



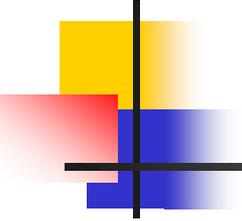
CENTRE FOR LAW
AND DEMOCRACY

Limits to the Freedom of Expression about the Past

Negotiating the Delicate Boundary between History and
Hate Speech

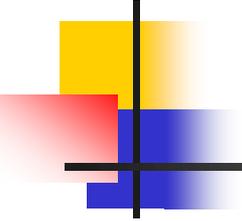
Poznan: 24 August 2022

Toby Mendel
Centre for Law and Democracy



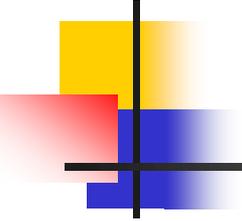
Introductory Comments

- Freedom of expression is a cherished right but, unlike the right to opinion, it is not absolute
- Article 19(3) of the ICCPR: general limits which States may impose
- Article 20(2): specific limits which States must impose, including hate speech
- Historians, like everyone else, must respect (legitimate) limits



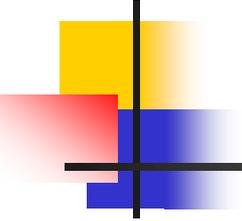
The Boundary Issue

- Title – delicate boundary – may seem odd
 - Search for truth vs. vile attack on a group
- Professional historians – seeking the truth about the past – will not even approach the boundary
- But, can be complicated to identify boundary:
 - Racists can dress up their anti-social rhetoric in historical garb
 - Repressive States abuse hate speech to control historical narrative: defamation and false news laws weapons of choice but hate speech also part of arsenal (Turkey)
 - Emergence of “citizen historians”, much like citizen journalists; lack professionalism, may promote (‘like’) racist statements



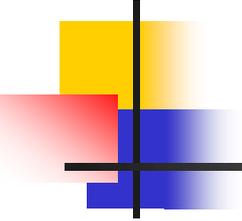
Definitions

- Hate speech: used to be synonymous with Article 20(2) of the ICCPR (speech States must ban) but even UN has been migrating to new (illogical?) definition
 - Merit to having compendious term for what must be banned
 - Scope under international law reasonably clear
- Racist speech: negative stereotypes which fall short of hate speech; not just racism
- Disinformation: intentionally inaccurate statements
- Misinformation: unknowingly inaccurate statements



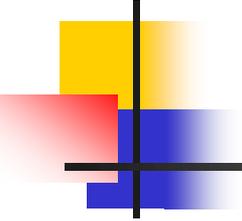
Restrictions

- Article 19(3) three-part test (must pass all 3 parts):
 - Provided by law: clear and accessible (notice of what is prohibited, not allocate discretion in application)
 - Legitimate aim: rights or reputations of others, national security, public order, public health, public morals
 - Exclusive list; primarily directed at that aim
 - Necessary (main part in practice)
 - Rationally connected: carefully designed, least intrusive means
 - Impair as little as possible; not overbroad
 - Proportionate: balance between protection and harm to speech; also applies to sanctions



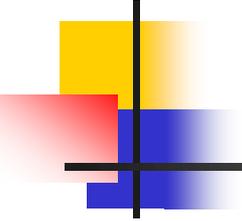
Restrictions, cont'd

- Article 20(2):
 - Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.
- Five primary elements:
 - Advocacy: understood as intent
 - Hatred: not just racism; strong emotion; opprobrium, enmity
 - Nationality, race or religion: legitimate to extend to similarly placed (historically disadvantaged) groups
 - Incitement: inchoate (does not need to be successful); but courts assume at least hostility
 - Hostility, discrimination, violence: latter two defined and legally prohibited in most countries (incitement to crime); hostility actually protected as an opinion



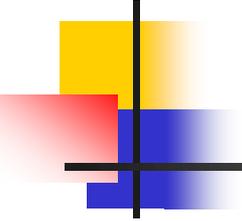
Intent

- Four criteria: intent; content; audience; context
- Clear requirement – read into “advocacy” – imposed repeatedly by courts
 - E.g. Faurisson: upheld conviction but concerned that law did not link liability to intent
- Should at least be intent to promote hatred or racism
- Implications for historians:
 - Intent key dividing line between genuine historical research and racist revisionism
 - Easy to share messages, including hateful ones; being irresponsible does not constitute intent
 - This does not mean that historians should be unprofessional



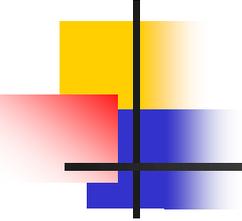
Content

- Goes to several of the five elements of hate speech (e.g. may show intent, whether there is incitement)
- Proof of truth key issue; e.g. defence in Canada
- Truth key underlying rationale for free speech
- Position not entirely established under international law
 - Some courts have noted that if truth promotes hatred this is because of the underlying social environment
 - But courts have relied on falsity, especially notorious falsity, as evidence of intent
- Convention on discrimination bans superiority ideas
 - Controversial since also reflect positive social group values
 - In practice Committee accepts positive group values



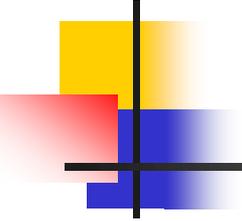
Content, cont'd

- Jersild: do not need to formally distance yourself from racist statements you cite
 - But also cannot adopt or endorse them
 - His goal was to expose racism; similar to historical goal of exposing truth
- For historians:
 - OK if you are successful in exposing truth, but not if you make a mistake
 - OK to quote hate speech; probably enough not to endorse it



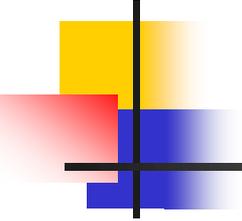
Audience

- Clearly relevant to issue of incitement
 - Look at factors like size and nature of audience and influence of speaker over it
- Ross: teacher removed from classroom; OK due to impressionable nature of kids
- Jersild: well-informed audience, serious programme
- For historians:
 - Difference between an academic publication and a tweet
 - Even for the latter, depends on who follows you



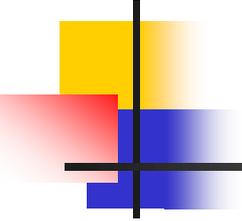
Wider Context

- Especially relevant to incitement; may provide evidence of intent
- “Shouting fire in a crowded theatre”
- Faurisson: Holocaust denial had become an established vehicle for anti-Semitism; not just denial of facts but role in promoting hatred
- Turkish cases:
 - Zana: former mayor, town in SE Turkey, at time of attacks
 - Incal: different, Izmir, limited violence, local activist
- Historians: cannot change context but if sensitive then perhaps be even more academically rigorous



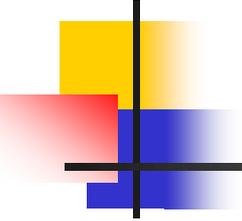
Holocaust/Genocide Denial Laws

- Quite a lot of the legal cases involve this
- Disputed issue: no court has ruled it out
 - Goes to issue of notorious falsity and intent
- Garaudy: focused on intent; did not look at actual risk of incitement
- General Comment 34: rules this out
- EU Council Framework Decision: punish denying/trivialising genocide ... if likely to incite
 - Essentially brings it back within scope of Article 20(2)
 - Balance: ban denying genocide where it is hate speech
- Faurisson: cases where right to be free of discrimination goes beyond strict scope of Article 20(2)



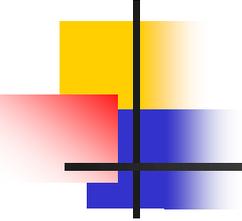
False News

- Not legitimate to have a blanket ban despite massive growth in mis- and disinformation and harm they cause
 - General Comment 34, 2017 Joint Declaration
 - But OK if linked to a specific harm: defamation, perjury
 - Focus instead on reliable speech: access to information, States disseminate accurate information
- Question of hate speech status of opinions (not facts)
 - OK if could (not should) honestly be held by fair-minded person based on available facts



Conclusion

- Historians should expose the truth, no matter how uncomfortable or what the consequences
- May be various moral, social or professional obligations in difficult cases
- Legally: OK if actual goal (intent) was to expose truth, even if missed the target, especially if work is professional
- But hate speech dressed up as historical research will not be protected



Conclusion

Look forward to questions and debate

toby@law-democracy.org

www.law-democracy.org