



Freedom of Expression and Disability

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Freedom of expression is certainly not an absolute right. As Justice Holmes famously said: ‘The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.’¹ However, the non-absolute character of the right to freedom of expression is of limited interest as far as disability discrimination is concerned. Also of limited interest is the question of what shall be covered under the term ‘expression’. Indeed, in any legal system, the courts do not struggle long to define what shall be *covered* under the guarantee of freedom of expression but usually concentrate their efforts on adjudicating what shall be *protected*.²

A few entertaining examples suffice to demonstrate the point. According to the US Supreme Court, the First Amendment covers sleeping on the lawns in front of the White House.³ A car parked by a single man, in protest against his company’s policy regarding the allocation of parking spaces for married couple, was also deemed to be covered by the Canadian constitutional guarantee as “expressive conduct”.⁴ To end with the European Court of Human Right, the blowing a hunting horn and the engagement in hallooing with intent to disrupt the activities of the “Portman Hunt” was interpreted as an “opinion” within the meaning of Article 10 of the European Convention on Human Rights.⁵ That such “conducts” are covered does not mean however that they ought to be protected. The courts will usually balance the competing interests before deciding which interest shall prevail in the circumstances of each case. As the Irish band *the Cranberries* would say, there is no need to argue further except to state that the benefit of freedom of expression is obviously guaranteed to persons with disabilities. It is a fundamental right guaranteed to ‘everyone’ and not only to citizens or natural persons.

More relevant to the topic of disability discrimination is the double aspect of such a right. A prior reminder might be useful: As the great German jurist Jellinek taught us,

¹ *Schenck v. United States*, 249 U.S. 47 (1919), p. 52.

² For a comparative study (in French) of the right to freedom of expression in the US and in Europe (France, Germany & ECHR), see our study, *Liberté d’expression et sa limitation – Les enseignements de l’expérience américaine*, P.U. Clermont-Ferrand/LGDJ, Paris, 2003.

³ *Clark v. Community for creative non-violence*, 468 U.S. 288 (1984).

⁴ *Irwin Toy v. Quebec* [1989] 1 RCS 927.

⁵ *Hashman and Harrup v. United Kingdom*, 25 November 1999, Reports 1999-VIII.

fundamental rights are primarily defensive rights (*status negativus*) against public interference but can also permit the individuals to require positive action from the State (*status positivus*). This distinction in mind, we may realize that freedom of expression could be compared as far as disability discrimination is concerned with the Roman god *Janus*, a divinity usually represented with a double-faced head, each looking in opposite directions.

As a negative fundamental right, freedom of expression is primarily understood as protecting the individual sphere of liberty against any undue infringement from the State. Freedom of expression could then reinforce disability discrimination by allowing some forms of what is generally labelled ‘hate speech’.

However, as a positive fundamental right, freedom of expression could offer persons with disabilities the opportunity to demand the introduction of public policies that would allow more *effective* exercise of their participation rights.

I. – Freedom of Expression as a Negative Fundamental Right: A Potential Protective Shield for ‘Hate Speech’

To quote Article 4 of the Declaration of 1789, liberty is the ability to do anything that does not harm others. The exercise of freedom of expression must obviously encounter some limits and these limits may be determined by the legislature, under the control of the judiciary.

Article 10 of the European Convention perfectly illustrates such a philosophy. Paragraph 1 of Article 10 contains an extensive definition of the right to freedom of expression: everyone has the right to hold opinions and to receive and impart information and ideas without interference by a public authority and regardless of frontiers. Paragraph 2 of Article 10 provides for the circumstances in which a State may legitimately interfere with the exercise of freedom of expression. As long as the public interference with the exercise of freedom of expression is ‘prescribed by law’, pursues a legitimate public

objective and is ‘necessary in a democratic society’, meaning proportionate to the objective pursued, the interference will not violate Article 10. Constitutional courts at the national level largely follow this approach and the provisions of the recent EU Charter of Fundamental Rights do not provide a different answer.

The freedom of the individual is thus extensively protected insofar as a court ensures that public interferences respect a certain number of requirements. Consequently, as a negative fundamental right, freedom of expression has the potential to protect ‘hate speech’⁶ aimed at persons with disabilities.

A. – The uneasy application of criminal provisions dealing with hate speech

The protection of freedom of expression and the current wording of criminal provisions aimed at hate speech appear to largely exclude the prosecution of ‘prejudiced’ comments aimed at disabled persons as a *specific group*. However, it is possible that such utterances could be punished under standard criminal provisions which deal with, among other things, discrimination, defamatory or insulting remarks, incitement to hatred or violence.

This diagnosis could well be applied to Ireland. Under the Prohibition of Incitement to Hatred Act 1989, it is an offence for a person to utter threatening, abusive or insulting comments aimed at a group of persons on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation.⁷ However, no mention is made of disability. The United Kingdom adopted an even more restrictive approach, in that Part III of the British Public Order Act of 1986 only deals with incitement to racial hatred.⁸

⁶ From a legal point of view, there is no such a thing as ‘hate speech’. The term is used in this paper to encompass a variety of legal rules aimed at protecting individuals, identified as members of a specific group, against prejudiced comments that could be qualified as defamatory, insulting or that incite discrimination, hatred or violence.

⁷ For the text of the Act and some comments, see P. Charleton, P. McDermott, M. Bolger, *Criminal Law*, Butterworths, 2000, p. 328.

⁸ Under plans unveiled recently by the UK Home Secretary David Blunkett, incitement to religious hatred will be made a criminal offence, see Home Office, New challenges for race equality and community

The legislative arsenal of several continental European countries, such as France, may be somewhat more expansive and plural but none seem to provide an answer to the position of disabled persons – perhaps with the sole exception of Germany.⁹ The French Penal Code punishes incitement to discrimination, hatred or violence directed at a specific category of people because of their assumed religion, race, etc.¹⁰ Nonetheless, no provision mentions disability as a criterion. This may not necessarily exclude the possibility of a general prohibition, which would cover defamatory comments and incitement to hatred or violence, irrespective of the identity of the targeted groups or individuals. The scope of Article 130 of the German Penal Code is wider as it protects “segments of the population” from incitement to hatred and defamatory comments. Nevertheless, it remains to be seen if persons with disabilities could qualify as a “segment”, as a specific group of the population that is “large” and “clearly identifiable” from a penal point of view. Interestingly, there is also a body of law concerned with collective insult that might be of interest for persons with disabilities. The legislation specifies that collective insult is especially likely to be covered if based on nationality, race, religion or ethnic group origin.

The difference in the US approach is striking. As the recent *Yahoo!* case made it clear, hate speech is protected by the First Amendment.¹¹ In the leading case, *R.A.V. v. Saint Paul*, when faced with a municipal ordinance prohibiting hate speech, the Court emphasized that ‘the point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.’¹² To summarize a judgment whose reasoning is at times quite byzantine, the Supreme Court does not declare that manifestations of racism cannot be punished. Rather, the Court

cohesion in the 21st century – A speech by David Blunkett to the Institute of Public Policy Research, 7th July 2004 (www.homeoffice.gov.uk/comrace).

⁹ For a clear and recent introduction in English to German law, see W. Brugger, ‘The Treatment of Hate Speech in German Constitutional Law’, *German Law Journal*, 2002, No. 12, Part. I, 2003, No. 1, Part. II (www.germanlawjournal.com).

¹⁰ See Article 24 and Article 32, Law on Freedom of the Press, 29 July 1881.

¹¹ See e.g. our article, ‘Conflits entre diverses conceptions de la liberté d’expression sur l’internet – vers l’imposition d’une *lex americana* en matière de lutte contre le discours raciste ?’, *Légipresse*, janvier-février 2002, n°188-II, p. 5.

¹² *RAV v. ST Paul*, 505 U.S.377 (1992), p. 392.

reminds that the conduct at issue (cross burning) can be punished but that same shall be done ‘without adding the First Amendment to the fire.’¹³ No discrimination between viewpoints will be tolerated in the public arena. However, interestingly, there is no constitutional obstacle for regulating abusive private behaviour, for instance racial harassment within the workplace.¹⁴ It is also worth noting that the legislation on group defamation was once deemed not to be in contradiction with the First Amendment. Then, in 1952, Justice Frankfurter offered a perfect digest of what is still the dominant view in Europe:

‘It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion violence between racial and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern Know-Nothings. Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform.’¹⁵

The above developments should not be interpreted as implying that prejudiced comments directed at disabled people could never be prosecuted. To take a single example, such utterances could fall for instance into the “fighting words” category.¹⁶ Undeniably, abusive and threatening language cannot be said to be of important social value and when there is a clear likelihood of a breach of public order (presumed in face-to-face situations), restraints on the speaker’s freedom are easily justified. In such circumstances,

¹³ ‘Let there be no mistake about our belief that burning a cross in someone’s front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire’, *Id.*, p. 396.

¹⁴ *Hishon v. King and Spalding*, 467 U.S. 69 (1984).

¹⁵ *Beauharnais v. Illinois*, 343 U.S. 250 (1952), p. 261-262.

¹⁶ According to the US Supreme Court, fighting words are ‘of such slight social value as a step to truth that any benefit that may be derived from them is clearly out-weighted by the social interest in law and order’, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Since the *R.A.V.* decision, the neutralisation of the fighting words doctrine has been suggested, as the Court appeared unwilling to tolerate any content-based restriction. Only a clear threat to public order could then justify a restriction on the expression of abusive language. See Note, ‘The Demise of the Chaplinsky Fighting Words Doctrine’, 106 *Harv. L. Rev.* 1129 (1993).

there is no imperative to grant specific rights to persons with disabilities as a group and freedom of expression is the least likely to obstruct legal proceedings.

Nonetheless, group defamation aimed at persons with disabilities could not be easily punished as such. Under standard criminal provisions aimed at preventing breach of public order, however, ‘abusive’ or ‘criminal’ comments aimed at disabled persons could be punished. Insults or comments that incite crime or violence against any group of individuals shall not be tolerated. Certainly, what is punished then does not truly depend on the quality of the aimed individual or group but on the dignity of the person – whose respect is a right for all – and/or on a prospective disturbance of public order.

The next question could then be: Shall persons with disabilities be included as a group of persons to be specifically protected as such? The implementation of the criminal provisions dealing specifically with the protection of specific groups may lead to the conclusion that it would be wise for advocacy groups to fight another battle. Before offering a brief abstract argument against such an extension, it may be interesting to review the implementation of hate speech provisions at the national and European levels.¹⁷

In Ireland, few cases emerged under the Prohibition of Incitement to Hatred Act 1989 and most of these cases resulted in acquittals.¹⁸ The main reason for this appears to be the apparent difficulty in proving an intent to stir up hatred.¹⁹ The most famous case might be the one of the Mayo Councillor who compared travellers to “pedigree dogs” that lie out in the sun instead of working. He was acquitted of inciting hatred towards them at Galway District Court as the judge was convinced that the politician did not intend to stir up hatred and that the problem was caused by the misreporting of his words. Notwithstanding the hypothesis of a face-to-face encounter where actual harm or distress is certain to occur, it seems that no prosecution would even be contemplated in the case

¹⁷ For a clear introduction to this debate, see T. McGonagle, ‘Wrestling (Racial) Equality from Tolerance of Hate Speech’, 23 *Dublin University Law Journal* (2001), p. 21.

¹⁸ For a conviction, see the case of a school bus-driver who used derogatory comment addressed at a teenager from Africa, *The Irish Times*, September 12, 2003.

¹⁹ See M. McGonagle, *Media Law*, Thomson Round Hall, 2003, p. 282.

of 'litigious' written comments. For instance, Mary Ellen Synon was not prosecuted for an article critical of the life and culture of the travelling community in 1996 and despite this troubling antecedent, also escaped prosecution (but no private self-regulation or private censorship depending on the view.²⁰) when she described Paralympians in 2000 as crippled persons.

The few cases in Ireland could be diversely interpreted: One optimistic interpretation would be to consider that as a long-time emigration country, Ireland did and still does not, to a certain extent, face the problem of racism associated with the important presence of foreigners in countries such as France or Germany. A more pessimistic person would argue that the Irish government does not consider the issue a pressing one and that the judiciary is not really keen on distinguishing between intended hatred and harsh political views which are unlikely to stir up hatred. And one might additionally argue that the self-regulation of the Irish social body might be effective enough to distinguish between what shall be tolerated within the public sphere and what shall be proscribed in a civilized society. However, recent reports emphasized a certain increase of racist acts in the Republic of Ireland, Northern Ireland being no exception if no worse. A more proactive approach by the legislature and the judiciary might then become more pressing in the next few years.

Would Mary Ellen Synon's utterances have been successfully prosecuted in France or in Germany? If it is agreed that her remarks could be assimilated to a value judgment and/or a matter of public interest, then the answer is clearly no. The constitutional protection of freedom of expression immunizes 'political speech' from criminal sanctions. For instance, in defamation cases, the defendant can plead that he expressed an opinion rather than a specific fact, as opinions are neither true nor false and do not have to be rational. In incitement to hatred cases, the defendant can also plead a similar defence by arguing that his intention was to discuss a matter of political concern. However, as soon as an element of hatred can be perceived, French courts appear not to pay the required

²⁰ For a poorly argued but typical opinion against the so-called left-liberal orthodoxy supposedly 'no friend of free speech', see K. Myers, *The Irish Times*, January 25, 1991, p. 19.

attention to the distinction in defamatory cases. In addition, incitement to hatred may be constituted without the courts in need to demonstrate the subjective intention of the speaker or the likelihood of a breach of public order.²¹ Generally speaking, the term ‘opinion’ is strictly interpreted and freedom of expression less of an obstacle even if, as a matter of principle, it protects the articulation of general comments directed to foreigners or specific groups. The study of Holocaust denial cases would lead to the conclusion that French courts push the principle of freedom of expression even further away. The legal provision dealing with ‘negationism’ could be indeed described as a purely content-based prohibition, meaning that the denial of the Holocaust is *per se* illicit. An analysis of German cases does not provide a divergent conclusion. Unquestionably, the Federal Constitutional Court is normally quite demanding on lower courts when freedom of expression is at issue in defamation or insult proceedings.²² However, as soon as hate speech is concerned, legal analysis tends to be less meticulous. In other words, ordinary courts are left with more leeway in their interpretation of the specific circumstances of the case, i.e. in their determination of the meaning and effect of the litigious utterances.

Such a flexible attitude when hate speech is concerned may be explained by the political rationale underlying judicial decisions. Indeed, the voluminous case law in both France and Germany could be explained by a specific social context: the emergence of a multicultural society and the worrying presence of extreme-right wing parties. These factors have increased the pressure on the legislature and the judiciary to deal with ‘hate speech’ in order to favour peaceful coexistence and preserve public order.

The US judiciary made a different – plainly political – choice regarding the functions of the right to freedom of expression in the American society. To quote the Cohen opinion:

²¹ See e.g. the case of a TV humorist who was convicted of incitement to racial hatred even if his intention was to mock racist people by professing abusive comments: see Cass. crim., 4 novembre 1997, *Droit pénal* 1998, comm. 33, note Véron.

²² For a description of the German FCC’s case law as overwhelmingly liberal, see F. Hufen, ‘Zuviel Meinungsfreiheit? Der verfassungsrechtliche Rahmen für eine demokratie – und menschenwürdige Streitkultur’, in *Meinungsfreiheit*, Rechtsstaat in der Bewährung, vol. 32, C.F. Müller Verlag, 1998, p. 14.

‘The constitutional right of free expression is powerful medicine in a society as diverse and as populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.’²³

Consequently, hate speech is protected insofar as the government cannot ‘prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.’²⁴ The underlying principles for such an approach are excellently described by F. Schauer: ‘Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense.’²⁵

European countries do not share the American suspicion of government, which has been rightly described as somewhat paranoid by E. Barendt,²⁶ and our common history taught us different lessons. Consequently, it is no surprise that freedom of expression as interpreted by the European Court of Human Rights did not impede the fight against hate speech. In numerous decisions, the Strasbourg Court has emphasized that freedom of expression constitutes one of the essential foundations of a democratic society and has made it clear that it will be extremely demanding on national courts when they balance freedom of expression with other rights. The rigour of the European Court varies however, depending on the circumstances of each case. For instance, freedom of expression is generally extensively protected when the defendant is a journalist and the plaintiff a politician or again when the issue could be described as a matter of public

²³ *Cohen v. California*, 403 U.S. 15 (1971), pp. 23-24.

²⁴ *Texas v. Johnson*, 491 U.S. 397 (1989), p. 414.

²⁵ F. Schauer, *Free Speech: A Philosophical Enquiry*, Cambridge University Press, 1982, p. 86.

²⁶ ‘The importation of United States Free Speech Jurisprudence’, in I. Loveland (ed.), *A special relationship? American influences on Public Law in the United Kingdom*, Clarendon Press, 1995, p. 222.

interest.²⁷ Hate speech would not benefit however from such a liberal fervour. To use an old American distinction (not anymore implemented), hate speech certainly falls in the category of ‘low-value speech’ as opposed to the high-value category. In such circumstances, the Strasbourg Court usually pays tribute to the concept of the national margin of appreciation and leaves it to the national courts to be sole judges of the balance that has to be attained between conflicting rights. The rationale for such a restrictive attitude could be found in Article 17 of the Convention aimed at the ‘enemies of Democracy’. It is clear that the Strasbourg Court is ready to accept that any opinion promoting racism or the Nazi ideology constitutes *per se* an ‘abuse’ of the right to freedom of expression. Such a rationale cannot however be applied, *ceteris paribus*, to utterances aimed at persons with disabilities.

To bring the discussion to a close, as long as courts are ready to punish abusive comments directed at a particular individual under ‘normal’ criminal provisions punishing defamation or insult, the necessity of specific provisions aimed at persons with disabilities as a group may be questioned. The courts do not need specific provisions to take into consideration the fact that the target of a defamatory comment or of an insult is disabled. In addition, incitement to violence or to illegal action could be punished as such without the need to refer to the particularities of persons with disabilities as a group.²⁸ To put it briefly, the main *raison d’être* for hate speech provisions is to forbid the dissemination of ideas which promote racism and nazi-like ideology and to allow for the peaceful coexistence of diverse ‘racial’ or religious communities in a pluralistic society. The historical background in Europe plainly justifies the enactment of legislative provisions aimed at such forms of hate speech but is the need to protect persons with disabilities so pressing as to require an amendment of the current legislative provisions?

²⁷ See e.g. *Lingens v. Austria*, 8 July 1986, A 103, para. 42; *Castells v. Spain*, 23 April 1992, A 236, para. 43.

²⁸ Does it need to be said that freedom of expression is no hindrance when crimes are more severely punished when the victim was ‘selected’ on basis of its race or other characteristics, see e.g. the clear ruling of the US Supreme Court in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). For an example of US legislation imposing additional penalties where the offender selects his or her victim based on race, color, religion, sex, sexual orientation, *disability*, age, or national origin, see Minn. Stat. Ann. § 609.749 (West 2003) and the study of S. Gellman and F. Lawrence, ‘Agreeing to agree: A proponent and opponent of Hate Crime Laws reach for common ground’, 41 *Harv. J. on Legis.* 421 (2004).

We are tempted to offer a negative answer. The assessment here is obviously a political and personal one. However, to add to the argument, on a practical side, it may be added that the implementation of such specific provisions has often led to a weakening of legal reasoning in order to guarantee successful prosecutions and the unfortunate martyrdom of the people prosecuted. Social and professional self-regulation might be the best policy for protecting disabled people from ‘offensive’ comments in the marketplace of ideas.²⁹ Finally, a broad piece of legislation which would contain anti-discrimination and equality provisions could be considered as a sufficient tool to police “private” prejudiced attitudes against disabled persons. For instance, the Irish Equal Status Act 2000 prohibits “harassment”, i.e. when a person subjects another person to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material, which in respect of the victim is based on any discriminatory ground and which could reasonably be regarded as offensive, humiliating or intimidating to him or her.³⁰ As long as it is strictly enforced, this type of anti-discrimination provision may adequately avoid any undue infringement on political speech and the ‘chilling effect’ of overbroad criminal provisions.

B. – Human Dignity as an Effective Countervailing Interest under Civil Law

The strict interpretation of criminal law may make a successful prosecution extremely difficult. Civil law is nonetheless available for those targeted by reason of their disabilities.

A German case – the *Titanic* case – is particularly informative of the approach of the European Court of Human Rights, or of any court, in balancing freedom of expression and the “rights of others”, i.e. essentially personality rights. The German case is also of special significance as it concerns the use of the word ‘cripple’ to describe a disabled

²⁹ For a clear introduction to media self-regulation in the context of hate speech, see e.g. T. McGonagle, ‘Protection of Human Dignity, Distribution of Racist Content’, in *Co-Regulation of the Media in Europe*, The European Audiovisual Observatory, 2003, p. 43.

³⁰ Section 11(5).

person, the same word which was used – but importantly was not directed to a particular individual – by Mary Ellen Synon in a controversial article about the Paralympics in 2000.

In the *Titanic* case, the German Federal Constitutional Court dealt with a satirical magazine that described a paraplegic reserve officer as a ‘born murderer’ and as a ‘cripple’.³¹ Whereas the lower court ruled entirely against the magazine, the Constitutional Court found the judgment in damages to be a disproportionate interference with freedom of expression as far as the ‘born murderer’ description was concerned for a number of reasons we will not mention. Regarding the epithet ‘cripple’, however, the Court found the description to be a ‘serious’ breach of the paraplegic’s personality right. It was a serious breach as the description of a severely disabled person as a ‘cripple’ is ‘humiliating’ and demonstrated a ‘lack of respect’. Such a description undermines the dignity of the person and so freedom of expression shall not prevail. Consequently, the balancing of rights operated by the lower court sustained constitutional scrutiny at this point.

Can the rationale of respect for human dignity as an ‘effective’ countervailing interest to freedom of expression be extended outside the German legal context? To be sure, in the Basic Law, the respect for human dignity (*Die Würde des Menschen*) is particularly emphasized³² and the Constitutional Court agreed that this is the supreme value in the German constitutional order.³³ Since the seminal *Mephisto* decision in 1971, numerous cases have emerged where the Federal Constitutional Court has had to scrutinize the lower courts’ balancing of freedom of expression and human dignity. Without being constitutionally guaranteed as such in France, the principle of respect of human dignity was given constitutional status by the Constitutional Council. It was since successfully invoked in a number of cases involving media and most notably, in a case concerning a

³¹ BVerfGE 86, 1.

³² Article 1: ‘The dignity of a man shall be inviolable. To respect and protect it shall be the duty of all state authority.’

³³ ‘Achtung und Schutz der Menschenwürde gehören zu den Konstitutionsprinzipien des Grundgesetzes. Die freie menschliche Persönlichkeit und ihre Würde stellen den höchsten Rechtswert innerhalb der verfassungsmäßigen Ordnung dar’, BVerfGE 45, 187, p. 227.

specific radio station known for its ‘provocative’ style. The boundary between provocation and plainly sickening was easily crossed when, for instance, the murder of a policeman was celebrated or scatological comments were addressed to some female participants of a famous TV show.

The European Court of Human Rights does not often refer to the concept of human dignity as such. Indeed, unlike the EU Charter of fundamental rights,³⁴ the European Convention does not provide for a specific guarantee. However, as the Strasbourg Court made it clear in its decision *Refah Partisi v. Turkey*, ‘the European Convention on Human Rights must be understood and interpreted as a whole. Human rights form an integrated system for the protection of human dignity’.³⁵ Nevertheless, as far as Article 10 is concerned, the interests that are protected at the national level under the umbrella of respect for human dignity are protected in the name of ‘reputation and rights of others’. While it is hazardous to predict any judicial ruling, we may without fear argue that a judgment which requires a newspaper to pay damages for using the epithet ‘cripple’ would certainly be considered by the European Court as ‘necessary in a democratic society’ in similar circumstances, i.e. where the victim is not a pre-eminent and controversial figure and is attacked viciously upon his physical aspect.

The situation is at least pretty straightforward in the US. The concept of ‘human dignity’ as a countervailing interest to freedom of expression is generally denounced for its inherent subjectivity and the Supreme Court clearly refused to consecrate the principle.³⁶ The trouble with the US situation is that notwithstanding the non-legal character of the concept of human dignity – it is a legitimate issue to discuss the normative character of such a concept – the availability of remedies in civil law for victims of abusive verbal attacks (certainly as long as you qualify as a ‘public figure’) has also been greatly diminished by the Supreme Court.³⁷ Before the First Amendment became a significant obstacle, victims of abusive comments could expect damages for intentional or reckless

³⁴ EU Charter, Article II-1: ‘Human dignity is inviolable. It must be respected and protected.’

³⁵ 31 July 2001, No. 41340/98, para. 43.

³⁶ For a brilliant discussion of the political rationale underlying such an approach, see R. Post, ‘The Constitutional Concept of Public Discourse’, 103 *Harv. L. Rev.* 601 (1990).

³⁷ *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

infliction of severe emotional distress.³⁸ The *Hustler Magazine v. Falwell* decision however appears to limit, to a certain extent, the sanction under Tort law of racial insults, ‘satiric’ cartoons or abusive critics directed at public officials.³⁹

The *Falwell* decision can be instructively contrasted with the *Strauß Caricature* case.⁴⁰ Mr Strauß, a prominent German politician, was portrayed in a satirical magazine as a pig engaged in a sexual activity with another pig wearing a judge’s robe. The drawing was certainly covered by the right to freedom of expression under Article 5(3) of the Basic Law. The question for the Federal Constitutional Court was however to decide if it was protected. In a ruling that is in complete opposition to the *Falwell* decision, the Court took the view that the caricature was an attack on the personal dignity of Mr Strauß:

‘It is not his human features, his personal peculiarities, that are brought home to the observer through the alienation chosen. Instead, the intention is to show that he has marked “bestial” characteristics and behaves accordingly. Particularly the portrayal of sexual conduct, which in man still today forms part of the core of intimate life deserving of protection, is intended to devalue the person concerned as a person, to deprive him of his dignity as a human being... a legal system that takes the dignity of man as the highest value must disapprove of [such a portrayal].’⁴¹

What can be concluded from the above cases? Our conviction is that constitutional courts, in Continental Europe at least, would certainly agree with the (civil) sanctioning of those expressing ‘abusive’ comments - abusive because they are intentionally aimed at people with certain characteristics such as race, religious preference, sexual orientation and also disabilities. Such comments would violate the fundamental principle of respect for human dignity in almost any circumstances. The rationale for European courts would

³⁸ See *Second Restatement of Torts*, 1977, § 46; Note, ‘First Amendment limits on tort liability for words intended to inflict severe emotional distress’, 85 *Colum. L. Rev.* 1749 (1985), p. 1750.

³⁹ See R. Delgado, ‘Words that wound : A tort action for racial insults, epithets and name-calling’, 17 *Harv. Civ.Rts.-Civ.Lib. L. Rev.* 133 (1982).

⁴⁰ G. Nolte, ‘*Falwell v. Strauß*: Die rechtlichen Grenzen politischer Satire in den USA und der Bundesrepublik’, *EuGRZ*, 15, 1988, p. 253.

⁴¹ BVerfGE 75, 369, p. 425 as translated by W. Brugger, *supra* note 9, para. 48.

be to argue that individuals are free to express their opinions in a more ‘civilized’ manner.⁴² The US Supreme court’s jurisprudence offers an alternative approach whereby ‘one’s man vulgarity is another’s lyric.’⁴³ It is however entirely legitimate for European courts to disagree with the underlying principles of such an approach and to define and follow another path.

II. – Freedom of Expression as a Positive Fundamental Right: A Consequential Guarantee Against Disability Discrimination

In an article aimed at challenging the dominant American idea that fundamental rights are essentially negative, defensive rights, David P. Currie had the excellent idea of demonstrating the European attachment to affirmative government duties by mentioning both Montesquieu’s argument that the state ‘owed all citizens’ ‘nourishment, suitable clothing, and the opportunity for a healthy life’, and Anatole France’s mockery of a law that forbade the rich as well as the poor from sleeping under bridges.⁴⁴ This conception would not be without legal consequences with the development of constitutional review in Western European countries after World War II. To put it briefly, it has led to the strengthening of the effectiveness of human rights by obligating public authorities to take steps to make sure that the enjoyment of the right is effective. Notwithstanding this constitutional progress, some judicial self-restraint is to be expected and the precise scope of ‘positive obligations’ as far as the question of supplying the means for an effective exercise of the right to freedom of expression still remains uncertain. This is the essential reason why persons with disabilities would better direct their resources at the political level in order to influence the drafting of legal provisions aimed at guaranteeing their effective right to communicate.

A. – The Legal Implications Derived from the ‘Objective’ Value of the Right to Freedom of Expression

⁴² For an excellent comparative study on the US, France and Germany, see J. Whitman, ‘Enforcing Civility and Respect: Three Societies’, 109 *Yale L. J.* 1279 (2000).

⁴³ 403 U.S. 15 (1971), p. 25.

⁴⁴ See D. P. Currie, ‘Positive and negative constitutional rights’, 53 *U. Chi. L. Rev.* 864 (1986).

The concept of positive fundamental rights is today well accepted in continental European constitutional doctrine. Contemporary constitutional texts as interpreted by national constitutional courts not only offer protection against the State but also require governmental action in order to guarantee the effective exercise of fundamental rights.

The interpretation of the German *Grundgesetz*, the German Constitution, is again particularly informative. After acknowledging that the basic rights of individuals do indeed apply most fully against the power of the state, the Federal Constitutional Court emphasized the fact that the Basic Law establishes an ‘objective ordering of values’.⁴⁵ The introduction of this concept in constitutional doctrine represented a ‘fundamental strengthening of the effectiveness of the basic rights and a certain extension of those rights beyond their traditional realm.’⁴⁶ Without explaining further the quite intangible concept of an ‘objective’ ordering of values, it is enough to say at this time that fundamental rights not only grant individual rights against the state but also apply more generally in all legal relationships.

In practice, such an approach has led to significant results as far as freedom of expression is concerned. Numerous national constitutional courts have capitalized on the potential offered by the German constitutional theory and have ruled that, as a matter of principle, the objective dimension of such a fundamental right requires positive measures from the State. In other words, the State must guarantee, among other things, the pluralism of information sources, and a right to access them. It has an obligation to remove obstacles any obstacles to the free circulation of ideas and information. For instance, in its first decision about broadcasting, the German Constitutional Court stressed that the constitutional guarantee of the right to freedom of expression ‘contains more than just the citizen’s right that the state respect a sphere of freedom in which he can express his

⁴⁵ ‘Ohne Zweifel sind die Grundrechte in erster Linie dazu bestimmt, die Freiheitssphäre des einzelnen vor Eingriffen der öffentlichen Gewalt zu sichern; sie sind Abwehrrechte des Bürgers gegen den Staat (...). Ebenso richtig ist aber, daß das Grundgesetz (...) in seinem Grundrechtsabschnitt auch eine objektive Wertordnung aufgerichtet hat’, *Lüth*, BVerfGE 7, 198, pp. 204-205.

⁴⁶ Peter E. Quint, ‘Free Speech and Private Law in German Constitutional Theory’, 48 *Md. L. Rev.* 247 (1989), p. 260.

opinions without hindrance.’ In the circumstances of the time, the Court concluded that broadcast stations must ‘be so organized that all interests worthy of consideration have an influence in their governing councils and can express themselves in the overall program.’⁴⁷

At the European level, the ‘objective’ value of freedom of expression has also been recognized. Indeed, freedom of expression is deemed to be not only of value for each individual (subjective dimension of the right), but could contribute to the essence of any democratic society (objective dimension). According to the European Court, freedom of expression ‘constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual’s self-fulfilment.’⁴⁸

What legal consequences flow from such a status? In numerous cases, the Strasbourg Court has noted that a genuine, effective exercise of the right to freedom of expression does not depend merely on the state’s duty not to interfere, but may require positive measures of protection.⁴⁹ The Court went as far as to emphasize that the same principle applies even in the sphere of relations between individuals, for instance within the workplace.⁵⁰

The general principle is that in determining whether or not a positive obligation exists, regard must be paid to the fair balance that must be attained between the general interest of the community and the interests of the individual, ‘the search for which is inherent throughout the Convention’ as the Court always classically adds. A positive obligation is never absolute and its scope will inevitably vary, having regard to the diversity of situations and the choices that must be made in terms of priorities and resources. In other words, such an obligation cannot be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.⁵¹

⁴⁷ BVerfGE 12, 205, 259-60, as translated by D. P. Currie, *supra* note 44, p. 871.

⁴⁸ See *Handyside v. United Kingdom*, A 24, 7 December 1976, para. 49.

⁴⁹ See *Özgür Gündem v. Turkey*, no. 23144/93, 16 March 2000, para. 42-46.

⁵⁰ See *Fuentes Bobo v. Spain*, no. 39293/98, 29 February 2000, para. 38.

⁵¹ See *Rees v. the United Kingdom*, A 106, 17 October 1986, para. 37.

Such judicial self-restraint is inevitable but the main point is that the state has to guarantee, as a matter of principle, the effective exercise of individual's freedoms. As far as persons with disabilities are concerned, however, the real test may lie in finding ways to require the state to *supply* the means for an *effective* exercise of the right to freedom of expression. And it remains to be seen what kind of enforceable claims against the state could be satisfied under the constitutional guarantee of freedom of expression for persons with disabilities. As a result, instead of pursuing a litigation strategy under Article 10 of the European Convention, disability groups may be well-advised to gain recognition as relevant 'stakeholders' in order to influence the drafting of norms at the supranational level.

B. – Supranational Efforts Aimed at Guaranteeing an Effective Exercise of Freedom of Expression for Persons with Disabilities

The quest for an effective right to expression and access to information for persons with disabilities is now under scrutiny outside the borders of Europe. The work is done outside the judicial branch – and that is a positive feature – by negotiations between the relevant 'stakeholders'. The aim is to guarantee an effective exercise of freedom of expression for persons with disabilities.

The first example worth mentioning, a draft Treaty on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities is currently being discussed under the auspices of the UN. An Article 13 provides for the States Parties to take appropriate measures to ensure that persons with disabilities can exercise their right to freedom of expression and opinion through Braille, sign language, and other modes of communication of their choice, and to seek, receive and impart information, on an equal footing with others, including by:

Providing public information to persons with disabilities, on request, in a timely manner and without additional cost, in accessible formats and technologies of their choice, taking into account different kinds of disability;

Accepting the use of alternative modes of communication by persons with disabilities in official interactions;

Educating persons with disabilities to use alternative and augmentative communication modes;

Undertaking and promoting the research, development and production of new technologies, including information and communication technologies, and assistive technologies, suitable for persons with disabilities;

Promoting other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;

Encouraging private entities that provide services to the general public to provide information and services in accessible and usable formats for persons with disabilities;

Encouraging the mass media to make their services accessible to persons with disabilities.

These efforts are currently complemented by the work being accomplished at the World Summit on the Information Society (WSIS), a process supervised by the International Telecommunication Union.⁵² The goal is there to build a people-centered, inclusive and development-oriented Information Society in order to override the ‘digital divide’.

The major originality of the WSIS is that while representation from governments at the highest level is an established principle, the drafting process is open to all relevant UN bodies and other international organizations, NGOs, the private sector, and the civil society. The ambition is to establish a truly ‘multi-stakeholder’ process.

The *Declaration of Principles* issued in December of last year,⁵³ recognises the special needs of persons with disabilities⁵⁴ and in particular acknowledges that the use of Information and Communication Technologies (ICTs) in all stages of education, training and human resource development should be promoted, taking into account the special needs of persons with disabilities and disadvantaged and vulnerable groups.⁵⁵

⁵² See www.itu.int/wsis.

⁵³ WSIS-03/GENEVA/DOC/0004, 12 December 2003.

⁵⁴ Para. 13: ‘In building the Information Society, we shall pay particular attention to the special needs of marginalized and vulnerable groups of society, including migrants, internally displaced persons and refugees, unemployed and underprivileged people, minorities and nomadic people. We shall also recognize the special needs of older persons and persons with disabilities.’

⁵⁵ See para. 30.

Interestingly and ambitiously, the guiding principles of the Declaration are cemented in a 'Plan of Action', i.e. 'concrete action lines' are proposed to implement the Declaration of Principles.⁵⁶

As far as infrastructure is concerned, Article 9 point e advises governments to address, in the context of national e-strategies, the special requirements of persons with disabilities, including appropriate educational administrative and legislative measures to ensure their full inclusion in the Information Society. Article 9 point f also urges governments to encourage the design and production of ICT equipment and services so that everyone has easy and affordable access to them including persons with disabilities and other disadvantaged and vulnerable groups. Promotion of the development of technologies, applications, and content suited to their needs, as guided by the Universal Design Principle and further enhanced by the use of assistive technologies, is also encouraged. A provision is also aimed at promoting teleworking and increasing employment opportunities for those with disabilities (Article 19 point c). Finally, Article 23 point I suggests that the local capacity for the creation and distribution of content that is relevant to different segments of population - including non-literate, persons with disabilities, disadvantaged and vulnerable groups - be nurtured.

The Summit will meet again in Tunis in November 2005 to review the implementation of the Action Plan and will set more detailed targets for the period 2005-2015. The 'soft' and 'participatory' approach followed by the Summit, i.e. the opening of the drafting process of non-binding norms to the relevant stakeholders, is certainly worth noting and might be more effective when it comes to display ambitious goals and to deliver them. It will be soon possible to evaluate the sort of change that persons with disabilities could expect from the supranational efforts now taking place. However, there is certainly a complementary way to impose the implementation of 'inclusive' public policies. It is to organise persons with disabilities as an electoral force at the local and national level.

⁵⁶ WSIS-03/GENEVA/DOC/0005.

