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CHAPTER 2

Laws Governing the Historian's Free Expression

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Where there is no law, there is no freedom.
Wherever law ends, tyranny begins.
(Locke 1689, II, §§ 57, 202).

Abbreviations

A19	Article 19
ECHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
OHCHR	Office of the (United Nations) High Commissioner for Human Rights
SRFEX	*Report of the (United Nations) Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*
UN	United Nations
UNCESCR	UN Committee on Economic, Social and Cultural Rights
UNCHR	UN Commission on Human Rights
UNHRC	UN Human Rights Committee

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Everywhere, historians are surrounded by laws and yet most of the time they do not see them.[1] But these laws are imperatively there, regulating directly or indirectly multiple aspects of their work. Being the domain of government, laws are state-endorsed by definition. According to the classical doctrine of *trias politica*, they are proposed by the executive branch, promulgated by the legislative branch and administered by the judicial branch of government.

The perspective of the lawmaker covers all domains of social activity and laws affecting historians are often crafted with these broader domains in mind. Dealing with the past is only one, and usually not the main, concern of the lawmaker. Laws affecting the work of historians belong to three types: those affecting their *work conditions* in general and specific ways, those regulating their access to *information*, and those governing their freedom of *expression*. This is what Fig. 2.1 visualizes. The distinction is not absolute: strictly speaking, laws determining information and expression are integral parts of those determining work conditions. Nevertheless, separating them is still useful because the more one moves from work conditions to information and expression, the more direct (though not necessarily the more profound) the impact of laws is on the work of historians. For example, education laws, as laws affecting specific work

Laws governing historians' general and specific work conditions

- *general:* international law and treaties; the constitution; laws regarding media, assembly, association…
- *specific:* heritage laws, education laws, academic freedom laws

Laws governing historians' information and containing limits set by private and public interests

- copyright laws, right to information laws, archives laws, national security laws
- laws regulating the legacy of past human rights violations[i]

Laws governing historians' free expression and containing limits set by private interests		***Laws governing historians' free expression and containing limits set by public interests***	
(individuals)		***(society and state)***	
privacy laws data protection laws	defamation laws insult laws	memory laws	blasphemy laws hate speech laws genocide denial laws

[i] I call legacy laws those laws that regulate the legacy of human rights violations in democracies that emerge after a period of conflict or dictatorship. The past-oriented character of these laws puts them in the historians' spotlight. The most relevant of these for present purposes are amnesty laws (because they limit the access to sources about crime suspects and perpetrators).

Fig. 2.1 Taxonomy of laws governing the historian's work

conditions, regulate how universities and thus history departments are organized: this certainly affects the work of historians but does not control directly what they write or teach (at least not in democratic societies). In contrast, right to information laws help determine the availability of records and therefore directly affect what historians can investigate. The laws with the most direct impact are subdivided according to the parties that can restrict the free expression of historians: individuals, society and state. The study of law types governing the information and expression of historians can give answers to one fundamental question: what are we legally allowed to say about the past?

In the present chapter, I offer a survey of laws that directly interfere with the free expression of historians, that is, with what they tell and write, with the purpose of protecting (alleged) public interests. They can be grouped under four types: memory laws, blasphemy laws, hate speech laws and genocide denial laws. For each type, a definition is given and overlap with other types indicated, important debates are summarized and consequences for the practice of history identified. In order to have a standard to discuss and evaluate these law types, I first present the broadly shared general freedom of expression framework as established by the United Nations.

The International Freedom of Expression Framework

The global standards that regulate the universal right to freedom of opinion and expression are set out in Articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR). The ICCPR is a formal elaboration of the 1948 Universal Declaration of Human Rights. It was approved by the United Nations in 1966 and as of September 2017 ratified by 169 states (representing 80% of the world population).[2]

The Standards

Article 19.1 describes the *formation* of opinions, Article 19.2 their *expression*, Article 19.3 their *restriction*, and Article 20 their *prohibition*.

Article 19 of the ICCPR

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. 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 (ordre public), or of public health or morals.

Article 20 of the ICCPR

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

In order to interpret these two articles, we need guidance of the Human Rights Committee, a United Nations body established in 1976 to supervise compliance with the ICCPR by the States Parties (the ratifying states). One of the Committee's tasks is to issue authoritative interpretations of the various ICCPR articles. In 2011, it produced a *General Comment* on Article 19, which is our main guide here (UNHRC 2011; replacing UNHRC 1983a; see also UNHRC 1983b).[3]

The Formation of Opinions

Article 19.1 establishes the right to form and hold opinions. The Human Rights Committee observed:

> Paragraph 1 of Article 19 requires protection of the right to hold opinions without interference. This is a right to which the Covenant permits no exception or restriction … All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. (UNHRC 2011, § 9)

This commentary emphasizes the absolute and nonderogable right *to hold* opinions, including those of a historical nature. Under "opinions of a historical nature" we should understand interpretations of past events and moral judgments about the conduct of historical figures.

This right is underpinned by the noncoercion principle. In the Human Rights Committee's words:

> Any form of effort to coerce the holding or not holding of any opinion is prohibited. Freedom to express one's opinion necessarily includes freedom not to express one's opinion. (UNHRC 2011, § 10; see also ICCPR, Article 18.2; UNHRC 1993, § 5)

Coercion is inconsistent with the right to hold opinions. In other words, from a human rights perspective, historians are not obliged to adopt interpretations of past events or moral judgments about the conduct of historical figures made by others; and citizens in general are not obliged to comply with

a duty to remember imposed on them by others (see for full discussion, De Baets 2009, Chap. 5).

The Expression of Opinions

Whereas Article 19.1 focuses on individuals as such, Article 19.2 focuses on individuals in their social context. It establishes the right to freedom of information and expression. This is a right of individuals looking for information and ideas ("seek"), individuals expressing opinions ("impart") and the public interested in hearing them ("receive"). Here, another principle emerges, the right to err or the right to make mistakes. According to the Human Rights Committee:

> The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. (UNHRC 2011, § 49)[4]

This right to err refers to opinions and less so to facts. Statements of fact are indeed distinguished from statements of opinion. From a human rights perspective, historical facts are susceptible to a truth/falsity proof whereas historical opinions are not. This distinction is an important fundament of legal epistemology. It means that expressing opinions enjoys far stronger protection than expressing statements of fact.

The Restriction of Opinions

Article 19.3 embodies the idea that the right to freedom of expression, although universal, is not absolute. It describes the standards to restrict free expression. (See for the restriction principles, UNCHR 1984 and SRFEX 2010, §§ 72–87.) Four general principles underlie these standards. First, restricting a right in order to protect it is delicate and, therefore, the scope of restrictions on free expression is itself restricted and should never undermine the essence of the right (see also ICCPR, Article 5). Second, only states may permissibly restrict free expression. Third, the exercise of the right of free expression carries with it special responsibilities. This clause is first and foremost applicable to states. They have responsibilities to respect (i.e., not to interfere with free expression when it is not necessary), responsibilities to protect (i.e., to prevent private actors from interfering with the free expression of others) and responsibilities to fulfill (i.e., to facilitate free expression by means of legal, financial, promotional and other measures; see also ICCPR, Article 2). In their turn, historians also have duties: for example, the duty not to express discriminatory views when they act as symbols of authority in a teaching context (see UNHRC 2000, § 11.6; ECHR 2011a, §§ 12, 14). Fourth, the standards are applicable at all times, including times of public emergency, although states may then take temporary measures enabling them to derogate

from their responsibilities under strict conditions (see ICCPR, Article 4.1; UNCHR 1984, part II).

The Three-Part Test

Based on these principles, a sophisticated method to assess the appropriateness of restrictions on free expression has been developed. It is internationally accepted and best known as "the three-part test." The first branch of the test prescribes that the restriction should be "provided by law." Inasmuch as we are dealing with laws in this chapter, this is of utmost importance here. In order to understand this branch of the test, we should first have a grasp of the notion of rule of law. Former British prime minister and historian Gordon Brown once observed that "In establishing the rule of law, the first five centuries are always the hardest." According to the United Nations:

> The "rule of law" … refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. (UN Secretary-General 2004, § 6)[5]

A focal part of the rule of law is legality. The central idea of the legality principle is that restrictions on free expression cannot be imposed by the whims of a public official on the spot; they must be enshrined in pre-existing laws which are consistent with international human rights standards. Furthermore, laws must be publicly accessible (they cannot be secret), and described in clear, precise and unambiguous language, so that everyone can understand them. They must also be equally enforced. Laws containing vague and overbroad formulations expand the range of people permitted to implement them, give them too much power, create uncertainty and arbitrariness and produce a chilling effect (a deterring effect) on free expression.[6]

The legality principle leads to at least two observations of interest to historians. First, the Human Rights Committee tells us:

> [I]t is not compatible with the Covenant for a restriction to be enshrined in traditional, religious or other such customary law. (UNHRC 2011, § 24, also § 32; see also *Joint Declaration* 2014, §§ 1b, 1f)

Second, it is also well known that most dictatorships invest much energy in keeping up a semblance of legality in a contorted attempt to enhance their legitimacy. Often, they function under a martial law regime. But dictatorial

decrees usually do not meet the legality principle. Some blatantly prescribe an entire ideology; others facilitate the persecution of dissidents or the ban on their publications under the guise of national security or anti-terrorism laws. Still others are secret laws or laws with secret interpretations or laws with overbroad secrecy regulations. Finally, some decree blanket amnesties granting immunity for perpetrators of human rights violations. Sometimes, provisions of dictatorial or colonial laws survive in democracies.[7]

The second branch of the test enumerates a list of legitimate interests on which free expression restrictions can be based. These interests can be private (respecting the rights or reputations of others) or public (protecting national security, public order, public health and public morals).

Among the private interests, reputation is straightforward, but the catch-all expression "rights of others" is less clear. In various legal cases, it has been understood to include, inter alia, the rights to copyright, to privacy and to equality. The phrase has also been invoked to protect the honor and dignity of genocide victims (deceased and surviving) and their relatives and descendants (see ECHR 2015, §§ 143–144, 155–157). The "rights of others" clause relates to both individuals and the community as a whole.

The public interests mentioned in Article 19.3 of the ICCPR are generally recognized as legitimate for the survival and functioning of society and the state (the latter as the legal and political manifestation of society). National security should be understood as the protection of:

> [T]he existence of the nation or its territorial integrity or political independence against force or threat of force. (UNCHR 1984, § 29)

This includes the possibility to shield sensitive information from the public. Ideally, public order should be:

> [T]he sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order. (UNCHR 1984, § 22; see also ECHR 2015, §§ 146–154)

The interest of public health (the third public interest) does not play a major role in the study of the past: although it is justified on public health grounds to ban misleading information about disasters, accidents, plagues and diseases while they unfold, the restriction of histories of these calamities must invoke public order grounds because of their potential to sow unrest. By contrast, the interest of public morals is crucially important for historians. The *Siracusa Principles,* adopted by the United Nations Commission on Human Rights in 1984, stipulate:

> Since public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in

> question is essential to the maintenance of respect for fundamental values of the community. The margin of discretion left to states does not apply to the rule of non-discrimination as defined in the Covenant [the ICCPR, *adb*]. (UNCHR 1984, §§ 27–28; see also UNHRC 1993, § 8; UNHRC 2011, § 32)

Significantly, the list of private and public interests is exhaustive. Interests not listed in Article 19.3 are not permissible as restriction grounds. This means that free expression restrictions in the name of "tradition," "custom," "culture," "national pride," "protection of memory" or "insult to the fatherland" should all be discarded as invalid.

The third branch of the test prescribes that restrictions should be "necessary" to achieve the protection of the interests. The necessity principle stipulates that the restriction must address a pressing social need.[8] In addition, the benefit flowing from the restriction must outweigh the harm it does to free expression and the restriction selected should be proportional and the least intrusive measure available. Restrictions that are unnecessary or disproportional (e.g., harsh sanctions) produce chilling effects that may unduly restrict free expression on the part of the person concerned and others (see also UNHRC 2011, §§ 34–35).

The three-part test is a staple of international law. If states fail it, a violation of the right to free expression has occurred.

The Prohibition of Opinions

Article 20 of the ICCPR is an extension of Article 19.3. Whereas Article 19.3 is about *restricting* expressed opinions, Article 20 is about *prohibiting* them. In the words of the Human Rights Committee:

> [F]or the acts addressed in Article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that Article 20 may be considered as *lex specialis* with regard to Article 19. (UNHRC 2011, § 51)

This means that governments have a duty to enact laws prohibiting war propaganda (Article 20.1 of the ICCPR) and laws prohibiting "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" (or hate speech for short) (Article 20.2 of the ICCPR). The views diverge on whether the acts prohibited under Article 20 can be considered opinions at all.

This is, in a nutshell, the international free expression framework insofar as it is relevant for historians. The framework is a coherent whole of fundamental principles, all of which have to be carefully balanced. It is our guide in discussing those laws that directly aim at restricting what historians say or write about the past.

Memory Laws

In recent decades, an increasing number of countries have adopted memory laws, that is, laws that *prescribe* or *prohibit* certain views of historical figures, symbols, dates and events (Fig. 2.2).

Memory Laws Regarding Historical Figures (as Part of Defamation Laws)

The most important subcategory of memory laws are those regarding historical figures but, curiously, they are rarely recognized as such because they are also a subcategory of an even more important group of laws: defamation laws. As a subcategory of defamation laws, memory laws regarding historical figures are vulnerable to the same criticism as defamation laws. Article 17 of the ICCPR stipulates:

> No one shall be subjected … to unlawful attacks on his honour and reputation.

Whereas honor is a person's self-esteem, reputation is a person's good name or fame, the esteem in which one is generally held within a particular community. An "attack on reputation," or defamation, is the intentional impairment of that reputation ("fama"). This can be done orally (slander) or in writing (libel) (for definitions, see A19 2000; A19 2003; A19 2006).

Proper defamation laws are laws that protect individuals against false statements of fact that damage their reputations. The basic principle is that only individuals can possess reputations: according to Article 17 of the ICCPR, the harm from an attack on reputation is personal in nature.[9] This principle rules out the notion of "group defamation" and it does not allow individuals to sue on behalf of a group. As we saw, the "reputation of others" is explicitly mentioned in Article 19.3 of the ICCPR as a possible restricting ground for free expression.

Defamation laws can infringe the basic principle (only individuals possess reputations) by incorporating improper purposes:

- The protection of the reputation of states, nations or religions
- The protection of the reputation of deceased persons

Content:	historical figures	historical symbols	historical dates	historical events
Overlap with other law types:	defamation laws blasphemy laws lèse majesté laws desacato laws	heritage laws	public order laws	genocide denial laws hate speech laws

Fig. 2.2 Typology of memory laws according to content

- The prevention of legitimate debate about matters of public concern (such as criticism of officials or exposure of official wrongdoing).

The first and second groups comprise improper objects of reputations; the last one provides unduly strong protection for reputations. Let us analyze these purposes in turn (*Joint Declarations* 2013, pp. 22–23, based on A19 2000).

First, scores of historians in communist countries have been sued in the past because they had defamed "the nation," "the state," "the Soviet system," "the Party" or its "nationalities policy." In the Middle East and North Africa, there is a strong tendency to attack critical historians in the name of concepts such as "Islam" or "justice." In Turkey, scores of writers, including many historians, were imprisoned because they insulted "Turkishness." Public bodies such as states are abstract, however, and do not possess reputations.

Second, there is the problem of posthumous reputation. Countless countries have adopted laws containing provisions for "protection of the memory of the dead" and against "defamation of the dead." Such laws against "defamation of the dead" are most prominent in cases of deceased political leaders. In 2000, at least 18 countries had such laws (World Press Freedom Committee 2000). Among the more notorious examples are the following. The Thai legislation on lèse majesté (1908) protects the monarch and his predecessors; in Turkey, a law protects the legacy of Atatürk (1951); in Iran, a similar law punishes insult against the memory of Ayatollah Khomeini (1995). In India, there is a Prevention of Insults to National Honour Act (1971), but in 2009 the Supreme Court turned down a plea to make it mandatory for people to show respect to Mahatma Gandhi. In 2014, a number of publications in Ethiopia were accused of belittling the legacy of former Prime Minister Meles Zenawi (who died in 2012). In the United States, the state of Oregon adopted a statute with the following provision:

> No textbook shall be used in the schools which speaks slightingly of the founders of the republic or of those who preserved the union or which belittles or undervalues their work. (*Oregon Revised Statutes* 1981, Sect. 337.260)

When this provision was challenged in court, the appeals court did not express an opinion on its constitutionality.

Because reputation is personal, it cannot be inherited. The London-based NGO Article 19 observed:

> [A] right to sue in defamation for the reputation of deceased persons could easily be abused and might prevent free and open debate about historical events. (A19, 2000, comment on principle 2)

In 2008, 349 historians sent a letter to the Spanish government to warn against the abuse of defamation laws, arguing that the 2007 Historical Memory Law, although encouraging historical research on the civil war and the Franco era, could have the unintended effect of increasingly exposing historians to libel trials initiated by the heirs of former perpetrators of human rights violations (Barros and 348 historians 2008).

Third, the issue of criticism of public officials is best introduced by explaining the public-figures doctrine, which stipulates that public figures such as heads of state and government should tolerate more criticism of their reputations than private citizens (see also ECHR 1986; *Joint Declarations* 2013, p. 23). German-speaking jurisdictions often label public figures as "figures of contemporary history." In spite of this widely accepted doctrine, political leaders in many corners of the world tolerate less rather than more criticism of their reputations. Heads of state have eagerly used the defamation instrument to repress unwelcome historical statements criticizing their reputations either directly or through comments on their past conduct or ideas. Biographies about political leaders have frequently caused serious trouble to their authors. The Human Rights Committee observed that:

> [A]ll public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as, [lèse majesté], *desacato,* disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials … States Parties should not prohibit criticism of institutions, such as the army or the administration. (UNHRC 2011, §§ 38, 47)[10]

When historians are sued for defamation, their strongest defense is that they told the truth: the *exceptio veritatis*. This is so because one cannot defend a reputation one does not deserve in the first place. The truth defense is curtailed in those countries that legally limit the time period for which proof of truth is possible.

In short, defamation laws are legitimate if and when they protect personal reputations against attack. When, however, they protect abstract entities such as states, state symbols or religions, when they protect the memory of deceased figures or shield heads of state and other public figures, including religious figures, from criticism, they are nothing else than memory laws and, in these three cases, improper.

Memory Laws Regarding Historical Symbols

Other brands of memory laws include those prescribing or prohibiting the use of historical symbols. "Symbols" is a broad term covering names (of countries, streets), flags (including coats of arms, badges), hymns and mottos, monuments (buildings, sculptures, statues, digital monuments), coins and

stamps, memorial plaques and portraits dedicated to former leaders, heroes or victims, and, finally, the paraphernalia of military organizations (such as uniforms). From this inventory, it can clearly be inferred that memory laws regarding historical symbols overlap with heritage laws (laws that protect the natural and cultural heritage), insofar as the material infrastructure of the symbols is involved.

After a change of regime, these historical symbols are frequently modified by law or decree, which explains why many new symbols celebrate resistance movements against past repression. In addition, symbols that were in use prior to the period of repression may be reintroduced to restore a sense of continuity with an earlier period of freedom or independence.

The state has many functions, among them a symbolic function when it emphasizes certain social values and an expressive function when it commemorates and educates (see also Brettschneider 2012, pp. 3, 5–7, 13, 15, 20–22). When the state prescribes symbols and endows them with an official character, it fulfills these symbolic and expressive functions. The laws regulating such symbols belong to the legitimate prescriptive kind, as long as citizens are free to use symbols other than the official ones (within the bounds specified below).

The adoption of new symbols, however, is often accompanied by prohibitive measures. Several countries have banned the use of totalitarian symbols (Closa Montero 2010, pp. 294–332). Bans on symbols of previous regimes are often justified on the grounds of protecting the rights of others (namely the victims of the previous regime) or maintaining public order. Although these are legitimate grounds as such, they can be invoked only if they are prescribed by law and if they can be shown to be really necessary. In an attempt to specify this "necessity standard," the NGO Article 19 drafted 20 *Principles on Protection of Human Rights in Protests* in 2015. Under Principle 10.2 ("Freedom to choose the cause or issue of protests"), states must allow protests that:

> [m]erely display insignia, uniforms, emblems, music, flags or signs that are historically associated with discrimination against certain groups, unless they are intended and likely to incite imminent violence. (A19 2015b, p. 23)

We have seen that flags (and other such symbols) do not have reputations, and therefore the charge of flag defamation is not a legitimate ground for prohibition. However, as late as 2014, sixteen EU member states punished the insult of state symbols, such as flags, anthems and coats of arms, and ten punished insult of the symbols of foreign states (International Press Institute 2014, pp. 16–18).[11]

Because laws seldom solve the entire problem, several issues usually remain unaddressed: should some of the discarded symbols be preserved for their artistic value? What does one do with private ownership of symbols? How does one cope with symbols charged with multiple meanings? How does one

treat places that are now sites of contestation? (For legal cases about symbols, see ECHR 1999; ECHR 2008; ECHR 2012a; ECHR 2012b.) Perhaps the most difficult issue of all is how to respect burial sites containing the remains of members of the previous regime (see, among others, *Third Geneva Convention* (1949), Article 120, and its 1977 additional protocols).

Memory Laws Regarding Historical Dates

There are also memory laws that prescribe or prohibit anniversaries or public holidays, and the commemorations associated with them (see, e.g., the UNHRC cases about Belarus at concernedhistorians.org). Here again, allocating an official status to historical dates as such is not problematic in principle. The end of an international or civil war, the downfall of a dictatorial regime and a declaration of independence are typical moments that are commemorated. Such days may also honor acts of resistance and uprising or, alternatively, commemorate the victims of past crimes. The same situation as in the case of symbols arises. The state is allowed to prescribe anniversaries and to endow them with an official character in order to fulfill its symbolic and expressive functions. As long as citizens are free not to attend official days and celebrate days other than the official ones, the laws regulating such anniversaries belong to the legitimate prescriptive kind.

Commemorations, however, are sometimes suppressed or obstructed on grounds of public order (disturbance of the peace) or, if they are held near cemeteries, public morals (disturbance of piety).[12] Examples include annulled celebrations of anniversaries of massacres, coups and rebellions; disturbances during annual pilgrimages; violence at sacred sites; the break-up of funerary corteges and wakes; and the suppression of traditional ceremonies.

The legitimacy of commemorations can be determined by combining the requirements of Articles 19 (freedom of expression) and 21–22 of the ICCPR (the freedoms of peaceful assembly and association). In 2013, the United Nations Committee on the Elimination of Racial Discrimination recommended:

> In order to promote inter-ethnic understanding, balanced and objective representations of history are essential, and, where atrocities have been committed against groups of the population, days of remembrance and other public events should be held, where appropriate in context, to recall such human tragedies, as well as celebrations of successful resolution of conflicts. (UN Committee on the Elimination of Racial Discrimination 2013, § 35)

Recently, the importance of digital technologies in public protests has been acknowledged. In 2011, the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (henceforth Special Rapporteur on Free Expression) voiced concern about:

> [T]he emerging trend of timed (or "just-in-time") blocking of the internet to prevent users from accessing or disseminating information at key political moments, such as … anniversaries of … historically significant events. (SRFEX 2011, § 30)

It should be recalled that, under international law, commemorations that upset others should be protected from violence, not banned (see UN 2016, Principle 4). Memory laws regarding symbols and dates overlap with the first class (historical figures) and last class (historical events) of memory laws because symbols and dates usually refer to these figures and events.

Memory Laws Regarding Historical Events

The last group of memory laws prescribes or prohibits views of historical events. Scores of countries have adopted such laws as the following examples demonstrate. In the past 25 years, at least 14 European countries approved laws condemning Holocaust denial.[13] France formally recognized the Armenian killings of 1915 as genocide in 2001, but a law to criminalize its denial was dismissed by the Constitutional Council in 2012. The same country also adopted laws regarding the slave trade and slavery (2001) and the positive role of French colonialism (2005; repealed 2006). Spain passed a comprehensive Historical Memory Act in 2007 to deal with the legacy of the civil war and the Franco era. In Ukraine, a 2006 law stipulated that the Holodomor, the famine of 1932–1933, was genocide. This was followed in 2015 by other memory laws that banned Nazi and communist symbols, criminalized denial of the "criminal nature of the communist totalitarian regime," and rehabilitated highly controversial resistance fighters in World War II. In 2009, the Russian government called for a law "On Combating the Rehabilitation of Nazism" that would not only criminalize attempts to rehabilitate Nazism but also block serious historical research into World War II (for analysis, see A19 2009b). Although this draft law was rejected, a similar law was approved by the Duma in 2014. In Algeria a presidential "Decree Implementing the Charter for Peace and National Reconciliation" was promulgated in 2006. It criminalized, inter alia, any expression believed to denigrate state institutions or security forces for their conduct during the internal conflict of 1992–2000. In 2013, Cambodia adopted a Law Against the Nonrecognition of Crimes Committed During Democratic Kampuchea. In 2016, the proposed new Liberation War Denial Crimes Act in Bangladesh provided for imprisonment and fines if certain events of the 1971 war of independence were denied, distorted or opposed. In 2012, the National Transitional Council of Libya promulgated a law that banned criticism of the 2011 Revolution and glorification of al-Qaddafi and his regime, but a month later the Supreme Court declared the law unconstitutional. In the

wake of the 1994 genocide, Rwanda adopted laws against "genocide ideology" (ideas that could lead to genocide, including the double genocide thesis), "divisionism" and "sectarianism" (ideas encouraging ethnic animosity between the Tutsi and Hutu populations) in the early 2000s (for analysis, see A19 2009c; Amnesty International 2010).

When reviewing these examples, several observations are in place. First, the overwhelming majority of these laws deal with one category of historical events, namely genocide, crimes against humanity and war crimes and their historical counterparts. Second, the United States did not adopt federal memory laws regarding historical events, although some states have such laws regarding historical figures. Some (Durrani 2014; Lidsky 2008, pp. 1091–1092, 1101; Post 2009, p. 132) attribute this absence to the First Amendment, which reads:

> Congress shall make no law … abridging the freedom of speech.

Third, in many countries, the memory laws have given rise to heated debates, foremost in France (see *Liberté pour l'histoire;* lph-asso.fr), but also elsewhere. These debates relate to such aspects as:

- The reasons for and against adopting memory laws, including laws regarding historical events of previous centuries or unconnected to national history
- The different roles of the three branches of government and of political parties, civil society groups and professional historians in creating or opposing memory laws
- The permissibility of using contemporary concepts of international law (such as genocide) to characterize historical crimes (as discussed in De Baets 2011, pp. 132–142)
- The problem of finding evidence for imprescriptible crimes long after the facts
- The proper function of laws and the proper role of the state in relation to history and collective memory (De Baets 2015; Belavusau and Gliszczyńska-Grabias, eds. 2017)
- The duration of commemoration (when should it start and end)? (UN Special Rapporteur in the Field of Cultural Rights 2014 § 57).

A Critical Evaluation of Memory Laws

In 2011, the Human Rights Committee has rejected those memory laws that *prohibit* historical views:

> Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States Parties in relation to the respect for freedom of opinion and expression. (UNHRC 2011, § 49)

In a footnote, the Committee clarified that this statement referred to "so-called memory laws." In 2013, the United Nations Independent Expert on the Promotion of a Democratic and Equitable International Order declared in the same vein:

> Such laws [defamation, blasphemy and memory laws, *adb*] have totalitarian implications and consequences, violate human dignity, the right to open debate, academic freedom, and ultimately lead to intellectual stagnation and self-censorship … States should … repeal legislation that is incompatible with Articles 18 and 19 [of the ICCPR]; in particular … memory laws and any laws that hinder open discussion of political and historical events. (*Report of the Independent Expert* 2013, §§ 38, 56e)

And in 2014, the Special Rapporteur on Free Expression and other rapporteurs jointly declared:

> Certain types of legal restrictions on freedom of expression can never be justified by reference to local traditions, culture and values … These include: … Laws which provide for special protection against criticism for officials, institutions, historical figures, or national or religious symbols. (*Joint Declaration* 2014, § 1f)

The NGO Article 19 tells us what is wrong with memory laws:

> [M]emory laws … are not necessary in a democratic society, but are in fact counterproductive. [They] too often end up elevating history to dogma … [They] are both unnecessary—since generic hate speech laws already prohibit incitement to hatred—and open to abuse to stifle legitimate historical debate and research. (A19 2008b)

This is all the more so when these laws provide for criminal sanctions. Given these risks, some have denounced "the nanny state and its memory police" (Garton Ash 2008).

This evaluation can be summed up as follows (Fig. 2.3):

Form:	prohibitive memory laws	prescriptive memory laws that are:	
		coercive	non-coercive
Condemned internationally?	yes	yes	no

Fig. 2.3 Typology of memory laws according to form

Clearly, memory laws of the *prohibitive* type are condemned internationally. In principle, the condemnation does not extend to memory laws of the *prescriptive* type. Only when memory laws of the *prescriptive* type adopt a coercive character, that is, when their implementation is obligatory and noncompliance is sanctioned with penalties or imprisonment, do they become indistinguishable from the prohibitive type.

Blasphemy, Hate Speech and Genocide Denial Laws

Blasphemy Laws

Some memory laws partially overlap with other law types, such as blasphemy, hate speech and genocide denial laws. Blasphemy laws seek to protect a religion, its doctrines, symbols and venerated personalities (direct blasphemy) or its adherents (indirect blasphemy) from insult and defamation (A19 2015a, p. 29). Heresy laws ban other religions altogether. In the quite frequent cases that they refer to historical religious figures, symbols, dates or events, there is much overlap with memory laws.

In India, for example, Penal Code provisions regarding the insult of religion or religious beliefs have been used against historians, although as early as 1977 the Supreme Court ruled that products of serious historical research could not be punished or proscribed under the Penal Code, even if some of the facts unearthed as a result of such research were unpalatable to followers of a particular religion (*Indian Penal Code* 1860, Articles 153a, 295a, 298; Coliver, ed. 1992, p. 173).

In 2012, almost half of the world's countries had laws that penalized blasphemy (Human Rights First 2012; Reporters without Borders 2013). They mainly used four grounds to restrict free expression. First, defamation of religion: because reputation is a right of individuals, not of abstract concepts such as religion, this is an illegitimate ground. Second, insult to religious feelings: to the extent that blasphemy laws use the concept of insult, they are vulnerable to the same objections as insult laws; they protect feelings of honor and dignity rather than reputations (World Press Freedom Committee 2000; A19 2006, pp. 1–3, 5, 10; also Barendt 2005, pp. 170–192, 227–246, 295–302). This is problematic because whether someone's honor or dignity has been hurt by a remark cannot be proven by external factors or by the test of the "reasonable person" (a hypothetical person who exercises average care); the only evidence available is the individual's own statement as to his or her feelings. Third, public morals: this ground is often appealed to in cases where the state religion is allegedly offended, making it illegitimate for the same reasons as the first two. Fourth, public order: this ground is also weak, as in a typical blasphemy case the disruption of public order following an accusation of blasphemy is not usually caused by the alleged blasphemers but by those feeling offended by them (Neier 2013). Blasphemy rows often lead to damage or destruction of places of worship and to desecration of sacred objects of the religion to which the alleged blasphemers belong (see also De Baets 2014).

In practice, blasphemy laws often serve to shield powerful religious leaders from legitimate criticism and to discriminate against the views of religious minorities, dissenting believers and nonbelievers (SRFEX 2012, §§ 53, 78; *Joint Declarations* 2013, p. 50). The Human Rights Committee noted that:

> Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant … [I]t would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith. (UNHRC 2011, § 48; also UNHRC 1993)

From a human rights perspective, blasphemy laws are impermissible, but in certain circumstances laws that ban the advocacy of religious hatred are not. The latter are part of the group of hate speech laws.

Hate Speech Laws

Mainly due to the Internet, hate speech has been on the rise in recent decades, often acquiring an international dimension through this channel. As we saw, Article 20.2 of the ICCPR requires states to prohibit hate speech by law. It is defined as:

> [A]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[14]

This definition has given rise to much discussion. Four issues stand out. First, it is not clear why some concepts were chosen over others, for example, incitement rather than provocation or instigation. In addition, clear descriptions of the incitement and advocacy concepts or of the other concepts (hatred, discrimination, hostility, violence) have not been available for decades. The Special Rapporteur on Free Expression first tried to define them in 2012:

> "Advocacy" is explicit, intentional, public and active support and promotion of hatred towards the target group; "[i]ncitement" refers to statements about national, racial or religious groups that create an imminent risk of discrimination, hostility or violence against persons belonging to those groups. (SRFEX 2012, § 44, giving also definitions for hatred, discrimination, hostility and violence, based on A19 2009a, Article 12.1; see also Mendel 2006, p. 46 and A19 2015a, pp. 74–78. For early criticism of the definition, see Partsch 1981, p. 228)

The *imminent risk standard* for incitement is important as it requires a direct and immediate connection between the expression and the conduct it advocates. The spark and tinder analogy has been used (Feinberg 1975, pp. 146, 149–50; also Post 2009, p. 134). Although hate speech by definition is inchoate (the conduct advocated through incitement does not have to be committed for the speech to amount to a crime), a high degree of risk of resulting

harm must be identified (SRFEX 2012, § 45e; OHCHR 2012; see also the 1969 Brandenburg test in the United States; see also A19 1996, principle 6).

Second, prohibitions under Article 20 are to be interpreted in conformity with the restrictions of Article 19.3 (UNHRC 2011, §§ 50–52; SRFEX 2012, §§ 41, 77; Nowak 2005, pp. 476–79; UN Committee on the Elimination of Racial Discrimination 2013, § 35). The Special Rapporteur on Free Expression proposed a checklist for the prohibition of expressions, including the following elements: severity of hatred, intent, content or form of speech, extent of speech, likelihood or probability of harm occurring, imminence of the acts called for, and context (SRFEX 2012, §§ 46, 79; see also OHCHR 2012). In particular, the context (e.g., a context in which hate speech is part of a media monopoly on the part of those in power) is important in deciding whether an expression is hate speech. The context includes historical patterns and also introduces a margin of appreciation (room for maneuvering in fulfilling legal duties) for states dealing with hate speech. In this connection, it remains unclear whether in certain contexts direct incitement can be implicit and expressed insidiously through a pattern of insinuations (UNHRC 1996: individual opinion by Evatt, Kretzmer and Klein; see also ECHR 2015, § 57, discussing direct versus indirect and explicit versus implicit incitement).

Third, many harmful, offensive or objectionable expressions, although raising concerns of tolerance and meriting condemnation, do not constitute hate speech (although, confusingly, they are called so). (SRFEX 2012, § 43; A19 2008a, p. 8). Fourth, strictly speaking, it is not correct to call hate speech "group defamation" because hate speech laws protect the life, safety and equality of members of vulnerable groups rather than their reputations.

Article 20.2 of the ICCPR imposes a duty on states to promulgate hate speech laws. On balance, if surrounded by all the demanding guarantees explained above, the need to protect free expression and prohibit hate speech is mutually compatible and supportive. Hate speech laws thus protect legitimate interests such as the rights of others (in particular their rights to life and equality), public order (their safety), and national security (if Article 20.1 of the ICCPR, prohibiting war propaganda, is also included). The question remains, however, why a separate Article 20.2 of the ICCPR and why checklists are necessary if all the restrictive grounds are already accommodated under Article 19.3. (On the history of ICCPR, Article 20.2, see Partsch 1981, pp. 226–30; Nowak 2005, pp. 468–71; Post 2009, pp. 123–38.)

Arguments in favor of hate speech laws include the following. Foremost, they protect vulnerable minorities. Moreover, being strong signs that the social values of a community exclude hate speech, they improve the norms of respect in liberal democracies. The arguments against hate speech laws are more numerous (Mendel 2010; Mendel 2012, pp. 7–11; see also the debate between Waldron 2012 and Hare 2012). They risk driving hate speech underground: "Sunlight is said to be the best of disinfectants"

(United States Supreme Court Justice Louis Brandeis in 1914). In addition, the provisions of such laws are often full of vague offenses and are abused to suppress criticism (Post 2009, pp. 125–26; for examples of vague offences, see SRFEX 2012, §§ 50–51). For example, Article 20.2 does not prohibit the advocacy of a right of peoples to self-determination and independence, although such advocacy is often labeled as hate speech. The conceptual difficulty in distinguishing between hate speech and vehement criticism of the political system is pervasive. In the past, states often used hate speech laws against the very minorities they were supposed to protect (SRFEX 2002, 37; Coliver 1992, p. 363; Hare 2012). Perhaps the strongest argument against hate speech laws is that they are not effective: they reach only a small subset of all hate speech and provide not only a platform for hate speech exposure, but also for hate speech itself (SRFEX 2012, § 32). On balance, whereas the *symbolic* effects of hate speech laws (emphasizing social values) are sizeable, their *repressive* effects (punishing offenders) and *preventive* effects (steering conduct in a certain direction) seem rather weak (see also Raes 1995, pp. 67–77). Already in 1992, the NGO Article 19 concluded that:

> [T]he possible benefits to be gained by such laws simply do not seem to be justified by their high potential for abuse. (Coliver 1992, pp. vii, viii, 363)

Expressions of hate speech may be dressed up as historical research. They may tell a pseudostory about the target groups who were supposedly responsible for injustice in the past or constitute an alleged threat in the present, which is then backed up by pseudohistorical arguments (Mendel 2006, pp. 40–41). For example, during the 1994 genocide in Rwanda, many murders were inspired by distorted historical views. Radical Hutus believed that the Tutsi were foreigners in Rwanda, where they were supposed to have settled following their arrival from the Nilotic regions. Therefore, Tutsi bodies were systematically thrown into the Nyabarongo river, a tributary of the Nile, apparently to "send the Tutsi back to their place of origin" and to "make them return to Abyssinia" (ICTR 1998, § 120, note 54). Such expressions of hate speech with a historical dimension can be condemned from a variety of angles: morally, they are lies; scientifically, forms of fraud; professionally, abuses of history; legally, human rights violations (De Baets 2009, Chap. 1).[15] Hate speech is rife in times of genocide or ethnic violence.

As in defamation cases, there must be a truth defense in hate speech cases: true statements must never be prohibited in the context of hate speech. There is, however, a complication. Much pseudohistorical hate speech may skillfully weave truthful elements into the story in order to make it sound more convincing. It is also probable that scores of mob members participating in hate speech campaigns are not aware of the historical falsifications (Mendel 2006, pp. 60–61). In the *Nahimana* case, the International Criminal Tribunal for

Rwanda specifically rejected both Nahimana and Ngeze's claimed commitment to the truth, stating that truth was "subservient to their objective of … destruction of the Tutsi ethnic group" (ICTR 2003, § 1027).

The preceding discussion clarified in passing that one particularly pernicious form of hate speech is the direct and public incitement to commit genocide. According to the 1948 Genocide Convention, such incitement must be punished as a criminal offense (*Convention* 1948, Article 3c). One of the questions, then, is whether the denial of past genocides can be seen as hate speech and incitement to genocide.

Genocide Denial Laws

All genocides (the Holocaust, the Armenian genocide, Srebrenica, etc.) and many crimes against humanity (e.g., in the Congo Free State) and war crimes (Nanjing, Katyń, My Lai, etc.) have been targets of denial both during and after the fact (Ternon 2003, pp. 207–221). This is so because these crimes, from the planning stage until long after the execution stage, are steeped with attempts to keep them secret and to erase their traces.

Until two decades ago, most genocide denial laws related to Holocaust denial only. Because of the importance of these laws in more than a dozen countries, the European Union tried to unify legislation in this area through a Framework Decision in 2008. This Decision has rapidly become the leading prototype of genocide denial laws in Europe and elsewhere (European Union 2008), although it presents itself as a criminal-law approach to racist and xenophobic hate speech rather than as a genocide denial law. It makes the following intentional conduct punishable with one to three years' imprisonment when it is directed against individuals and groups defined by reference to race, color, religion, descent or national or ethnic origin: (a) publicly inciting to violence or hatred, including by distributing tracts and pictures; (b) publicly condoning, denying or grossly trivializing genocide, crimes against humanity and war crimes as defined in the 1998 International Criminal Court statute or crimes defined in the 1945 Nuremberg Charter, when that conduct is carried out in a manner likely to incite violence or hatred against such individuals and groups (summary of European Union 2008, Article 1).[16]

Clause (a), as a variant of the hate speech definition, is not problematic. At most, one can object that, as much genocide denial is only available as printed matter or online content, one can always escape incitement simply by not watching or reading it (Feinberg 1975, p. 145). Clause (b), however, has provoked two opposing reactions. Most welcomed the qualification that the conduct described under clause (b) must be "likely to incite" violence or hatred, thus linking it to clause (a) and to the imminent risk standard of incitement in hate speech laws. On the other hand, two of the three types of conduct specified under (b)—publicly condoning, denying or grossly trivializing—aroused much criticism because of their vagueness. Only "denial"

seems straightforward: it is the allegation that a given crime did not occur or, if it did, that it does not merit the qualification "genocide," even in the face of massive corroborated evidence to the contrary. But what is "condoning"? Is it doubting, disputing, excusing, explaining away, relativizing, trivializing, minimizing, justifying, accepting, defending, endorsing, approving, advocating, encouraging, promoting, spreading, glorifying, praising, celebrating or making an apologia?[17] And when exactly does "trivializing" become "gross"? Many of these terms are without definition under international human rights law and open to abuse (A19 2015a, p. 33). Several historians therefore found clause (b) either superfluous or in violation of the legality principle and either way a danger to the historical debate (see also Cajani 2011).

Two grounds are commonly invoked to restrict genocide denial. The first is the reputations of others. Deniers imply that the victims are lying about the genocide and thus are falsifying history; by so doing, the deniers defame the reputations of survivors and the memory of the victims. Second is public order. In this view, genocide denial is perceived as a camouflage for hate speech, and in the case of Holocaust denial, as a pretext for anti-Semitism and racism.

One of the toughest unsolved puzzles is whether the appeal to the memory and dignity of deceased genocide victims (as in the argument above) is a legitimate ground to prohibit genocide denial. On the one hand, the dead, as former human beings, do not possess human rights. Nor is the memory of victims a legitimate restriction ground of free expression. However, as we saw, the living must exercise their right to free expression with a sense of responsibility, among which, it could be argued, is the duty to respect the dignity of the dead (which is a posthumous, not a human dignity). In the *Perinçek* case, the European Court of Human Rights (ECHR) found a compromise solution: an attack on the reputation of one's ancestors can affect one's private life and identity, thus circumventing the puzzle by linking respect for the dead to a right of the living, namely their privacy (De Baets 2009, Chap. 4; see also A19 2009b, pp. 13–14; ECHR 2015, §§ 200–202).

The Human Rights Committee and the ECHR have dealt differently with cases of Holocaust denial. The Human Rights Committee, in *Faurisson v France* (1996), dealt with Faurisson's denial under Article 19.3 of the ICCPR rather than Article 20.2 of the ICCPR. Moreover, the Committee was critical about the Gayssot law (the Holocaust denial law under which Faurisson was convicted) and similar Holocaust denial laws, but because it did not see it as its task to evaluate laws in the abstract, it did not then ask France to repeal it (UNHRC 1996, §§ 9.3, 9.5, 9.7). Fifteen years after *Faurisson*, the Committee made an appeal to remove memory laws under explicit reference to this very case, making it likely that it equates most genocide denial laws with proscriptive memory laws (which it rejects) rather than hate speech laws (which it accepts).

Like the Human Rights Committee, the ECHR systematically rejected all the applications of Holocaust deniers. Usually, however, it did not resort to Article 10 of the European Convention on Human Rights (the equivalent of

Article 19 of the ICCPR), but to Article 17 (the equivalent of Article 5 of the ICCPR). Article 17, the so-called abuse clause, was devised to counter the enemies of democracy. Indeed, the ECHR has consistently viewed Holocaust denial as advocacy of National Socialism, a totalitarian doctrine incompatible with democracy and human rights and falling outside the scope of the right to free expression protected under Article 10 (Cannie and Voorhoof 2011). Another bone of contention is why the ECHR considers the Holocaust to be an "established historical fact," whereas other equally well-researched genocides (e.g., the Armenian genocide) do not receive such a status (Mendel 2006, pp. 40–41; see also ECHR 2011b, §§ 41–43, ECHR 2015, §§ 209–220).

Several questions surrounding genocide denial and laws to combat them have been fiercely debated, for example

- Is genocide denial itself the final stage of a genocide in that it completes the murders and the erasure of evidence, and if in this case denial becomes a part of the definition of genocide, are deniers accomplices of genocide (punishable under Article 3e of the Genocide Convention)?
- Is genocide denial a form of direct and public incitement to genocide (punishable under Article 3c of the Genocide Convention), enhancing the risk of future genocide?
- Given the different historical experiences of countries, how large is the margin of appreciation for states in dealing with it (see also Flauss 2006, pp. 7–17)?

The question whether genocide denial laws are efficient has not been answered satisfactorily. Some of those convicted of genocide denial have received prison sentences, in Europe as well as Rwanda, but undoubtedly courtrooms only capture a small part of the phenomenon, especially given the Internet's speed and reach. The claim that it prevents denial in other than symbolic ways is debatable. "The State cannot act effectively against the lie because it has no monopoly over the truth" (Raes 1995, p. 74). If this is true itself, no genocide laws are needed: hate speech laws alone suffice to punish genocide denial, if that denial passes the incitement threshold.

Many have pointed to the adverse effects of genocide denial laws. They argue that genocide denial laws create an impression among those sceptical of official wisdom that the truth about genocide is too fragile for debate and cannot survive without legal protection, even after many decades. Furthermore, deniers have an advantage regardless of the trial outcome: if they are accused of denial, they can sue their accusers for defamation (see, e.g., High Court of Justice Queen's Bench Division 2000); if they are charged and convicted, they can pose as free-speech martyrs, and if they are acquitted, they receive a semblance of credibility. Opponents of such laws further argue that if genocide denial is criminalized, there is no logical reason not to criminalize

other historical crimes, at the risk of creating a never-ending series of taboos (the ratchet effect).

Conclusion

From an international human rights perspective, only laws applying the three-part test of Article 19.3 and the imminent risk standard for incitement of Article 20.2 of the ICCPR are justified. On that criterion, *all* memory laws that prohibit historical views, *all* memory laws that prescribe historical views *insofar as they are coercive, all* lèse majesté laws, *all* desacato laws, *all* insult laws, *all* blasphemy laws, *all* heresy laws, *all* genocide denial laws *insofar as they do not belong to the class of proper hate speech laws*, and *all* defamation laws *of which the purpose is not to protect the reputations of living individuals* should be rejected. Only proper defamation laws and proper hate speech laws are allowed. In addition, we found that even hate speech laws that are in conformity with Article 20.2 of the ICCPR, although strong for their symbolic effects, are weak for their repressive and preventive effects. Nevertheless, the restrictions regime of Article 19.3 of the ICCPR has proven to be a solid instrument to solve free-expression conflicts. Although it can be refined, it has stood the test of time.

Laws have an impact on the entire historiographical operation. They influence the historian's general and specific work conditions. At the heuristic level, they help determine the amount of information available. At the epistemological level, they help guide the methodology and force historians to think more deeply about evidence and truth. At the ethical level, they encourage the virtues of accuracy and honesty and lead to reflection about the rights and duties of responsible historians and their subjects and audiences. If just laws are essential for society's survival, then they are certainly also essential for history's survival.

Notes

1. All websites mentioned were last visited on March 23, 2017. I am grateful to Toby Mendel, director of the Centre for Law and Democracy (Halifax, Canada), for his critical reading of this chapter's draft. Section 1 was delivered as a lecture entitled "Laws Governing the Free Expression of Historians in Democracies" at the international conference on "State-Sponsored History" in Ghent, Belgium (November 2015). A version of it appeared as "A Historian's View of the International Freedom of Expression Framework," *Secrecy and Society*, 1 (2016), no. 1, article 8 (http://scholarworks.sjsu.edu/secrecyandsociety/vol1/iss1/8). Section 2 was delivered as a lecture entitled "A Critical View of Memory Laws/Una vista crítica de las leyes de memoria" at the International Workshop on Historiography and Theory of History in La Habana, Cuba (February 2017). I thank all those present at these conferences for their comments.
2. URL: indicators.ohchr.org. Countries that have not yet ratified the ICCPR include China, Cuba, Malaysia, Myanmar and Saudi Arabia.

3. All *General Comments* are at www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx.
4. This right to err echoes the views of John Stuart Mill (1859, Chap. 2), who argued that erroneous and false opinions are valuable because they challenge disbelievers to refute them in order to come closer to the truth. In the process, some of the supposedly erroneous or false information could turn out to be true after all.
5. URL: www.un.org/en/ruleoflaw. The definition of rule of law is inspired, inter alia, by Article 8 in *Déclaration* (1789). See also Fuller's classic (1964), 33–94, discussing eight requirements for legality: generality; promulgation; nonretroactivity; clarity; noncontradiction; capability of being obeyed; constancy through time; congruence between law declared and law administered.
6. Article 15 of the ICCPR emphasizes one element of the legality principle: the prohibition of retroactive application of criminal laws (*nullum crimen sine lege*).
7. For example, India's sedition law dates from 1870 and Egypt's assembly law from 1914. For the latter, see Cairo Institute for Human Rights Studies (2017).
8. In Europe, the usual formula is "necessary in a democratic society."
9. This claim is inferred from UNHRC (1988), § 11: "Article 17 affords protection to personal honour and reputation …" and "States parties should indicate in their reports to what extent the honour or reputation of individuals is protected by law." See also A19, 2000, principle 2; Nowak 2005, pp. 403–404. There is one exception: also entities with the right to sue and be sued have reputations.
10. *Desacato* laws criminalize disrespect for public officials.
11. For example, the nine EU member states where insulting the state was a criminal offence were Austria, Belgium, Croatia, Germany, Poland, Portugal, and Slovenia (punishable with imprisonment), and Italy and Spain (not punishable with imprisonment).
12. Laws governing cemeteries and memorial sites are of importance here.
13. Outside Europe, Holocaust denial laws (or broader ones covering Holocaust denial) exist, for example, in Israel, Germany, Canada and Australia.
14. Derived from Articles 2 (equality) and 7 (nondiscrimination) in *Universal Declaration of Human Rights* (1948).
15. Classical cases are those against Julius Streicher, Hans Fritzsche and Ferdinand Nahimana. For the latter, see ICTR 2003.
16. Only Article 1 is discussed here, not the passages containing remarks about "hate crimes."
17. See, for example, the distinction drawn by the Spanish Constitutional Court (Tribunal Constitucional de España 2007) between denial and justification of genocide, criminalizing the latter but not the former. See also ECHR (2015), §§ 96–97, 240.

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