words, is black anti-Semitism but one aspect of a comprehensible resentment harbored by blacks against whites? Or is it but a means for blacks to carve out a common ground with white non-Jews by casting the Jews as the common enemy? And does it matter, if the dangers of anti-Semitism prove greater than those of undifferentiated anti-white hatred?

The *what* or message uttered in the context of hate speech also matters, and may or not, depending on its form and content, call for sanction or suppression. Obvious hate speech such as that involving crude racist insults or invectives can be characterized as "hate speech in form". In contrast, utterances such as Holocaust denials or other coded messages that do not explicitly convey insults, but are nonetheless designed to convey hatred or contempt, may be refereed as "hate speech in substance". At first glance, it may seem easy to justify banning hate speech in form but not hate speech in substance. Indeed, in the context of the latter, there appear to be potentially daunting line-drawing problems, as the boundary between genuine scholarly, scientific or political debate and the veiled promotion of racial hatred may not always be easy to draw. Moreover, even hate speech in form may exceptionally not be used in a demeaning way warranting suppression[15].

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[14]Because of prevailing social and economic circumstances, it has often been the case that the whites with whom black ghetto dwellers have the most -- often unpleasant -- contacts, namely shopkeepers and landlords, happen to be Jews. *See* "Surviving The Rage in Harlem", The Jerusalem Report, Feb. 8, 1996, p. 30.

[15]For example, in the United States the word "nigger" is an insulting and demeaning word that is used to refer to a person

Finally, *where* and *under what circumstances* hate speech is uttered also makes a difference in terms of whether or not it should be prohibited. As already mentioned, "where" may make a difference depending on the country, society or culture involved, which may justify flatly prohibiting all Nazi propaganda in Germany but not in the United States. "Where" may also matter within the same country or society. Thus, hate speech in an intra-communal setting may in some cases be less dangerous than if uttered in an inter-communal setting. Without minimizing the dangers of hate speech, it seems plausible to argue, for example, that hate speech directed against Germans at a Jewish community center comprising many Holocaust survivors, or a virulent anti-white speech at an all black social club in the United States, should not be subjected to the same sanctions as the very same utterance in an inter-communal setting, such as an open political rally in a town's central square.

Circumstances also make a difference. For example, even if black hate speech against whites in the United States is deemed as pernicious as white hate speech against blacks, legal consequences arguably ought to differ depending on the circumstances. Thus, for example, black hate speech ought not be penalized -- or at least not as much as otherwise -- if it occurs in the course of a spontaneous reaction to a police shooting of an innocent black victim in a locality with widespread perceptions of racial bias within the police department.

More generally, which of the above mentioned differences ought to figure in the constitutional treatment of hate speech depends on the values sought to be promoted, on the perceived harms involved,

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that is black. When uttered by a white person to refer to a black person, it undoubtedly fits the label "hate speech in form". However, as used among blacks, it often serves as an endearing term connoting at once intra-communal solidarity and implicit condemnation of white racism.

and on the importance attributed to these harms. As already noted, the United States approach to these issues differs markedly from those of other Western democracies. Before embarking on a comparison of these contrasting approaches however, it is necessary to specify two important points concerning the scope of the present inquiry: 1) there will be no discussion of the advantages or disadvantages of various approaches to the regulation of hate speech, such as imposition of criminal versus civil liability; and 2) since all the countries which will be discussed below including the United States deny protection to hate speech that incites violence -- or, to put it in terms of the relevant American jurisprudence, that poses "a clear and present danger" of violence -- the focus of what follows will not be on such speech. Instead, it will be on hate speech that incites racial hatred or hostility but that falls short of incitement to violence. This last limitation is important for two reasons. First, prohibiting hate speech that constitutes a clear incitement to immediate violence hardly seems a difficult decision. Second, criticism of the United States for tolerating hate speech does not always seem to take into account the difference between incitement to violence and incitement to discrimination or hatred. But, unless this difference is kept in mind, the discussion is likely to become confusing. Indeed, the key question is not whether speech likely to lead to immediate violence ought to be protected, but rather whether hate speech not likely to lead to such immediate violence, but capable of producing more subtle and uncertain, albeit perhaps equally pernicious, evils ought to be suppressed or fought with more speech.

II Hate Speech and the Jurisprudence of Free Speech in the United States

Freedom of speech is not only the most cherished American constitutional right, but also one of its foremost cultural symbols[16]. Moreover, the prominence of free speech in the United States is due to many different factors, including strong preference for liberty over equality, commitment to individualism, and a natural rights tradition derived from Locke which champions freedom from the state -- or negative freedom -- over freedom through the state -- or positive freedom[17]. In essence, free speech rights in the United States are conceived as belonging to the individual against the state, and they are enshrined in the First Amendment to the Constitution as a prohibition against government interference rather than as the imposition of a positive duty on government to guarantee the receipt and transmission of ideas among its citizens[18]

Even beyond hate speech, freedom of speech is a much more pervasive constitutional right in the United States than in most other constitutional democracies[19]. Indeed, Americans have a deep seated

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[16]See Lee Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* 7 (1986).

[17]For a thorough discussion of the distinction between positive and negative liberty, see Isaiah Berlin, "Two Concepts of Liberty" in his *Four Essays on Liberty* (1969).

[18]The First Amendment provides, in relevant part, that "Congress shall make no law ... abridging the freedom of speech or of the press ..."

[19]For example, flag burning see *Texas* v. *Johnson*, 491 U.S. 397 (1989) a crude parody of a church leader, *Hustler Magazine* v. *Falwell*, 485 U.S. 46 (1988), and publication of sensitive classified diplomatic information susceptible of adversely

belief in free speech as a virtually unlimited good and a strong fear that an active government in the area of speech will much more likely result in harm than in good. In spite of this, however, there have been significant discrepancies between theory and practice throughout the twentieth century, with the consequence that American protection of speech has been less extensive than official rhetoric or popular belief would lead one to believe. For example, although political speech has been widely recognized as the most worthy of protection[20], for much of the twentieth century laws aimed at suppressing or criminalizing socialist and communist views were routinely upheld as constitutional[21]. With respect to communist views, therefore, American protection of political speech has been more limited than that afforded by most other Western democracies.

American theory and practice relating to free speech is ultimately complex and not always consistent. Accordingly, to better understand the American approach to hate speech -- which has itself changed over time[22] -- it must be briefly placed in its proper historical and theoretical context.

In the broadest terms, one can distinguish four different historical stages in which the perceived principal function of free speech saw significant changes. On the other hand, there have also been four

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affecting sensitive peace negotiations, *New York Times* v. *United States* (The Pentagon Press Case) , 403 U.S. 713 (1971), were all held to amount to protected speech.

[20]See, *e.g.*, Alexander Meiklejon, *Free Speech and its Relation to Self-Government* (1948).

[21]*See, e.g., Debs* v. *United States*, 249 U.S. 211 (1919); *Gitlow* v. *New York*, 268 U.S. 652 (1925); *Dennis* v. *United States*, 341 U.S. 494 (1951).

[22]*See supra* note --.

principal philosophical justifications of free speech which have informed or explained the relevant constitutional jurisprudence. Moreover, the philosophical justifications do not necessarily correspond to the historical stages, but rather intertwine and overlap with them. Nor do sharp boundaries separate the four historical stages, which run into each other, and in which free speech fulfills various different functions. The principal marking point between these various stages is a shift in the *dominant* function of free speech. All this makes for a complex construct with a large number of possible permutations. Accordingly, only the broadest outlines of the historical and theoretical context of American free speech jurisprudence will be considered in what follows.

Of the four historical stages of free speech, the first three have had definite -- if often only implicit -- influences on the Supreme Court's free speech jurisprudence. In contrast, the fourth stage, which is still in its infancy, thus far has had virtually no effect on the judicial approach to free speech issues, though it has already made a clear imprint on certain legislators and scholars [23]. The first of these historical stages dates back to the 1776 War of Independence against Britain, and establishes protection of the people against the government as the principal purpose of free speech[24]. Once democracy had become firmly entrenched in the United States, however, the principal threat to free speech came not from the government but from the "tyranny of the majority". Accordingly, in stage two, free speech was meant above all to protect

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[23]An example of legislation consistent with stage four is the ordinance held unconstitutional in *R.A.V.* v. *City of St. Paul*, 505 U.S. (1992). For scholarship informed by a stage four perspective, see, e.g., Mary Matsuda, et al., eds. *Words That Wound: Critical Race Theory, Assaultive Speech, and The First Amendment* (1993); and, Katharine Mackinnon, *Feminism Unmodified: Discourses on Life and Law (1987)*.

[24]*See* Lee Bollinger, *The Tolerant Society*, supra, at 144.

proponents of unpopular views against the wrath of the majority[25]. Stage three, which roughly covers the period between the mid-ninety fifties to the ninety-eighties corresponds to a period in the United States in which many believed that there had been an end to ideology[26], resulting in a widespread consensus on essential values[27]. Stage three is thus marked by pervasive conformity and the principal function of free speech shifts from lifting restraints on *speakers* to insuring that *listeners* remain open-minded[28]. Finally, beginning in the ninety eighties with the rapid expansion of feminist theory, critical race theory and other alternative discourses -- all of which attacked mainstream and official speech as inherently oppressive, white male dominated discourse -- there emerged a strong belief in the pluralization and fragmentation of discourse. Consistent with that belief, the principal role of free speech in stage four becomes the protection of oppressed and marginalized discourses and their proponents against the hegemonic tendencies of the discourses of the powerful[29].

Of these four stages, stage three affords the greatest justification for toleration of hate speech[30], while stage four provides the strongest case for its suppression -- at least to the extent that it targets racial or religious minorities. Stages one and two do not provide clear cut answers as the perceived evils of hate

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[25] *Id.*

[26] *See, e.g.,* Daniel Bell, *The End of Ideology* (1965).

[27] See Lee Bollinger, *The Tolerant Society, supra,* at 143-44.

[28] *Id.*

[29] *See, e.g.,* the works by Matsuda and Mackinnon cited in note ---, *supra.*

[30] For an extended argument in favor of such toleration from a stage three perspective, see Lee Bollinger, *The Tolerant Society, supra.*

speech are likely to fluctuate depending on the circumstances. Assuming in stage one that hate speech is not promoted by government, the magnitude of the harms associated with it would depend on the degree of sympathy or revulsion which it produces in official circles. In stage two, on the other hand, even if those who engage in hate speech constitute but a very small minority of the population, the danger posed by hate speech would depend on whether political majorities tend to agree with that speech's underlying message, or whether they are seriously disturbed by it and firmly committed to combating the views it seeks to convey.

Assessment of how hate speech might fare under the four different historical stages is made much more difficult if the four main philosophical justifications for free speech in the United States are taken into proper account. These four justifications can be referred to respectively as: the justification from democracy; the justification from social contract; the justification from the pursuit of the truth; and the justification from individual autonomy[31]. As we shall see, each of these justifications ascribes a different scope of legitimacy to free speech. Moreover, even different versions of the same justification lead to shifts in the boundaries between speech that requires protection and speech that may be constitutionally restricted, and such shifts are particularly important in the context of hate speech.

The justification from democracy is premised on the conviction that freedom of speech serves an indispensable function in the process of democratic self-government[32]. Without the freedom to convey and

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[31]For an extensive discussion of philosophical justifications of free speech that both overlaps with, and differs from, the present discussion, *see* Frederick Schauer, *Free Speech: A Philosophical Enquiry* (1982).

[32]The principal exponent of this view was Alexander Meiklejohn *see* his *Free Speech and its Relation to Self-*

receive ideas, citizens cannot successfully carry out the task of democratic self-government. Accordingly, political speech needs to be protected, but not necessary all political speech[33]. If the paramount objective is the preservation and promotion of democracy, then anti-democratic speech in general, and hate and political extremist speech in particular, would in all likelihood serve no useful purpose, and would therefore not warrant protection[34]

The justification from social contract theory is in many ways similar to that from democracy, but the two do not necessarily call for protection of the same speech. Unlike the other three justifications, that from social contract theory is at bottom procedural in nature. Under this justification, fundamental political institutions must be justifiable in terms of an actual or hypothetical agreement among all members of the relevant society [35], and significant changes in those institutions must be made only through such agreements. Just as in the case of justification from democracy, in that from social contract there is a need for free exchange and discussion of ideas. Unlike the justification from democracy, however, that from the social contract cannot exclude *ex ante* any views which, though incompatible with democracy, might be relevant to a social contractor's decision to embrace the polity's fundamental institutions or to agree to any

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Government, supra.

[33]Meiklejohn himself had a broad view of political speech, and advocated an extensive protection of it.

[34]It is of course possible to maintain that toleration of extremist antidemocratic speech would tend to invigorate the proponents of democracy and hence ultimately strengthen rather than weaken democracy. Be that as it may, toleration of anti-democratic views is not logically required for purposes of advancing self-governing democracy.

[35]*See*, e.g., John Rawls, *A Theory of Justice* 11-12 (1971).

particular form of political organization. Accordingly, the justification from social contract seems to require some tolerance of hate speech, if not in form then at least in substance.

The justification from the pursuit of the truth originates in the utilitarian philosophy of John Stuart Mill. According to Mill, the discovery of truth is an incremental empirical process that relies on trial and error and that requires uninhibited discussion[36]. Mill's justification for very broad freedom of expression was imported into American constitutional jurisprudence by Justice Oliver Wendell Holmes and became known as the justification based on the free marketplace of ideas[37]. This justification, which has become dominant in the United States ever since[38], is premised on the firm belief that truth is more likely to prevail through open discussion (even if such discussion temporarily unwittingly promotes falsehoods) than through any other means bent on eradicating falsehoods outright.

Mill's strong endorsement of free speech was rooted in his optimistic belief in social progress. According to his view, truth would always ultimately best falsehood so long as discussion remained possible, and hence even potentially harmful speech should be tolerated as its potential evils could best be minimized through open debate. Accordingly, Mill advocated protection of all speech so long as it falls short of incitement to violence.

Although Holmes's *justification* of free expression is very similar to Mill's, his *reasons* for embracing the free marketplace of ideas are in sharp contrast to those of Mill. Unlike Mill, Holmes was

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[36]*See* John Stuart Mill, *On Liberty* (1859).

[37]*See Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

[38]*See* Frederick Schauer, *Free Speech: A Philosophical Enquiry*, *supra* at 15-16.

driven by skepticism and pessimism and expressed grave doubts about the possibility of truth. Because of this, Holmes justified his free marketplace approach on pragmatic grounds. Since most strongly held views eventually prove false, any limitation on speech is most likely grounded on false ideas. Accordingly, Holmes was convinced that a free market place of ideas was likely to reduce harm in two distinct ways: it would lower the possibility that expression would be needlessly suppressed based on falsehoods; and it would encourage most people who tend stubbornly to hold on to harmful or worthless ideas to develop a healthy measure of self-doubt[39].

Like Mill, Holmes did not endorse unlimited freedom of speech. For Holmes speech should be protected unless it poses a "clear and present danger" to people, such as falsely shouting "fire" in a crowded theater and thereby causing panic[40]. Both Mill's and Holmes's justification from the pursuit of truth justify protection of hate speech that does not amount to incitement to violence. Indeed speech amounting to an "incitement to violence" is but one instance of speech that poses a "clear and present danger". In the end, whether speech incites to violence or creates another type of clear and present danger, it does not deserve protection -- under the justification from the pursuit of truth -- because it is much more likely to lead to harmful action than to more speech, and hence it undermines the functioning of the marketplace of ideas.

In the end, Mill and Holmes represent two sides of the same coin. Mill overestimates the potential of rational discussion while Holmes's underestimates the potential for serious harm of certain types of speech that fall short under the clear and present danger test. The justification from the pursuit of truth is

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[39]*See Abrams* v. *United States*, supra at 630.

[40]*See Schenk* v. *United States*, 249 U.S. 47 (1919).

at bottom pragmatic. As we shall see below, however, because both the Millian and Holmesian pragmatic reasons for the toleration of hate speech are based on dubious factual claims, they may in the end as much undermine as they may bolster any pragmatic justification of tolerance of hate speech that falls short of incitement to violence [41].

Unlike the three preceding justifications which are collective in nature, the fourth justification for free speech, that from autonomy, is primarily individual-regarding. Indeed, democracy, social peace and harmony through the social contract, and pursuit of the truth, are collective goods designed to benefit society as a whole. In contrast, individual autonomy and well being through self-expression are presumably always of benefit to the individual concerned without in many cases necessarily producing any further societal good.

The justification from autonomy is based on the conviction that individual autonomy and respect require protection of unconstrained self-expression[42]. Accordingly, all kinds of utterances arguably linked to an individual's felt need for self-expression ought to be afforded constitutional protection. And consistent with this, the justification from autonomy clearly affords the broadest scope of protection for all types of speech.

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[41]For an extended critique of the use of pragmatism to justify free speech protection of hate speech that does not pose a clear and present danger of violence, see Michel Rosenfeld, *Just Interpretations: Law Between Ethics and Politics* (1998), Chapter 6.

[42]*See* Ronald Dworkin, *Taking Rights Seriously* (1977); David Richards, "Free Speech and Obscenity Law: Toward A Moral Theory of the First Amendment," 123 U. of Pennsylvania L. Rev. 45 (1975).

As originally conceived, the justification from autonomy seemed exclusively concerned with the self-expression needs of speakers. Since hate speech could plausibly contribute to the fulfillment of the self-expression needs of its proponents, it would definitely seem to qualify for protection under the justification from autonomy.

Under a less individualistic -- or at least less atomistic -- conception of autonomy and self-respect, however, focusing exclusively on the standpoint of the speaker would seem insufficient. Indeed, if autonomy and self-respect are considered from the standpoint of listeners, then hate speech may well loom as prone to undermining the autonomy and self-respect of those whom it targets. This last observation becomes that much more urgent under a stage four conception of the nature and scope of legitimate regulation of speech. Indeed, if the main threat of unconstrained speech is the hegemony of dominant discourses at the expense of the discourses of oppressed minorities, then self-expression of the powerful threatens the autonomy of those whose voices are being drowned, and hate speech against the latter can only exacerbate their humiliation and the denial of their autonomy.

As these last observations indicate, the possible intersections between the four historical stages and the four philosophical justifications are multiple and complex. Current American constitutional jurisprudence concerning hate speech, however, relies by and large on the justification from the pursuit of truth and tends to espouse implicitly a stage three -- or a combination of stage two and stage three --- vision on the proper role of speech.

Turning briefly to some of the most salient cases, it must first be reiterated that current judicial treatment of hate speech in the United States is of relatively recent vintage. Indeed, less than fifty years ago,

in *Beauharnais* v. *Illinois*[43], the Supreme Court upheld a conviction for hate speech emphasizing that such speech amounted to group defamation, and reasoning that such defamation was in all relevant respects analogous to individual defamation, which had traditionally been excluded from free speech protection. Beauharnais, a white supremacist, had distributed a leaflet accusing blacks, among other things, of rape, robbery and other violent crimes. Although Beauharnais had urged whites to unite and protect themselves against the evils he attributed to blacks, he had not been found to have posed a "clear and present danger" of violence.

Beauharnais has never been explicitly repudiated, but it has been thoroughly undermined by subsequent decisions. Already, the dissenting opinions in *Beauharnais* attacked the Court's majority rationale, by stressing that both the libel and the "fighting words"[44] exceptions to free speech involved utterances addressed to individuals, and were hence unlikely to have any significant impact on public debate. In contrast, group libel was a public, not private, matter, and its prohibition would inhibit public debate.

The current constitutional standard, which draws the line at incitement to violence, was established in the 1969 *Brandenburg* v. *Ohio*[45] decision. *Brandenburg* involved a leader and several members of the Ku Klux Klan who in a rally staged for television (in front of only a few reporters) made several

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[43]343 U.S. 250 (1952).

[44]In *Chaplinsky* v. *New Hampshire*, 315 U.S. 565 (1942) the Supreme Court held that insults addressed to an individual that are so offensive as to readily prompt a violent reaction did not fall within the ambit of constitutionally protected speech.

[45]395 U.S. 444 (1969).

derogatory remarks mainly against blacks, but also some against Jews. In addition, while not threatening any imminent or direct violence, the speakers suggested that blacks should return to Africa and Jews to Israel, and announced that they would petition the government to act, but that if it refused they would have no other recourse than to take matters in their own hands. Selected portions of this rally were later broadcast on local and national television.

The Supreme Court in a unanimous decision set aside Brandenburg's criminal conviction concluding that the Klan may have advocated violence, but that it had not incited it. Significantly, in drawing the line between incitement and advocacy, the Court applied to hate speech a standard it had recently established to deal with communist speech involving advocacy of forcible overthrow of the government[46]. In so doing, the Court's decision raises the question of whether hate speech ought to be equated with (politically) extremist speech. While the intricacies of this issue remain beyond the scope of this article, two brief observations seem in order. First, extremist speech based on a political ideology like communism is above all political speech and it does not necessarily involve personal hatred. Second, even if extremist speech involved such hatred -- e.g., if communists seek to fuel passions against those whom they call "capitalist pigs" -- such hatred cannot be simply equated with virulent anti-Semitism or racism.

If one case has come to symbolize the contemporary political and constitutional response to hate speech in the United States, it is the Skokie case in the late 1970's. This case arose out of a proposed march by Neo-Nazis in full SS uniform with swastikas through Skokie, a suburb of Chicago with a large Jewish population, including thousands of Holocaust survivors. The local municipal authorities took

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[46]*See Yates v. United States*, 354 U.S. 298 (1957) (conviction for mere advocacy held unconstitutional).

measures -- including enacting new legislation -- designed to prevent the march, but both state and federal courts eventually invalidated the measures in question as violative of the Neo-Nazis's free speech rights[47].

The Neo-Nazis made it clear that their choice of Skokie for the march was intended to upset Jews, by confronting them with their message. The constitutional battle focused on whether the proposed march in Skokie would amount to an "incitement to violence". Based on the testimony of Holocaust survivors residing in Skokie, who asserted that exposure to the swastika might provoke them to violence, a lower state court determined that such a march could be prohibited[48].

That decision was reversed on appeal, on the ground that the lower court had wrongly concluded that the proposed march had met the "incitement to violence" requirement[49]. While acknowledging the intensity of the likely feelings of Holocaust survivors, the court held that they were not sufficient to prohibit the proposed march[50]. The court did not specify what standard would have to be met to justify banning display of the swastika. What, if a Jew who is not a Holocaust survivor had testified that a Neo-Nazi march with a Swastika would move him to violence? Or else, what if a gentile had thus testified?

These uncertainties illustrate some of the difficulties associated with the "incitement to violence"

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[47]*See Smith* v. *Collin*, 436 U.S. 953 (1978); *National Socialist Party* v. *Skokie*, 432 U.S. 43 (1977); *Village of Sokie* v. *National Socialist Party*, 69 Ill. 2d. 605, 373 N.E. 2d. 21 (1978).

[48]*Village of Skokie* v. *National Socialist Party of America* 51 Ill. App. 3d. 279 (1977).

[49]*Village of Skokie* v. *National Socialist Party of America* 69 Ill. 605, 614 (1978) Id., at 615.

[50]*Id.*, at 615.

standard, even if one assumes that it is the right standard. Be that as it may, the Skokie controversy ultimately fizzled, for after their legal victories, the Neo-Nazis decided not to march in Skokie. Instead, they marched in Chicago[51] far from any Jewish neighborhood. Because of their very marginality, and because they had no sway over the larger non-target audience in the United States, the actual march by the Neo-Nazis did much more to showcase their isolation and impotence than to advance their cause. Under those circumstances, allowing them to express their hate message probably contributed more to discrediting them than would have been the case had the prohibition against their march been upheld by the courts.

Because of contextual factors prevalent in the United States during the late 1970's, the result in the Skokie case may appear to be pragmatically justified, and to fit within a stage three conception of free speech[52]. Indeed, in as much as the Neo-Nazi message had no appeal , and reminded its listeners of past horrors as well as of the fact that the United States had to go to war against Hitler's Germany, it could conceivably be analogized to a vaccine against total complacency. Moreover, by the very falsehood of its ring, utterance of the Neo-Nazi message could well be interpreted as reinforcing the belief in a need for virtually unlimited free speech associated with the justification from the pursuit of the truth[53].

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[51]*See Smith* v. *Collin*, 439 U.S. 916, 917 (1978) (Blackmun, J. dissenting).

[52]For an extended argument in support of the judicial handling of the Skokie case within the scope of a stage three conception, *see* Lee Bollinger, *The Tolerant Society, supra*.

[53]It is significant, consistent with these observations, that Jews were on both sides of the Skokie controversy, as civil rights organization defended the Neo-Nazis' right to speak. For a further analysis of this fact, *see* Michel Rosenfeld, "Extremist Speech and the Paradox of Tolerance" (Book Review),

Even if the Skokie case was rightly decided, the constitutional jurisprudence which it helped to shape has proved quite troubling when applied under less favorable circumstances. This conclusion becomes manifest from a consideration of the case of *R.A.V.* v. *City of St. Paul*[54], involving the burning of a cross inside the fenced yard of a black family by young white extremists[55]. The latter were convicted under a local criminal ordinance which provided in relevant part that

> Whoever places on public or private property a symbol, object not limited to, a burning cross or Nazi swastika, which one knows... arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct...[56]

In a unanimous decision, the U.S. Supreme Court reversed the conviction holding that the above ordinance was unconstitutional. In essence, the court deemed the ordinance unconstitutional for two principal reasons: First, it targeted speech that would not amount to an incitement to violence; and, second, even granting that a burning cross qualified as "fighting words", thus meeting the incitement standard, by criminalizing some incitements but not others, the ordinance was based on impermissible viewpoint discrimination. Indeed, while the ordinance criminalized expression likely to incite violence on the basis of race or religion, it did not criminalize similar expression equally likely to incite violence on other bases, such as homosexuality.

Because of the pervasive nature of racism and the long history of oppression and violence against

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100 Harvard L. Rev. 1487 (1987).

[54]505 U.S. 377 (1992).

[55]The burning of a cross long a practice by white supremacists such as those belonging to the Ku Klux Klan has been a symbol of virulent racism much like the display of the swastika has been associated with virulent anti-Semitism.

[56]St. Paul Bias-Motivated Crime Ordinance (1990).

blacks in the United States, and given the frightening associations evoked by burning crosses, the situation in *R.A.V.* cannot be equated with that involved in the Skokie case. Of course, swastikas tend to inspire as much fear and anger in Jews as burning crosses do in blacks. The major difference between the Skokie case and *R.A.V.*, however, has to do not with the perniciousness of the respective symbols involved, but with the different factual and emotional impact of these symbols on the target and non-target audiences before whom they were meant to be displayed.

Significantly, the Holocaust survivors who testified that the proposed Neo-Nazi march in Skokie would lead them to violence emphasized that their reaction would be triggered by memories of the past. Moreover, though there was some anti-Semitism in the United States in he 1970's, the small fringe Neo-Nazis were so discredited that it seemed most unlikely that they would in any way, directly or indirectly, advance the cause of anti-Semitism[57]. In contrast, cross burning produced fears not only concerning the past but also the present and the future, and not based on events that had taken place across an ocean, but on events that had marked the sad history of race relations in the United States from the founding of the republic. Indeed, the cross burning in *R.A.V.* occurred in a racially mixed neighborhood in a era in which several homes of black persons who had moved into white neighborhoods had been burned in efforts to

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[57]This last observation may no longer hold true in view of certain more recent events, which have increased the profile of white supremacist extremists. For example, in a recent incident, several children were shot at a Jewish day-care center in Los Angeles, *See* "Community Center Shootings", The Los Angeles Times, Aug. 11, 1999, p.A1; and a white supremacist went on a shooting spree which included the firing of many shots that did not cause any injuries near a synagogue in Chicago. During that same spree, however, that individual did kill a black person and an Asian. *See* The Chronicle of Higher Education, Jul. 16, 1999, p. A8.

dissuade members of a growing black middle class from moving into white neighborhoods[58].

In sum, though both the proposed march in Skokie and the cross burning in *R.A.V.* were meant to incite hatred on the basis of religion and race respectively, their effects were quite different. Skokie mainly produced contempt for the marchers and a reminder that there was little danger of an embrace of Nazism in the United States. *R.A.V.,* on the other hand, played on pervasive, and to a significant degree justified, fears concerning race relations in America. Undoubtedly, cross burning itself is rejected as repugnant by the vast majority of Americans. The underlying racism associated with it, and the message that blacks should remain in their own segregated neighborhoods, however, unfortunately still have adherents among a non-negligible portion of whites in America.

The ultimate difference between the impact of the hate speech in Skokie and that in *R.A.V.* relates to the emotional reactions of the respective target and non-target audiences involved. In Skokie, the vast majority of Jews felt no genuine present or future threat whereas the non-target gentile audience felt mainly contempt and hostility towards the Nazi hate message. *In R.A.V.,* however, the target audience definitely experienced anger, fear and concern while the non-target audience was split along a spectrum spanning from revulsion to mixed emotions to downright sympathy for the substance of the hate message if not for its form.

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[58]*See* e.g., UPI, Nov. 20, 1984, Tuesday AM Cycle; Fed. 18, 1987, Wednesday AM Cycle.

III. The Treatment of Hate speech Under International Human Rights Norms and in the Constitutional Jurisprudence of Other Western Democracies

If free speech in the United States is shaped above all by individualism and libertarianism, collective concerns and other values such as honor and dignity lie at the heart of the conceptions of free speech that originate in international covenants or in the constitutional jurisprudence of other Western democracies. Thus, for example, Canadian constitutional jurisprudence is much concerned with multiculturalism and group-regarding equality[59]. For its part, the German Constitution sets the inviolability of human dignity as its paramount value[60], and specifically limits freedom of expression to the extent necessary to protect the young and the right to personal honor[61].

These differences have had a profound impact on the treatment of hate speech. In order to better appreciate this, I shall briefly focus on salient developments in three countries and under certain international covenants. The three countries in question are: Canada, the United Kingdom and Germany.

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[59]See Kathleen Mahoney, "The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography", 55 Law and Contemporary Problems 77 (1992).

[60]See German Basic Law, Art 1.

[61]German Basic Law, Art. 5 (2).

A) Canada

It is particularly interesting to start with the contrast between the United and Canada, two neighboring countries which were once British colonies and which are now advanced industrialized democracies with large immigrant populations with roots in a vast array of countries and cultures. Moreover, while Canada has produced a constitutional jurisprudence that is clearly distinct from that of the United States, the Canadian Supreme Court has displayed great familiarity and mastery of American jurisprudence[62].

Although both the United States and Canada are multiethnic and multicultural polities, the United States has embraced an assimilationalist ideal symbolized by the metaphor of the "melting pot" while Canada has placed greater emphasis on cultural diversity and has promoted the ideal of an "ethnic mosaic"[63]. Consistent with this difference, the Canadian Supreme Court has explicitly refused to follow the American approach to hate speech. In a closely divided decision, the Canadian Court upheld the criminal conviction of a high school teacher who had communicated anti-Semitic propaganda to his pupils in the leading case of *Regina* v. *Keegstra*[64].

Keegstra told his pupils that Jews were "treacherous", "subversive", "sadistic", "money loving", "power hungry" and "child killers". He went on to say that the Jews "created the Holocaust to gain

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[62]One example is the thorough discussion of American decisions and rejection of the American approach in the majority opinion in Canada's leading hate speech case, *Regina* v. *Keegstra*, 3 R.C.S. 697 (1990).

[63]See Will Kymlycka, *Multicultural Citizenship* 14 (1995).

[64]3 S.C.R. 687 (1990).

sympathy". He concluded that Jews were inherently evil and expected his students to reproduce his teachings on their exams in order to avoid bad grades[65].

The criminal statue under which Keegstra had been convicted prohibited the willful promotion of hatred against a group identifiable on the basis of color, race, religion or ethnic origin[66]. The statute in question made no reference to incitement to violence, nor was there any evidence that Keegstra had any intent to lead his pupils to violence.

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

> "(1) seeing and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed"[67]

Thus, the Canadian protection of freedom of expression like the American relies on the justification from democracy, on that from the pursuit of truth and on that from autonomy. The Canadian conception of autonomy, however, is less individualistic than its American counterpart as it seemingly places equal emphasis on the autonomy of listeners as on that of speakers.

In spite of these affinities, the Canadian Supreme Court refused to follow the American lead and to draw the line at incitement to violence. Stressing the Canadian Constitution's commitment to multicultural

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[65] 3 S.C.R. at 714.

[66] *Id.*, at 713.

[67] *Id.*, at 728.

diversity, group identity, human dignity and equality[68], the Court adopted a nuanced approach designed to harmonize these values with those embedded in freedom of expression. And based on this approach, the Court concluded that hate propaganda such as that promoted by Keegstra did not warrant protection as it did more to undermine mutual respect among diverse racial, religious and cultural groups in Canada than to promote any genuine expression needs or values.

In reaching its conclusion, the Canadian Court considered the likely impact of hate propaganda on both the target-group and on non-target group audiences. Members of the target group are likely to be degraded and humiliated, to experience injuries to their sense of self-worth and acceptance in the larger society, and may as a consequence avoid contact with members of other groups within the polity [69]. Those who are not members of the target group, or society at large, on the other hand, may become gradually de-sensitized and may in the long run become accepting of messages of racial or religious inferiority[70].

Not only does the Canadian approach to hate speech focus on gradual long-term effects likely to pose serious threats to social cohesion rather than merely on immediate threats to violence, but it also departs from its American counterpart in its assessment of the likely effects of speech. Contrary to the American assumption that truth will ultimately prevail, or that speech alone may not lead to truth but is unlikely to produce serious harm, the Canadian Supreme Court is mindful that hate propaganda can lead to great harm by bypassing reason and playing on the emotions. In support of this, the Court cited approvingly the following observations contained in a study conducted by a committee of the Canadian

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[68] *Id.*, at 736.

[69] *Id.*, 746.

[70] *Id.*, at 747.

Parliament:

> "The success of modern advertising, the triumphs of impudent propaganda such as Hitler's have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by historical, emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field."[71]

In short, the Canadian treatment of hate speech differs from its American counterpart in two principal respects: First, it is grounded on somewhat different normative priorities; and second, the two countries differ in their practical assessments of the consequences of tolerating hate speech. Under the American view, there seems to be a greater likelihood of harm from suppression of hate speech that falls short of incitement to violence than from its toleration. From a Canadian perspective, on the other hand, dissemination of hate propaganda seems more dangerous than its suppression as it is seen as likely to produce enduring injuries to self-worth and to undermine social cohesion in the long run.

B) The United Kingdom

Unlike the United States and Canada, the United Kingdom does not have a written constitution. Nevertheless, it recognizes a right to freedom of expression through its adherence to international covenants, such as the European Convention on Human Rights, and through commitment to constitutional values inherent in its rule of law tradition[72]. Moreover, the United Kingdom has criminalized hate speech

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[71] *Id.*

[72] See ECHR, Art.10, and the decision by the *House of Lords* (sitting as a court of law) *in Regina v. Secretary of State for the Home Department, ex parte Brind.* [1991] 1 AC 696 (freedom of expression considered a basic right under both written and written constitutions). Furthermore, through adoption of the Human Rights Act of 1998, which became effective in October 2000, the United Kingdom has incorporated ECHR Art. 10 into

going back as far as the seventeenth century. The focus of British regulation of free speech has shifted over the years, starting with concern with reinforcing the security of the government, continuing with preoccupation with incitement to racial hatred among non-target audiences, and culminating with the aim of protecting targets against racially motivated harassment. As we shall see, the results of British regulation have been mixed, with significant success against Fascists and Nazis, but with much less success in attempts to defuse racial animosity between whites and non-whites.

The seventeenth century offense of seditious libel punished the utterance or publication of statements with "an intention to bring into hatred and contempt or to excite disaffection against the person of Her Majesty.... or to promote feelings of ill-will and hostility between different classes of her subjects"[73]. To the extent that seditious libel allows for punishment of political criticism of the government, it contravenes a core function of modern freedom of expression rights. Although seditious libel was primarily used to punish those perceived to pose a threat to the monarchy, occasionally, it was used in the context of what today is called "hate speech"[74]. Thus, in *Regina* v. *Osborne*[75] the publishers of a pamphlet that asserted that certain Jews had killed a woman and her child because the latter's father was a Christian were convicted of seditious libel. As a consequence of distribution of the pamphlet some Jews were beaten and

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domestic law, thus making it directly applicable before British courts. *See* Thomas Morton, "Free Speech v. Racial Aggravation" 149 New Law Journal 1198 (1999).

[73]Anthony Lester and Geoffrey Bindman, *Race and Law in Great Britain* 345 (1972).

[74]*Id.*

[75]2 Swanst. 503n (1732).

threatened with death[76]. As this case involved direct incitement to violence and a clear threat to the maintenance of public order, it may be best viewed as vindicating government dominance and control rather than as protecting the Jews from group defamation.

Because seditious libel can be used to frustrate criticism of government, it can pose a threat to the kind of vigorous debate that is indispensable in a working democracy. Significantly, as used in the early twentieth century seditious libel became rather ineffective as convictions could only be obtained upon proof of direct incitement to violence or breach of public order[77]. In 1936, Parliament adopted Section 5 of the Public Order Act[78]. This legislation, which proved useful in combating the rise of British Fascism prior to and during World War II, relaxed the seditious libel standards in two critical respects: first it allowed for punishment of speech "likely" to lead to violence even if it did not actually result in violence; and, second it allowed for punishment of mere intent to provoke violence[79].

After World War II, the United Kingdom enacted further laws against hate propaganda, consistent with its obligations under international covenants[80]. Thus, in 1965, the British Parliament enacted Section 6 of the Race Relations Act (RRA 1965) which made it a crime to utter in public or to publish words "which are threatening, abusive or insulting" and which are intended to incite hatred on the basis of race,

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[76]See Anthony Lester and Geoffrey Bindman, *supra*, at 345.

[77]*Id.*, at 347.

[78]POA, 1936, ch 6, § 5.

[79]*See* Nathan Courtney, "British and United States Hate Speech Legislation: A Comparison" 19 Brook. J . Int'l L. 727, 731 (1993).

[80]*Id.*, at 733.

color or national origin[81].

The RRA 1965 focuses on incitement to hatred rather than on incitement to violence, but it reintroduces proof of intent as a prerequisite to conviction. This makes prosecution more difficult, as evinced by the acquittal in the 1968 *Southern News* case[82]. The newspaper involved a publication of the Racial Preservation Society, which advocated the "return of people of other races from this overcrowded island to their own countries". At trial the publishers asserted that their paper addressed important social issues and that it did not attempt to incite hatred. Because of the prosecution's failure to establish the requisite intent, the net result of *Southern News* was the dissemination of its racist views in the mainstream press, and a judicial determination that its message the was legally protected expression of a political position rather than illegal promotion of hate speech.

The problem posed by *Southern News* was remedied by removal of the intent requirement in the Race Relations Act of 1976 (RRA, 1976)[83]. Moreover, the RRA of 1965 did lead to a series of convictions, but a number of these obtained against leaders of the Black Liberation Movement in the late 1960's raise disturbing questions if not about the law itself, at least about its enforcement. For example, in *Regina* v. *Malik*[84], the black defendant was convicted and sentenced to a year in prison for having asserted that whites are "vicious and nasty people" and for stating, inter alia,

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[81]RRA 1965, ch 73 § 6 (1).

[82]This is an unreported case discussed in the London Times, March 28, 1968 edition, at 2.

[83]See RRA, 1976, ch. 74 § 70.

[84]52 Crim. App. 140 (1968).

> "I saw in this country in 1952 white savages kicking black women. If you ever see a white man lay hands on a black woman, kill him immediately. If you love our brothers and sisters you will be willing to die for them."

The defendant admitted that his speech was offensive to whites but argued that he had a right to respond to the evils that whites had perpetrated against blacks[85]. In another case, four blacks were convicted of incitement to racial hatred for a speech made at Hyde Park's Speakers Corner in which they called on black nurses to give the wrong injection to white people.[86]. The court was unswayed by the defendants' claim that they were expressing their frustrations as blacks who had to endure white racism[87].

The laws discussed thus far have focused on threats to the public and on promotion of hatred through persuasion of non-target audiences. In 1986, however, Parliament added Section 5 of the Public Order Act, which made hate speech punishable if it amounted to harassment of a target group or individual, and in 1997 it enacted the Protection from Harassment Act[88]. These provide more tools in the British legal arsenal against hate speech, but have not thus far led to any clearer or more definitive indication of the ultimate boundaries of punishable hate speech in the United Kingdom. In the end, the problem may have to do less with the particular legal regime involved, than with the social and political context in which that

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[85]Although the above cited passage urges violence if certain conditions are met, it clearly falls short of an "incitement" to violence. Actually, to the extent that it advocates violence to combat violence, it arguably preaches self-defense rather than mere aggression.

[86]Unreported cases discussed in the London Times, Nov. 29, 1967, at 3.

[87]*Id.*

[88]See Public Order Act, 1986, ch. 64, §§ 5-6; Protection From Harassment Act 1997, ch. 40 § 7.

regime is embedded. As already mentioned, British legislation has been much more successful in combating fascism and Nazism than in dealing with hatred between whites and non-whites. Perhaps the reason for that difference is that a much greater consensus has prevailed in Britain concerning fascism than concerning the absorption and accommodation of the large relatively recent influx of racial minorities.

C. Germany

The contemporary German approach to hate speech is the product of two principal influences: the German Constitution's conception of freedom of expression as properly circumscribed by fundamental values such as human dignity, and by constitutional interests such as honor and personality[89]; and the Third Reich's historical record against the Jews, and especially its virulent hate propaganda and discrimination which culminated in the Holocaust.

Unlike the United States, and much like Canada, Germany casts freedom of expression as one constitutional right among many rather than as paramount or even as first among equals. Whereas under the Canadian Constitution, freedom of expression is limited by constitutionally mandated vindications of equality and multiculturalism, under the German Basic law freedom of expression must be balanced against the pursuit of dignity and group-regarding concerns.[90]

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[89]See supra, at ---.

[90]The values underlying the Basic Law's approach of freedom of expression were discussed by the German Constitutional Court in the landmark *Lüth* Case, 7 BVerfGE 198 (1958). (the Basic law "establishes an objective order of values ... which centers upon dignity of the human personality developing freely within the social community....") (translation by Donald Kommers, in his *The Constitutional Jurisprudence of the Federal Republic of*

The contrast between the German balancing approach and other approaches to freedom of speech, such as the American or the Canadian is well captured in the following summary assessment of the German constitutional Court's treatment of free speech claims:

> "First, the value of personal honor always trumps the right to utter untrue statements of fact made with knowledge of their falsity. If, on the other hand, untrue statements are made about a person after an effort was made for accuracy, the court will balance the conflicting rights and decide accordingly. Second, if true statements of fact invade the intimate personal sphere of an individual, the right to personal honor trumps freedom of speech. But if such truths implicate the social sphere, the court once again resorts to balancing. Finally, if the expression of an opinion -- as opposed to fact -- constitutes a serious affront to the dignity of a person, the valor of personal honor triumphs over speech. But if the damage to reputation is slight, then again the outcome of the case will depend on careful judicial balancing"[91].

In broad terms, freedom of speech like other constitutional rights in Germany is in part a negative right -- i.e., a right against government -- and, in part a positive right -- i.e., a right to government sponsorship and encouragement of free speech[92]. In contrast to the Anglo-American approach, which in its Lockean tradition regards fundamental rights as inalienable and as preceding and transcending civil society, the German tradition regards fundamental rights as depending on the (constitutional) state for their establishment and support. Consistent with this, and the more free speech rights are conceived and treated as positive rights, the easier it becomes to pin on the state responsibility for hate speech which it may find repugnant but which it does not prohibit or punish. Furthermore, the German constitutional system is immersed in a normative framework that is more Kantian than Lockean, thus requiring a balancing of rights

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Germany 363 (2nd. Ed. 1997).

[91]Donald Kommers, *supra*, at 424.

[92]*Id.*, at 386.

and duties not only on the side of the state but also on that of the citizenry[93].

Like in the United States, in Germany freedom of speech is legitimated from the respective standpoints of the justification from democracy, from that from the pursuit of truth and from that from autonomy. These justifications are conceived quite differently in Germany than in the United States, however, with the consequence that the nature and scope of free speech rights in Germany stand in sharp contrast to their American counterparts. Indeed, because of its constitutional commitment to "militant democracy"[94], the German justification from democracy does not encompass extremist anti-democratic speech, including hate speech advocating denial of democratic or constitutional rights to its targets. The German justification from the pursuit of truth, on the other hand, does not embrace its American counterpart's Millean presuppositions. This emerges clearly from the German Constitutional Court's firm conviction that established falsehoods can be safely denied protection without hindrance to the pursuit of truth[95]. Finally, the German justification from autonomy is not centered on the autonomy of the speakers as its American counterpart has proven to date. Instead, the German justification implies the need to strike a balance between rights and duties, between the individual and the community, and between the self-expression needs of speakers and the self-respect and dignity of listeners.

The contemporary German constitutional system is grounded in an order of objective values,

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[93]*See id.*, at 298, 305.

[94]*See* German Basic Law, Art. 21.

[95]*See, e.g., The Holocaust Denial Case,* 90 BVerfGE 241 (1994) discussed below.

including respect for human dignity and perpetual commitment to militant democracy[96]. As such, it excludes certain creeds and thus paves the way for content-based restrictions on freedom of speech which would be unacceptable under American free speech jurisprudence[97]. Undoubtedly, the German Basic Law's adoption of certain values and the consequent legitimacy of content-based speech regulation originated in the deliberate commitment to repudiate the country's Nazi past and to prevent at all costs any possible resurgence of it in the future. Within this context, concern with protection of the Jewish community and with prevention of any rekindling of virulent anti-Semitism within the general population has left a definite imprint not only on the constitutional treatment of hate speech, but also on the evolution of free speech doctrine more generally.

Evidence of this can be found in the Constitutional Court's landmark decision in the 1958 *Lüth Case*[98]. *Lüth* involved an appeal to boycott a post-war movie by a director who had been popular during the Nazi period as the producer of a notoriously anti-Semitic film. Lüth, who had advocated the boycott and who was an active member of a group seeking to heel the wounds between Christians and Jews, was enjoined by a Hamburg court from continuing his advocacy of a boycott. He filed a complaint with the Constitutional Court claiming a denial of his free speech rights.

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[96]Neither Art. 1 of the Basic Law which enshrines human dignity nor Art. 21 which establishes militant democracy are subject to amendment and are thus made permanent fixtures of the German constitutional order.

[97]*See, e.g.* the *R.A.V.* case *supra* in which a hate speech prohibition was held unconstitutional as it was deemed to promote viewpoint discrimination in as much as it targeted racial hatred but not hatred against homosexuals.

[98]7 BVerfGE 198.

The Constitutional Court upheld Lüth's claim and voided the injunction against him, noting that he was motivated by apprehension that the reemergence of a film director who had been identified with Nazi anti-Semitic propaganda might be interpreted, especially abroad, "to mean that nothing had changed in German cultural life since the National Socialist period..."[99]. The Court went on to note that Lüth's concerns were very important for Germans as "[n]othing has damaged the German reputation as much as the cruel Nazi persecution of the Jews. A crucial interest exists, therefore, in assuring the world that the German people have abandoned this attitude..."[100]. Accordingly, in balancing Lüth's free speech interests against the film directors's professional and economic interests, the Court concluded that "where the formation of public opinion on a matter important to the general welfare is involved, private and especially individual economic interests must, in principle, yield"[101].

Germany has sought to curb hate speech with a broad array of legal tools. These include criminal and civil laws that protect against insult, defamation and other forms of verbal assault, such as attacks against a person's honor or integrity, damage to reputation, and disparaging the memory of the dead[102]. Although the precise legal standards applicable to the regulation of hate speech have evolved over the years[103], hate speech against groups, and anti-Semitic propaganda in particular have been routinely curbed

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[99]Translation by Donald Kommers, in *op. cit.* at 367.

[100]*Id.*

[101]*Id.*

[102]*See* Friedrich Kübler, *supra*, at 340.

[103]*See id.*, at 340-47 for an account of the most important changes.

by the German courts. For example, spreading pamphlets charging "the Jews" with numerous crimes and conspiracies, and even putting a sticker only saying "Jew" on the election posters of a candidate running for office were deemed properly punishable by the courts[104].

Under current law, criminal liability can be imposed for incitement to hatred, or attacks on human dignity against individuals or groups determined by nationality, race, religion, or ethnic origin[105]. Some of these provisions require showing a threat to public peace, while others do not[106]. But even when such a showing is necessary, it imposes a standard that is easily met[107] in sharp contrast to the American requirement of proof of an incitement to violence.

Perhaps the most notorious and controversial offshoot of Germany's attempts to combat hate speech relate to the prohibitions against denying the Holocaust, or to use a literal translation of the German expression, to engage in the "Auschwitz lie"[108]. Attempts to combat Holocaust denials raise difficult questions not only concerning the proper boundaries between fact and opinion, but also concerning the limits of academic freedom.

These issues came before the Constitutional Court in the *Holocaust Denial Case* in 1994[109]. This case arose as a consequence of an invitation to speak at a public meeting issued by a far right political party

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[104] *See* id., at 343-44.

[105] *See* id., at 344-34.

[106] *Id.*, at 345.

[107] *See id.*, at 344, n.32.

[108] *Id.*, at 344-346.

[109] 90 BVerfGE 241.

to David Irving, a revisionist British historian who has argued that the mass extermination of Jews during the Third Reich never took place. The government conditioned permission for the meeting on assurance that Holocaust denial would not occur, stating that such denial would amount to "denigration of the memory of the dead, criminal agitation, and most important, criminal insult, all of which are prohibited by the Criminal code"[110]. Thereupon, the far right party brought a complaint alleging an infringement of its freedom of expression rights.

Relying on the distinction between fact and opinion and emphasizing that demonstrably false facts have no genuine role in opinion formation, the Constitutional Court upheld the lower court's rejection of the complaint. In so doing, the Court cited the following passage from the lower court's opinion:

> "The historical fact itself, that human beings were singled out according to the criteria of the so-called "Nuremberg Laws" and robbed of their individuality for the purpose of extermination, puts Jews living in the Federal Republic in a special, personal relationship vis-a-vis their fellow citizens; what happened [then] is also present in this relationship today. It is part of their personal self-perception to be understood as part of a group of people who stand out by virtue of their fate and in relation to whom there is a special moral responsibility on the part of all others and that this is part of their dignity. Respect for this self-perception, for each individual, is one of the guarantees against repetition of this kind of discrimination and forms a basic condition of their lives in the Federal Republic. Whoever seeks to deny these events denies vis-a-vis each individual the personal worth of Jewish persons. For the person concerned, this is continuing discrimination against the group to which he belongs and, as part of the group, against him"[111].

In short, given the special circumstances involved, Holocaust denial is seen as robbing the Jews in Germany of their individual and their collective identity and dignity, and as threatening to undermine the rest of the population's duty to maintain in Germany a social and political environment in which Jews and the Jewish

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[110] *Holocaust Denial Case*, summary of facts provided by Donald Kommers, *supra*, at 383.

[111] *Id.* at 386.

community can feel to be an integral part.

Holocaust denial in relation to the Jews in Germany presents a very special case. But what about the fact/opinion distinction in other contexts? Or hate and insults against other individuals or groups?

The constitutional Court rendered a controversial decision bearing on the fact/opinion distinction in the *Historical Fabrication Case*[112]. That case involved a book claiming that Germany was not to be blamed for the outbreak of World War II, as that war was thrust upon it by its enemies. The Court held that the book's claim amounted to an "opinion" -- albeit a clearly unwarranted one -- and was thus within the realm of protected speech. While who is to blame for the outbreak of the war is clearly more a matter of opinion than whether or not the Holocaust took place, the line between fact and opinion is by no means as neat as the Constitutional Court's jurisprudence suggests. For example, is admission of the Holocaust coupled with the claim that the Jews brought it on themselves a protected opinion or such a gross distortion of the facts as to warrant equating the "opinion" involved with assertion of patently false facts?

The issue of insults linked to false facts targeting groups other than Jews was at the core of the Constitutional Court's decision in the *Tucholsky I Case*[113] which dealt with display of a bumper sticker on a car with the slogan "soldiers are murderers". The bumper sticker in question had been displayed by a social science teacher who was a pacifist and who objected to Germany's military role in the 1991 Gulf War. Moreover, the above slogan had a long pedigree in German history as it was the creation of the writer Kurt Tucholsky an Anti-Nazi pacifist of the 1930's who was stripped of his German citizenship in 1933.

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[112]90 BVerfGE 1 (1994).

[113]21 EuGRZ 463-65 (1994).

The lower court interpreting the slogan literally found it to be a defamatory incitement to hatred which assaulted the human dignity of all soldiers. By asserting that all soldiers are murderers, the slogan cast them as unworthy members of the community. Based on this analysis, the social science teacher was fined for violating the criminal code's prohibition against incitement to hatred against an identifiable group within society.

The Constitutional Court, construing the slogan as an expression of opinion, held it to be constitutionally protected speech. In so doing, the Court asserted that the slogan should not be construed literally. Emphasizing that the slogan had been displayed next to a photograph from the Spanish Civil War showing a dying soldier who had been hit by a bullet accompanied by an inscription of the word "why?", the Court interpreted the message of the slogan as casting soldiers as much as victims as it had as killers. Accordingly, the slogan could be interpreted as an appeal to reject militarism, by asking why society forces soldiers -- who are members of society as everyone else -- to become potential murderers and to unnecessarily expose them to becoming victims of murder.

The Constitutional Court's decision provoked an angry reaction among politicians, journalists and scholars[114]. The Court revisited the issue as it reviewed other criminal convictions in cases involving statements claiming that "soldiers are murderers" or "soldiers are potential murderers", in its 1995 *Tucholsky II Case*[115]. Noting that the attacks involved were not against any particular soldier but against soldiers as agents of the government, the Court reiterated that the statements involved amounted to constitutionally protected expressions of opinion rather than to the spreading of false facts. The Court

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[114] See Donald Kommers, *supra* at 392-93.

[115] *Id.*, at 393.

recognized that public institutions deserve protection from attacks that may undermine their social acceptance. Nonetheless, the Court concluded that the right to express political opinions critical or even insulting to political institutions rather than to any segment of the population outweighed the affected institutions' need for protection.

These two decisions illustrate some of the difficulties involved in drawing cogent lines between fact and opinion, and between acceptable -- and in a democracy indispensable -- political criticism and inflammatory excesses threatening the continued viability of public institutions. This notwithstanding, in Germany the prohibitions against hate speech are firmly grounded. The only open questions concern their constitutional boundaries in cases that do not involve anti-Semitism or the Holocaust.

D) International Covenants

Freedom of speech is protected as a fundamental right under all the major international covenants on human rights adopted since the end of World War II, such as the 1948 U.N. Universal Declaration of Human Rights[116], the 1966 United Nations Covenant on Civil and Political Rights (CCPR)[117], and the 1950 European Convention on Human Rights (ECHR)[118]. These covenants, however, do not extend protection to all speech, and some such as the CCPR specially condemn hate speech[119]. A particularly strong stand against hate speech, which includes a command to states to criminalize it, is promoted by

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[116]Article 19.

[117]Article 19.

[118]Article 10.

[119]*See* CCPR Art. 20 quoted in footnote ---, *supra*.

Article 4 of the 1965 International Convention on the Elimination of All forms of Racial Discrimination (CERD). Article 4 provides in relevant part, that

> State Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form....
>
> [State Parties] shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination... and also the provision of any assistance to racist activities, including the financing thereof...
>
> Shall declare illegal and prohibit organizations...and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offense punishable by law...

The United States attached a reservation to its ratification of CERD as compliance with Article 4 would obviously contravene current American free speech jurisprudence[120].

International bodies charged with judicial review of hate speech cases have, by and large, embraced positions that come much closer to those prevalent in Germany than to their United States counterpart. For example, in *Faurisson* v. *France*[121], the U.N. Human Rights Committee upheld the conviction of Faurisson under France's "Gayssot Act" which makes it an offence to contest the existence of proven crimes against humanity. Faurisson, a French university professor had promoted the view that the gas chambers at Aushwitz and other Nazi camps had not been used for purposes of extermination, and claimed that all the people in France knew that "the myth of the gas chambers is a dishonest fabrication."

The Human Rights Committee decided that Faurisson's conviction for having violated the rights and

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[120]*See* Friedrich Kübler, *supra*, at 357.

[121]U.N. Doc CCPR/C/58/550/1993 (1996).

reputation of others was consistent with the free speech protection afforded by Article 19 of CCPR. Since Faurisson's statements were prone to foster anti-Semitism, their restriction served the legitimate purpose of furthering the Jewish community's right to live free "from fear of an atmosphere of anti-Semitism".

Notwithstanding its support for Fausission's conviction, the Human Rights Committee noted that the "Gayssot Act" was overly broad in as much as it prohibited publication of bona fide historical research which would tend to contradict some of the conclusions arrived at the Nuremberg trials. Thus, whereas suppression of demonstrably false facts likely to kindle hatred is consistent with United Nations standards, suppression of plausible factual claims or of opinions based on such facts would not be justified even if it happened to lead to increased anti-Semitism.

The European Court of Human Rights has also upheld convictions for hate speech as consistent with the free speech guarantees provided by Article 10 of the ECHR. An interesting case in point is *Jersild* v. *Denmark*[122]. The Danish courts had upheld the convictions of members of a racist youth group who had made derogatory and degrading remarks against immigrants, calling them among other things, "niggers" and "animals," and that of a television journalist who had interviewed the youths in question and broadcast their views in the course of a television documentary which he had edited. The journalist appealed his conviction to the European Court, which unanimously stated that the convictions of the youths had been consistent with ECHR standards, but which by a 12 to 7 vote held that the journalist's conviction violated the standards in question.

The convictions of the youths for having treated a segment of the population as being less than

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[122]19 E.H.R.R. 1 (1994).

human were consistent with the limitations on free speech for "the protection of the reputation or rights of others" imposed by Article 10 of the ECHR[123]. The conviction of the journalist for aiding and abetting the youths had been premised on the finding that the broadcast had given wide publicity to views that would otherwise have reached but a very small audience, thus exacerbating the harm against the targets of the hate message. Stressing that the journalist in no way had endorsed the message of his racist interviewees; but that he had endeavored to expose them and their message in terms of their social milieu, their frustrations, their propensity to violence and their criminal records as posing important questions of public concern; the European Court's majority concluded that his conviction had been disproportionate in relation to the permissible aim of protecting the rights and reputations of the target group.

As the journalist had no intent of promoting hatred, the legitimacy of his conviction turned on a balancing of his expression rights in reporting facts and conveying opinions about them and the harms imposed by the hate message on its targets. Both the majority and the dissenters on the European Court agreed that balancing was the proper approach. They disagreed, however, concerning how much weight should borne by the competing interests involved. From the standpoint of the dissenters, the majority placed too much weight on the journalist's expression rights and too little on the protection of the dignity of the victims of hatred. In reaching their conclusion, the dissenters emphasized the fact that the journalist had edited down the interviews to the point of principally highlighting the racial slurs, and that he had at no point in the documentary expressed disapproval or condemnation of the statements uttered by his interviewees.

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[123]*See* ECHR, Art. 10 (2).

In the end, the disagreements between the majority and the dissent in *Jersild* center on the proper interpretation to be given to the general tenor of the documentary and to the attitude displayed in it by the journalist through his interviews and reports. Accordingly, just as it became plain in the context of hate speech regulation in Germany, prohibitions against crude insults and patently false statements of fact generally seem legally manageable. On the other hand issues depending on opinions or on drawing the often elusive line between fact and opinion, present much more troubling questions. With this in mind and in light of the various contrasts between the different approaches to hate speech outlined above, it is now time to explore how best to deal with hate speech in the context of contemporary constitutional concerns.

IV Confronting the Challenges of Hate Speech in Contemporary Constitutional Democracies: Observations and Proposals

The preceding analysis reveals that protection of hate speech as well as its prohibition raise serious and difficult problems. Not all hate speech is alike, and its consequences may vary from one setting to another. Furthermore, to the extent that hate speech produces harms that are not immediate, these may be uncertain and hard to measure. Also, the impact of hate speech seems to depend to a significant extent on the medium of its communication. Thus, an oral communication to a relatively small audience at Speakers' Corner in London's Hyde Park should not be automatically lumped together with a posting on the Internet available worldwide on the web.

The two contrasting approaches to hate speech adopted respectively by the United States and by other Western democracies both have certain advantages and certain drawbacks. The main advantage of the American approach is that it makes for relatively clear cut boundaries between permissible and

impermissible speech. Also, at least in cases in which hate speech poses little threat to its targets and its message is resoundedly repudiated by an overwhelming majority of its non-target audience, as occurred in the Skokie case, tolerance may be preferable. Indeed in that case, the dangers stemming from suppression and possible spread underground of hate speech would seem to outweigh those likely to result from unconstrained communication.

The chief disadvantage of the American approach is that it is not attuned to potentially serious harms that unfold gradually over time, or that may have its greatest immediate impact in remote places. In addition, the American approach tends to remain blind to the considerable potential harm that hate speech can cause to the equality and dignity concerns of its victims, or to the attitudes and beliefs of non-target audiences. Indeed, the latter may well reject the explicit appeal to hate, but nonetheless be influenced by the more diffuse implicit message lurking beneath the surface of that appeal.[124]

The principal advantage of the approach to hate speech prevalent outside the United States is that it makes for unequivocal condemnation of it as morally repugnant, and at least in some cases, such as in the United Kingdom's efforts against the spread of fascist hate propaganda discussed above, it can play an important role in the struggle against extremist anti-democratic political movements. Furthermore, as exemplified by contemporary Germany's steadfast and continuous pursuit against anti-Semitic hate

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[124]This may well have been the case for a significant number of whites in connection with the *R.A.V.* case discussed above. These whites most likely found the cross burning repugnant, but nonetheless agreed with the underlying concern of not having to live in a racially mixed neighborhood. And they may even have hidden that belief from themselves by rationalizing that it is better to have a racially segregated neighborhood to avoid the kind of ugly violence exemplified by cross burning.

propaganda, vigorous prohibition and enforcement can bolster the security, dignity, autonomy and well being of the target community while at the same time reminding non-target groups and society at large that the hate message at stake is not only repugnant and unacceptable, but that it will not be tolerated, and that those who are bent on spreading it will be punished.

The principal disadvantages to the approach to hate speech under consideration, on the other hand, are: that it inevitably has to confront difficult line drawing problems, such as that between fact and opinion in the context of the German scheme of regulation; that when prosecution of perpetrators of hate speech fails, such as in the British *Southern News* case discussed above,[125] regulation may unwittingly do more to legitimate and to disseminate the hate propaganda at issue than would have a complete absence of regulation;[126] that prosecutions may be too selective or too indiscriminate owing to (often unconscious) biases prevalent among law enforcement officials as appears to have been the case in the prosecutions of certain black activists under the British Race Relations Act;[127] and, that since not all that may appear to be hate speech actually is hate speech -- such as the documentary report involved in *Jersild*[128] or a play in which a racist character engages in hate speech, but the dramatist intends to convey an anti-hate message -- regulation of that speech may unwisely bestow powers of censorship over legitimate political, literary and

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[125]*See supra*, at ____.

[126]This disadvantage should not be overestimated, however. Indeed, if most prosecutions against a certain type of hate succeed and only a few fail, then conceivably prohibition may on the whole be preferable to free spread through lack of regulation.

[127]*See supra*, at ____.

[128]See supra, at ____.

artistic expression to government officials and judges.

In the last analysis, none of the existing approaches to hate speech are ideal, but the American seems, on balance, less satisfactory than its alternatives. Above all, the American approach seems significantly flawed in some of its assumptions, in its impact and on the message it conveys concerning the evils surrounding hate speech. In terms of assumptions, the American approach either underestimates the potential for harm of hate speech that is short of incitement to violence or it overestimates the potential of rational deliberation as a means to neutralize calls to hate. In terms of impact, given its long history of racial tensions, it is surprising that the United States does not exhibit greater concern for the injuries to security, dignity, autonomy and well being which officially tolerated hate speech causes to its black minority. Likewise, America's hate speech approach seems to unduly discount the pernicious impact that racist hate speech may have on lingering or dormant racist sentiments still harbored by an unfortunately non-negligible segment of the white population[129]. Furthermore, even if we discount the domestic impact of hate speech, given the worldwide spread of locally produced hate speech, such as in the case of American manufactured Neo-Nazi propaganda disseminated through the worldwide web, a strong argument can be made that

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[129]In this connection, it is significant that following a steep rise in racist incidents involving hate speech on university campuses throughout the United States, several universities, including the University of Michigan and Stanford adopted regulations against hate speech. These were, however, struck down as unconstitutional by lower courts because they restricted speech falling short of the incitement to violence standard. *See Doe* v. *Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989); and, *Corry* v. *Stanford*, No. 74039 (Cal. Super. Ct. Santa Clara Co. Feb., 27, 1995) (applying constitutional standard incorporated in state law and made applicable to private universities).

American courts should factor in the obvious and serious foreign impact of certain domestic hate speech in determining whether such speech should be entitled to constitutional protection. Finally, in terms of the message conveyed by refusing to curb most hate speech, the American approach looms as a double-edged sword. On the one hand, tolerance of hate speech in a country in which democracy has been solidly entrenched since independence over two hundred years ago, conveys a message of confidence against both the message and the prospects of those who endeavor to spread hate[130]. On the other hand, tolerance of hate speech in a country with serious and enduring race relations issues may reinforce racism and hamper full integration of the victims of racism within the broader community[131].

The argument in favor of opting for greater regulation of hate speech than that provided in the United States rests on several important considerations, some related to the place and function of free speech in contemporary constitutional democracies, and others to the dangers and problems surrounding hate speech. Typically, contemporary constitutional democracies are increasingly diverse, multiracial, multicultural, multireligious and multilingual. Because of this and because of increased migration, commitment to pluralism and to respect of diversity seem inextricably linked to vindication of the most fundamental individual and collective rights. Increased diversity is prone to making social cohesion more precarious, thus, if anything, exacerbating the potential evils of hate speech. Contemporary democratic states, on the other hand, are less prone to curtailing free speech rights than their predecessors either

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[130]This is the view defended in Lee Bollinger's, *The Tolerant Society, supra*.

[131]For a discussion of the uses of tolerance of hate speech to promote existing racism, *see* Michel Rosenfeld, *"Extremist Speech* and the Paradox of Tolerance" , *supra*.

because of deeper implantation of the democratic ethos, or because respect of supranational norms has become inextricably linked to continued membership in supranational alliances that further vital national interests.

Consistent with these observations, contemporary democracies are more likely to find themselves in a situation like stage four in the context of the American experience with free speech rather in one that more closely approximates stage one within that experience[132]. In other words, drowning out minority discourses seems a much greater threat in contemporary constitutional democracies that are pluralistic than government prompted censorship. Actually, viewed more closely, contemporary pluralistic democracies are most likely in a situation that combines the main features of stage two and stage four. Thus, the main threats to full fledged freedom of expression would seem to come primarily from the "tyranny of the majority" as reflected both within the government and without, and from the dominance of majority discourses at the expense of minority ones.

If it is true that the conformity of the majority and the dominance of its discourse pose the greatest threat to uninhibited self-expression and unconstrained political debate in a contemporary pluralist polity, then significant regulation of hate speech seems largely justified. This is not only because hate speech obviously inhibits the self-expression and chance of inclusion of its victims, but also, less obviously, because hate speech tend to bear closer links to majority views than might initially appear. Indeed, in a multicultural society, while crude insults uttered by a member of the majority directed against a minority may be unequivocally rejected by nearly all other members of the majority culture, the fear and concerns that led

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[132] *See supra*, at ---.

to the hate message may be widely shared by a large proportion of members of the majority culture who regard the spreading of other cultures as threats to their way of life. And under those circumstances, hate speech might best be characterized as a pathological extension of majority feelings or beliefs.

So long as the pluralist contemporary state is committed to maintaining respect for diversity, it cannot simply embrace a value neutral mind set, and consequently it cannot legitimately avoid engaging in some minimum of viewpoint discrimination. This is made clear by the German example, and although the German experience has been unique, it is hard to imagine that any pluralist constitutional democracy would not be committed to a similar position, albeit to a lesser degree[133]. Accordingly without going as far as German free speech jurisprudence, at a minimum contemporary pluralist democracy ought to institutionalize viewpoint discrimination against hate speech, that is to say, against the crudest and most offensive expressions of racism, religious bigotry, and virulent bias on the basis of ethnic or national origin.

Rejection of a content-neutral approach to speech does not contravene the four philosophical justifications of free speech discussed above, but it does somewhat alter the nature and scope of speech

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[133]This includes even the United States, which for all its professed commitment to a free speech jurisprudence anchored on viewpoint neutrality, has in practice in certain cases upheld restrictions on speech that in all fairness seem based on viewpoint bias. See, e.g., *Dennis* v. *United States,* 341 U.S. 494, 544-45 (1951) (concurring opinion, by Frankfurter, J.) (characterizing clearly political speech of members of the Communist Party advocating -- but not inciting to violence or creating any imminent present danger of -- the violent overthrow of the government as speech that ranks "low" "on any scale of values which we have hitherto recognized"). This confuses the *category* of speech involved, namely political speech, which has traditionally been ranked as the highest, and the *content* of the speech, which had been indeed rejected as repugnant and completely unworthy by the vast majority of Americans.

protected under some of them. In terms of the justification from democracy, whereas tolerating hate speech is not inherently at odds with maintaining a free speech regime compatible with the flow of ideas required to sustain a well functioning democracy, it is inconsistent with the smooth functioning of a democracy marked by an unswering commitment to pluralism. Consistent with this, either the justification from democracy is regarded as constrained by the need to sustain pluralism, or conceived as linked to a particular kind of democracy grounded on pluralism. In either case, in a polity committed to pluralism, hate speech could not conceivably contribute in any legitimate way to democracy.

A similar argument can be advanced in relation to the justification from social contract. Either commitment to pluralism is not subject to alteration through agreement, or it is assumed that preservation of basic individual and collective dignity is in the self-interest of every contractor, and thus not prone to being bargained away in the course of agreeing to any viable pact. Consequently, hate speech could be safely banned without affecting the integrity of the social contract justification.

In view of the earlier discussion of the justification from autonomy[134], it is obvious that it goes hand in hand with a ban against hate speech so long as the autonomy of speakers and listeners is given equal weight. In other words, if autonomy is taken as requiring dignity and reciprocity, then it demands banning hate speech as an affront against the most basic rights of its targets.

Unlike the above justifications, that from the pursuit of truth does not depend on whether or not one embraces pluralism. Nevertheless, if one rejects the presumptions made by Mill and Holmes, the banning of hate speech can be amply reconciled with commitment to the pursuit of truth. The justification for

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[134]*See supra*, at---.

rejecting the Millean and Holmesian presumptions has been persuasively made by the Canadian Supreme Court in the *Keegstra* case discussed above[135] and need not be repeated here. Moreover, banning definitively proven falsehoods such as unequivocal denial of the Holocaust, cannot conceivably hinder pursuit of the truth.

On the other hand, opinion based hate speech may not be as convincingly dismissed, but at least when it comes to hate speech in form, it is difficult to see how it could in any way contribute to furthering the truth. The same cannot be automatically said about the broader message lurking beneath hate-based opinion. Thus a racist belief or opinion may be based on fears or concerns which may not themselves be worthless from the standpoint of pursuit of the truth. For example, sentiments against recent immigrants belonging to different races or cultures may stem from fears of challenges against one's economic security and cultural values. Whether and to what degree such fears may be warranted are certainly questions which ought to be freely discussed from the standpoint of pursuit of the truth. Consistent with this, special caution should be exercised when dealing with what appears to be hate speech in substance, but is not hate speech in form.

From a theoretical standpoint, it is quite possible to draw a bright line between fears and concerns and racist animus. Arguing that immigration from a former colony should be curtailed because it will result in a loss of jobs among the natives and result in undesired changes in the local culture is certainly distinguishable from the hate message that the immigrants in question are "animals" who should be shipped back to their country of origin[136] even if one recognizes that the former message is implicitly incorporated

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[135] *See supra*, at---.

[136] *Cf.* The *Jersild* case, *supra*

into the latter. Because of the ambiguity and openness to several inconsistent interpretations of some messages which may plausibly amount to hate speech in substance, the above mentioned line may not always be easy to draw in practice. As we shall examine below, that standing alone does not afford a good reason for tolerating all opinion-based hate speech. In short, whether couched in hate speech in form or in hate speech in substance, expressions of racial animus do not advance the search for the truth and thus do not call for protection from the standpoint of the justification from pursuit of the truth.[137]

Although consistent with the four philosophical justifications of freedom of speech, to become fully acceptable from a practical standpoint regulation of hate speech must cope satisfactorily with the vexing problems identified in the course of our review of the current status of regulation outside the United States. The principal problems encountered involve line drawing, bias, difficulties in interpretation leading to suppression of speech deserving of protection and/or to toleration of certain hate messages, and facilitation of government or majority driven censorship.

Most of these problems are raised in the prevalent American criticism against regulation based on the so called "slippery slope" argument.[138] Pursuant to this argument, since it is impossible to draw neat lines imposing verifiable constraints on judges and legislators, once the door to regulation is open ever so slightly it is bound gradually to open wider, eventually allowing for censorship of all kinds of legitimate yet

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[137]In this connection, it is important to distinguish between *expression* of racial animus and *reporting* such animus. Conveying information concerning whether one is a racist, as opposed to uttering racial epiteths, can of course contribute to discovery of the truth.

[138]*See* Frederick Schauer, "Slippery Slopes", 99 Harvard L. Rev. 361 (1985).

unpopular speech. Accordingly, failure to confront the "slippery slope" problem, may well lead to dangerous erosion of free speech.

Unless one adopts a Holmesian view of speech[139], the "slippery slope" argument is largely unpersuasive, and this seems particularly true in the context of hate speech. Indeed, in many cases, such as those involving Holocaust denial, cross burning, displaying swastikas, calling immigrant "animals", there do not appear to be any line drawing problems. These cases involve clearly recognizable expressions of hate which constitute patent assaults against the most basic dignity of those whom they target, and which fly in the face of even a cursory commitment to pluralism. On the other hand, there are cases of statements, which some groups may find objectionable or offensive, but which raise genuine factual or value based issues, and which ought therefore be granted protection. For example, strong criticism of the Pope for his opposition to contraception and to homosexual relationships as being "indifferent to human suffering caused by overpopulation and an enemy of human dignity for all" may be highly offensive to Catholics, but even in a country in which the latter are a religious minority should clearly not be in any way censored, punished or officially characterized as hate speech.

There is of course a grey area in between these two fairly clear cut areas, in which there are difficult line drawing problems, as exemplified by the German controversy over the claim that "soldiers are murderers"[140]. Line drawing problems, however, are quite common in law as they tend to arise whenever a scheme of regulation attempts to draw a balance among competing objectives. This problem may well be exacerbated when a fundamental right like free speech is involved, but that justifies at most deregulating

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[139] *See supra*, at ----.

[140] *See supra*, at ---.

the entire gray area, not toleration of all hate speech falling short of incitement to violence.

In the last analysis, the best way to deal with the problems likely to arise in connection with regulation of hate speech is to approach them consistent with a set of fundamental normative principles, and in light of certain key contextual variables. In other words, the standards of constitutionally permissible regulation of hate speech should conform to certain fundamental principles that transcend geographical, cultural and historical differences[141], and at the same time remain sufficiently open to accommodate certain highly relevant historical and cultural variables. The fixed principles involved are openness to pluralism and respect for the most elementary degree of autonomy, equality, dignity and reciprocity.[142] The variables, on the other hand, include the particular history and nature of discrimination, status as minority or majority group, customs, common linguistic practices, and the relative power or powerlessness of speakers and their targets within the society involved.

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[141]That does not necessarily mean that these are universal, only that they ought to be common to contemporary pluralist constitutional democracies. For a more extended discussion of the question of universalism of human rights, *see* Michel Rosenfeld, "Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities", 30 Columbia Human Rights L. Rev. 249 (1999).

[142]This standard establishes a bare minimum which seems adequate in the context of speech regulation, but not in that of government policy. For example, this standard would allow for criticism of a particular religion on the grounds it is too restrictive, an enemy of progress, or indifferent to the rights of women. While these statements may offend believers, it cannot be fairly said that they deprive them of the most elementary degree of dignity. However, a government policy attacking such religion, or making it difficult for its adherents to freely practice it would surely have to be subjected to a much higher standard.

managed or minimized.

Conclusion

Hate speech raises difficult questions that test the limits of free speech. Although none of the constitutional regimes examined in these pages leaves hate speech unregulated, there are vast differences between the minimal regulation practiced in the United States and the much more extensive regulation typical of other countries and of international covenants. Both approaches are imperfect, but in a world that has witnessed the Holocaust, various other genocides and ethnic cleansing, all of which surrounded by abundant hate speech, the American way seems definitely less appealing than its alternatives. As hate speech can now almost instantaneously spread throughout the world, and as nations become increasingly socially, ethnically, religiously and culturally diverse, the need for regulation becomes ever more urgent. In view of these important changes the state can no longer justify commitment to neutrality, but must embrace pluralism, guarantee autonomy and dignity, and strive for maintenance of a minimum of mutual respect. Commitment to these values requires states to conduct an active struggle against hate speech, while at the same time paving the way to avoiding most of the pitfalls likely to be encountered in the course of that struggle. It would of course be preferable if hate could be defeated by reason. But since unfortunately that has failed all too often, there seems no alternative but to combat hate speech through regulation in order to secure a minimum of civility.

To minimize problems and to reduce the possibility of bias, regulation of hate speech should be subjected to a dialectic fueled by the tensions created by efforts to reconcile the fixed principles and the relevant variables. This dialectic should determine, among other things, how far within the grey area regulation should extend. Thus, for example, given their different historical experiences with anti-Semitism, it seems reasonable that Germany go further than the United States in prohibiting anti-Semitic speech that falls within a grey area. Although American and German Jews are entitled to the same degree of dignity and inclusion within their respective societies, most likely greater restrictions on anti-Semitism are required in Germany than in the United States in order to achieve comparable results.

Recourse to the above mentioned dialectic is also likely to minimize bias in the regulation of hate speech. One way in which this can be achieved is by taking into account historically significant differences between the proponents and intended targets of hate messages. Thus, racist speech by a member of a historically dominant race against members of an oppressed race are likely to have a more severe impact than racist speech by the racially oppressed against their oppressors. Although this may not justify selective regulation of hate speech, it does call for greater leniency when the racially oppressed is at fault, and for taking into account as a mitigating factor the fact -- found in some of the British cases discussed above[143] -- that the racist speech of a member of an oppressed racial group was in response to the racism perpetrated by members of the oppressor race. Furthermore, if these contextual variables are properly accounted for, it becomes less likely that majority biases will dominate prosecutorial or judicial decisions. In short, regulation of hate speech cannot avoid producing certain problems, but these can be, by and large,

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[143] *See supra*, at ---.