TAKING DENIAL SERIOUSLY: GENOCIDE DENIAL AND FREEDOM OF SPEECH IN THE FRENCH LAW

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"*And the ghost of all the dead tonight will wait for the dawn with mine eyes and my soul, perhaps to satisfy their thirst for life, a drop of light will fall upon them from on high*"

Arshile Gorky[1]

The French National Assembly's adoption of a bill penalizing[2] the denial of the Armenian genocide (October 12, 2006), later followed by the German plan to outlaw genocide denial throughout European Union, stoked the vigorous French debate on the connection between genocide denial and law and, more generally, between history and law.[3] The main criticism expressed by the detractors of laws against negationism – in particular historians – is

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1 *Thirst*, *in* GRAND CENTRAL SCHOOL OF ART QUARTERLY (*reprinted in* ETHEL K. SCHWABACHER, ARSHILE GORKY 21 (Macmillan 1957) reproduced in NOURITZA MATOSSIAN, BLACK ANGEL: A LIFE OF ARSHILE GORKY 156 (Chatto & Windus 1998)).

2 I use in this paper the term "penalization" rather than "criminalization," as a reference to the fact that genocide denial is not considered a "*crime*" in French law – but a "*délit*" (misdemeanour).

3 For an analysis of the debate related to the so-called "*lois mémorielles*" ("memorial laws"), first launched by the enactment of a law which enjoins teachers to recognize "*the positive role* of the French presence overseas, notably in north Africa" (Law No. 2005-158 of Feb. 24, 2005, Journal Officiel de la République Française [J.O.] [Official Gazette of France], art. 4. (emphasis added)), see LA COLONISATION, LA LOI ET L'HISTOIRE (Claude Liauzu & Gilles Manceron eds., Syllepse 2006); Patric Fraissiex, *Le Droit Mémoriel, in* REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL, 483–508 (2006); Emmanuel Cartier, *Rivalité ou Complémentarité?*, R.F.D.C. no. 67, 507 (2006); Sévane Garibian, *Pour Une Lecture Juridique des Quatre Lois 'Mémorielles'*, ESPRIT, (2006).

the following: penalization of denial constitutes a violation of freedom of expression and, as such, represents a threat to democracy.[4]

My presentation, based strictly on a legal perspective, addresses the main question raised in this debate: *does penalization of genocide denial constitute a violation of freedom of speech*? The thesis developed here is that, in France, anti denial laws and freedom of speech are not irreconcilable in view of three main elements that must be considered jointly: first, the relativity of the protection of free speech considering French as well as European human rights law, and the philosophical justification that grounds this protection; second, the legal limitations of the prohibition of genocide denial given the existing case law related to the 1990 Gayssot Law;[5] and third, the significance of genocide denial.

THE RELATIVITY OF THE PROTECTION OF FREE SPEECH

It is first important to remember that all legal texts guaranteeing freedoms also admit that no freedom is absolute or unlimited: limitations are permitted if determined by law and if necessary in a democracy. This general principle is notably expressed at article 4 of the French Declaration of the Rights of Man and of the Citizen[6]

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4 See the petition titled "*Liberté pour l'Histoire*" ("Freedom for History") originally signed by 19 historians (then, rapidly, by many others) and published in the three most important French newspapers: that is LIBÉRATION, Dec. 13, 2005, at 35, as well as Jean Baptiste De Montralon, *Mémoire et Historie, Examen Critique ou Repentance: Le Débat Fait Désormais Rage*, LE MONDE Dec. 14, 2005, at 10 and Delphine Chayet, *Dix-neuf Historiens Signet une Pétition Contre La 'Vérité Officielle,'* LE FIGARO Dec. 14, 2005 at 9. The petition claims for the abrogation of all "memorial laws" without distinction. *See* François Terré, *Négation du Génocide Arménien: une loi au Mépris du Droit*, LE FIGARO, Oct. 13, 2006, at 16; Michel Wieviorka, *Les Députés Contre L'histoire*, LE MONDE, Oct. 17, 2006, at 23; Jean-Philippe Feldman, *Il Faut Abolir la loi Gayssot!,* LE MONDE, Oct. 18, 2006, at 19; Jérôme de Hemptinne, *Génocide: L'engrenage*, LIBÉRATION, Oct. 25, 2006, at 33. For different views, *see* Sévane Garibian, *Du Négationnisme Considéré Comme Atteinte à L'ordre Public*, LE MONDE, May 13, 2006, at 22; Sévane Garibian, *La Négation, Objet Légitime du Droit*, LIBÉRATION, Nov. 3, 2006, at 28; Alain Policar, *Histoire: Trois Bonnes lois et une Mauvaise*, LE MONDE, Oct. 18, 2006, at 19; Bernard-Henry Lévy, *Arménie: Loi Contre Génocide*, LE MONDE, Feb. 2, 2007, at 20.

5 Penalization of genocide denial is, indeed, not new in France: it has been provided for since July 13, 1990, with the adoption of the Gayssot Law, which exclusively protects the memory of the Jewish genocide. The bill, adopted on October 12, 2006, aims at extending this protection to the Armenian genocide. It still needs to be adopted by the French Senate and then promulgated by the President of the Republic to finally become a law.

6 DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 4 (Fr. 1789) [hereinafter 1789 Declaration]("Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to

– which is part of the corpus of constitutional norms.[7] More specifically, articles 10 and 11 of this Declaration,[8] as article 10 of the European Convention of Human Rights[9] and articles 19 and 20 of the United Nations International Covenant on Civil and Political Rights,[10] provide for both the respect for freedom of speech and its limitations. Penalization of denial is only one limitation of free speech among many others (like defamation or insult) based on the responsibility that every citizen and historian has in the use of the freedom. Moreover, the 1990 Gayssot Law – the model for the 2006 bill – has been considered compatible with freedom of expression by the French courts, the European Commission and Euro-

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the other members of the society the enjoyment of the same rights. These limits can only be determined by law.").

7 Decision no. 71-44 DC of the *Conseil constitutionnel*, 16 July 1971 (the *Conseil constitutionnel* is an independent body created to control the constitutionality of government acts and the regularity of elections and referenda).

8 1789 Declaration, *supra* note 6, at art. 10 ("No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law."). "The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law." *Id*. at art. 11.

9 While article 10 § 1 of the 1950 European Convention establishes that

> [e]veryone has the right to freedom of expression . . .," 10 § 2 reads: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Id. G.A. Res. 2200A GAOR SUPP. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (Mar. 25, 1976).

10 United Nations International Covenant on Civil and Political Rights, Dec. 16, 1966, Article 19, *available at:* http://www.hrweb.org/legal/cpr.html

> 1. Everyone shall have the right to hold opinions without interference; 2. Everyone shall have the right to freedom of expression . . .; 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.

Id. Article 20 of the Covenant states: "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. *Id.* This Covenant has been ratified by the United States in 1992. It is, thus, part of the Supreme Law of the land under article 6 of the U.S. Constitution and has the same legal status as federal law. Kevin Boyle, *Hate Speech: The United States Versus the Rest of the World?*, 53 ME. L. REV. 487, 493 (2001).

pean Court of Human Rights, as well as the International Comity of Human Rights.[11]

The understanding of such an approach presupposes keeping in mind the philosophical justification that grounds the protection of free speech in Europe in general and France in particular: preservation of democracy in the strict sense of the term. Accordingly, anti-democratic speeches and diffusion of extreme ideas (like anti-Semitism, racism and hate speeches), as dangerous and harmful acts regarding the preservation of democracy, ought to be excluded from legal protection.[12] This conception of freedom of speech, stemming from the 1793 French revolutionary slogan "*Pas de liberté pour les ennemis de la liberté*" ("No liberty for the enemies of liberty")[13] finds an echo in Karl Popper's answer to the well known "paradox of tolerance" (according to which unlimited tolerance must lead to the disappearance of tolerance), where he claims, in the name of tolerance, the right not to tolerate the intolerant.[14] On the contrary, the philosophical justification behind the protection of free speech in the United States is quite different and stands alone among democracies, in the extraordinary degree to which its Constitution protects the First Amendment.[15] Indeed, freedom of expression, one of America's "foremost cultural symbols"[16] or "*icône culturelle*" ("cultural icon"),[17] is mainly justified by the ultimate goal of truth (or best perspectives or solutions).

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11 For developments, *see* Régis de Gouttes, *A Propos Du Conflit Entre Le Droit à la Liberté D'Expression et le Droit à la Protection Contre le Racisme*, *in* MÉLANGES EN HOMMAGE À LOUIS EDMOND PETTITI 251 (Bruylant, 1998); National Consultative Commission of Human Rights, LA LUTTE CONTRE LE NÉGATIONNISME. BILAN ET PERSPECTIVES DE LA LOI DU 13 JUILLET 1990 TENDANT À RÉPRIMER TOUT ACTE RACISTE, ANTISÉMITE OU XÉNOPHOBE (La Documentation Française 2003); Sévane Garibian, *La loi Gayssot ou le droit désaccordé*, *in* L'HISTOIRE TROUÉE. NÉGATION ET TÉMOIGNAGE 228 (Catherine Coquio ed., l'Atalante 2004) [hereinafter "L'HISTOIRE TROUÉE"].

12 European and French judges have stressed that the main interests protected by the Gayssot Law include "the bases of a democratic society," as well as "justice" and "peace": *Pierre Marais c. France*, decision of the European Commission (24 June 1996); *Garaudy c. France*, decision of the European Court (24 June 2003); Juris-Data, cour d'appel [CA] [regional court of appeal] Aix-en-Provence, Jan. 7, 1993, JURIS DATA n° 040945.

13 *Cf. infra* note 43.

14 KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES 668 (Routledge 2002) (1945). For a careful study of the "paradox of tolerance," see Michel Rosenfeld, *Extremist Speech and the Paradox of Tolerance,* 100 HARV. L. REV. 1457 (1987).

15 *See* FRANCIS D'SOUZA, STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION, AND NON-DISCRIMINATION, ARTICLE 19 (1992); Boyle, . . .," *supra* note 10, at 487–502; ROBERT A. KAHN, HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY (Palgrave Macmillan 2004).

16 LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 7 (Oxford University Press 1986).

This justification finds its origin in John Stuart Mill's utilitarianism, and its concrete application in the case law of the U.S. Supreme Court through Judge Holmes' concept of a "free marketplace of ideas" – based on the assumption that "the best test for truth is the power of the thought to get itself accepted in the competition of the market."[18] However the question whether or not extremist and radical speeches should be protected by freedom of expression has formed the "backbone of modern study of the First Amendment,"[19] and the goal of truth has been restricted by the "clear and present danger" test.[20]

Thus, the non absolute character of freedom of expression is a given in democracies and only the degree of possible restrictions and their reasons differ, depending on the function attached to free speech (democracy-protecting function in France, truth-declaring function in the United States). The justification for anti-denial laws based on the argument that such laws help preserve democratic values might seem surprising to those who believe that outlawing genocide denial amounts to violating these same values. Yet the former argument does stand in France, in view of the legal limitations of the prohibition of denial.

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17 Michel Rosenfeld, *La Philosophie de la Liberté d'Expression en Amérique. La Liberté d'Expression en Théorie et en Pratique* (Véronique Champeil-Desplats trans.), *in* L'ARCHITECTURE DU DROIT. MÉLANGES EN L'HONNEUR DE MICHEL TROPER 883 (Economica 2006).

18 *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 197 (Oxford University Press 1996); *see also* Rosenfeld, *supra* note 17, at 889.

19 Bollinger, *supra* note 16, at 4.

20 On the classic marketplace of ideas theory, its judicial application and its limits, see C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (Oxford University Press 1989). On the "clear and present danger" test, notably developed by judges Holmes and Brandeis, as a limitation of free speech in the American constitutional case law, see *id*. at 8. *See also* DWORKIN, *supra* note 18, at 198; MICHAEL KENT CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 389, 428 (Duke University Press 2000); Schenk v. United States, 249 U.S. 47 (1919). Let us recall Judge Holmes' famous metaphor:

> The most stringent protection of free speech would not protect a man from falsely shouting fire in a theater and causing a panic . . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Id. at 52. On the necessity to revise the American conception of freedom of speech and move it closer to international standards, see Boyle, *supra* note 10, at 501–02; MICHEL ROSENFELD, JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS 187 (University of California Press 1998); *see also* Rosenfeld, *supra* note 17, 893–94.

THE LEGAL LIMITATIONS OF THE PROHIBITION OF GENOCIDE DENIAL

The interpretations given by the French judges in genocide denial cases clarify the limitations of the prohibition – restrictively apprehended[21] – laid down by the Gayssot Law, and guarantee its conformity to democratic values in general, and freedom of expression in particular.[22] A careful study of the jurisprudence related to the 1990 Law shows that what is actually condemned by judges is not the negationist opinion in itself but the public diffusion of this opinion as an act of bad faith likely to produce undesirable and dangerous or harmful effects in a democracy.[23] In other words, what is problematic in cases of denial is not the difference of opinion but the abusive method used (dissimulation or distortion of information, false proofs etc.) under the cover of academic legitimacy to spread a denialist ideology grounded on anti-Semitic, racist or heinous propaganda. The function of judges in such cases is not to intervene in the qualification of a historical event. What matters to them is not the question whether the discourse at issue is true, but whether it reveals a propagandist, political motivation.[24] In that sense, Courts do not take into consideration *what* is said, but rather *how* and *why* it is said.

If History is a permanent questioning of events and facts,[25] it nevertheless implies professional responsibility and ethics: freedom of a scholar or of an academician does not mean irresponsibility.[26]

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21 Contrary to what Robert Kahn states. KAHN, *supra* note 15, at 111.

22 For developments see Garibian, *supra* note 11, at 224.

23 Michel Troper, *La Loi Gayssot et la Constitution*, 1253 ANNALES HSS 54 (1999).

24 On denial as the result of a mix-up between history and politics, see PAROLES À LA BOUCHE DU PRÉSENT. LE NÉGATIONNISME: HISTOIRE OU POLITIQUE? (Natacha Michel ed., Al Dante 1997) [hereinafter "PAROLES"]. French legal scholar Denis Salas stresses that what is at stake is the critical confusion between historical knowledge and "messianic discourse" or "ideological passion." Salas, *LeDroit Peuf-il Contribuer au Travail de Mémoire? in* LA LUTTE CONTRE LE NÉGATIONNISM, *supra* note 11, at 42.

25 Though on "academic relativism" and the idea of doubt see Henry C. Theriault, *Denial and Free Speech: The Case of the Armenian Genocide*, *in* LOOKING BACKWARD, MOVING FORWARD: CONFRONTING THE ARMENIAN GENOCIDE 236 (Richard G. Hovannisian ed., Transaction Publishers 2003). *See also* MARC NICHANIAN, LA PERVERSION HISTORIOGRAPHIQUE. UNE RÉFLEXION ARMÉNIENNE 105 (Lignes 2006) (discussing the Carlo Ginzburg / Hayden White controversy over the concept of "historical truth").

26 *See*, *e.g.*, Roger W. Smith, Eric Markusen & Robert Jay Lifton, *Professional Ethics and the Denial of the Armenian Genocide*, HOLOCAUST AND GENOCIDE STUDIES 1–22 (Spring 1995); Yves Ternon, *Freedom and Responsibility of the Historian: The 'Lewis Affair,' in*, REMEMBRANCE AND DENIAL: THE CASE OF THE ARMENIAN GENOCIDE 237–248 (Richard G. Hovannisian ed., Wayne State University Press 1999). Denis Salas talks about the necessity to maintain a

The key element here is the idea of responsibility one has when questioning the reality of a crime of genocide whose specificity, just like that of denial, is determined by the *intention* that motivates the act.[27] Actually, the major and significant difference between genocide denial and other limitations of free speech lies in the requirement of a mal intent or bad faith to be proven by the accusor (in case of negationism), whereas in the case of defamation or insult bad faith or mal intent are presumed (here, the plaintiff is favored but the defendant is given the right to prove either his good faith or the veracity of the litigious statements). This burden of proof that rests with the accusor is a deciding factor in so far as it has three main advantages: first, it constitutes a strong and heavy requirement, thus considerably narrowing the prohibition's scope in general, and preserving academic freedom in particular;[28] second, it permits to avoid the perverse effects ensued from other offences which consist in offering deniers a "golden opportunity to present their views to a wider audience,"[29] or legitimating denial by creating a "debate that is no debate and an argument that is no argument;"[30] third, it does not allow judges to examine the veracity of

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"*horizon de responsabilité à la liberté de l'historien*" ("horizon of responsibility to the freedom of the historian"), like that of the journalist, doctor or judge in the exercise of duties which might cause moral prejudice (SALAS, *supra* note 24, at 42).

27 Dworkin, *supra* note 18, at 255. More generally, on the importance of *intentional harm* related to the problem of free speech restrictions, an interesting parallel can be drawn with Dworkin's lines:

> Intentional harm is generally graver than non intentional harm; as Oliver Wendell Holmes once said, even a dog knows the difference between being kicked and being stumbled over. But the distinction is important now . . . because though intentional insult is not covered by academic freedom, negligent insult must be.

Id. The author then recalls the issues raised by the adoption of speech codes in some American Universities. He notes that the one adopted by the University of Michigan was held unconstitutional, precisely because it didn't provide for any *requirement of intention*. *Id.* at 256–257. For developments on speech codes/academic freedom/free speech in the United States, and on the "general and uncompromising responsibility" professors and scholars have, Cf. *id.* at 244. *See also* Theriault, supra note 25, at 249 (discussing the Aristotelian distinction between voluntary and involuntary acts); Kahn, *supra* note 15, at 119 (discussing the "dilemma of toleration" and the question whether a society can combine formal toleration and informal censorship, such as speech codes).

28 Robert Kahn points out rightly that "as an instrument of censorship [the Gayssot Law] failed." Kahn, *supra* note 15, at 117; but the author surprisingly uses this observation as an argument opposing the Law, whereas it can be seen as a further argument supporting it.

29 *Id.* at 5.

30 DEBORAH LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY vii-viii (Free Press 1993). On this account, the *Irving v. Lipstadt* British case is exceptional: the denier, David Irving, filed suit against the historian Deborah Lipstadt (who called him a "Holocaust denier" in her book *Denying the Holocaust*) claiming that she libeled him, thus giving her the chance, as a defendant, to prove her words right and blast Irving's methods, motives and conclusions. *Id. Cf*. DEBORAH LIPSTADT, HISTORY ON TRIAL: MY DAY IN

the denier's affirmations, and does not stop historians from doing their work.

The dangerous and harmful character of denial in a democracy is the second key element: genocide denial falls under the law insofar as it constitutes a violation of the law and order (through the expression of heinous, racist or anti-Semitic propagandist discourse),[31] of which the right to the respect of human dignity is, in France, an essential component.[32] Human dignity as well as solidarity and equality between human beings – is ravaged by the execution of genocide; and yet again by its denial. Indeed, the *raison d'être* of a specific legal answer to negationism can be found in the significance of genocide denial.

THE SIGNIFICANCE OF GENOCIDE DENIAL

All scholars, irrespective from discipline, agree that denial is "consubstantial"[33] to genocide – it is not a distinct act, rather a "part of it:"[34] an "assassination of the memory;"[35] an obliteration of proof and testimony intrinsically "linked to the violence of the genocide;"[36] a "growing assault on truth;"[37] the ultimate stage of the genocidal process which perpetuates the crime[38] — "Deniers

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COURT WITH DAVID IRVING (Harper Collins 2005). Be it noted that Irving filed suit against Lipstadt "in the name of freedom of speech"; nevertheless, the Court refused to consider Holocaust denial protected free speech, even though the British conception of freedom of expression is close to the American one. *Id*.

31 TROPER, *supra* note 23, at 1248.

32 *Cne de Morsang-sur-Orge* and *Ville d'Aix-en-Provence*, decisions of the Council of State (*Conseil d'Etat*), October 27, 1995. In France, the right to the respect of human dignity is a constitutional principle (DECISIONS N° 94-343-344 DC OF THE *Conseil constitutionnel*, July 27 1994). Since 2000, it has been often used by regular courts, as well as by both the Civil and Criminal Division of the final Court of Appeal [*Cour de cassation*], as a limitation of free speech. For a recent and precise study on the principle of the respect of human dignity in the French law, see Sandrine Cursoux-Bruyère, *Le principe constitutionnel de sauvegarde de la dignité de la personne humaine*, REVUE DE LA RECHERCHE JURIDIQUE. DROIT PROSPECTIF 1377-1423 (2005).

33 Salas, *supra* note 24, at 38–39.

34 Israel W. Charny, *A Contribution to the Psychology of Denial of Genocide*, J. OF ARMENIAN ST. 299 (1992).

35 PIERRE VIDAL-NAQUET, LES ASSASSINS DE LA MÉMOIRE (La Découverte 2005) (1981).

36 Theriault, *supra* note 25, at 242.

37 Deborah Lipstadt, *Growing Assault on Truth*, *in* 1 ENCYCLOPEDIA OF GENOCIDE 179 (Charny ed., ABC-Clio 1999).

38 The literature on this matter is very rich. *See*, *e.g.*, HÉLÈNE PIRALIAN, GÉNOCIDE ET TRANSMISSION 89 (L'Harmattan 1994); Catherine Coquio, *Génocide: Une Vérité sans Autorité. La Négation, la Preuve et le Témoignage, in* REVUE DE L'ARAPS 163 (Association Rencontres Anthropologie Psychanalyse 1999); YVES TERNON, DU NÉGATIONNISME. MÉMOIRE ET TABOU 14

join the initial perpetrators by reviving the overall injury that the genocide represents,"[39] keeping the survivors and their descendants in shame,[40] with no access to closure,[41] and drowning them in a destructive confusion between the roles of victim and executioner.

No legal action can be properly understood unless denial is taken seriously for what it is, and for its immediate as well as long term effects on both the individual and the collective level. Because of its meaning and implications, genocide denial ought to be specifically addressed by the law. After all, the best summary and clearest expression of the signifiance of negationism in a democratic society can be found in the case law of the European Court of Human Rights, which considers denial to be an "abuse of law" prohibited at article 17 of the 1950 European Convention.[42] According to this article, no one may use the rights guaranteed by the Convention in a way aiming "at the destruction of any of the rights and freedoms set forth herein."[43] Hence freedom of speech can not be used to engage in genocide denial; in other words, freedom of speech should not be used as a "sword," rather as a "shield."[44]

(Desclée de Brouwer 1999); Frédéric Worms, *La négation comme violation du témoignage*, *in* L'HISTOIRE TROUÉE *supra* note 11, at 95. For an interesting approach of denial as an apologia for genocide, *cf*. Natacha Michel, *De l'affirmationnisme*, *in* PAROLES *supra* note 24, at 13–22 (the author hence suggests to consider genocide denial as an act of *affirmationism* rather than *negationsim*).

39 THERIAULT, *supra* note 25, at 242.

40 *See* NICHANIAN, *supra* note 25, at 201.

41 *Cf.* JANINE ALTOUNIAN, LA SURVIVANCE. TRADUIRE LE TRAUMA COLLECTIF (Dunod 2000).

42 *Garaudy v. France*, 24 June 2003. For commentaries see Michel Levinet, *La fermeté bienvenue de la Cour européenne des droits de l'homme face au négationnisme. Obs. s/ la décision du 24 juin 2003, Garaudy c. France, in* REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 653-662 (2004); Damien Roets, *Epilogue européen dans l'affaire Garaudy: les droits de l'homme à l'épreuve du négationnisme*, DALLOZ, 240–44 (2004).

43 Article 17 of the 1950 European Convention of Human Rights states: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extend than is provided for in the Convention" (the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights contain a similar clause, respectively at articles 30 and 5). For an analysis of Article 17 of the European Convention of Human Rights and the concept of "abuse of law," see Alphonse Spielmann, *La CEDH et l'abus de droit*, *in* MÉLANGES PETTITI 673–686 (Bruylant 1998); *see also* Sébastien Van Drooghenbroeck, *L'article 17 de la Convention Européenne des Droits de L'homme Est-il Indispensable?*, *in* REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 541-66.

44 DEBORAH LIPSTADT, DENYING THE HOLOCAUST (Penguin 1994).

Unlike what certain critics seem to believe, it is not the penalization of denial that is incompatible with democratic values, but it is the *denial as such*:[45] denial as an "abuse of law," a violation of the law and order and, more fundamentally, as a violation of the right to the respect of human dignity. Moreover, if one accepts the postulate that "the distortion of history for political ends has significant implications for both the practice of democracy and the protection of human rights," and "each historical misrepresentation of efforts to exterminate a particular ethnic group increases the likelihood that such efforts will be undertaken again in another time and place,"[46] then it might be worthwhile apprehending the legal answer to genocide denial as a tool – among others – for genocide prevention, linking together the past and the future.

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45 On the familiar "slippery slope" argument offered by opponents of anti-denial laws, who see the penalization of genocide denial as being censorship, and censorship as being the first step toward tyranny: *cf*. KAHN, *supra* note 15; THERIAULT, *supra* note 25, at 251. More generally, on "slippery slope" arguments, see RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 204 (Oxford 1996). Henry Theriault considers this objection as being met by a slippery slope argument in the reverse direction: "permitting genocide denial despite the damage it does not only reinforces deniers in their destructive activities but also opens an ethical loophole that will potentioally allow a range of harms, including violence, in various circumstances. At the extreme, successful genocide denial begets genocide." THEIRIAULT, *supra* note 25, at 251.

46 Roger W. Smith, *The Significance of the Armenian Genocide after Ninety Years,* 1 GENOCIDE STUDIES & PREVENTION, i, i-iv (2006).