***Regulation of Hate Speech: The Right to be a Bigot vs the Right to Dignity***

**Ben Symons, State Chambers**

## *Introduction*

Free speech is intrinsic to the definition of democracy.[1] Democracy will not be true to its essential ideal if those in power are able to manipulate the electorate by withholding information and stifling criticism.

For democracy to deliver all that it promises, an informed electorate is necessary.[2] Deliberation on public policy is therefore essential to secure individual rights and to advance policies for the common good. In order for the citizenry to be appropriately engaged, it is argued that there must be no constraints on the free flow of information and ideas.[3]

While it has been said that "rights are trumps", when fundamental liberties come into conflict they must somehow be mediated.[4]

The liberal political conception of justice will ascribe to all citizens certain fundamental rights and liberties, including that of the right to live with dignity, and of free expression.[5] However, the right to freedom of expression can come into conflict with other human rights, including the right to human dignity. This is especially so on the issue the hate speech. The purpose of this paper is to present the conflict of rights as an issue and to explore theoretical solutions to it.

## *History - The democratic significance of freedom of speech*

It is thought that the democratic ideology of free speech may have emerged in the late 6th or early 5th century BC. Athenian democracy and the centrality of free expression, debate and deliberative decision-making is touched upon in Pericles' Funeral Oration, given in 430BC to honour the dead of the first battles of the Peloponnesian War:

"*We reach decisions on public policy only after full discussion, believing that sound judgement, far from being impeded by discussion, is arrived at only when full information is considered before a decision is made.*"[6]

---

[1] Robert Post, Equality and Autonomy in First Amendment Jurisprudence, 95 *Mich. L. Rev.* 1517, 1521 (1997)

[2] Owen M. Fiss, Free Speech and Social Structure, 71 *Iowa L. Rev*. 1405, 1411 (1986): Free speech should not be focused on "the protection of autonomy" but on whether the expression in question enriches public debate.

[3] Cass Sunstein, Free Speech Now, 59 *U. Chi. L. Rev*. 255, 316 (1992): "we should understand the free speech principle to be centered above all on political thought. In this way the free speech principle should always be seen through the lens of democracy."

[4] Aharon Barak, "*Proportionality: Constitutional Rights and Their Limitations*", Cambridge: Cambridge University Press, 2012, 145-210.

[5] John Rawls, "*Political Liberalism*", New York: Columbia University Press. Second Ed., 2005.

[6] Thucydides, Book II of his History of the Peloponnesian War.

The values of the Roman Republic similarly included freedom of speech and freedom of religion.[7]

The regulation of speech commenced early in the common law. *The Statute of Westminster of 1275* introduced the criminal offence *De Scandalis Magnatum* which provided "[*t]hat from henceforth none be so hardy to tell or publish any false News or Tales, whereby discord, or occasion of discord or slander may grow between the King and his People, or the Great Men of the Realm*". The primary aim was the prevention of false statements which, in a society dominated by extremely powerful landowners, could threaten the security of the state.[8]

When the subjects of the realm began to find a voice in the early English parliaments, they began to, on occasion, oppose the King's will and seek a greater voice in matters of state. In 1559, the Crown granted the Parliament's formal request of the privilege of freedom of speech.[9] However, that privilege was granted subject to the condition that members be "neither unmindful nor uncareful of their duties, reverence, and obedience to their sovereign".[10] The privilege was also limited by subject matter. Topics touching on the royal prerogative were excluded from its protection and Parliament required leave from the Crown to introduce such topics.

On a number of occasions Elizabeth I stopped a debate which she considered touched on her prerogative. At the start of the seventeenth century it was accepted that Parliament could, on the invitation of the monarch, debate any topic. Much more contested, however, was whether Parliament could discuss such matters on its own initiative.

The scope of Parliament's freedom of speech on foreign policy topics became more complex under the early Stuart Kings. Parliament increasingly debated matters of foreign policy and sought to exert influence and control over the king's choices and actions. In some situations, James I permitted and encouraged Parliament's discussion of foreign policy issues (such as relations with Spain, and the marriage of his son Charles I), while in others he refused Parliament's competence to do so.[11]

Thus Parliament began to properly debate matters of war and foreign policy when invited to by the king. But by 1621, the Commons took the step from mere debate to advising the king on matters of war and foreign policy. James I and Charles responded angrily. In a letter to the Commons, James rebuked it for "argu[ing] and

[7] M. P. Charlesworth (March 1943). "Freedom of Speech in Republican Rome". The Classical Review. The Classical Association. 57 (1): 49.

[8] *R v Zundel* [1992] 2 SCR 731 per McLachlin J; William Holdsworth "*A History of English Law*" (5th ed. 1942), vol. III, at p. 409.

[9] 'Answer to Petition for Privilege' (22 February 1593) in J.R. Tanner, "*Tudor Constitutional Documents*, AD 1485-1603" (Cambridge University Press, 1930) at p.552.

[10] In the parliament that sat between 8 February - 15 March 1576, Peter Wentworth made outspoken demands for free speech in Parliament. The House of Commons itself imprisoned Wentworth, believing that he had overstepped the line; most members accepted that they should not discuss matters such as foreign policy without the Queen's permission. He was sent to the Tower after the session of 23 November 1584 - 29 March 1585 for interference with the Queen's prerogative. Wentworth died in the Tower of London in 1596: JR Tanner, "*Tudor Constitutional Documents*, AD 1485-1603" (Cambridge University Press, 1930) at p.557.

[11] Conrad Russell, "The Foreign Policy Debate in the House of Commons in 1621" (1977) 20 *The Historical Journal* 289, 296.

debat[ing] publicly of the matters far above their reach and capacity, tending to our high dishonour and breach of prerogative royal" and commanded it not to "meddle with anything concerning our government or deep matters of state", matters which were the business of the Privy Council.[12]

In response, the Commons sent a second petition to the King, which drew a distinction between 'discourse' (protected by Parliament's 'ancient liberty' of freedom of speech) and 'determination' (which would improperly intrude on the 'sacred bounds' of royal authority). The Commons acknowledged that the king had the sole powers to make peace and war and to organise the marriage of the prince. They claimed again, however, the Commons' power to discuss and inform the king on these matters. The petition articulated two foundations for its power: first, the Commons' position as representatives of the 'whole commons of the kingdom'; and secondly, its ancient and undoubted right to free speech inherited from the Commons' ancestors.[13]

After 1621, the Commons was often consulted by James I on matters of policy and government. However, Charles I was not as receptive to parliamentary debate or advice as James. He asserted that the 'greatest council of state' was the Privy Council, not Parliament, and that the Privy Council was above the general interference of the Commons.[14]

By post-Restoration, the rules and practices regarding Parliament's freedom of speech had changed. In practice, the scope of Parliament's freedom of speech was relatively settled: Parliament could debate any topics of its choice. The key issue of contestation now was whether Parliament could and should go beyond mere debate and advice to the monarch, and seek to exert control over foreign policy. As an aspect of its freedom of speech, MPs would criticise the king's decisions and actions and make clear their opinions on the course of action they thought he should pursue. The Commons thus insisted on a share in foreign policy if they were to supply the means of carrying it out.

Following the abdication of the last Stuart king, Article 9 of the *Bill of Rights 1688* codified and affirmed Parliament's privilege of free speech. Parliament had a constitutional right to debate on any subject of its choosing, and was not restricted from talking about any matters, including those that were within the scope of the royal prerogative.

***Debate in the age of parliamentary government***

In the 18th century, Parliament banned publication of its debates as a breach of privilege. This led to a battle with radical MP and journalist John Wilkes – a popular national figure who was convicted in 1764 for publishing an attack on George III and the Government. In 1771, he used his influence in the City of London to protect

[12] 'King's letter to the Speaker, 3 December 1621' in J.P. Kenyon "*The Stuart Constitution 1603-1688*" (2nd ed., Cambridge University Press) at p.39.
[13] 'Commons Protestation of 18 December 1621' in J.P. Kenyon "*The Stuart Constitution 1603-1688*" (2nd ed., Cambridge University Press) at p.42.
[14] S.R. Gardiner, "The Constitutional Documents of the Puritan Revolution", 1625-1660 (3rd ed, Oxford University Press, 1906) pp.4-5.

people who printed parliamentary debates from arrest. Unable to prevent publication of debates, Parliament stopped trying to suppress parliamentary reporting.

This opened the way for radical MP and journalist William Cobbett to publish Parliamentary Debates in 1803. He sold the title to William Hansard, and Hansard became Parliament's official record in 1909.

### *J.S. Mill – On Liberty*

The notion that the expression of dissent or subversive views in general should be tolerated, not censured or punished by law, developed alongside the rise of printing and the press. John Milton's *Areopagitica*, published in 1644, was his response to the Parliament's re-introduction of government licensing of printers. Church authorities had previously ensured that Milton's essay on the right to divorce was refused a license for publication. In *Areopagitica* (published without a license) Milton made a plea for freedom of expression and toleration of falsehood, stating:

"*Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."*

John Stuart Mill justified elevating free speech to a fundamental right on the basis of the importance of discovering truth:

"*[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error*."[15]

It followed in Mill's view that "*there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered*." However, Mill also recognised what is known as the harm principle, in placing the following limitation on free expression:

"*the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others*".

### *Modern Justifications*

Three main theoretical underpinnings exist for justifying the right to freedom of speech.

Proponents of the first theory claim that the purpose of protecting free speech is to further democratic institutions.[16]

---

[15] John Stuart Mill, "On Liberty", 1859.

[16] Robert Post, "Reconciling Theory and Doctrine in First Amendment Jurisprudence", 88 *Cal. L. Rev.* 2353, 2362-63 (2000) (stating that "[t]he democratic theory of the First Amendment . . . protects speech insofar as it is required by the practice of self-government").

Those who espouse the second prominent school of thought conceive the constitutional commitment to personal autonomy to be the reason why courts and society at large to diligently safeguard and treasure free speech.[17]

The third persuasion connect the high regard for free speech to the advancement of knowledge: the market-place of ideas.[18]

***Free speech in the modern age***

Post WWII, the international community identified discrimination and racism as an abuse of human dignity and equality, as well as a major cause of other massive violations, including genocide.

The greatest man-made calamities that have plagued the world for centuries involved and required full control over expressions, opinions and at time conscience: the slave trade and slavery, the inquisition, the Holocaust, the genocide in Cambodia or Rwanda, the Stalin regime and the gulag. Such control over freedom of expression was recognized as the handmaiden of power.

As early as 1946, at its very first session, in the UN General Assembly adopted Resolution 59(I) which states: "*Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated*."

This has been echoed by other courts and bodies. For example, the UN Human Rights Committee has said: "The right to freedom of expression is of paramount importance in any democratic society."

The European Court of Human Rights has also recognised the vital role of freedom of expression as an underpinning of democracy: "Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man."

***International Recognition of Free Speech and its limits: UDHR and ICCPR***

Freedom of expression is guaranteed under Article 19 of the *Universal Declaration on Human Rights* (**UDHR**), and similarly under article 19 of the *International Covenant on Civil and Political Rights* (**ICCPR**):

*Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.*[19]

[17] C. Edwin Baker, "Autonomy and Free Speech", 27 *Const. Comment.* 251, 259 (2011) (asserting that the "most appealing" theory of the First Amendment regards "the constitutional status of free speech as required respect for a person's autonomy in her speech choices").

[18] *Abrams v U.S.* 250 U.S. 616 (1919) (Holmes J); see also *Davis v Federal Election Commission*, 554 U.S. 724, 755-56 (2008) (Stevens, J) quoting *Red Lion Broad. Co. v FCC*, 395 U.S. 367, 390 (1969) - "*It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail*."

Yet, freedom of expression is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters. Article 19(3) of the ICCPR lays down the conditions which any restriction on freedom of expression must meet:

*The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (order public), or of public health or morals.*

***Regulation of Hate Speech in International Law***

International law imposes clear positive duties upon States as far as restrictions of freedom of expression is concerned including the prohibition on war propaganda and on hate speech. Article 20 of the ICCPR provides:

*"Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law"*[20]

This is the only duty that States must abide by, as far as restricting freedom of expression is concerned. There is, however, no agreed definition of "hate speech" in international law. Instead, there are marked different regional or national approaches in restricting it.

At one end of the spectrum is the US approach that takes a very wide and robust approach to protecting free speech. There are generally three types of speech that are proscribed under the 1st amendment: (i) obscenity, (ii) defamation, and (ii) speech that gives rise to "imminent lawless action". "Hate speech" generally falls in to the third of these categories.[21] However, the robust interpretation that the US Supreme Court has taken to guaranteeing the first amendment right to free speech means that hate speech is generally protected unless (i) the speech actually incites to violence and (ii) the speech will likely give rise to imminent violence. This is a very stringent standard indeed: even speech advocating violence and filled with racial insults, will be protected absent a showing that violence is likely to occur immediately.

On signing the ICCPR in 1992, the United States made a reservation to the effect that nothing in the treaty shall require or authorise legislation in the United States that is incompatible with the First Amendment, and impliedly, in the way that the first amendment has been interpreted by the US courts. It is also notable that the US is the only major world power that has not signed the Race Discrimination Convention. This

[19] Freedom of expression is also protected in all three regional human rights treaties, at Article 10 of the European Convention on Human Rights (ECHR), at Article 13 of the American Convention on Human Rights and at Article 9 of the African Charter on Human and Peoples' Rights.
[20] ICCPR (20.2); see also restrictions on "incitement" in the Genocide Convention of 1948 (Art III(c)); and CERD (4(a)).
[21] Roger Kiska, "Hate speech: A comparison between the European Court of Human Rights and the United States Supreme Court Jurisprudence", 25 *Regnent U. L. Rev*. 107 at 139.

US approach to regulating hate speech has been described as the "United States v the rest of the world"[22].

At the other hand of the spectrum are the stringent restrictions on hate speech, and the development of regulations proscribing Holocaust denial and other genocides.[23] The substantial differences in the ways States restrict hate speech are especially clear in the European Union where countries have grappled with hate groups, from the French or German position of high restriction, to that of the UK or Hungry where greater protection has been afforded to a variety of speech.

Finding a common definition of hate speech is further complicated by the fact that the International Convention on the Elimination of Racial Discrimination (**CERD**) has established a different standard, which offers the most far-reaching protections against hate speech. CERD defines discrimination as any distinction based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the enjoyment, on an equal footing, of any human right or fundamental freedom. [24] State Parties are required to take a range of measures to combat discrimination, including by not engaging in discrimination, by providing effective remedies and by combating prejudice and promoting tolerance.

The Human Rights Committee concluded that there are certain provisions in the ICCPR and CERD that reflected customary international law, and these may not be the subjects of reservations by states when they ratify. One such is the duty to prohibit the advocacy of national racial or religious hatred. According to the Committee, customary international law binds all states in most circumstances whether or not they consent, and the prohibition on racial discrimination and advocacy of hatred are part of customary international law.[25]

Questions arise as to whether the *advocacy* of hatred is specifically required (it is not by the CERD, but is by the ICCPR). There is also international disagreement about whether the dissemination of ideas based on racial superiority or hatred, but which do not constitute incitement to discrimination or violence, can legitimately be prohibited.

***Balancing ICCPR Articles 19 and 20***

Recognition of the need to balance rights, and to prevent people from using their rights as weapons to attack the rights of others, is reflected in Article 5 of the ICCPR, which states:

*Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the*

[22] Under the Shadow of Weimar, Democracy, Law and Racial Incitement in Six Countries, edit by Louis Greenspan and Cyril Levitt, p.186.
[23] (Eg) *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights); *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.
[24] Article 4(a) of CERD.
[25] General Comment No.24 Issues Relating to Reservations made upon ratification of accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant 52nd Sess., Nov. 11 1994.

*destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.*

Article 5 of the Vienna Declaration even more clearly states that:

*All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.*

Balancing different competing rights is at all times a difficult exercise, but it is particularly so in international context. The prevailing position is that balancing can only be done on a case by case basis, taking into account the particular circumstances and implications of the case.

A few principles regarding articles 19 and 20 may be extracted:

1. No hierarchy of rights exists: At the heart of the balancing act is the rejection of any formal hierarchy among fundamental rights.

2. Coherence between Articles 19 and 20: There is strong coherence between the two articles and the risks of Article 19 allowing greater restrictions on hate speech than Article 20 is very negligible. The coherence has been highlighted by the Human Rights Committee. During the drafting of the ICCPR, the draft article that ultimately became Article 20 was realigned so that it would immediately follow Article 19, thereby emphasising the contiguity of the two articles.

3. The three part test applies to article 20: The implication of the coherence between articles 19 and 20 is that the States' outlawing of advocacy of hatred under Article 20(2) ICCPR must be circumscribed by the requirements of Article 19(3) ICCPR, in particular the requirement that restrictions imposed on freedom of expression be "necessary in a democratic society".

***The Pernicious Effect of Hate Speech***

"Hate speech‟ is a term of art in legal and political theory that is used to refer to verbal conduct – and other symbolic, communicative action – which wilfully "expresses intense antipathy towards some group or towards an individual on the basis of membership in some group", where the groups in question are usually those distinguished by ethnicity, religion, or sexual orientation.[26]

Hate speech thus includes things like identity-prejudicial abuse and harassment, certain uses of slurs and epithets, some extremist political and religious speech (e.g.

[26] J. Angelo Corlett and Robert Francescotti, "Foundations of a Theory of Hate Speech", *The Wayne Law Review* 48 (2002): 1071- 1100, p. 1083.

statements to the effect that all Muslims are terrorists, or that gay people are second-class human beings), and certain displays of hate symbols (e.g. swastikas or burning crosses).

According to Jeremy Waldron, hate speech denies minority groups' dignity because it expresses ideas denying that members of these groups should be assigned the same and equal rights afforded to people in general by an egalitarian society. The goal behind this kind of speech would be to argue that certain groups of people are different and that these groups should be conferred a different and lower social status because of their difference.[27]

It is important to bear in mind that the argument we now face (discussed below) claims that the harm caused by hate speech is independent of the speech's impact on third parties. This means that the problem with hate speech would be not confined to direct incitement to lawless action, or even to the cumulative persuasion effect that it could have on third parties. The harm in question would be intrinsic to the speech itself. Waldron argues that hate speech and racial vilification should be regulated as they have been used as tools to oppress groups, including by silencing and stifling their own rights, including of free speech.

Members of groups targeted by hate speech fear that the speech will diminish their access to services, resources and opportunities in society. The immediate focus of concern in this case is not the immoral content of hate speech, but the effect of speech in other important dimensions of life.

***The US Experience***

There is no absolute right to free speech in the USA. The First Amendment, as incorporated through the Fourteenth Amendment, is a fetter on both State and Federal government action. Private causes of actions between citizens, such as in defamation, remain available.[28]

There are, however, limits both on political and private speech: Contemporary jurisprudence recognizes the constitutionality of laws limiting a variety of public and personal speech, including a restriction forbidding electioneering within 100 feet of a polling place on election day.[29]

The "marketplace of ideas" justification, developed by Justice Oliver Wendell Holmes, played a significant role in the creation of First Amendment jurisprudence. In a series of cases arising from convictions under the *Espionage Act of 1917*, Holmes set the initial standard for criminal statutes limiting expression. In the first of these cases, *Schenck v United States*, Holmes J established the "clear and present danger" test for identifying the "proximity and degree" of the harm Congress can legitimately curb.[30] The test turned out to be ambiguous enough to grant wide latitude to subdue

[27] Jeremy Waldron "The Harm in Hate Speech" (Harvard University Press, 2012).
[28] *Gertz v. Robert Welch, Inc*. 418 U.S. 323 (1974).
[29] *Burson v. Freeman*, 504 U.S. 191, 206, 211 (1992) (finding a Tennessee statute survived strict scrutiny based in part on "simple common sense").
[30] 249 U.S. 47, 52 (1919). Shouting fire in a crowded theater is an example of speech outside the bounds of the First Amendment.

unpopular political ideas, such as those espoused by persons ideologically committed to communism even when there was no showing that the speaker was engaged in a conspiracy to the government or participate in violence.[31]

Holmes J strongly opposed the use of political pressure to force ideological conformism. In *Abrams v United States*[32], which upheld the conviction of several communists who published leaflets opposed to United States military efforts to put down the Soviet Bolshevik revolution, Holmes J spoke of the marketplace of ideas as being essential for attaining the "ultimate good desired" by the majority.

The marketplace of ideas doctrine is now firmly established in jurisprudence. The "clear and present danger" test, however, was reformulated by the Warren Court, which adopted a more exacting standard of proof.[33] In *Brandenburg*, the Court held that government can proscribe "advocacy of the use of force or of law violation" only when it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[34]

A majority judgment given by Justice Douglas in *Terminiello v Chicago*, 337 U.S. 1, 4-5 (1949) contains an oft-quoted passage that guided has US approach to regulating "hate speech" in the 20th and 21st century:

*As Chief Justice Hughes wrote in De Jonge v. Oregon, 299 U. S. 353, 299 U. S. 365, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes. A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions, and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment . . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.*[35]

The case of *Terminiello* case concerned a priest, Father Terminiello, who was under suspension but who spoke at a convention organised by Christians for America in an

[31] *Dennis v United States*, 341 U.S. 494, 516-17 (1951) (finding the advocacy of communism to pose a clear and present danger to US. democracy).
[32] 250 U.S. 616 (1919).
[33] *U.S. v Alvarez*, 132 S.Ct. 2537, 2552 (2012) (Breyer, J., concurrence) ("false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas"); *New York State Bd. of Elections v Lopez Torres*, 552 U.S. 196, (2008) ("The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference."); *Texas v Johnson*, 491 U.S. 397, 418 (1989) ("The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas.").
[34] 395 U.S. 444, 447 (1969).
[35] *Terminiello v Chicago*, 337 U.S. 1, 4-5 (1949):

auditorium in Chicago billed as "Christian Nationalism or World Communism - Which?". The speech was given at the start of the cold war and was a speech in which Father Terminiello rallied against communism and specifically referred to Russians as "murders and rapists".

An angry mob pro-communist mob had gathered outside the auditorium. The mob hurled both abuse and missiles. Father Terminiello was charged under an ordinance with a breach of the peace. By majority, the Court held that the ordinary was a violation of the First Amendment.

The Supreme Court's decision in *Brandenburg* reversed the conviction of an Ohio Ku Klux Klan leader for advocating violence against blacks because the statute of conviction was not confined to speech that was intended and likely to produce imminent lawless action.[36]

Thus hate speech, like seditious speech, is protected unless it is calculated to incite or likely to produce imminent lawless action.

***"Group Libel" in the USA***

In *Beauharnais v Illinois* 343 U.S. 250 (1952), by a 5–4 vote, the Supreme Court upheld the constitutionality of an Illinois statute prohibiting the publication or exhibition of any writing or picture that portrayed "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which…exposes [the members of the class] to contempt, derision, or obloquy or which is productive of breach of the peace or riots."

The decision affirmed the defendant's conviction for distributing a pamphlet that exposed black Illinois citizens to contempt or derision, or obloquy. However, the pamphlet neither threatened violence nor was likely to incite disorder. The majority observed that it was enough that the leaflet was just hateful and defamatory. As Justice Frankfurter explained:

*Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community.*

However, scholars question that decision's continuing applicability. Justice Brennan's 1964 opinion in *New York Times v Sullivan* appears to undermine *Beauharnais*. In *Sullivan*, the Court held that liability for damages turned on the plaintiff's proof of actual malice, that is, that the defendant's statement was made with knowledge of its falsity or reckless disregard as to whether it was false. But *Sullivan* applied only to defamation of public figures. Brennan J's reasoning for special protection for comments about public officials in order to protect robust public debate is inapplicable when the reputations of non-public figures are at stake.

[36] See also *Virginia v Black*, 538 U.S. 343 (2003) on the subject limits which can be legitimately placed on intimidating behavior such as cross burning.

The US Supreme Court in *Snyder v Phelps* (2011) held that the First Amendment protected speech that a jury had found intentionally inflicted emotional harm on the family of a deceased marine during his funeral. The speech contained a mixture of hateful comment and comment on public issues. Even though Justice Samuel Alito found that the hate speech should not have been given constitutional protection because neither the deceased nor the members of his family were public figures (as per *Sullivan*), eight Justices ruled in the speakers' favour.

***The approach of the countries in the European Union***

The countries of the European Union are at the other end of the spectrum in relation to their approach of regulating free speech. While their legislative frameworks to regulating "hate speech" differ widely, the major European Union ("EU") countries have passed legislation that enable action to be taken against "hate speech" that amounts to something less than threatening violence. Most have "criminal penalties" for the use of "hate speech". For instance, Section 5 of the United Kingdom's *Public Order Act* 1936 prohibits "threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely". German law objectively criminalises acts "liable .. to disturb a breach of the peace."[37]. They often use enact other legislation that enhances protection against hate speech, for instance France and Germany both have laws prohibiting holocaust denial.

***The approach of the European Court of Human Rights***

Article 10(1) of the European Human Rights Convention provides for freedom of expression.

Article 10(2) of the Convention provides for the derogations from this right. Restrictions on freedom of speech may be made by a member State where they relate to 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.

The European Commission of human rights adopts an approach where it balances the interests of protecting free speech against the protection of individual rights, however, unlike the US courts it does not explicitly use different levels of scrutiny for different categories of rights. First, the Commission determines whether the statute challenged is the result of a "normal functioning democratic society". This involves determining whether the law has been properly promulgated, is not unduly vague, and serves a legitimate purpose. Then, as a second step, the Commission adopts a proportionality test and as a second step applies a proportionality test. This second step involves balancing the importance of the speech restriction to democratic society against the degree of tailoring of the restriction to that end. Finally, the European Court gives an

[37] Under the Shadow of Weimar, Democracy, Law and Racial Incitement in Six Countries, edit by Louis Greenspan and Cyril Levitt, p196.

additional "marginal of appreciation" to each Member states to allow for differences in their democratic systems[38].

In a series of cases, the European Commission and Court on Human Rights has refused to protect attempts to deny the Holocaust, largely on the basis that these fuel anti-Semitism and states, particularly those in states with a history of anti-Semitism, have the competence to decide whether they would like to legislate specifically against such denials.

At the same time, the European Court of Human Rights has also made clear that if the statements in question do not disclose an aim to destroy the rights and freedoms of others, or deny established facts relating to the Holocaust, they are protected by the guarantee of freedom of expression. Following this approach, the courts in the United Kingdom overturned a conviction under the UK's *Public Order Act 1986* of an individual for facing and stomping on an American flag[39].

***Free Speech in Australia***

Murphy J in *Gallagher v Durack* (1983) 152 CLR 238 stated at (248):

*The absence of a constitutional guarantee does not mean that Australia should accept judicial inroads upon freedom of speech which are not found necessary or desirable in other countries*.

These views eventually found majority support when the Court recognized an implied freedom of political communication as an incident of the system of representative government established by the Constitution.[40]

The High Court subsequently ruled that this implied freedom only protects against laws that infringe upon political speech, which is restricted to matters that may influence voter's decisions at the poll.

In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, former New Zealand Prime Minister David Lange sued the ABC for defamation, and the ABC raised the implied freedom of political speech as a defence. In a unanimous decision, McHugh J said, "*Those sections [of the Constitution that imply freedom of political speech] do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power*."

Laws can be made restricting political speech where the law serves a legitimate purpose in that it is compatible with the maintenance of a representative and

[38] This is the approach described in Stanley Halpin, "Racial Hate Speech: A comparative analysis of the impact of international human rights law upon the law of the United Kingdom and the United States" 94 *Marq. L. Rev.* 463 at 476.

[39] Racial Hate Speech: A comparative analysis of the impact of international human rights law upon the law of the United Kingdom and the United States, Stanley Halpin, 94 Marq. L. Rev. 463 at 477 citing *Percy v DPP* [2001] EWHC (Admin) 1125 (eng.), 166 J.P. 93 (Q.B.).

[40] First recognised in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106. This was reaffirmed in *Unions NSW v New South Wales* [2013] HCA 58.

responsible government, is suitable to achieve its purpose, is necessary (there is no less restrictive alternative), and the importance of its purpose outweighs the weight of the restriction. If a law fails any of these tests, it is invalid.[41]

The High Court, in cases such as *Coleman v Power* (2004) 220 CLR 1 and *Monis v The Queen* (2013) 249 CLR 92, has accepted that laws that make it unlawful to make 'insulting' or 'offensive' communications will burden that implied freedom of political communication and that their validity will depend upon the application of the proportionality test set out above.

***Australia's Experience Regulating Hate Speech***

Australia has disregarded international moves towards criminalising hate speech. Article 4 of CERD requires States to criminalise the *'... dissemination of ideas based on racial superiority or hatred.'* Article 20 of the ICCPR requires States to prohibit promotion of national, racial or religious hatred that incites discrimination, hostility and violence.

During ratification of the ICCPR and CERD, Australia made reservations to Article 4 of CERD and Article 20 of the ICCPR. Australia justified this move on the grounds of criminal punishment being both disproportionate to the harm caused by hate speech and a risk to freedom of speech. Due to these reservations, Commonwealth laws do not make racial vilification a criminal offence.

The *Racial Hatred Act 1995* (Cth) was adopted by the federal Parliament in 1995 following an extensive debate that stretched over nearly a full parliamentary sitting year. The Act inserted Part IIA into the *Racial Discrimination Act 1975* (Cth) (**RDA**) (comprising sections 18B-18E). These provisions in the RDA have remained unamended since their introduction.

The Explanatory Memorandum to the Racial Hatred Bill 1994 (Cth) noted that a balance between competing rights was carefully considered in the drafting of the legislation:

*The Bill is not intended to limit public debate about issues that are in the public interest. It is not intended to prohibit people from having and expressing ideas. The Bill does not apply to statements made during a private conversation or within the confines of a private home.*

*The Bill maintains a balance between the right to free speech and the protection of individuals and groups from harassment and fear because of their race, colour or national or ethnic origin.*

Sections 18C and 18D of the RDA provide as follows:

*18C Offensive behaviour because of race, colour or national or ethnic origin*
*(1) It is unlawful for a person to do an act, otherwise than in private, if:*

[41] *Brown v Tasmania* [2017] HCA 43 (18 October 2017) at [152]; *McCloy v State of New South Wales* (2015) 89 ALJR 857; *Chief of the Defence Force v Gaynor* [2017] FCAFC 41.

*(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and*
*(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.*

*(2) For the purposes of subsection (1), an act is taken not to be done in private if it:*
*(a) causes words, sounds, images or writing to be communicated to the public; or*
*(b) is done in a public place; or*
*(c) is done in the sight or hearing of people who are in a public place.*

*...*

*18D Exemptions*
*Section 18C does not render unlawful anything said or done reasonably and in good faith:*
*(a) in the performance, exhibition or distribution of an artistic work; or*
*(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or*
*(c) in making or publishing:*
*(i) a fair and accurate report of any event or matter of public interest; or*
*(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.*

While it is unlawful to act in the way described in s 18C, without an exemption under s 18D, it is not a criminal offence and cannot be prosecuted as such in a court. Instead, a person can complain about the unlawful act to the Australian Human Rights Commission, which can then seek to conciliate the complaint. If conciliation fails and the complaint is terminated, any person affected in relation to the complaint can apply to the Federal Court or the Federal Circuit Court, alleging that an unlawful act occurred and if the Court is satisfied that the unlawful act was done by a respondent, the Court may make orders including:

(i) declaring that the respondent has committed an unlawful act;
(ii) granting an injunction to direct that the publication or conduct not be repeated or continued; and
(iii) requiring that the respondent perform any reasonable act to redress any loss or pay the respondent damages.[42]

**Overview of the Australian model of regulating hate speech**

While Australia has not moved to criminalise hate speech, the way in which courts have interpreted the provisions of section 18C and 18D of the *Racial Discrimination*

[42] Section 46P of the *Australian Human Rights Commission Act 1986* allows people to make complaints to the Australian Human Rights Commission about unlawful acts.

*Act 1975* (Cth) have resulted in a model of regulating hate speech that is closer to our European counterparts.

Justice Bromberg opined in *Eatock v Bolt*[43], that these sections sought to balance two competing values, the right to freedom of speech and the right to be free from racial prejudice and intolerance[44]. Further, Bromberg J in line with the decision of French J (as he then was) and Lee J in *Bropho v Human Rights & Equal Opportunity Commission*[45] considered that the requirement of proportionality in relation to section 18D, meant that neither of these rights was supreme or unbending, and that establishing a section 18D involved a balancing exercise in relation to these rights[46].

It is also interesting to observe that Bromberg J held that at the heart of trying to secure freedom from racial prejudice and intolerance is the protection of equality and the inherent dignity of all human beings[47]. He specifically endorsed the writings of Professor Jeremy Waldron that hate speech was "an assault upon the dignity of the persons affected – dignity, in the sense of those persons' basic social standing, of the basis of their recognition as social equals, and of their status as bearers of human rights and constitutional entitlements"[48]

**Statements of principle – the application of section 18C**

*1. The conduct that section 18C is directed to extends beyond "hatred"*

The landmark case of *Toben v Jones*[49] was the first case in which the Full Federal Court considered the meaning of Section 18C of the *Racial Discrimination Act 1975* (Cth).

Commenting on the "International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)", Justice Allsop as part of the Full Court of the Federal Court elaborated on the crucial link between prohibiting racial hatred and preventing racial discrimination:

*"The unexpected recrudescence, in the winter of 1959-1960, of some of the most recent and horrific manifestations of racist behaviour enlivened the world community to act swiftly and … unanimously, to takes steps towards the elimination of the perceived evil. The perceived evil was all forms of racial discrimination and racial prejudice, the manifestation of which had been, in recent generations, at times horrifically violent and strident, at times overt, and at times less overt and less brutal, but nevertheless insidiously pervasive. In any form, it was recognised by all nations in the international community, to strike at the dignity and equality of all human beings. Racial hatred was … the form of the perceived evil most likely to lead to brutality and violence … ."*[50]

---

[43] (2011) 197 FCR 261.
[44] (2011) 197 FCR 261 at 311 [211].
[45] [2004] FCAFC 16
[46] *Eatock v Bolt* (2011) 197 FCR 261 at 342 [350]
[47] *Eatock v Bolt* (2011) 197 FCR 261 at 311 [212].
[48] *Eatock v Bolt* (2011) 197 FCR 261 at 314 [222] citing Professor Jeremy Waldron, "Dignity and Defamation: the Visibility of Hate" (2009-2010) 123 *Harv. L. Rev.* 1596 at 1610
[49] (2003) 199 ALR 1.
[50] *Toben v Jones* (2003) 129 FCR 515 at 537-538 [98], [100].

In a separate judgment, Justice Carr observed:

*"I accept the Commonwealth's submission that acts done in public which are objectively likely to offend, insult, humiliate or intimidate and which are done because of race, colour or national or ethnic origin are likely to incite other persons to racial hatred or discrimination or to constitute acts of racial hatred or discrimination. In my view, the Convention can be seen to be directed not only at acts of racial discrimination and hatred, but also to deterring public expressions of offensive racial prejudice which might lead to acts of racial hatred and discrimination."*[51]

All three judges (Carr J, Kiefel J and Allsop J as he then was) found section 18C to be constitutionally valid and based on the reasoning above, did not see any basis to read down section 18C(1)(b) concerning "an act done because of the race, colour or national or ethnic origin of the other person" by inserting a requirement of "hatred"[52].

*2. Section 18C is directed towards insults and offensive conduct with "profound and serious effects" not "mere slights"*

The Federal Court has interpreted the words of s 18C in a manner that attributes to them a serious level of offence or insult. Earlier, Justice Kiefel sitting as at first instance in the Federal Court stated in *Creek v Cairns Post Ltd* (2001) 112 FCR 352 at [16] that s 18C is directed at the infliction of 'profound and serious effects, not to be likened to mere slights'.

Justice French, when also a member of the Federal Court, in *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at [67]-[68] noted that the terms 'offend, insult, humiliate or intimidate' are open textured and may be 'used in ordinary parlance to describe a level of response to a person's conduct which is relatively minor'. His Honour considered that the lower registers of the meaning of these terms were 'a long way removed' from the mischief at which the RDA was directed. French J concluded at [69] that as 'a general principle freedom of expression is not limited to speech or expression which is polite or inoffensive' and he agreed at [70] that the conduct caught by s 18C was such as to have 'profound effects not to be likened to mere slights'.

A question therefore arises as to whether the text of the RDA reflects these judicial pronouncements which appear to raise the bar for the establishment of an offence under s.18C.

A question also arises as to what conduct may fall within section 18D of the *Racial Discrimination Act 1975* (Cth).

It is interesting to consider these matters in light of recent Australian cases on these sections of the *Racial Discrimination Act 1975* (Cth).

---

[51] *Toben v Jones* (2003) 129 FCR 515 at 524-525 [19].
[52] *Toben v Jones* (2003) 129 FCR 515 Carr J at 526 [28], Kiefel J at 528-529 [50] and Allsop J at 551 [145].

**Statements of principle – section 18D of the *Racial Discrimination Act 1975* (Cth)**

Section 18D provides a defence that an act that infringes section 18C would still be lawful where it is done reasonably and in good faith in a number of different circumstances that are specified above.

The onus is squarely on the respondent / defendant to establish this defense on the balance of probabilities[53].

Justice Bromberg in *Eatock v Bolt*[54] essentially endorsed the reasoning in *Bropho v Human Rights & Equal Opportunity Commission*[55] concerning the requirements to act reasonably and "in good faith". First, regard should be had to the subject motive of the statement maker, and the second an overall objective assessment should be made about whether:

*"the act was done in good faith, having due regard to the degree of harm likely to be caused and the extent to which the act may be destructive of the objects of the Act (See: Cannane v J Cannane Pty Ltd (in Liq) (1995) 192 CLR 557 per Kirby J at 596-597"*[56];

and

*"The words "in good faith" as used in section 18D import a requirement that the person doing the act exercise prudence, caution and diligence, which in the context of the Act, would mean due care to avoid or minimise the consequences identified by section 18C."*[57]

As above, Justice Bromberg essentially considered that the requirement of proportionality in relation to section 18D, meant that neither the right to freedom of expression or the right to be free from racial prejudice and discrimination was supreme or unbending, and that establishing a section 18D involved a balancing exercise in relation to these rights[58].

**Recent Australian cases considering the application of section 18C and section 18D of the *Racial Discrimination Act 1975* (Cth)**

1. *Bropho v Human Rights & Equal Opportunity Commission*

The case *Bropho v Human Rights & Equal Opportunity Commission*[59] concerned a complaint made to the Human Rights and Equal Opportunity Commission that a

[53] *Eatock v Bolt* (2011) 197 FCR 261 at 339 [339].
[54] *Eatock v Bolt* (2011) 197 FCR 261.
[55] [2004] FCAFC 16, Bromberg J considered that the approach of each judge to constructing the words "reasonably" and "in good faith" was broadly similar.
[56] *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105 Lee J at [141]
[57] *Eatock v Bolt* (2011) 197 FCR 261 at 341 [345] citing Lee J in *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105 Lee J at [144].
[58] *Eatock v Bolt* (2011) 197 FCR 261 at 342 [350].
[59] [2004] FCAFC 16, Bromberg J considered that the approach of each judge to constructing the words "reasonably" and "in good faith" was broadly similar.

cartoon published by *West Australian Newspapers Limited* contravened section 18C of the *Racial Discrimination Act 1975* (Cth).

The cartoon concerned the repatriation of the head of the aboriginal elder Yagan, Yagan had been shot to death by a white settler in cold blood in 1833, apparently in retribution for Yagan's involvement in the killing of two other white settlers. Yagan's head was placed in the wedge of a smoke tree to preserve it. It was later transported to England and put on display at the Royal Institute in Liverpool until 1964. Yagan's head was eventually buried in Everton cemetery. In 1990, the West Australian Nyoongar community asked the British government to exhume Yagan's head. The British Government eventually granted permission. The Nyoongar community in Perth then began to make arrangements to have Yagan's head transported back to Australia. Among other things, there were publically aired differences between members of the group over who was entitled to retrieve and return Yagan's head. A Mr Bodney commenced litigation in the Western Australian Supreme Court to try and restrain other members from retrieving Yagan's head.

These events were the subject of various press reports in The West Australian newspaper and culminated in a cartoon strip in September 1997 that was the subject of the complaint under section 18C in these proceedings. The cartoon strip showed an aboriginal elder telling a group of younger indigenous children the story about the return of Yager's head from England. The cartoon insinuated that some of the factions warring to bring back Yager's head were mixed race, were not associated with the Nyoongar tribe and were taking advantage of public funding to travel to England. The final picture showed Yager's head in a cardboard box pining to return to England for a pint in an English pub.

The Commission did find that the cartoon infringed section 18C. The Commission considered that the portrayal of Yagan was demeaning, that it portrayed some of the people involved as not being real aboriginals and that it portrayed the people involved as being motivated by the opportunity to travel to England at the taxpayer's expense rather than spiritual beliefs[60]. However, the Commission did find that the cartoon fell within the exception within section 18D. They found this on a fair reading of the cartoon and that the West Australian's coverage of the story had generally been well balanced and had generally encouraged support and unity of the Aboriginal community.

There was ultimately an appeal to the Full Federal Court by Mr Bropho challenging the Commissions finding. However, in a two to one decision, the Full Court considered that it should not engage in merits review and disturb the finding of the Commission.

2. *Creek v Cairns Post Pty Ltd* [2001] FCA 1007

This case concerned a report in the Cairns Post on the decision of the Queensland Department of Family Services, Youth and Community Care ("The Department") concerning the custody of a 2 year old aboriginal girl. The 2 year old's natural mother had been killed in a car accident in 1995. The Department took the child from

60 *Corunna v West Australian Newspapers* (2001) EOC 93-146.

her foster carers, a white family and put her in the custody of a relative of her natural mother, that relative also had care of the child's two brothers.

The principal issue that the newspaper explored was whether the "Stolen Generation" report had influenced the Department's decision to remove the child from the care of her foster parents and place her in the custody of an aboriginal relative. The Cairns Post article was accompanied by two photographs. The first was a photo of the white couple from whom the child had been taken. They were pictured in their living room that reflected a comfortable suburban lifestyle. There was a lounge chair and book cases in the background. The second photo was of the aboriginal relative in to whose custody the child had been put. The photo showed her in a bush camp with an open fire and a shed in which children could be seen. The photo had been taken on an earlier occasion when she had been assisting locate backpackers who were lost in a remote rural area. The photo had been taken from the newspapers archive library because they were the only photos of the woman that were available.

The applicant took action under section 18C alleging that the humiliated her and portrayed her as a primitive bush aboriginal woman, that this was her usual lifestyle, and this was the environment that the child would be raised in. In fact that place where the photo was taken was a recreational area where the applicant took her family.

Held: Justice Kiefel held that the test of whether an "act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people" was an objective test to be considered from the point of view of a hypothetical person in the applicant's position or group of which the applicant was one.

Justice Kiefel held that a person in the applicant's position would feel offended, insulted or humiliated from the way that she was portrayed in the photograph in the context in which the article was written. The context being that the 2 year old child had been put in to less desirable circumstances as portrayed by the comparison that was invited to be drawn between the 2 photographs.

However, Justice Kiefel considered that it was then necessary to consider whether the basis for the act was race, colour, national or ethnic origin. Justice Kiefel considered that the intensity of the feeling of the person humiliated, insulted or offended was not relevant to this inquiry. Justice Kiefel ultimately decided that there was ***no basis*** to find that the act related to the race or ethnic origin of the applicant and therefore section 18C (and particularly section 18C(2)(b)) had not been breached.

3. *Toben v Jones* [2003] FCAFC 137

Facts: The case concerned an organisation called the Adelaide Institute that published material on the internet that amounted to a denial of the holocaust. Among other things, the article claimed that only 800,000 people died at Auchwitz, rather than 4 million, and alleged that Jews were not simply victims in history, but they were also murderers.

The Human Rights and Equal Opportunity Commission determined that the articles published on the internet contained content that racially vilified Jewish people. The respond filed an application in the Federal Court to have the Commissions finding enforced. The Federal Court granted injunctions ordering the Respondent to remove the material from the internet. The director of the Adelaide Institute, Dr Toben, appealed, and among other things, challenged that the published material complained of did not offend section 18C.

The following findings were made:

(i) Carr J: In my view, the Convention (and implicitly section 18C) can be seen to be directed not only at acts of racial discrimination and hatred, but also to deterring public expressions of offensive racial prejudice which might lead to acts of racial hatred and discrimination."[61]

(ii) All three judges did not see any basis to read down section 18C(1)(b) concerning "an act done because of the race, colour or national or ethnic origin of the other person" by inserting a requirement of "hatred"[62].

(iii) It is necessary to make a separate inquiry in to whether the publication was because of "race, colour, national or ethnic origin". This involves considering the "reasons" from an objective point of view of the publisher, including their motive[63].

(iv) All three justices found that a fair reading of the publication showed that Jewish people were reasonably likely to be offended (the appellant conceded so much) and that the document was published because of the race of ethnic origin of Jewish Australians. As such, they had no problem finding that section 18C was infringed;

(v) All three justices considered that Section 18D could not be invoked and that on a fair reading of the document, it was provocative and inflammatory and was contrived to smear people of Jewish origin. Essentially, there was no evidence to show the publication was produced in good faith[64].

(vi) It may be difficult to establish a section 18D defence where there is a racially based motive for making the publication[65].

4. *Eatock v Bolt* (2011) 197 FCR 261

The highly publicised case of *Eatock v Bolt* concerned two newspaper articles published in the Herald Sun newspaper by journalist Andrew Bolt. In these articles, Mr Bolt referred to 18 different people. Most of these people had light coloured skin,

[61] *Toben v Jones* (2003) 129 FCR 515 at 524-525 [19].
[62] *Toben v Jones* (2003) 129 FCR 515 Carr J at 526 [28], Kiefel J at 528-529 [50] and Allsop J at 551 [145].
[63] *Toben v Jones* (2003) 129 FCR 515 Carr J at 526 [31], Kiefel J at 531 [62]-[64] and Allsop J at 553 [154].
[64] *Toben v Jones* (2003) 129 FCR 515 Carr J at 528 [46], Kiefel J at 534 [78], Allsop J 554-555.
[65] *Toben v Jones* (2003) 129 FCR 515 Kiefel J at 532 [71].

but it identified as being Aboriginal. All of them were figures that were in the public eye. For instance, one figure was Geoff Clark who was a former chairman of the Aboriginal and Torres Strait Island Commission. Another was Professor Behrendt, a professor of law at the University of Technology. She also chaired the National Indigenous Television Service around 2006 for three years.

A compliant was made to the Human Rights and Equal Opportunity Commission by Ms Eatock. Unable to resolve the complaint by reconciliation, Ms Eatock sought a declaration that the two newspaper article were in contravention of section 18C of the *Racial Discrimination Act 1975* (Cth).

Justice Bromberg found that the articles were reasonably likely to offend a hypothetical light skinned Aborigine because the articles conveyed the following imputations:

(i) there are fair-skinned people in Australia with essentially European ancestry but with some Aboriginal descent, of which the individuals identified in the articles are examples, who are not genuinely Aboriginal persons but who, motivated by career opportunities available to Aboriginal people or by political activism, have chosen to falsely identify as Aboriginal; and

(ii) fair skin colour indicates a person who is not sufficiently Aboriginal to be genuinely identifying as an Aboriginal person[66].

Justice Bromberg accepted that part of Mr Bolt's motivation for writing was the identity choices that he considered that the people he was writing about were making. However, Justice Bromberg also considered that race, colour and ethnic origin, and in particular, communicating a message about the Aboriginality of the people concerned was also a motivating factor.[67] As such, he found that section 18(1)(b) of the *Racial Discrimination Act 1975* (Cth) was satisfied.

In then remained to consider whether the articles had been published "reasonably and in good faith" and could therefore fall within one of the exemptions in Section 18D of the *Racial Discrimination Act 1975* (Cth) on the basis that:

(i) they were a fair and accurate report of any event or matter in the public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

First, Justice Bromberg considered that the newspaper articles contained significant factual errors. In particular, the newspaper articles emphasized the non-Aboriginality ancestry of each person and contained factual errors belittling the Aboriginal connection of each person addressed in the article[68]. The factual errors came to light

[66] *Eatock v Bolt* (2011) 197 FCR 261 at 268 [16].
[67] *Eatock v Bolt* (2011) 197 FCR 261 at 336-338 [326]-[332].
[68] *Eatock v Bolt* (2011) 197 FCR 261 at 353 [405].

particularly through oral evidence given by 9 of the people featured in the articles[69]. For these reasons, the articles could not satisfy section 18D(1)(c) because they were not factually accurate and what was published could not be said to be fair comment[70]. Mr Bolt was not helped by the fact that his pleadings admitted the 9 individuals who gave evidence were of Aboriginal descent, genuinely self-identified as such both as a child and at present and each had communal recognition as an Aboriginal person[71].

Further, Justice Bromberg considered that the articles used inflammatory and provocative language, for instance the use of the words "professional aborigine" and "black-than thou" [72]. This finding, coupled with the factual errors led Justice Bromberg to conclude that in any case there was a lack of proportionality between Mr Bolt's right to express himself, and the harm that is sought to be minimised, being racial prejudice and intolerance[73]. Therefore, Mr Bolt's articles could not fall within the section 18D exception.

5. *Prior v Queensland University of Technology* [2016] FCCA 2853 ("Prior")

On 28 May 2013 three students, Mr Wood, Mr Powell and Mr Thwaites entered a computer lab at the Queensland University of Technology that was designated for indigenous students only. Ms Prior, an administration officer working at the computer lab, asked them if they were indigenous. They replied that they were not. Ms Prior politely asked them to leave the lab, which they did.

The students then went to another computer lab and logged on to a Facebook page called "QUT Stalker Space". One of the students, Mr Wood made the following post:

*"Just got kicked out of the segregated Indigenous computer room, QUT stopping segregation with segregation ……?"*

Another student Mr Powell, in response to a later unidentified post said:

*"I wonder where the white supremacist computer lab is ….."*

A post authored in the name of the third student, Mr Thwaites, contained a racial slur.

Ms Prior saw these posts and found them offensive. She brought suit under section 18C against the three students, and other students, who had made comments on the "QUT Stalkers Space".

*Comments of Mr Wood*

Judge Jarret extensively analysed the principles relating to whether a publication infringes section 18C of the *Racial Discrimination Act 1975* (Cth). He ultimately held it was not reasonably likely that a hypothetical person in the position of the applicant, or a hypothetical member of the Aboriginal or Torres Strait Island

[69] *Eatock v Bolt* (2011) 197 FCR 261 at 352 [398].
[70] *Ibid.*
[71] *Eatock v Bolt* (2011) 197 FCR 261 at 283 [65].
[72] *Eatock v Bolt* (2011) 197 FCR 261 at 355 [414].
[73] *Eatock v Bolt* (2011) 197 FCR 261 at 358 [427].

exhibiting the characteristics consistent with a member of that group in a free and tolerant society would feel offended, insulted, humiliated or intimidated by Mr Woods comments because the comments:

(a) were directed against QUT and its actions;

(b) rallied against racial discrimination[74].

*Comments of Mr Powell*

Judge Jarrett found that a hypothetical person in the position of the applicant or belonging to a group that she had identified, having characteristics that could be expected of such a person in a free and tolerant society would not feel offended, insulted, humiliated or intimidated by the comments he made, in the context that they were made. That is, taking an impressionistic view of Mr Powell's comments in response to other comments on the Facebook page, Judge Jarrett considered that Mr Powell's comments did not contravene section 18C[75].

*Comments of Mr Thwaites*

Mr Thwaites claimed that he did not make the post, although someone else had made it appear that he did. Judge Jarrett considered that as there was no evidence that Mr Thwaites made the post, the case against him should be summarily dismissed.

***Attacks on religion and the law of blasphemy in Australia***

*Acts committed on the basis of religious beliefs*

The heading of Section 18C of the *Racial Discrimination Act 1975* (Cth) reads:

*"18C Offensive behavior because of race, colour, or national or ethnic origin"*.

It does not specifically apply to offensive behavior because of "religion". It may be that in certain circumstances that it will apply to offensive behavior because of religion if it can be shown that the behavior is also linked to the race, nationality or ethnic origin of the persons from that religion.

Therefore, behavior that is offensive because of religion may not be able to be challenged under section 18C of the *Racial Discrimination Act 1975* (Cth).

Victoria is the only State in Australia that has specifically passed a law relating to religious intolerance. Section 8(1) of the *Racial and Religious Tolerance Act 2001* (Vic) ("RRT Act") states that:

*"A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons."*

[74] *Prior v Queensland University of Technology & Ors (No.2)* [2016] FCCA 2853 at [49].
[75] *Prior v Queensland University of Technology & Ors (No.2)* [2016] FCCA 2853 at [67].

Section 8(2) of the RRT Act goes on to State that the act may occur either in or outside of Victoria.

Section 11 of the RRT Act provides that conduct undertaken "reasonably and in good faith", similarly to section 18D of the *Racial Discrimination Act 1975* (Cth), will not result in a contravention of section 8(1) of the RRT Act.

Arguably, section 8(2) of the RRT Act results in acts occurring in other States that are communicated to persons within Victoria are actionable under the RRT Act. For instance, material published on the Internet that is downloaded by a Victorian user would certainly be actionable under the RRT Act for the same reason that defamatory material published on the Internet is actionable in the State where the user downloads that material[76]. Other actions even having the slightest connection with Victoria could also be actionable under the RRT Act (for instance, offensive material broadcast on in a television or radio news reports).

***Attempts to Amend the RDA***

The Abbott government in 2014 proposed amendments to the RDA would have weakened the protection provided to racial minorities from actions that are "reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate ... because of ... race, colour or national or ethnic origin".

The proposed amendments were a direct response to the successful civil action claim brought in 2011 against journalist Andrew Bolt for breaching the RDA when he published disparaging comments about a number of prominent Indigenous individuals.[77]

The effect of the changes would have been to narrowly define prohibition of racist speech by removing the protections against offending, insulting or humiliating groups or individuals on the basis of race, colour or national or ethnic origin. Only acts that are reasonably likely to vilify (defined as inciting hatred) or intimidate (defined as causing fear of physical harm) on the basis of race, colour or national or ethnic origin would have been unlawful. At the same time the proposed amendments would have broadened the exceptions allowing vilification or intimidation if it is 'in the course of participating in the public discussion'.

The proposed amendments to the RDA and the responses they garnered raise pertinent questions about Australian values and the Australian national identity. In support of the amendments and the right to free speech they are intended to protect, Attorney-General George Brandis unashamedly declared that '[p]eople do have the right to be bigots'.[78]

In the absence of a bill of rights, the issue becomes one that may only be resolved by reference to prevailing social values.

---

[76] *Dow Jones & Company Inc v Gutnick* [2002] HCA 56 Gleeson CJ, McHugh , Gummow and Hayne JJ at [44] and Gaudron J at [56].
[77] *Eatock v Bolt [No 2]* (2011) 284 ALR 114.
[78] George Brandis, 'In Defence of Freedom of Speech' (2012) 56(10) *Quadrant* 21.

As a Minister of the Liberal-National Coalition government, Brandis' remark can be explained by his commitment to traditional liberal democratic rights: to protect free speech even when the speech is offensive, insulting or bigoted. His approach may be understood in moral philosophical terms as aiming to protect the moral right to do wrong.[79] Support for this right can be found in the liberal tradition that places utmost importance on the protection of individual rights. The right to do wrong is said to protect individual autonomy and choice. In the exercise of this right a person has a choice to do right or wrong and that choice should be protected from the interference of others. However, even liberals accept that this right does not extend to all wrongs. It definitely would not extend to the commission of particularly egregious wrongs.[80]

According to Senator Brandis, the amendments to the RDA were defensible because they aimed to get rid of a provision that made it illegal to 'hurt the feelings of others'. So understood, the scope of s18C went too far in curbing attitudes that should be allowed to be freely exchanged in public. Brandis' basic argument was that the law was an illegitimate interference with the right to free speech to insult others — a right that from a liberal perspective falls within the ambit of the right to do wrong.

George Williams and Ronald Sackville defend s.18C, but suggest some modest amendments to reflect the way the section already been construed by the Courts.[81] For example, they suggest that the references to 'insult' and 'offend' in 18C could be removed as "mere slights" have already been held not to offend s.18C.

A 2017 Commonwealth parliamentary inquiry in to Part IIA of the *Racial Discrimination Act 1975* (Cth) similarly recommended that the words "insult, offend and humiliate" be replaced with the words "harass" or alternatively that the words "profound and serious effects" be inserted in to the legislation[82]. The inquiry had concerns that freedom of speech may be being unjustifiably limited, and these changes would overcome those concerns[83]. The inquiry also considered that there was considerable confusion in the Australian public about the meaning and scope of Section 18C and that these changes would clarify that meaning[84]. Finally, the Committee considered that properly designed education programs on the changes to section 18C would assist in achieving this aim[85].

## *Conclusions*

Modern democracies are recognising the connection between speech and humanity. For example, the German Basic Law gives primacy to human dignity over free speech. So too in Canada concerns about dignity and pluralistic equality sometimes trump urges of speech. Netherlands and Denmark are among the other democracies

[79] Orj J Herstein, 'Defending the Right to Do Wrong' (2012) 31 *Law and Philosophy* 343, 347.
[80] Jeremy Waldron, 'A Right to Do Wrong' (1981) 92 *Ethics* 21, 29.
[81] Ronald Sackville, 'Anti-Semitism, hate speech and Pt IIA of the Racial Discrimination Act' (2016) 90 ALJ 631; see also George Williams, 'The Legal Assault on Australian Democracy' (2016) 16 *QUT Law Review* 19 for a survey of various State and Federal laws which impact on free speech.
[82] P47 at paragraph 2.130 of Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth).
[83] Ibid, P48 at paragraph 2.131.
[84] Ibid, p48 paragraph 2.130.
[85] Ibid p48 paragraph 2.136.

that protect human dignity that sometimes limit others' right to harmful forms of self-expression.[86]

The justification for making inroads into the "right" to free speech on the basis of the protection of human dignity has sound doctrinal foundations. Hate speech can perpetuate ascriptive inequalities, and the subjugation of groups on the basis of their social or ethnic features in turn stifles their own ability to participate freely in the democratic process.

**3 November 2017**

[86] David Partlett, "International Publications and Protection of Reputation: A Margin of Appreciation but Not Subservience?" 62 *Ala. L. Rev*. 477 (2011); Guy E. Carmi, "Dignity Versus Liberty: The Two Western Cultures of Free Speech", 26 *B.U. Int'L L.J*. 277, 372 (2008); 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", 78 *Tul. L. Rev*. 1549, 1579 (2004). Susanne Baer, "Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism", 59 *U. Toronto L.J*. 417, 434 n.49 (2009). Gregory S. Gordon, "A War of Media, Words, Newspapers, and Radio Stations", 45 *Va. J. Int'l Law* 139, 147 (2004).