



Articles

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National Bans for YouTube: The Debate in Thailand in Comparison with India, Turkey and Germany

Debates about national bans for the video station YouTube show that there are different views about appropriate content and the extent of freedom of expression on the internet. In particular the question of what constitutes insult to national leaders or symbols is culturally specific and will be interpreted differently in various countries. Historical circumstances and experiences may also make certain topics particularly sensitive. The result is a more regulated environment with nationally designed internet policies, in which cultural and political differences retain their relevance and are enforced by nation states.

I. Introduction: National Identity and the Internet

Social scientists have often pointed to the fact that modern nation states are basically constructs made up of different ethnic and/or dialect groups, in spite of nationalist mythologies stressing the unity of a nation and the common interest of its citizens.¹ This is nowhere clearer than in developing countries and post-colonial societies, which may have old cultural traditions but whose collective memories as nation states are relatively short and of recent origin.² The problem of such countries is that they construct and defend a national identity at a time when older nation states in Europe and North America and the forces of globalisation are beginning to diffuse such national identities triggering a move towards larger regional concepts.³ To stress national unity and prevent disintegration, developing countries stress symbols of national unity, which preceded the nation state such as religion, charismatic leaders and/or royal dynasties.

However, such sacred symbols of nationhood may not be granted the same respect in the faceless world of globalised cyberspace. Accordingly, national governments have shut down or considered to shut down websites, which distribute disrespectful material, much to the dismay of NGOs advocating freedom of expression on the internet. The following examples for debates about national bans for the Google owned video station YouTube from Thailand, India, Turkey and Germany show the conflicting views of what is appropriate in representing the nation state and its leaders on the internet.

II. Thailand: Lese Majeste and the Current Political Turmoil

The current discussion in Thailand concerning freedom of expression on the internet has to be understood in the context of the political turmoil, which has been engulfing the country for the past few years.

1. Political Background

After a military coup in 1991, the military appointed government was challenged successfully by a Campaign for Popular Democracy with widespread support of the urban middle class and the press. An elected government was returned and the army had to retreat to the barracks. A new Constitution was drafted and finally adopted in 1997 at a time, when the country was in the midst of the Asian Crisis, which had started in Thailand. The aftermath of the Crisis saw the rise of the *Thai Rak Thai* (Thai Loving Thai) Party founded by the telecommunications tycoon *Thaksin Shinawatra*, who became Prime Minister after an election win in 2001. "Thaksinomics" as his approach came to be called was inspired to some extent by the economic success of "developmental states" elsewhere in the region.⁴ Apart from the guiding hand of the state in the economy, it required quiet politics. As a consequence, electronic media and the press came under tight control.⁵ Political activists and NGOs began to turn to alternative media outlets in the form of the internet.⁶ Increasing demonstrations against the Thaksin government started in 2005 and the ensuing political crisis finally led to a military coup in September 2006 and the installation of a military led interim government. The Constitution of 1997 was abrogated and an interim constitution was put in its place while a new one was drafted and adopted in a nation wide referendum in August 2007. Elections in December 2007 showed, however, that the power struggle continues with a pro-Thaksin party winning the most seats. The People Power Party (PPP) as election winner is currently trying to form a government in coalition with a number of smaller parties.

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1 This was perhaps most famously expressed by *Benedict Anderson* in his *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (London: Verso, 1991).

2 For Thailand in particular see *C.J. Reynolds, Seditious Histories: Contesting Thai and Southeast Asian Pasts*, (Seattle and Singapore: University of Washington Press/Singapore University Press, 2006, Chapter 11; *C.J. Reynolds*, 'Introduction: National Identity and its Defenders', in *C.J. Reynolds* (ed.), *National Identity and its Defenders: Thailand Today* (Chiang Mai: Silkworm Books, 2002).

3 *C. Antons*, 'Traditional Cultural Expressions and Their Significance for Development in a Digital Environment: Examples from Australia and Southeast Asia', in *C.B. Graber and M. Burri Nenova* (eds.) (Cheltenham: Edward Elgar, in print).

4 *C. Antons*, 'Law Reform in the 'Developmental States' of East and Southeast Asia: From the Asian Crisis to September 11, 2001 and Beyond', in *C. Antons and V. Gessner* (eds), *Globalisation and Resistance: Law Reform in Asia since the Crisis*, (Oxford and Portland, Oregon: Hart Publishing 2007), Chapter 4.

5 *C. Baker and P. Phongpaichit*, *A History of Thailand*, (Cambridge: Cambridge University Press 2005), Chapter 9.

6 *P. Daorueang*, 'Thai civil society and government control: a cyber struggle', in *S. Gan, J. Gomez and U. Johannsen* (eds), *Asian Cyberactivism: Freedom of Expression and Media Censorship*, Singapore: Friedrich Naumann Foundation 2004).

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2. The Ban on YouTube

In the middle of this extraordinary political turmoil, in April 2007 the video website YouTube came under pressure when it allowed the uploading of several videos which were disrespectful of King *Bhumibol Adulyadej*. The Ministry of Information and Communications Technology (MICT) promptly reacted by blocking access to the YouTube website and by threatening internet service providers that left access to the site open with revocation of their licences.⁷ Prior to blocking access to the site, the Ministry had approached Google and asked for the offensive material to be taken down, but Google's response was that it had no policy regarding content deemed offensive in Thailand and that it would not assist in implementing censorship.⁸ The company also pointed out that it kept material on its site, which mocked US President *George W. Bush* far more harshly than King *Bhumibol*.⁹ The Ministry's move to ban YouTube drew a sharp reaction from various groups advocating freedom of expression on the internet, such as Freedom Against Censorship Thailand (FACT). Reporters Without Borders equally expressed concern in a statement emphasising that such a serious decision should require a court order.¹⁰ Commentators in Thailand on the other hand pointed to YouTube's double standards in acting swiftly against pornography on its site, but not against culturally insensitive and insulting material.¹¹ They also pointed to the hypocrisy in Google's position in defending freedom of expression when it comes to Thailand while complying with Chinese demands to heavily censor the search results for its Chinese search engine.¹² YouTube's comparison of the case with mockery of the US President was missing the point, as mockery of the Thai Prime Minister was equally unproblematic in Thailand.¹³ The English language daily *The Nation* in an editorial also emphasised the role of the King as the spiritual leader of Thailand.¹⁴

3. The Legal Basis

International media attention for the YouTube incident would perhaps have been fairly limited, if not for the legal basis of the ban.

a) The Traditional Law Against Lese Majeste

The specific reason for the ban was Thailand's law against lese majeste, which is to be found in Article 112 of the Thai Criminal Code and reads as follows:

Article 112. Whoever defames, insults, or threatens the King, the Queen, the Heir apparent or the Regent shall be punished with imprisonment of three to fifteen years.

David Streckfuss, an American expert on lese majeste in Thailand, has pointed out that during successive amendments the number of provisions punishing forms of lese majeste has declined, while at the same time the overall importance of this criminal charge has increased. The maximum penalty for the crime was raised at first from three to seven years in the Criminal Code of 1908 and then further to fifteen years following a military coup in 1976.¹⁵ Equally important was the widening of the scope of the provision by the amendment of 1959, which added the insulting of the King to the acts of defaming or threatening him.¹⁶ The amendment also changed the for-

mer title of the relevant section of the Criminal Code from "Offences against the King and State" to "Offences against the Security of the Kingdom". At the same time, the circle of royalty protected by the provision has been narrowly circumscribed to include the King, the Queen, the Heir apparent and the Regent.¹⁷

As anyone is allowed to bring the charge, critics have pointed out that lese majeste is frequently used by politicians as a political weapon to discredit opponents.¹⁸ During the recent crisis, both ousted Prime Minister *Thaksin Shinawatra* and his political opponents accused each other of lese majeste.¹⁹ After further YouTube videos politically attacked chief royal advisor Prem Tinsulanonda, legislation was proposed to amend the lese majeste provision so that it would include in its protective scope also children of the monarch and the royal advisors in the Privy Council and allow for the imposition of media restrictions with concern to lese majeste cases. However, these legislative proposals were abandoned shortly after their proposal.²⁰

b) The Computer Crime Act 2007

While the amendments to the Criminal Code were not adopted, cases such as the one leading to the YouTube ban will in future be covered by the new Computer Crime Act, which took effect on 18 July 2007.²¹ The Computer Crime Act among other things prohibits acts involving "import to a computer system of forged computer data, either in whole or in part, or false computer data, in a manner that is likely to cause damage to that third party or the public" (Section 14[1]) as well as "import to a computer system of false computer data in a manner that is likely to damage the country's security or cause a public panic (Section 14[2]). Furthermore,

7 'YouTube blocked because of clip 'offensive to monarchy'', *The Nation*, 5 April 2007; 'Thailand outraged over new YouTube king videos', *The Nation*, 6 April 2007; 'Two more offensive videos put on side', *The Nation*, 7 April 2007; 'Lese Majeste: YouTube ban to remain in effect for now', *The Nation*, 6 April 2007.

8 'We will not assist in implementing censorship: YouTube', *The Nation*, 7 April 2007.

9 'Lese Majeste: YouTube ban to remain in effect for now', *The Nation*, 6 April 2007.

10 'Thai YouTube ban worries watchdog', *The Nation*, 6 April 2007.

11 T. *Khanthong*, 'Disrespect for monarchy a direct attack on heart of the nation', *The Nation*, 6 April 2007; T. *Taptim*, 'Net's cheap and easy freedoms put values to the test', *The Nation*, 11 April 2007.

12 G. *Long*, 'The hypocrisy of the GoogleTube', *The Bangkok Post*, 19 April 2007.

13 J. *Na Thalung*, 'Principle of freedom of speech works both ways', *The Nation*, 7 April 2007.

14 'Editorial: Freedom comes with responsibility', *The Nation*, 10 April 2007.

15 D.E. *Streckfuss*, *The Poetics of Subversion: Civil Liberty and Lese-Majeste in the Modern Thai State*, PhD thesis, University of Wisconsin-Madison (Ann Arbor: UMI Dissertation Services 1998), pp. 149-150, 169-170.

16 *Ibid.*, p. 159.

17 *Ibid.*, p. 155.

18 *Ibid.*, p. 136.

19 P. *Bouring*, 'The uses and misuses of lèse-majesté', *International Herald Tribune*, 12 April 2007; 'Thaksin faces less majeste claims', *BBC News*, 20 March 2007.

20 'Thailand plans tougher lese majeste law', *Reuters India*, 9 October 2007; 'Thailand halts plan to toughen less majeste law', *Reuters*, 9 October 2007; D. *Ten Kate*, 'Testing Free Speech in Thailand', *Asia Sentinel*, 11 October 2007; T. *Winichakul*, 'Lese majeste law still problematic', *The Nation*, 11 October 2007.

21 An unofficial translation of this new Act is available from the Prachatai website at www.prachatai.com/english/printversion.php?id=117 (accessed 8 January 2008).

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“acts ... (3) that involve import to a computer system of any computer data related with an offence against the Kingdom’s security under the Criminal Code” (Section 13[3]). These subsections would presumably also cover the access of security infringing material, including material covered by lese majeste, via proxy servers situated outside of Thailand. Dissemination or forwarding of computer data already known to be infringing under Section 14(1), (2), (3) or (4)²² would be punishable under Section 14(5). All of these acts would be punished by imprisonment for up to five years and/or a monetary fine of up to one hundred thousand Baht. Section 15 imposes the same penalties on service providers, who intentionally support or consent to an offence under Section 14 within a computer system under their control. Presumably equally applicable to cases such as the YouTube incident would be Section 16 punishing someone “who imports to a computer system that is publicly accessible computer data where a third party’s picture appears either created, edited, added or adapted by electronic means or otherwise in a manner that is likely to impair that third party’s reputation or causes that third party to be isolated, disgusted or embarrassed.” The punishment in this case is imprisonment for up to three years and/or a fine of up to sixty thousand Baht.

Section 17 extends the application of the Act to offences outside of Thailand in case of Thai offenders, if the country where the offence is committed or the injured party requires punishment; or in the case of a foreign citizen, if the Thai government or the injured party requires punishment. Section 18 allows for various seizures and access during investigations. Finally, Section 20 allows for the blocking of computer data by court order. Under this provision, officials may file a petition for a restraint order in cases of offences “to disseminate computer data that might have an impact on the Kingdom’s security as stipulated in Division 2 type 1 or type 1/1 of the Criminal Code, or that might be contradictory to the peace and concord or good morals of the people”. The official may subsequently carry out the restraint order him-/herself or instruct the Service Provider to restrain the dissemination of such computer data. In the meantime, the Thai press has reported of the first cases prosecuted under the new law.²³

c) The Constitutional Guarantees of Freedom

Apart from the new Computer Crime Act, important new provisions relevant for freedom of speech and freedom of expression in Thailand can also be collected from the new Constitution, which was adopted in a

nation wide referendum in August of 2007.²⁴ Principles of freedom of expression are guaranteed in Chapter 3 (Rights and freedoms of the Thai people) in both Part 3 on ‘Personal rights and freedoms’ and in Part 7 on ‘Freedom of expression of individuals and mass media’. Section 45 provides that “a person shall be free to express his or her views in speech, writing, print, advertising, and other modes of communication.” The second paragraph of the Section prohibits restriction of this freedom “except by virtue of law, specifically to maintain the stability of the state, to protect the rights and freedoms, honour, reputation and rights of the family or privacy of other individuals, to keep public peace and order and good morals, or to prevent or stop deterioration of mental and physical health.” Similar national security considerations also qualify the freedom of communication guaranteed by Section 36. First of all, the freedom to communicate with one another must be exercised “by lawful means”. Further, while it is prohibited to “check, detain, or disclose communication between or among persons, including such other acts as to gain advance knowledge of the contents of the communications”, this applies “except by virtue of law, specifically to protect national security or to maintain peace and order, or good morals of the people.” Section 28 of the General Provisions on rights and freedoms guarantees in general that “a person shall be able to invoke or exercise his or her human dignity, rights or freedoms in so far as doing so does not infringe on those of others or violates this Constitution or good morals of the people.” Regarding incidents involving lese majeste, it is important to note that the revered position of the King is also enshrined in Section 8 of the Constitution.²⁵

d) Independent State Agency

Further regulation of the media sector can be expected from an independent state agency, envisaged by Section 47, whose responsibility it will be to allocate the frequencies for radio and television transmission and “to direct and regulate the activities relating to radio and television transmission and telecommunication.” In operating under this provision “the highest benefits of the public at both national and local levels must be considered, including in terms of education, culture, national security, other public interests, promotion of free and fair competition, and public participation in the operations.” The provision is made dependant on the enactment of a law establishing the State agency within one year after the coming into force of the Constitution (Section 295[1]).

e) The Internal Security Act 2007

A final legislation relevant for national security cases is the controversial new Internal Security Act.²⁶ The Act was passed by the military installed parliament in December 2007 shortly before the elections.²⁷ It gives an Internal Security Operations Command (ISOC) after a resolution of Cabinet the power to take responsibility for the prevention, suppression and eradication or mitigation of matters affecting internal security which have the tendency to persist for a long time, fall under the responsibility of several government agencies and do not require the declaration of a state of emergency under the Act on Government Administration in a State of Emergency (Section 14). Section 17(6) empowers the Direc-

²² Section 14(4) covers computer data of a pornographic nature.

²³ ‘Computer Crime: Notorious website owner released’, *The Nation*, 7 September 2007; ‘Net surfers seek truth on cyber crim arrest’, *The Nation*, 6 September 2007.

²⁴ A draft of the text subsequently adopted is available on the website of the Thai Parliament, www.parliament.go.th/percy/sapa25_upload/25_20070517151204_2007.pdf (accessed 31 December 2007).

²⁵ Section 8: The King is in a position of reverence and shall not be violated. It is prohibited to expose the King to any kind of accusation or lawsuit.

²⁶ For an unofficial translation of the revised draft of the Act in the version of 16 October 2007, see <http://rspas.anu.edu.au/rmap/newmandala/up-content/uploads/2007/10/thailandinternalsecurityactdraftof16oct2007inenglish.pdf> (accessed 8 January 2008).

²⁷ ‘Thailand approves internal security law that critics say maintains military grip’, *International Herald Tribune*, 21 December 2007.

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tor of ISOC with the approval of cabinet to issue regulations to prohibit the use of communication routes or vehicles or to impose conditions on the use of communication routes or vehicles.

III. Offensive YouTube Videos in India, Turkey and Germany

1. The Indian Example

Around the same time as the YouTube incident in Thailand occurred, two other Asian nations were also confronted with YouTube videos mocking their leaders and founding fathers. The first incident occurred in India in January 2007, when a US based comedian of Indian descent posted a Gandhi parody on the YouTube website. Among other reactions, the video caused a silent protest by the Gandhi Sena Sabarmati Ashram in Ahmedabad and the stoppage of a train in Varanasi by students of the Mahatma Gandhi Kashi Vidyapeeth. The Ministry for Information and Broadcasting took up the matter with Google and asked for the video to be taken down. It also demanded and received a public apology from two TV news channels, which had aired the video. The Department of Information Technology meanwhile as well as requesting from YouTube to take down the clips also wrote to the creator of the video clip directly. The Indian born comedian apologised for the video clip on his website²⁸ and the clip was finally taken down with no further action from the government required.²⁹

a) The Legal Basis

As the matter was settled quickly, one can only speculate what the legal basis for government action could have been in this case. The Indian Penal Code of 1860 has a number of provisions, which seek to prevent the provocation of violence between ethnic and religious communities, such as Section 153A, which seeks to prevent "disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities" (Section 153A[1]) and acts "prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities" which in addition disturb or are likely to disturb public tranquillity (Section 153A[2]). While the video sparked the stopping of a train, it is difficult to argue that the elements of interethnic, racial or religious tensions, which these provisions require, were present. Even if one was to interpret the protest actions caused by the video as rioting, a provocation to cause rioting punishable under Section 153 would require an illegal act committed by the provocateur. Finally, there is Section 504, punishing the intentional insult and provocation of a person, which must be committed, however, with intention or knowledge that the provocation will cause the offended person to break the public peace.

The Information Technology Act of 2000 deals with offences in Chapter XI. Of those, Section 67 targets the publication of obscene material in electronic form. While this includes material which has the general effect of tending "to deprave and corrupt" persons who are likely to read, see or hear it, the remainder of the provision mainly seems to be concerned with sexually explicit

material, which is "lascivious or appeals to the prurient interest". In a wide ranging discretionary provision, however, Section 69 allows a government appointed controller to order government agencies to intercept computer transmitted information if he/she is "satisfied that it is necessary or expedient so to do in the interest of the sovereignty or integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognisable offence" (Section 69[1]). Section 69(2) makes the subscriber or any person in charge of the computer resource responsible to the authorities. Offences committed outside of India may be prosecuted, if they involve a computer, computer system or computer network located in India (Section 75).

b) The Constitutional Guarantees of Freedom

Freedom of speech and expression is guaranteed by Article 19(1)(a) of the Indian Constitution. However, according to Article 19(2), "nothing in sub-clause a of clause (1) shall affect the operation of any existing law, or prevent the State from enacting any law" if it imposes "reasonable restrictions on the exercise of the right conferred... in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence".

2. The Turkish Example

Video clips mocking Turkey's founding father *Ataturk* led to a more serious government reaction in Turkey. In March 2007, a court in Istanbul ordered the temporary closure of the YouTube website after reviewing the material.³⁰ In January 2008, access to YouTube was again blocked after further video clips disrespectful of *Ataturk* had appeared on the website.³¹

a) The Legal Basis

The legal basis for the ban is not mentioned in the press reports. However, *Ataturk* is mentioned in the Preamble to the Turkish Constitution as founder of the Republic of Turkey and his memory is protected under Law No. 5816 to Protect *Ataturk*.³² Article 1.1 of this Law

²⁸ www.gauthamprasad.com/statement.htm, (accessed on 30 April 2007).

²⁹ 'Show-cause to channels on Mahatma video', *The Hindu*, 14 January 2007, at www.thehindu.com/2007/01/14/stories/2007011412801000.htm (accessed on 1 May 2007); 'YouTube angers I&B with its tasteless Gandhi video', *The Times of India*, 13 January 2007, at <http://timesofindia.indiatimes.com/articleshow/msid-1161665,prtpage-1.cms> (accessed on 30 April 2007); 'Outrage in India over offensive Gandhi video', *Khaleej Times Online*, 13 January 2007, at www.khaleejtimes.com/DisplayArticleNew.asp?xfile=data/subcontinent/2007/Jf... (accessed on 30 April 2007); 'Comic's Mahatma Gandhi Spoof Video Sparks Outrage', *New America Media*, 22 January 2007, at http://news.ncmonline.com/news/view_article.html?article_id=030e843d23f710307784 (accessed 9 January 2008).

³⁰ 'YouTube suspended in Turkey', *Turkish Daily News*, 8 March 2007, available at www.turkishdailynews.com.tr/article.php?enewsid=67766 (accessed on 30 April 2007); 'Turkey blocks YouTube over insult to Ataturk', *Reuters*, 7 March 2007, at www.reuters.com/article/Print?articleID=USL0718464920070307 (accessed on 1 May 2007).

³¹ 'Turkey Bans YouTube for Second Time', *ABC News*, at www.abcnews.go.com/print?id=4162612 (accessed on 24 January 2008); 'Turkish court reimposes YouTube ban for offensive content', *Jurist*, 20 January 2008, at <http://jurist.law.pitt.edu> (accessed on 24 January 2008).

³² 'Questions and Answers: Freedom of Expression and Language Rights in Turkey', Human Rights Watch, at www.hrw.org/press/2002/08/turkeyqa041902.htm (accessed 2 May 2007).

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prescribes a penalty of imprisonment from one to three years for “anyone who publicly insults or curses the memory” of the Turkish leader.³³

There is further Article 301 of the Criminal Code, which foresees imprisonment from six months to three years for “public denigration of Turkishness, the republic or the Grand National Assembly of Turkey” (Article 301[1]). Article 301(4) exempts “expressions of thought intended to criticize”, which shall not constitute a crime.³⁴ Apart from a few high profile cases, reportedly about 60 cases have been prosecuted under this provision.³⁵ While Article 301 is soon to be amended, according to Turkish experts quoted by the *International Herald Tribune* there are about 39 articles limiting freedom of expression in Turkey, of which 13 are commonly used.³⁶

b) The Constitutional Guarantees of Freedom

The Turkish Constitution guarantees freedom of communication in Article 22 and freedom of expression and dissemination of thought in Article 26. The first mentioned right may be restricted by a court decision or by a written order of an authorised agency, which must be approved by a judge on the grounds of national security, public order, prevention of crime commitment, protection of public health and public morals, or protection of the rights and freedoms of others. Similarly, restriction of Article 26 is possible “for the purposes of

protecting national security, public order and public safety, the basic characteristics of the republic and safeguarding the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation and rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.”³⁷ In the YouTube case in 2007, further legal matters were not raised, however, as the ban on YouTube was revoked after only two days once the offending video was removed from the website.³⁸

3. The German Example

In Germany, YouTube made headlines in 2006 when it was used to disseminate a news magazine produced by members of the far-right National Democratic Party of Germany (NPD). Alerted to the video, YouTube reacted promptly and removed the video because of violations of its regulations.³⁹ More recently, the use of YouTube for the dissemination of rightwing extremist videos and music was discussed by the TV magazine *Report*. The magazine referred to attempts by jugendschutz.net, the central agency for youth protection on the internet, which reportedly had asked for the taking down of over 100 videos identified as objectionable without immediate reaction from YouTube. The magazine interviewed the speaker on interior politics of the Social Democratic Party (SPD) and the Vice-President of the Central Council of Jews in Germany, who both asked for legal steps to be taken.⁴⁰ Similar requests were made by politicians from other parties represented in the German federal parliament.⁴¹ YouTube reacted by promising to improve its system of user objection to inappropriate content, so that illegal videos with incitement to hatred could be taken down quickly.⁴² The debate intensified again after YouTube established its German domain YouTube.de in November 2007.⁴³ In January 2008, prosecutors began an investigation into videos with rightwing extremist content, which had appeared on YouTube.⁴⁴

a) The Legal Basis

The German Criminal Code has several provisions dealing with different forms of extremist propaganda. A report of jugendschutz.net of 2006 indicates that the three most relevant crimes in this particular context are the use of symbols of unconstitutional organizations (Section 86a), the dissemination of material which incites to hatred (Section 130[2]) and the denial of the holocaust (Section 130[3]).⁴⁵ Section 86a(1)1. punishes the domestic distribution or public use of symbols of parties or organizations, which have been declared unconstitutional, banned or are a former National Socialist organization. Expressly mentioned as examples are flags, insignia, uniforms, slogans and forms of greeting (Section 86a[2]). It is equally prohibited to produce, stock, import or export objects which depict or contain such symbols for distribution or use domestically or abroad (Section 86a[1]2.) The distribution or public use must be in a meeting or in disseminated writings, whereby the term “writings” is further defined in Section 11(3) as including audio and visual recording media, data storage media, illustrations and other images.

33 See the Human Rights Watch Report on Turkey of 1999, available at www.hrw.org/reports/1999/turkey/turkey993-03.htm (accessed on 9 January 2008).

34 ‘Turkey: Article 301: How the law on “denigrating Turkishness” is an insult to free expression’, Amnesty International at www.amnesty.org/library/print/ENGEUR440032006 (accessed on 2 May 2007).

35 ‘A Turkish law that chills speech now spurs debate: Rights groups decry curbs on expression’, *The Boston Globe*, 15 December 2005, at www.boston.com/news/world/middleeast/articles/2005/12/15/a_turkish_law_that_... (accessed on 2 May 2007).

36 S. Tavernise, ‘Turkey struggles to define itself’, *International Herald Tribune*, 24 January 2008 (accessed on 25 January 2008).

37 For an English translation of the Turkish Constitution see www.byege.gov.tr/mevzuat/anayasa/anayasa-ing.htm (accessed on 2 May 2007).

38 ‘Turkey revokes YouTube ban’, *Turkish Daily News*, 10 March 2007, at www.turkishdailynews.com.tr/article.php?enewsid=67977 (accessed on 30 April 2007).

39 ‘NPD plant Wochenschau auf YouTube’, *Spiegel Online*, 27 September 2006, at www.spiegel.de/politik/deutschland/0,1518,druck-439431,00.html (accessed on 17 January 2008); ‘NPD sender Nachrichten übers Netz’, *Focus Online*, 27 September 2006, at www.focus.de/digital/internet/video-community_aid_116366.html (accessed on 17 January 2008); ‘YouTube schaltet NPD-Wochenschau ab’, 28 September 2006, at www.spiegel.de/politik/deutschland/0,1518,druck-439773,00.html (accessed on 17 January 2008).

40 ‘Hass frei Haus – Wie YouTube verbotene Nazi-Musik massenweise verbreitet’, at www.swr.de/report/-/id=233454/vv=print/pv=print/mid=233454/did=2478134/1u... (accessed 9 January 2008); ‘Propaganda auf YouTube’, *Focus Online*, www.focus.de/politik/deutschland/neonazis_aid_130617.html (accessed on 17 January 2008).

41 ‘Politik will gegen Nazi-Videos vorgehen’, *Tagesspiegel*, 29 August 2007, www.tagesspiegel.de/politik/deutschland/Nazi-Videos-YouTube;art122,2368876 (accessed on 17 January 2008).

42 ‘YouTube: Alle Filme mit rechtsextremen Inhalten sollen schnell gelöscht werden’, *PC Welt*, 30 August 2007, www.pcwelt.de/misc/article/print/index.cfm?pid=1636&pk=92239&op=prn (accessed on 17 January 2008).

43 ‘Klagen über Nazi-Videos auf YouTube.de’, at www.n24.de/print.php?articleId=166624 (accessed on 17 January 2008).

44 ‘Ermittlungen wegen YouTube-Videos’, *Focus Online*, 10 January 2008, at www.focus.de/digital/internet/rechtsextremismus_aid_233068.html (accessed on 17 January 2008).

45 ‘Erfolgreich gegen Rechtsextremismus im Internet’ at www.jugendschutz.net/pdf/re_kurzbericht_06.pdf (accessed on 17 January 2008).

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Section 130 deals with various alternatives of "agitation of the people". Section 130(1) punishes the incitement of hatred and calls for violence against segments of the population and the assaulting of the human dignity of others in a manner that is capable of disturbing the public peace. Section 130(2) covers various forms of disseminating, displaying, posting, presenting or making accessible of such material as well as the making accessible of the material to persons under the age of eighteen and the producing, obtaining, supplying, stocking, offering, announcing, commending and importing or exporting of relevant material for own use or for facilitating use by another. Section 130(3) deals with the public denial or rendering harmless of crimes of genocide committed under the rule of National Socialism and Section 130(4) with the various forms of dissemination of such material. In cases of Holocaust denial, German courts have found that the act also constituted insult (Section 185) and disparagement of the memory of deceased persons (Section 189).⁴⁴

While these various provisions certainly allow for the prosecution of those who actually produce and upload relevant material, it remains to be seen whether the authorities will consider action against YouTube. It was suggested by some of those interviewed in the TV magazine *Report* that YouTube could perhaps be regarded as an accessory to the various crimes described in Section 130. As for the extraterritorial reach of the German criminal law in such cases, the German Federal Court declared in 2000 that in deciding where the criminal acts described in Section 130 took place, it was necessary to ask where the effects of the crimes were to be felt.⁴⁵ Material inciting to hatred against Jewish communities in Germany and denying the holocaust would disturb the public order in Germany, so that German criminal law was applicable even where the material was placed on a server in a foreign country.⁴⁶

b) The Constitutional Guarantees of Freedom

Article 5 of the German Constitution provides in sub-section (1) that "everyone has the right freely to express and to disseminate his opinion by speech, writing and pictures" and that "there shall be no censorship". Nevertheless, as sub-section (2) clarifies "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 honour". Article 5(3) stresses in particular freedom of art, science, research and teaching, although freedom of teaching does not absolve from loyalty to the constitution. Thus, freedom of expression is limited by the provisions of the Criminal Code mentioned above. However, Sections 86a(3) and 130(5) of the Criminal Code refer to Sections 86(3), which recognises that the use and dissemination of the material may also serve legitimate interests such as civil

enlightenment, the averting of unconstitutional aims, the promotion of art and sciences, research or teaching, reporting about current historical events or similar purposes. Section 86a(3) refers further to Section 86(4), which grants discretionary space to the courts to refrain from the imposition of punishment in cases where guilt is slight.

IV. Conclusion

Jack Goldsmith and *Tim Wu*'s book 'Who Controls the Internet?' bears the subtitle 'Illusions of a Borderless World'.⁴⁷ They make the following point:

"It's not just that nations have the power to shape the internet architecture in different ways. It is that the United States, China, and Europe are using their coercive powers to establish different visions of what the internet might be. In so doing, they will attract other nations to choose among models of control ranging from the United State's relatively free and open model to China's model of political control."

They also stress "the abiding significance of geography, and most importantly of the national governments that use coercion to enforce national laws within their territories."⁴⁸ Thus, we have moved on from the argument frequently heard in the 1990s that the Internet's challenge to government's authority would diminish the nation-state's relevance.⁴⁹ Local cultural perceptions and political concerns remain relevant and national governments will design and enforce their internet policies accordingly. The examples in this article confirm this assumption. In particular, the question of what constitutes "insult" to national leaders and symbols is culturally specific and will be interpreted differently by the various countries surveyed in this article and certainly by an audience beyond that of the nation state in question. In other countries, historical circumstances and experiences create particular sensitivities. It can be concluded, therefore, that we are moving from the ideal of a borderless internet world with culturally unified understandings of freedom of expression to a much more regulated environment, in which cultural and political differences retain their relevance and are enforced by nation states.

44 BGH v. 12.12.2000 – 1 StR 184/00, CR 2001, 260 m. Anm. Vassilaki, HRRS-Datenbank, Rz. X, available at www.hrr-straftrecht.de/hrr/1/00/1-184-00.php3 (accessed on 17 January 2008).

45 See Section 9 of the Criminal Code.

46 BGH v. 12.12.2000 – 1 StR 184/00, CR 2001, 260 m. Anm. Vassilaki, HRRS-Datenbank, Rz. X, available at www.hrr-straftrecht.de/hrr/1/00/1-184-00.php3 (accessed on 17 January 2008).

47 J. Goldsmith and T. Wu, *Who Controls the Internet – Illusions of a Borderless World* (New York: Oxford University Press 2006).

48 *Ibid.*, p. 184.

49 *Ibid.*, p. 3.