

The role of law in combating racism, xenophobia, and anti-Semitism

Law Against Hatred



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The law should be one of the instruments used by the state in fighting racism, xenophobia and anti-Semitism

How should the state act against racism, xenophobia, and anti-Semitism? What is the justification for restricting the freedom of expression of those using hate speech, and to what extent should it be restricted? What mechanisms can be used by democracy to defend itself against its enemies? In my research I am attempting to answer these questions, with the aim of contributing to the ultimate defeat of such extreme negative phenomena as racism and its related forms, intolerance, hatred and discrimination.

Comparative studies

The institute in which I work, and which is enabling me to pursue my academic aims, is the Poznań Human Rights Centre of the PAS Institute of Legal Studies, under the directorship of Prof. Roman Wieruszewski. We are carrying out research into a universal system for the protection of human rights, and into the questions of outlawing discrimination, religious freedom, and multiculturalism in the context of protecting minorities.

A highly significant professional experience for me was my one-year scholarship at Yale University, awarded by ISGAP (the Institute for the Study of Global Antisemitism and Policy), which not only enabled me to acquire knowledge in one of the world's greatest centers of learning, but also provided me with access to unique materials, as well as facilitating personal contact with experts who had long been a source of inspiration

and professional motivation to me. What was especially interesting for me was taking part in debates and more informal discussions on the differences between the United States and Europe in attitudes to the limits on freedom of expression, particularly in the context of the penalization of "hate speech."

The standard in force in the United States was established in the landmark decision of the United States Supreme Court in the case of *Brandenburg v Ohio*, namely the well-known "imminent lawless action test," stipulating that for any restrictions on freedom of speech to be regarded as being in accordance with the First Amendment to the American Constitution there must be a real, imminent and unavoidable danger of words actually being translated into actions. This formulation is connected with the general character of the American model of defending constitutional rights, which, at least in a literal interpretation of the First Amendment, does not make any provision for appeals to proportionality or the relative balancing of rights, preferring instead an absolutist approach and the assumption that rights should not in any way be restricted.

The limits of freedom

I try to combine my academic work with participation in a non-governmental organization dedicated to combating anti-Semitism, racism, and xenophobia - the "Open Republic" Association - in which the theoretical problems I am examining in an academic context are reflected in real-world issues. This perspective highlights very clearly all the inadequacies not only of Polish legal regulations themselves, but also of their application by public prosecutors and courts. In this context, it seems particularly important that Polish law enforcement agencies and courts should become more aware of the necessity of applying the anti-racism instruments established in international human rights law. The standards of protection that these instruments create are, to a large extent, also binding for Poland.

The problems I am working on are directly connected with the basic dilemma which always arises when the rights and freedoms of one group must be infringed on in order to protect the rights and freedoms of another group. This situation often evokes John Stuart Mill's "Harm Principle," that one person's liberty ends at that point where he inflicts harm on others. However, in the case of racism and its related forms intolerance and hatred, the



Bogdan Skok

In Poland, the law forbidding the dissemination of hatred is not implemented effectively, despite many incidents of this kind. Shown here: anti-Semitic slogans being removed from a commemorative monument in Jedwabne, where, on 10 August 1941, the town's Jews were murdered by their Polish neighbors

concept of harm should be interpreted more widely than just harm to the individual or group, since the harm inflicted by racism affects not only the direct victims of racist hate speech or hate crimes. The presence in the public realm of views and attitudes denying the principles of tolerance and respect for human rights or human dignity should be regarded as a destructive influence on social relations on almost every level. It is interesting that this aspect of harm – which provides a justification for a legal reaction to the problems of racism, anti-Semitism, or xenophobia – is increasingly being highlighted by some representatives of the American doctrine.

For example, Jeremy Waldron, in his latest book on hate speech, reflects on the extent to which the unrestricted right to public hate speech against members of minorities negatively impacts on their chances of having equal rights in society, on the fulfillment of their plans and aspirations, on their life chances, and on the future of their children, since a social and legal environment which allows the propagation of racial, ethnic, or religious hatred, up to the point where it leads to a direct threat of violence, effectively prevents minority groups from benefiting from the rights and freedoms to which they are entitled. In particular, in the context of freedom of speech, Waldron points out that those exposed to extreme manifestations of discrimination, racism, or other forms of exclusion are unable to use their right to the free expression of their views through equal participation in debate with groups or organizations propagating, for example, the idea of racial segregation.

The role of law

Moreover, placing racism, anti-Semitism and xenophobia in the category of problems requiring a legal reaction is connected with the question of the functions of law. These functions should be understood in the contexts of the aim of law – in other words, the expectations

associated with the operation of laws – and of the effects of law – the real-world effects of the operation of laws, as reflected in the sphere of social relations. It is especially worth focusing on the regulatory function of law, which entails the establishment by law of the boundaries of acceptable social behavior, and on the protective function, which in the case of counteracting racism should be aimed at the defense of weaker minority groups. Also important is the educational function, whereby legal instruments influence the promotion of specific values and the shaping of positive social attitudes. These functions provide a justification for using the law as a way of overcoming problems like racism and anti-Semitism. It is not possible, however, to guarantee that enacted legal provisions will actually have all the intended effects.

It is obvious that laws – even those which are applied most effectively – remain only one of the elements in the fight against racism and racist discrimination. Nathan Pearlmuter argued that although anti-Semitism can be fought with a considerable degree of success, it can never be totally eliminated. It is for this reason that racism, xenophobia and anti-Semitism should also, and perhaps above all, be firmly opposed in the spheres of education, culture, politics and social relations. At the same time, in view of the particular nature and history of the persecution and discrimination suffered by racial, national, ethnic and religious minorities, an essential component of this opposition in all of the mentioned spheres should undoubtedly be law. ■

Further reading:

- Hennebel L., Hochmann T. (ed.). (2011). *Genocide Denials and the Law*. Oxford University Press.
- Judt T. From the House of the Dead: An Essay on Modern European Memory. (2005). In: Judt T. *Postwar: A History of Europe Since 1945*. Penguin Press
- Poliakov L. (2003). *History of Antisemitism*. Vol. I-IV. University of Pennsylvania Press