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# GENOCIDE DENIAL UNDER CONSTITUTIONAL LAW: COMPARATIVE ANALYSIS OF SPAIN, GERMANY AND FRANCE

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*Abstract: This article examines Genocide denial under the constitutional law, mainly the conflict between constitutionally protected rights of freedom of speech and dignity/equality. The comparison reflects the attitudes of three European States - Germany, Spain and France. The Article discusses the history and background of anti-Holocaust laws in the concerned countries and possible criminalization of the Armenian Genocide denial. It further concentrated on the Constitutional Court decisions, which are marked with differences connected with factors such as history, morals, values of the particular society and, of course, politics.*

## **Introduction**

The phenomenon of genocide denial is an issue of hot debate. Opinions on how to deal with the denial are sharply divided. Those favoring robust speech protection assess denial as a political issue, while others offer legal regulations. Apart from being an issue of public, academic and political debate, genocide denial possesses also a crucial constitutional difficulty, as its regulation operates in the nexus of competing constitutional concepts - freedom of speech and dignity, equality. The second important aspect of the issue is the type of regulation- criminalization or civil law solution. The mentioned considerations are grounded on the specific historical and conceptual settings, as well as on the system of values of the particular society.

This paper is a comparative analysis of the constitutional law approaches to the criminalization of Genocide denial within the framework of values and symbolic function of the anti-negation laws in a specific cultural context. The three states – Germany, Spain and France-are chosen for having adopted different approaches to the issue, from the robust protection of human dignity by Germany to valuing French freedom of expression and a moderate approach elaborated by the Spain Constitutional Court.

## Freedom of Speech v. Dignity

One of the basic arguments for the freedom of speech is its fundamental role in seeking the truth,<sup>1</sup> which was further elaborated in the theory of the “marketplace of ideas”<sup>2</sup> to enhance public discourse. The importance of free speech is also assessed as a high democratic value and a basis for the development of an individual autonomy<sup>3</sup> in the democratic order<sup>4</sup>. Meanwhile, in nearly all legal systems, the freedom of expression is recognized as a non-absolute right in the context of other fundamental rights and may be limited by the states under certain conditions.<sup>5</sup> The limitations aim at balancing the freedom of speech and the rights of others. All human beings are born free and equal in dignity and rights, which encompasses also the right of non-discrimination.<sup>6</sup> Human dignity<sup>7</sup> is tightly connected with individual autonomy and is called an inherent right,<sup>8</sup> the “highest human right”, as well as “the source of rights”<sup>9</sup> and that only “the performance of free person can create human dignity”.<sup>10</sup> In other words, other rights, including freedom of speech become means and conditions for the formation of human dignity.

The prevalence of one constitutional norm over the other in a particular society depends “on the values sought to be promoted, harm perceived, and the importance attributed to this harm”<sup>11</sup>. When the freedom of speech conflicts with other values of the society (dignity and equality), a “wide array for regulations come to play”.<sup>12</sup> The underlying argument is that societies are founded on different historical, cultural, philosophical premises, which brings to different perceptions and values. The overall attitude of European nations to human

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1. Mill John Stuart, “On Liberty,” cited in Claudia E. Haupt, “Regulating Hate Speech—Damned if You Do and Damned if You Don’t: Lessons Learned from Comparing the German and U.S. Approaches,” *Boston University International Law Journal* 23:299 (2005): 314.

2. Bruce Ackerman, “The Marketplace of Ideas,” [www.digitalcommons.law.yale.edu/fss\\_papers/154](http://www.digitalcommons.law.yale.edu/fss_papers/154) (accessed 10 May, 2012).

3. Keith Werhan, *Freedom of Speech: A Reference Guide to the United States Constitution* (Westport, Conn.: Praeger, 2004), 36.

4. Alexander Meiklejohn, *Free Speech and Its Relations to Self-Government* (New York: Harper and Brothers Publishers, 1948), 93-94.

5. Limitation clauses in international and national jurisdictions.

6. UN preamble.

7. Dignity (latin– *dignitas* – worth, noble appearance, worth, *dignatio* – respect for someone).

8. *Human Rights. Collection of regional international documents* (Vilnius, 1993), 232.

9. Alfonsas Vaišvila, “Human Dignity and the right to Human Dignity in terms of legal personalism, from conception of static dignity to conception of dynamic one,” *Jurisprudencija* 3:117(2009): 111-127, [www.mruni.eu](http://www.mruni.eu) (accessed 10 May, 2012).

10. *Ibid.*

11. Michel Rosenfeld, “Hate Speech in the Constitutional Jurisprudence: A Comparative Analysis,” *Cardozo Law Review* 24: 4 (2003): 1528.

12. Kathleen Mahoney, “The Canadian Constitutional approach to Freedom of Expression in Hate Propaganda and Pornography,” *Law and Contemporary Problems* 55, 1 (1992):77.

rights bears the notion of the WWII.<sup>13</sup> Europe generally has never accepted the freedom of speech in the same manner as the U.S. with its unique preference and protections of free speech.<sup>14</sup> While dignity, in the context of constitutional rights and values plays more primary role in Europe<sup>15</sup> than in the U.S.<sup>16</sup>

Genocide denial regulations partly depend on the mentioned factors. Two ways are offered to assess the regulations of genocide-denial laws:<sup>17</sup> to look into “historical accounts of ethnic, racial and religious violence, genocide, and discriminatory practices” that have occurred within that particular state and consider “the jurisprudential history of the society concerning equality, group libel, peace and security, and human dignity”. Both the European Commission on Human Rights and the European Court of Human Rights has ruled that in light of “historical experience” it is acceptable to prohibit certain acts.<sup>18</sup> This implies that a law criminalizing Holocaust denial may be appropriate for Germany as a perpetrator of a crime, while the same law will not be accepted in other state not connected with Holocaust. It derives that crimes should have a substantive impact on a society or a significant group within the society to serve as a basis for the content-based regulation of freedom of speech. The second factor to consider is the attitude of that particular state towards freedom of speech, human dignity and equality. Thus, under this analysis a law criminalizing Holocaust denial may be appropriate in most states of Europe because of its wide impact on those particular states and a high value of human dignity in the region, but the Armenian Genocide, while passing the dignity requirement, will probably fail under the first.

## **German Constitutional Law Approach to Criminalization of Genocide Denial**

Dignity has a dominant role in the German Constitution, and is called “a supreme value dominating the whole system of the fundamental rights”<sup>19</sup>, a central value “obliging states to realize and protect it”<sup>20</sup>. This attitude is linked to the historical developments, culture and perceptions of the German society. Human dignity is enshrined in Article 1 of the German

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13. Ruti Teitel, “Militating Democracy: Comparative Constitutional Perspectives,” *Michigan Journal of International Law*, 29:49(2008): 65.

14. John Knechtle, “Holocaust Denial and the Concept of Dignity in the European Union,” *Florida State University Law Review* 36:41(2008): 45, 47.

15. *Ibid.*, 58.

16. Silvia Suteu, “Law against Negation: Anti-Holocaust Denial Legislations in Europe,” [www.fromceu.hu](http://www.fromceu.hu) (accessed 2 May, 2012).

17. John Knechtle, “Holocaust Denial and the Concept of Dignity in the European Union,” 52-53.

18. B.H., M.W., H.P. et G.K. v. Austria, no. 1277/87, Commission decision of October 12, 1989. Refah Partisi (The Welfare Party) and others v. Turkey, nos. 41340/98, 41342/98, 41343/98, 4144/98, 2003, para. 124.

19. Claudia E. Haupt, “Regulating Hate Speech,” 326.

20. Silvia Suteu, “Law against Negation...” 41.

Basic Law<sup>21</sup>. It stipulates that human dignity is inviolable and the state has a duty to respect and protect it. It's also important to mention Article 2(1), which provides the right for free development of one's personality "insofar as does not violate the rights of others or the constitutional order and the moral law".

It is important to mention that an insult to the memory of deceased person is protected in German jurisdiction, which recognizes that the specific circumstances of an individual's death as part of his/her dignity, which is protected after the death<sup>22</sup>. Under the German jurisprudence the denial of a murder of an individual by a state based on his/her origin/race harms the dignity of that individual.

The right of free speech is in Article 5, which initially makes broad protection for speech, ensuring both a right to disseminate expression and receive information. Paragraph 2 of the same Article further indicates the conditions for limitation as found "in the provisions of general laws, for the protection of young persons, and in the right to personal honor".

The rights enshrined in Article 5 are limited by different provisions of the criminal code, administrative law, and the civil code of Germany, which empowered the state to exercise wide content-based regulations on speech.

There is no separate law banning Holocaust denial in Germany. Meanwhile, several provisions in the German Penal Code form an anti-denial apparatus. Section 130 deals with "agitation of people", which punishes incitement to racial hatred and attacks on human dignity. Art. 130 (2) deals directly with denial of Nazi crimes. It stipulates that the incitement of hatred against segments of the population and calls for violent or arbitrary measures assaults their human dignity and shall be punished with imprisonment from three months to five years. Paragraph 3 of the same Article punishes with imprisonment for five years or a fine those who "publicly or in a meeting *approves of denies or belittles* an act committed under the rule of National Socialism or the Code of Crimes against International Law". The newly added paragraph 4 made it an act punishable by 3 years of imprisonment and fine publicly or in a meeting to assault human dignity of the victims *by approving of, denying or rendering harmless* the violent and arbitrary National Socialist rule. Article 189 criminalizes the detraction of the memory of deed.

A major consideration in evaluating anti-denial laws should be paid on the German's self-perception as a perpetrator of Holocaust; and in this respect criminalizing denial serves a moral purpose. The successor state of the "Third Reich" has assumed legal and moral responsibility for the Nazi policy of Jews extermination.<sup>23</sup> These historical and moral elements explain the fact that Germany was the first country to enact such laws, and during its EU presidency strongly agitated for the criminalization of Holocaust denial throughout

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21. German Constitution.

22. "Introduction," in Ludovic Hennebel and Tomas Hochmann (eds.), *Genocide Denials and the Law* (Oxford: Oxford University Press, 2011), xliii-xliv.

23. Claus Leggewie, "Seven circles of European memory," [www.eurozine.com/pdf/2010-12-20-leggewie-en.pdf](http://www.eurozine.com/pdf/2010-12-20-leggewie-en.pdf) (accessed 25 April 2012).

the EU.<sup>24</sup> The history of fascism and Third Reich played a significant role also in shaping German's attitude toward democracy and the state's anti-denial legislation.<sup>25</sup> The state is called a "militant democracy"<sup>26</sup>, as the Constitution of Germany is based on the principle of a "democracy capable of defending itself"<sup>27</sup> and fighting against anti-democratic forces. The enactment of many German statutes after World War II also aimed at eliminating Nazism and its ideology, namely that of disseminating racial hatred.<sup>28</sup> In this realm hate speech<sup>29</sup> is assessed as a tool of propaganda which can destroy the foundations of cherished democracy and speech regulations are established to prevent the revival of Nazi past.<sup>30</sup>

Only taking the aforementioned background in the mind one can assess the Germans Federal Constitutional Court (hereinafter the Court) decision on the constitutionality of *Holocaust denial laws (Auschwitzluge)*. Court explained its position by distinguishing between opinions and facts. The Court emphasized that opinions are subjective and are protected under Basic Law whether they are "well founded or emotional or rational, dangerous or harmless, valuable or worthless"<sup>31</sup>. Thus, the mere expression of opinion is considered as constitutionally protected. By contrast, freedom of speech does not protect the dissemination of factual statements that are false or are based on the fact that has been proven to be false.<sup>32</sup> In other words, incorrect or untruthful factual statements do not fall within the ambits of Article 5. The Court further stressed that the denial of Holocaust is a clearly false fact, as the accounts of eyewitnesses, historians, and judicial proceedings dismiss any doubt about Holocaust and German responsibility.

The Court's next argument was that freedom of speech does not take precedence when it violates the right to the protection of personality by "formal insult or vilification"<sup>33</sup>. The

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24. Ian Traynor, "Germany bids to outlaw denial of Holocaust across continent," [www.guardian.co.uk/world/2007/jan/16/germany.thefarright](http://www.guardian.co.uk/world/2007/jan/16/germany.thefarright) (accessed 20 May, 2012).

25. Sionaidh Douglas-Scott, "The Hatefulness of Protected speech: A Comparison of American and European Approaches," *William and Mary Bill of Rights Journal* 7(1999): 319.

26. Silvia Suteu, "Law against Negation," 45.

27. Laurent Pech, "The Law of Holocaust Denial in Europe: Towards a (Qualified) EU-wide Criminal Prohibition," [www.centers.law.nyu.edu/jeanmonnet/papers/09/091001.html](http://www.centers.law.nyu.edu/jeanmonnet/papers/09/091001.html) (accessed 25 April 2012).

28. John Knechtle, "Holocaust Denial and the Concept of Dignity," 49.

29. Hate speech is a communication that carries no meaning other than the expression of hatred for some group, especially in circumstances in which the communication is likely to provoke violence. It is an incitement to hatred primarily against a group of persons defined in terms of race, ethnicity, national origin, gender, religion, sexual orientation, and the like. Hate speech can be any form of expression regarded as offensive to racial, ethnic and religious groups and other discrete minorities or to women.

30. Mariana Mello, "Hagan v. Australia: A Sign of the Emerging Notion of Hate Speech in Customary International Law," *Loyola of Los Angeles International and Comparative Law Review* 28:365 (2006): 374.

31. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 13, 1994, 90 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 241 (F.R.G.), [www.bundesverfassungsgericht.de/entscheidungen.html](http://www.bundesverfassungsgericht.de/entscheidungen.html) (accessed 11 May 2012).

32. Claudia Haupt, "Regulating Hate Speech," 329.

33. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 13, 1994.

Court also stressed the importance of not only an individual dignity but also of a particular group implying the dignity rights of the Jews currently living in Germany. The Jews were regarded as a vulnerable group. Holocaust denial significantly harms the reputation and dignity of Jews, since the Holocaust is an integral part of Jews identity and personal dignity<sup>34</sup> (a strong dignity-based argument). The Court stressed that Nazi persecutions have become part of modern generation of Jews living in Germany. So, Denial of Holocaust equals to denial of Jews identity<sup>35</sup>. It will create an atmosphere of insecurity for the Jews and a possibility of repetition of those notorious events. The rights to equality and non-discrimination were also evaluated by the Court.

So, the Court concluded that Sec 130 is compatible with the Constitution and other rights, namely dignity, equality, non-discrimination and protection of personality. Besides, the Court stated that it is simply enforcing the limits established by the German Constitution itself.<sup>36</sup> While the criminalization of glorification of Nazi crimes is not neutral toward opinions as the Constitution requires, it is nevertheless justified by Germany's dark past.<sup>37</sup>

Thus, the essence of this decision was the role of Holocaust denial in the German society, the guilt of the German state and the responsibility of the state that such crimes will never happen again.

The Court's decision was criticized in that the latter did not consider other non-punishable interpretations and other less restrictive means to achieve the goal,<sup>38</sup> and has chosen to protect dignity at the expense of free speech in nearly absolute terms.<sup>39</sup> This is, however, quite in consonance with the spirit of German Basic Law that "all rights must be weighed against human dignity, which takes precedence over all other values"<sup>40</sup>.

As mentioned, Germany's direct participation in Holocaust results in a special moral responsibility on the German society. This responsibility mandates to assure and guarantee the collective dignity and security of Jews living in Germany. Above all, the Constitutional Court of Germany as a part of society and state apparatus feels the same *moral* responsibility, which explains the compatibility of the Holocaust denial criminalization with the German Constitution.

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34. Ibid.

35. Dieter Grimm, "The Holocaust Denial Decision of the Federal Constitutional Court of Germany," in Ivan Hare, James Weinstein (eds.), *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2010), 560.

36. Claudia Haupt, "Regulating Hate Speech," 330.

37. BVerfG (2009), Wunsiedel, 1 BvR 2150/08, Par. 64-68.

38. Winfried Brugger, "Ban on or Protection of Hate Speech? Some Observations Based on German and American Law," *Tulane European and Civil Law Forum* 17 (2002): 53.

39. Ronald J. Krotoszynski, "A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany," *Tulane European and Civil Law Forum* 78 (2004): 1581.

40. Claudia Haupt, "Regulating Hate Speech," 314.

Taking these dignity-based and guilt-based arguments can the Armenian Genocide denial survive the German Constitutional Court analysis? Within the spectrum of guilt-based argument one can argue that Germany was an ally of Ottoman Turkey during World War I and the Armenian Genocide in 1915 was perpetrated and executed by the approval of the Germany. This was admitted also on the governmental level: the German Bundestag adopted a resolution on the Armenian Genocide which not only condemned the actions of the Young Turks' Government that resulted in almost a complete extermination of the Armenians living in the Ottoman Empire, but also recognized the historical responsibility of Germany and called on the Federal Government to continue further public discussions about the responsibility of the German Reich in the Armenian Genocide. However, whether this would be enough to shape a public attitude and establish collective guilt so that to raise it to the level of moral issue? It took more than 100 years for the German lawmakers to admit the fact of the Armenian Genocide and the responsibility of Germany.

Although the criminalization of denial in Germany relates only to the Holocaust, in this paragraph we will apply the Court's reasoning to the Armenian Genocide denial case to see whether it will pass the test. Definitely, the Armenian Genocide denial passes the first argument of the German Constitutional Court on opinions and facts, as the Armenian Genocide is a clearly established historical fact. Moreover, the German Bundestag very recently officially admitted that the 1915 events qualify as genocide.

The Court's next argument on the protection of personality and the importance of dignity of a particular group can also well suit into an Armenian case. Armenian Genocide denial significantly harms the reputation and dignity of Armenians, since Mets Yeghern is an integral part of Armenians' identity. As in case of Holocaust denial, Armenian Genocide denial also violates the rights to equality and non-discrimination. However, in Holocaust denial case the Court referred to the rights of Jews living in Germany, and the responsibility of the German state to assure their security and guarantee against the Holocaust repetition. The number of Jews living in Germany outnumbered the Armenians living in Germany several times. There are still Holocaust survivors and their heirs living in Germany - a perpetrator state, who admitted and hugely regretted about the past genocide, and the German state feels an obligation to safeguard them from any kind of discrimination and reminder about the past atrocities. This analysis is hardly applicable to the Armenians living in Germany. Plus, the existence of a huge Turkish Diaspora in Germany can play a negative role in this case. Finally, the weight of guilt in the Jews case is far great than in the Armenian Genocide case, where the weight of German guilt is still to be discovered, discussed and admitted.

## **Spain Constitutional Law Approach to Criminalization of Genocide Denial**

Article 20 of the Spain Constitution recognizes the freedom of speech, thoughts and truthful information. In its fourth paragraph, Article 20 imposes limits on this right based on "the respect for the rights... and, especially, in the right to honor, privacy, personal iden-



tity, and protection of youth and childhood”. Article 10 of the Constitution declares dignity as the inviolable inherent right, which together with “the free development of the personality, respect for the law and the rights of others, constitutes the foundation of political order and social peace”.

The Spain Constitutional Court (hereinafter the Court) has declared that the right to freedom of speech is a precondition for exercising other rights. At the same time Constitution does not recognize the right to insult, and freedom of speech protection “excludes absolutely humiliating expressions”.<sup>41</sup> According to the Court freedom of speech is a right to make judgments and opinions, without factual claims or objective data, and when freedom of speech provides untrue information, the Court will assess it as information and “the constitutional protection will be extended only to truthful information”.<sup>42</sup> However, in assessing the Holocaust denial law the Court seemed to contradict this approach.

In 1971, Article 607 on the crime of genocide was introduced to the Spanish Criminal Code, which was amended in 2007.<sup>43</sup> In its original, Section 607.2 of the Spanish Criminal Code prescribed that “dissemination of ideas and doctrines that deny or justify the crimes [acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group] or aim at reinstating regimes or institutions that contribute those crimes is punishable with imprisonment from one to two years”.

In its analysis the Spain Constitutional Court states that this rule aims not to “the simple spreading of ideas or opinions, but to the protection of society from behaviors that “would generate a climate of violence and hostility that, in an indirect way, could materialize in specific acts of racial, ethnic or religious discrimination”.<sup>44</sup> Although the article was aimed at the protection of Jews, the wording of the article is wide, including also other genocides.

In understanding Spain anti-negation legislation it’s also important to consider that the Spain Constitution came into force after 36 years of Franco dictatorship and the fears of Spanish people are reflected in the Constitution.<sup>45</sup> That’s why it is also called “militant democracy”, which implies the defensive character of the Spain Constitution and the re-

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41. Alfredo Coll and Sergio Doncel, “Freedom of Speech in American and Spanish Law: A Comparative Perspective,” [www.works.bepress.com/alfredo\\_coll/1](http://www.works.bepress.com/alfredo_coll/1) (accessed 28 July 2016).

42. *Ibid*, 7.

43. The Section was amended in November 2007 after another decision of the Constitutional Court that criminalization of denial of past events violates the right to freedom of speech. Now Section 607.2 reads “...those who are found guilty of spreading ideas **justifying** the destruction of the protected groups or of **attempting to reinstate** regimes or institutions which carried out such policies and/or bore relevant ideologies are to be punished with a prison sentence of one to two years”.

44. Spain Constitutional Court Judgment No. 235/2007, of November 7. [www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2352007en.aspx](http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2352007en.aspx) (accessed 30 May 2012), also Pablo Salvador Coderch and Antoni Rubí Puig,, “Genocide Denial and Freedom of Speech: Comments on the Spanish Constitutional Court’s Judgment 235/2007, November 7<sup>th</sup>”, in *Dret. Revista Para el Análisis del Derecho* 4 (2008):16.

45. For more information see Enrique Guillen Lopez, “Judicial Review in Spain: The Constitutional Court,” *Loyola of Los Angeles Law Review* 41: 529 (2008): 529-562.

striction of some fundamental rights - freedom of speech - in order not to be used for anti-constitutional purposes. Another important fact related to section 607.2 is that Jewish culture and community had been historically and systematically persecuted in Spain and anti-Semitism was quite widespread in Spanish society.<sup>46</sup>

With this background in 1991 the Court in assessing the constitutionality of Section 607.2 ruled that initially denial speech fell under the freedom of speech protection, however, it does not protect racist declarations, which are contrary to the right of honor and human dignity<sup>47</sup>. So, the Court was of the opinion that the right to dignity should prevail over the right of freedom of speech.

However, in 2007 the Constitutional Court of Spain struck off the denial aspect of the article, thus criminalizing only the justification of genocides.

The issue of Article 607.2 constitutionality was again raised on September 14, 2000 connected with the case of the bookstore owner who had sold and distributed books and documents denying the Holocaust. In evaluating Article 607.2 the Court first stressed the importance of the freedom of speech not only as a basic individual freedom (even if is disturbing and unpleasant), but also its role in Spain's democratic system, which implies that fundamental rights may not be limited because are counter to the spirit of Constitution.<sup>48</sup>In democracy state authorities cannot interfere in the exchange of ideas (very similar to "marketplace of ideas" theory), unless they infringe upon other constitutionally protected rights.<sup>49</sup>The Court highlighted the urgent need to set clear boundaries between behaviors that do not merit protection and dissemination of ideas and ideologies.

The Court differentiated between denial and justification, between simple denial and positive value judgments. The simple denial of genocide as a historical fact without adding any subjective value judgment is ruled to be protected by the Constitution. The Court found that Section 607(2) of the Criminal Code punishes simply the dissemination of ideas without any damage to the constitutionally protected rights, so constitutionally protected rights of freedom of speech (Articles 20(1), and freedom of thought (Art. 16)) should prevail. Although the Court accepted that the denial of Holocaust is very "reprehensible and distorted", however statements, doubts and opinions about the historical fact are protected by the freedom of speech. By contrast, positive value judgments may be criminally punished, because "dissemination of offensive utterances is unnecessary for the expression of ideas and opinions and fall outside the right's scope of protection"<sup>50</sup>. So, the Court held that there is a difference between denying and justifying, because the "latter conduct does create a clear and present danger".

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46. Jose Rodriguez Jiménez, "Antisemitism and the Extreme Right in Spain (1962-1997)," [www.sicsa.huji.ac.il](http://www.sicsa.huji.ac.il) (accessed 24 April 2012).

47. Case of Violeta Friedman, No 101/90, Judgment of November 11, 1991.

48. Spain Constitutional Court Judgment No. 235/2007, of November 7, para 5.

49. *Ibid.* para 6.

50. *Ibid.*

As to the punishable acts the Court explained that freedom of speech does not guarantee the right to express and disseminate particular statements with the intention of “disdaining or discriminating individuals or groups”. Second, freedom of speech does not guarantee the right to “praising tyrants, glorifying their publicity or justifying their actions if they entail humiliation to their victims in the context of denying the Nazi genocide”. Third, freedom of speech does not cover the so-called «hate speech», which involves direct incitement to violence against citizens or against particular racial or ideological groups. Thus, genocide denial will be criminalized only if *disdain or discriminate, justify the crime or humiliate the victims and incite violence* against particular group. In other cases Holocaust denial is protected by the freedom of expression. So, the ruling of the Spain Court differs from the German Court with regard to opinions and factual statements. Under the right of freedom of speech the Spain Court decided to protect factual statements, while the German Court preferred to guarantee opinions. From the moral point of view opinions are free but lies have no constitutional value. Moreover, facts are scientifically testable, while opinions labeled radical yesterday can be considered acceptable today.

So, despite the historical fact of Spain’s involvement in the persecutions of Jews and anti-Semitism, it seems that the society is changing. The moral part of guilt becomes more and more remote and by the influence of globalization and modern challenges new human right values appear to outweigh in the Spanish society. The people start to value the freedom of speech and its role in the everyday life of ordinary citizens. Meanwhile, legislator declared its intention to continue efforts to bring a new draft with a view to overcome the Court’s decision.<sup>51</sup>

In Spain’s perspective, the denial of the Armenian Genocide is not quite straightforward: most importantly, the state hasn’t yet officially recognized the Armenian Genocide, which was done by more than dozen city councils. It is clear that the mere denial of the historical fact of the Armenian Genocide fall outside the scope of Article 607.2 Spain Penal Code. However, whether the justification of the Armenian Genocide could still be protected under the Spain Constitution?

The issue seems quite debatable. Although there was no underlying argumentation about Holocaust history in the reasoning of the Court, however in assessing the mere existence of Article 607.2, the history of Jews persecutions in Spain should be kept in mind. There is no history of Armenian persecutions in Spain. Moreover, Spain was a neutral state during WWI, during which the Armenian Genocide was carried out. Armenian community in Spain was formed after the dissolution of the USSR, in contrast to other states where the Armenian emigration started just after the 1915 Genocide.

Thus the Court’s argument that denial “would generate a climate of violence and hostility” and “could be materialized in specific acts of racial, ethnic or religious discrimination” is less applicable to the Armenians. However, as already mentioned because Spain hasn’t

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51. Cited in Michael Whine, “Expanding Holocaust denial and Legislation against it,” *Jewish Political Studies Review* 20:1-2(2008).

recognized the Armenian Genocide, this mere fact can deter the Court from even considering the Armenian Genocide denial case.

## **French Constitutional Law Approach to Criminalization of Genocide Denial**

The Declaration of Rights of Man and Citizen guarantees freedom of speech as the most precious rights of man, stating that people are free to speak, write, and print “*on condition that they answer for any abuse of this freedom*”.<sup>52</sup> Furthermore, the Declaration states the only bound on the exercise of natural rights is the necessity to assure the enjoyment of these same rights to other members of the society.<sup>53</sup> Meanwhile the Parliament of France can enact rules on the right of freedom of speech, as well as institute indictments on abuse of the right that violate public order and the rights of others provided “that damage must be necessary, appropriate and proportionate to the objective pursued”.<sup>54</sup> Consequently, under French law, people have rights which can be restricted by the legislature if considered necessary for public security. To understand such an approach one should consider the philosophical and historical grounds of free speech in France, which was directed at the preservation of democracy<sup>55</sup> as a non-self-perpetuating system.<sup>56</sup> This notion comes from the 1793 French revolutionary slogan “*Pas de liberté e pour les ennemis de la liberté*”<sup>57</sup>.

One of such restrictions on the freedom of speech is Holocaust denial law (Loi Gaysot), which was paradoxically included as Article 24 in the 1881 Freedom of the Press law. The Article stipulates that “Anyone who disputes the existence of the crimes against humanity as defined in the Statute of the International Military Tribunal which have been committed by the members of a criminal organization or by a person found guilty of such crimes by a French or international court shall be liable to one year’s imprisonment and/or a fine”. The aim of the law is to “protect public order, morals and rights of others, referring to the respect due to past and the necessary preservation of social peace in the future”.<sup>58</sup> A clear recognition that the Holocaust denial is anti-Semitism the *Gaysot* law is intended to protect the Jewish community “against hostility, antagonism and ill will”.<sup>59</sup> It should also be clarified that the rationale of the law in France differs from that of Germany. The

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52. Declaration of the Rights of Man – 1789, [www.avalon.law.yale.edu/18th\\_century/rightsof.asp](http://www.avalon.law.yale.edu/18th_century/rightsof.asp) (accessed 21 May 2012).

53. Article 4 and 11 of the Declaration of the Rights of Man.

54. Article 34 of the French Constitution.

55. Sévane Garibian, “Taking Denial Seriously: Genocide Denial and Freedom of Speech in French Law,” *Cardozo Journal of Conflict Resolution* 9:479 (2008): 483.

56. Vivian Curran, “Balancing Freedom of Expression and Human Rights in France,” [www.jurist.org/forum/2012/02/vivian-curran-genocide-denial.php](http://www.jurist.org/forum/2012/02/vivian-curran-genocide-denial.php) (accessed 30 May 2012).

57. “No liberty to the enemies of liberty,” Sévane Garibian, “Taking Denial Seriously,” 482.

58. Silvia Suteu, “Law against Negation,” 73.

59. Josephs Jonathan, “Holocaust Denial Legislation,” *Working Papers du Centre Perelman de philosophie du droit* 3 (2008): 50.

latter focused on the untruthful nature of the Auschwitz lie, while the French authorities in outlawing Holocaust denial have mostly relied on the argument that it pursues racist and antidemocratic aims.<sup>60</sup> It's worth highlighting the role of history in shaping the attitude of France towards Holocaust. The involvement of Vichy France with Nazi German anti-Jewish policy, French anti-Semitic attitude,<sup>61</sup> Jews aggressive persecutions in France<sup>62</sup> played their prominent role on the conciseness of the French society.<sup>63</sup> In 1995 President Chirac recognized the responsibility on behalf of the French state for the nation's participation in atrocities against its Jewish citizens during WWII.<sup>64</sup> As a result, there is a solid degree of culpability in the French society. Holocaust denial laws are legacies of sensitive and painful events in French history through which "the French nation is supposed to come to terms with its sobering past".<sup>65</sup> Even the U.S. District Court for the Northern District of California accepted the right of France to enact anti-negation laws against "the distribution of Nazi propaganda in response to its terrible experiences during WWII".<sup>66</sup>

The law was not submitted to review to the Constitutional Council (hereinafter the Council) prior to its ratification. The Court of Cassation decided not to refer the law to the constitutional review because "it evidently does not conflict with the freedom of expression".<sup>67</sup> The *Gayssot* law was assumed compatible with the Constitution, because what is punished is not the holding of opinions, but the diffusion of that opinion, which is an "act susceptible to produce undesirable effects...".<sup>68</sup> So far 29 cases have been tried under *Gayssot* law<sup>69</sup> and ordinary courts have ruled on the compatibility of the law with the right to freedom of expression guaranteed by Article 10 of the European Convention on Human Rights (ECTHR),<sup>70</sup> namely is *prescribed by law, is necessary in a democratic society* for

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60. Sévane Garibian, "Taking Denial Seriously," 485.

61. Lyombe Eko, "New Medium, Old Free Speech Regimes: The Historical and Ideological Foundations of French & American Regulation of Bias-Motivated Speech and Symbolic Expression on the Internet," *Loyola. Los Angeles International and Comparative Law Review* 28:69 (2006):106.

62. Richard H. Weisberg, *Vichy Law and the Holocaust in France* (Amsterdam: Harwood Academic Publisher, 1996), 2.

63. Peter Carrier, *Holocaust Monuments and the National Memory Cultures in France and Germany since 1989* (New York: Berghahn Books, 2005), 51.

64. Lyombe Eko, "New Medium, Old Free Speech Regimes," 83-84.

65. Roger Cohen, "France Confronts its Jews, and Itself," *New York Times*, 19 October 1997, 1.

66. UEJF & LICRA v. Yahoo! Inc., Tribunal de grande instance [T.G.I.] [Superior Court] Paris, May 22, 2000, The Clerk of the Chief Justice Christine Bensoam, (Fr.), available at [www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm](http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm).

67. [www.senat.fr/basile/visio.do?id=d45186620120123\\_8&idtable=d136282-72330\\_3|d45186620120123\\_8&\\_c=Genocide+bill&rch=ds&de=20110527&au=20120527&dp=1+an&radio=dp&aff=36282&tri=p&off=0&afd=ppr&afd=ppl&afd=pjl&afd=cvn#eltSign7](http://www.senat.fr/basile/visio.do?id=d45186620120123_8&idtable=d136282-72330_3|d45186620120123_8&_c=Genocide+bill&rch=ds&de=20110527&au=20120527&dp=1+an&radio=dp&aff=36282&tri=p&off=0&afd=ppr&afd=ppl&afd=pjl&afd=cvn#eltSign7) (accessed 31 May 2012).

68. Michel Troper, "La loi Gayssot et la constitution," *Annale. Histoire, Sciences Sociales* 54(6) (1999):1253.

69. Silvia Suteu, "Law against Negation," 96.

70. 1. Everyone has the right to **freedom of expression**. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless

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the prevention of *disorder* and the *protection of the rights of others*. The law is considered to protect the rights of the Nazis' victims by ensuring and safeguarding the respect to their memory and safeguards the peaceful coexistence in the France.<sup>71</sup> To further justify this conclusion, courts sometimes additionally referred to ECtHR limitation clause.<sup>72</sup> The legitimacy of the Law was also upheld by the international case-law.<sup>73</sup>

On January 2012 the French Parliament adopted the Genocide Bill - criminalizing "contestation or trivialization of genocide named in the French Criminal Code and recognized by the French law".<sup>74</sup> Although the law criminalizes the denial of any genocide legally recognized by France, it unofficially implied the Armenian genocide, as the French law recognized only 2 genocides – the Holocaust, the denial of which is criminalized separately, and the Armenian Genocide<sup>75</sup>. The experts assessed the adoption of the Bill within the framework of 2008 EU Council Framework Decision and with the nation's own complicated past.<sup>76</sup> However, these were not enough for the Bill to survive. Unlike the Gaysot law, the Genocide Bill was submitted to the Constitutional Council (hereinafter the Council) for evaluation.

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of frontiers.

2. The exercise of these freedoms, carries with it duties and responsibilities, may be subject to such **restrictions** or penalties as are **prescribed by law** and are **necessary in a democratic society**, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

71. *Yahoo! II*, 379 F.3d 1120, 1126-1127 (9th Cir. 2004).

72. None of the provisions of the ECtHR may be interpreted as implying any right to engage in any activity or perform any act aimed at the destruction of the rights and freedoms set forth in the ECHR.

73. ECtHR 7 July 2003, Case No. 65831/01, *Garaudy v. France*; ICCPR 8 November 1996, Case No 550/1993, *Robert Faurisson v. France*.

74. The purpose of this bill is to punish by one year of imprisonment and a fine of 45,000 euros, or both, only those who have publicly denied, challenged or trivialized crimes of genocide, crimes against humanity and war crimes, as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, Article 6 of the Charter of the International Military Tribunal annexed to the Agreement of London of August 8th, 1945, or recognized by France.

Accordingly, the Act on Freedom of the Press is amended to ensure that offenses of a racist nature are now a common law offense under the Freedom of the Press Act. Moreover, it allows any association duly declared for at least five years at the date of the facts, which proposes, in its statutes, to defend the moral interests and honor of victims of crimes of genocide, crimes against humanity And war crimes to exercise the rights of the civil party with respect to the apology, denial or trivialization of crimes of genocide, war crimes or crimes against humanity. [www.senat.fr/lng/en/index.html](http://www.senat.fr/lng/en/index.html)

75. In 2001 France passed a law recognizing the Armenians Genocide. In 2006 the French National Assembly approved an amendment to the 2001 statute, imposing criminal sanctions for the denial of the Armenian Genocide. However, it was dropped before being submitted to the Senate. The next attempt to criminalize the Armenian Genocide denial was made on 2012.

76. *Balancing Freedom of Expression and Human Rights in France*, [www.jurist.org/forum/2012/02/vivian-curran-genocide-denial.php](http://www.jurist.org/forum/2012/02/vivian-curran-genocide-denial.php) (accessed 12 June 2012).

Before dwelling upon the Council reasoning and decision, let's first understand the place of the Armenian Genocide in the frame of the French memory laws' arguments<sup>77</sup>. So, the Gaysot law as a memory law deals specifically with the Holocaust denial in France and is tightly connected with the history of Holocaust in France, its political, cultural and social implications, the killing of French Jews and the rise of denialism in France.<sup>78</sup> What about the Armenian Genocide? Does it fit into the common understanding of French history and culture? Armenian Genocide denial laws should have some connection with the French history, culture, etc. Although one can argue that France as a great power did not interfere to stop the massacres and deportations, thus aiding and abetting the Armenian Genocide, this argument will hardly survive the critique. This same rationale could be applied to other great powers as well. Plus, other instances of assistance and help from the French part can be pointed out. Another argument, listed also in the Report to the National Assembly on the Proposed Armenian Memory Law<sup>79</sup>, could be the place of France "as a birthplace of human rights", thus having a role to protect universal human rights values. However, as the author of the idea correctly put it, in this case the France will adopt a broader approach to the issue and will criminalize all genocides<sup>80</sup> (by the way, this was one of the arguments of the Council).

When evaluating the constitutionality of Genocide Bill, the Council first assessed the vital role of the freedom of speech, and further elaborated on the right of the Parliament to enact on freedom of speech and at the same time to institute indictments on abuse of its exercise.<sup>81</sup> The main argument of the Council was based on Article 6 of the Declaration of Human and Citizens rights 1789, which stipulates that the law as the expression of general will of all citizens must be the same for all "whether it protects or punishes". The Genocide Bill was intended to punish only Genocides recognized by the French Parliament, which, according to the Council, cannot be considered as normative within the meaning of Article 6. And thus, the legislature unconstitutionally interfered with the right of freedom of expression.<sup>82</sup> It derives from the reasoning of the Council that if the Bill equally criminalizes all Genocides it will survive judicial scrutiny. In this case what about Holocaust, does its "exceptional status" still work? In that case what about the equality and normative value of the laws declared by the Council?

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77. Together with the **Gaysot law**, there is another memory law connected with the French history - **Taubira law** - which recognizes slave trade and slavery as a crime against humanity.

78. John Wolf, *Harnessing the Holocaust: the Politics of Memory in France* (Palo Alto, CA: Stanford University Press, 2003), 264.

79. <http://www.assemblee-nationale.fr/11/dossiers/genocide.asp> (accessed 30 June 30 2017).

80. David Fraser, "Law's Holocaust Denial: State Memory, Legality," in Ludovic Hennebel and Tomas Hochmann (eds), *Genocide Denials and the Law*, (Oxford: Oxford University Press, 2011), 41.

81. [www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/decision/decision-no-2012-647-dc-of-28-february-2012.114637.html](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/decision/decision-no-2012-647-dc-of-28-february-2012.114637.html)

82. Ibid.

As to the reality, the dissemination of the Bill on all Genocides poses a clear danger for France, because accusations of France's involvement in Rwandan genocide and massacres in Algeria.<sup>83</sup> According to some analysts, there is also a political and economic context in this overall situation: in addition of being an active ally of NATO, Turkey and France (also EU -Turkey relations<sup>84</sup>) have trade ties valued at \$13.5 billion.<sup>85</sup>

In 2016 the French legislature again tried to criminalize the denial of the Armenian Genocide. It was passed as an amendment to the French "Loi relative à l'égalité à la citoyenneté" (Law on Equality and Citizenship). However, the French Constitutional Council again ruled the amendment unconstitutional as it conflicts with the freedom of expression and is neither necessary nor proportionate<sup>86</sup>.

## Conclusion

Genocide denial laws are "symbolic laws";<sup>87</sup> they incorporate different constitutional values such as freedom of speech, dignity, equality. They are also contingent on the historical, cultural, political, social and psychological matters of a particular society, thus being called also memory laws. However, these approaches do not fully explain the choice of the particular state how to deal with an issue of Genocide denial. From the historical perspective the three discussed states were somehow similar: the concept of militant democracy was relevant in all cases. The same refers to their collective memory related to Holocaust as a social imperative to remember the past atrocities against Jews. The special responsibility seems to be felt by the three states, with different degree of culpability. The decision of French Constitutional Council reflects not only the absence of that culpability towards the Armenian Genocide, but also the political reasons underlying the decision, which can well be applied to Germany and Spain.

Social change and geopolitical evolution brought to the reevaluation of the right-protection system in Spain, where past notions are replaced by a more balanced ones to the values related to individual rights.

However, one crucial question still remains with such approach: shouldn't the law be the same for all?

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83. [www.taipeitimes.com/News/world/archives/2011/12/19/2003521130](http://www.taipeitimes.com/News/world/archives/2011/12/19/2003521130) (accessed 29 June 2015).

84. [www.bloomberg.com/news/2012-05-14/end-france-s-block-on-turkey-s-eu-bid-president-hollande.html](http://www.bloomberg.com/news/2012-05-14/end-france-s-block-on-turkey-s-eu-bid-president-hollande.html) (accessed 28 June 2015).

85. [www.edition.cnn.com/2012/01/23/world/europe/france-armenia-genocide/index.html](http://www.edition.cnn.com/2012/01/23/world/europe/france-armenia-genocide/index.html) (accessed 24 May 2012).

86. Décision N° 2016-745 DC du Conseil constitutionnel du 26 janvier 2017.

87. Silvia Suteu, "Law against Negation," 54.