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LEGISLATING AGAINST GENOCIDE DENIAL: CRIMINALIZING DENIAL OR PREVENTING FREE SPEECH?

ROGER W. SMITH*

Denial of well-documented genocides and of crimes against humanity is deeply offensive to survivors, their descendents, and all those who care about fellow humans without regard to ethnic, racial, or religious identity. There are also the consequences of denial: lack of respect for the victims of the most horrendous crimes against whole groups in the case of genocide, and for the suffering of innocent persons in the various offenses listed under the heading of “crimes against humanity.” Moreover, with that denial, would-be perpetrators will be encouraged to commit atrocities if it suits them: with denial comes silence, and if individuals, groups, and states do not remember and do not resist denial, their inaction sends a signal that genocide and crimes against humanity can be committed with impunity. The lesson can be drawn: commit genocide and deny it. In due time, the world will forget it ever happened or set it aside out of expediency. Put differently, perceptions of interest will trump history: politics are about interests and power, and only marginally about truth or justice. Genocides that are denied tend also to be forgotten, cutting us off from knowledge about why genocide takes place, who is responsible, and how such crimes can be prevented. Such forgotten genocides also lead us away from a sense that genocide is a recurrent phenomena and that means must be found to prevent and mitigate it. Denial erodes or obfuscates the sense that prevention of genocide is part of national interest. While genocide causes immense human misery, it also leads to local and regional wars (for example, the Congo and its devastation as a result to a large extent of the Rwandan genocide), vast outflows of refugees, years of humanitarian assistance, and disruption of international commerce, contributing to further impoverishment of populations in the region. As concerns our issue, in the Turkish denial of the Armenian Genocide, there have been threats by Turkey to leave NATO, recall diplomats, and cancel contracts amounting to

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billions of dollars.¹

In ancient times, rulers were not shy about the deaths that they inflicted upon whole peoples. In fact, they were proud of their ability to conquer and eliminate a people, capture their queen, and put her into the service of the royal bed of the conqueror. Parades, monuments, and writings were all used to glorify what today we would call genocide. In the twentieth century, on the other hand, denial of genocide was the universal strategy of perpetrators, the cry of innocence that followed the devastation. The claim was that the events did not take place (or, for example, there were not in any case that many deaths inflicted upon the Armenians; they just died; but what they did to us, however, was brutal and deliberate), that we bear no responsibility for what happened (it was disease, breakdown of authority, self-defense, civil war), and that the term “genocide” is not applicable to the events (acts were in self-defense, by over zealous officials, and, insisted above all, without intent to eliminate a group in whole or substantial part).²

There are three main elements of denial: the facts, the responsibility, and the applicability of the crime of “genocide” to whatever happened. Lately, a new theme, offering yet another logical possibility in the denial of genocide, has gained traction: trivialization and relativization. This creates many new opportunities for denial arguments. There could be a moral equivalency argument: both sides engaged in genocide. Hence, it is concluded there were no victims or perpetrators. Universalizing the guilt means that no one was guilty. In the dark all cats are black. However, we are not dealing with cats but human lives and with ethics. Even if true (that everyone in a given situation commits murder), which it is not, it is not a basis for exoneration. Genocide is not a clean hands event, and it is seldom an equal opportunity event either. It certainly was not either of these things in the Armenian case, the Holocaust, or Cambodia.

Another argument is that similar events have been recurrent throughout history and there are far worse cases that could be cited. There is also the attempt to minimize the number of deaths and to hide the brutality, rape, and cultural destruction of the genocide. One might cite the one and a half million deaths of the Armenians, but then will be countered with Stalin’s famine in the Ukraine resulting in six million deaths,³ and then of Mao’s irrational programs that resulted in the deaths of over twenty million persons. The argument’s conclusion: what is the big deal about your (small) loss of life?

There is also the argument, and this was made explicit with regard to

1. Roger W. Smith, *Denial of the Armenian Genocide*, in 2 GENOCIDE: A CRITICAL BIBLIOGRAPHICAL REVIEW 63–85 (Israel W. Charny ed., 1991).

2. *Id.*

3. *Revelations from the Russian Archives, Ukrainian Famine*, Library of Congress, Jan 4, 1996, <http://www.loc.gov/exhibits/archives/ukra.html>.

the Armenians by the Princeton historian, Lewis Thomas, in the 1950s, that genocide is just a part of development. Yes, the loss of so many lives is tragic, but Turkey emerged with a largely homogeneous population, a strengthened and unified nation, and as a more viable ally of the United States during the Cold War.⁴

With regard to trivialization, I shall cite only two examples. First, Jean-Marie Le Pen, the French ultra-rightist politician who said that the Nazi gas chambers were only “a detail of history.”⁵ Second, the claim, which straddles trivialization and relativization, that more Germans than Jews “died” during World War II, which ultimately ignores the vast differences between the intentional death of genocide and the loss of life during wartime.

Genocide denial is pervasive, of importance, and composed of a finite number of arguments. Moreover, it is, unfortunately, deeply embedded in the politics of various countries, which like the U.S., Britain, and Israel, for reasons of expediency, aid and abet the Turkish denial of the Armenian Genocide. Although the European countries, and now the EU, have focused on denial of the Holocaust, for reasons which I shall explore shortly, it is the denial of the Armenian Genocide that has gone on for 95 years and that has had major consequences: diplomatic, political, economic, and, within Turkey itself, trials of those who have acknowledged the Genocide, which is forbidden under the Turkish Penal Code, Article 301.⁶ Under Turkish law, public reference to the Armenian case is subject to prosecution as an “insult to Turkishness.”⁷ There is judicial punishment, to be sure. Nobel Prize winner, Orhan Pamuk, and many others have now been tried under this law. But in the current climate of denial, also extra-judicial punishment: Hrant Dink was assassinated not long after having been charged under the criminal code for affirmation of the Armenian Genocide.⁸

Genocide denial has serious consequences. The question is how to deal with it.⁹ Should denial (and we shall have to see what kind of denial) be

4. LEWIS W. THOMAS & RICHARD N. FRYE, *THE UNITED STATES AND TURKEY AND IRAN* (1951).

5. *Le Pen to Be Sued over Gas Chamber Statements*, EUROPEAN JEWISH PRESS, Nov. 30, 2005, available at <http://www.ejpress.org/article/news/france/4377>.

6. Turkish Penal Code (Türk Ceza Kanunu / TCK), Law no: 5237 of 26 Sept. 2004 [*hereinafter*, Law no: 5237]. This law has been updated and is now cited as Turkish Penal Code (Türk Ceza Kanunu / TCK) Law no: 5759 of 30 April 2008. Under the updated form, “Turkishness” has been replaced by “Turkish Nation.” Bulent Algan, *The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey*, 9 GERMAN LAW JOURNAL 2237–39 (2008).

7. Law no: 5237, *supra* note 6.

8. Michael Levy, *Hrant Dink: The Murder of Free Speech*, ENCYCLOPEDIA BRITANNICA BLOG (Jan. 19, 2007), <http://www.britannica.com/blogs/2007/01/hrant-dink-the-murder-of-free-speech>.

9. For an overview, see generally Martin Imbleau, *Denial*, in 1 ENCYCLOPEDIA OF

prohibited by law? This has been the approach that many European countries have adopted individually, and it has been supported by the EU as a whole.¹⁰ Or should it be a matter of education, scholarship, and making use of freedom of speech to counter the deniers' claims? The United States, the United Kingdom, Ireland, and the Scandinavian countries have opted for the latter approach in the name of freedom of speech and rejection of the role of government as the arbiter of historical fact.¹¹ Moreover, some of the countries that once had laws against denial of the Holocaust have since rescinded them: Slovakia in 2005 and Spain in 2007.¹² There has also been rejection of draft legislation over the issue of proposed prison sentences for denial, sometimes on the grounds that a maximum of one year is too lenient, and four years is too harsh.¹³ Currently, there is no common pattern among the sentences allowed. Germany has the longest, up to five years, Luxembourg the shortest, between 8 days and 6 months.¹⁴ Moreover, among countries that do legislate against Holocaust denial, the pattern of enforcement varies significantly, with Germany and Austria alert to infractions, and Lithuania and Romania lax. Almost all of the legislation against denial concerns the Holocaust; Rwanda was included in the draft by the EU in December 2009, but the Armenian Genocide was specifically excluded. At present, the only European country that prohibits denial of the Armenian Genocide is Switzerland.¹⁵ France attempted to criminalize denial of the Armenian case in 2006 and it passed in the Assembly, but was never ratified by the Senate, and thus has not become law.¹⁶

Britain, Canada, Denmark, Italy, Sweden, and the United States have no law against Holocaust or other genocide denial. Spain has no law against denial of the Holocaust or other genocide, but punishes justifying any

GENOCIDE AND CRIMES AGAINST HUMANITY 243–47 (Dinah L. Shelton ed., 2005).

10. *EU to Finally Agree on 'Minimal' Hate Crime and Revisionism Law*, EUROPEAN JEWISH PRESS, Apr. 18, 2007, available at http://www.ejpress.org/article/news/western_europe/16012 [hereinafter *EU to Finally Agree*].

11. *Id.*; see also *Laws Against Holocaust Denial*, WIKIPEDIA, http://en.wikipedia.org/wiki/Laws_against_Holocaust_denial#External_links [hereinafter *Laws Against Holocaust Denial*].

12. *Id.*

13. *Id.*

14. *Id.*; Michael Whine, *Expanding Holocaust Denial and Legislation Against it*, 20 JEWISH POLITICAL STUDIES REVIEW 1 (2008), available at <http://www.jcpa.org> (click on "Jerusalem Center Projects an On-Line Publications" then click on "Jewish Political Studies Review" scroll down to find article).

15. Strafgesetzbuch [StGB] [Criminal Code] Dec. 21, 1937, 54 AS at 757 (1938), as amended by Gesetz, June 18, 1993, AS 2887 (1994), art. 261bis (Switz.).

16. See Adopted Parliamentary Bill no. 610. Oct. 12, 2006, available at <http://www.assembleenationale.fr/12/ta/ta0610.asp> (last visited Apr. 8, 2010). The bill proposed to amend Act no. 2001-70 of Jan. 29, 2001, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Jan. 30, 2001, p. 8175, which already formally acknowledged the existence of the Armenian genocide of 1915.

genocide, and does so with imprisonment.¹⁷ The following countries in Europe explicitly or implicitly make Holocaust denial illegal: Austria, Belgium, Czech Republic, France, Germany, Liechtenstein, Lithuania, Luxembourg, Poland, Portugal, Romania, and Switzerland.¹⁸ Although the language of their respective statutes varies somewhat, it is clear that denial in private conversations is not a crime, nor casual denial in public. The key language is often “denial,” without specifying whether that refers to denial of the acts, responsibility on the part of the perpetrator, or the appropriateness of applying the term “genocide” to the facts of a case. This opens up a large area of confusion and allows great leeway to a prosecutor; it also fails to provide guidelines to citizens as to what is allowed and what is prohibited. The better language that is also often included in the statutes is “grossly minimizes, attempts to justify, or approves the genocide committed by the German National Socialist Regime during the Second World War” (Belgium Negationist Law, 1999).¹⁹ Related phrases, such as “coarsely trivializes, or tries to justify genocide” or “grossly trivializing crimes of genocide,” are often used.²⁰

In summary, the legislation seems to define “denial” as public denial of the facts, minimization of the scale of the genocide, extreme trivialization, or justification for genocide. Whether relativization would somehow be included is not clear, but possibly it would fall under either trivialization or justification. One of the problems with such legislation is that it is not clear what a genocide is and what it is not. Was Bosnia genocide? Is Darfur an ongoing genocide, or once a genocide, but no longer? Was Bangladesh a civil war or a genocide? And, is it the case, as some international lawyers have concluded, that Cambodia was not genocide? As long as one punishes only denial of the Holocaust, privileging it above all other genocides, then at least the reference is known, but once one moves beyond that, the issue of characterization is crucial.²¹

In 2009 the EU attempted to address this problem by saying that for something to be a “genocide” it must be so labeled by an international court or in the charter of the Nuremberg court. Unfortunately, there are at least four problems with this solution. First, why should such determinations be restricted to an international court, as opposed to other courts? Second, the Nuremberg court did not make a determination of Nazi genocide, but of crimes against humanity. Third, the formula currently used will make it impossible for the Armenian Genocide to be recognized as genocide since it occurred before the UN Genocide Convention went into effect. And lastly,

17. *Laws Against Holocaust Denial*, *supra* note 11.

18. *Id.*

19. *Id.*

20. *Id.*

21. *EU to Finally Agree*, *supra* note 10.

historians have their own role in assessing what is and is not genocide; we should not conclude that genocide is a legal concept only.

To explain why some countries have chosen to legislate against Holocaust denial and others have resolutely refused to interfere with it is complicated. It is in part a matter of culture: liberty versus equality; the individual versus the community; rights versus responsibilities. Culture is partly shaped by legal traditions, but also shapes them in turn. Comparing common law and civil law traditions, the latter tends to be more paternalistic, proscribing not only denial of the Holocaust, but imposing various restraints on the press.²² For example, the Gayssot Act,²³ used as the basis for Holocaust denial prosecution in France, was adopted in 1990 as an amendment to the Freedom of the Press Law of 1881,²⁴ which, despite its title, contained numerous restrictions on what could and could not be published. Nevertheless, the civil law tradition has also been more supportive of protecting the dignity of the individual, and attempting to provide for equality of treatment in the community. Moreover, there is a strong expression of this balancing of rights and responsibilities in the United Nations Declaration of Human Rights (1948)²⁵ and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953).²⁶

Article 19 of the United Nations Declaration of Human Rights states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."²⁷ But the first two parts of Article 29 state:

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible. (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.²⁸

22. *Laws Against Holocaust Denial*, *supra* note 11; Act No. 90-615 of July 13, 1990, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], 14 July 1990, p. 8333.

23. Law No. 90-615 of July 13, 1990.

24. Law of July 29, 1881, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 30, 1881, p. 4201; *see also*, French Embassy, *Freedom of Speech in the French Media*, available at <http://www.ambafrance-uk.org/Freedom-of-speech-in-the-French>.

25. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948) [*hereinafter* Universal Declaration].

26. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, 224 [*hereinafter* European Convention].

27. Universal Declaration, *supra* note 25, art. 19.

28. *Id.* at art 29.

And then Article 30: “Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”²⁹ Article 10 of the European Convention takes the same position: freedom of opinion and expression balanced by the rights of others. The article states, “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”³⁰ Notwithstanding, the European Court of Human Rights has found no objection to saying that one has the right of freedom of expression without interference by public authority and that one can go to prison for denying the Holocaust.

Culture and legal tradition are important parts of the explanation for the outlawing of Holocaust denial in certain countries. Standing aside from that, another explanation is their relationship, past and present, with the Holocaust. The anti-Holocaust-denial policy grew out of two things. First, many European countries were complicit in the death of the Jews, and punishing denial of the Holocaust is seen as a form of atonement. Second, there was a fear, which continues, that neo-Nazi and other fascist groups would try to vindicate themselves by eliminating the Holocaust and maintaining racism. Thus, the idea was that suppression of fascism was in part a matter of suppressing denial of the Holocaust. So far, those who have been prosecuted for denial have been publishers, scholars, and political activists, not ordinary citizens, and not skin heads. The design was to deter, through imprisonment or fines, the production and dissemination of materials that called into question the historical reality of the Holocaust or that grossly minimized or trivialized it. The policy worked to some extent, but repeat offenders were not uncommon. The response was to increase the punishment. Not surprisingly, David Irving, the British historian, was given three years imprisonment by Austria for having said that Jews were not killed at Auschwitz. But the Internet has changed the means of producing and distributing denial materials on the Holocaust and other genocides: the Internet freely flows around the globe, every day, at all hours.³¹ Thus, there are far better ways of showing contrition than sending people to jail for expressing their thoughts, however false they may be. The Supreme Court in Spain agreed with this view and voided the Spanish law against denial in 2007, on the grounds that it violated the Constitution’s guarantee of

29. Universal Declaration, *supra* note 25, art. 30.

30. European Convention, *supra* note 26, at 221.

31. Michael J. Bazylar, *Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism*, http://www1.yadvashem.org/about_yad/departments/audio/Prof_Bazylar.html (last visited Mar. 2, 2010).

freedom of thought.³²

What is rather surprising in all this is how recent the ban on Holocaust denial is. Germany itself did not outlaw denial until 1985, followed by a more sweeping law enacted in 1994; similarly, Austria, although it too had laws to suppress potential revival of the National Socialists, did not ban Holocaust denial until 1992. France, with its Gayssot Act, adopted in 1990, may have influenced other states to move in the same direction. In any case, the Czech Republic did so in 1992, Belgium in 1995, Spain in 1995 (rescinded in 2007), Luxembourg in 1997, Poland in 1998, and Romania in 2002.³³ Still, it is Germany, citing its particular historical responsibility, that has been the main driving force to ban Holocaust denial, racism, and xenophobia throughout the European Union. It partially succeeded in 2009 with acceptance of a law against:

[p]ublicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court (Articles 6,7, and 8) directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national and ethnic origin, and - crimes defined by the Tribunal of Nuremberg (Article 6 of the Charter of the International Military Tribunal, London Agreement of 1945) directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.³⁴

It was a partial victory for the German position, but several states, including Britain, indicated that they would not punish denial out of consideration of the right to freedom of speech, and would only punish such speech if it were a form of incitement.

Thus, there are cultural, historical, and philosophical reasons for legislation against the denial of the Holocaust. But those who agree with the use of law to suppress certain forms of expression, and do not regard it as a violation of freedom of speech, may still raise an important issue about why the denial of other genocides is not also forbidden. This has been raised repeatedly with regard to the Armenian Genocide. Denial of the first large scale genocide of the twentieth century has been going on for 95 years, inflicting enormous pain on survivors and their descendents. It has also led to threats by the Turkish government to other states that have

32. Pablo Salvador Coderch and Antoni Rubí Puig, *Genocide Denial and Freedom of Speech*, INDRET, Mar. 13, 2009, at 12, available at http://www.indret.com/pdf/591_en.pdf.

33. Wikipedia, *supra* note 11.

34. *EU Justice Ministers agree on racism and xenophobia proposal*, EUROPEAN UNION @ UNITED NATIONS Apr. 19, 2007, available at http://www.europa-eu-un.org/articles/en/article_6960_en.htm.

publicly recognized the Genocide.³⁵ But with one major exception, official recognition of the Genocide did not lead to attempts to prohibit denial of the Armenian case. This exception is the French recognition of the Armenian Genocide in 2001, followed by legislation in 2006 that attempted to prohibit denial of the Armenian Genocide, with the same penalties as for denial of the Holocaust (up to three years in prison and a substantial fine).³⁶ The attempt is important for a variety of reasons, not the least of which is the insight it provides on the complications of legislation against denial and the unintended consequences (intellectual and political) of such laws.

The case study that follows is excerpted from a letter I sent to deputies of the French National Assembly on May 18, 2006, on the eve of a debate and vote on a bill to criminalize denial of the Armenian Genocide.³⁷ There was no official response, but I did hear from many genocide scholars from around the world and from many Armenians in Europe and America. There was no consensus, suggesting that the case for freedom of speech and restrictions on it to protect the dignity of individuals, cannot be resolved in the abstract. On the other hand, there is an argument that is hard to refute: without freedom of speech, democracy is not possible. Then too, on the practical level, are there not alternatives to legislation that criminalizes thought in the name of dignity and equal rights? Such alternatives may actually be far more effective than the power of the law, and do not turn arch deniers into martyrs.

Here are excerpts from the letter:

The proposed new legislation is intended to give force to the law passed in 2001 officially recognizing the Genocide by providing penalties for those engaged in its denial. One should question how this law, if adopted, would facilitate dialogue between the Armenians and Turks, which is a stated objective of the 2001 law, or between the French and the Turks? Does not this law inadvertently provide new opportunities for the reactionary elements of Turkish state and society to radicalize the masses against the French and the Armenians? By using French law, which limits freedom of speech, as an example, would the Turkish state not justify laws that promote its policy of denial and therefore make it even harder to deviate from the official government position on history? If so, how does that help Turkish civil society in gaining any awareness of the issue? Does the law advance the language of reconciliation or the language of conflict? Can such laws bring a

35. *Laws Against Holocaust Denial*, *supra* note 11.

36. Adopted Parliamentary Bill no. 610. Oct. 12, 2006.

37. Letter from Roger W. Smith to Deputies of the French National Assembly (May 18, 2006) (on file with author).

solution to the problem, or do they become part of the problem themselves? Does using the penal code in France for any limitation on the discussion of historical events endanger the prime function of scholars, writers and journalists – to analyze, question, and debate issues? Would it not create a slippery slope that would allow the state to sanction and impose dogmas as to how society should think? Finally, is this not the very method of limiting freedom of speech that countries such as Turkey use, as state attempts to control history in order to control society?

Of course, we do need laws to protect against such problems as racism and neo-Nazism, and there are legal limits to freedom of speech, such as libel, fraud, defamation. Therefore, those who argue that the freedom of speech is not absolute are absolutely right. Some observers have argued that you cannot have a law criminalizing Holocaust denial and not allow a similar law for denying the Armenian Genocide, which is officially recognized by France as genocide.

On the level of principle, one could argue either for or against treating all denial of genocide as equal. But there is the historical context of the Holocaust denial laws that is different from Armenia, Rwanda, etc. At the same time if only the Holocaust cannot be legally denied, then some will take this to mean that only the Holocaust was a genocide; others will feel that the suffering of their people is being slighted. But if we open this up and list all genocides and criminalize denial of all of them, then our minds would be enormously constrained by the State. Freedom of inquiry, expression, thought would be limited in ways that are totally unnecessary and unintended. Accordingly, are laws such as this a mistake and contrary to freedom of speech? Some might argue that governments should eliminate all cases of prosecution of denial, rather than extend the net.³⁸

In conclusion: denial is dangerous, demeaning, corrupting, and hurtful. It must be dealt with. But how? Should it be through legislation or through education, scholarship, and advocacy? Which approach is most effective, which least restrictive of free expression? Which best shows respect for individuals? I have deep respect for both traditions, yet recognize that each has its limitations. Still, at the end of the day, my fear is that a government that can tell us what not to say can also tell us what we must say.

38. Letter from Roger W. Smith, *supra* note 37.