To deny or not to deny: A comparison of genocide denial legislation in France and Australia

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Abstract

When discussing how to best combat genocide denial, denial legislation is all too often presented as the premier solution. However, as this article will showcase, a legal approach in the face of genocide denial is utterly inadequate. Real-world applications of denial legislation are plagued by issues like politicisation and potentially empowering denialists to the point that these policies are ineffectual or even counterproductive. I therefore posit that in light of denial legislation's ineffectiveness, as demonstrated by France's *Gayssot* law, that these policies should not be enacted in the case of Australia because they would prove ineffectual.

The article that follows is structured in five parts. The first two segments address the relevant definitions and literature. The third part evaluates the arguments for and against denial laws by using France's *Gayssot* law as an existing example in order to gauge denial legislation's effectiveness. The fourth section applies the earlier analyses to the case for denial laws in Australia, especially considering the *Racial Discrimination Act 1975* (Cth). Finally, the article presents a discussion of alternative approaches to combatting genocide denial, specifically truth commissions and confrontation. I conclude that in light of denial legislation in France and its overall ineffectiveness, Australia should not implement genocide denial laws as they would ultimately prove ineffectual.

Introduction

The most effective means of combatting genocide denial remains a highly elusive objective for most democratic societies. For many countries in the European Union (EU) such as France, genocide denial legislation is their chosen tool for deterring denial. In Australia, genocide denial laws, and indeed the question of what constitutes denial, remain a contested point. The central concern of this article is whether denial legislation is effective, namely in the case of France, and if it should be enacted in Australia. I argue that Australia should not pass genocide denial laws because they would prove ineffective, as is showcased by France's case of ineffectual legislation. This article is structured in five parts. The first two segments address the relevant definitions and literature. The third part evaluates the arguments for and against denial laws by using France's *Gayssot* law as an existing example to gauge denial legislation's effectiveness. The fourth section applies these analyses to the case for denial laws in Australia, while noting the impact of the *Racial Discrimination Act 1975* (Cth). Finally, the article presents a discussion of alternative approaches to combatting genocide denial, specifically truth commissions and confrontation. I conclude that, given the overall ineffectiveness of denial legislation in France, Australia should not implement genocide denial laws as they would ultimately prove ineffectual.

Definitions

In order to ascertain the efficacy of genocide denial laws in France, it is important to first consider how effectiveness is defined. Ultimately, this article will be utilising a qualitative definition derived from literature on law reform. This approach is appropriate in this context, as a qualitative definition recognises that the nuance of genocide denial cannot be comprehensively captured through quantitative

measures such as contrasting pre- and post-denial legislation hate crime statistics. Consequently, in this article, effectiveness is understood as 'the extent to which a law can do the job it is intended to do' (Mousmouti, 2014, p. 4). What is then required of genocide denial legislation for it to be considered effective? In line with this definition, I posit that effective denial legislation must deter genocide denial, especially in the public sphere, while avoiding unnecessary encroachments upon the rights outlined in the United Nations Universal Declaration of Human Rights (UDHR), such as freedom of expression (United Nations, 1948b).

In this article, genocide is defined in line with Article II of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (United Nations, 1948a, p. 1). As for genocide denial, I used Roger Smith's understanding that denial consists of denying, trivialising, or relativising the facts relating to a case of genocide (Smith, 2010, p. 129). Genocide denial law is defined in this paper as legislation that criminalises public denial that demonstrates malicious intent (Garibian, 2008, pp. 484–486). Finally, hate speech is defined as any communication that uses pejorative, offensive, and/or discriminatory language with respect to an individual's actual or perceived identity factors such as race or religion (United Nations, 2019). Hate speech laws in turn use civil or criminal legislation to penalise the dissemination of hate speech.

Within the discussion of alternative means of combatting genocide denial, this article refers to the concept of 'transitional justice'. In this paper, transitional justice is defined as the aims and processes that societies use to holistically address past or ongoing mass atrocity violence, such as genocide, that are achieved through judicial or non-judicial means (Kaufman, 2014). In a related vein, a truth commission is understood in this article as a non-judicial body formed for the purpose of investigating specific episodes of mass human rights violations, namely genocide, and in turn developing a historical record of the events in question; importantly, these bodies utilise the accounts of both victims and perpetrators as part of their investigations (Lund, 1998, p. 282).

Literature review

The thematic scope of this review is limited to analyses of the effectiveness of genocide denial laws, especially with regard to the EU and member states such as France, as well as the appropriateness of similar legislation in Australia. As for the types of literature included within this article, the review includes peer-reviewed, academic articles and reports from the last two decades that explicitly relate to discussions of genocide denial legislation and its application within the EU and Australia.

Generally, the literature is highly critical of denial legislation's effectiveness, and instead suggests that denial laws may in fact cause, rather than prevent, harm. There are three main critiques that denial legislation scholars present. The first critique is concerned with issues such as politicisation that stem from allowing governments and their corresponding courts to define genocide in order to legislate denial (Hayden, 2008; Smith, 2010). In a similar vein, the second critique questions the effectiveness of French and EU denial laws in light of ambiguity within existing legislation (Gorton, 2015; Knechtle, 2008; Pégorier, 2018). The final critique considers the broad ramifications of denial law on human rights as well as the influence of denialist groups (Behrens, 2015; Gorton, 2015). Despite these critiques, these academics by no means intend to diminish the importance of countering genocide denial in Europe or any other context; rather, the central themes of their critiques are that denial would be better deterred by amending legislation or through nonlegal avenues. Furthermore, while these critiques are commonly presented by the literature, there are notable exceptions that stand by the importance of genocide denial law (Garibian, 2008; Pruitt, 2017).

Regarding literature on the appropriateness of genocide denial legislation in Australia, the search came across a gap in the field of genocide studies as I could not procure any published, scholarly articles that met the scope of this review. As will be expanded upon later in this article, I posit that some key factors relating to this lacuna are the political and societal discomfort with the concept of genocide in Australia, and the existence of hate speech legislation that can already be used to prosecute genocide denial.

Genocide denial laws in France

In order to gauge the effectiveness of genocide denial law, this article focuses on France and its legislation targeting Holocaust denial as a case study. France's key domestic sociohistorical foundations for denial laws include a long history enshrining both the protection and restriction of individual liberties as well as a difficult legacy regarding its role in the Holocaust (Gzoyan, 2019, pp. 83–84). For many European countries such as France, genocide denial laws stem in no small part from a societal desire to atone for their country's direct or indirect role in the Holocaust in addition to suppressing existing and future fascist movements (Smith, 2010, p. 134). The *Gayssot* law, instituted in 1990 as part of France's broader hate speech legislation, forms the foundation of French Holocaust denial law. In addition, EU frameworks that address hate speech and denial, namely the European Convention on Human Rights (ECHR), as well as the European Court of Human Rights (ECHR) and its case law all play key roles in the application of French denial legislation.

While critics and advocates of denial law may disagree on its effectiveness, the seriousness of genocide denial is not disputed. There is an academic consensus that genocide denial constitutes a serious violation of individuals' rights and dignity (Garibian, 2008, pp. 482, 486). Furthermore, denial has grave consequences for victims, perpetrators, and democratic society as a whole, and is an inherent part of the process of genocide (Smith, 2010, p. 128; Stanton, 2016).

Advocates for the effectiveness of denial law present two central arguments. The first claim is that the prevention, suppression, and punishment of genocide denial is best achieved through legal avenues. Essentially, advocates argue that criminalising denial helps to protect the memory and victims of genocide in addition to discouraging future crimes of genocide (including denial) (Pruitt, 2017). Inherent to this argument is the belief that legal protections pertaining to freedom of expression must have inherent restrictions and responsibilities (Garibian, 2008, pp. 480–481). Restrictions on civil liberties in democratic societies must be carefully considered in order to maintain an appropriate balance between individuals' rights to freedom of expression and freedom from discrimination. However, in the case of French law, I contend that it adequately addresses this equilibrium by recognising that individuals' freedoms should only be curtailed in order to preserve the rights of others and in turn these liberties can only be limited by the law (The National Assembly (France), 1789).

Furthermore, the ECHR, the UDHR, and French case law all recognise the limitation of personal freedoms when they are used to infringe upon others' rights (Council of Europe, 1950, p. 12; The National Assembly (France), 1789; United Nations, 1948b, p. 8). French law also considers human dignity to be a 'principle of constitutional status' that must be considered throughout the legal process (Barroso, 2012, p. 339). As a consequence of this principle, the act of denial in France is framed not only as an attack on individuals' rights, but also on the dignity of the greater community affected by Holocaust denial such as descendants or survivors (Pruitt, 2017, p. 271).

The second argument of denial law advocates is that the public distribution of extremist, intolerant beliefs such as genocide denial actually undermine democratic values, and so denial laws are key to the preservation of democracy. Unlike an American 'absolutist' approach to freedom of speech, French law uses a conception of free speech that centres around the preservation of democracy as well as the rights of the individual (Garibian, 2008, p. 482; Viala-Gaudefroy, 2021). Therefore, the dissemination of anti-democratic, extremist ideas, such as genocide denial, are considered by France as threats to its democracy, and so they must be subject to legal restrictions and consequences (Garibian, 2008, pp. 482–483).

Before fully demonstrating denial laws' ineffectiveness, it is important to first note that I also believe that the removal of existing legislation would bring about far more harm than good by signalling to denialists that democracies are yielding to denial. The following discussions therefore do not call for the removal of current denial laws but rather are against relying upon existing laws to act as a meaningful deterrent. In light of this, I do not doubt that denial law advocates are correct in saying that genocide denial violates the rights of the individual and compromises democratic values. However, the crux of the issue is that denial laws are ineffective because they do not actually protect individuals' rights or democratic resilience. There is no strong evidence that denial legislation deters denialists,

especially public figures (Weaver, Depierre, & Boissier, 2009, pp. 516–517). Additionally, private denial, arguably the most prolific form of genocide denial, cannot be prosecuted in a democratic society because it would constitute a dangerous incursion on civil liberties (Behrens, 2015, p. 33). That is all to say that there is no meaningful evidence that denial legislation fulfils its purpose and deters genocide denial.

Instead, there is far more evidence supporting denial law critics' conclusion that denial legislation is fundamentally ineffective. The issues with genocide denial laws can be divided into two general categories. The first grouping relates to issues that stem from the legal and political process of enacting denial legislation. The second category is concerned with the issues associated with the ramifications of denial legislation. Regarding the legal and political process of denial legislation, the key problem is that in order to criminalise genocide denial, the government must first delineate which events are deemed to be within the scope of the legislation. That is to say, it becomes a task for politicians and the courts to decide what constitutes genocide and also what constitutes denial. This process presents many fundamental issues that ultimately undermine the effectiveness of denial law.

Firstly, genocide, and in turn denial, is a multifaceted and interdisciplinary phenomenon that cannot be adequately understood or addressed through a solely political or legal approach (Rosenberg, 2012; Smith, 2010, pp. 132–133). Moreover, by allowing politicians to determine which cases should be deemed genocide, denial legislation can be used to uphold political narratives about cases of genocide. For example, some academics posit that France is hesitant to further pursue Armenian genocide denial legislation because it could compromise the state's economic and political relationship with Turkey (Gzoyan, 2019, p. 87).

Secondly, like many other European denial laws, French denial legislation only criminalises outright denial of the occurrence of the Holocaust but does not cover the other aspects of genocide denial (Pruitt, 2017). This is problematic because forms of genocide denial that are trivialising or relativising in nature, such as minimising casualty counts, are not covered by the legislation (Jones, 2016, pp. 683–686). Furthermore, by only criminalising Holocaust denial, French denial laws are effectively privileging the protections of the rights and dignity of those affected by the Holocaust over other genocide victims (Behrens, 2015, pp. 30–31). This is in addition to the fact that comparatively novel modes of communication, such as the internet, are becoming increasingly major hubs for denial dissemination while also being notoriously difficult to regulate or sanction (Hare & Weinstein, 2009, pp. 539–540). Similarly, the ambiguity in relevant ECHR case law obfuscates the capacity of EU member states such as France to legislate denial (Gorton, 2015).

With respect to the consequences of denial legislation, it seems that these laws may cause more harm than good. Those found guilty under denial laws can actually become further entrenched in denialist ideology through prolonged exposure to radical ideas in prison (Behrens, 2015, pp. 40–41). Moreover, convicted denialists can come to achieve an elevated status among other denialists through their perceived sacrifice for 'the cause' and the media attention that often accompanies high-profile denial cases (Jones, 2016, p. 688). However, the ineffectiveness of France's denial laws is best highlighted in the rise and popularity of far-right politician Jean-Marie Le Pen, and his persistent Holocaust denial, even after the enactment of the *Gayssot* law. Despite being found guilty of denial twice in the 1990s, Le Pen continues to publicise blatantly Holocaust denialist comments ('Court upholds', 2018; 'French far-right', 2021). If French denial legislation was truly effective, Le Pen and other denialists should have been deterred by the *Gayssot* law; however, as is demonstrated by Le Pen's continued denialist remarks as well as the rise of other public figures who partake in Holocaust denial such as Éric Zemmour, this is not the case (Rose, 2021). As is demonstrated in the case of Holocaust denial laws in France, genocide denial legislation does not meaningfully deter denial, and it can in fact amplify the influence of denialists. That is to say, genocide denial laws are fundamentally ineffective because they do not function as intended.

The potential applicability of genocide denial laws in Australia

In view of Australia's domestic sociohistorical context, denial legislation related to general crimes of genocide or Australia's colonial history would be most appropriate. However, this same context means that Australian society and politics has an enduringly uncomfortable relationship with both the concept of genocide and its domestic applications (Lawrence, 2020). This article is discussing whether Australia *should* enact genocide denial legislation rather than whether Australia *could* implement these laws. Nevertheless, I would be remiss if I did not acknowledge the actual political and social context which would greatly influence the viability and capacity of genocide denial laws in Australia.

As it stands, mainstream Australian politics and society endorses a multitude of competing interpretations of Australia's colonial history and subsequent cases for genocide. For the most part, these viewpoints dismiss either the persisting effects of genocide against Australia's First Nations peoples or outright deny that genocide ever occurred (Tatz, 2016, p. 87). On the other hand, there is a broad array of credible academic and sociocultural sources, such as the 1997 *Bringing them home* report,[1] that attest not only to the occurrence of genocide in Australia, but also its enduring impacts (Human Rights and Equal Opportunity Commission, 1987, p. 190; Tatz, 2001). In spite of these facts, no federal government administration has acknowledged that genocide has occurred in Australia (Mays, 2020). Consequently, in the existing context where Australia's societal and political mainstream is already directly and indirectly denying their country's own case for genocide, criminalising genocide denial is unviable. However, considering this context, it is all the more crucial to meaningfully analyse whether Australia has an obligation to pass genocide denial legislation. I will now argue that Australia should not enact genocide denial legislation because it would prove ineffective.

When considering the appropriateness of denial legislation in Australia, most of the same arguments and considerations from the discussion of French denial law arise as the majority of the issues with denial legislation are universal. To reiterate these arguments briefly: denial legislation fails to deter public or private denial, in addition to potentially facilitating denialists and the governmental politicisation of genocide. These arguments, and the other points outlined earlier in this article that are not specific to France, remain true in Australia's case. However, a key additional element is that Australia has a framework of hate speech legislation that has already been used to prosecute genocide denial.

While there are state-level examples of hate speech laws in Australia, the most significant piece of hate speech legislation is the federal-level *Racial Discrimination Act 1975* and its Section 18C (Human Rights and Equal Opportunity Commission, 2002). As part of the *Racial Hatred Act 1995* (Cth), Section 18C was added to the *Racial Discrimination Act 1975* in order to recognise hate speech within Australian discrimination laws (McNamara, 2016). It is important to note that the *Racial Discrimination Act* is civil, not criminal, legislation and that it also includes reasonable exceptions to Section 18C, such as for educational purposes (McNamara, 2016). For example, in 2002, in the case of *Jones v Töben*, Dr Fredrick Töben was found guilty of breaching Section 18C by publishing Holocaust denial material online (Hare & Weinstein, 2009, pp. 534–536). Furthermore, although Section 18C in isolation may only provide civil recourse, it nonetheless serves the same theoretical function that advocates argue for denial law, in that it uses fear and consideration of legal consequences as a deterrence.

While Section 18C and its applications do certainly present their own flaws, these points fall beyond the remit of this article. The important fact is that Australia has an existing legal framework that prohibits hate speech in a manner that can be used to prosecute genocide denial (Hare & Weinstein, 2009, pp. 534–537). While arguments can certainly be made for amending Section 18C to better address genocide denial, separate denial legislation in Australia would fundamentally be ineffective (Sackville, 2016, pp. 636–638, 641–642).

[1] Formally known as the *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*.

Alternatives to denial legislation

Two perspectives are often presented when engaging with the topic of combatting genocide denial, with one being the legal method already presented within this article, and the other being the societal approach (Smith, 2010). The societal approach uses education, academia, freedom of speech, and other social mechanisms through non-judicial strategies in order to counter denial. Therefore, as part of the societal approach, the mechanisms of truth commissions and confrontation present the most common alternatives to the legal method.

Truth commissions

In the wake of genocidal violence, many states such as Rwanda have used transitional justice strategies as means of addressing the aftermath (Kaufman, 2014). Truth commissions are often central to transitional justice processes, and in turn present an alternative path to combatting genocide denial. By acting as a forum for both victims and perpetrators of genocide to share their experiences, truth commissions can not only provide individual and societal catharsis, but also help to make the establishment of historical memory into a communal rather than political process (Behrens, 2015). Furthermore, the public act of perpetrators taking responsibility for their actions and establishing the facts contested by denialists, such as casualty counts, can weaken the core 'evidence' of common denialist strategies like relativisation (Behrens, 2015, pp. 44–45; Jones, 2016, pp. 791–793).

However, the practice of truth commissions is not without its faults. For one, victims and perpetrators alike can be unwilling to share their experiences, let alone in the public forum that is required of a truth commission (Behrens, 2017, 3.3 Confronting the deniers). Moreover, truth commissions require mediators to ensure that the provided accounts are factual and properly representative of the events in question. Without objective mediators and genuine intent to present a veracious account of the genocide in question, then truth commissions can be used to amplify, politicise, and validate particular or fictitious accounts of the genocide (Behrens, 2015, pp. 45–46). Consequently, while truth commissions have great potential for aiding in combatting genocide denial, they require careful practical application lest they become counterproductive.

Confrontation

When attempting to counter genocide denial, confrontation remains a controversial but nonetheless common alternative to denial legislation. In the context of genocide denial, confrontation takes many forms along the spectrums of individual and systemic focuses as well as direct and indirect approaches. Furthermore, it generally involves challenging denialist arguments through debate or the provision of education with the intention of discrediting their reasonings as well as convincing potential and actual denialists of the ideology's failings. While direct personal confrontation, often between academics or genocide victims and well-known denialists, presents the most sensationalist strategy, its premise is inherently flawed; meaningful debate intrinsically requires both parties to present factual arguments, which is not a requisite condition for the rationalisations of denialists (Behrens, 2017, 3.3 Confronting the deniers).

Alternatively, systemic indirect approaches that focus on providing accessible, appropriate genocide education to either the general public or 'moderate' denialists have been found to have far greater success (Behrens, 2017, 3.3 Confronting the deniers; Bilali, Iqbal, & Freel, 2019, pp. 301–302). Furthermore, an education-orientated approach has the additional benefit of being able to indirectly target private denial in a manner that laws simply cannot accomplish. However, radical denialists, especially those in public or leadership positions within denialist organisations, are far less likely to be swayed by such an approach (Behrens, 2017, 3.3 Confronting the deniers). The confrontation approach is ultimately most effective in preventing the creation of new denialists but fails in the face of the radicals who act as the vanguards of these beliefs.

Conclusion

While the question of how to best combat genocide denial is undoubtedly of great consequence, it is ultimately without a panacea. There is no approach without flaws or failings. Democracies cannot absolutely criminalise or stifle denial without politicising genocide and ultimately encroaching on human rights. Conversely, societies that function without any judicial or social checks invite the dissemination of genocide denial, and in turn the catastrophic consequences that can follow. A balance between rights, responsibility, and restrictions must be struck when attempting to counter genocide denial. However, in the question of denial legislation's effectiveness, the answer nonetheless remains the same: it ultimately does not fulfil its intended function.

The contentions at this article's heart concerned the effectiveness of genocide denial laws, their application within France, and their appropriateness in Australia. Each of the five parts that I addressed helped to construct and argue my central thesis. Consequently, in light of the ineffectiveness of existent denial laws such as the *Gayssot* law and Australia's existing hate speech legislation, Australia should not enact denial legislation because it would ultimately be ineffective. Genocide denial is an ever-evolving concept that demands relentless scrutiny and engagement from societies concerned with individuals' rights and democratic values. However, as I have demonstrated, denial legislation is neither the only approach to counteracting genocide denial nor an effective means of doing so.

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