Sophia's Model United Nations 2019

Social, Cultural and Humanitarian Committee

Main Agenda - Freedom of Speech with Particular Reference to Dignity and Liberty

Reserve Agenda - Safeguarding Populations Displaced by Disaster

Chairperson - Akshat Bhatia

Vice- Chairpersons - Diya N Choudri, Siya Mukund

Welcome Letter From the Dais

Delegates,

Welcome to this Simulation of the Social, Cultural and Humanitarian Affairs Committee. This guide will serve the purpose of a tool to further your research. The phrasing of the agenda is such that it will allow you to discuss freedom of speech in the context of the mandate of the SOCHUM. The mandate of the SOCHUM allows the international community to discuss the agenda only in the context of a humanitarian question. The humanitarian question is explicitly highlighted in the phrasing of the agenda. Note that the SOCHUM's mandate restricts us to discussion of the agenda only in the context of this humanitarian question, and the extension of said discussion to matters of freedom of life and the right to reputation will be considered out of mandate. Delegates are requested to understand the complexities of both models individually, followed by which they can dig into the foreign policy of their own government and decipher what end of the continuum their nation is aligned to. In sharp contrast, the second agenda in a broader context is a perfect fit to the mandate of the SOCHUM and most perspectives arising from a general interpretation of the agenda will be within the mandate. We hope to see you in the conference, and look forward to three days of fruitful debate.

Best,

Akshat Bhatia (Chairperson)

Diya N. Choudri (Vice-Chairperson)
Siya Mukund (Vica-Chairperson)

Introduction to Agenda

The mandate of the SOCHUM, as highlighted earlier in the background guide, can only address freedom of speech as a humanitarian question. What makes freedom of speech a humanitarian question in modern constitutional law is the two varied approaches to freedom of speech - the perspective of freedom of speech as human dignity and the perspective of freedom of speech as human liberty. Both of these terms result in constitutional models that change the way freedom of speech is looked at in a nation. The SOCHUM is not prohibited from making references to the incidents related to journalists. However, our mandate only permits us to discuss the agenda as a humanitarian question. Hence, the executive board will look forward to debate originating from one of the two concepts that will be highlighted further in this background guide. Once there is adequate deliberation on freedom of speech in the context of dignity and liberty, delegates may move on to creating links between free speech in media and these constitutional interpretations of freedom of speech.

Historic Development

In order to grasp the concept of freedom of speech in its contemporary usage, we must look into its development, all the way from back when Plato and Euripides established its roots in The Suppliants , or back when Caliph Omar established its existence in the Muslim world. [1] Although a majority of philosophers and scholars in and beyond the western world supported the recognition of freedom of speech[2], their preaches lacked recognition of free speech as a fundamental right. The first instance of freedom of speech being officially documented as a right in a nation came in France in 1789, in a document titled “Declaration on the Rights of a Man and the Citizen (Declaration des droits de l'Homme et du citoyen) . This document was not the first document to grant freedom of speech to a specific class of people , since that was done in 1689 in the English Bill of Rights where freedom of speech was given to the parliament. However, this document lays the foundation for freedom of speech being accepted for the wider public. Just 2 years later, the United States, in the First Amendment of their

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[1] "Only decide on the basis of proof, be kind to the weak so that they can express themselves freely and without fear, deal on an equal footing with litigants **by** trying to reconcile them." Marcel **A.** Broisard, On the Probable Influence of Islam on Western Public and International Law

[2] Common examples include Erasmus, in the year 1516 in his *Education of a Christian Prince* and more specifically John Milton , in *Areopagitica,* where he looked down upon restrictions on the press

Constitution, prohibited congress from making a law “abridging the freedom of speech”. Since then, the freedom of speech has been accepted by most countries around the world.[3] Although the prevalence in the bills of rights of nations cannot be definitively factored to a singular event, many scholars of International Law believe that it was after World War II and the subsequent treaties and declarations being formed that the freedom of speech was broadly regarded as a fundamental right (although there was some variation in the way different sovereign nations described it).

Main Contentions

1) Dignity Vs Liberty

In order to compare, *tempus regit factum*, the usage of freedom of speech in Western democracies and the difference in interpretation of the concept by Western democracies (most of these originated from interpretations by the Germany and the United States of America,

[3] As Ronald J Krotoszynski puts it in his research paper titled “ The first amendment in a Cross Cultural perspective : A comparitive analysis of Freedom of Speech” , “Virtually all constitutional democracies purport to respect the freedom of speech”

hence their usage as paradigmatic examples in this section) , it can be broadly classified into freedom of speech in the context of human dignity, and that in the context of liberty. There exists a profound variation in attitudes of Western democracies towards freedom of speech .This continuum of Liberty and Dignity can act as a mechanism for constitutional comparison, with Germany and the United States of America in its extreme ends. Perhaps the only common element in the progression of the referent constitutional interpretations of freedom of speech is exceptionalism. Communitarian and individual dignity in the context of freedom of speech could be found all the way back in the already referenced Euripides, Plato and Caliph Omar ideologies. The same idea of dignity, however, may be have varied constitutional and judicial interpretations. In the United States, for example, its interpretation is impacted by the concept of due process and equal protection. On the contrary, the philosophical heritage from the likes of Berlin and Nozick in the German interpretation, has a teleological and liberal encapsulation of their heritage.

Dignity and Liberty are constitutional terms that have multiple interpretations and a lot of ambiguity associated with which one is accepted by most constitutional democracies. In order to engage in constitutional comparison between these terms, it is necessary that we lay out

the meaning of these terms in the context of this background guide. In order to arrive at the judicial interpretation of dignity and liberty, the next two paragraphs are designed to individually define the evolution of each term in the post-WWII era. This will subsequently help in understanding the fundamental difference in the concept of freedom of speech in modern democracies. Note that most European democracies follow the dignity model, while the United States of America follows the liberty model.

Human dignity as a constitutional term originated post world War II[4]. The very beginning of the Universal Declaration of Human Rights recognizes inherent human dignity[5]. It also serves as a leading value in most prominent human rights covenants[6], and in the development of the debate about the relativism or the universalism of human rights[7]. Even at a national level, it can be noted that human dignity forms the

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4 James Q. Whitman, *On Nazi 'Honour' and the New European 'Dignity*', in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS

5 "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world", G.A. Res. 217A (III)

6 For example, the International Covenant on Civil and Political Rights (UN Doc. A/6316), the International Covenant on Economic, Social and Cultural Rights (U.N. Doc. A/6316) , or International Convention on the Elimination of All Forms of Racial Discrimination (U.N. Doc. A/6014)

7 David Kretzmer & Eckart Klein, *Forward*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE v (David Kretzmer & Eckart Klein eds., 2002)

basis of constitutional Law. After the fall of the Iron Curtain, the geographic proximity of most East European countries to Western European countries resulted in them conceding to the value of human dignity in their constitutional reforms, primarily because they desired to be a part of the European Union. Its incorporation into Bills of Rights commenced in Post WWII Germany, where it was interpreted as "the most fundamental rights of a man, which cannot be violated under any circumstances"[8] . This incorporation is similar to that in the first amendment of the constitution of the United States of America. The nation of South Africa also lays particular emphasis on the right as a form of human dignity, and highlights it an exemption to the concept of restriction from rights, and by that logic, a right similar to that in the German interpretation. The most influential historic origin of the concept of human dignity comes from Immanuel Kant, who's concept of this constitutional term encouraged an absolutist approach, with adaptability to a communitarian atmosphere[9]. It is to be noted, however, that most Western democracies have not recognizes the Kantian, and any other deontological approach to the concept. The difference between these approaches in the context of modern international Law , and hence in the concept of this simulation, is that rights are en-

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[8] *Supra* note 7

[9] Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence.*

forceable while teleological acceptances are not. A notable entity in the legal sphere of the acceptance of human dignity in the American constitution is Justice Brennan J, who integrated it in the constitutional jurisprudence of the states through his dissenting opinion in *Paul v. Davis* [10] (1976) and further in *Furman V. Georgia* [11] (1972) . His legacy, after his retirement in 1990 was forsaken by the wider public in the states, as well as the judicial system in other nations. It can be concluded, therefore, that a constitution that accepts freedom of speech in the context of human dignity limits speech that is peripheral to or at odds with the value of human dignity and civility.[12] It is found that most constitutions that follow this model have a complex web of judicially deferent speech restricting legislation in context of speech that is not in adherence to the concept of human dignity, as it is understood in this paragraph. As a result of that, freedom of speech in these democracies restricts some type of speech (unpopular opinions, for instance) on the basis of institutional value judgements, while at the same time shows lenience towards other kind of speech. This model can be

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[10] 424 U.S. 693, 734-35, n.18

[11] 408 U.S. 238, 305-06

[12] A modern example of this concept would be recent Canadian decisions upholding regulations of public discourse prohibiting pornography and hate speech being typical of the tendency of other nations legally to subordinate public discourse to fundamental community values of respect and civility (Jordan M. Steiker, *"Post" Liberalism)*

found in most western democracies, with the exception of the United States of America , in which liberty is in the driving seat of human rights in the context of freedom of speech.

Liberty is also a vague an unclear term, mostly because it is often equated with libertarianism. Ronald Dworkin's view on the term is that the word liberalism was used throughout the 18th as well as the 19th century to support and define a cluster of political opinions, which results in the deviation of the term's modern usage from the principle behind it. In the political discourse of the United States of America, being libertarian has nothing to do with being liberal. Liberal perceptions in the political discourse of the United States of America are progressive and strongly differ from the perceptions of classic liberalism (libertarianism) . Movements like the Critical Legal studies movement and the radical feminism movement have always challenged free speech legislation in the United States of America. Speech restrictive legislation has been used as a tool to ensure subordination of certain communities and more importantly to prevent any significant change in societal structure. Some perceptions of libertarianism encouraged freedom of speech[13], while other interpretations of the same encouraged

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[13] Ronald Dworkin, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY

regulation of speech in some limited context. [14] Progressive liberalism has, however, found to restrict freedom of speech in the context of potentially ameliorating societal discourse (for example, protecting women and minorities). This restriction was justified by liberals as supposedly being positive liberty. Liberty is, in its contemporary usage among other rights, the most supportive of unreserved freedom of speech. The liberty of expression and speech, as enunciated by Benjamin Constant, “must be guaranteed against arbitrary invasion”. Under this system, the government’s direct and institutional interference in freedom of speech is looked down upon more than the government’s interference with any other right, primarily due to the fact that progressive political liberalism is based on the concept of distrust for governmental authority, and freedom of speech is a tool to challenge that authority. The concept of positive liberty and negative liberty was articulated and documented by a certain Isaiah Berlin, who argued that when a man does not have liberty, “a democracy can crush individuals as mercilessly as any dictatorship” [15]. The liberty based model says that a state can impose laws if the state believes that it is “rational”, and that an individual (a rational individual) would not choose to commit the act unless he is “corrupt, ignorant or blind”. Only under the

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[14] Kent Greenwalt ; FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH (1989)

[15] Isaiah Berlin, *Two Concepts of Liberty*

circumstances where an “irrational statement” is made (for example, bigotry or racism may be considered irrational) can the state make laws to restrict speech.

Fundamentally, the difference between the two models highlighted above is that the system of dignity rests upon values, while the concept of liberty rests on rationale. There exists a distinct relationship between the concepts of human dignity and liberty. Most democracies in the world are attempting to reconcile the differences between the two and blur this distinctions. While the dignity based model encapsulates cultural heritage, the liberty based model reflects libertarian instincts and societal norms. It is often argued by scholars like Edward Eberle that dignity and liberty are “converging values” and result in almost the same legislation. In contrast, scholars like Donald P. Kommers highlight the theoretical dichotomy between these concepts (he did concede, however, that in reality they may seem similar) . It is this vague nature of the terms that allow nations to set their own definition of these values in the context of freedom of speech, somewhere between that of Germany and that of the United States of America .

2) Germany’s dignity model

German constitutional legislation revolves around the concept of human dignity. [16] Most constitutional values are explained on the basis of the fundamental principle of human dignity. The fact that every value or right in German constitutional law branches out from the value of human dignity or is represented as a subordinate principle originating from the absolute right of human dignity gives the value a certain omnipotence in German constitutional Law. In the context of freedom of speech, the value of human dignity can be analogized, as Ronald J. Krotoszynski does, to the first Amendment in the constitution of the United States of America. [17] From a legal perspective, Article I of the Basic Law of Germany can potentially be equated to the first amendment in some respects. The constitutional jurisprudence in the context of the German constitutional Court, is set with human dignity as the *Grundwert* (German for fundamental value)[18]. In other words, German constitutional law portrays freedom of speech and expression as a mechanism to uphold the *Grundwert* . The first reference to free

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16 "The dignity of man is inviolable" , Article I , German Basic Law

17 Ronald J. Krotoszynski Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*

18 "[I]n so shaping this system the Court went to great lengths to ensure that the supreme *Grundwert*, human dignity, was always duly considered and never compromised. This is particularly visible in the judicial development of . . . freedom of expression (Article 5)." , Giovanni Bognetti, *The Concept of Human Dignity in European and U.S. Constitutionalism*, in EUROPEAN AND US CONSTITUTIONALISM

speech in the German constitution comes in Article 5[19] (hereinafter "free speech clause") . However, the superiority of freedom of speech as an extension of Article 1 rather than a concept originating from Article 5 is evident. In other words, the free speech clause in itself is not sufficient to provide for freedom of speech, without Article 1 being the *Grundwert*. The issue with this interpretation, in contrast to that of the United States of America, is that free speech is protected only as long as it is in adherence with the *Grundwert*. If free speech in a certain case can be proven to be at odds with the *Grundwert*, then the constitutional court cannot protect it.

German Law is, however, considered speech restrictive. This is primarily due to the fact that the country has used a broad array of legal tools and constitutional interpretations to protect "attacks against a man's honor and integrity" and other types of speech by proving that they are peripheral to the underlying concept of Article 1, in a natural-

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[19] Article 5 (Freedom of Expression) of the Basic Law for the Federal Republic of Germany states:

1. Everyone has the right freely to express and to disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by radio and motion pictures are guaranteed. There shall be no censorship.

2. These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth and by the right to inviolability of personal honor. 3. Art and science, research and teaching are free. Freedom of teaching does not absolve from loyalty to the constitution.

ist sense. [20] With the evolution of this type of restriction in Germany, speech that causes minimal or no harm can also be restricted. As Winfried Brugger notes in his paper titled “Treatment of Hate Speech” :

“German statutes specifically refrain from requiring that racist messages lead to a clear and present danger of imminent lawless action before becoming punishable. A distant and generalized threat to the public peace and to life and dignity, particularly of minorities, suffices for legal sanctions irrespective of whether and when such danger would actually manifest itself.”

Examples like these create a perception that contemporary German laws do not restrict speech to prevent potential harm from occurring. [21] In theory, German law of freedom of speech is designed to ensure that different groups of society act in a respectful manner towards each other, rather than to make sure that the grounds of human decency are met. “Giving the finger” for example, constitutes a criminal offense in Germany. The issue in this model is that the concept of “civility” is determined by the state and not by the people. [22] The restrictive na-

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[20] Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*

[21] Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality*

[22] Winfried Brugger, “ Germany has a tradition of state-sponsored civil discourse.” , *Treatment of Hate Speech*

ture of speech law in Germany can be appropriately exemplified by their constitutional concept of a “criminal insult”. Cases relating to criminal insults appearing in German courts go as far as one person addressing another informally (using “sie”, an informal greeting rather than “du”, a formal greeting) being equated to a criminal insult with the rationale that it contradicts the concept of human dignity. Usage of terms like “asshole”, “jerk” and “idiot” also constitutes as a criminal offense in Germany, punishable with up to two years in prison [23], which clearly indicates that the concept of restriction of freedom of speech exists only for the purpose of maintaining respect within the community and protecting an individual’s honor, rather than to promote varied opinions.

A study of Germany’s protection of political speech gives us its’ sharpest contrast to the constitution of the United States of America. Due to the concept of “militant democracy”, speech relating to the democratic process (which would be given complete and unconditional immunity in the United States of America) is often subjected to scrutiny and constitutes a criminal offense[24]. Political speech is only protected if it falls under the mainstream political ideology present in the nation. Controversies, or even political satire may in some cases not

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[23] Strafgesetzbuch [StGB][Penal Code] Nov. 13 1988, as amended, §185.

[24] Gregory H. Fox & Georg Nolte, *Intolerant Democracies, Harvard Journal of International Law*

be considered within the limited scope of protected speech in Germany.[25] The rationale behind the criminalization of the caricature of the Bavarian Prime Minister as a pig in the Straub Caricature case was dated back to when the Nazi propaganda depicted jews as rats and vermin (the rationale was that the prime minister was dehumanized as a pig and a parallel can be drawn to the Nazi propaganda which violates human dignity) . German laws can provisionally criminalize a truthful statement too, if it violates a person's human dignity. This is because German constitutional law highlights a certain "right to reputation" as an extension of the right to dignity. The prohibition of Nazi symbols and other historic symbols associated with the Nazi propaganda can be another example that falls in the same category. Moreover, the right to an assembly is also restricted by German legislation, if it suspected to contain speech that is at odds with human dignity. The denial of the Holocaust also constitutes a criminal offense due to the fact that it is against the current mainstream political ideology in the nation. [26] The right to reputation carries an unparalleled significance in Germany (so much so that the reputation of a dead per-

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[25] The Strauß Caricature Case , DECISIONS OF THE *Bundesverfassungsgericht* – Federal Constitutional Court – Federal Republic (1958) (where a caricature of the Bavarian Prime Minister as a pig engaged in sexual intercourse was ruled as unlawful)

[26] Holocaust Denial Case, No. BVERFGE 247 , Federal Constitutional Court

son carries more legal significance than the free speech of a living being) . [27]

In conclusion , if there exists an insult towards a group (except the Jews)[28], or to the National Flag[29] or the National Anthem[30], the German constitutional court is tolerant to it. However, when an individual's honor and reputation is at stake, the German constitutional court has always considered it superior to Article 5 of their constitution. [31] In a similar case where there exists group defamation, the court often considers it under protected speech [32]. In the "Soldiers are murderer" Case (Tucholsky cases) , a bumper sticker reading "soldiers are murderers" was on a car, and despite the fact that it did, beyond a reasonable doubt, taint soldiers as murderers, the court in a three judge

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[27] "noting that even the reputation of a dead person usually trumps freedom of expression under German doctrine" , Ronald J. Krotoszynski Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany,*

[28] "insults targeting groups other than the Jews are more tolerated by the Constitutional Court" ; Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*

[29] Flag Desecration case , Bundesverfassungsgericht (Federal Constitutional Court)

[30] German National Anthem Case (Mar 7 1990) , Bundesverfassungsgericht (Federal Constitutional Court)

[31] *Supra* note 27

[32] "Soldiers are Murderers Cases", in which the German Federal Constitutional Court allowed pacifist protest against the German participation in wars, despite a plausible understanding of this protest as tarnishing German soldiers as "murderers"

panel headed by Dieter Grimm allowed the use of this sticker. If the same thing , or a similar plausible insult was directed at an individual, the court would most likely constitute it as a criminal offense.[33] The justification used by the Federal constitutional court was that the insult was directed at the institution and not at the people who staff the institution.

Some scholars of constitutional law consider Germany the most speech restrictive democracy in the world[34]. Criminalization of insults and many other statements that would be considered perfectly normal in most western democracies makes it clear that the German free speech law does not work for the sole purpose of preventing harm. It also creates grounds for significant state-sponsored bias, which is not something they want, considering their recent Nazi history. The absolute opposite of this concept of free speech is the United States of America.

3) **United States of America's Liberal Model**

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[33] The Court, both in Tucholsky I & Tucholsky II went to considerable lengths to interpret the "soldiers are murderers" slogan, as not having been directed at specific soldiers, or the entire German Army. It is apparent that a clear and unequivocal statement that "all currently enlisted German soldiers are murderers" is fully punishable under German law, and even under the more speech- friendly ruling of Tucholsky I. As long as the speech involved is inapplicable to "readily identifiable soldiers" it receives greater protection.

[34] A rather interesting exception to this claim by scholars is pornography, which Germany does not restrict or prohibit under any circumstances, which seems inconsistent with their cultural attitudes

The label of “American exceptionalism” has been given to the concept of freedom of speech with particular reference to the American Constitution’s first amendment. The interpretation of the amendment, however, can be viewed as one of many manifestations of the concept of exceptionalism. The authoritative interpretation of the First amendment is recalcitrant to most western democracies’ understanding of freedom of speech. It is to be noted that the first Amendment was originally the third amendment submitted to the constitution of the United States of America. However, its position in the Bill of Rights of the United States of America does, according to some scholars, impact its relative importance as opposed to the other rights in the Bill of Rights of the United States of America (from a legal or a psychological perspective). American culture is known to lay particular emphasis on freedom of speech. [35] There exists intense debate between scholars of international law as to why first Amendment law and its subsequent implications seem to oppose balance with other rights in the Bill of Rights of the United States of America. However, it in unclear in the first place whether first amendment law can be balanced at all, if intended by the government. [36] In order to examine the relative position of freedom of speech in the constitution of the United States of Ameri-

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[35] ROBERT A. KAHN, HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY

[36] Iddo Porat, From Interests-Based to Rights-Based Balancing

ca with other rights, we must determine whether the first amendment is a rule or a principle. If it is a rule, that would mean that any law that encourages or contextually results in abridgment of free speech will be automatically deemed unconstitutional. If it is a principle, then legislation that can result in abridgment of speech in certain limited context may be permitted by the state. [37] The fact that the interpretation of the first amendment as a rule or a principle can result in such significant alteration of statutes results in conflicts between absolutists and non-absolutists. The closest we have come to a solution in this regard is David Faigman's claim that "Many rules are really standards in disguise" [38]The jurisprudence has developed over a set of years, much like any statute under the common law system would, which resulted in David Strauss classifying this development as the "Common-law constitution" [39]. Defamation laws in the United States of America are by far the most press friendly laws in any democracy. This is because of the general standard of defamation followed in all cases throughout, and to the extent of freedom given in the context of political speech. Intentional falsity is the standard required in the United States to result

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[37] Ronald M. Dworkin, Is Law A System of Rules? in THE PHILOSOPHY OF LAW

[38] David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment*

[39] David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA

in defamation, after the landmark *New York Times Co. v. Sullivan case*[40]. The burden of proof for intentional falsity is extremely hard to meet [41]. The standard set by the Sullivan case, however, has been rejected by many other countries despite constant attempts by journalists to take it to other jurisdictions. The standard in other countries is significantly lower to what the United States of America follows (the strict liability standard is followed in most of Europe) . Furthermore, the American constitution's attitude towards the fairness doctrine (which was repealed in the 1980s) is also uncharacteristic of western democracies [42]. The first amendment, coupled with the unconstitutional nature of the fairness doctrine in the United States of America results in any regulation on print media or other media being deemed unconstitutional. This attitude of the United States with regard to free speech restrictions also has multilateral implications. In particular, during the formation of the International Convention on the Elimination of all forms of Racial Discrimination, the United States of America, despite being one of the countries leading the formation of the convention, exempted itself from certain duties with regard to criminalizing hate

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[40] *Sullivan*, 376 U.S. at 264. For a detailed description of this ruling and its background, *see generally* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991)

[41] It must be proven that "actual malice" is present

[42] *See* ERIC BARENDT, *BROADCASTING LAW: A COMPARATIVE STUDY*

speech. A similar example of US exempting itself from such an obligation is Article 20 of the International Covenant on Civil and Political Rights that requests criminalization of Xenophobic and Racist acts. The United States' attitude towards hate speech is closely linked with the content neutrality doctrine in the United States of America. This doctrine can be traced back to 1982, in the *Police Dep't v. Mosley* case, where it was concluded that the government is not permitted to restrict speech due to its content[43], and that any action taken to prevent this speech by the government is "presumptively invalid"[44] in accordance to the First amendment . It is this doctrine that results in acts like flag burning [45], cross-burning [46] (with some exemptions) , pornography [47] being deemed legal. Moreover, the evidentiary burden required to restrict speech in this context is known as the "clear and present danger requirement"[48] . Under this concept, only if an individual explicitly and clearly advocates for clearly lawless violence that is certain to occur will the speech not be protected. With the complex arrays of court tac-

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[43] aka "the rule against content discrimination" or "viewpoint discrimination"

[44] United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 817

[45] Texas v. Johnson, 491 U.S. 397

[46] *R.A.V.*, 505 U.S. at 377 overturned an order tha banned cross-burning

[47] Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 325

[48] Established in *Brandenburg*, 395 U.S. at 448-451.

tics in the United States of America, these conditions are virtually impossible to meet in a real case. In other countries, restriction on freedom of speech is made according to the content of the speech. Both the content neutrality requirement and the evidentiary standard test of clear and present danger have been fundamentally embedded in the First amendment. These doctrines, coupled with the fact that many scholars vouched to legalize obscenity and libel under the first amendment in the 1950s and 60s may be potentially harmful to the American society. Obscenity doctrines have been constantly developed by constitutional courts in the United States of America. An example for this would be the difference between obscenity and child pornography in *New York v. Ferber* [49]where it was held that the government could restrict the distribution of child pornography due to the obvious harm it could cause to the children. Another slight exemption to the first amendment is the cross burning cases and its implications. The supreme court banned cross burning in the case of *Virginia v. Black*[50]. This conclusion was disputed in the R.A.V case [51], where it was highlighted that if only cross burning was deemed illegal, that would equate to content based discrimination. The supreme court,

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[49] 458 U.S. 747, 765-66 (1982)

[50] *Black*, 538 U.S. at 343.

[51] *R.A.V.*, 505 U.S. at 391

however, anchored its claims on the history of cross-burning in the United States of America and subsequent violent actions[52]. Note that despite the variation in systems, the V*irginia v. Black* case and the rationale behind it given by the supreme court can be equated to the Holocaust Denial case in Germany, since they both stem from a racial history.

In case the first amendment did not exist in the United States of America, freedom of speech would still anchor on the due process clause. The U.S Supreme court has earlier used the due process clause to protect speech. The incorporation of a free speech right in the fourteenth amendment further fortifies, in principle, the protection of speech in the United States of America. The roots of this right can be traced back to 1907, where Justice Harlan in the *Patterson v. Colorado* case said :

"I go further and hold that the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by that clause of the 14th Amendment forbidding a state to deprive any person of his liberty without due process of law. It is, I think, impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the nation

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[52] The court said "in light of the cross burning's long and pernicious history as a signal of impending violence."

or by the states, which does not embrace the right to enjoy free speech and the right to have a free press."[53]

The interrelationship between the content neutrality doctrine, equal protection clause and due process clause has been highlighted by scholars of international law for decades. It is often stated that in the incorporation hypothetical, due process is at the core while equal protection is at the penumbra. It is important to note that the fact that the United States of America uses liberty as a basis to protect speech while the Germans and other Western democracies use dignity is not the only reason for the differences between the laws of the nation. In other words, if the United States of America would have used equal protection as a basis to incorporate freedom of speech in their constitution, most of the discrepancies between European nations and the United States of America would still exist. Canada, for example interprets equality in the context of human dignity. This discourse is rejected, for obvious reasons, by the Supreme Court of the United States of America. Doctrines like the state action doctrine, *de facto* and *de jure* discrimination and requirement of intent ensure that the judicial interpretation in the United States of America is significantly different from those of other western democracies, even if they were formed on the basis of the same principles. The approach of the United States to

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53 Justice Harlan's dissenting opinion in the Patterson v. Colorado, 205 U.S. 454, 465 (1907)

freedom of speech is more liberal than their approach to other rights and constitutional issues. The law in the states is so much more restrictive in the context of affirmative action, for instance. This attitude is deeply rooted in American culture, and will be extremely hard to abridge the ideologies of the United States of America and other European and Western democracies. There is, however, a need to bridge the gap between the states and other constitutional democracies. The US protects speech regardless of potential harm. The first amendment, coupled with the narrow definitions of speech restriction in the jurisdiction of the United States of America show a profound national commitment to one of their oldest principles.

Conclusion

The German interpretation of freedom of speech and that of the United States of America are the two extremes in the continuum of constitutional interpretation of freedom of speech. Most western democracies are inclined, however, to the dignity concept than to that of the United States of America.

In most western democracies, a limited extent of centrality is attributed to freedom of speech. There has, however, been numerous concerns in recent years associated with human dignity in speech protection. In some democracies, the concept of human dignity is absent from their constitution. The common ground between most democracies in the west in the context of freedom of speech is the criminalization of hate speech . [54] Defamation laws in most western democracies are far more speech restrictive than the United States of America. The scope of hate speech criminalization is widespread in jurisdictions including the United Kingdom and Australia. With or without any explicit underlying principle, these constitutions *de facto* protect human dignity anyway, even in the absence of any value for the concept in their constitutional jurisprudence. Human dignity is also emerging in nations like Italy and France as a constitutional concept. Free speech in the United States, in sharp contrast, is well above individualism. The cause for this may be, as highlighted by James Whitman, social traditions favoring liberty and dignity respectively. The dignity based approach is un-

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54 "Most English-speaking and European countries have laws against racial vilification, and some widely adopted international treaties require them. Under the Convention on the Elimination of Racial Discrimination, which was signed but not ratified by the United States, parties are to make criminal 'all dissemination of ideas based on racial superiority or hatred' and 'incitement to racial discrimination.' This principle reaches well beyond face-to-face vilification, and covers the expression of obnoxious ideas. The constitutional liberty our Court has suggested for hate speech is much broader than the speech treated as free in many other democracies." , KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH (1989)*

doubtedly the dominant approach in Europe and the larger part of the world.

The dominance of the dignity approach in Europe can be factored to the dominance of balancing rights in western constitutionalism. Balancing freedom of speech with human dignity or liberty will result in some contrast between the constitutional interpretation of the United States of America and Europe. This is due to the fact that most democracies do not regard freedom of speech as highly as the Americans. Freedom of speech exists as a value that must be incorporated and protected in coordination with other rights in their Bill of Rights. In the United States of America, however, freedom of speech is given the highest regard. Another area of contrast is the rule based approach in the United States of America, as opposed to the principle based approach in other Western democracies. The rule based system is a result of the fact that American scholars of constitutional law do not talk about freedom of speech in the context of balancing of rights.

Questions a Resolution Must Answer

1) Is there a possibility of common ground being established between the liberty and the dignity concept ?
2) What possible repercussions should there be for the USA's exemption from Article 20 of the ICCPR on the basis of the First Amendment ?
3) What possible order of precedence between the right to reputation and the freedom of speech can be deemed constitutional
4) Does this era of western constitutionalism that does not give freedom of expression the highest regard have multilateral implications in the context of modern International Law?

Agenda 2 - Safeguarding populations displaced by disaster

Introduction to Agenda

It is a common misconception that displacement is followed by a simple housing policy structure. The process of resettlement is, on the contrary, a multidimensional process that involves reparation and policy making not only after the disaster, but also before it. The process commences with preventive risk reduction and planning by various institutions of society in collaboration with the government as to how the resettlement process will be approached in case there is a disaster. Risk assessment is perhaps one of the most crucial steps in the process. Note that risk is not directly proportional to the probability of disaster. In the context of this agenda, “risk” refers to the mortality risk and the risk of injury within the population, rather that of the occurrence of the disaster. For example, Japan and Philippines have an almost identical degree of exposure to tropical cyclones. However, their mortality risk differs significantly, due to their varied scores in the Human Development Index (HDI). In order to understand this risk based assessment that further assists governments in drafting policies and plans that safeguard populations after the occurrence of disasters, we must understand that risk is divided, in this context, between intensive and extensive risk. Intensive risk, in the context of disasters, refers to the risk of exposure of a majority of the population of the country to an extremely hazardous and intense event, while extensive risk refers to the risk of dispersed populations to exposure to multiple and repetitive hazards of low or moderate intensity,

which further hinders the resettlement process. There are, however, a few factors that hinder the efficient formation of these policies, which will be discussed in the next section.

Main Contentions

1) Differential distribution of risk based analysis - Although the distribution of hazards makes no distinction between more or less developed countries, their impacts in terms of deaths and people affected is much lower in countries with higher levels of human development. For example, Japan and the Philippines, which have similar degrees of exposure to tropical cyclones, have very different mortality risks, which can be correlated with the different levels of human development: Japan's Human Development Index (HDI) score is 0.953, compared to the Philippines', which is 0.771.In the Philippines, with a population of 16 million, the annual likelihood of deaths due to cyclones is 17 times higher than in Japan, which has 22.5 million inhabitants (UNISDR 2009a; UNISDR 2009b).

Economic losses in absolute terms are higher in the more developed countries, but when measured against the total wealth in those countries, they are lower in relative terms than in developing countries. Likewise, in small island states, such as St. Lucia, disasters can wipe out several decades of

development, while in high-income countries, such as the United States, the effects are less perceptible, even in the case of such events as Hurricane Katrina, which in 2005 caused economic losses in the order of US$125 billion.

2) Climate Change - The Intergovernmental Panel on Climate Change (IPCC) has confirmed that changes are already occurring in the geographical distribution, frequency, and intensity of hydro- meteorological hazards because of climate change (Parry et al. 2007). The changes ob- served in the volume, intensity, frequency, and type of precipitation are associated with increases in the areas affected by drought, in the numbers of heavy daily precipitation events that lead to flooding, and in the intensity and duration of certain kinds of tropical storms (UNISDR 2009a).

The IPCC Fourth Assessment Report states that tropical cyclones are likely to intensify if the surface temperature of the sea rises (Parry et al. 2007); and any increase in the severity of cyclones will magnify the unevenness of the disaster risk distribution. The Global Assessment Report (UNISDR 2009a) provides a telling example: the economic risk simulation model shows that 1.9 percent of the gross domestic product (GDP) of Madagascar is at risk annually from Category 3 cyclones, but only 0.09 percent of the GDP of Japan. If these cyclones were to increase to Category 4, 3.2

percent of the GDP of Madagascar would be at risk, but only 0.16 percent of the GDP of Japan.

Based on the concentration and uneven distribution of risk, it may be assumed that in a context of climate change, the interactions between disaster risk and poverty will intensify. This intensification occurs because the frequency of hazards such as floods and tropical cyclones increases and the resilience of the affected populations decreases, due to low agricultural productivity, shortages of water and energy, increases in disease vectors, among other factors (see UNISDR 2009a).

Questions a Resolution Must Answer

1) Is there a possible alternative to the risk analysis strategy in the case of vulnerability cause by unstable local governments ?

2) To what extent can these risk analysis strategies be integrated with land planning and other development policies?

3) Can preventive resettlement be efficiently conducted in the absence of risk analysis strategies by the government ?